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 BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

This is a petition for discretionary review of a decision by the First District Court of Appeal which reversed the Judge of Compensation Claim's calculation of Dixon's permanent and total disability benefits based upon this Court's holding in Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla. 1997). Although the First District felt that the broad holding in Grice, without any limiting language, necessitated reversal, it expressed reservations about that decision's precedential effect on this case: "we question whether . . . [this Court's] holding is applicable to cases such as that on appeal in which the claimant's ACE exceed his AWW.[1]" GAB Business Services, Inc., and Bio Lab, Inc. v. Dixon, 24 F.L.W. 1674, 1675 (Fla. 1st DCA July 5, 1999).

The facts of this case are not in dispute. Dixon was injured in a car accident in Orange County on March 28, 1994, while working for Bio Lab, Inc., as a sales representative. (R. 89) His duties at Bio Lab were essentially those of an inventory clerk who went to various stores such as Home Depot to determine what supplies they needed. (R. 6) Dixon was hurt on his way to make a delivery for his employer. (R. 89) He was accepted as permanently and totally disabled on June 8, 1995. (T. 89)

The parties stipulated below that Dixon's AWW was $260.00 with a credit of $173.33 until his health insurance benefits were discontinued. (R. 89-90) The Respondents [hereinafter "Employer/Carrier"] provided Dixon with a group disability policy

from Metropolitan Life that paid him $100.00 per month. (R. 177) At the time of the hearing on July 23, 1998, Dixon was receiving Social Security Benefits in the amount of $198.74 a week. (R. 177) His AWW was $260.00; his ACE were $2,083.00, or $484.42 a week. (R. 177)

Dixon relocated in Florida in 1987, after retiring as an Illinois police officer. (R. 6) At the time of his injury, he was receiving a monthly pension from the Illinois State Retirement Fund (R. 21) in the amount of $1,150.00.

On December 25, 1997, the Employer/Carrier began imposing an offset on Dixon's benefits based upon its interpretation of this Court's decision in Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla. 1997). Dixon filed a Petition for Benefits on February 23, 1998, which requested a recalculation of the Permanent and Total Disability Benefits offset which the Employer/Carrier had begun taking. (R. 202)

On July 23, 1998, the Judge of Compensation Claims conducted a hearing regarding the recalculation of Dixon's Permanent and Total Disability Benefits. (R. 175) On August 4, 1998, the Judge of Compensation Claims entered the Order which is the subject of this appeal. The Judge ruled:

> The Employer/Carrier shall calculate and pay, together with statutory interest, all disability benefits due the Employee by applying the formula announced in Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla. 1997), to the Employee's Average Current Earnings figure of $2,083.00 per month, or

> $484.42 per week, rather than the Employee's Average Weekly Wage of $260.00. (R. 179)

The Judge of Compensation Claims also directed the Employer/Carrier to pay Dixon's attorney reasonable fees and costs. (R. 179) The Employer/Carrier timely filed a notice of appeal to the First District. (R. 187) The appeal was briefed and argued.

On July 15, 1999, the First District issued its opinion reversing the ruling of the Judge of Compensation Claims after stating:

> We are fully aware of the fact that there is no mention in Grice about the claimant's ACE and, therefore, its precedential effect with regard to this case is much in doubt. Nevertheless, we are constrained to conclude that the broad holding in Grice, without any limiting language, necessitates reversal in this case.

Dixon, 24 F.L.W. at 1676.

The First District then certified the following question to this Court as one of great public importance:

> WHETHER THE HOLDING IN Escambia County Sheriff's Dep't V. Grice, 692 So.2d 896 (Fla. 1997), CAPPING TOTAL BENEFITS RECEIVED BY A WORKER AT 100 PERCENT OF HIS OR HER AVERAGE WEEKLY WAGE, APPLIES 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?

Id. This proceeding ensued.

