SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CAROLINE GILBERT,

Petitioner,

v.

PUBLIX SUPER MARKETS, INC.
and CARE ADMIN.SERVICES, INC.,

Respondents.

_____/

CASE NO: 94,998

DCA NO: 97-1573

CLAIM NO: 264-13-5905

D/A: 1/26/95

PETITIONER'S REPLY BRIEF ON THE MERITS

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This is a Petition for Discretionary Review from an Order of the First District Court of Appeal, Tallahassee, Florida, Opinion filed 12/28/98.

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Petitioner, CAROLINE GILBERT, shall be referred to herein as the "claimant”.

The Respondents, PUBLIX SUPERMARKETS, INC. and CARE ADMIN. SERVICES, INC., shall be referred to herein as the “E/C” (Employer/Carrier), or by their separate names.

The Judge of Compensation Claims shall be referred to herein as the “JCC”.

References to the Record on Appeal shall be abbreviated by the letter “V” and followed by the applicable volume and page number.

References to the Appendix attached hereto shall be referred to by the letter “A” and followed by the applicable appendix page number. The Appendix contains the Order of the First District Court of Appeal filed 12/28/98.

The Petitioner’s Initial Brief on the Merits will be referred to by the letters “IB” and followed by the applicable page number.

The Respondents’ Answer Brief on the Merits will be referred to by the letters “AB” and followed by the applicable page number.

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is Courier New, 12 point.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Petitioner adopts and realleges the Statement of the Case and Statement of the Facts as set forth in Petitioner's Initial Brief on the Merits.

The E/C state in their Answer Brief that Claimant had assumed responsibility to prepare a weekly store newsletter(AB-4). The newsletter was the idea of Mr. Currey, the store manager(V2-353), and the newsletter responsibility was given to Claimant(V2-353). Mr. Currey specifically testified that he held Claimant accountable each week to have it done(V2-353, 354). The E/C states that the newsletter had only recently begun to be circulated within the store(AB-4). Mr. Currey testified that the newsletter started a few months before the date of Claimant's accident(V2-354), and there had been 18 newsletters prior to the date of Claimant's accident (V2-362). In fact on the date of Claimant's accident, Claimant had the 19th newsletter in her vehicle(V1-169, 170, 172, V2-362, V8-1496, 1497).

The E/C citing portions of the record from Mr. Currey, the manager, contend that Claimant was expected to prepare the news letter at work and not at her home(AB-4). The portion of the record initially cited by the E/C for this statement was the original testimony of Mr. Currey(V2-355). However, later in Mr. Currey's testimony, after being reminded of his deposition, agreed that he never instructed Claimant not to do the newsletter at home, and in

fact told her to keep track of her time when doing the newsletter at home so she could be paid for it(V2-357,358). The exact colloquy during Mr. Currey's testimony is as follows:

> "Q: Do you recall your deposition being taken a couple of months ago?
>
> A: Yes.
>
> Q: Do you recall me asking that question then?
>
> A: Yes.
>
> Q: Do you recall what your answer was?
>
> A: Should be the same.
>
> Q: On page 85, Mr. Currey, at line 7, or line 9, rather, I asked you, "Was she ever specifically instructed not to promulgate these newsletters at home?" Your answer was "No". Did you ever instruct her not to promulgate the news letters at home?
>
> A: She was encouraged to do them at work.
>
> Q: That's a different answer, then. My specific question was, "Did you ever instruct her not to do the newsletter at home?
>
> A: I encouraged her to do them at work.
>
> Q: Did you ever instruct her not to do it at home?
>
> A: Not that she wasn't allowed to, no. I did not say that she wasn't allowed to.
>
> Q: You asked her to do it at work, but you did allow her to take it home as long as she kept track of her time, correct?
>
> A: Yes, exactly.
>
> Q: If she had kept track of her time, she would have been paid for it, correct?
>
> A: Yes.

Q: Because it was a job duty?

A: To do the newsletter, yes.” (V2-357, 358).

Furthermore, Mike Seithel testified Claimant typed the newsletter at home because:

> “. . .We didn’t have a typewriter at the store to type out on. . .”(V2-264).

Mr. Currey, store manager, confirmed that there was no typewriter in the store office(V2-345,346).

