IN THE SUPREME COURT OF FLORIDA



CASE NO. 96,239

RAYMOND DIXON,

Petitioner,

-vs-

GAB BUSINESS SERVICES, INC., et al.,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

# PETITIONER'S REPLY BRIEF

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## SUMMARY OF THE ARGUMENT

The Employer/Carrier's Answer Brief is unable to refute Dixon's contention that section 440.15(10) applies to this case and governs its outcome. Although section 440.15(10) played no part in the result this Court reached in Grice, it surely does in this case because it is undisputed that Dixon's ACE exceed his AWW. The Employer/Carrier's reliance on Grice turns on an interpretation of that decision which attempts to expand its holding to the facts of this case. However, this interpretation is legally incorrect and fatally flawed because it ultimately cannot account for the effect of section 440.15(10) and 42 U.S.C. 424a, both of which plainly apply here. Dixon's ACE is thus the benchmark for his offset calculations.

This Court's recent decision in City of Clearwater v. Acker, 24 Fla. L. Weekly S567 (Fla. Dec. 9, 1999), shows that the contours of the holding in Grice are subject to reasonable limitations based upon the rules of statutory construction and common sense. Acker also illustrates that section 440.20(15) does not rule the world where a more specific and factually appropriate statute applies to a particular case. Here, that statute is section 440.15(10).

A potential preemption question would be posed by the Employer/Carrier's interpretation of Grice because it ignores 42 U.S.C. 424a. This predicament is easily avoided, however, if the Court rejects the Employer/Carrier's interpretation, which Dixon

has shown herein to be legally illegitimate.

This case concerns purely legal issues regarding decisional and statutory law. It requires no minute or precise math calculations by the Court as to offsets.

The First District's Order awarding attorneys' fees should be affirmed. It is completely within the discretion of the appellate court to award attorneys' fees to claimants even if they have technically not prevailed in an appeal. The First District's award of fees in this case therefore cannot have been an abuse of discretion. The statute and case law upon which the Employer/Carrier relies do not deal with the discretion of the First District to award attorneys' fees, but rather with the amount of fees a Judge of Compensation Claims can award in a given case.

## ARGUMENT

### I.

**THIS COURT SHOULD CLARIFY THAT ITS HOLDING IN Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla. 1997), DOES NOT APPLY WHEN SOCIAL SECURITY DISABILITY IS ONE OF THE BENEFITS RECEIVED BY THE WORKER, AND 80 PERCENT OF HIS OR HER AVERAGE CURRENT EARNINGS, AS COMPUTED BY THE SOCIAL SECURITY ADMINISTRATION, ARE GREATER THAN HIS OR HER AVERAGE WEEKLY WAGE.**

Dixon argued in his Initial Brief that this Court should not extend its holding in Grice to the facts of this case. In support of this point, Dixon relied upon: (1) the applicability of section 440.15(10), Florida Statutes (1994); (2) the history of the Social Security offset; (3) the context of the Grice decision, which he maintained was factually disparate from the situation this case presents. The Employer/Carrier makes no serious attempt to address or analyze points one and two, and must therefore be deemed to have conceded them. As to point three, the Employer/Carrier acknowledges on page 14 of its Answer Brief that "nowhere in the Florida Supreme Court's decision in Grice is the ACE mentioned."[1] These concessions are critical because the application of section 440.15(10) in this case is outcome determinative. Moreover, it is now clear that the only real support the Employer/Carrier finds in Grice lies in that decision's broad holding. Having admitted that this Court was not

[1] See also Answer Brief at page 20: "The ACE was not even mentioned by the Court as being a factor in these calculations."

asked in Grice to consider the instance of an injured worker with an ACE in excess of his AWW, it follows that section 440.15(10) played no part in the result this Court reached. Yet section 440.15(10) does apply here because it is undisputed that Dixon's ACE exceed his AWW. The Judge of Compensation Claims and the First District both shared this view.