SUMMARY OF THE ARGUMENT

The Judge of Compensation Claims correctly determined Dixon's Permanent and Total Disability Benefits. Section 440.15(10), Florida Statutes (Supp. 1994), which expressly prohibits an Employer/Carrier from reducing workers' compensation benefits to a greater extent than the Social Security Administration could reduce SSD benefits under 42 U.S.C. section 424a, as well as the historical application of the social security disability offset, fully support the view that this Court's holding in Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla. 1997), does not, and was never meant to apply in instances such as those involved in the case at bar, where the claimant's ACE exceed his AWW.

Grice did not involve an injured worker whose ACE were greater than his AWW. This case does. Further, any interpretation of this Court's decision in Grice to permit offsets which exceed the dictates of 42 U.S.C. section 424a would violate federal law and would hence be preempted.

This Court should quash the First District's decision in the opinion below, and answer the certified question in the negative.

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.

The decision below should be quashed and the certified question should be answered in the negative to establish that this Court's ruling in Escambia County Sheriff's Dep't. v. Grice, 692 So.2d 896 (Fla. 1997), does not apply to cap total benefits received by a worker at 100 percent of his or her AWW when social security disability is one of the benefits received by the worker, and 80 percent of his or her ACE, as computed by the social security administration, are greater than his or her AWW. This contention is firmly supported by the statutory authority which surrounds this issue, the history of the social security disability offset, and a clear understanding of the factual background underlying this Court's decision in Grice.

Section 440.15(10)(a), Florida Statutes (Supp. 1994), provides:

> Weekly compensation benefits payable under this chapter for disability resulting from injuries to an employee who becomes eligible for benefits under 42 U.S.C. §423 shall be reduced to an amount whereby the sum of such compensation benefits payable under this chapter and such total benefits otherwise

> payable for such period to the employee and his dependents, had such employee not been entitled to benefits under this chapter, under 42 U.S.C. §402 and §423, does not exceed 80 percent of the employee's average weekly wage. However, this provision shall not operate to reduce an injured workers' benefits under this chapter to a greater extent than such benefits would have been otherwise reduced under 42 U.S.C. s. 424(a). (Emphasis added.)

The final sentence of the foregoing statute references 42 U.S.C. section 424a, which states:

> **(a) Conditions for reduction; computation**
>
> If for any month prior to the month in which an individual attains the age of 65--
>
> (1) such individual is entitled to benefits under §423 of this title, and
>
> (2) such individual is entitled for such month to--
>
> > (A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State, or
> >
> > (B) periodic benefits on account of his or her total or partial disability (whether or not permanent) under any other law or plan of the United States, a State, a political subdivision (as that term is used in §418(b)(2) of this title), or an instrumentality of two or more States (as that term is used in §418(g) of this title) other than (i) benefits payable under Title 38, (ii) benefits payable under a program of assistance which is based on need, (iii) benefits based on service all or substantially all of which was included under an agreement entered into by a State and the Commissioner of Social Security under §418 of this title, and (iv) benefits under a law or plan of the

> United States based upon service all or substantially all of which is employment as defined in §410 of this title.
>
> the total of his benefits under §423 of this title for such month and of any benefits under §402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of--
>
> (3) such total of benefits under §423 and §402 of this title for such month, and
>
> (4) such periodic benefits payable (and actually paid) for such month to such individual under such law or plans, exceeds the higher of--
>
> (5) 80 per centum of his "average current earnings" (Emphasis added.)

The net effect of section 440.15(10)(a) and 42 U.S.C. section 424a is to limit the offset available to employers by directing that the employee shall receive 80% of his AWW or ACE, whichever is higher. In other words, section 440.15(10)(a) permits offsets, but limits them to the extent that benefits would be reduced under Social Security law. This was essentially the determination of the Judge of Compensation Claims. (R.178) The First District reached the same conclusion. Dixon, 24 F.L.W. at D1675. That these statutes require the higher of two gauges of income levels to be used reflects a state and federal intent that a claimant's income must be calculated based on earnings which have historically been his highest. This avoids the inequities which would occur in instances where a worker with a previous level of income takes a

lower paying job and is later injured.[1]

The plain language of section 440.15(10)(a) therefore mandates that the offset restrictions of 42 U.S.C. section 424a cannot be ignored. Moreover, as noted by the First District:

> 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 would give rise to a federal preemption controversy.

Dixon, 24 F.L.W. at D1676.