The E/C state in their Answer Brief that Claimant occasionally used a computer at the store to work on her newsletter(AB-5), but that statement is not supported by the E/C’s references to the record. For example, the E/C refer to Mr. Seithel’s testimony(V2-282,283), but at that portion of the record Mr. Seithel stated that Claimant did not work on the newsletter, on the computer keyboard, but rather:

> “would work at the counter, you know, next to the computer and she would be hand writing everything down.” (V2-283)

obviously to take home to type. Furthermore, the E/C’s reference to Mr. Currey’s testimony(V2-361) is to that portion where Mr. Currey initially stated that there was a way to do the newsletter at work on the computer(V2-361), but there is no testimony from Mr. Curry that Claimant ever did the newsletter at work on the computer.

The E/C state that the store manager expected the newsletter to be at the store Wednesday if Claimant was off on Thursday(AB-4). Mr. Currey did testify that if Claimant was going to have Thursday

off, he expected the newsletter to be there on Wednesday(V2-363, 364).

However, the unrefuted testimony from every witness who testified on the subject, including Mr. Currey, store manager, was that Claimant had to have the newsletter prepared by 8:00 a.m. Thursday morning(V2-354,355). Furthermore Mr. Currey testified that Claimant routinely delivered the newsletter on her day off, Mr. Currey knew of that and never reprimanded Claimant in past for bringing the newsletter in on Thursday as opposed to Wednesday(V2-356,363,364). The fact that Claimant would deliver the newsletters on Thursday mornings prior to 8:00 a.m. even when she was not scheduled to work on Thursday mornings was also confirmed by Claimant's immediate supervisor, Michael Seithel(V8-1435).

The E/C argue that the newsletter's distribution with Employee paychecks was not required(AB-4). Although Mr. Seithel testified that the paychecks would be delivered if the newsletter wasn't there, as is what occurred on the morning of Claimant's accident (V2-278), the unrefuted testimony establishes that Claimant was to deliver the newsletter before 8:00 a.m. on Thursday morning so that they would be attached to the paychecks(V2-266,267).

A more specific reference to facts will be made during Argument.

POINTS ON APPEAL I

THE JCC ERRED, AND THE FIRST DISTRICT COURT OF APPEAL ERRED, IN

FINDING THAT CLAIMANT'S INJURIES ARE NOT COMPENSABLE BASED ON THE "GOING AND COMING RULE", WHEN A CONCURRENT CAUSE OF CLAIMANT'S TRIP INTO WORK ON THE MORNING IN QUESTION WAS A BUSINESS PURPOSE, TO-WIT:
TO DELIVER THE NEWSLETTER DUE ON THURSDAY MORNING, AND THEREFORE, CLAIMANT'S INJURY IS COMPENSABLE UNDER THE DUAL PURPOSE DOCTRINE".

II

THE JCC ERRED IN DENYING AND DISMISSING CLAIMANT'S PETITION FOR BENEFITS AND IN DENYING CLAIMANT'S CLAIM FOR MEDICAL BENEFITS, INDEMNITY BENEFITS, PENALTIES, INTEREST, COSTS AND ATTORNEY'S FEES.

ARGUMENT I

THE JCC ERRED, AND THE FIRST DISTRICT COURT OF APPEAL ERRED, IN FINDING THAT CLAIMANT'S INJURIES ARE NOT COMPENSABLE BASED ON THE "GOING AND COMING RULE", WHEN A CONCURRENT CAUSE OF CLAIMANT'S TRIP INTO WORK ON THE MORNING IN QUESTION WAS A BUSINESS PURPOSE, TO-WIT:
TO DELIVER THE NEWSLETTER DUE ON THURSDAY MORNING, AND THEREFORE, CLAIMANT'S INJURY IS COMPENSABLE UNDER THE DUAL PURPOSE DOCTRINE".

The E/C initially argue that jurisdiction was improvidently granted, contending that the District Court's decision is not an express and direct conflict with any appellate court decision(AB6-9). Petitioner respectfully submits that the E/C is rearguing their position set forth in their Answer Brief on jurisdiction. This Honorable Court has already considered those arguments, and granted jurisdiction in its Order of June 30, 1999. Petitioner submits that there is a conflict between the District Court's decision and this Honorable Court's decisions in Nikko Gold Coast Cruises v. Gulliford, 448 So.2d 1002 (Fla. 1984)and Cook v. Highway Casualty

Co., 82 So.2d 679 (Fla. 1955).