In its Answer Brief, the Employer/Carrier is at a complete loss in explaining how section 440.15(10) should bear upon the offset calculations herein except to boldly conclude that a claimant's ACE are "clearly not relevant." See Answer Brief at page 21. If this claim were to be taken seriously, then one can only wonder when a claimant's ACE and section 440.15(10) would ever apply in determining offsets. It is presumed[2] that the legislature would not enact a purposeless and therefore useless piece of legislation. See State v. Zimmerman, 370 So.2d 1179, 1180 (Fla. 4th DCA 1979). One of the historical reasons for the statute, as briefed by Amicus and set forth in the decision below, was to bring handling of offsets into conformity with the standards of federal social security law. As stated by the First District:

> Under this scheme, the state and federal laws effectively guaranteed payment of the maximum disability payments available under either social security or workers' compensation law, and they shifted the source of payments from predominately state-generated payments to predominately federal-generated payments.

[2] Dixon acknowledges that this is sometimes a brave assumption.

Id. at 1065.

> Despite this shifting of the offset, the Florida and federal statutes contain provisions designed to ensure that the injured employee does not receive less under the two acts than he or she would under either.

GAB Business Services, Inc. v. Dixon, 24 Fla. L. Weekly at 1674, 1675 (Fla. 1st DCA July 15, 1999) (emphasis added). The Employer/Carrier would have this Court ignore the history and purpose of section 440.15(10) based upon the broad holding of Grice which it admits never implicated this statute.

The Employer/Carrier represents that in the proceedings below, Dixon "questioned the authority and accuracy of Grice, and he argued that Grice is wrong." See Answer Brief at page 5. This statement is inaccurate and misses the point of this appeal. Dixon questions the Employer/Carrier's interpretation of Grice, which involves an expansion of that decision's holding that is entirely unjustified for the reasons Dixon has argued.

The Employer/Carrier argues that Dixon has waived the right to raise preemption before this Court because he did not do so before the Judge of Compensation Claims or the First District. This statement reflects several layers of misunderstanding. Dixon stated in his Initial Brief that the potential exists for a conflict between a federal statute and a state court ruling if this Court's broad holding in Grice were interpreted in the manner the Employer/Carrier advocates. The First District agreed:

> In a situation involving benefits in addition to compensation and SSD, if application of

> the 100 percent AWW cap arising under section 440.20(14) appears to reduce total benefits to less than 80 percent of a worker's ACE, such reduction of workers' compensation benefits appears to violate section 440.15(10), as well as 42 U.S.C. section 424a, which could give rise to a preemption controversy.

Dixon, 24 Fla. L. Weekly at D1676.

A federal preemption problem does not arise unless and until the Employer/Carrier's tortured interpretation of this Court's holding in Grice is sanctioned. Both the Judge of Compensation Claims and the First District[3] were clearly unsympathetic to the Employer/Carrier's reading of Grice. Accordingly, neither court's ruling presented a preemption controversy.

The Employer/Carrier next argues that section 440.15(10) is merely a state statute which references a federal statute, and that it is therefore not shielded by the same protections afforded a federal statute under the Supremacy Clause.[4] This argument fails because 42 U.S.C. section 424a is a federal law that protects workers independent and apart from section 440.15(10).

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[3] See Dixon, 24 Fla. L. Weekly at D1675: "We agree with Dixon that the clear language of section 440.15(10), when coupled with 42 U.S.C. section 424a, limits the SSD offset available to E/Cs by either 80 percent of the claimant's AWW or ACE, whichever is greater. See Trilla v. Braman Cadillac, 527 So.2d 873 (Fla. 1st DCA 1988)(E/C's offset could be calculated based upon 80 percent of AWW only upon showing that offset was not greater than offset allowed Social Security Administration)."

[4] Neither of the two decisions which the Employer/Carrier cites regarding this point, i.e., Abdullah v. American Airlines, 181 F.3d 363 (3rd Cir. 1999), Meyer v. Conlon, 162 F.3d 1264 (10th Cir. 1998), support this contention.

