ORIGINAL

SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

FILED
DEBBIE CAUSSEAUX
OCT 12 1999
CLERK, SUPREME COURT
By

LOCKHEED MARTIN AEROSPACE
AND ACE USA.

Petitioner,

v.

WILLIAM H. SCHWARZ

Respondent

_____/

SUPREME COURT
CASE NO.:1998-4684
96638

BRIEF
IN SUPPORT OF PETITIONER'S NOTICE TO
INVOKE DISCRETIONARY JURISDICTION
OF THE SUPREME COURT OF FLORIDA

James M. Hess, Esquire
and George W. Boring, III, Esquire
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PRELIMINARY STATEMENT

This Brief is submitted in support of Petitioners' Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida because the decision of the District Court of Appeal, First District, in the instant case expressly and directly conflicts with this Court's decision in *Escambia County Sheriff's Dep't v. Grice, 692 So.2d 896 (Fla. 1997).*

Moreover, the First District Court of Appeal has certified a question concerning the appropriate calculation of workers' compensation offsets. See *Acker v. City of Clearwater, 23 FLW D1970 (Fla. 1st DCA 1998); City of Clearwater v. Rowe, 23 FLW D2120 (Fla. 1st DCA 1998); City of Clearwater v. Hahn, 23 FLW D2120 (Fla. 1st DCA 1998); Department of Labor and Employment Security v. Boise Cascade Corp., 23 FLW D2124 (Fla. 1st DCA 1998) and Department of Transportation v. Johns, 23 FLW D2519 (Fla. 1st DCA 1998).* Thus, the decision of the First District Court of Appeal in this case, involves an issue of law already certified to be of great public importance in the above mentioned *Grice* related cases.

In this brief, the parties will be referred to as follows: The Petitioners, Lockheed Martin Aerospace and ACE USA, will be referred to "jointly" as Employer/Carrier, respectively, or the

Petitioners. The Respondent, William Schwarz, will be referred to as the Claimant or the Respondent.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Claimant, William Schwarz, was involved in a compensable industrial accident occurring on April 1, 1996. The claimant's last date of employment with the Employer, Lockheed Martin, was March 31, 1998. 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. The Employer/Carrier voluntarily accepted the Claimant as permanently and totally disabled effective April 1, 1998. However, the Employer/Carrier took the position that although the Claimant was accepted as PTD effective April 1, 1998, the Employer 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.

In June of 1998, the Claimant filed a Motion to Enforce Stipulation, claiming that as of June 1998 the Employer/Carrier had not initiated payment of PTD benefits or supplemental benefits. A hearing was held before Gail Adams, Judge of Compensation Claims on August 28, 1998. The issue at the hearing was whether the Claimant was entitled to collect

workers' compensation permanent total disability benefits during the same period in which he was receiving his full salary in the form of the 26 week lump sum payment of salary continuation. The Employer/Carrier took the position that this was an Employer provided and Employer funded benefit. Thus, the Employer/Carrier argued that, pursuant to this Court's ruling in *Grice*, the Claimant could not receive workers' compensation benefits from his Employer and other collateral sources, which when totaled exceeded 100% of his average weekly wage. On November 18, 1998, the JCC entered an Order determining that the Employer/Carrier should not offset the lump sum salary continuance because it was not a private or public disability benefit.

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 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 Petitioner then filed a Notice to Invoke Discretionary Jurisdiction of Supreme Court on September 27, 1999.

SUMMARY OF THE ARGUMENT

The decision of the First DCA 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 the Florida Supreme Court's decision in *Grice*. Relying upon its decision in *Dixon v. Pasadena Yacht and Country Club*, the First DCA appears to have held that only disability benefits can be used under *Grice* to offset indemnity benefits. However, *Grice* itself, made no such distinction. Instead, the Supreme Court's decision in *Grice* reiterated the rule that the total benefits from all sources can not exceed the claimant's average weekly wage. Accordingly, in affirming the JCC's decision allowing the claimant to receive

permanent total disability benefits at the same time he was receiving his full salary, the First DCA rendered a decision which expressly and directly conflicts with this Court's decision in *Grice*. Moreover, the decision of the First District Court of Appeal relates to an issue of law already certified to be of great public importance.

ARGUMENT

POINT I

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE SUPREME COURT OF FLORIDA ON THE SAME QUESTION OF LAW.

The decision of the First DCA 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 the Florida Supreme Court's decision in *Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997)*. The First DCA in its Order relies upon its opinion in *Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141 (Fla. 1st DCA 1999)*, wherein the First DCA held that social security retirement benefits do not constitute a "collateral source" as contemplated by *Grice* and therefore, the employer/carrier could not offset the amount of social

security retirement benefits received by the claimant. *Id. at 144.* In so holding, the First DCA quoted language from Section 440.20(15) Florida Statutes (1991), stating in pertinent part:

> "When an employee is injured and the Employer pays his full wage 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..."

