96638

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

Case No. 98,4684

LOCKHEED MARTIN AEROSPACE, and
CIGNA PROPERTY & CASUALTY COMPANY,

Appellants/Petitioners,

v.

WILLIAM H. SCHWARZ,

Appellee/Respondent.
_____/

RESPONDENT'S, WILLIAM H. SCHWARZ,
RESPONSE BRIEF ON JURISDICTION
On Appeal from the
District Court of Appeal for
the State of Florida
First District

MARK A. NATION, Esquire
Florida Bar #968560
THE NATION LAW FIRM
570 Crown Oak Centre Drive
Longwood, FL 32750
(407) 339-1104
Attorneys for Appellee -
Respondent, William H.
Schwarz

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

CERTIFICATE OF COMPLIANCE WITH TYPE SIZE-STYLE REQUIREMENTS

Pursuant to this Court's Administrative requirements, the undersigned certifies that Respondent's Response Brief on Jurisdiction is produced in 12 point Courier, a font that is not proportionally spaced.

MARK A. NATION, Esquire
Florida Bar #968560
THE NATION LAW FIRM
570 Crown Oak Centre Drive
Longwood, FL 32750
(407) 339-1104
Attorneys for Appellee - Respondent, William H. Schwarz

INTRODUCTORY STATEMENT

Respondent, WILLIAM H. SCHWARZ, who was the appellee in the district court below and the claimant in the worker's compensation proceedings below, shall be referred to as "Respondent" or "Schwarz" throughout this document. Petitioners, Lockheed Martin Aerospace and Cigna Property & Casualty Company, who were appellants in the district court below and the employer-carrier, respectively, in the worker's compensation proceedings below, shall be referred to as "Petitioners" or "Lockheed Martin" and "Cigna" in this document. References to Petitioners' Initial Brief on Jurisdiction shall be designated "B. on Jur." followed by the appropriate page number. References to Petitioners' Appendix shall be designated "App." followed by the appropriate page number.

STATEMENT OF THE FACTS AND CASE

This appeal and attempt to invoke this Court's discretionary conflict jurisdiction arises out of a compensable worker's compensation claim and the acceptance of Schwarz by Lockheed Martin as permanently and totally disabled on April 1, 1998.

Schwarz began working for Lockheed Martin in June 1966. In June 1992, Schwarz became vested in certain retirement benefits, including twenty six (26) weeks of severance pay equal to twenty six (26) weeks of wages payable over twenty six (26) weeks or in a lump sum. Specifically, Lockheed Martin had a Health and Welfare Benefit Plan established pursuant to the Employee Retirement Income Security Act, Title 29 U.S.C. §1001 et. seq. Pursuant to this qualified plan, Schwarz became vested in retirement benefits two (2) years before his disabling injury. (App.-1)

On March 31, 1998, Schwarz retired from Lockheed Martin. Upon retirement, Schwarz became entitled to receive retirement benefits, including severance pay. Schwarz elected to take his severance pay equal to twenty six (26) weeks of wages in a lump sum. (App.-1).

On April 1, 1996, Schwarz was injured in a compensable accident. On April 1, 1998, Lockheed Martin and Cigna voluntarily accepted Schwarz as permanently and totally disabled.

On April 10, 1998, the Judge of Compensation Claims, entered an order affirming the parties' stipulation that Schwarz was entitled to permanent total disability benefits on April 1, 1998. In June 1998, Schwarz filed a motion to enforce the stipulation accepting him as permanently and totally disabled as of April 1,

1998.

A hearing was held on August 28, 1998. The issue at the hearing was whether an employer-carrier is entitled to offset permanent total disability benefits with retirement benefits which vested two (2) years before the claimant's date of injury, and which were due and owing upon retirement and were not payable on account of the injury. (App.-1)

On November 18, 1998, the Judge of Compensation Claims entered an order holding, among other things, that Lockheed Martin and Cigna could not take an offset for vested severance pay as this pay was not a private nor public disability benefit, and holding that Schwarz was entitled to permanent total disability benefits beginning April 1, 1998. (App.-1) Petitioners timely appealed. On April 10, 1999, the First District **per curiam affirmed** the order of the Judge of Compensation Claims. (App.-2) On April 23, 1999, Petitioners served a Motion for Rehearing. On September 15, 1999, the First District entered an Order denying the Motion for Rehearing. These proceedings have ensued.