State law which ignores or contravenes 42 U.S.C. section 424a is preempted. That Congress has permitted states like Florida to operate as a "reverse offset" state does not mean Florida law can ignore the offset limitations announced in 42 U.S.C. section 424a. The better view is that Florida's status as a reverse offset state is sustainable only so long as state law concerning offsets remains within the limitations which section 440.15(10) establishes through its incorporation of 42 U.S.C. section 424a. It is irrelevant that certain offset configurations are not "straight Social Security offsets" or that these calculations are a "creation of state law." See Answer Brief at page 27. The point is that at the end of the day, offsets must conform with the dictates of 42 U.S.C. section 424a.

Dixon's preemption discussion was to show the Court why it should steer clear of the Employer/Carrier's attempt to extend the holding in Grice. A ruling that clarifies this point would help prevent further litigation of preemption issues involving 42 U.S.C. 424a in workers' compensation cases such as this. Absent such clarification, however, the potential exists for claimants' attorneys to further litigate preemption questions because the First District's discussion of preemption in the opinion below provides a legal basis for claimant's lawyers to test this point. This Court can avert future litigation and its attendant court congestion by clarifying that it never meant for Grice to be interpreted as the Employer/Carrier has recommended.

On page 11 of its Statement of the Facts, the Employer/Carrier argues that "[i]t is also important to note that the offset taken by the E/C under Grice is only $230.50, while the offset that could be taken by the Social Security Administration, if the E/C did not take away any kind of offset, would be $237.60. Therefore, the E/C's offset under Grice is not greater than that which the Social Security Administration could take." (emphasis in original). This contention is pointless, inaccurate and ultimately misleading. First, it entails an illogical comparison between an offset it maintains an Employer/Carrier can take under Grice--$230.50[5]--and an offset the Social Security Administration would be entitled to if the Employer/Carrier took no offset at all--$237.60, the amount of social security Dixon is supposed to receive on a monthly basis. This comparison is pointless because the Employer/Carrier did take an offset in this case. This appeal is about whether that offset was proper. It is also inaccurate and self-contradictory because, as the Employer/Carrier has itself maintained throughout its Answer Brief, the correct amount of offset available to the Social Security Administration is $49.41. See Answer Brief at pages 7-8, 22-23. Making a groundless

[5] The Employer/Carrier provides absolutely no foundation or record citation in its Brief that would support the use of this figure. Fla. R. Work. Comp. P. 4.230(c) does not permit motions to strike a brief or portions of one. Rule 4.230(c), however, provides that a party "may call attention to breaches of these rules" and establishes that "[s]tatements in briefs not supported by the record shall be disregarded and may constitute cause for imposition of sanctions." Further, the entire paragraph in which this statement appears is argument, which has no place in a statement of the facts.

comparison using internally inconsistent and unsupported figures only serves to confuse the issue before the Court.

Some brief discussion is in order regarding the Employer/Carrier's repeated use and reference to tables in connection with its offset discussion. Essentially the same tables and figures appeared in the briefs the Employer/Carrier presented to the First District. They played no part in that court's decision, nor should they here. There is no serious debate in this case about the figures which underlie Dixon's offset calculations. This is clear from the First District's opinion. The issue is what bearing section 440.15(10) and this Court's holding in Grice should have on these figures. Nor is there is any serious question that if Dixon's view of section 440.15(10) and Grice is accepted by this Court, Dixon should prevail and the ruling of the Judge of Compensation Claims should be affirmed. The converse is also true should the Court accept the position of the Employer/Carrier.

The Employer/Carrier's reliance upon Acker v. City of Clearwater, 660 So.2d 754 (Fla. 1st DCA 1995), is inexplicable. This decision does not appear to be on point inasmuch as it merely affirms a workers' compensation order allowing recovery for a claimant's post-traumatic stress disorder. Dixon suspects that the Employer/Carrier meant to cite Acker v. City of Clearwater, 23 Fla. L. Weekly D1970 (Fla. 1st DCA Aug. 17, 1998); however, this is not entirely clear from the Employer/Carrier's brief.