The First DCA in *Dixon* interpreted this statutory language as applying to duplicative disability benefits. *Id. at 143.* Thus, the First DCA appears to have held that only disability benefits can be used under *Grice* to offset indemnity benefits. Yet, *Grice* itself makes no such distinction. In *Grice*, the county was entitled to an offset when the combination of the employees' workers' compensation, disability retirement, and social security disability exceeded his average weekly wage. 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". Accordingly, the First DCA's decision in the instant case expressly and directly conflicts with this Court's decision in *Grice*.

Furthermore, the cases relied upon by this Court in *Grice* do not limit to disability benefits those benefits to be capped

at 100% of a workers' compensation claimant's average weekly wage. In that regard, in *Brown v. S.S.Kresge Co., 305 So.2d 191, 194 (Fla. 1974)*, this Court interpreted the above quoted 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" (emphasis added). Moreover, in *Barragan v. City of Miami, 545 So. 2d 252, 253 (Fla. 1989)*, this Court noted the well settled rule that the total benefits from all sources cannot exceed the claimant's average weekly wage. Accordingly, this Court held that the employer may not offset workers' compensation benefits 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). In addition, in *Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141 (Fla. 1st DCA 1999)* the case relied upon by the First DCA in affirming the JCC's decision in the instant case, the First DCA, in holding that social security retirement cannot 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 average weekly wage ignores the fact that the employee pursuant to the Social Security Act, typically contributes 50% of his/her wages to the social security retirement fund" *Id. at 143, fn 2*

In contrast, in the instant case, for the time period of April 1, 1998 through September 28, 1998, the claimant received salary continuation in the amount of $64,500, an amount representing 26 weeks of the claimant's salary. This was an employer provided and employer funded benefit. Thus, the rationale used by the First DCA in *Dixon* in holding that social security retirement benefits cannot be used in applying an offset because they do not constitute a "collateral source" as contemplated in *Grice,* does not apply to the case presently before this court, since the benefits sought to be offset in the instant case are an employer provided and employer funded benefit.

The clear public policy articulated in the *Grice* decision, which has been consistently applied in workers' compensation case law beginning with *Brown v. S.S. Kresge Co.*, 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 public policy decision to which this Court has consistently prescribed clearly applies to the instant case, such that the claimant's receipt of $64,500 in salary continuation should be includable in the *Grice* calculation. This longstanding public policy decision of capping benefits at the average weekly wage coupled with the legislative intent of

preventing a claimant from receiving a windfall as a result of receiving both permanent total disability benefits and his full salary, clearly establishes that the 26 weeks of salary continuation should be included in the calculation of the average weekly wage, to insure that the claimant does not receive benefits in excess of his average weekly wage. For the foregoing reasons, the decision of the First DCA expressly and directly conflicts with this Court's decision in *Grice*.

POINT II

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE RELATES TO AN ISSUE OF LAW ALREADY TO BE CERTIFIED OF GREAT PUBLIC IMPORTANCE.

There are several cases pending before the Florida Supreme Court which will clarify the issue of which benefits are properly includable in applying an offset pursuant to *Escambia County Sheriff's Department v. Grice.* The following question has been certified:

> "Where an Employer takes a workers' compensation offset under section 440.20(15), F.S. (1985), and initially includes supplemental benefits paid under Section 440.15(1)(e)(1), F.S. (1985), is the employer entitled to recalculate the offset based on the yearly five percent increase in supplemental benefits?"

In *Acker v. City of Clearwater, 23 FLW D1970 (Fla. 1st 1998)*, the Employer/Carrier took an offset to the extent that the permanent total disability benefits, supplemental benefits,

and pension disability benefits exceeded 100% of the claimant's average weekly wage. For each subsequent year, the employer/carrier continued on a yearly basis to recalculate the offset by adding the 5% yearly increase in supplemental benefits. The First DCA held that recalculating the offset every year, so as to include the increase in supplemental benefits frustrated the intended purpose of the supplemental benefits. However, the First DCA noted that a close review of the facts in the *Grice* case reveals that increases in supplemental benefits were included in the yearly calculation of the offset. Accordingly, the question certified to be of great public importance in *Acker*, when decided by this Court, should clarify the issue of which benefits are properly includable in applying a *Grice* offset.

