SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

LOCKHEED MARTIN AEROSPACE and ACE USA,

Petitioners,

v.

WILLIAM H. SCHWARZ,

Respondent.
_____/

CASE NO. :SC96638

CLAIM NO :258-52-7598

D/ACCIDENT: 04/01/96

PETITIONER'S INITIAL BRIEF ON THE MERITS

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CERTIFICATION OF FONT TYPE AND SIZE

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STATEMENT OF THE FACTS AND OF THE CASE

The Claimant, William H. Schwarz, is 61 years old, date of birth 7/18/38, and he sustained a compensable industrial accident occurring on April 1, 1996. The claimant's last date of employment with the employer, Lockheed Martin Information Systems, was March 31, 1998 (R-I-52). At that time the claimant participated in a voluntary layoff, under the terms of which he was entitled to receive 26 weeks of his salary at his normal rate of pay (R-I-67-68). He could take this 26 weeks of equivalent salary over a number of weeks or in a lump sum (R-I-53). If he took it in a lump sum the amount would be a lump sum of the entire 26 weeks of salary. If he elected to be paid weekly for ten weeks, he would be paid his salary for ten weeks. At that point if he decided to take the remainder in a lump sum, he would receive a lump sum based on the remaining 16 weeks. Regardless of how he elected to be paid, the amount the claimant would receive would be the same amount whether he elected to spread out the payments over 26 weeks or whether he took a lump sum payment (R-I-54).

The claimant elected to take this payment in one lump sum (R-I-57). There was still a medical benefit available to the claimant through the employer even though he took the lump sum (R-I-71). The reason the claimant elected to take the payment in one lump sum was because his daughter was getting married and he needed the upfront cash because of the expense of the wedding (R-I-68).

In addition to this lump sum payment, the claimant also started collecting his retirement, which amounted to $5,414.87 per month (R-I-69). Moreover, he received payment of $562.50 per month as a supplemental payment until he reaches age 62 (R-I-69). The 26 weeks of salary continuance, $5,414.87 per month in retirement and $562.50 per month in supplemental retirement payments were all benefits which were funded by the employer (R-I-69). Furthermore, the claimant received a special lump sum pension payment of $111,894.14 on September 1, 1998, which was also funded by the employer (R-I-69-70).

On April 10, 1998, the JCC entered an Order approving a Joint Stipulation stating that "the employer/carrier has voluntarily accepted the claimant as permanently and totally disabled under Florida Statute Section 440.15." (R-I-41).

Subsequently, Lockheed Martin Information Systems, and its carrier, CIGNA Property & Casualty, filed a DWC-4 taking the position that although the claimant was accepted as permanently and totally disabled effective April 1, 1998, the employer had continued full salary in lieu of compensation until September 28, 1998. Thereafter, the employer/carrier would begin compensation payments for permanent total and supplemental benefits on September 29, 1998 (R-I-48). In June of 1998, the claimant filed a Motion to Enforce Stipulation claiming that "as of 6/5/98, the employer/carrier has not initiated payment of permanent total benefits or supplemental benefits," and "the claimant is not on salary continuance."

A hearing was held before Gail Adams, Judge of Compensation Claims on August 28, 1998 concerning the claimant's motion. The issue at the hearing was whether the claimant was entitled to collect workers' compensation permanent total disability benefits during the same time period in which he was receiving his full salary in the form of a 26-week lump sum payment of salary continuation. The claimant took the position that this was a retirement benefit and was not related to the claimant's disability. Alternatively, if the employer/carrier was entitled to a credit through

Grice, this credit should only apply to the one week in which the claimant received the lump sum of $64,000 (R-I-5-6).

The employer/carrier argued that this was an employer provided and employer funded benefit. In Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla. 1997), this Court held that an injured worker may not receive benefits from his employer and other collateral sources which, when totaled, exceed 100 percent of his average weekly wage. In this case, receiving PTD benefits from April 1 - September 28, the same 26 weeks for which he received a lump sum payment equal to his salary, would result in the claimant receiving in excess of his average weekly wage.

On November 18, 1998, the Judge of Compensation Claims entered an Order determining that: the employer/carrier should not offset the $64,000 lump sum salary continuance as it is not a private or public disability benefit; the claimant is entitled to 20 percent penalties and interest for the employer's failure to comply with this Court's Order dated April 10, 1998 holding that Mr. Schwarz was entitled to PTD benefits beginning on April 1, 1998; and that the claimant is entitled to have his attorney's fees and costs paid by the employer/carrier (R-I-107).

