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

REPLY BRIEF

James M. Hess, Esquire
Florida Bar No. 0210943
George W. Boring, III, Esquire
Florida Bar No. 0063370
Langston, Hess, Bolton, Znosko & Helm, P.A.
111 South Maitland Avenue
Maitland, FL 32751
(407) 629-4323
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

CERTIFICATION OF FONT TYPE AND SIZE

This is to certify that the font size used in this brief is Times New Roman 14.

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 remains whether the claimant is entitled to 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. On March 31, 1998, the claimant participated in a voluntary layoff at Lockheed Martin. (R-I-52-67). The lump sum payment he received at that time was a typical benefit provided to those who were participating in the voluntary layoff. (R-I-68). Under the terms of the layoff, he was entitled to receive 26 weeks of his salary at his normal rate of pay. He could elect to take the amount in a lump sum, he could spread it out over 26 weeks, or he could take the lump sum at any point in time. (R-I-68). In addition to the pay he received, he started collecting his retirement at the same time in the amount of $5,414.87 per month. He also received an additional monthly payment of $562.50 per month. (R-I-69). All of these benefits, his retirement, his supplemental payment, and his 26 week lump sum salary were funded by Lockheed Martin. (R-I-69). Although the claimant disagrees with the employer/carrier's assertion that the claimant was receiving salary continuation, and that the lump sum payment was from an employer source, (AB-12,14), after he left his employment with Lockheed Martin, 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 repeatedly held that "that should be the limit

of compensation which he is entitled." Brown v. S.S. Kresge Co., 305 So. 2d 191,192 (Fla. 1974).

The claimant attempts to distinguish Brown because the claimant in Brown was receiving sick leave pay as a result of a disabling condition (AB-14). Likewise, the claimant attempts to distinguish Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989), on the grounds that workers' compensation and disability pension benefits were involved. (AB-16). Additionally, the claimant distinguishes Escambia County Sheriff's Department v. Grice, 692 So. 2d 896 (Fla. 1997), because Grice deals with social security disability and state disability retirement benefits. (AB-16). Finally, the claimant attempts to distinguish Domutz v. Southern Bell Telephone & Telegraph Co., 339 So. 2d 636 (Fla. 1976) on the basis that Domutz does not state what type of "pension benefit" the claimant was receiving. (AB-15, 22). Thus, the claimant attempts to make a distinction between indemnity benefits owed as a result of a disabling condition and benefits to which the claimant is entitled whether or not he suffered an incapacitating injury. (AB-17). The crux of the claimant's argument is that non-disability benefits may not be included in the 100% average weekly wage Grice cap and the Grice cap is limited only to duplicative disability benefits (AB-22).

However, this Court has never expressly held that non-disability related benefits are excluded from the 100% average weekly wage cap. No case has held

that only disability benefits can be used to offset indemnity benefits. In fact, in Domutz, supra, the issue was whether disability compensation benefits could be set off by pension benefits. The fact that Domutz did not specify whether the pension benefits were disability pension benefits or retirement pension benefits merely means that the issue of whether retirement pension benefits can be credited against workers' compensation benefits remains open for review by this Court.

This Court has held 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." Brown v. S.S. Kresge Co., 304 So. 2d 191, 194 (Fla. 1974). Further, this Court has held that an 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. Barragan v. City of Miami, 545 So. 2d 252, 255 (Fla. 1989). Finally, this Court has 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". Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997).

The decisive factor in these cases is not whether the benefits being received by the claimant are disability benefits or non-disability benefits. Rather, the critical issue is whether the combination of benefits furnished by the employer

together with workers' compensation benefits exceed the employee's average weekly wage. If so, this Court has consistently held that 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.

Additionally, the claimant argues that he is entitled to PTD benefits in addition to his full salary because if he had not been injured, he could have retired, received all of his retirement benefits, plus go out and get another job and make additional income. (AB-21, 23). Whether the claimant would go out and get another job to make additional income if he was not permanently and totally disabled is speculative and irrelevant. Theoretically, any permanently and totally disabled claimant could argue that if he had not sustained his workers' compensation injury, he could have gone out and obtained a second job and made additional income. In this case, it is unlikely that the claimant would have gone out and gotten a second job given his retirement income of $5,414.87 per month, an additional monthly payment of $562.50 per month and a lump sum payment of $111,894.14 which he received on September 1, 1998. (R-I-69). Nevertheless, it is not the employer/carrier's responsibility to pay additional benefits to replace potential additional income that the claimant might speculatively have earned had he decided to go out and get another job after his retirement.

The claimant voluntarily retired from his employment from Lockheed Martin on March 31, 1998. From April 1, 1998 through September 28, 1998, he received his full salary from an employer provided and employer funded source. For him to also receive permanent total disability benefits for the same period of time would result in the claimant receiving, from an employer funded source, 166% of his salary for the 26 weeks following his retirement. This results in a windfall for the claimant in the form of a double recovery financed in whole by the employer.

