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SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

LOCKHEED MARTIN AEROSPACE and ACE USA,

Petitioners,

v.

WILLIAM H. SCHWARZ,

Respondent.
_____/

CASE NO: **SC96-638**

LOWER TRIBUNAL NO: **98-04684**

CLAIM NO: **258-52-7598**

D/ACCIDENT: **04/01/96**

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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This is an Appeal from an Order of the First District Court of Appeal, Tallahassee, Florida, Opinion filed 8/10/99, affirming an Order from the State of Florida, Department of Labor and Employment Security, Offices of the Judge of Compensation Claims, District "H" dated 11/18/98.

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PRELIMINARY STATEMENT

The Petitioners, LOCKHEED MARTIN AEROSPACE and ACE USA, shall be referred to herein as the “E/C” (Employer/Carrier) or by their separate names.

The Respondent, WILLIAM H. SCHWARZ, 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” (Volume) and followed by the applicable volume and page number.

References to the Appendix attached to the Petitioner's Initial Brief shall be referred to by the letters “A" followed by the applicable Appendix page number.

References to the Petitioners' Initial Brief on the Merits shal be referred to by the letters "IB" and followed by the applicable page number.

CERTIFICATE OF TYPE SIZE AND STYLE

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

V

STATEMENT OF THE CASE

On October 2nd, 1997, the Claimant, WILLIAM H. SCHWARZ, filed a Petition for Benefits/Claim for Benefits for injuries sustained as a result of an industrial accident arising out of and during the course and scope and his employment on April 1, 1996 (V1-14-16).

Thereafter, in a Pretrial Stipulation filed January 26th, 1998, the Claimant was seeking, inter alia, PTD from 7/29/97 to present and continuing (V1-20). The E/C listed as a defense on the Pretrial Stipulation that Claimant was not at MMI, and determination of PTD was premature (V1-21).

However, on or about April 6th, 1998, Claimant, and the Employer/Carrier entered into a Joint Stipulation wherein it was provided, inter alia, as follows:

> "1. The Employer/Carrier has voluntarily accepted Claimant as permanently and totally disabled under Florida Statute 440.15." (V1-45).

The Joint Stipulation was approved by the JCC in an Order dated April 10th, 1998 (V1-40-44).

Thereafter, on April 15th, 1998, the E/C filed Form DWC-4 stating that they accepted Claimant PTD effective 4/1/98 (V1-48). However, the E/C stated that they had continued full salary in lieu of

compensation until 9/29/98 (V1-48). As such, the E/C indicated they would begin compensation payments for permanent total supplemental benefits on 9/29/98 (V1-48).

Thereafter, Claimant filed a Motion alleging that the E/C was taking an improper offset. Thereafter, on August 28th, 1998, a hearing on the aforesaid Motion was held before the Honorable Judge of Compensation Claims, Gail Adams (V1-1, 106). According to Claimant, the issue claimed at the hearing was as follows:

1. Whether an Employer/Carrier can offset PTD benefits with retirement benefits which vested two years before the date of injury, and which are not payable on account of any injury.

2. Even if the Employer/Carrier was entitled to offset the vested retirement benefits, it could only offset the payments for one week, and not twenty-six weeks.

3. The Court was also asked to assess a 20% penalty, costs, interest, and attorney's fees, if the Court finds that the Employer/Carrier is not entitled to the above offset (V1-106, 107).

The Employer/Carrier defended the offset on the following grounds:

1. Pursuant to the Court's decision in Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896(Fla. 1997), the Claimant is not due his PTD benefits until twenty-six weeks after April 1, 1998.

2. The Employer/Carrier is not liable for penalties, interest, costs, and attorney's fees.

Thereafter, on November 18th, 1998, the Honorable Judge of Compensation Claims, Gail Adams, entered her Compensation Order (V1-106-110). In that Order, the JCC specifically found that Claimant began working for the Employer in June of 1966 (V1-108). The JCC found that in June, 1992, long before the date of accident, Claimant became vested with certain retirement benefits, including severance pay equal to twenty-six weeks of wages, payable over twenty-six weeks or in a lump sum (V1-108). The JCC found that Claimant was entitled to these retirement benefits irregardless of the reason for his retirement (V1-108).

The JCC further found that on March 31st, 1998, Claimant retired (V1-108). Upon retirement, Claimant became entitled to receive all of his retirement benefits, including the severance pay (V1-108). The JCC noted Claimant elected to take the severance pay in a lump sum (V1-108).

