SUPREME COURT OF FLORIDA

CASE NO. 94,366

District Court of Appeal,

1st District-No. 98-01272

DEPARTMENT OF TRANSPORTATION
AND FLORIDA DEPARTMENT OF
INSURANCE,

Petitioners,

vs.

TONY JOHNS,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent, Tony Johns, agrees in all material respects with the statement of the case and facts provided by the Petitioners, Department of Transportation and Florida Department of Insurance.

SUMMARY OF ARGUMENT

It is the contention of the Claimant and based on the Florida Statutes, that the JCC did not err in excluding the claimant's permanent total supplemental benefits from the 100% Grice offset provisions. Therefore, the JCC's decision should be affirmed.

ARGUMENT

THE JCC DID NOT ERR IN EXCLUDING THE CLAIMANT'S PERMANENT TOTAL SUPPLEMENTAL BENEFITS FROM THE 100% CAP MANDATED BY FLORIDA STATUTE §440.15.

The Claimant has been accepted as catastrophically injured and permanently and totally disabled by the Carrier. As a result the Claimant is specifically entitled to supplemental benefits by Statute. That statute, §440.15 (1)(f)1, Florida Statutes says:

> If permanent total disability results from injuries that occurred subsequent to June 30, 1955, and for which the liability of the employer for compensation has not been discharged under s. 440.20(12), the injured employee shall receive additional weekly compensation benefits equal to 5 percent of her or his weekly compensation rate, as established pursuant to the law in effect on the date of her or his injury, multiplied by the number of calendar years since the date of injury. The weekly compensation payable and the additional benefits payable under this paragraph, when combined, may not exceed the maximum weekly compensation rate in effect at the time of payment as determined pursuant to s. 440.12(2). Entitlement to these supplemental payments shall cease at age 62 if the employee is eligible for social security benefits under 42 U.S.C. ss. 402 and 423, whether or not the employee has applied for such benefits. These supplemental benefits shall be paid by the division out of the Workers' Compensation Administration Trust Fund when the injury occurred subsequent to June 30, 1955, and before July 1, 1984. These supplemental benefits shall be paid by the employer when the injury occurred on or after July 1, 1984. Supplemental

> benefits are not payable for any period prior to October 1, 1974. **440.15(1)(f)1** (emphasis added).

It is important to note that the statute clearly provides a maximum cap for two specific benefits, that is, the weekly compensation payable and the supplemental benefits. Those two benefits, when combined, may not exceed the maximum weekly compensation rate in effect <u>at the time of payment</u>, thereby allowing the legislature to set a legislative cap on these specific benefits provided a permanent and total claimant in each calendar year. Further, by linking the maximum amount the Claimant may receive to the maximum compensation rate in the year <u>in which it is paid</u>, the legislature allows for a cost of living adjustment yearly so that these catastrophically injured claimants may continue some semblance of existence above the poverty level (as defined by the Legislature in setting the maximum compensation rates for each year). It must be stressed that these cost of living adjustments apply only to those Claimants' who are catastrophically injured and permanently and totally disabled and to no other workers' compensation claimants.

The Petitioners in the instant case are asking this Court to apply a different

maximum cap on Claimant's benefits as purportedly enunciated in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997).

The First District Court of Appeal was initially presented with a very similar argument in Hunt v. D.M. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996). The First District Court of Appeal's ruling in Hunt was affirmed in Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997). Hunt was decided in the summer of 1996. The issue for that Court was whether or not the 80% statutory limitation on Social Security disability payments and compensation payments combined could be recalculated each year and deducted from the Claimant's compensation since social security provides a yearly cost of living increase. The First District Court of Appeal ruled that once the initial calculation of Social Security offset has been performed, the offset need not be re-calculated annually. See Cruse, supra.

This Court, in the summer of 1997, decided Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997). Although Grice does not specifically mention the Claimant's supplemental benefits provided in §440.15(1)(f)1, Florida

Statutes, Grice does purport to say that the Claimant's total compensation benefits shall not exceed his average weekly wage at the time he/she got hurt, in direct contravention with the legislative mandate that supplemental benefits be limited to the maximum compensation rate in the year in which they are paid.

