THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

WAL-MART STORES and
CLAIMS MANAGEMENT, INC.,

Petitioners

v.

GEORGE CAMPBELL,

Respondent.

_____/

DOCKET NO. 90,757

FIRST DISTRICT COURT OF APPEAL
DOCKET NO: 96-02764

CLAIM NO: 384-56-9384

D/A : 12/13/90

REPLY BRIEF OF PETITIONERS

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This is an appeal from the decision of the First District Court of Appeal filed June 2, 1997.

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PRELIMINARY STATEMENT

The Petitioners, Wal-Mart Stores and Claims Management, Inc., will be referred to as "Petitioners" or the "employer/carrier". The Respondent, George Campbell, will be referred to as "Respondent" or the "claimant". The Judge of Compensation Claims will be referred to as the "JCC". Average weekly wage will be referred to as "AWW". References to the record on appeal will be referred to by the letter "R" followed by the appropriate page number.

SUMMARY OF ARGUMENT

This Honorable Court should answer the certified question in the affirmative. In fact, this Honorable Court should redraft the certified question and specifically address whether concurrent earnings are includable under the 1990 workers' compensation statute.

This is an important case involving a recurrent issue for which there are multiple inconsistent appellate cases. Workers' compensation cases commonly involve concurrent earnings questions. Due to extreme inconsistency in past appellate cases and fairly tortured statutory construction, this Court should accept jurisdiction and hear the merits, particularly since the First District has asked this Honorable Court to do so.

In the instant case, and in Vegas v. Globe Security, 627 So.2d 76 (Fla. 1st DCA 1993), the First District held that the definition of "wages" is not applicable in AWW calculations. That holding is completely inconsistent with both the statute and every other case decided by the First District in the past. The only possible place that the definition of "wages" has any applicability is in AWW calculations.

Under the First District's decision in Vegas, concurrent earnings are includable under the 1990 statute because §440.14(1)(a) contains the language "whether for the same or another employer". In the instant case, the First District held that the AWW should have been calculated under §440.14(1)(d). That subsection does not contain the "controlling" language that the

First District relied upon in deciding Vegas. Thus, under the plain language of the statute, and even under the Vegas decision, concurrent earnings should not have been includable if §440.14(1)(d) is the appropriate statutory subsection.

The First District's interpretations of §440.02(24) and §440.14 have created an absurdity. A fundamental principal of statutory construction is to avoid absurd results. This Court is faced with an opportunity to right a wrong and to correct a patently erroneous interpretation of the law. The instant case should be reversed and Vegas should be overruled.

> CERTIFIED QUESTION: WHETHER AMERICAN UNIFORM AND RENTAL SERVICE V. TRAINER, 262 SO.2D 193 (FLA. 1972), MANDATES USE OF §440.14(1)(A), FLA.STAT., TO DETERMINE AVERAGE WEEKLY WAGE IN ALL CASES WHERE THE CLAIMANT HAS WORKED IN ONE EMPLOYMENT FOR SUBSTANTIALLY THE WHOLE OF THIRTEEN WEEKS PRIOR TO THE INDUSTRIAL ACCIDENT, BUT HAS WORKED IN A CONCURRENT EMPLOYMENT FOR ONLY A PORTION OF THE THIRTEEN WEEK PERIOD, BY COMBINING THE TOTAL EARNINGS IN BOTH EMPLOYMENTS AND DIVIDING BY THIRTEEN, OR WHETHER IN SUCH CASES THE LEGISLATURE INTENDED USE OF §440.14(1)(D) TO DETERMINE AVERAGE WEEKLY WAGE AS A FAIR AND REASONABLE APPROXIMATION OF 'THE FULL-TIME WEEKLY WAGES OF THE INJURED EMPLOYEE.'

The Petitioners assert that this Court should answer the certified question in the affirmative. In fact, given the arguments raised by both parties in this appeal, the certified question should be rephrased in order to specifically address whether concurrent earnings are includable in AWW calculations under §440.14, Fla.Stat. (1990).

ISSUE I: WHETHER THE INSTANT CASE IS OF SUFFICIENT IMPORTANCE FOR THIS HONORABLE COURT TO ACCEPT JURISDICTION.

In the Initial Brief Petitioners raised several reasons why this Court should accept jurisdiction of the instant case. The reasons can be summarized as follows:

1. The instant case involves an important recurring issue that will affect AWW calculations involving concurrent earnings for all dates of accident.

2. The First District's opinions have been entirely inconsistent and the concurrent earnings issue needs clarification by this Honorable Court.

3. Due to exclusive First District jurisdiction of workers' compensation cases, this Court should hear the merits of this issue, particularly since the First District has asked this Court to do so.