The JCC found, in her Order, that the E/C cannot simply take an offset without statutory or case authority for doing so (V1-109). Offsets have only been allowed for benefits payable on account of an injury, such as Social Security Disability, short and long term disability, and retirement disability (V1-109). The JCC found, however, that the Employer's offset in this case, specifically

taking an offset on the twenty-six weeks of severance pay paid to Claimant in a lump sum, was illegal because there was no statutory or case law authority allowing an offset for retirement benefits which vested before the date of the accident (V1-109). The JCC found that Claimant's severance benefits vested prior to the date of the injury, were due and owing upon retirement, and were not payable on account of any injury (V1-109).
Consequently, the E/C had no authority for taking the offset (V1-109).

The JCC further found that even if the E/C was entitled to offset the severance payment, there was no justification for the E/C taking the offset for twenty-six weeks (V1-109. The severance pay was paid in one lump sum, and at most the E/C would be entitled to an offset for the one week in which the payment was made (V1-109).

Finally, the JCC found that since the E/C did not pay PTD benefits beginning April 1st, 1998, they subjected themselves to a penalty under F.S. 440.20(7)(V1-109, 110).

Thereafter, the Employer/Carrier Appealed the JCC's Order of November 18th, 1998 to the First District Court of Appeal (V1-112, 113). The First DCA, in an Opinion filed August 10, 1999, Affirmed, Per Curium, the JCC's Order of November 18th, 1998, on the authority of Dixon v. Pasedena Yacht & County Club, 731 So.2d 414(Fla. 1st DCA 1999)(A-2).

Thereafter, the Petitioners filed a Notice to Invoke Discretionary Jurisdiction with this Honorable Court (A-3).

Thereafter, on February 21st, 2000, this Honorable Court entered an Order Accepting Jurisdiction and setting a Brief Schedule on the Merits (A-4).

This Answer Brief of Respondent is being filed pursuant to this Honorable Court's Order of February 21st, 2000.

STATEMENT OF THE FACTS

The Claimant/Respondent respectfully submits that the Statement of the Facts as set forth by Petitioners in their Initial Brief is incomplete. As such, Claimant herein supplements the Statement of Facts as set forth by Petitioners in their Initial Brief.

The Claimant, WILLIAM H. SCHWARZ, was born on 7/18/38, and as such is currently 61 years old. The Claimant began working for the Employer herein in June of 1966 (V1-108).

The Employer herein has a policy where an Employee who is with them for more than three years will thereafter receive one week severance pay per year of service up to a total of twenty-six weeks (V1-65). Since Claimant worked for the Employer for more than thirty years, Claimant was entitled to the maximum severance pay of twenty-six weeks (V1-53). Thus, in June 1992, long before the date of accident, Claimant became vested with certain retirement benefits, including his retirement pay, pension, and severance pay

equal to twenty-six weeks of wages (V1-52, 53, 77, 80-83, 108).

Additionally, the twenty-six week severance pay can either be paid out on a weekly basis over twenty-six weeks or can be paid as a lump sum (V1-53, 54). If you take it in a lump sum, your medical benefits would cease, but if you extend it for twenty-six weeks, your medical benefits remain in effect while you continue to receive your weekly payments (V1-54, 55).

Furthermore, the Claimant would get exactly the same twenty-six week severance pay regardless of the reason that he is retiring (V1-59). In other words, the twenty-six week severance pay is not paid to the Claimant because of an injury, but rather because claimant was retiring (V1-59).

On April 1st, 1996, Claimant sustained a compensable accident when an airplane trip for business purposes caused ear rupture, dizziness, vertigo and nausea (V1-14, 40). Claimant's accident was accepted as compensable (V1-40).

On March 31st, 1998, Claimant retired from his employment with the Employer herein (V1-52). Upon retirement, Claimant became entitled to receive all of his retirement benefits including the severance pay (V1-59). Claimant elected to take his severance pay in a lump sum (V1-57, 76). The total amount of the lump sum severance was $64,500.02 (V1-77).

The E/C state in their Initial Brief that when claimant retired

he was entitled to receive 26 weeks of his salary at his normal rate of pay (IB-1). Although claimants severance pay was computed at 26 weeks of his salary at his normal rate of pay, it nevertheless was “severance pay”, not a “salary continuation” as referred to by the E/C (IB-1, 3) (V1-52, 53).

As previously noted, by Joint Stipulation executed on April 6th, 1998, the parties stipulated that Claimant was PTD as of April 1st, 1998 (V1-45, 46, 48). Claimant’s AWW was stipulated at $2,563.21 per week, with a corresponding maximum compensation rate of $465.00 (V1-108).

