IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 96,239

RAYMOND DIXON,

Petitioner.

-vs-

GAB BUSINESS SERVICES, INC.,
AND BIO LAB, INC.

Respondents.
_____/

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS AND FLORIDA WORKERS' ADVOCATES

RANDY D. ELLISON, ESQ.
1645 Palm Beach Lakes Blvd., Ste. 350
West Palm Beach, FL 33401
(561) 478-2500
Attorney for Amicus Curiae

CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Reply Brief is Times New Roman 14 Pt.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE

Amicus Curiae, The Academy of Florida Trial Lawyers and Florida Workers' Advocates, adopt Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

A long line of Florida authorities recognize that 80% of an employee's average current earnings as defined by federal Social Security law represents an absolute "floor," beneath which offsets are not permitted, irrespective of the level of average weekly wage which that federal "floor" would represent. This principle, codified in Fla. Stat. §440.15(10)(a), is an expression of the intertwined legislative intentions of both the United States Congress and the Florida Legislature and has been recognized as a fundamental premise by this Court.

The current case calls upon this Court to resolve the conflict between that 80% average current earnings "floor" and the 100% of average weekly wage "ceiling" which this Court has inferred from Fla. Stat. §440.20(15). This Court should resolve that statutory conflict in favor of the explicit average current earnings "floor," rather than the dubiously-derived, implicit "ceiling" of Fla. Stat. §440.20(15).

ARGUMENT

POINT ON APPEAL

THE AVERAGE WEEKLY WAGE CEILING MUST GIVE WAY TO THE AVERAGE CURRENT EARNINGS FLOOR.

For nearly a decade, from 1958 to 1966, there was no such thing as a Social Security "offset." During this period, totally disabled workers received full benefits from both Social Security and workers compensation. Ultimately, employers prevailed upon the United States Congress with the argument that because they pay half the premiums for Social Security, they were effectively being forced to pay twice for the same injury where the worker received full benefits from both workers' compensation and Social Security. American Bankers Insurance Co. v. Little, 393 So.2d 1063, 1065, n.4 (Fla. 1980); Lofty v. Richardson, 440 F.2d 1144, 1151-52 (6th Cir. 1977).

Effective January 1, 1966, Congress adopted 42 U.S.C. §424(a), which permits Social Security to take an offset to the extent that combined Social Security and workers' compensation benefits exceed 80% of a recipient's average current earnings. "Average current earnings" (ACE) is technically defined in 42 U.S.C. §424a(a)(5), but essentially is measured by a worker's highest sustained level of earnings during the worker's career. Social Security does not apply any offset to private disability policies, irrespective of their size or the source of their premium payments.

One of the primary arguments which the Council of State Chambers of Commerce offered to the Congress in support of the re-enactment of the Social Security offset, was the risk that threatened state offsets would undermine worker safety by shifting the cost of injuries away from the industries causing them (i.e., workers compensation) to the economy as a whole (i.e., Social Security). Lofty, supra at 1148 (quoting from congressional subcommittee hearings). Notwithstanding this argument, Congress elected to permit each state the option of reversing the federal offset. In Social Security nomenclature, Florida is such a "reverse offset" state, because the Florida legislature has exercised this option and thus permitted Florida's workers' compensation carriers to take the offset which would otherwise be taken by the federal government. By reversing the offset, the financial burden of injured workers has been effectively shifted from predominantly state generated payments to predominantly federal payments. See, American Bankers, supra, at 1065; Burks v. Day's Harvesting, Inc., 597 So.2d 858, 860 (Fla. 1st DCA 1992).

Notwithstanding the fact that both the state and federal systems agree upon 80% as the appropriate proportion for purposes of offset determination, unlike the federal system's highest career earnings ACE figure, Florida utilizes an average weekly wage (AWW) measure which (with rare exception) focuses exclusively upon the earnings during the thirteen weeks immediately pre-injury. One might explain this difference in

state (AWW) vs. federal (ACE) benefit measures as resting upon the Social Security system's necessarily broader concern with the individual's entire working life, in contrast to the workers' compensation system's generally more narrow focus on the particular job which the worker was performing when injured. Regardless, to the extent they substantially differ, the federal system is clearly the more enlightened at least as it pertains to long-term disabilities, implicitly recognizing that a worker's lifetime disability benefits should not be permanently fixed based upon an earnings "snapshot" at the time of injury, which may well be wholly anomolous.