On appeal, the Employer/Carrier argued that pursuant to a long line of cases from the Florida Supreme Court, the total benefits a claimant receives from all sources cannot exceed the claimant's average weekly wage. In other words, when an employee receives the equivalent of his full wages from whatever employer source that should be the limit of compensation to which he is entitled. Moreover, the Employer/Carrier argued that the JCC erred in limiting Grice to offsets only of payments made on account of disability.

In an opinion filed August 10, 1999, the First District Court of Appeal, citing Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141 (Fla. 1st DCA 1999), affirmed the JCC's Order. The Employer/Carrier filed a Motion for Rehearing pursuant to Florida

Rule of Appellate Procedure 9.330(a) on August 23, 1999. On September 15, 1999 the First District Court of Appeal entered an Order denying the Motion for Rehearing. The Employer/Carrier then filed a Notice to Invoke Discretionary Jurisdiction of Supreme Court on September 27, 1999.

It was the position of the Employer/Carrier that the 1st DCA's decision expressly and directly conflicted with a decision of the Supreme Court of Florida and passed upon a question already certified to be of great public importance.

On October 11, 1999, the Employer/Carrier submitted its Brief in Support of Petitioner's Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida. On February 21, 2000, the Supreme Court entered an Order accepting jurisdiction and dispensing with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

This brief addresses whether the receipt of an employer provided and employer funded salary continuation, when combined with permanent total disability benefits, can exceed 100% of the average weekly wage.

SUMMARY OF THE ARGUMENT

The claimant in this case participated in a voluntary layoff with his employer, Lockheed Martin, on March 31, 1998. Under the terms of the layoff, he was entitled to receive 26 weeks of his salary at his normal rate of pay. He had the option to take this 26 weeks of salary over a number of weeks or in a lump sum. He elected to take this payment in one lump sum. Thus, although the employer/carrier voluntarily accepted the claimant as permanently and totally disabled effective April 1, 1998, he continued to receive his full salary for 26 weeks until September 28, 1998. Accordingly, permanent total disability benefits should begin on September 29, 1998.

The issue in this case is whether the claimant is entitled to receive 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. The rule is that the total benefits a claimant receives from all sources cannot exceed the claimant's average weekly wage. In other words, when an employee receives the equivalent of his full wages from whatever employer source that should be the limit of compensation to which he is entitled. To hold otherwise would result in a situation where the claimant receives a windfall by receipt of a combination of benefits that exceed his average weekly wage.

Under established caselaw, Brown, Domutz, Barragan and Grice, the critical factor is whether the combination of benefits furnished by the employer together with workers' compensation benefits exceed the employee's average weekly wage. This Court has consistently held that, if employer provided benefits and workers' compensation benefits exceed the employee's average weekly wage, then the employer is entitled to offset the employee's workers' compensation benefits to the extent that the total of all of these benefits exceed the employee's average weekly wage.

The Judge of Compensation Claims awarded the claimant permanent total disability benefits during the same period of time he was receiving his full salary reasoning that the employer/carrier could not offset the lump sum salary continuance because it was not a private or public disability benefit. The 1st DCA affirmed citing Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141 (Fla. 1st DCA 1999). In Dixon, the 1st DCA concluded that social security retirement benefits were not collateral source benefits as contemplated in Grice because there is no authority for an offset in regard to social security retirement benefits provided in the statute, and the statute applies only to duplicative disability benefits. The decision of the 1st DCA in Dixon is erroneous for two reasons. First, this Court in Grice held that despite a lack of statutory authority for an offset of disability retirement benefits, the combination of all benefits received by a claimant may not exceed the employee's average weekly wage. Second, no cases have expressly held that non disability related pension benefits were excluded. Rather, in Domutz v. Southern Bell Telephone & Telegraph Co., 339 So.2d 636 (Fla. 1976), the total of the claimant's benefits and workers' compensation benefits did not exceed the claimant's average weekly wage and thus, this court declined to address the issue of whether pension benefits paid by an employer could be credited against workers' compensation benefits. Accordingly, that issue remains open for review in this case.