Upon accepting Claimant as PTD the Employer took the position that it was entitled to an offset for the first twenty-six weeks of disability. The Employer argued that the lump sum payment was “salary continuance” (V1-2, 3, 7). However, in a letter dated to Claimant on February 4th, 1998, the E/C advised Claimant that any six months salary continuance would end on February 18th, 1998 (V1-78). Furthermore, as previously stated hereinabove, Barbara Ferrini, human relations with the Employer, testified that the twenty-six week payment that Claimant received was severance pay (V1-53), and a benefit that Claimant was entitled to because he was retiring (V1-59).

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

POINTS ON APPEAL

POINT I
(As restated by Respondent)

WHETHER OR NOT THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE ORDER OF THE JUDGE OF COMPENSATION CLAIMS, WHICH LIMITED BENEFITS SUBJECT TO THE 100 PERCENT AVERAGE WEEKLY WAGE CAP TO PRIVATE OR PUBLIC DISABILITY BENEFITS AND WHICH AWARDED THE CLAIMANT PERMANENT TOTAL DISABILITY BENEFITS FOR THE SAME PERIOD OF TIME THAT CLAIMANT RECEIVED A SEVERANCE PAY FROM THE EMPLOYER THAT WAS UNRELATED TO CLAIMANT'S INJURY.

POINT II

WHETHER OR NOT THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE ORDER OF THE JCC FINDING THAT EVEN IF THE EMPLOYER/CARRIER WAS ENTITLED TO OFFSET THE SEVERANCE PAY, THE EMPLOYER/CARRIER COULD NOT TAKE THE OFFSET FOR TWENTY-SIX WEEKS, BUT RATHER WOULD BE ENTITLED TO AN OFFSET FOR THE ONE WEEK IN WHICH THE PAYMENT WAS MADE.

SUMMARY OF ARGUMENT

I

The first DCA, on the authority of Dixon v. Pasadena Yacht and Country Club 731 So.2d 141 (Fla. 1st DCA 1999),properly affirmed the JCC's conclusion that the E/C could not take an offset against claimants severance benefits because claimant was entitled to the severance benefits independent of any injury upon retirement. Since the severance pay was unrelated to any injury or disability of claimant, it is not a collateral source subject to the 100% AWW cap discussed in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla.1997). It is respectfully submitted that this Honorable Courts decision in Grice, Supra, and any offset which may

be permissible pursuant to F.S. 440.20(14)(1995) applies only to duplicative disability benefits, but not to retirement benefits or severance pay benefits, or any other benefit unrelated to a disability or injury.

II

Although there is no specific case on the point involving the "Grice Cap", claimant respectfully submits that when an offset is taken by an E/C it can only be for the specific time period that the claimant actually received the money subject to the offset, irregardless of how much money it is. For example, in National Distillers v. Guthrie 473 So.2d 806 (Fla.1st DCA 1985), the First District Court of Appeal held that the E/C could offset a real estate commission against wage loss benefits only for the month in which the real estate commission was paid, even though the commission may have been the result of a couple of months of work.

The same principle would apply in the case at bar. If an offset is allowed against the severance pay received by claimant, it would only be for the actual week that the claimant received the severance pay.

ARGUMENT

POINT I

WHETHER OR NOT THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE ORDER OF THE JUDGE OF COMPENSATION CLAIMS, WHICH LIMITED BENEFITS SUBJECT TO THE 100 PERCENT AVERAGE WEEKLY WAGE

CAP TO PRIVATE OR PUBLIC DISABILITY BENEFITS AND WHICH AWARDED THE CLAIMANT PERMANENT TOTAL DISABILITY BENEFITS FOR THE SAME PERIOD OF TIME THAT CLAIMANT RECEIVED A SEVERANCE PAY FROM THE EMPLOYER THAT WAS UNRELATED TO CLAIMANT'S INJURY.

The JCC, in her Order of November 18, 1998 specifically found as follows:

> "The E/C cannot simply take an offset without statutory or case law authority for doing so. Offset's have only been allowed for benefits payable on account of an injury, such as social security disability, short and long term disability, and retirement disability. The employers offset in this case is illegal because there is no statutory or case law authority allowing an offset for retirement benefits which vested before the date of the accident. Mr. Schwarz severance benefits vested prior to the date of the injury; were due on owing upon retirement; and were not payable on account of any injury. Consequently, the E/C has no authority for taking the offset."

Furthermore, on August 10, 1999 the First District Court of Appeal rendered its opinion in the above referenced matter affirming per curium the JCC's Order based on Dixon v. Pasadena Yacht and Country Club 731 So.2d 141 (Fla. 1st DCA 1999)(A-2).

Claimant respectfully submits that the finding by the JCC, and subsequent affirmance by the First District Court of Appeal, is proper under the law and should be affirmed.