The E/C argue that the First District Court of Appeal did not repudiate or contravene the dual purpose doctrine as articulated in Cook, but simply held that the doctrine did not pertain to Claimant's commute based on alleged record support for the factual finding that the presence of the store newsletter in Claimant's car on the day of her accident was completely incidental and she would not have made the drive with the newsletter if she had not otherwise been obligated to open the door on that day(AB-7). Petitioner contends there is no factual support for a determination that the presence of the store newsletter in Claimant's car on the day of her accident was completely incidental, since Claimant had delivered the newsletter to the store on 18 previous Thursday mornings prior to 8:00 a.m., including those Thursday mornings that Claimant was not scheduled to work(V2-356,363, V8-1435), and even on those Thursday mornings Claimant would have to work, but not until some time period after 8:00 a.m.(V2-263; V8-1419, 1447). From a legal standpoint the presence of the store newsletter in Claimant's car on the date of the accident was not completely incidental, since it was a job requirement to have the newsletter in the store prior to 8:00 a.m. every Thursday morning, and Claimant would have had to, and in the past did, make trips to the store on Thursday mornings before 8:00 a.m., to deliver the newsletter even when she was not otherwise scheduled to work. From

a legal standpoint this invokes the dual purpose doctrine, Nikko Gold Coast Cruises v. Gulliford, supra, Cook v. Highway Casualty Co., supra, and also constitutes a special mission for the Employer pursuant to F.S. 440.092(2)(1995). In fact, Petitioner would respectfully submit that there is not one bit of evidence that could lead to the conclusion that the presence of the store newsletter in Claimant's car that day was completely "incidental".

The E/C also argue that there is no conflict with Nikko v. Gulliford, supra. Yet, there is a clear conflict between the First DCA's decision in the case at bar and Nikko, supra. For example, in Nikko, supra, this Honorable Court specifically found:

> "Even if Gulliford, had not intended to come to work for the day, he would have still had to make the same trip in order to return the operational cash to the business or, make arrangements for someone else to do so." Nikko, supra at 1004.

Similarly in the case at bar even if Claimant was not coming to work on the Thursday morning in question, when the accident occurred, Claimant still would have had to have made the same trip in order to deliver the newsletter, or make arrangements for someone else to do so. This fact is established by the unrefuted testimony of every witness who testified on the issue that the newsletter had to be brought into the store each Thursday morning before 8:00 a.m. so that it could be delivered with the paychecks (Nathan Hicks, Second Assistant Manager V2-220); Mr. Seithel, Claimant's direct supervisor(V2-262,263; V8-1434), David Currey,

Store Manager(V2-354). This is also established by the unrefuted evidence that Claimant did in fact deliver the newsletter prior to 8:00 a.m. on Thursday mornings that Claimant either was not scheduled to work at all(V2-356, V8-1435), or was not scheduled to work until after 8:00 a.m.(V2-263; V8-1419, 1447).

Furthermore this Honorable Court in Nikko, supra, further stated:

> "We have continued to hold that it is not necessary that the dominant purpose of a trip to be business. All that need be determined is that an injury occurred as the result of a trip, **a concurrent cause of which was a business purpose**." Nikko v. Gulliford, supra at 1005.

A concurrent cause of Claimant's trip on the morning in question was a business purpose, to wit: Delivery of the newsletter that was required be to be delivered prior to 8:00 a.m. that Thursday morning.

Finally, the E/C's argument that Claimant performed the work at home as a convenience to Claimant is not factually supported in the record, nor would it defeat the dual purpose or "special mission" theory of compensability. As previously stated, Claimant's own immediate supervisor, Mr. Seithel testified that Claimant prepared the newsletter at home because there was no typewriter in the store(V2-264). More importantly, however, is even if Claimant prepared the newsletter at home for her own convenience, she did so with the knowledge and consent of her Employer,(V2-357,358), and was paid for the time that she spent at home preparing the

newsletter(V2-358). It was Claimant's duty to deliver this newsletter from the Employer's sanctioned place of preparation (Claimant's home) to the Employer's premises (Publix Store Number 427 where Claimant worked) sometime on Thursday morning prior to 8:00 a.m. Claimant's trip on the Thursday morning in question, January 26, 1995, had a dual purpose, one of which was a business purpose, to wit: Delivery of newsletter number 19. Furthermore, Claimant's delivery of newsletter 19 on the morning of January 26, 1995 constituted a "special mission for the Employer", which is an exception to the going and coming rule per F.S. 440.092(2)(1995).