Moreover, Grice itself makes no determination that only disability benefits can be used to offset indemnity benefits. Rather, in Grice, this Court intended that any employer provided benefits should be used in determining whether the claimant is receiving more than his average weekly wage in a combination of employer provided benefits and workers' compensation benefits. When this Court stated that an injured worker may not receive benefits from his employer and other collateral sources which exceed his average weekly wage, it is apparent from the case law cited by this Court that

the Court was speaking of benefits from all sources and from whatever employer source.

The Dixon Court distinguished social security retirement benefits from indemnity benefits owed as a result of one's disabling condition because social security retirement benefits are based on advanced years and one would be entitled to those regardless of whether he or she suffered an incapacitating injury. However, it is important to note that one does not receive social security disability benefits and social security retirement benefits at the same time because the social security system recognizes that social security disability replaces wages during working life and social security retirement replaces wages after working life. Likewise, permanent total disability benefits serve as a replacement for the wages earned by the claimant during the period of his disability and retirement or pension benefits serve as a replacement for the claimant's wages following his retirement. Thus, each of these benefits is employer funded. Accordingly, to allow the claimant to receive from two separate funds, each funded by the employer, replacements for his wages would result in the claimant being unjustly enriched.

Despite this Court's position that any employer provided benefits should be used in determining whether a claimant is receiving more than his average weekly wage, the JCC nevertheless found that offsets are only applicable to benefits payable on account of an injury such as Social Security Disability, short and long term disability and retirement disability. The 1st DCA agreed that Section 440.20(14) only applies to duplicative disability benefits. The 1st DCA erred and its Order should be reversed.

Finally, the 1st DCA affirmed the JCC's Order finding that even if the employer/carrier was entitled to offset the claimant's receipt of 26 weeks of salary, the employer/carrier could only take the offset for the one week in which the lump sum payment was made as opposed to the entire 26 weeks. Applying the offset in this manner is arbitrary because it depends on the whim of the claimant. In that regard, the claimant could either take the salary continuance in a lump sum or receive a check every other week. Moreover, he could have collected the payment biweekly for several weeks and then decided to receive a lump sum of the remaining weeks. Under the reasoning of the Court below, the employer's entitlement to an offset depends on when and if the claimant decides to receive the salary in a lump sum. The employer/carrier is either entitled to offset the receipt of 26 weeks of full salary or it is not. Whether the employer/carrier is entitled to offset the full amount of the salary continuation should not arbitrarily be determined by the whim of the claimant.

Beginning March 31, 1998, the claimant received an amount equal to his normal salary for 26 weeks. Thus, in essence he received full salary until September 28, 1998, the end of the 26 week period. The claimant should not be allowed to collect permanent total disability benefits until September 29, 1998 when his 26 weeks of salary

continuance would have been paid out had he elected to receive the salary continuance on a weekly basis. Because the 1st DCA affirmed the JCC's Order which did not allow the E/C to offset the claimant's 26 weeks of salary continuance, the 1st DCA's Order should be reversed.

ARGUMENT – **POINT I**

THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE ORDER OF THE JUDGE OF COMPENSATION CLAIMS WHICH LIMITED BENEFITS SUBJECT TO THE 100% 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 THE CLAIMANT WAS RECEIVING HIS FULL SALARY IN THE FORM OF EMPLOYER PROVIDED AND EMPLOYER FUNDED SALARY CONTINUATION WITHOUT CONSIDERATION OF THE LIMITATION SET FORTH IN SECTION 440.20(14), FLORIDA STATUTES (1995).

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 receives his full salary in the form of a 26-week lump sum payment of salary continuation. The longstanding rule as set forth by the statute and interpreted by this Court is that, although a claimant is entitled to workers' compensation benefits in addition to any benefits under an insurance plan to which he contributed, sick leave benefits, or pension benefits, regardless of whether the employee contributed to the funding of those benefits, the total benefits from all sources cannot exceed the claimant's average weekly wage.

Section 440.20(14), Florida Statutes (1995) provides in pertinent part:

> When an employee is injured and the employer pays his full wages or any part thereof during the period of disability . . . and the case is

> contested by the carrier or the carrier and employer and thereafter the carrier, either voluntarily or pursuant to an award, makes a payment of compensation . . ., the employer shall be entitled to reimbursement to the extent of the compensation paid . . .

This section of the statute is a codification of former I.R.C. Rule 9.