Federal preemption occurs whenever there is a conflict between state and federal statutes such that state law is an obstacle to the full accomplishment of Congressional objectives. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982); see generally L. Tribe, American

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[1] Dixon asks the Court to consider the following hypothetical situation. An individual with an undergraduate degree works for 20 years, earning between $1,000.00 and $2,000.00 a week. He then takes a part-time job making $100.00 a week while in school earning a second undergraduate degree. If he is injured at his part-time job, his average current earnings would not be created by his employer at the time of his accident, but rather by his prior income. The claimant's employer at the time of his accident should not benefit from his contributions and those made by his previous employer to the Social Security Administration. Essentially, that is what the Employer/Carrier is attempting to do in this case. This hypothetical illustrates how the situation of a claimant who has an average current earning which is higher than his average weekly wage is different from one involving a claimant whose average weekly wage and average current earning are the same.

Constitutional Law, sections 6-25 through 6-26 (2d ed. 1988). The potential exists in this case for a conflict between a federal statute and a state court ruling. In restricting benefit reduction as set forth in 42 U.S.C. section 424a, Congress clearly expressed an intent to provide offset limits beyond which states could not go. If this Court's broad holding in Grice were to be interpreted to permit reduction of a worker's total benefits to less than 80 percent of his or her ACE, such an interpretation would run afoul of, and be preempted by, 42 U.S.C. section 424a.

From the standpoint of Florida statutory law, the Florida Legislature, via section 440.15(10)(a), has deigned that workers whose ACE exceed their AWW will not be subject to offsets of the type which would necessarily occur if this Court were to adopt the Employer/Carrier's interpretation of Grice. The central weakness in the Employer/Carrier's analysis of Grice in the proceedings before the First District was that it ignored section 440.15(10)(a) and the federal statute which it plainly references, 42 U.S.C. section 424a.

The First District's opinion in Dixon fully vindicates Dixon's interpretation of section 440.15(10)(a) and 42 U.S.C. section 424a. Moreover, that court's exposition of the history behind the social security disability offset also establishes that Dixon's reading of section 440.15(10)(a) and 42 U.S.C. section 424a is consistent with its evolution:

As explained in Lofty v. Richardson, 440 F.2d

> 1144, 1148 (6th Cir. 1971), when the Social Security Act was passed in 1935, there was no provision in it for disability benefits. When disability benefits were first added in 1956, an offset for workers' compensation was required. Two years later, however, the offset was repealed because it was believed that duplication of benefits was slight. Numerous complaints, largely by employers and employer-based organizations, were made to Congress that employers were duplicating payments, because they were responsible for both workers' compen sation and one-half of social security benefits. Consequently, Congress reenacted the offset in 1966. Id. In so doing, Congress adopted 42 U.S.C. section 424a, which permitted the Social Security Administration, in the absence of a state workers' compensation SSD offset provision, to take an offset to the extent that combined SSD and workers' compensation benefits exceeded 80 percent of the worker's ACE.
>
> In 1973, Florida amended its workers' compensation law to allow, under section 440.15(10), E/Cs instead of the Social Security Administration to take the SSD offset. American Bankers Ins. Co. v. Little, 393 So.2d 1063, 1064 (Fla. 1980). Under this scheme, the state and federal laws effectively guaranteed payment of the maximum disability benefits available under either the social security or workers' compensation law, and they shifted the source of payments from predominately state-generated payments to predominately federal-generated payments. 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. Id. at 1064.

Dixon, 24 F.L.W. at D1675.

Dixon submits that by its opinion in Grice, this Court never

intended to inhibit section 424a's dictates as to offsets in the manner the Employer/Carrier suggested before the Judge of Compensation Claims and the First District. Grice involved a claimant, Thomas Grice, who was hurt while working for the Escambia County Sheriff's Department. Grice received permanent total disability, social security disability, and state disability benefits.[2] Escambia County later told Grice it intended to offset his permanent total disability benefits based upon the extent to which his workers' compensation, state disability and social security benefits exceeded his AWW. Grice disputed this, and the matter went before the Judge of Compensation Claims, who agreed with the County.