SUMMARY OF THE ARGUMENT

The decision of the First District Court of Appeal is a per curiam affirmance rendered without an opinion. This Court, therefore, lacks jurisdiction to review it. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Moreover, the First District's PCA citation to Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141 (Fla. 1st DCA 1999) is insufficient to create conflict jurisdiction. Dodi Publishing Co. v. Editorial America S.A., 385

So.2d 1369 (Fla. 1980).

Additionally, the First District's per curiam affirmance **does not** expressly and directly conflict with any decision of this Court or of **another** district court of appeal on the same question or law, and is distinguishable on its facts from the decisions cited by Petitioners to be in conflict with the instant action. This Court, therefore, lacks discretion to exercise its jurisdiction to review the per curiam affirmance in this action.

Finally, that the First District has certified to this Court a question in Acker v. City of Clearwater, 23 FLW D1970 (Fla. 1st DCA 1998), a question that is factually and legally distinguishable from the question resolved in the case *sub judice*, is insufficient to create conflict jurisdiction pursuant to Art. V §3(b)(3), Fla. Const. or jurisdiction pursuant to Art. V §3(b)(4), Fla. Const. Allstate Ins. Co. v. Langston, 655 So.2d 91 (Fla. 1995); Jollie v. State, 405 So.2d 418 (Fla. 1981).

ARGUMENT

It appears Petitioners are attempting to invoke this Court's discretionary jurisdiction pursuant to Art. V §3(b)(3), Fla. Const. The jurisdiction of this Court under Art. V §3(b)(3), Fla. Const., however, only extends to a narrow class of cases, Mystan Marine, Inc. v. Harrington, 339 So.2d 200, 201 (Fla. 1976), and the power of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. Sanchez v. Wimpey, 409 So.2d 20, 21 (Fla. 1982). Accordingly, this Court has consistently held since 1980 that it lacks jurisdiction to review per curiam

decisions of the several district courts of appeal rendered without an opinion. Jenkins, 385 So.2d at 1359 (Fla. 1980). As noted by this Court:

> The pertinent language of Section 3(b)(3) as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to". "Expressly" is defined: "in an express manner". Webster's *Third New International Dictionary* (1961 ed. unarb.) The single word "affirmed" comports with none of these definitions...
>
> Accordingly, we hold that from and after April 1, 1980, the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, ...when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or the Supreme Court.

Jenkins, 385 So.2d at 359. Notwithstanding, Petitioners seek review of the following per curiam opinion of the First District:

> PER CURIAM.
>
> AFFIRMED. See Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141 (Fla. 1st DCA 1999).

The decision was rendered without an opinion. This Court, therefore, lacks jurisdiction to review it. Jenkins, 358 So.2d at 359. This is because an express and direct conflict cannot be established with a per curiam affirmance without an opinion. Davis v. Mandu, 410 So.2d 915 (Fla. 1981). Nor, can the First District's citation to Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141

(Fla. 1st DCA 1999) create conflict jurisdiction. Dodi Publishing Co. v. Editorial America S.A., 385 So.2d 1369 (Fla. 1980). In Dodi, 385 So.2d at 369, this Court rejected the assertion that it should reexamine a case cited in a per curiam decision to determine if the contents of the cited case conflict with other appellate decisions. See also: Jollie v. State, 405 So.2d 418, 421 (Fla. 1981), Robles Del Mar, Inc. v. Town of Indian River Shores, 385 So.2d 1371 (Fla. 1980).