In Brown v. S.S. Kresge Co., 305 So.2d 191, 192 (Fla. 1974), the claimant received workers' compensation benefits and sick leave benefits. This Court held that workers' compensation benefits when combined with sick leave benefits could not exceed the claimant's average weekly wage. In so holding, this Court interpreted the above-mentioned statutory language to mean that "when an injured employee receives the equivalent of his full wages **from whatever employer source** that should be the limit of compensation to which he is entitled." Id. at 194. (emphasis added)

In this case, the claimant's last date of employment with Lockheed Martin was March 31, 1998 (R-I-52). At that time, the claimant elected to participate in a voluntary layoff (R-I-67-68). As a result of this participation in the voluntary layoff, he was entitled to receive 26 weeks of salary to be paid at his normal rate of pay and at normal increments (R-I-68). He also had the right to accept this money in a lump sum at any time before the 26 weeks were paid out (R-I-53). This salary continuance was calculated based on the claimant's highest pay rate for 13 weeks before his layoff. In the claimant's case, this allowed him to collect the same as his full salary. The lump sum salary continuance was $64,500.02, which represents 26 weeks of salary (R-I-77). In addition, beginning in March of 1998, the claimant began collecting his monthly pension benefit in the amount of $5,414.87 as well as a supplemental monthly payment in the amount of $562.50 per month (R-I-69). Thus, not only was the claimant collecting his full salary, he was also collecting his pension benefits from Lockheed Martin. After he left his employment, the claimant received the equivalent of his full wages from a Lockheed Martin provided and Lockheed Martin funded source for 26 weeks. This Court has held that "that should be the limit of compensation to which he is entitled."

The decisive factor in Brown, supra, was whether the combination of benefits from the employer exceeded the claimant's average weekly wage. In Domutz v. Southern Bell Telephone & Telegraph Co., 339 So.2d 636, 637 (Fla. 1976), the issue was whether the employer was entitled to credit the amount of pension benefits against workers' compensation benefits. In Domutz, when the compensation benefits were added to the pension benefits, this amount did not exceed the average weekly wage. This Court, citing Brown, recognized the rule that the combination of benefits from the employer may not

exceed the claimant's average weekly wage. Id. Subsequent Florida Supreme Court decisions have re-affirmed this position.

For instance, in Barragan v. City of Miami, 545 So.2d 252, 253 (Fla. 1989), the claimant was a Miami police officer who suffered permanent work-related injuries. He was granted workers' compensation benefits and disability pension benefits. The City, pursuant to a city ordinance, reduced the disability pension benefits by the amount of workers' compensation benefits. Id. The Supreme Court held that under the statute, an employer is prohibited from deducting workers' compensation benefits from an employee's pension benefits. Id. at 254-255. However, noting the well-settled rule that the total benefits from all sources cannot exceed the claimant's average weekly wage, the Supreme Court held that the employer may not offset workers' compensation payments against an employee's pension benefits **except to the extent that the total of the two exceeds the employee's average monthly wage**. Id. at 255. (emphasis added).

Similarly, in Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896, 898 (Fla. 1997), the claimant was receiving state disability retirement, social security disability benefits, and workers' compensation benefits. The county offset the claimant's workers' compensation benefits by the state disability retirement and the social security disability benefits to the extent that the combined benefits exceeded the claimant's average weekly wage. The First District Court of Appeals reversed, holding that there was no statutory authority or case law to support stacking disability retirement benefits with social security disability benefits to offset workers' compensation. Further, the 1st DCA noted that the state retirement plan did not contain an offset provision and there was no offset provision under Section 440.15(9). Grice v. Escambia County Sheriff's Dept., 658 So. 2d 1208-1211 (Fla. 1st DCA 1995). This Court disagreed and held that the county was entitled to an offset when the combination of the employee's workers' compensation, disability retirement and Social Security Disability exceeded his average weekly wage. The Court further 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 percent of his average weekly wage." Id.

Under this line of cases, the critical factor is whether the combination of benefits furnished by the employer together with workers' compensation benefits exceed the employee's average weekly wage. This Court has consistently held that if the employer provided benefits and workers' compensation benefits exceed the employee's average weekly wage, the employer is entitled to offset the employee's workers' compensation benefits to the extent that the total of all of these benefits exceed the employee's average weekly wage. Otherwise, the employer/carrier would be paying twice and the claimant would receive a windfall as a result of his injury.