The First District Court of Appeal, when presented with the facts of the instant case, applied the rationale of Hunt v. D.M. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996) and Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997) and ruled that the Employer/Carrier may take into account the supplemental benefit received by the Claimant but only at the time it is initially paid and the amount may not be recalculated yearly thereby providing and adhering to the legislative intent of a Claimant keeping up with the inflationary spiral. This ruling did not conflict with the legislative mandate in §440.15 (1)(f)1, written in its' entirety earlier in this brief.

The Petitioners in this appeal are asking this Court to rule that Grice overrides the legislative mandate of §440.15 (1)(f)1, Florida Statutes, and legislatively set a new cap on the

Claimant's permanent total benefits and his supplemental benefits (including his yearly supplemental increases). If the Petitioners are successful in their argument, then Grice must expressly overrule §440.15(1)(f)1, Florida Statutes, (average weekly wage at the time of injury (Grice) vs. the maximum weekly compensation rate in effect at the time of payment (§440.15(1)(f)1)).

It is a fundamental principal of statutory construction that where the language of a statute is plain and unambiguous there is no room for judicial interpretation. Special Disability Trust Fund v. A-1 Block Corp., 688 So.2d 968 (Fla. 1997). In this case the lower Court held that the JCC had no authority to add words or create a new formula not placed there by the Legislature. *Also see* Chaffe v. Miami Transfer Company, Inc., 288 So.2d 209, 215 (Fla. 1974), which held that the Court may not invoke a limitation or add words to statutes.

It is obvious from these cases that the Courts cannot legislate, by adding words, formulas or other additions to statutes not placed therein by the Legislature. That principle holds true as long as the statute in question is clear and unambiguous. Special Disability Trust Fund, supra. Therefore, in

analyzing the instant case, the first question this Court must examine is whether or not the supplemental statute is clear and unambiguous.

A little history might shed some light on these arguments. PTD supplemental benefits became a part of the Florida Workers' Compensation Statute effective October 1, 1974, when the following passage was inserted into the Workers' Compensation Act in §440.15(1)(e), Florida Statutes:

> "In case of permanent total disability resulting from injuries which occurred subsequent to June 30, 1955, for which the liability of the employer for compensation has not been discharged under the provisions of subsection 440.20(10), the injured employee shall receive from the Division additional weekly compensation benefits equal to 5% of the injured employee's weekly compensation rate as established pursuant to the law in effect on the date of his injury, multiplied by the number of calendar years since the date of the injury, and subject to the maximum weekly compensation rates set forth in subsection 440.12(2). Such benefits shall be paid out of the workers' compensation trust fund. This applies to payments due after October 1, 1974." (See 1974 Supplemental Florida Statutes 1973)

There can be no dispute that prior to October 1, 1974, the concept of PTD supplemental benefits did not exist in Chapter 440 of the Florida Statutes. It therefore must be presumed that the legislature had a specific purpose in mind when it added

this section. It is the claimant's contention that the only reasonable interpretation that can be given to this addition is that the Florida legislature intended to provide the injured worker, who was declared to be catastrophically injured and unable to never return to work, with some type of cost of living increase, as a hedge against inflation. It must have been recognized that injured workers prior to the addition of this section of the Florida Statutes, would often see their PTD benefits, which may have been appropriate at the time of injury, have less and less value as the years passed, since the amount of the PTD benefits was effectively reduced as a result of inflation.

Case law also supports the claimant's position, i.e., that the PTD supplemental benefits were designed to provide a hedge against inflation. This purpose was stated as follows in Department of Labor and Employment Security, Division of Workers' Compensation v. Vaughan, 411 So.2d 294, 295 (Fla. 1st DCA 1982):

> To partially offset the effects of inflation since the award of compensation benefits in earlier years, that statute directs the fund supplement the compensation still to be paid under such an award by adding 5% times the number

of years since the date of the injury."

This point was also discussed by the court in Shipp v. State Workers' Compensation Trust Fund, 481 So.2d 76, 79 (Fla. 1st DCA 1986):

> "…the purpose of supplemental benefits, …is to protect recipients of periodic benefits from the long term effects of inflation that reduce the value of a fixed amount of benefits. The effects of inflation are the same irrespective of the method of calculating supplemental benefits…we know that lump sum payments are not a favored remedy. (See 440.20(12)(a), Florida Statutes, 1981) Supplemental benefits are intended as an incentive to continue periodic payments and avoid the potential for inflation to diminish the value of such payments."