On appeal, the First District reversed. On review, this Court held 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." Id. at 898.[3] (Emphasis added.)

Grice did not involve an injured worker whose ACE were greater than his AWW. The Employer/Carrier recognized this on page 12 of

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[2] Grice's average weekly wage was $583.88. Before offsets, his weekly worker's compensation benefits were $392.00; his weekly state disability retirement benefits were $167.36; and his weekly social security benefits were $163.85.

[3] The court relied on section 440.20(15), and language from Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), to the effect that "the total benefits from all sources cannot exceed the employee's average weekly wage." (Emphasis added.)

its Initial Brief before the First District. Before the Judge of Compensation Claims, the Employer/Carrier did not dispute that Dixon's ACE was higher than his AWW. (R. 177)[4]. The First District's opinion in the decision below left no doubt that the court believed Grice to be factually dissimilar to the case at bar:

> Nevertheless, because Grice did not address this issue, we question whether its holding is applicable to cases such as that on appeal in which the claimant's ACE exceed his AWW. Our concern arises from the clear language of section 440.15(10), which expressly prohibits an E/C from reducing workers' compensation benefits to a greater extent than the Social Security Administration could reduce SSD benefits under 42 U.S.C. section 424a, as well as the historical application of the SSD offset.

Dixon, 24 F.L.W. at D1675.

It follows from the foregoing that the language from section 440.15(10)(a), which distinguishes between instances where an injured worker's ACE exceed his AWW, was never implicated in Grice. Here, however, that language does apply because Dixon's ACE exceeded his AWW.

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[4] The Judge of Compensation Claims noted: "The facts of this case were essentially undisputed. In the case at hand, the Employee's AWW is $260.00, or $1,118.00 on a monthly basis ($260.00 multiplied by 4.3 weeks). On the other hand, the Employee's ACE is $2,083.00 or $484.42 on a weekly basis ($2,083.0 divided by 4.3)." (R.177) The E/C conceded on page 2 of its Amended Initial Brief before the First District that "the Claimant's ACE was much higher based on prior employment than his AWW based on his employment at the time he sustained the accident of March 28, 1994."

The Grice analysis also partially relied upon section 440.20(15)[5], Florida Statutes. However, section 440.15(10)(a), in contrast to section 440.20(15), specifically addresses claimants whose ACE exceed their AWW. A specific statute covering 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). This is especially true here, where the facts of this case necessitate and indeed require reference to section 440.15(10)(a)'s more germane language and direction concerning ACE.

Claimants receive permanent and total disability benefits because of what they have lost. Dixon's injury prevents him from engaging in future full or part-time employment, working longer hours to make more money, attaining job advancement and its attendant personal satisfaction and finding a better, more lucrative job elsewhere. It is an error of logic and fact to contend, as did the Employer/Carrier before the First District, that injured claimants like Dixon receive a windfall whenever

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[5] Relying on Brown v. S.S. Kreske Co., 305 So.2d 191 (Fla. 1974), this Court indicated in Grice that this statute capped a claimant's benefits when the worker has received the equivalent of his full wages from his employer. Grice, 692 So.2d 896 at 898.

section 440.15(10)(a) and 42 U.S.C. section 424a are accorded their plain and intended meaning.

The Employer/Carrier would treat injured, semi-retired workers in a manner which will enable it to avoid or significantly reduce any responsibility sheerly because of the largesse of a benefit plan that the claimant has earned. The Employer/Carrier has contributed nothing towards the accrual of these benefits.

The statutory authority urged by Dixon herein prevents the inequity inherent in such a result where ACE are higher than AWW. In such situations, the injured worker should not be penalized, nor should the Employer/Carrier gain an economic advantage because of the happenstance that the claimant was injured at time when his income was lower than it typically has been over a five-year-period. See 20 U.S.C. section 404.408.

CONCLUSION

This Court should quash the First District Court of Appeals' decision and answer the certified question in the negative. The decision of the Judge of Compensation Claims should be affirmed and the Court should remand with directions to calculate Dixon's disability benefits based upon his ACE figure of $2,083.00 per month, or $484.42 per week, rather than his AWW of $260.00.