In response, the claimant argues that the case is unimportant, In support of this assertion, the claimant points out that the 1994 workers' compensation law included an important change which specifically addressed concurrent earnings. The 1990 version of the statute, applicable in the instant case, defines "wages" as:

> "[T]he money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury and includes only the wages earned on the job where he is injured and does not include wages from outside or concurrent employment..." §440.02(24), Fla.Stat. (1990). (emphasis added)

In contrast, the 1994 version of the statute defines "wages" as:

> "[T]he money rate at which the service rendered is recompensed under the contract of

> hiring in force at the time of the injury and includes only the wages earned and reported for federal income tax purposes on the job where the employee is injured and any other concurrent employment where he is also subject to **workers' compensation coverage and benefits..."** §440.02(24), Fla.Stat. (1994). (emphasis added)

The claimant's position is that since the law was amended in 1994 this issue has been resolved and the acceptance of jurisdiction by this Honorable Court will do nothing to clarify workers' compensation law.

The employer/carrier's first response is to note that this argument merely reinforces the importance of the instant case. The claimant acknowledges in his Answer Brief that the definition of "wages" was specifically amended in 1994 to include concurrent earnings. The employer/carrier asserts that this change must have had a purpose. If concurrent earnings were includable under the 1990 version of the statute, as ruled by the First District, why was it necessary to change the definition of "wages" to include concurrent earnings, particularly since the First District's position is that the definition of "wages" has no meaning in the concurrent earnings context?

While once again pointing out the absurdity of the First District's decision in Vegas v. Globe Security, 627 So.2d 76 (Fla. 1st DCA 1993), the claimant misses an important point. The First District's holding in the instant case does not merely affect the calculation of AWW for dates of accident from 07/01/90 through 12/31/93. The instant case governs **all** AWW calculations involving concurrent earnings for **all** dates of accident because the instant

case control3 the method of calculating all AWWs involving concurrent earnings. Thus, this is a far more important issue than acknowledged by the claimant in the Answer Brief.

More fundamentally, the claimant seems to argue that a case is not important unless it affects a large volume of cases. Even if it were true that the instant case had limited applicability, that does not make it unimportant. The employer/carrier assures this Honorable Court that this case is of extreme importance to the employer/carrier. Additionally, this Court should not forget that it is faced with an opportunity to right a wrong and that this opportunity should not be missed even if it only affected a single case.

The bulk of the claimant's argument involving this issue attempts to list a "parade of horribles" that will occur if this Court corrects the First District's erroneous interpretation of §440.14, Fla.Stat. (1990). As with most "slippery slope" arguments, the claimant is completely unable to cite any evidence that these horrible things will occur. Additionally, such an argument fails to recognize that the First District was simply wrong and plainly disregarded the legislature's will when it decided Vegas. A more appropriate "slippery slope" argument would be that if this Court fails to accept jurisdiction, reverse the instant case, and overrule Vegas, the First District will continue to impose its will on the workers' compensation system even when it conflicts with the express enactments of the legislature.

The employer/carrier does not suggest that failure to accept jurisdiction in this case will cause any calamitous event. Rather, the employer/carrier asserts that this case present a clear opportunity to correct patently erroneous law. That is why this Court should accept jurisdiction.

ISSUE II. WHETHER **THE** FIRST DISTRICT COURT **OF** APPEAL INCORRECTLY HELD THAT **§440.02(24),** FLA.STAT (1990) HAS NO APPLICABILITY WHEN INTERPRETING **§440.14, FLA.STAT.** (1990).

In the Answer Brief the claimant raises essentially three points in response to the employer/carrier's argument:

1. The employer/carrier 'waived' its right to argue that the First District incorrectly decided Vegas.

2. The 'plain language' of 5440.14, Fla.Stat. (1990) requires the inclusion of concurrent earnings in AWW calculations.

3. Correcting the First District's erroneous decision in Vegas would lead to a variety of horrible results.

The employer/carrier did not "waive" its right to argue that this Court should overrule Vegas. As correctly noted by the claimant, once this Court accepts jurisdiction it may consider any issue relevant to the case. P. K. Ventures, Inc. v. Raymond James & Associates, Inc., 690 **So.2d** 1296, 1297 (Fla. 1997); Cantor v. Davis, 489 **So.2d** 18, 20 (Fla. 1986). There is no more relevant issue in the instant case than the First District's interpretation in Vegas.