Therefore, the First DCA's opinion in the case at bar is in direct conflict with Nikko, because in both cases the Claimants had a dual purpose in going to work, yet in the case at bar the First DCA found, contrary to this Honorable Court's decision in Nikko, supra, that Claimant's injuries were not compensable.

The E/C next argue that the "dual purpose" exception to the going and coming rule requires a factual showing that a personal commute to work has a concurrent "business" purpose(AB-10). Claimant agrees. Claimant's commute to work on the morning of January 26, 1995 unquestionably had a concurrent business purpose.

The E/C argue that F.S. 440.092(2) creates an exception to the going and coming rule for a "special errand or mission for the Employer", but that ground for Claimant compensation is one of several raised below which has now been abandoned(AB-10). Claimant

disagrees. The statutory language “special errand or mission for the Employer” is the very language which retains the dual purpose doctrine in worker’s compensation law. This argument has not been abandoned, but in fact was argued in considerable detail by Claimant/Petitioner in her initial brief(IB-29-32).

The E/C argue that Claimant’s normal work schedule dictated that she open her store at 4:00 a.m. on the days she had that responsibility, one of which at her own request was the day of the accident(AB-11). Although it is true that on the morning that the Second Assistant Managers (of which Claimant was one) was required to open the store, it had to be opened at 4:00 a.m.(V2-229, 230; V9-1630, 1631), Claimant normally did not work on Thursday mornings (V9-1702), and on the Thursday mornings that she did work, she normally would come in at 10:00 a.m. (V8-1425). Despite this fact, Claimant nevertheless would bring the newsletter in between 6:30 and 7:00 a.m. on Thursday mornings(V2-263; V8-1419,1447).

The E/C argue that Claimant’s claim for compensation depends on a showing that there is no competent substantial evidence in the record to the effect that the presence of the Store Newsletter in her car on the Thursday morning of the accident was happenstance, completely incidental to her commute(AB-11). Claimant submits that there is no CSE to show that the store newsletter in her car Thursday morning was happenstance, completely incidental to her commute(AB-11). To conclude that the presence of the store

newsletter in Claimant's car on the Thursday morning of the accident was happenstance, completely incidental to her commute, completely ignores all of the testimony that:

(a) It was Claimant's job to prepare and deliver the newsletter;

(b) The newsletter had to be delivered on Thursday mornings prior to 8:00 a.m. so it could be passed out with the checks

(c) Claimant regularly prepared the newsletters at home with her Employer's knowledge, consent and was actually paid for it.

(d) Claimant routinely delivered the newsletter to the place of employment on Thursday mornings prior to 8:00 a.m., even on those Thursday mornings when Claimant was not required to work, and on those Thursday mornings when Claimant was not required to work until 10:00 a.m.

(e) Claimant had delivered the newsletter to the Employer prior to 8:00 a.m. 18 prior times.

The E/C dispute the testimony that Claimant completed the newsletter at home because there was no typewriter in the store (AB-12). Yet, this is the very testimony presented by Claimant's immediate supervisor, Mr. Seithel, who is an Assistant Manager at the store(V2-264). The E/C argues that there was a computer in the store that was available for Claimant's use in preparing the newsletter and that on occasion she had in fact used it for that purpose(AB-12). Although there was a computer in the store, none of

the pages cited by the E/C in their brief support their statement that on occasion Claimant had used the computer to prepare the newsletter(V2-282,283,361,385,386). Further as previously argued, even if Claimant supposedly completed the newsletter at home for her convenience, it was done so with the consent of the Employer, for which she was paid. As previously stated, she therefore had an obligation and an employment duty to deliver that newsletter from the Employer sanctioned place of preparation, her home, to her place of employment every Thursday morning before 8:00 a.m., whether she worked that day or not.

The E/C argue Claimant was not under a duty to deliver the newsletter to the store on any Thursday, particularly the one's which she was not working(AB-12). Again Claimant disagrees. Although the E/C cites to Mr. Currey's testimony where he would expect Claimant to deliver it on Wednesdays if she was not working on Thursdays, the fact of the matter is that Claimant routinely delivered the newsletter on Thursday mornings, and Mr. Currey, with full knowledge of this procedure, never issued any reprimands to Claimant in the past for bringing in the newsletter on Thursday as opposed to Wednesday(V2-363,365). The fact that pay checks would not be withheld from Employees if the store newsletter was not completed in time for delivery with those checks does not negate Claimant's duty to deliver the newsletter every Thursday morning before 8:00 a.m. Incidentally other than the day of Claimant's

accident there is no evidence that the Claimant ever failed to deliver the newsletter in a timely manner in the past.