Respectfully submitted,

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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 ___ day of October, 1999.

Respectfully submitted,

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CERTIFICATION

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

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[1] The abbreviation "ACE" shall refer to a claimant's Average Current Earnings. "AWW" shall refer to a claimant's Average Weekly Wage.

ORIGINAL

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 APPENDIX

1. Order of Judge of Compensation Claims, District H, entered August 4, 1998.

2. Opinion of District Court of Appeal, First District, filed July 15, 1999.

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CASE NO. 96,239

RAYMOND DIXON,

Petitioner,

-vs-

GAB BUSINESS SERVICES, INC., et al.,

Respondents.

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1. Order of Judge of Compensation Claims, District H, entered August 4, 1998.

STATE OF FLORIDA
DIVISION OF WORKERS' COMPENSATION
DIVISION "H"

CLAIM NO: 320 30 2324 D/A: 3/28/94

EMPLOYEE: Raymond Dixon

Represented by: Monte R. Shoemaker, Esq.
P.O. Box 151057
Altamonte Springs, FL 32715

EMPLOYER: Bio Lab, Inc.

CARRIER : GAB Business Services

Represented by: Mathew D. Stavers, Esq.
1900 Summit Tower Blvd., #540
Orlando, FL 32810

ORDER

This matter came on to be heard by the undersigned Judge of Compensation Claims on July 23, 1998 based on a Petition for Benefits requesting a recalculation of the appropriate offsets the Employer/Carrier were taking against the Employee's Permanent Total Disability Benefits. The Employer/Carrier had taken the position that the proper method of calculating available offsets was to apply the formula to the Employee's Average Weekly Wage (AWW) as was done in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997). The Employee's position was that the formula announced in Grice should be applied to the Employee's Average Current Earnings (ACE).

Present at the hearing were the following:

1. Mathew D. Staver, Esquire, attorney for the Employer/Carrier.

2. Monte R. Shoemaker, Esquire, attorney for the Employee.

3. Jamie Garcia, law clerk with office of the attorney for the Employer/Carrier.

The evidence submitted for my consideration consisted of the following:

1. The parties entered into a Pre-trial Stipulation form and as amended by a letter from the Employee's attorney dated April 9, 1998, the stipulations contained therein being accepted by the undersigned and incorporated herein by reference, said Pre-trial Stipulation form being marked for identification purposes as Joint Exhibit #1.

2. A Hearing Information Sheet and Memorandum submitted by the attorney for the Employer/Carrier which was marked for identification purposes as Employer/Carrier's Exhibit #1.

3. A copy of the Metropolitan Life long-term disability policy provided to the Employee by the Employer and a letter explaining Metropolitan's payment history and future obligations under that policy, which was marked for identification purposes as Employer/Carrier's Exhibit #2.

4. A Hearing Information Sheet submitted by the attorney for the Employee, which was marked for identification purposes as Employee's Exhibit #1.

The facts of this case were essentially undisputed. In the case at hand, the Employee's AWW is $260.00, or $1,118.00 on a monthly basis ($260.00 multiplied by 4.3 weeks). On the other hand, the Employee's ACE is $2,083.00 or $484.42 on a weekly basis ($2,083.00 divided by 4.3). The Employer provided the Employee with a group disability policy from Metropolitan Life that essentially provides a $100.00 per month payment, although more has been erroneously paid in the past and none is currently being paid until the overpayment has been recouped. In addition, the Employer/Carrier has stipulated that the Employee is permanently and totally disabled under the Workers' Compensation law as a result of his industrial accident. The Employee is receiving Social Security Disability Income Benefits in the amount of $198.74 per week. Although not germane to the legal issue before me, he is also receiving a retirement pension from his previous employment as a law enforcement officer in Illinois.

I have carefully considered the positions of the parties, have weighed the argument of counsel for the parties and have evaluated the appropriate case law and applicable statutory provisions. Had this Employer not provided the Employee with a

group disability policy, the provisions of §440.15(10), Florida Statues, would control the offset available to this Employer. In Grice, the Court did not address the propriety of applying the announced formula to the Employee's Average Current Earnings. I conclude that the holding in Grice is limited to the facts presented in that case. There is no discussion about any difference that may have existed between the Employee's AWW and ACE in Grice.