Regardless, this Court's recent decision in City of Clearwater v. Acker, 24 Fla. L. Weekly S567 (Fla. Dec. 9, 1999), shows that section 440.20(15) does not insuperably limit an injured workers' compensation to 100 percent of his AWW as the Employer/Carrier has argued. In Acker, this Court reconciled two apparently conflicting statutes, section 440.15(1)(e)(1), Florida Statutes (1985), and section 440.20(15)[6], Florida Statutes (1985). Addressing this issue, the Court observed:

> Clearly, the stated purpose for the enactment of section 440.15(1)(e)(1), as a hedge against inflation, would be frustrated under the City's interpretation of section 440.20(15). Thus, there is an apparent conflict between the purpose of the supplemental benefits statute and the City's argument that section 440.20(15) requires increases in supplemental benefits to be included in offset calculations. "Where two. . .statutes are found to be in conflict, rules of statutory construction must be applied to reconcile. . . the conflict. We are aided in this task by the maxim that

[6] This Court clarified in Acker that the plain language of section 440.20(15) "does not state that injured workers may not receive in excess of 100 percent of their individual AWW," and that "[i]t was not until 1989 that this Court interpreted section 440.20(15) as limiting an injured workers' combined benefits from all sources to 100 percent of his or her individual AWW." Id. at s569. Citing Barragan, 545 So.2d at 252. Rejecting the City's argument that supplemental benefits should be included in offset calculations because the legislature did not specifically state that increases in supplemental benefits should be excluded from such calculations, the Court noted that "[h]ad the 100 percent cap come from a strictly literal reading of the statute, this might be in order. However, where the 100 percent cap is a judicial interpretation of an ambiguous statute, and any further expansion of the statute through judicial interpretation would render another statute meaningless, this Court must first try to read the statutes harmoniously." Id. at S569. Here, as argued by Dixon, the Employer/Carrier would interpret this Court's decision in Grice and section 440.20(15) to render section 440.15(10)as meaningless.

> "legislative intent is the pole star by which we must be guided in interpreting the provisions of a law." (citations omitted).

Acker, 24 Fla. L. Weekly at S568.

The foregoing language from Acker provides guidance as to this case. Should the Court perceive a conflict between section 440.15(10)(a) and section 440.20(15), it should apply rules of statutory construction to reconcile this conflict. Dixon argued in his Initial Brief that section 440.15(10)(a), in contrast to section 440.20(15), specifically addresses claimants whose ACE exceed their AWW. The applicable rule of statutory construction here is that a particular subject area controls over a statute covering the same and other subjects in more general terms, as a more specific statute is considered to be an exception to general terms of more general statute. C.S. and J.S. v. S.H. and K.H., 671 So.2d 260, 268 (Fla. 4th DCA 1996). The specific terms of section 440.15(10)(a) therefore govern the more general terms of section 440.20(15). As to this Court's recognition of the time-honored tool of using legislative intent as a guide to interpreting statutes, Dixon submits that the legislative history behind section 440.15(10) and 42 U.S.C. §424a, which was extensively briefed by Amicus and set forth by the First District in the opinion below, not only shows the primacy of section 440.15(10) in this case; it also confirms the correctness of the ultimate point Dixon has advanced in this appeal: that 440.15(10), coupled with 42 U.S.C. s424a, limits the SSD offset

available to Employer/Carriers by either 80 percent of the claimant's AWW or ACE, whichever is greater. See Dixon, 24 Fla. L. Weekly at D1675.

As to the Employer/Carrier's claim that "[t]he reasoning behind Grice is that a Claimant should not receive a windfall as a result of an industrial accident,"[7] Dixon responds as follows. It is the Employer/Carrier which wants a windfall by seeking to avoid or reduce any economic responsibility based upon a retirement plan benefit the claimant has earned and towards which the Employer/Carrier has contributed nothing. Further, section 440.15(10) would conclusively determine the issue on appeal except for the fact that Dixon receives roughly $100.00[8] per month from a group disability policy. (R. 90, 177) This led the First District to observe:

> [i]t is clear that if the only two benefits involved were workers' compensation and SSD, section 440.15(10) would apply and the E/C would be entitled to an SSD offset based on the greater of 80 percent of ACE or AWW.