CONCLUSION

The decision of the First DCA expressly and directly conflicts with the *Grice* decision because it allows the claimant to receive permanent total disability benefits in addition to employer provided and employer funded benefits which when totaled, exceed 100% of the claimant's average weekly wage. Additionally, the decision of the First DCA in this case relates to an issue which has already been certified to be of great public importance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five (5) copies of Petitioners' Brief in Support of Notice to Invoke Discretionary Jurisdiction have been furnished via overnight Federal Express to: Debbie Causseaux, Clerk of the Supreme Court of Florida, Tallahassee, Florida , this 11th day of October, 1999 and a true and copy hereof has been furnished via U.S. Mail to Mark Nation, Esquire, 570 Crown Oak Centre Drive, Longwood, FL 32750, this 11th day of October, 1999.

JAMES M. HESS, ESQUIRE
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Attorney's for the Petitioner

APPENDIX

1) Final Compensation Order of the Honorable Gail Adams, Judge of Compensation Claims, dated November 18, 1998.

2) Decision of the District Court of Appeal, First District, dated August 10, 1999.

3) Notice to Invoke Discretionary Jurisdiction of Supreme Court.

STATE OF FLORIDA
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
DISTRICT "H"

EMPLOYEE:
William H. Schwarz
8500 Amber Oak Drive
Orlando, FL 32817

ATTORNEY FOR EMPLOYEE:
Mark A. Nation, Esq.
340 Crown Oak Centre Drive
Longwood, FL 32750

EMPLOYER:
Lockheed Martin Aerospace
12506 Lake Underhill Road
Orlando,, FL 32825

ATTORNEY FOR EMPLOYER/CARRIER:
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Maitland, FL 32794-5050

CARRIER:
CIGNA
P. O. Box 8187
Jacksonville, FL 32239

CLAIM NO.: 258-52-7598

D/A: 04/01/96

MEMORANDUM AND ORDER

After proper notice to all parties, a hearing was held on this claim in Orlando, Orange County, Florida, on August 28, 1998, before the Honorable Gail Adams, Judge of Compensation Claims.

The following documentary items were admitted into evidence:

Judge's Exhibit 1: Hearing Information Sheets

Judge's Exhibit 2: Joint Stipulation of Parties executed April 6, 1998.

Joint Exhibit 1: William Schwarz Deposition dated 8/12/98

Joint Exhibit 2: Barbara Farini Deposition dated 8/17/98

According to Claimant, the issue claimed at the hearing were:

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 26 weeks.

3. The court was also asked to assess a 20% penalty, costs, interests and attorney's fees, if the court finds that the Employer/Carrier is not entitled to the above offset.

The defenses raised by the Employer/Carrier at the hearing were:

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 26 weeks after April 1, 1998.

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

Based upon the foregoing, and the applicable law, I make the following determinations:

1. The Judge of Compensation Claims has jurisdiction of the parties and subject matter of the claim.

2. Following my review of the evidence and applicable law, I find that the Employer/Carrier should not offset the vested severance pay as it is not a private or public disability benefit.

3. Claimant is entitled to 20% 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.

4. In succeeding on the Motion to Enforce Stipulation Claimant's counsel has performed a valuable service for the Claimant, and as the Employer/Carrier refused to pay PTD benefits as stipulated to and as ordered, Claimant is entitled to have her attorneys fees and costs paid by the Employer/Carrier. The Court reserves jurisdiction

to determine the amount of the fee.

My ruling is based on the fact that there is no statutory or case law authority for taking the offset in question.

Claimant, William Schwarz began working for the employer in June of 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. [Exhibit 5 to Farini Deposition.] Importantly, Mr. Schwarz was entitled to these retirement benefits regardless of the reason for his retirement.

On March 31, 1998, Mr. Schwarz retired from the employer. Upon retirement, he became entitled to receive all of his retirement benefits, including the severance pay. Mr. Schwarz could elect to take the severance pay over 26 weeks or in a lump sum. By electing the lump sum, "all benefits coverage [ceased], and no additional pension service [was] earned." [Exhibit 5 to Farini Deposition.] Mr. Schwarz elected to take the severance pay in a lump sum.

On April 1, 1996, Mr. Schwarz was injured in a compensable accident. Mr. Schwarz was voluntarily accepted by the Employer/Carrier as PTD on April 1, 1998. His AWW was stipulated at $2,563.21, with a corresponding maximum compensation rate of $465.00.

Upon accepting Mr. Schwarz as PTD, the Employer/Carrier took the position that it was entitled to an offset against any PTD benefits owing for the first 26 weeks of disability. According to the employer, Mr. Schwarz' acceptance of a lump sum payment entitled it to 26 weeks of offset. The Employer/Carrier argues that the lump sum

payment was "salary continuance," however, the payment was not salary continuance. Instead, the payment was for a vested retirement benefit. In a letter written to Mr. Schwarz, the employer admits that salary continuance ended on February 18, 1998. [Exhibit 4 to Farini Deposition.]