In Dixon v. Pasadena Yacht and Country Club, Supra, the First District Court of Appeal was faced with the following question:

> "...Whether social security retirement benefits are a "collateral source" subject to the 100 percent AWW cap discussed in Grice...", Dixon v. Pasadena Yacht and Country Club, Supra at 142.

As it relates to the aforesaid issue, the First District Court

Appeal concluded:

> "...That social security retirement benefits are not "collateral source" benefits as contemplated in Grice, and that application of the 100 percent AWW cap and offset was error." Dixon v. Pasadena Yacht and Country Club, Supra at 142.

In so concluding, in Dixon, Supra, the First District Court of Appeal indicated that there was no authority for an offset in regard to social security retirement benefits. The First District Court of Appeal noted that F.S. 440.15(3)(b)7(1991) allowed an offset against wage loss benefits paid an injured worker who also received social security retirement benefits, but the First DCA held that statute was inapplicable because claimant was being paid PTD and PTD supplemental benefits, not wage loss.

Furthermore, the First DCA found that F.S. 440.15(9)(a)(1991) provided no authority for the offset because the aforesaid statute dealt only with social security disability benefits, not retirement benefits.

In Dixon, Supra, the First District Court of Appeal further rejected the E/C's argument that they were allowed to take an offset on claimants social security retirement benefits based on the provisions of F.S. 440.20(15)(1991) (currently renumbered to F.S. 440.20(14)(1995). The First DCA held that the aforesaid statute applies only to duplicative disability benefits and would not apply to retirement benefits.

In the case at bar, the severance pay benefits that claimant is receiving is akin to social security retirement benefits. Claimant retired on March 31, 1998 (V1-52). Upon claimants retirement claimant became entitled to receive all of his retirement benefits including his severance pay (V1-59). Claimant elected to take his severance pay in a lump sum (V1-57, 76).

Barbara Ferrini, Human Relations Director with the employer, testified that the 26 week payment that claimant received was severance pay (V1-53), and a benefit that claimant was entitled to because he was retiring (V1-59). The severance pay that claimant received upon retirement actually vested in 1992 (severance pay based on 1 week severance pay per year of service up to a total of 26 weeks) (V1-65), and claimant would be entitled to receipt of this severance pay upon retirement whether claimant was injured or not (V1-59).

Concerning claimants severance pay the JCC stated

> "Claimant, William Schwarz began working for the employer in June 1966. In June 1992, long before the date of accident, Mr. Schwarz became vested with certain retirement benefits, including severance pay equal to 26 weeks of wages, payable over 26 weeks or in a lump sum...Importantly, Mr. Schwarz was entitled to these retirement benefits regardless of the reason for his retirement." (V1-108).

Therefore, just as the E/C could not take an offset against claimants social security retirement benefits in Dixon v. Pasadena Yacht and Country Club, Supra, the E/C in the case at bar cannot

take an offset against claimants severance pay.

The E/C in their Initial Brief state that the issue in this case is whether the claimant is entitled to receive workers compensation permanent total disability benefits during the same period of time in which he received his “full salary in the form of a 26 week lump sum payment of salary continuation.” (IB-11).

Claimant disagrees with the E/C’s assertion that claimant was receiving “salary continuation”. Claimant respectfully submits that although the severance pay was calculated at claimants regular salary times 26 weeks, it was still severance pay that claimant was entitled to upon retirement (V1-52, 53), and not “salary continuation”.

The E/C in their statement of the facts and of the case state that the E/C took the position that the employer had “continued full salary in lieu of compensation” until September 28, 1998 (IB-2). Claimant would respectfully submit that payment to a claimant of a “salary in lieu of compensation” cannot and does not occur under the workers compensation law unless their is sufficient evidence to establish the employers intent or the employees reasonable belief of the employers intent to pay wages in lieu of disability benefits, Hardee County Plumbing v. Heflin 567 So.2d 995 (Fla.1st DCA 1990). Clearly in the case at bar, there was no intent of the employer to pay claimant salary “in lieu of compensation”

until September 28, 1998, since claimant was entitled to the severance pay upon retirement irregardless of whether claimant had a disability or not. Claimant would also note incidentally that payment of benefits to an injured employee from a municipal pension fund also do not constitute workers compensation payments, Ruzek v, City of Hollywood 384 So.2d 155 (Fla.1st DCA 1980).

The E/C next argue that the total benefits from all sources cannot exceed the claimants average weekly wage (IB-11). Every case that has capped a claimant benefits at 1— percent of claimants AWW has dealt with benefits that an injured worker has received because of his injury, but nowhere has there been a case that has held that benefits unrelated to claimants injury or disability are included in the 100 percent AWW Grice cap.