It must be remembered that this case was tried in front of a Judge of Compensation Claims for whom Vegas was controlling

precedent. It was not possible to argue to the JCC that Vegas should be disregarded in some manner. However, the employer/carrier did mention to the JCC that the inclusion of concurrent earnings was illogical given the plain language of the statute. (R 217)

In Cantor v. Davis, 489 So.2d 18 (Fla. 1986) this Court dealt with a similar "waiver" argument. Cantor involved a medical malpractice claim where the trial court found a particular statute to be unconstitutional. On appeal, the district court reversed and held the statute to be constitutional. Id. at 19. Before this Honorable Court the respondent argued that because another issue was never raised before the trial court or the district court, this Honorable Court could not address the issue because it had been waived by the petitioner. This Court held, however, that once this Court accepts jurisdiction it may consider any issue affecting the case. Id. at 20.

In the instant case the employer/carrier commented at trial on the absurdity of the Vegas decision. (R 217) The employer/carrier further argued before the First District that the Vegas decision must be limited to §440.14(1)(a), Fla.Stat. (1990). This Court has the power to hear this issue. It has an opportunity to correct a patently incorrect decision. It should not shrink from its responsibility to do so.

The second argument raised by the claimant in his Answer Brief involves the "plain language" of 5440.14, Fla.Stat. (1990). The claimant points out that the Vegas Court ruled that the plain

language of the statute required the inclusion of concurrent earnings. As noted in Vegas, the legislature's express intent to exclude concurrent earnings could not overcome this "clear language", The problem with this argument is that this "plain language" does not appear in the statute relied upon by the First District in the instant case.

In Vegas, the First District held that the "plain language" of the statute required the inclusion of concurrent earnings:

> "Our examination of §440.14(1)(a) has not convinced us that this particular statute is 'of doubtful meaning'. We are thus guided by the plain meaning of the statutory language, and are inescapably drawn to the legislature's retention in §440.14(1)(a) of the provision requiring consideration of the claimant's earnings 'whether for the same or another employer' during the thirteen weeks immediately preceding the injury, and also to the statutory requirement establishing AWW at one-thirteenth 'of wages earned in such employment'. These phrases, completely unaffected by the 1990 amendments, are neither ambiguous nor are they modified by the new definition of wages." 627 So.2d at 85.

What the claimant fails to acknowledge in the Answer Brief, and what the First District failed to reconcile in the instant case, is that this "plain language" is not contained in the statutory provision applied in the instant case. The operative language, according to the First District, is "whether for the same or another employer". That language is not contained in §440.14(1)(d), Fla.Stat. (1990), the provision applied by the First District in the instant case.

How can "plain language" that does not even exist in the statute at issue mandate the inclusion of concurrent earnings? It

cannot and it does not. If this Court recognizes that the Vegas Court erroneously interpreted $440.14, Fla.Stat. (1990), then the employer/carrier should win this case because concurrent earnings should not be included at all. Even if the First District was correct in Vegas, the employer/carrier should win this case. The operative language that mandates the inclusion of concurrent earnings is not contained in the statutory section applied by the First District.

The final argument raised by the claimant is a reiteration of the same argument raised in the first part of the Answer Brief. Specifically, the claimant makes the "slippery slope" and the "parade of horribles" arguments. Without providing any specific evidence the claimant attempts to scare the Court into ignoring the fundamental injustice done by the First District in Vegas.

The employer/carrier asserts that this Court should not fail to correct the injustice done in this case and in Vegas simply because the claimant points out speculative harm that may or may not occur. It cannot be forgotten that those claimants subject to the 1990 statute who have received disability payments based on concurrent earnings have received payments to which they are not entitled. It cannot be forgotten that employer/carriers have been forced to pay benefits to claimants for which they are not responsible.

The claimant suggests that, if this Court corrects the First District's erroneous Vegas decision, claimants will be forced to repay these excess payments to employer/carriers. That is simply

not true. Under the workers' compensation law, the only way that employer/carriers could recoup this money is by taking a twenty percent offset against future payments. §440.15(13), Fla.Stat. (1994). Additionally, many cases are already settled and others have non-appealable orders addressing the AWW.

In the Answer Brief, the claimant essentially ignored a fundamental point raised by the employer/carrier in the Initial Brief. That is, the unexplainable anomaly of the First District's conclusion that the definition of "wages" controls AWW calculations in every respect except with concurrent earnings. In the Answer Brief, the claimant merely makes the circular argument that the definition is inapplicable because the First District says the definition is inapplicable.