In urging this Court to accept jurisdiction to essentially review the order of the Judge of Compensation Claims, Petitioners assert that "the First DCA **appears to have held** that only disability benefits can be used under Grice [Escambia County Sheriff's Dept. v. Grice, 629 So.2d 896 (Fla. 1977)] to offset indemnity benefits." (B. on Jur.-4 and 6) Petitioner then states, "The decision of the First DCA eliminates employer provided salary continuation payable to a permanently and totally disabled claimant from those classification 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 Dept. v. Grice, 629 So.2d 896 (Fla. 1997)" (B. on Jur.-5)

Contrary to Petitioners' assertions, the First District simply affirmed per curiam the order of the Judge of Compensation Claims, that under the facts of this case, Lockheed Martin/Cigna, could not offset retirement benefits available to Schwarz under a Health and Welfare Benefit Plan established by Lockheed pursuant to the

Employee Retirement Income Security Act, 29 U.S.C. §1001 et seq. in which Schwarz became vested two (2) years before his disabling injury. The First District did not express, that is "to represent in words", the holding asserted by Petitioners that only disability benefits can be used to offset indemnity benefits, and Petitioners cannot extend the First District's per curiam affirmance to create express and direct conflict with Grice, 629 So.2d 896 (Fla. 1997).

Moreover, the per curiam affirmance in the case *sub judice* **does not** expressly and directly conflict with Grice, 629 So.2d 896 (Fla. 1997). Without rearguing the merits of the underlying action, Respondent would submit that the First District simply affirmed per curiam the order of the Judge of Compensation Claims citing Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141 (Fla. 1st DCA 1999). Petitioners urge that the First District misapplied Dixon, 731 So.2d at 142-44, or that the rationale used by the First District in Dixon cannot be applied to the instant action. (B. on Jur.-8) Art. V, §3(b)(3), Fla. Const. provides, however, that this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of **another district court of appeal** or the Supreme Court on the same question of law. This provision does not allow this Court to review alleged conflicts in decisions of the same appellate court. Little v. State, 206 So.2d 9 (Fla. 1968); Gilliam v. State, 267 So.2d 658, 659 (Fla. 2d DCA 1972).

Furthermore, in Grice, 692 So.2d at 898, this Court held that an employer may offset an employee's worker's compensation benefits

to the extent that the total of the employee's worker's compensation, **disability** retirement and social security **disability** benefits exceed his average weekly wage. In Dixon, 731 So.2d at 142 and 144, the First District acknowledged this Court's holding in Grice, and distinguished indemnity benefits owed as a result of one's disabling condition and social security retirement benefits which are based on advance years and to which one would be entitled regardless of whether he or she suffered an incapacitating injury. *Id.* at 143. Thus, the First District concluded that an employer may not offset the amount of social security retirement benefits a claimant receives from his worker's compensation benefits. *Id.* at 144. There is no express and direct conflict between Grice and Dixon. Nor, is there an express and direct conflict between Grice and the instant action. As in Dixon, there is a critical distinction between indemnity benefits owed as a result of one's disabling condition and vested retirement benefits to which one is entitled regardless of whether he or she suffers an incapacitating injury.

Because the per curiam affirmance of the First District does not expressly and directly conflict with any decision of this Court or of another district court of appeal on the same question of law, this Court lacks discretionary jurisdiction to review it. The per curiam affirmance in the case *sub judice* is not out of harmony with a prior decision of this Court or another district court of appeal, and is distinguishable in its controlling factual elements and the points of law settled from the decisions with which the instant

action is alleged to conflict. Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962). Therefore, this Court should discharge its discretionary jurisdiction and decline review the per curiam affirmance hereby sought to be reviewed. The Fla. Star v. B.J.F., 530 So.2d 286 (Fla. 1988); Dept. of Health v. Nat. Adoption Counseling, 498 So.2d 888 (Fla. 1986); Dept. of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983); Mystan Marine, Inc., v. Harrington, 339 So.2d 200 (Fla. 1976).

Petitioner has alternatively urged this Court to review the per curiam affirmance of the First District in this action because the First District has certified, in Acker v. City of Clearwater, 23 FLW D1970 (Fla. 1st DCA 1998), the following question to be of great public importance:

> Where an employer takes a worker's compensation offset under Sec. 440.20(15), F.S. (1985), and initially includes supplemental benefits paid under Sec. 400.15 (1)(e)(1), F.S. (1985) is the employer entitled to recalculate the offset based on the yearly 5% increase in supplemental benefits?