In the case before this Court, for the time period of April 1, 1998 through September 28, 1998, the claimant received $64,500, an amount representing 26 weeks of the claimant's salary. If the claimant is permitted to receive permanent total disability benefits for the same period of 26 weeks in which he received his full salary, the claimant will receive a windfall by receipt of a combination of benefits that exceed his averge weekly wage. The Judge of Compensation Claims awarded the claimant permanent total disability benefits during the same period of time he was receiving his full salary. The First District Court of Appeal affirmed, citing Dixon v. Pasadena Yacht & Country Club, 731 So.2d 141 (Fla. 1st DCA 1999).

In Dixon, the issue was whether social security retirement benefits are a collateral source subject to the 100% cap discussed in Grice. The First District concluded that social security retirement benefits are not collateral source benefits as contemplated in Grice because, according to the First District, there is no authority for an offset in regard to social security retirement benefits, and nothing in Chapter 440 Florida Statutes provides support for such a reduction. Id. at 142. The Dixon court further held that Section 440.20(14), Florida Statutes (1995) and its predecessor, IRC Rule 9, addressed reimbursement for compensation benefits and thus, applied only to duplicative disability benefits. Id. at 143. The decision of the First District in Dixon is erroneous because it eliminates employer provided salary continuation payable to a permanently and totally disabled claimant from those classifications of benefits which must be considered or used in calculating and arriving at the average weekly wage cap which is required by this Court's decision in Grice.

First, the Court in Dixon denied an offset reasoning that there was no statutory authority providing any support for an offset of social security retirement benefits. However, in Grice v. Escambia County Sheriff's Dept., 658 So.2d 1208, 1211 (Fla. 1st DCA 1995), the First District used similar reasoning to deny an offset because there was no statutory provision authorizing the aggregation of social security benefits together with state retirement disability benefits for purposes of computing an offset against workers' compensation benefits. The First District reasoned that since the legislature provided for a social security offset against workers' compensation benefits, but did not include an offset based on the receipt of state disability retirement pension benefits, the legislature must not have intended to allow such an offset. Id. at 1211. However, this Court rejected that argument and held that despite the lack of statutory authority for an offset of disability retirement benefits, the combination of all benefits received by a claimant may not exceed the employee's average weekly wage, and to that extent an offset is allowable. Escambia County Sheriff's Depart. v. Grice, 692 So.2d 896, 898 (Fla. 1997). Accordingly, in this case, the employer/carrier should be entitled to offset the 26 week lump sum salary continuance despite the lack of specific statutory authority to the extent

that the combination of permanent total disability benefits received by the claimant and the salary continuance received by the claimant exceed his average weekly wage. Under this Court's ruling in Grice, the lack of specific statutory authority is not controlling to the extent that the combined benefits exceed the average weekly wage.

Furthermore, the First District in Dixon considered Section 440.20(15), Florida Statutes (1991) and found that the statute and its predecessor rule addressed reimbursement for compensation benefits and thus, have been consistently interpreted as applying to duplicative disability benefits. Again, the First District erred. No case has expressly held that non disability related pension benefits are excluded. In Domutz v. Southern Bell Telephone and Telegraph Company, 339 So.2d 636 (Fla. 1976), the issue was whether disability compensation benefits could be set off by pension benefits. However, in Domutz, the employee's average weekly wage exceeded the total of pension benefits and workers' compensation benefits. Because the combined benefits did not exceed the average weekly wage, this Court declined to address the issue of whether pension benefits paid by the employer could be credited against workers' compensation benefits. Id. at 637. Thus, that issue remains open for review in a case such as the case presently before this Court where the combined benefits exceed the average weekly wage.

Moreover, Grice itself makes no such distinction that only disability benefits can be used to offset indemnity benefits. The statute sections and cases relied upon by this Court in Grice, including Brown, Domutz and Barragan, supra, do not limit to disability benefits those benefits to be capped at 100% of the workers' compensation claimant's average weekly wage. In Grice, this Court noted that Section 440.21, Florida Statutes (1985), precludes offsets for collateral benefits until an injured worker has received 100 percent of his average weekly wage in combined benefits. However, "once the 100 percent cap has been reached, workers' compensation must be reduced pursuant to Section 440.20(15), Florida Statutes (1985) . . ." Grice, 692 So.2d at 898 (citing Barragan, Brown, and Domutz)(emphasis added). In rendering its decision in Grice, this Court stated that "the total benefits from all sources cannot exceed the employee's average weekly wage" and "when an injured employee receives the equivalent of his full wages from whatever employer source, that should be the limit of compensation to which he is entitled." Id. at 898 (emphasis added). Accordingly, this Court made a policy decision 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 percent of his average weekly wage." Id. at 898 (emphasis added). This Court did not limit the employer/carrier to offsets for only payments made on account of disability. Rather, the Court stated that "benefits from his employer and other collateral sources", "total benefits from all sources", and benefits "from whatever employer source"

cannot exceed the claimant's average weekly wage. Thus, this Court intended that any employer provided benefits should be used in determining whether the claimant is receiving more than his average weekly wage in a combination of employer provided benefits and workers' compensation benefits.