Regardless of the differing philosophies which may imbue these two measures, the Florida Workers' Compensation Act and the federal Social Security Act both contain "hold harmless" provisions which effectively guarantee that the worker will receive the maximum disability benefit payable under either statute's offset scheme. See, American Bankers, supra; citing, Fla. Stat. §440.15(10) (1975); 42 U.S.C. §424a(d) (1976). In fact, in initially authorizing retroactive application of the Florida offset "reversal" statute, Fla. Stat. §440.15(10), this Court assured all concerned that the differing computational methods of the federal and Florida offsets were entirely irrelevant, as these "hold harmless" provisions would require use of the highest of the two measures. See, American Bankers, supra.

Thus, the First District Court's statement in Hunt v. Stratton, 677 So.2d 64, 66

(Fla. 1st DCA 1996), describing the federal standard as an "absolute limitation" on the Florida offset, is fully supported by both statutory text and a long line of authorities stretching back at least to this Court's American Bankers decision. See also, Burks, supra, (maximum reduction under Florida law may "never" be greater than federal offset); Trilla v. Braman Cadillac, 527 So.2d 873 (Fla. 1st DCA 1988) (carrier "must use ACE if the 'permissible combined benefits' are greater under the latter formula"). This absolute federal floor remained inviolate as a matter of legislative and Congressional intention for nearly 30 years, until the (reluctantly expressed) decision of the First District Court below.

The employer/carrier has argued that this absolute "floor" should be breached for the first time based upon the purportedly contrary language of Fla. Stat. §440.20(15). This Court has interpreted that section as imposing a 100% of AWW "ceiling" on employer-provided benefits and, most recently, interpreted Social Security payments to fall within that inferential benefit limitation. See, Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997). The First District Court below felt reluctantly constrained to accept this argument based simply upon the breadth of the language used by this Court in expressing that 100% of AWW Grice "ceiling." See GAB Business Services, Inc. v. Dixon, 24 F.L.W. D1674,1675-76 (Fla. 1st DCA 1999).

Because the current facts present a situation where the heretofore "absolute" 80%

ACE floor exceeds the newly-interpreted 100% AWW "ceiling," something must give. Put more formally, it is the function of this Court to read the statutes in a manner which resolves the apparent conflict. Hunt, supra. Given this Court's role in deciding this question of first impression and the primacy of legislative intention as the object of this Court's endeavor, it is necessary to briefly trace the dubious lineage of what has now become known as the "Grice offset."

Fla. Stat. §440.20(15) states:

> When an employee is injured and the employer pays his full wages or any part thereof during the period of disability, or pays medical expenses for such employee, and the case is contested by the carrier or the carrier and employer and thereafter the carrier, either voluntarily or pursuant to an award, makes a payment of compensation or medical benefits, the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded, plus medical benefits, if any, out of the first proceeds paid by the carrier in compliance with such voluntary payment or award, provided the employer furnishes satisfactory proof to the judge of such payment of compensation and medical benefits. Any payment by the employer over and above compensation paid or awarded and medical benefits, pursuant to subsection (14), shall be considered a gratuity.

(emphasis added).

A close examination of this statutory language shows that its drafter was concerned only with the situation where the employer voluntarily paid benefits during the pendency of a contested case, as it provided solely for employer reimbursement out of

subsequent carrier payments. By its terms, this statutory language clearly was not intended to address the taking of an offset in any of the following situations: a) in a non-contested case; b) by a carrier, c) on an ongoing basis; or d) as "reimbursement" of payments by the United States Treasury. Yet, that is how far from the text we now find ourselves.