(Also see Division of Workers' Compensation, Workers' Compensation Administration Trust Fund v. Hansborough, 507 So.2d 785, 786 Fla. 1st DCA 1987).

It is clear from these three cases that the Florida legislature's desire to assist permanently and totally disabled workers in avoiding the effects of inflation was not lost on the First District Court of Appeal. The courts in Vaughan, Shipp, and Hansborough recognized that the purpose of PTD supplemental benefits was to help the injured worker avoid the effects

of inflation, and to actually act as an incentive to injured workers to continue periodic payments rather than accept a lump sum settlement of money.

The Statute in effect at the time of this accident states in regard to the legislative intent re settling a workers' compensation case was as follows:

> **§440.20(12)(a)(1992)** It is the stated policy for the administration of the workers' compensation system that it is in the best interests of the injured worker that he receive disability or wage-loss payments periodically. Lump-sum payments in exchange for the employer's or carrier's release from liability for future payments of compensation, death benefits, and rehabilitation expenses other than for medical expenses shall be allowed only under special circumstances…..

In the case of Mr. Johns, it is clear that he has never settled his workers' compensation claim and is in the system as the legislature intended. However, if Mr. John's supplemental benefit is taken from him there would exist an absolute certainty that the best course for Mr. John's would be to settle his case, in direct conflict with the stated legislative purpose.

If the employer/carrier's position in the instant case is

accepted, it will have the effect of doing away with any increase in the claimant's PTD supplemental benefits because it will forever freeze the claimant's total weekly benefits (including pension and any other benefits for which he might eventually qualify) at $408.14, which was the claimant's average weekly wage in 1992. This would mean that the claimant's maximum total benefits would forever equate with the same rate of pay that he was earning in 1992, which was 6 years ago. To suggest that an amount of money in 1998 is able to purchase the same degree of goods and services as it was in 1992 is ludicrous, and completely ignores the very concept of inflation that the legislature attempted to address by creating the concept of PTD supplemental benefits in the first place. If the employer/carrier's position in the instant case is accepted, then it will totally destroy the intention of the legislature to create a cost of living mechanism to deflect, to some degree, the effects of inflation, but will also fly in the face of the very sentiments expressed by the courts in Vaughan, Shipp, and Hansborough, which recognized that the purpose of supplemental benefits is to protect recipients of periodic benefits from the long term effects of inflation. For these reasons, if this court

rejects the claimant's position, it will effectively not only be ignoring the expressions of the Vaughan, Shipp, and Hansborough courts, but will actually be ignoring the very intentions of the legislature that originally created the concept of PTD supplemental benefits in 1974. Additionally, this Court, in rejecting the claimant's position, would effectively be punishing claimants who, like Mr. Johns, have decided that they are better served by not settling their claims, rather than creating an incentive for such claimants, as was discussed by the court in Shipp. The claimant would truly be punished, because by not settling their claim, it is clear that the purchasing power of their periodic payments would continue to decrease as each year passes.

Additional legislative support for the concept of PTD supplemental benefits as a hedge against inflation can be seen from the 1984 legislative changes to the Workers' Compensation Act, which were discussed by the court in Polote Corporation v. Meredith, 482 So.2d 515, 517 (Fla. 1st DCA 1986):

> "Section 440.15(1)(e), Florida Statutes, states: The injured employee shall receive from the Division additional weekly compensation benefits equal to 5% of the injured employee's compensation rate, as established pursuant to the

> law in effect on the date of his injury, multiplied by the number of calendar years since the date of injury and subject to the maximum weekly compensation rate set forth in 440.12(2).
>
> This language is ambiguous to whether the supplemental benefits is limited by the weekly compensation rate at the time of the injury or the time of payment. The latent ambiguity of this language was corrected by Chapter 84-267, Laws of Florida, which amended the Section to read that the weekly compensation and the additional benefits shall "not exceed the maximum weekly compensation rate in effect at the time of payment as determined pursuant to 440.12(2). This is consistent with the long standing policy of the Division of Workers' Compensation and great weight is given to agency determinations with regard to a Statutes' interpretation." San Souci v. Division of Florida Land Sales and Condominiums, Department of Business Regulation, 421 So.2d 623 (Fla. 1st DCA 1982).