Dixon, 24 Fla. L. Weekly at D1675-1676. Because of this group disability policy, however, the Employer/Carrier can only rely on this Court's statement in Grice that "[h]ere, the combination of Grice's workers' compensation, disability retirement, and social security disability benefits exceed his AWW." Grice, 692 So.2d at

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[7] See Answer Brief at page 13.

[8] The Employer/Carrier refers to this amount on page 10 of its Answer Brief.

898 (emphasis added). In other words, it is Dixon's disability policy that provides the sole means by which the Employer/Carrier would cloak itself in the broad holding of Grice. The Employer/Carrier's entire discussion of Dixon's Met Life group disability policy in its Answer Brief at pages 8-10 and 23-24 is simply to lay the predicate for how it came to recalculate Dixon's offset from a "pure" offset under section 440.15(10) to a "Grice" offset. Dixon submits that by its holding in Grice, this Court did not intend for a $100.00 a month disability policy to thwart the effect of section 440.15(10) and 42 U.S.C. section 424a, especially in instances such as this case where a claimant's ACE clearly exceed his AWW.

Dixon has advocated that in cases such as this one, the injured worker should not be penalized nor should the Employer/Carrier gain an economic advantage because of the happenstance that the claimant is injured at a time when his income is lower than it typically was over a five-year period. In this sense, the Employer/Carrier is correct in stating that the "AWW and ACE are totally separate matters." See Answer Brief at page 13. The Employer/Carrier's discussion of this critical issue, however, stops here. In contrast, Dixon has discussed extensively herein why this legally necessitates different treatment of offset calculations where a claimant's ACE exceed his AWW.

Dixon agrees with the Employer/Carrier that a claimant's ACE

constitute a retroactive survey of his income before his accident. This level of income took him 5 years to attain. See 20 U.S.C. §404.408. Because of this, it is entirely logical that injured workers whose incomes in previous careers exceed their level of pay in semi-retirement not be penalized because of on-the-job injuries.

## ANSWER BRIEF ON CROSS-PETITION

### II.

### THE FIRST DISTRICT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS' FEES TO THE CLAIMANT.

The Employer/Carrier argues that the First District's award of attorneys' fees[9] to Dixon should be reversed. This Court has long recognized that an appellate court is allowed a sound judicial discretion as to whether attorneys' fees should be awarded to the attorney for the claimant even though he is unsuccessful on appeal. See Wick Roofing Co. v. Curtis, 110 So.2d 385 (Fla. 1959); Florida Juice Co., Inc. v Yeates, 111 So.2d 433 (Fla. 1959). See also City of Miami v. Burnett, 596 So.2d 478 (Fla. 1st DCA 1992). If, as these decisions establish, it is within the sound discretion of the appellate court to award fees to the claimant's attorney whether or not the claimant prevails on

[9] After the First District awarded Dixon attorneys' fees, the Employer/Carrier moved for rehearing on this issue. The First District denied the Employer/Carrier's motion, as shown by the Order attached hereto at A1.

appeal, it follows that the First District's award of fees to Dixon's attorney cannot have been an abuse of discretion.

A reader of the Employer/Carrier's Answer Brief who did not have the benefit of reviewing the First District's opinion in the decision below could easily misapprehend the thrust of that decision, which was to vindicate virtually every contention in Dixon's brief. An example of this is illustrated by the following:

> We agree with Dixon that the clear language of section 440.15(10), when coupled with 42 U.S.C. section 424a, limits the SSD offset available to E/Cs by either 80 percent of the claimant's AWW or ACE, whichever is greater. See Trilla v. Braman Cadillac, 527 So.2d 873 (Fla. 1st DCA 1988)(E/C's SSD offset could be calculated based upon 80 percent of AWW only upon showing that offset was not greater than offset allowed Social Security Administration).