The case of Brown v. S.S. Kresge Company Inc. 305 So. 2d 191 (Fla. 1974), a case relied upon by the E/C in their Initial Brief (IB-12) is distinguishable from the case at bar. In Brown v. S.S. Kresge Company Inc., Supra, the question was:

> "... Whether sick leave benefits provided by an employer through group insurance coverage shall be credited on workmen compensation injury benefits, or are sick leave benefits a part of the fringe benefits of the injured employees employment contract..." Brown v. S.S. Kresge Company Inc., Supra at 194.

This Honorable Court in Brown v. S.S. Kresge Company Inc., Supra, concluded that the E/C could not take an offset based on claimants

sick leave benefits, unless the combination of workers compensation benefits and sick leave benefits provided by the employer exceed claimants AWW. The Florida Supreme Court based this ruling on former IRC rule 9 which, in effect was codified by F.S. 440.20(15)(1979) (currently F.S. 440.20(14)(1995), Belle v. General Electric Company 409 So.2d 182 (Fla. 1st DCA 1982) at 183 F.N.1.

The First DCA in Dixon, Supra, distinguished Brown v. S.S. Kresge Company Inc., Supra, from a social security retirement situation, because the claimant in Brown, Supra, was receiving sick leave pay as the result of claimants disabling condition, i.e. as a result of claimants workers compensation injury. However, in Dixon, Supra, and in the case at bar, the severance pay that the claimant is receiving are not contingent in any way upon the claimants disabling condition, and therefore would not be covered by F.S. 440.20(14)(1995) (the codification of IRC rule 9).

The claimant also takes issue with the E/C's contention that claimants severance pay is actually from an "employer source" (IB-12, 13). As previously noted, claimants severance pay is a retirement benefit. Vested retirement benefits are not payable by the employer. The employer has established a health and welfare benefit plan pursuant to the employee retirement income security act, Title 29 U.S.C Section 1001 et Seq. There are several cases noting that the employers health and welfare benefits package is an

ERISA qualified plan,see Booton v.Lockheed Medical Benefits Plan, 110 F.3d 1461 (9th CIR 1997), Evans v. Lockheed Special Accident Insurance Plan, 916 F.2d 1437 (9th CIR 1990); Wooton v. Lockheed Retirement Plan For Certain Salaried Employees, 859 F.2d 155 (9th CIR 1988). Under the plan, claimant became entitled to his retirement benefits two years before his disabling injury. The plan was simply the ERISA fiduciary holding and managing the funds for the benefit of claimant pending his retirement, see Title 29 U.S.C. Sections 1102 and 1104. Indeed, if claimant was forced to file a civil lawsuit in order to compel payment of his retirement benefits, including severance pay, he would have had to sue the plan, and not the employer. Under ERISA, an employer is not a proper party to a lawsuit to enforce the payment of benefits, Zelda v. Delta Airlines Inc. 423 So.2d 945 (Fla. 3rd DCA 1982), see also Barrett v. Thorofare Markets Inc. 452 F.Supp 880 (W.D. PA 1978); Boyer v. J.A. Majors Co. Employees Profit Sharing Plan 481 F. Supp 454 (N.D. GA 1979) (employer not a proper party defendant where company has an ERISA plan in place); Carter v. Montgomery Ward and Company 76 FRD 565 (E.D. TENN 1976).

Claimant also respectfully submit that the case of Domutz v. Southern Bell Telephone and Telegraph Company 339 So.2d 636 (Fla. 1976), another case relied upon by E/C in their Initial Brief (IB-13), does not support the E/C's position. The decision in Domutz,

Supra indicates that the claimant was receiving PTD and pension benefits, but does not state whether the pension benefits are "disability pension" or some sort of retirement pension. Similarly, the industrial relations commission order in Southern Bell Telephone and Telegraph Company v. Domutz IRC order 2-2823(July 24, 1975) likewise does not indicate what type of pension benefits claimant was receiving.

The case of Barrigan v. City of Miami 545 So.2d 252 (Fla. 1989), another case relied upon by the E/C in their Initial Brief (IB-14) is again distinguishable from the case at bar.

The issue in Barrigan, Supra was as follows:

> "Does the employers reduction of claimants pension benefits, pursuant to contractual provision for offset of workers compensation, permit the deputies application of section 440.21, Fla. Stap. to award compensation benefits to claimant "at his combined maximum monthly wage"?

The "pension benefits" referred to in Barrigan v. City of Miami, Supra, was a "disability pension".

