SUPREME COURT OF FLORIDA

CITY OF CLEARWATER,

Petitioners,

v.

JUDI ACKER,

Respondent.
_____/

Case No.: 93,800
DCA Case No.: 97-02719

BRIEF OF AMICUS CURIAE, BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS

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PRELIMINARY STATEMENT

Petitioner, CITY OF CLEARWATER, shall be referred to herein as "Petitioner" or "Employer/Carrier." Respondent, JUDI ACKER, shall be referred to herein as "Respondent" or "Claimant."

STATEMENT OF THE CASE AND FACTS

Amicus Curiae accepts the Statement of the Case and Facts as submitted by Petitioners herein.

SUMMARY OF ARGUMENT

Section 440.20(15), Florida Statutes (1985), limits the employer's liability to pay all compensation, including supplemental benefits, to 100% of the claimant's average weekly wage. This Court has consistently held that under Section 440.20(15), the claimant's "full wages" is the limit of compensation to which the claimant is entitled. To prevent the employer's liability from exceeding 100% of the claimant's AWW, the §440.20(15) offset must be recalculated every year. This Court recently upheld this principle in Escambia County Sheriff's Department v. Grice, 692 So.2d 898 (Fla. 1997), when this Court recalculated the §440.20(15) offset on a yearly basis.

Recalculating the §440.20(15) offset every year does not frustrate the intended purpose of supplemental benefits. Claimants subject to the §440.20(15) offset are protected from the long-term effects of inflation because claimants receiving collateral benefits in addition to workers' compensation benefits also receive a cost of living adjustment from these collateral benefits. For example, claimants receiving Social Security benefits also receive a cost of living adjustment from Social Security. Claimants receiving disability pension benefits also receive a cost of living adjustment for these pension benefits.

Workers' Compensation claimants subject to the §440.20(15) offset are in a financially better position than workers' compensation claimants not subject to the §440.20(15) offset because the claimants subject to the §440.20(15) offset are being

paid at 100% of their AWW. Workers' Compensation claimants subject to the §440.20(15) offset are also in a financially better position than permanently disabled individuals with non-work related conditions because the workers' compensation claimants receive both workers' compensation benefits and collateral benefits. Therefore, there is no reason to create an exception to the long established rule that the claimant's compensation is limited to 100% of his AWW. Under the clear language of §440.20(15), employers should be allowed to recalculate the §440.20(15) offset every year to limit their liability for compensation to 100% of the claimant's AWW.

ARGUMENT

SECTION 440.20(15), FLORIDA STATUTES (1985), LIMITS THE EMPLOYER'S LIABILITY TO PAY ALL COMPENSATION, INCLUDING SUPPLEMENTAL BENEFITS, TO 100% OF THE CLAIMANT'S AVERAGE WEEKLY WAGE.

Amicus Curiae fully supports the arguments made by Petitioners. Rather than reiterate the arguments made by Petitioners, Amicus Curiae herein will attempt to concisely state why Petitioners should be allowed to recalculate the workers' compensation offset under Section 440.20(15), Florida Statutes (1985) on a yearly basis. There are two reasons why the §440.20(15) offset should be recalculated every year. Each reason will be discussed separately below.

A. Failure to recalculate the §440.20(15) offset every year is contrary to the clear language of the Statute.

Section 440.20(15), Florida Statutes (1985) limits the employer's liability to pay compensation (including supplemental benefits) to 100% of the claimant's average weekly wage. This principle has been repeatedly expressed by this Court. In Brown v. S.S. Kresge Co., 305 So.2d 191, 194 (Fla. 1974), this Court stated that [under current Section 440.20(15)] the claimant's "full wages" (or 100% of the AWW) should be the limit of compensation to which he is entitled. This statutory interpretation has been consistently upheld by this Court. See Domutz v. So. Bell Telephone and Telegraph Co., 339 So.2d 636 (Fla. 1976), Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), and Escambia County Sheriff's Dept. v. Grice, 692 So.2d 898 (Fla. 1997).

At the trial of this case, the claimant asked the Judge of Compensation Claims to ignore the clear language of Section 440.20(15). The claimant asked the JCC to create an exception to Section 440.20(15) for supplemental benefits. The JCC correctly refused to do so based on the clear language of the statute and based on the prior holdings of this Court.

The First District Court of Appeal reversed the JCC's decision in Acker v. City of Clearwater, 23 F.L.W. D1970 (Fla. 1st DCA 1998). The First DCA created an exception to Section 440.20(15), which allows the claimant to receive workers' compensation supplemental benefits exceeding 100% of his AWW. Beginning with the year after the offset is calculated, the claimant will receive supplemental benefits exceeding 100% of his AWW. These benefits will steadily increase every year. These benefits are also tax free, resulting in an even greater windfall to the claimant.

The exception created by the First District Court of Appeal is contrary to the clear language of Section 440.20(15), Florida Statutes (1985). Section 440.20(15) limits the employer's liability for all compensation, including supplemental benefits, to the claimant's "full wages."