Limiting the employee to 100 percent of his average weekly wage in employer provided benefits does not, as the claimant argues, penalize a claimant for planning for retirement. (AB-21). Further, it does not, as the claimant argues, result in long-term devoted employees receiving less benefits than short-term employees who sustained disabling injuries. (AB-18). A claimant who receives a permanent total disabling injury on the first day of his employment would receive permanent total disability benefits, an amount equal to sixty-six and two thirds percent of his salary. On the other hand, a long term employee who plans for retirement and sustains a permanently and totally disabling injury near the end of his employment, would receive 100% of his salary in retirement benefits and permanent total disability benefits. By limiting a claimant to 100% of his average weekly wage in combined employer provided benefits, the court avoids a situation

where an employee is better off financially being retired and injured than he would be healthy and working. The JCC erred in limiting Grice to simply payments made on account of disability. Further, the First District Court of Appeal erred in affirming her order relying on Dixon v. Pasadena Yacht and Country Club, 731 So.2d 141 (Fla. 1st DCA 1999), which held that section 440.20(14) Florida Statutes (1995), only applied to duplicative disability benefits. Accordingly, the order of the First District Court of Appeal 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.

The JCC ruled that even if the employer/carrier was entitled to offset the 26 weeks of salary, the employer/carrier was only entitled an offset for the one week

in which the payment was made. The claimant argues that National Distillers v. Guthrie, 473 So.2d 806 (Fla. 1st DCA 1985) is analogous to the case presently before this court (AB-24).

The situation in Guthrie is distinguishable from the present factual situation. Guthrie was a wage loss case in which the claimant was a real estate agent. In some months he received no income from his employment. He was awarded wage loss benefits for these months. In other months the claimant received commissions from real estate closings that greatly exceeded his average weekly wage. Id. at 807. The employer/carrier argued that because commissions paid at closing in any one month resulted from efforts expended over a number of months, all commissions should be deemed to be earned over that extended period. Id. at 807. However, the claimant's right to receive income was not determined until the real estate transaction closed. Id. at 808. The First DCA declined to interpret the word "earn" to mean constructive receipt of income subject to perfection or vesting of a right to receive income at sometime in the future. Accordingly, the court allocated the claimant's commission income to the month in which it was received. Id. at 808.

In contrast, in the present case, the claimant's right to receive the 26 weeks of salary had already been determined and the only question was whether he would spread out the payments over the entire 26 week period or take the payment in one

lump sum. In Guthrie, the First DCA ruled as it did because the wage loss statute provided for a determination of wage loss on a month to month basis in which each month constituted a separate claim. Id. at 808. However, unlike Guthrie, the present case is not a wage loss claim. Each week of the 26 week period in question does not constitute a separate claim. Here the Court is not bound by any statutory scheme requiring it to consider each week of the 26 week period on a week by week basis.

Moreover, the court in Guthrie recognized that its ruling resulted in the anomaly of the claimant receiving wage loss benefits for certain months of the year even though his total earnings for the year exceeded his pre-injury annual income. Id. at 808. However, because the court felt bound by the wage loss statutory language providing for a determination of wage loss on a month to month basis, the court felt that any change in the wage loss statute to avoid such an anomalous result would be properly left to the legislature. Id. at 808. In contrast, no such statutory provision exists in this case which would dictate that the Court should consider separately each week of the 26 week period in question. Thus, there is no reason for an anomalous result whereby the claimant would receive essentially all of his PTD benefits for the same period of time he received his full salary simply because he chose to receive his full salary in one lump sum.

When the claimant left his employment at Lockheed Martin, he received 26 weeks of salary. He chose to accept the salary in one lump sum as opposed to spreading it out over a number of weeks. The employer/carrier is either entitled to offset the 26 weeks of salary or it is not. Whether the employer/carrier is entitled to offset the full amount of the salary should not be arbitrarily determined by the claimant. The JCC erroneously ruled that even if the employer/carrier was entitled to an offset, it was only entitled to an offset for the one week in which the payment was made. The First DCA's Order affirming the JCC's ruling should be reversed.

CONCLUSION

In this case, beginning March 31, 1998, 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 repeatedly held 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. Based on this longstanding rule, the claimant should not be allowed to collect permanent total disability benefits until September of 1998, the end of the 26 week period. This court has never expressly held that non-disability related benefits are excluded from the 100% average weekly wage cap and the 1st DCA erred in relying on Dixon, which erroneously limited the Grice cap only to duplicative disability benefits. Accordingly, the JCC erred in limiting benefits subject to the 100% average weekly wage cap to private or public disability benefits. Additionally, the JCC erred in finding that even if the employer/carrier was entitled to offset the lump sum, the employer/carrier would only be entitled to an offset for the one week in which the payment was made. Further, the First DCA erred in affirming the JCC's Order.

Accordingly, the petitioners, Lockheed Martin and ACE USA, respectfully request this Court enter an Order reversing the First DCA's opinion.

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 June, 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 June, 2000.

_____
JAMES M. HESS, ESQUIRE
Florida Bar No. 0210943
GEORGE W. BORING, ESQUIRE
Florida Bar No. 0063370
Langston, Hess, Bolton, Znosko
& Helm, P.A.
111 South Maitland Avenue
Maitland, Florida 32751
(407) 629-4323
Attorneys for the Petitioners