When first formulated in Brown v. S.S. Kresge Co., 305 So.2d 191 (Fla. 1974), this 100% of average weekly wage "ceiling" was described by this Court as nothing more than a "logical interpretation" of the relevant language of (at that time) an Industrial Relations Commission rule. Id. at 194. To this day, this Court has never explained how or why a statute limited by its terms to reimbursement of voluntary employer payments during unsuccessful contest by the carrier, was transmogrified into an independent cap on employee benefits.

Even in Grice, supra, wherein this Court first expanded this inferential principle to encompass Social Security as a form of employer payment, this Court was left merely to quote the statutory language and appeal to its Brown decision as having "interpreted the foregoing language" in the manner suggested. Grice, supra, at 898. With all due respect to this Court, there is an unbridgeable chasm between the statutory language above-quoted and the ultimate contours of the Grice decision. At best, this Court extracted a generic principle from precise statutory language in Brown and then expanded

that generic principle without regard to the original statutory language, to reach the ultimate Grice result.

Because of the unique facts at bar, this Court now must chose between two irreconcilable offset principles, both of which have been previously recognized and endorsed by this Court. Specifically, this Court must decide between a statutory ceiling (Grice) of highly dubious textual lineage and a heretofore "absolute" statutory floor (American Bankers) premised upon clearly expressed legislative and Congressional purpose in the coordination of state and federal benefits.

While the employer/carrier will naturally wish to emphasize that, on these unique facts, this claimant would receive more than his average weekly wage at the time of injury (characterizing this as a "windfall"), this argument ignores the federal interest in assuring that, (irrespective of the wage level immediately preceding injury), the injured employee shall not receive less than 80% of his highest level of career earnings (ACE), together with any collaterally available private disability insurance payments. Thus, from a federal perspective, not only will Mr. Dixon not receive a "windfall," but strict enforcement of the so-called "Grice" offset in these circumstances would create a positive "shortfall" in relation to that federal standard. Moreover, even utilizing Florida concepts, it is plainly employer/carriers who will receive a windfall, regardless of how this Court rules, simply by virtue of being permitted to offset Social Security benefits for which the

worker paid fully half the premiums to begin with. Compare, Jewel Tea Co. v. Florida Industrial Commission, 235 So.2d 289 (Fla. 1969). The current question is simply the extent of the employer/carrier windfall which will be permitted.

From a practical standpoint, where a claimant such as Mr. Dixon has established a substantially higher ACE than his AWW at the time of injury, his Social Security benefits will be relatively higher, shifting the proportionate burden of injury even further toward payments by the federal system. By definition, those relatively higher Social Security benefits and associated ACE must necessarily inure to the benefit of either the employer/carrier or the worker, depending upon how this Court resolves the current "statutory" conflict. Since the higher ACE is the result of the worker's historical efforts (for which the current employer bears no responsibility), it seems equally obvious that the primary benefit of that higher historical ACE should flow to the worker rather than the new employer, even were such equitable considerations truly the issue.

CONCLUSION

The heretofore absolute ACE "floor" is premised upon explicit text expressing the coordinated intention of both the Florida Legislature and the United States Congress that the employee should receive no less than if the offset were taken by Social Security. This Court should vindicate that over-arching legislative intention, notwithstanding any conflict with the textually-suspect "Grice offset".

RANDY D. ELLISON, ESQ.
Attorney for Amicus Curiae
1645 Palm Beach Lakes Blvd
Suite 350.
West Palm Beach, FL 33401
(561) 478-2500
Florida Bar No.0759449

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished to MATTHEW D. STAVER, ESQ., 1900 Summit Tower Blvd., Suite 540, Orlando, FL 32810 and D. PAUL McCASKILL, ESQ., 545 Delaney Avenue, Ste. 7, Orlando, FL 32801, by mail, this 20th day of October, 1999.

_____

RANDY D. ELLISON, ESQ.
Attorney for Amicus Curiae
1645 Palm Beach Lakes Blvd.
Suite 350
West Palm Beach, FL 33401
(561) 478-2500
Florida Bar No.0759449