This Honorable Court in Barrigan, Supra, held that Florida Statute 440.21 prohibits an employer from deducting workers compensation benefits from an employees pension benefit. This Honorable Court in Barrigan, Supra, concluded:

> "The employer may not offset workers compensation payments against an employees pension benefits except to the extent that the total of the two exceeds the employees average monthly wage. We answer the certified question in the affirmative..."

Again, the First DCA in Dixon, Supra, distinguished Barrigan,

Supra, on the grounds that workers compensation and disability pension benefits were involved in Barrigan, Supra, where as retirement benefits were involved in Dixon. Similarly, in the case at bar, severance pay benefits to which claimant was entitled upon retirement are involved, not disability pension benefits.

Again, the case of Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla.1997), another case relied upon by the E/C in their Initial Brief (IB-14, 15) is distinguishable from the case at bar because Grice also dealt with social security disability and state disability retirement benefits, not regular retirement benefits, nor severance pay.

As the First DCA stated in Dixon, Supra,

> "...We see a critical distinction between indemnity benefits, owed as a result of ones disabling condition, and social security retirement benefits, which are based on advanced years and to which one would be entitled regardless of whether he or she suffered an incapacitating injury..." Dixon, Supra at 143.

Similarly in the case at bar, there is a critical distinction between indemnity benefits owed as a result of a disabling condition, and severance pay to which claimant is entitled whether or not he suffered and incapacitating injury.

The E/C next contend that if claimant is permitted to receive permanent total disability benefits for the same period of 26 weeks in which he received his full salary, claimant would receive a

windfall by receipt of a combination of benefits that exceed his AWW (IB-16). Claimant disagrees. Claimant is not receiving a windfall at all. Claimant is entitled to the severance pay irregardless of whether he had an injury or not. Claimant is entitled to PTD benefits because the claimant, as a result of an injury is permanently totally disabled. If the E/C's argument is accepted, it is they who would be receiving the windfall, not claimant. The E/C would not have to pay a permanently totally disabled worker permanent total disability benefits, even though premiums were paid for such coverage, simply because, from the E/C's standpoint, the injury fortuitously occurred to a long time employee who through over 30 years of service built up an entitlement to receive 26 weeks salary as severance pay when he retired. It seems somewhat incongruous that a longtime devoted employee who, through over 30 years of service to this employer has entitled himself to a severance pay upon retirement would actually receive less benefits (and indeed no benefits for 26 weeks if the E/C's position is accepted) then would a worker who suffered a permanently totally disabling injury on his first day of employment. The E/C's obligation to pay permanent total disability benefits should not hinge on whether the injury occurs to a longtime employee who, through years of devotion, has built up a severance package, as opposed to a short term employee who

unfortunately sustains a disabling injury.

The E/C next argue that the First DCA's decision in Dixon, Supra, is erroneous because it eliminates employer provided salary continuation payable to a PTD claimant from those classification of benefits which must be considered or used in calculating and arriving at the AWW cap required by this Honorable Courts decision in Grice (IB-16, 17). Claimant disagrees. The decision of the First DCA in Dixon, Supra, does not eliminate "employer provided salary continuation" if the employer is truly paying a salary to an injured worker in lieu of workers compensation benefits. However as previously discussed hereinabove, the E/C was not paying claimant any salary continuation in lieu of workers compensation benefits, but rather pay claimant a vested severance pay to which claimant was entitled upon retirement.

The E/C next contend that since there was no specific statutory authority for an offset of disability retirement benefits, and yet this Honorable Court in Grice, Supra, included disability retirement benefits in the 100 percent AWW Grice cap, the lack of specific statutory authority is not controlling to the extent that the combined benefits exceed the AWW (IB-17, 18). Claimant disagrees. Claimant respectfully submits that the E/C cannot take an offset unless there is statutory authority or case authority for so doing. As the First DCA noted in Dixon, Supra, the Legislature

clearly knows how to fashion a social security retirement offset, or a severance pay offset, if they feel that it is appropriate. For example, effective with the 7/1/79 Amendments, the Legislature provided for a social security retirement offset against wage loss benefits. Specifically, F.S. 440.15(3)(b)4(1979) provides:

> "When the injured employee reaches age 62, wage loss benefits shall be reduced by the total amount of social security retirement benefits the employee is receiving, not to exceed 50% of the employees wage loss benefits."

The fact that the Legislature specifically provided an offset for social security retirement benefits against wage loss benefits, but did not provide either a social security retirement offset or severance pay offset against permanent total disability benefits, indicates that the Legislature did not intend for there to be an offset for social security retirement benefits or severance pay benefits against permanent totally disability benefits, see e.g. Gay v. Singletary 700 So.2d 1220 (Fla.1997) (Inclusio Unuius Est Exclusio Alterius - when a law expressly describes a particular situation when something should apply, an inference must be drawn that what is not included by the specific reference was intended to be omitted or excluded).