A review of §440.15(10), Florida Statues, makes it obvious that the Legislature intended that injured workers receive the maximum disability benefits available from the Social Security Administration and from the Workers' Compensation law by limiting the offset available so as to allow the Employee to receive 80% of the Employee's AWW or ACE, whichever is higher. This court concludes that a literal application of the holding of Grice to the facts of this case would reduce the disability benefits available to this Employee to such an extent that the intent of §440.15(10), Florida Statues, would be frustrated. I also conclude that the Grice Court did not intend for Florida employers to reduce their statutory obligations to injured workers by simply providing a small group disability policy that would then allow them to avoid any obligation to follow the dictates of §440.15(10), Florida Statues. Any other conclusion would permit employers to apply the formula to the Employee's

AWW, irrespective of the reduction in combined benefits the Employee would otherwise receive pursuant to §440.15(10), Florida Statues. Therefore, I conclude that the proper offset available to this Employer should be calculated by applying the formula, as announced in Grice, to the Employee's ACE.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Employer/Carrier shall calculate and pay, together with statutory interest, all disability benefits due the Employee by applying the formula announced in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997) to the Employee's Average Current Earnings figure of $2,083.00 per month, or $484.42 per week, rather than the Employee's Average Weekly Wage of $260.00.

2. The Employer/Carrier shall pay the Employee's attorney a reasonable attorney's fee pursuant to §440.34(3)(b), Florida Statutes, jurisdiction being reserved by the undersigned to determine the amount of a fee due should the parties fail to reach an agreement that is acceptable to the undersigned.

3. The Employer/Carrier shall reimburse the Employee's attorney for taxable costs incurred in the prosecution of this claim, jurisdiction being reserved by the undersigned to determine the amount of taxable costs to be reimbursed should the parties fail to reach an agreement that is acceptable to the undersigned.

DONE AND ORDERED at Orlando, Orange County, Florida, this 4 day of August, 1998.

Honorable John Thurman
Judge Of Compensation Claims

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy hereof was sent by U.S. Mail on the 4 day of August, 1998, to Bio Lab, Inc., Great Lakes Chemical, 627 E. College Avenue, Decatur, GA 30030; GAB, P.O. Box 947960, Maitland, FL 32794-7960; Mathew D. Staver, Esq., 1900 Summit Tower Blvd., #540, Orlando, FL 32810; Raymond Dixon, 1722 Spring St., Grinnell, IA 50112; and Monte R. Shoemaker, Esq., P.O. Box 151057, Altamonte Springs, FL 32715-1057.

by Gedeon

Secretary to Judge of
Compensation Claims

CASE NO. 96,239

RAYMOND DIXON,

Petitioner,

-vs-

GAB BUSINESS SERVICES, INC., et al.,

Respondents.

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2. Opinion of District Court of Appeal, First District, filed July 15, 1999.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

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

Appellants,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

v.

CASE NO. 98-3194

RAYMOND O. DIXON,

Appellee.
_____/

Opinion filed July 15, 1999.

An appeal from an order of the Judge of Compensation Claims. John Thurman, Judge.

Mathew D. Staver of Staver & Associates, Orlando, for Appellants.

D. Paul McCaskill, Orlando, for Appellee.

Randy D. Ellison, West Palm Beach, for Amicus Curiae Academy of Florida Trial Lawyers.

PER CURIAM.

This case involves the social security disability offset authorized in section 440.15(10), Florida Statutes (Supp. 1994), and the benefit cap arising under section 440.20(14), Florida Statutes (Supp. 1994), as interpreted by the Florida Supreme Court in Escambia County Sheriff's Dep't v. Grice, 692 So. 2d 896 (Fla.