This Court has already rejected the exception created by the First District Court of Appeal. In Grice, this Court recalculated the offset every year to verify that the claimant's compensation did not exceed 100% of his AWW. The First District Court of Appeal acknowledged that their decision was at odds with this Court's decision in Grice when the lower court stated:

> We recognize that a close review of the facts in the Grice case reveals that increases in supplemental benefits appear to be included in the yearly calculation of the offset. Acker at 1971.

The First District Court of Appeal then stated that this precise issue was not addressed in the Grice case. To the contrary, this precise issue has been addressed in every single case decided by this Court. In every case decided by this Court, this Court has consistently interpreted Section 440.20(15), Florida Statutes (1985) to limit all compensation, including supplemental benefits, to 100% of the claimant's average weekly wage.

Historically, the Legislature has changed this offset provision when it deemed necessary. In 1973, the Legislature repealed Section 440.09(4). Prior to its repeal, Section 440.09(4) allowed a dollar for dollar offset of workers' compensation benefits to the extent that pension benefits were paid to public employees. If the employee's pension benefits exceeded the workers' compensation benefits, then the employee received no workers' compensation benefits. Once Section 440.09(4) was repealed in 1973, public employees were able to receive a combination of pension benefits and workers' compensation benefits to the extent that the combination did not exceed 100% of the employee's average weekly wage. If the Legislature so chooses, the Legislature can again amend the offset in Section 440.20(15) to allow supplemental benefits to exceed the employee's AWW. As of this date, the Legislature has refrained from amending the Statute in this manner.

Section 440.20(15) is clear. This section limits all compensation to the claimant's "full wages." The exception created by the First DCA should instead be left to the Legislature. If the Legislature wants to create an exception to Section 440.20(15), then the Legislature should create the exception. Section 440.20(15) does not permit supplemental benefits or any other compensation to exceed 100% of the claimant's AWW. In order to prevent the claimant's compensation from exceeding the AWW, the 440.20(15) offset must be recalculated yearly. This is required by the clear language of the Statute.

B. Recalculating the offset every year does not frustrate the intended purpose of supplemental benefits.

When deciding Acker, the First DCA's overriding concern was that claimants are not protected from the long-term effects of inflation. However, this concern is unfounded. Claimants are protected from the long-term effects of inflation because claimants receiving collateral source benefits also receive cost of living adjustments from these collateral sources. For example, claimants receiving Social Security benefits also receive a cost of living adjustment from Social Security. Claimants also receive a cost of living adjustment for disability pension benefits. Therefore, claimants are protected from inflation due to the COLA's received from the collateral sources.

There are thousands of people who suffer from non-work related disabling conditions, illnesses, or diseases, such as cardiac

problems or strokes. People with non-work related disabling conditions may receive pension disability benefits and social security benefits, with annual cost of living increases. The annual COLA's provided through pensions and Social Security protect these individuals from the effects of inflation. Workers' compensation claimants are in a financially better position because they receive workers' compensation benefits in addition to these other collateral benefits. Since claimants subject to the §440.20(15) offset are in a much better financial position than their co-workers with non-work related disabling conditions, they have no valid claim that they have been left unprotected by the effects of inflation.

A claimant subject to the §440.20(15) offset is also in a financially superior position to a claimant who only receives permanent total disability benefits at 66 2/3% of his AWW, plus supplemental benefits. At the outset, the claimant receiving a combination of benefits equalling 100% of his AWW (claimant #1) receives substantially more than the claimant (claimant #2) who only receives permanent total disability and supplemental benefits. Amicus acknowledges that claimant #2 will receive annual non-compounding supplemental benefit increases at a rate of 5% per year. However, by the time claimant #2 approaches the earnings of claimant #1 (who has been consistently receiving 100% of his AWW), claimant #1's collateral benefits with the annual COLA increases will exceed 100% of claimant #1's AWW. Therefore, claimant #2 will never receive more than claimant #1. When factoring in the "time

value of money", the difference in benefits between claimant #1 and claimant #2 becomes even more pronounced. Therefore, claimants subject to the §440.20(15) offset have no claim that they have been left unprotected by the effects of inflation.

The intended purpose of supplemental benefits is to give permanently disabled workers' compensation claimants an annual cost of living increase to keep up with the effects of inflation. Recalculating the §440.20(15) offset every year does not frustrate this goal. Claimants who receive collateral benefits subject to the §440.20(15) offset also receive COLA's from these collateral benefits. Claimants who are subject to the §440.20(15) offset are in a financially better position than people with non-work related disabling conditions because they receive workers' compensation benefits in addition to the collateral source benefits. Workers' Compensation claimants subject to the §440.20(15) offset are also in a financially better position than workers' compensation claimants who only receive permanent total disability and supplemental benefits. Therefore, recalculating the §440.20(15) offset every year still satisfies the goal of supplemental benefits. This Court should uphold its prior decision in Grice and allow the employer/carrier to recalculate the §440.20(15) offset every year.

CONCLUSION

For the foregoing reasons, Amicus Curiae herein respectfully submit that the Judge of Compensation Claims did not err, that the certified question should be answered in the affirmative and that the decision of the First District Court of Appeals should be reversed.

Respectfully submitted this 9th day of October, 1998.

Derrick E. Cox, Esquire