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. The employer's 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 and owing upon retirement; and were not payable on account of any injury. Consequently, the Employer/Carrier has no authority for taking the offset.

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.

Finally, my April 10, 1998 Order held that Mr. Schwarz was entitled to PTD benefits beginning on April 1, 1998. The Employer/Carrier has failed to pay the

compensation benefits in a timely manner thereby subjecting itself to penalties under 440. 20(7).

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 18th day of Nov., 1998.

HONORABLE GAIL ADAMS
Judge of Compensation Claims

THIS IS TO CERTIFY that the above Compensation Order was entered in the Office of the Judges of Compensation Claims for District "H" and a copy was served by U.S. Mail on each party and their counsel this 18th day of November 1998, at the addresses listed herein.

SECRETARY TO JUDGE ADAMS

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

LOCKHEED MARTIN AEROSPACE and CIGNA PROPERTY & CASUALTY CO. ,

Appellants,

v.

WILLIAM H. SCHWARZ,

Appellee.

_____/

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

CASE NO. 98-4684

Opinion filed August 10, 1999.

An appeal from Order of the Judge of Compensation Claims. Gail Adams, Judge.

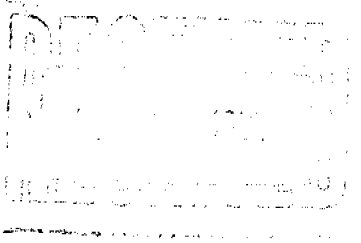
James M. Hess and George W. Boring, III, of Langston, Hess, Bolton, Znosko & Helm, P.A., Maitland, for Appellants.

Mark A. Nation of The Nation Law Firm, Longwood, for Appellee.

PER CURIAM.

AFFIRMED. See Dixon v. Pasadena Yacht and County Club, 731 So. 2d 414 (Fla. 1st DCA 1999).

JOANOS, ALLEN and DAVIS, JJ., CONCUR.



DISTRICT COURT OF APPEAL
FIRST APPELLATE DISTRICT
TALLAHASSEE, FLORIDA

LOCKHEED MARTIN AEROSPACE and
CIGNA PROPERTY & CASUALTY CO.,

Appellants,

v.

WILLIAM H. SCHWARZ,

Appellee.
_____/

CASE NO. : 98-04684

CLAIM NO : 258-52-7598

D/ACCIDENT: 04/01/96

NOTICE TO INVOKE DISCRETIONARY
JURISDICTION OF SUPREME COURT

NOTICE IS GIVEN that Lockheed Martin Aerospace and ACE USA, Appellant/Petitioner(s), invoke the discretionary jurisdiction of the Supreme Court to review the decision of the Court rendered September 15, 1999. The decision expressly and directly conflicts with a decision of the Supreme Court on the same question of law. Furthermore, the decision passes on a question already certified to be of great public importance.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular mail delivery this 27th day of September, 1999 to Mark A. Nation, Esquire, 340 Crown Oak Centre Drive, Longwood, FL 32750.

George W. Boring

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October 11, 1999

Debbie Causseaux
Clerk of Court
Supreme Court
500 S. Duval Street
Tallahassee, FL 32399-1927

Re: Claimant: William Schwarz
Employer: Lockheed Martin Areospace
Docket No.: 1998-4648
Lower Tribunal No.: 258-52-7598
Accident Date: 4/1/96

Dear Clerk of Court:

Enclosed please find an original and five copies of the Brief in Support of Petitioner's Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida in the above-referenced matter. If the enclosed meets with your approval, please execute same and forward to the appropriate parties.

Thank you for your attention to this matter.

Very truly yours,

George W. Boring

George W. Boring, III
James M. Hess

GWB/dd
Enclosures

SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

LOCKHEED MARTIN AEROSPACE
AND ACE USA.

Petitioner,

SUPREME COURT
CASE NO.:1998-4684

v.

WILLIAM H. SCHWARZ

Respondent

_____/

STATEMENT CERTIFYING THE SIZE
AND STYLE OF TYPE USED IN THE BRIEF

COME NOW the Petitioner's, Lockheed Martin Aerospace and ACE USA, and file this, their statement certifying that the size and style of type used in the Brief in Support of Petitioners' Notice to Invoke Discretionary Jurisdiction dated October 11, 1999 is 12 point Courier New.

I HEREBY CERTIFY that a true and correct copy was sent via U.S. mail to: Debbie Causseaux, Clerk of the Supreme Court of Florida, Tallahassee, Florida, and Mark Nation, Esquire, 570 Crown Oak Centre Drive, Longwood, FL 32750, this 14th day of October, 1999.

George W. Boring

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