1997). The question to be resolved is whether the employer/carrier (E/C) may cap claimant's workers' compensation and collateral benefits at 100 percent of his average weekly wage (AWW) and thereby offset the amount of workers' compensation benefits paid, or whether the cap on total benefits is 80 percent of claimant's average current earnings (ACE), as computed under the social security law, which would allow no offset because 80 percent of claimant's ACE is greater than his AWW. The judge of compensation claims (JCC) decided that the cap should be based on claimant's ACE and denied the offset. We reverse, but certify the question to the Florida Supreme Court.

The facts in this case are not in dispute. Claimant, Raymond O. Dixon, retired as a police officer in Illinois and relocated to Florida where he later began working for Bio Lab, Inc., as a sales representative. He was injured in a compensable automobile accident on March 28, 1994, and was accepted as permanently and totally disabled as of June 8, 1995. Dixon's AWW at the time of the accident was $260 per week, and the corresponding compensation rate was $173.33; the monthly rates for both were $1,118 and $745.32, respectively. Besides receiving permanent, total disability (PTD) benefits of $745.32 per month, Dixon was given a minimum payment of $100 per month from a group disability policy provided by Bio Lab, as well as social security disability (SSD) benefits in the amount of $424.58 per month. The total of these three benefits is $1,269.90. Claimant's ACE, as determined by the Social Security Administration, are $2,083, and 80 percent thereof

is $1,666.40. The reason that Dixon's ACE are more than his AWW is because he was paid much more while a police officer in Illinois than he was while employed at Bio Lab.[1]

The E/C sought to offset claimant's workers' compensation benefits paid and payable by approximately $151.90 per month, the amount that the three benefits exceed the claimant's $1,118 monthly AWW. Dixon successfully replied that based upon section 440.15(10), the cap should be 80 percent of his ACE, or $1,666.40, which would yield no offset to the E/C because this amount surpasses his monthly AWW of $1,118. The E/C contends on appeal that Grice is controlling and allows offsets for combined benefits in excess of 100 percent of AWW. Dixon argues that section 440.15(10) controls and that Grice did not address this issue.

Grice involved the combination of workers' compensation, SSD, and state disability retirement benefits. In capping benefits at 100 percent of AWW and allowing the E/C to offset or decrease its workers' compensation payment to the extent total benefits exceeded the claimant's AWW, the supreme court broadly declared:

> We . . . 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 totalled, exceed 100% of his average weekly wage.

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[1]Dixon was semi-retired at the time of his accident. He was receiving a pension from the Illinois State Retirement Fund in the amount of $1,150 per month, and the employment at Bio Lab supplemented his retirement income. The E/C did not, however, consider the pension payments in the offset calculation.

Grice, 692 So. 2d at 898. Given this holding, we feel compelled to reverse the JCC's order, which caps the amount of benefits at 80 percent of Dixon's ACE and thereby allows Dixon to receive total benefits overpassing his AWW.

Nevertheless, because Grice did not address this issue, we question whether its holding is applicable to cases such as that on appeal in which the claimant's ACE exceed his AWW. Our concern arises from the clear language of section 440.15(10), which expressly prohibits an E/C from reducing workers' compensation benefits to a greater extent than the Social Security Administration could reduce SSD benefits under 42 U.S.C. section 424a, as well as the historical application of the SSD offset.

Section 440.15(10)(a), Florida Statutes (Supp. 1994), provides, in pertinent part, as follows:

> Weekly compensation benefits payable under this chapter for disability resulting from injuries to an employee who becomes eligible for benefits under 42 U.S.C. s. 423 [social security disability] shall be reduced to an amount whereby the sum of such compensation benefits payable under this chapter and such total benefits otherwise payable for such period to the employee and his dependents, had such employee not been entitled to benefits under this chapter, under 42 U.S.C. ss. 402 [social security retirement] and 423, does not exceed 80 percent of the employee's average weekly wage. However, this provision shall not operate to reduce an injured worker's benefits under this chapter to a greater extent than such benefits would have otherwise been reduced under 42 U.S.C. s. 424(a). . . .