The effect of this clarification by Chapter 84-267, Laws of Florida, cannot be overstated. It is clear that the legislature, when deciding to address, in Chapter 84-267, the question of whether the supplemental benefit was limited by the weekly compensation rate at the time of the injury, or the time of payment, intended to maintain the position discussed above, i.e. that the purpose of PTD supplemental benefits is to act as a hedge against inflation. This is the only reasonable interpretation that can be given to Chapter 84-267. This is because that chapter's decision to add "at

the time of payment" seems to suggest an interest in allowing PTD total supplemental benefits to have their intended effect as a hedge against inflation. Otherwise, the legislature would have said "weekly rate in effect at the time of injury", so that the claimant would be limited to the maximum compensation rate in effect at the time of his injury. The decision to allow the permanently and totally disabled worker to continue to receive an increase yearly, subject to each year's maximum compensation rate, demonstrates why the legislature clearly wished to allow the injured worker to receive an increase each year to act as a hedge against inflation.

Unfortunately, the opinion expressed by the employer/carrier would have the exact opposite effect of that which was intended by Chapter 84-267, as well as the courts in Meredith, Shipp, Vaughan and Hansborough. For the claimant to forever, whether it be in 1998, 2008 or 2018, be limited to his 1992 average weekly wage, completely ignores the effects of inflation. For this reason, it is completely erroneous for the carrier to state the claimant is not being deprived of anything under its' argument. The claimant is clearly being deprived of the very thing that the legislature and the

courts of the State have repeatedly intended, which is a cost of living increase to those individuals who are PTD and have concluded that a settlement of their case is not in their best interest; a decision that has been applauded by the courts of Florida, which have concluded that settlements are presumed not be in the best interest of injured workers.

Grice involved an interpretation of collateral source benefits not specifically mentioned in the Workers' Compensation statute (pension and other employer derived benefits). It does not mention nor apply to the legislatively enabled benefit afforded the permanently and totally disabled Claimant. In fact, the statute which affords supplemental benefits itself caps those benefits to the maximum comp rate in effect at the time of payment, thereby giving the legislature, not the Courts, the ability to regulate the amount and ceiling of those benefits.

Additionally, and somewhat curiously, the Legislature experimented this exact same scenario, that is, attempting to say that all of the Claimant's benefits (including pensions, etc.) could never exceed the 100% limitation discussed herein when they

passed §440.15(12) ch. 90-201 in 1990. That statute said in total:

> (12) EMPLOYEE ELIGIBLE FOR BENEFITS UNDER THIS CHAPTER AND PENSION DISABILITY BENEFITS PAYABLE BY A PUBLIC EMPLOYER. – Where any person receives compensation under this chapter by reason of the disability of an employee of the state or any political subdivision of the state, and such person is also entitled to receive any sum, by reason of the same disability, from any pension plan or other benefit fund with respect to which the same employer provides the majority of the current funding, nothing in this chapter shall be construed to prevent the reduction of pension benefits paid by said employer by the amount of workers' compensation payments paid by the employer. However, no such reduction may result in compensation benefits payable under this chapter and under the pension plan or other benefit fund which, in sum, total less than 100 percent of the money rate at which the service rendered by the employee was recompensed, excluding overtime, under the contract for hiring in force at the time of the employee's injury. Nothing in this subsection shall be construed to abrogate the terms of any contract of employment or the stated conditions of employment at the time of hiring.

That statute allowed the pension benefit to be reduced if compensation and pensions (not including Social Security) exceeded 100% of the weekly wages of the employee (the exact facts of the instant case). The Legislature quietly repealed this law the very next year. There is no language in the current Workers' Compensation law to justify this type of offset even though the Legislature saw

fit to do a major rewrite of the law in 1994. It can easily be gleaned from the Legislature's actions in 1990 and 1991 that they were aware of this issue. Their rejection of this argument in 1991 and their failure to include language of this nature in the 1994 revisions clearly indicates that they considered and rejected the very argument made by the Petitioners.