As pointed out by the employer/carrier in the Initial Brief, the definition of "wages" is controlling in determining the AWW. Curry Industries v. Maringer, 691 So.2d 4 (Fla. 1st DCA 1997); Mehrer v. Creative Hair Dressers, Inc., 659 So.2d 333 (Fla. 1st DCA 1995); Cable Vision of Central Florida v. Armes, 629 So.2d 274 (Fla. 1st DCA 1993); Value Rent A Car v. Liccardo, 603 So.2d 680 (Fla. 1st DCA 1992); Rudd Sod Co. v. Reeves, 595 So.2d 254 (Fla. 1st DCA 1992); Witzky v. West Coast Duplicating and Claims Center, 503 So.2d 1327 (Fla. 1st DCA 1987); Viking Sprinkler Co. v. Thomas, 413 So.2d 816 (Fla. 1st DCA 1982); Miller v. Bends Service Station, Inc., 417 So.2d 266 (Fla. 1st DCA 1982). Not only does the First District uniformly hold that AWW calculations are governed by the definition of "wages", the claimant points out in

his Answer Brief that the definition of "wages" was specifically amended in 1994 to include concurrent earnings. If the Vegas Court was correct that the definition of "wages" has no applicability in AWW calculations when addressing concurrent earnings, why did the legislature specifically amend the statute in 1994 to include concurrent earnings?

The framework crafted by the First District in the instant case and in Vegas is, quite frankly, a complete mess. First, the Vegas court held that the definition of "wages", which governs AWW calculations in all other cases, is irrelevant when addressing the AWW in the context of concurrent earnings. Second, the First District held that the controlling language that mandated the inclusion of concurrent earnings was contained in §440.14(1)(a). Finally, in the instant case, the First District held that concurrent earnings were includable even under other subsections that do not contain this controlling language, but which do contain the term "wages" which specifically excludes concurrent earnings. This construction is absurd.

This Court has repeatedly held that a basic tenet of statutory construction is to avoid constructions that result in absurd consequences. See, e.g., State v. Hamilton, 660 So.2d 1038, 1045 (Fla. 1995); Wuornos v. State, 676 So.2d 972 (Fla. 1996); Kaisner v. Kolb, 543 So.2d 732, 738 (Fla. 1989). If the First District is correct that the definition of "wages" does not govern this case and that language specific to §440.14(1)(a) mandates the inclusion of concurrent earnings, then concurrent earnings are not includable

under §440.14(1)(b), §440.14(1)(c), or §440.14(1)(d) because these sections do not contain the operative language. This is an absurd result. The way that the First District reconciles this absurdity is to simply hold that concurrent earnings are includable under all statutory sections without regard to how they are written. The instant case should be reversed and Veqas should be overruled.

ISSUE III. WHETHER THE JCC MISAPPLIED §440.02, FLA.STAT. (1990), §440.14, FLA.STAT. (1990), AND AMERICAN UNIFORM AND RENTAL SERVICE V. TRAINER, 262 SO.2D 193 (FLA. 1972).

In response to the employer/carrier's arguments the claimant essentially relies on statements made by Professor Larson and on statements made by this Court and the First District in cases decided prior to the statutory amendment to the definition of "wages". In so doing, the claimant ignores the most fundamental precept of the workers' compensation law.

Workers' compensation is purely a creature of statute and has no life outside of Chapter 440. Humana of Florida v. McKaughan, 652 So.2d 852 (Fla. 2nd DCA 1995). Workers' compensation law is governed solely and exclusively by what the statute says, not what the courts feel the law should be. Evergreen Sod Farms, Inc. v. McClendon, 513 So.2d 1311 (Fla. 1st DCA 1987), affirmed, Tarver v. Everqreen Sod Farms, Inc., 553 So.2d 765 (Fla. 1988). The instant case, Veqas, and the claimant's arguments are all premised not on what the statute says, but on a belief that it is not fair to exclude concurrent earnings.

It is unquestioned that the legislature explicitly excluded concurrent earnings from the definition of "wages" in the 1990 workers' compensation law. Was that exclusion unconstitutional? Of course not. Since it was not an unconstitutional enactment it should be honored by the courts. It should be applied even if the courts believe it is not fair. Sympathetic compassion for injured persons does not constitute a legal basis for allowing increased compensation not properly supported by the law. Jay Livestock Market v. Hill, 247 So.2d 291, 292 (Fla. 1971).

In addressing the interaction between §440.02(24) and §440.14, this Court should look first to the statutory language itself. Only after considering the plain meaning of the words themselves should this Court look to precedent. Professor Larson's treatise should not serve as a basis to interpret a law that is wholly based upon statutory language specific to each state in the nation.

The First District's analysis in the instant case has rendered the statute meaningless. Essentially, the JCC is free to adopt whatever AWW he or she feels is fair and reasonable. The plain statutory language means nothing and the JCC is free to disregard it at will. This Honorable Court should correct this absurd construction, reverse the instant case, and overrule Vegas.

CONCLUSION

The instant case should be reversed and remanded to the Judge of Compensation Claims for a new order. This court should rule that concurrent earnings should be excluded altogether. In the alternative, this court should rule that Section 440.14(1)(a) applies and the combined wages approach should be used in calculating the AWW.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to Mark Tipton, Esquire, Post Office Box 700, Ocala, Florida 34478 this 26th day of August, 1997.

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