The reduction allowed under 42 U.S.C. section 424a is as follows:

> (a) **Conditions for reduction; computation**

> If for any month prior to the month in which an individual attains the age of 65-
>
> (1) such individual is entitled to benefits under section 423 of this title, and
>
> (2) such individual is entitled for such month to-
>
> (A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State . . .
>
> * * *
>
> the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of--
>
> (3) such total of benefits under section 423 and 402 of this title for such month, and
>
> (4) such periodic benefits payable (and actually paid) for such month to such individual under such law or plans,
>
> exceeds . . .
>
> (5) 80 per centum of his "average current earnings[.]"

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 on 80 percent of AWW only upon showing that offset was not greater than offset allowed Social Security Administration).

The reason for this limitation on the SSD offset is evident when one considers its history. As explained in Lofty v. Richardson, 440 F.2d 1144, 1148 (6th Cir. 1971), when the Social Security Act was passed in 1935, there was no provision in it for disability benefits. When disability benefits were first added in

1956, an offset for workers' compensation was required. Two years later, however, the offset was repealed because it was believed that duplication of benefits was slight. Numerous complaints, largely by employers and employer-based organizations, were made to Congress that employers were duplicating payments, because they were responsible for both workers' compensation and one-half of social security disability benefits. Consequently, Congress reenacted the offset in 1966. Id. In so doing, Congress adopted 42 U.S.C. 424a, which permitted the Social Security Administration, in the absence of a state workers' compensation SSD offset provision, to take an offset to the extent that combined SSD and workers' compensation benefits exceeded 80 percent of the worker's ACE.

In 1973, Florida amended its workers' compensation law to allow, under section 440.15(10), E/Cs instead of the Social Security Administration to take the SSD offset. American Bankers Ins. Co. v. Little, 393 So. 2d 1063, 1064 (Fla. 1980). Under this scheme, the state and federal laws effectively guaranteed payment of the maximum disability benefits available under either the social security or workers' compensation law, and they shifted the source of payments from predominantly state-generated payments to predominantly federal-generated payments. 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. Id. at 1064.

The question then is whether the section 440.20(14) AWW cap on the amount of benefits a claimant may receive from combined collateral sources, as expressed in Grice, can be applied so as to limit a claimant's total benefits to 100 percent of his or her AWW regardless of the claimant's ACE. It 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. 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 potential federal preemption controversy.[2]

We are fully aware of the fact that there is no mention in Grice about the claimant's ACE and, therefore, its precedential effect with regard to this case is much in doubt. Nevertheless, we

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[2]See also section 440.21(1), Florida Statutes (Supp. 1994), which prohibits "[a]ny agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by the employer for the purpose of providing compensation or medical services and supplies as required by this chapter." We assume that by allowing a cap on benefits which include SSD, the Florida Supreme Court implicitly found in Grice that SSD is not a "benefit fund . . . maintained by the employer," although employers advance half of the contributions to the social security fund, and that it is not therefore "an agreement by an employee to pay any portion" of benefits.

are constrained to conclude that the broad holding in Grice, without any limiting language, necessitates reversal in this case. Although we reverse, we certify the following question to the Florida Supreme Court as one of great public importance:

> WHETHER THE HOLDING IN ESCAMBIA COUNTY SHERIFF'S DEP'T v. GRICE, 692 So. 2d 896 (Fla. 1997), CAPPING TOTAL BENEFITS RECEIVED BY A WORKER AT 100 PERCENT OF HIS OR HER AVERAGE WEEKLY WAGE, APPLIES 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?

REVERSED and REMANDED for further consistent proceedings.

ERVIN, WEBSTER and LAWRENCE, JJ., CONCUR.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true copies of the Appendix were served by mail, upon Mathew D. Staver, Esquire, 1900 Summit Tower Blvd., Suite 540, Orlando, Fl 32180, this 27th day of October, 1999.

Respectfully submitted,

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October 27, 1999

Clerk of Court
Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Case No : 96,239
DCA Case No: 98-03194
Respondents: GAB Business Services and Bio-Labs, Inc.
Petitioner : Raymond Dixon
D/A : 3/28/94
Claim No : 320 30 2324

Dear Mr. White:

Enclosed please find the original of the Petitioner's Appendix with seven copies reference the above matter.

Sincerely,

MR Shoemaker

Monte R. Shoemaker

MRS/cm
Enclosures
Cc: Mathew Stavers, Esquire