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SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

SUPREME COURT CASE NO: 95,229
FIRST DCA CASE NO: 98-2234
CLAIM NO: 265-27-9309
D/A: 9/2/85

AMERICAN DUTCH HOTEL and
CIGNA PROPERTY & CASUALTY CO.,

Petitioners,

v.

JOHNNY MCWILLIAMS,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

BILL MCCABE, ESQ.
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This is an Answer Brief of Petitioner's Initial Brief on Jurisdiction for Discretionary Review from an Order of the First District Court of Appeal, Tallahassee, Florida, Opinion filed 3/3/99.

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TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Petitioners, AMERICANA DUTCH HOTEL and CIGNA PROPERTY u& CASUALTY CO., shall be referred to herein as "E/C" or by their separate names.

The Respondent, JOHNNY MCWILLIAMS, shall be referred to herein as "Claimant"

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 Amended Initial Brief in Support of Petitioners' Notice to Invoke Discretionary Jurisdiction will be referred to by the letters "IB" and followed by the applicable page number.

References to the Appendix attached to the Initial Brief of Appellant will be referred by the letters "A" and followed by the applicable appendix page number. The Appendix attached to the Petitioner's Amended Initial Brief contains the Final Compensation Order of the JCC dated 5/11/98, the Opinion filed by the First District Court of Appeal on 3/3/99, and the Notice to Invoke Discretionary Jurisdiction filed by Petitioners on 3/31/99.

CERTIFICATE OF TYPE STYLE AND SIZE

It is hereby certified that the type used in this brief is Courier New, 12 pt.

STATEMENT OF THE CASE

On 7/29/97, Claimant filed a Petition for Benefits ("PFB") as a result of a compensable injury of 9/2/85 (V2-261-264). On 3/25/98, a hearing on the PFB was held before the Honorable JCC John Thurman (V1-1, V2-223), wherein the sole issue was to determine the correct compensation rate to which Claimant should be paid workers' compensation benefits (V2-225). As it relates to the issues before this Honorable Court, one of the issues before the JCC at that hearing was whether or not this Court's decision of Grice v. Escambia County Sheriff's Dept., 692 So.2d 896 (Fla. 1997) applies to supplemental benefits. Although Claimant had many arguments why it does not, the most compelling argument was the statutory language in the supplemental benefits statute, F.S. 440.15(1)(e)1(1985), which clearly states:

> " ... The weekly compensation payable and the additional benefits payable pursuant to this paragraph, when combined, shall not exceed the maximum weekly compensation rate in effect at the time of payment, as determined pursuant to Sec. 440.12(2) ..."

It was the position of the E/C that Claimant could not receive workers' comp ("WC") benefits from his employer (to include supplemental benefits) and other collateral sources (which, in this case was just SSD) which, when totaled, exceed 100% of his AWW.

On 5/11/98, the JCC entered his Compensation Order (V2-223-237), wherein he specifically rejected the E/C's argument that

Grice applies to supplemental benefits (V2-232). The JCC gave four reasons why he so held (V2-232-235).

Thereafter, on 3/3/99, the First DCA affirmed the JCC's Order, Americana Dutch Hotel v. McWilliams, 24 FLW D624 (Fla. 1st DCA 1999)(A-B1-4) and stated, inter alia, as follows:

> "In addition, as the JCC explained in his order, the statute addressing supplemental benefits "(a) contemplates that a claimant's regular compensation benefits plus supplemental benefits can exceed a claimant's AWW; and (b) only caps those benefits when they exceed the maximum weekly compensation rate in effect at the time of payment..." Indeed, rather than capping the total of compensation benefits plus supplemental benefits at the claimant's AWW, as argued by the E/C, Sec. 440.15(1)(e)1, Fla.Stat. (1985), specifically provides that "the weekly compensation payable and the additional benefits payable pursuant to this paragraph, when combined, shall not exceed **the maximum weekly compensation rate in effect at the time of payment** as determined pursuant to Sec. 440.12(2)."

The JCC explained that the maximum weekly compensation rate for 1998 is $492.00, which is greater than the amount Claimant should receive pursuant to the JCC's Order (A-B-3-4), McWilliams, supra at D624.

STATEMENT OF THE FACTS

The operative facts as apply to this case are as follows:

1. Claimant's AWW was $311.97 with a corresponding comp rate of $207.99 per week (V1-10, 42, V2-227).

2. The initial amount of SSD (Claimant's PIA) is $541.70 per month, which equates to $125.98 per week (V1-84, V2-227).

3. Claimant's ACE (monthly average current earnings) was $1,389.00 per month (V2-228), and therefore, 80% of Claimant's ACE is $1,111.20 (V1-84).