The First District in Dixon, in holding that social security retirement can not be used to cap the claimant's benefits at 100% of his average weekly wage, noted that:

> Indeed, to permit the employer an offset for social security retirement benefits for any amount surpassing the workers' AWW ignores the fact that the employee, pursuant to the Social Security Act, typically contributes 50 percent of his/her wages to the social security retirement fund. Dixon, 731 So.2d at 143 fn2.

However, in the case before this Court, for the time period of April 1, 1998 through September 28, 1998, the claimant received employer provided and employer funded salary continuation which the employer/carrier sought to offset against permanent total disability benefits. Because the benefits sought to be offset in this case are employer funded, the rationale used by the Dixon Court that social security retirement can not be used in applying an offset because the employee contributes to the social security retirement fund does not apply.

Moreover, in Dixon the court distinguishes social security retirement benefits from indemnity benefits owed as a result of one's disabling condition because social security retirement benefits are based on advanced years and one would be entitled to those benefits regardless of whether he or she suffered an incapacitating injury. Id. at 143. However, importantly, one does not simultaneously receive social security disability benefits and social security retirement benefits. During the period of disability, one

receives social security disability payments. However, at age 62, social security disability ends and social security retirement begins. Thus, under the social security system, one does not receive duplicative benefits. Rather, social security disability replaces wages during working life and social security retirement replaces wages after a working life period ends.

Likewise, permanent total disability benefits serve as a replacement for the wages earned by the claimant during the period of his disability. Retirement or pension benefits, on the other hand, serve as a replacement for the claimant's wages following his retirement. Each of these benefits is employer funded. The employer pays the premium which provides the workers' compensation coverage, and the employer funds the amount paid to the claimant as salary continuation. Thus, the claimant is receiving from two separate funds, each funded by the employer, replacements for his wages.

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. The employer should not be required to pay the employee more than his full wages. To allow the claimant to receive a combination of permanent total disability benefits and his 26 weeks of salary continuation, which exceeds his average weekly wage, would result in a windfall in the form of a double recovery which was financed in whole by the employer. In this case, the

claimant would be unjustly enriched by allowing him to recover the equivalent of his wages in addition to permanent total disability benefits over and above his average weekly wage from sources funded by the employer.

The unmistakable public policy articulated in the Grice decision which has been consistently applied in workers' compensation case law beginning with Brown is that an injured worker may not receive benefits from his employer and all other collateral sources which exceed 100% of his average weekly wage. This longstanding policy of capping benefits at the average weekly wage so as to prevent the claimant from receiving an windfall as a result of receiving both permanent total disability benefits and his full salary applies to the instant case such that the claimant's receipt of $64,500.00 in salary continuation should be includable in the Grice calculation.

Despite this Court's unequivocal position indicating that any employer provided benefit should be used in determining whether a claimant is receiving more than his average weekly wage, the JCC nevertheless found:

> The employer/carrier cannot simply take an offset without statutory or case law authority for doing so. 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. (R-I-109)

The JCC limited Grice to simply payments made on account of disability. The First District Court of Appeal affirmed her Order, relying on Dixon, which agreed that

section 440.20(14), Florida Statutes (1995) only applies to duplicative disability benefits.

The First District erred and its Order should be reversed.

POINT II

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 SALARY CONTINUANCE, THE EMPLOYER/CARRIER COULD NOT TAKE THE OFFSET FOR 26 WEEKS BUT RATHER WOULD BE ENTITLED TO AN OFFSET FOR THE ONE WEEK IN WHICH THE PAYMENT WAS MADE.