Therefore, not only is there no statutory authority to support the E/C's position, but the fact that the Legislature had provided an offset for social security retirement benefits against wage

loss, but never against PTD, establishes that this Legislature did not intend that there be either a social security retirement offset or a severance pay offset against PTD benefits.

Secondly, logic and common sense would distinguish between indemnity benefits owed as a result of ones incapacitating injury and social security retirement, or severance pay benefits or any other type of benefit that has nothing to do with an incapacitating injury. Claimants severance pay in the case at bar is nothing more than a benefit to which the claimant is entitled by virtue of his longevity with the company and retirement. To accept the E/C's position, the E/C could also take an offset against other investments of an injured worker that the injured worker relies upon for retirement, such as stock dividends, 401K plans, etc. Clearly this would be inappropriate.

If a claimant does receive other collateral benefits for a disabling injury, then it is reasonable to allow an E/C to take an offset, so that the claimant does not receive more that 100 percent of his AWW from various sources paying claimant for his disability. However, when claimant would be entitled to a particular benefit anyway, such as severance pay, a retirement benefit, or social security retirement, irregardless of whether or not claimant has had an injury, that would be totally inequitable, because the E/C would be getting an offset against a benefit that is not being paid

to claimant for his disability, and which has nothing to do with claimants disability. In such a case, claimant would be penalized for planning fore retirement, because he would be receiving no benefits because of it. For example, in the case at bar, if the E/C's position is accepted, claimant gets no benefits for his PTD status for 26 weeks because the E/C would be able to offset their obligation to pay PTD benefits based on severance pay benefits that claimant would otherwise receive anyway. However, if the claimant was not injured, the claimant could have retired from the employer anyway, received all of his retirement benefits including severance pay, plus go out and get another job and make additional income. However, since claimant is PTD, claimant is not able to do this. Claimant under the workers compensation act should be compensated for his PTD status since it does preclude to claimant from going out and earning other income.

The E/C argue that Grice itself makes no distinction that only disability benefits can be used to offset indemnity benefits (IB-19). Claimant would submit, however, as stated previously hereinabove, that every case involving the 100 percent AWW cap involves some sort of disability benefits (except for perhaps Domutz v. Southern Bell Telephone and Telegraph Company, Supra, which does not state what type of "pension benefit" claimant is receiving). Furthermore there is not a single case that the E/C has

cited that has held that a non-disability benefit may be included in the 100 percent AWW Grice cap. On the other hand, the First DCA in Dixon v. Pasadena Yacht and Country Club, Supra, specifically held that a non-disability benefit is not included in the Grice cap, and that the Grice cap is limited only to duplicative disability benefits.

The E/C next argue that because the benefits sought to be offset in this case are employer funded, the rationale used by the Dixon court that social security retirement cannot be used in applying offset because the employee contributes to the social security retirement fund does not apply (IB-20, 21). Claimant disagrees. Claimant would respectfully submit that as it relates to some sort of disability fund, such as long term disability, then whether or not the claimant contributed to the fund would be important. For example, if claimant purchased his own long term disability policy completely outside of his employment, clearly the employer should not be able to take an offset from benefits received in that long term disability policy (although most of those policies do entitle the long term disability carrier to offset any workers compensation or social security benefits that claimant is receiving). However, when it relates to a non-disability fund, such as retirement, or severance pay, it should not matter who contributes to it. If it is a benefits to which claimant is entitled irregardless of his

injury, then that benefit should not be the basis for an offset for workers compensation benefits payable to the claimant specifically and only because of a disabling injury.

The E/C next argue that the intent of this court has been that once an employer has made the employee whole by paying to the employee the equivalent of his full wages, the employee should not be entitled to additional workers compensation (IB-22). What the E/C overlooks, however, is they did not make the claimant whole. As previously stated hereinabove, the claimant could have retired from the employer at anytime he wanted to and receive the exact same severance pay and retirement benefits that he is getting now, even if he had no injury. However, as previously stated if the claimant retired from this employer, without a disabling injury, the claimant would have had the ability to go to another company obtain another job and earn wages at that other company in addition to the severance pay and retirement pay claimant is receiving from the employer herein. However, as a result of claimants totally disabling injury, claimant cannot retire from this employer and then go get a job from another employer. Therefore unless the E/C pays claimant PTD benefits to make up for the loss of income that this claimant could have received from another, while still receiving the exact same retirement benefits that claimant is receiving now, the E/C must pay claimant PTD benefits.