4. Claimant's supp benefits for 1998 were $135.19 per week (V2-229), and they increase at the rate of $10.40 per week every year, with the next increase due 1/1/99 (V2-229).

5. The maximum weekly comp rate for 1998 is $492.00 (V1-16).

6. At the time of the hearing, the E/C was paying Claimant WC benefits, including supp benefits, at the rate of $126.45 per week (V1-172-179, V2-203).

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

POINTS ON APPEAL

I

WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE SUPREME COURT OF FLORIDA ON THE SAME QUESTION OF LAW.

II

WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE RELATES TO AN ISSUE OF LAW ALREADY CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE.

SUMMARY OF ARGUMENT

I

Contrary to the assertion of the E/C, the decision of the First DCA does not expressly and directly conflict with this Honorable Court's decision in Grice, because the precise issue raised in this case was not addressed in Grice.

II

The First DCA did not certify the question raised on this appeal to be a decision passing upon a question of great public interest, and therefore, this Honorable Court may not assume jurisdiction on the grounds of "great public interest", Estes v. City of North Miami Beach, 227 So.2d 33 (Fla. 1969).

ARGUMENT

I

WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE SUPREME COURT OF FLORIDA ON THE SAME QUESTION OF LAW.

Article V, Sec. 3(b)(3), Fla. Const. provides:

> "(b) JURISDICTION - THE SUPREME COURT: ... (3) may review any decision of a District Court of Appeal ... that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law." See also, Rule 9.030(a)(2)(A)(iv), Fla.R.App.P..

In order to invoke the discretionary jurisdiction of the Supreme Court under Article V, Sec. 3(b)(3), Fla.Const., and Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., antagonistic principles

of law must have been announced in a case by the lower court based on practically the same facts. The conflict must be obviously and patently reflected in the decisions relied on, and must result from an application of law to facts which are in essence on all fours, without any issue as to the quantum and character of proof, Trustees of the Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961). For purposes of determining conflict jurisdiction, this Court is limited to facts which appear on the face of the Opinion, Hardee v. State, 534 So.2d 706 (Fla. 1988). The purpose of conflict jurisdiction is to give this Court jurisdiction on any case decided by one of the DCAs wherein such decision might conflict on the same point of law, with a prior decision of another DCA, or a decision of this Court, so that there might be uniformity in the case law in Florida, Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co., 116 So.2d 762 (Fla. 1959). The concern of this Court in cases based on conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law, Wainwright v. Taylor, 476 So.2d 669 (Fla. 1985). However, in order to have a conflict which causes confusion or lack of uniformity among the Florida Courts, the conflict must be express and direct, i.e., it must appear within the four corners of the majority decision, Dept. of HRS v. National Adoption

Counseling, 498 So.2d 888 (Fla. 1986). Inherent or so-called "implied" conflicts may no longer serve as a basis for this Court's jurisdiction, HRS v. National Adoption, supra. However, conflict jurisdiction does exist where a case gives rise to a fair implication that conflicts exist, Hardee v. State, supra.

In the case at bar, the E/C cited just one case which they contend is in direct conflict with the decision rendered by the First DCA, to-wit: Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla. 1997). Respondent submits that the case at bar does not expressly and directly conflict with this Honorable Court's decision in Grice, because, as noted by the First DCA in the case at bar:

> " ... the precise issue raised in the instant case was not addressed in the Grice case." McWilliams, supra at D624.

In Grice, the claimant was receiving WC benefits in the form of PTD (and probably supp benefits), state disability retirement, and SSD. The issue before this Court in Grice was as follows: The E/C argued that they were allowed to offset Claimant's PTD benefits based upon the amount that his combined WC, **state disability retirement**, and SSD exceeded his AWW.

Grice argued that he was entitled to WC and state disability retirement benefits, with the only offset being that which is statutorily allowed for SSD, F.S. 440.15(9)(a)(1985). In other words, the issue in Grice was whether or not state

disability retirement could be included in determining the E/C's offset. This, in fact, is reflected by the very question certified to be of great public importance to this Court in Grice:

> "When an employee receives workers' compensation, state disability retirement, and social security disability benefits, is the employer entitled to offset amounts paid to the employee for state disability retirement and social security disability against workers' compensation benefits to the extent that the combined total of all benefits exceeds the employee's average weekly wage?" Grice, supra at 897.

This Court, in Grice, ruled that the E/C could include state disability retirement In calculating its offset, stating

> "We find that the county's interpretation of the relevant statutes and case law is the proper one and hold that an injured worker, except where expressly given such a right by contract, may not receive benefits from his employer and other collateral sources which, when totaled, exceed 100% of his average weekly wage. Here, the combination of Grice's workers' compensation, disability retirement, and social security disability benefits exceed his AWW. Thus, the county is entitled to the offset it seeks. Accordingly, we answer the certified question in the affirmative ..." Grice, supra at 898.