In spite of the clear legislative intent above, the employer/carrier urges this court to look to the case of City of North Bay Village v. Cook, 617 So.2d 753 (Fla. 1st DCA 1993) and Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997) for the proposition that the Claimant's supplemental benefits should be set off in the same manner as the compensation benefits specifically mentioned in Grice. However, Grice does not mention the Hunt decision, *supra*, even though Grice was decided 10 months after Hunt. Grice simply does not resolve the central issue in the instant case, because it fails to consider the Hunt and Cruse findings, which specifically supported the claimant's position that only the permanent total disability supplemental benefits owed at the time of the initial calculation are to be considered in the calculation of the

workers' compensation offset.

The failure of the 1st District Grice court to address Hunt is possibly explained by the fact that the Hunt decision (Hunt v. D.M. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996), opinion issued July 15, 1996) was rendered by the First District after the First District issued the initial Grice decision (Grice v. Escambia County Sheriff's Department, 658 So.2d 1208 (Fla. 1st DCA 1995; opinion issued August 15, 1995). However, this Court, which issued Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997) on May 1, 1997, had the benefit of the Hunt decision and, if this Court had intended to abrogate Hunt it would have done so.

The employer/carrier's reliance upon Cook is unwarranted. Although the claimant acknowledges that PTD supplemental benefits are "compensation" as that term is defined in §440.02(6), Florida Statutes, he contends that reliance on Cook for anything beyond that point is misplaced. In fact, even the employer/carrier recognizes that the Cook decision does not specifically state that annual increases in supplemental benefits are to be included in future calculations of the offset. Merely because PTD

supplemental benefits are compensation does not mean that subsequent increases, beyond the amount of PTD supplemental benefits owed at the time of the initial calculation are to be considered, as the employer/carrier urges. Cook did not address the issue and is therefore of no precedential value. Additionally, it was decided prior to the First District Court of Appeal's decision in Hunt, and therefore cannot be said to in any way contradict the findings in Hunt.

The employer/carrier has not identified any case, which directly contradicts the conclusion reached by the Hunt court. For the employer/carrier to suggest that this Court in Grice somehow addressed the impact of Hunt on this issue is not meritorious, since the Grice decision, issued approximately 10 months after the Hunt decision, makes absolutely no mention of the Hunt case, either to express agreement or disagreement.

The employer/carrier concludes its brief by stating that the claimant is not being "deprived" of anything because he is receiving 100% of his average weekly wage and that this is the maximum to which he is entitled, pursuant to Grice.

Unfortunately, the employer/carrier's assertion in this regard is erroneous, not only because it is based upon the Grice decision which does not address the supplemental issue, but also because a suggestion that an individual is limited to 100% of the AWW at the time of the injury completely ignores the concept of inflation, which has certainly been a consideration of the legislature and courts of Florida since the 1970's, when the concept of permanent total disability supplemental benefits was first introduced upon the landscape of the Florida Workers' Compensation Law.

Further, the Petitioners urge this Court to limit a permanent and totally disabled claimant from ever receiving more that he was making when he got hurt for the reason that, to do otherwise, would encourage workers not to return to work. However, this argument begs the question; claimant's who receive these benefits are, by definition, catastrophically injured and most likely would never return to any type of work in their lifetime (that is why these benefits are called permanent and total).

For these reasons, it is clear that the position articulated the

employer/carrier flies in the face of the intention expressed by the legislature in 1974 and 1984, 1990 and its' specific repeal, and the major rewrite of 1994, as well as the expressed opinions of the district court in Meredith, Shipp, Vaughan and Hansborough.

CONCLUSION

As a result, the position of the employer/carrier should be rejected by this court, and a finding should be made that the employer/carrier is only permitted to include the permanent total supplemental benefits to which the claimant is entitled at the time of the initial calculation of the workers' compensation offset, and that they are not permitted to include any annual increases beyond the initial calculation.

Accepting this position would permit this court to not only give effect to the intentions of the legislature that created the concept of PTD supplemental benefits in 1974, and further clarified their position with regard to these benefits in 1984, it would also permit this court to remain consistent with its previously stated opinions regarding the purpose of PTD supplemental benefits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail delivery this 24th day of December, 1998, to David A. McCranie, Esquire, One San Jose Place, Suite 32, Jacksonville, FL 32257.

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