It is therefore respectfully submitted that the JCC, and the First DCA in affirming the JCC, have correctly concluded that the 100 percent AWW Grice cap applies only to duplicative disability benefits, and does not apply to severance pay benefits to which the claimant is entitled irregardless of injury or disability status.

POINT II

WHETHER OR NOT THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE ORDER OF THE JCC FINDING THAT EVEN IF THE EMPLOYER/CARRIER WAS ENTITLED TO OFFSET THE SEVERANCE PAY THE EMPLOYER/CARRIER COULD NOT TAKE THE OFFSET FOR TWENTY-SIX WEEKS, BUT RATHER WOULD BE ENTITLED TO AN OFFSET FOR THE ONE WEEK IN WHICH THE PAYMENT WAS MADE.

The JCC, in her Order of November 18, 1998 specifically found as follows:

> "Further, even if the E/C was entitled to offset the severance payment, there is no justification for the E/C taking the offset for 26 weeks. The severance pay was paid in one lump sum. At most, the E/C would be entitled to an offset for the one week in which the payment was made. Offsetting the lump sum payment for 26 weeks is arbitrary. The fact that Mr. Schwarz received a very large payment during the course of one week does not allow the E/C to carry that payment over until it is exhausted." (V1-109).

This ruling by the JCC, and the First DCA's affirmance of this ruling is in accord with applicable law and should be affirmed.

Claimant would respectfully submit that the case that most applies to this situation is the case of National Distillers v. Guthrie 473 So.2d 806 (Fla.1st DCA 1985). Guthrie, Supra, was a wage loss case. Wage loss benefits were paid on a monthly basis.

The claimant in Guthrie, Supra, was real estate agent. The JCC awarded Guthrie wage loss benefits for several months during which Guthrie received no income from his employment as a real estate salesman. In several other months during the same year claimant received real estate commissions that greatly exceeded his AWW.

The E/C challenged the JCC's award of wage loss benefits contending in essence that the E/C should have been able to spread out those real estate commissions, even to months that claimant was not actually paid the real estate commissions, so they would not have to pay claimant any wage loss benefits.

The First DCA rejected the E/C's arguments and affirmed the JCC's award of wage loss benefits during those months that claimant did not receive any real estate commissions. The First DCA held, in essence, that the E/C could offset the earnings only during the month that the earnings were actually paid, and not over other months. In so holding the First DCA stated

> "We have not overlooked the apparent anomaly of permitting this claimant to receive wage loss benefits for a certain month during the year even though his total earnings from commissions for any given 12 month period may well exceed the level of his annual income prior to his injury. The statutory scheme, however, provides for the determination of wage loss on a month to month basis in which each month constitutes a separate claim..." National Distillers v. Guthrie, Supra at 808.

Similarly in the case at bar claimant received one payment. PTD benefits are to be paid bi-weekly, F.S. 440.20(2)(1995). Therefore

if the E/C is entitled to any offset at all, they are only entitled to an offset for the week during which claimant received his one lump sum payment.

E/C argue that offsetting the lump sum payment for 26 weeks is not arbitrary, and the payment was, in fact, a continuation of the claimants salary for 26 weeks (IB-25). As argued under Point I hereinabove, the severance pay claimant received was not a salary continuation. In fact, in a letter dated to claimant on February 4, 1998 the E/C advised claimant that any six month salary continuance that they did have would end on February 18, 1998 (V1-78).

It is therefore respectfully submitted that the JCC properly concluded that even if the E/C was entitled to an offset, it would only be for the one week in which the payment was made.

CONCLUSION

The JCC, and the First DCA, properly concluded that the E/C is not entitled to take an offset against vested retirement benefits, including vested severance pay. These benefits are not payable by the employer, but rather by an ERISA fiduciary holding and managing funds that belong to claimant for his severance pay when he retires. Furthermore, the 100 percent AWW Grice cap applies only to duplicative disability benefits, but not benefits such as a severance pay to which a claimant is entitled independent of his injury or disability.

Additionally even if the employer were entitled to an offset they would only be entitled to an offset for the one week during which the severance pay was paid.

Wherefore claimant/respondent respectfully request this Honorable Court enter an Order affirming the First DCA's opinion which affirmed the JCC's Order of November 18, 1998.

Respectfully submitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this _____ day of May, 2000 to: **Mark A. Nation, Esquire**, 570 Crown Oak Centre Drive, Longwood, FL 32802 and **James M. Hess, Esquire and George W. Boring, III, Esq.**, 111 S. Maitland Avenue, Maitland, FL 32751.

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