Dixon, 24 Fla. L. Weekly at 1675. Elsewhere in the opinion below, the First District questioned whether the holding in Grice "is applicable to cases such as that on appeal in which the claimant's ACE exceed his AWW." Dixon, 24 Fla. L. Weekly at D1675.

The Employer/Carrier contends that Wick Roofing, Florida Juice Company and City of Miami are distinguishable[10] from this case because the claimants therein, as opposed to the employer/carriers, initiated the appeals which proved

[10] The Employer/Carrier suggests on page 30 of its Answer Brief that this Court "should revisit this issue." This is another self-contradiction because on the Employer/Carrier's rationale these decisions should have no force and effect at all because of their purported factual distinctions.

unsuccessful. Apart from the fact that nothing in these opinions indicates that such a limitation or requirement exists, this is truly a distinction without a difference. Attorneys' fees are arguably more appropriate in workers' compensation appeals where the employer/carrier has initiated the appeal because of the practical necessity that the claimant's attorney has no choice in such instances but to file an answer brief in defense of the findings and rulings of the Judge of Compensation Claims before whom he or she prevailed. Finally, this Court's statement in Wick Roofing Co. v. Curtis that "at the appellant level the court is allowed a sound judicial discretion as to whether attorneys' fees should be allowed to the attorneys for the claimant-employee even though he is unsuccessful on the appeal" bears no suggestion that only claimants who initiate unsuccessful appeals are entitled to fees. Id. at 387.

The Employer/Carrier's reliance section 440.34(2) and Trans World Tire Co. v. Hagness, 651 So.2d 124 (Fla. 1st DCA 1995),[11] is misplaced because the foregoing statute and case law deal with the amount of fees a Judge of Compensation Claims may award, rather

[11] Fumigation Dep't. v. Pearson, 559 So.2d 587 (Fla. 1st DCA 1989), Wiseman v. AT & Technologies, Inc., 569 So.2d 508 (Fla. 1st DCA 1990), and Barr v. Pantry Pride, 518 So.2d 1309 (Fla. 1st DCA 1987), have no application here, as these cases do not concern the question of an appellate court's discretion to award attorney's fees to a claimant's attorney. These decisions deal with the Judge of Compensation Claims' use of benefits attained for the injured worker as a determinant in deciding the amount of fees a claimant's attorney should receive.

than an appellate court's discretion to award fees under the circumstances of a particular case. The appropriate statutory authority here is section 440.34(5), Florida Statutes (1993), which states:

> If any proceedings are had for review of any claim, award, or compensation order before any court, the court may award the injured employee or dependent an attorney's fee to be paid by the employer or carrier, in its discretion, which shall be paid as the court may direct.

Section 440.34(5) contains no language which indicates that discretionary appellate fees are only permissible where a claimant (as opposed to the Employer/Carrier) has initiated an appeal, nor does it require that a claimant prevail in an appeal as a prerequisite to an award of appellate fees.

If the First District had any doubt about the appropriateness of fees in this case, it had the opportunity to grant rehearing and vacate its previous Order. The court declined this invitation. In cases such as this one, which involve clarification of interstitial matters of considerable importance to both claimants and carriers, it is appropriate to award attorneys' fees to claimants. The First District plainly felt that the question on appeal is significant because it certified it as one of great public importance. Because of the number of people potentially implicated, these issues should be briefed, analyzed and resolved. Based upon the foregoing, affirmance of the First District's Order "gives recognition to the policy of

providing for the disabled employee a full measure of protection guaranteed by Workmen's Compensation Law. This again has been the consistent policy of this court over the years." Wick Roofing Co., 110 So.2d at 387.

## CERTIFICATE OF SERVICE

**WE HEREBY CERTIFY** that true copies hereof were served by mail, upon Mathew D. Staver, Esquire, 1900 Summit Tower Blvd., Suite 540, Orlando, Fl 32180, this 21st day of December, 1999.

## CERTIFICATION

**WE HEREBY CERTIFY** that the size and style is 12 pt Courier New.

Respectfully submitted,

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