The question certified in Acker is different from the issue resolved by the Judge of Compensation Claims in the instant action, and affirmed by the First District. Furthermore, the First District has not certified the issue resolved in the case *sub judice* to this Court. This Court has recently reiterated that it does not have jurisdiction, pursuant to Art. V §3(b)(4), Fla. Const., to review a decision of a district court, based on a **party's contention** that the decision presents an issue of great public importance. Allstate Ins. Co. v. Langston, 655 So.2d. 91

(Fla. 1995). The district court must certify issues of great public importance. *Id.*

That the question certified in Acker, 23 FLW D1970 (Fla. 1st DCA 1998) **might** "clarify the issue of which benefits are properly includable in applying an offset pursuant to Escambia County Sheriff's Dept. v. Grice", (B. on Jur.-9), is insufficient to supply this Court with conflict jurisdiction. Jollie v. State, 405 So.2d 418, 421 (Fla. 1981) (only a PCA citation which is pending before the Supreme Court or has been reversed creates conflict jurisdiction). The PCA citation in the instant action, Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141 (Fla. 1st DCA 1999) is not currently pending before this Court, nor has it been reversed. Thus, this Court lacks conflict jurisdiction.

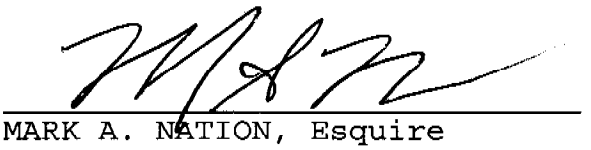
CONCLUSION

The order of the Honorable Gail Adams, Judge of Compensation Claims, "District Court H", Claim No. 258-52-7598, was affirmed per curiam, **without opinion** by the First District. The Florida Supreme Court lacks jurisdiction to review per curiam decisions of the several district courts of appeal rendered without an opinion. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Therefore, this Court lacks jurisdiction to review Lockheed Martin Aerospace and Cigna Property & Casualty Company v. William H. Schwarz, Case No. 98-4684 (Fla. 1st DCA, August 10, 1999).

Moreover, the First District's PCA citation to Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141 (Fla. 1st DCA 1999) is insufficient to create conflict jurisdiction in this Court.

Dodi Publishing Co. v. Editorial America S.A., 385 So.2d 1369 (Fla. 1982). Additionally, the First District's per curiam affirmance in the instant action does not expressly and directly conflict with Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla. 1997), and a direct conflict is essential to this Court's jurisdiction. Bowman v. Employers Mutual Liability Ins. Co. of Wis., 261 So.2d 821 (Fla. 1972).

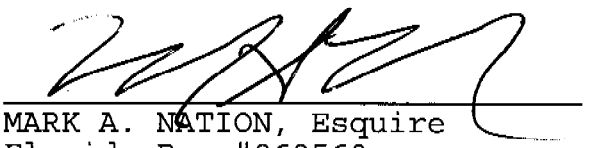
Finally, that the First District has certified a question to this Court, in Acker v. City of Clearwater, 23 FLW D1970 (Fla. 1st DCA 1998), that is factually distinguishable from the issue in the instant action is insufficient to create discretionary conflict jurisdiction in this Court. Jollie v. State, 405 So.2d 418, 421 (Fla. 1981), Harrison v. Hyster Co., 515 So.2d 1279, 1280 (Fla. 1987). Petitioners' assertions about the importance of questions presented in this case are insufficient to create jurisdiction in this Court pursuant to Art. V, §3(b)(4), Fla. Stat. Allstate Ins. Co. v. Langston, 655 So.2d 91 (Fla. 1995). Accordingly, Respondent respectfully requests this Court to discharge its discretionary jurisdiction and to decline to review the per curiam affirmance hereby sought to be reviewed.



MARK A. NATION, Esquire
Florida Bar #968560
THE NATION LAW FIRM
570 Crown Oak Centre Drive
Longwood, FL 32750
(407) 339-1104
Attorneys for Appellee - Respondent, William H. Schwarz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James M. Hess, Esquire and George W. Boring, III, Esquire, Post Office Box 945050, Maitland, FL 32794-5050 this 5th day of November, 1999.



MARK A. NATION, Esquire
Florida Bar #968560
THE NATION LAW FIRM
570 Crown Oak Centre Drive
Longwood, FL 32750
(407) 339-1104
Attorneys for Appellee - Respondent, William H. Schwarz