In her Order dated November 18, 1998, the Judge of Compensation Claims found:

> Further, even if the Employer/Carrier was entitled to offset the severance payment, there is no justification for the Employer/Carrier taking the offset for 26 weeks. The severance pay was paid in one lump sum. At most, the employer/carrier 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 Employer/Carrier to carry that payment over until it is exhausted. (R-I-109)

When the claimant left his employment with Lockheed Martin on March 31, 1998, he was to receive 26 weeks of salary continuance. The claimant's salary continuance was calculated based upon his highest pay rate for 13 weeks before his layoff. Thus, the salary continuance was equivalent to receiving his full salary for 26 weeks. However, the claimant had an option. He could either take the salary continuance in a lump sum or receive a check every other week. Regardless of how he decided to accept the 26 weeks of salary, he would be paid the same amount. (R-I-54). The claimant elected to accept the 26 weeks of salary in one lump sum because he "needed the money desperately" (R-I-96). In that regard, both the claimant's son and his daughter were getting married in August (R-I-96).

Offsetting the lump sum payment for 26 weeks is not arbitrary. The lump sum payment was based on 26 weeks of salary and was equivalent to 26 weeks of salary. The payment was, in fact, a continuation of the claimant's salary for 26 weeks.

He could have collected the payments for six weeks, and then received a lump sum of the remaining 20 weeks. He could have collected payments for 14 weeks, then received a lump sum of the remaining 12 weeks. Under the claimant's argument and the Judge's ruling, the employer under those circumstances would be entitled to offset the amount for six weeks or for 14 weeks, depending on when and if the claimant decided to

receive the salary in a lump sum. Applying the offset in this manner is arbitrary because it depends on the whim of the claimant. Under the JCC's ruling, if a claimant accepts the payment in a lump sum because of his child's wedding, because he wants to go on a vacation, or for any other personal reason, the E/C is only entitled to a partial offset. If, on the other hand, a claimant elects to receive the salary spread out over the full 26 weeks, the E/C would be entitled to an offset for the entire 26 weeks.

The E/C is either entitled to offset the receipt of 26 weeks of full salary, or it is not. Whether the E/C is entitled to offset the full amount of the salary continuation should not arbitrarily be determined by the whim of the claimant.

Beginning March 31, 1998, the claimant received an amount equal to his normal salary for 26 weeks. Therefore, he received full salary until September 28, 1998, the end of the 26 week period following his last date of employment with Lockheed Martin. Because this lump sum salary continuance was the same as the claimant's full salary, the claimant should not be allowed to collect workers' compensation permanent total disability benefits until September of 1998 when his 26 weeks of salary continuance would have been paid out had he elected to receive his salary continuance on a weekly basis. The JCC ruled that even if the E/C was entitled to an offset the salary continuance, the E/C was only entitled to an offset for the one week in which the payment was made.

This ruling was erroneous and therefore, the 1st DCA's Order affirming the JCC's Order should be reversed.

CONCLUSION

The 1st DCA erred in affirming the Judge of Compensation Claims' Order awarding the claimant permanent total disability benefits during the same period of time the claimant received his full salary, and limiting the application of Grice to offsets for Social Security Disability, short term and long term disability and retirement disability benefits. The statute and case law have indicated that when a claimant receives the equivalent of his full wages from whatever employer source, that should be the limit of compensation to which he is entitled. In other words, the total benefits from all sources cannot exceed the claimant's average weekly wage. To determine otherwise would result in the claimant receiving a windfall by receiving replacements for his wages from two separate employer provided funds, thereby being unjustly enriched. This Court has held that any employer provided benefit should be used in determining whether a claimant is receiving more than his average weekly wage. Thus, Grice offsets are not limited to simply payments made on account of disability.

Finally, because the lump sum payment made to the claimant is based on 26 weeks of salary and was equivalent to 26 weeks of salary, the employer/carrier was entitled to offset the entire 26 weeks of lump sum payment and was not simply entitled to an offset for the one week in which the payment was made. The 1st DCA's Order should be reversed.

APPENDIX

1. Record of Appeal.

2. Decision of 1st DCA, dated August 10, 1999.

3. Notice to Invoke Discretionary Jurisdiction of Supreme Court.

4. Order Accepting Jurisdiction dated February 21, 2000.

5. Case Law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies have been furnished via Federal Express Mail to: Debbie Causseaux, Supreme Court Clerk, 500 S. Duval Street, Tallahassee, FL 32399-1927 this ___ day of April, 2000 and a true copy hereof has been furnished via U.S. Mail to: Mark A. Nation, Esquire, 340 Crown Oak Centre Drive, Longwood, FL 32750, on this ___ day of April, 2000.

_____

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