The E/C argue that the store newsletter was not an indispensable part of the business of Publix Store Number 427(AB-13). Although it may not have been an “indispensable” part of the business, it was a rather an important part of the business as reflected by the fact that when Claimant was on vacation the newsletter was continued by other employees(V2-358, 359), including on one occasion Mr. Currey himself(V2-359), and the newsletter continued to be prepared after Claimant’s accident by another employee(V2-361). The newsletter was a very important means by which management informed store associates of various programs, new associates, various promotions, and a list of procedures that were to be followed by associates(V2-353,V8-1419-1421).

The E/C next challenge Claimant’s statement that she would have delivered the newsletter to the store on the day of her accident irrespective of her obligation to open the store day(AB-13). The E/C relying on(V2-281, 282), contend the record does not support that inference(AB-13). Claimant disagrees. The portion of the record referred to by the E/C for that statement is testimony that there was no compelling reason for Claimant to have the newsletter at the store by 4:00 a.m.(V2-281, 282). However, as previously set forth hereinabove, the unrefuted testimony from all witnesses who testified on the issue, including Mr. Currey, was

that the Claimant would bring the newsletter in prior to 8:00 a.m. even on the mornings that Claimant did not have to work or did not have to be at work until 10:00 a.m. The fact that Claimant may not have had to deliver the newsletters specifically at 4:00 a.m. does not in any way negate the dual purpose doctrine or the fact that Claimant was on a "special mission" on the morning in question, since the newsletter had to be delivered by Claimant at some time prior to 8:00 a.m. that morning whether Claimant worked that morning or not. Arthur Larson and Lex K. Larson, Larson Worker's Compensation Law, Sec. 18.13 at 4.368-369(1997); Swartz v. McDonald's Corporation, 726 So.2d 783 (Fla. 1st DCA 1998), dissenting opinion of Honorable Judge Benton at 788, 189.

The E/C next argue that Claimant's preparation of the store's newsletter was not a required responsibility of her job so far as Publix was concerned(AB-15). That statement is completely contrary to Mr. Currey's testimony that:

> "Q: This newsletter responsibility was given to Ms. Gilbert?
>
> A: Yes it was.
>
> Q: And did you hold her accountable each week to have it done?
>
> A: Yes I did."(V2-353, 354).

The case of D.C. Moore & Sons v. Watkins, 568 So.2d 998 (Fla. 1st DCA 1990), a case relied upon by the E/C in their Answer Brief (AB-15, 16) is completely distinguishable from the case at bar. In

D.C. Moore & Sons v. Watkins, supra, Claimant's accident occurred while Claimant was driving from his home to work after hours to return keys to his place of employment that Claimant was not supposed to take home in the first place. To the contrary in the case at bar, Claimant's accident occurred while Claimant was, in part, delivering a newsletter to her place of employment, that had to be delivered that morning before 8:00 a.m., that Claimant prepared at home the night before with her Employer's knowledge and consent, and for which Claimant was paid.

It is respectfully submitted that Claimant's injuries in the case at bar, are, per Gulliford, supra, Cook, supra and F.S. 440.092(2)(1995) compensable under the dual purpose doctrine.

II

THE JCC ERRED IN DENYING AND DISMISSING CLAIMANT'S PETITION FOR BENEFITS AND IN DENYING CLAIMANT'S CLAIM FOR MEDICAL BENEFITS, INDEMNITY BENEFITS, PENALTIES, INTEREST, COSTS AND ATTORNEY'S FEES.

Claimant adopts and realleges the argument set forth under Point II of Claimant's Initial Brief(IB-32, 33).

CONCLUSION

Claimant adopts and realleges the conclusion set forth in Claimant's Initial Brief(IB-33,34).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail on this 12th day of October, 1999 to: Thomas A. Vaughan,

Esquire, 20 N. Orange Avenue, Suite 1307, Orlando, FL 32801; Arthur J. England, Jr., Esquire and Brenda K. Supple, Esquire, Greenberg, Traurig, P.A., 1221 Bricknell Avenue, Miami, Florida 33131 and to Michael Wall Jones, Esquire, Pyle, Jones & Hurley, P.A., 1069 West Morse Boulevard, Winter Park, FL 32789.

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