That is not the question that was decided by the First DCA in the case at bar, but rather it was whether or not this Court's decision in Grice applies to supplemental income benefits paid pursuant to F.S. 440.15(1)(e)1(1985). This point was neither argued nor ruled upon by this Court in Grice (see decisions of First DCA in McWilliams, supra at D624 and Acker v.

City of Clearwater, 23 FLW D1970 (Fla. 1st DCA 1998)(*review pending* #93,800)(Fla. filed 8/27/98) at D1971).

The First DCA in both of those decisions stated:

> "We recognize that a close review of the facts in the Grice case revealed that increases in supplemental benefits appear to have been included in the yearly calculation of the offset. We note, however, that the precise issue raised in the instant case was not addressed in the Grice case." McWilliams, supra at D624.

Both the JCC (V2-232)(A-A-10-13) and the First DCA (A-B-2-4), McWilliams, supra, held that the Grice decision does not apply to supplemental income benefits. The reasons given by both the First DCA and the JCC were as follows:

1. Grice did not in any way deal with supplemental benefits as set forth in F.S. 440.15(1)(e)1(1995).

2. There is a statute dealing with supplemental benefits that: (a) contemplates that a claimant's regular compensation benefits plus supplemental benefits can exceed a claimant's AWW; and (b) only caps those benefits when they exceed the maximum weekly compensation rate in effect at the time of payment, as determined pursuant to F.S. 440.12(2). The Legislature specifically did not cap supplemental benefits at a Claimant's AWW, but rather capped it at the maximum weekly comp rate in effect at the time of payment, which, in 1998, is $492.00.

3. The purpose of supplemental benefits is to allow for inflation, Acker, supra. If a Claimant was not allowed

supplemental benefits after a combination of his comp benefits, SSD benefits, and supp benefits equaled his AWW, then a PTD Claimant would have no way of combating inflation.

Therefore, since this Court's decision in Grice, did not rule on the precise issue raised in the case at bar, there can be no express and direct conflict between the First DCA's decision in the case at bar and this Court's decision in Grice.

It is therefore respectfully submitted that this Court does not have jurisdiction to hear this case under the "express and direct conflict" provision of the Florida Constitution and Florida Rules of Appellate Procedure.

II

WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE RELATES TO AN ISSUE OF LAW ALREADY CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE.

Article V, Sec. 3(b)(4), Fla.Const., provides:

> "(b) JURISDICTION - THE SUPREME COURT ... (4) may review any decision of a District Court of Appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another District Court of Appeal." See also, Rule 9.030(a)(2)(A)(v), Fla.R.App.P.

Certification by a DCA that a decision passes upon a question of great public interest is a pre-requisite to jurisdiction of the Florida Supreme Court to review on a ground of great public interest, Allstate Insurance Co. v. Langston, 655 So.2d 91 (Fla. 1995), Estes v. City of North Miami Beach, supra. The certification of the question must be in the case at

bar and if not, this Court may not accept jurisdiction of the case on the grounds that it passes upon a question of great public interest, Allstate v. Langston, supra at 93, fn.1, Estes, supra. Respondent concedes that the issue of law already certified to be of great public importance and accepted by this Court in Acker, supra, *(review granted,* Supreme Court Case No: 93,800); Dept. of Transportation v. Johns, 23 FLW D2519 (Fla. 1st DCA 1998); and Dept. of Labor & Employment Security v. Boise Cascade Corp., 23 FLW D2124 (Fla. 1st DCA 1998) does relate to the issue of law in the case at bar. However, jurisdiction of this Court may not be obtained by the fact that a question has been certified as one of great public interest in another case, but rather, jurisdiction of this Court, based on an "issue of great public importance" can be obtained only if the District Court certifies the question as one of great public importance in the specific case at bar.

CONCLUSION

The First DCA's decision in the case at bar does not expressly and directly conflict with this Court's decision in Grice, and the First DCA did not certify the question in the case at bar to be one of great public importance.

It is therefore respectfully requested that this Honorable Court deny the Petitioner's Notice to Invoke Discretionary Jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail on this 11th day of May, 1999 to: Herbert A. Langston, Jr., Esq., 111 S. Maitland Ave., Maitland, FL 32751.

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By_____
Chief Deputy Clerk

Honorable Sid J. White, Clerk
SUPREME COURT
500 South Duval Street
Tallahassee, FL 32399

Re: Johnny McWilliams v. Americana Dutch Hotel
Case No: 95,229

Dear Mr. White:

Please find enclosed for filing in the above Court file the original and five (5) copies of the Answer Brief of Respondent, along with the original and five (5) copies of our Motion for Attorney's Fees.

Thank you very much for your attention to this matter.

Sincerely,

Bill McCabe

BMC:na
Enclosure