IN THE SUPREME COURT OF FLORIDA

HRS DISTRICT II AND
ALEXSIS RISK MANAGEMENT

Petitioners

vs. Case Number: 96,801

ANN L. PICKARD

Respondent

______________________________/

ON PETITION TO REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL OF THE FIRST DISTRICT OF FLORIDA

AMENDED
ANSWER BRIEF OF RESPONDENT,
ANN L. PICKARD

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STATEMENT OF THE FACTS

On September 13, 1996, Ms. Pickard was accepted as permanently and totally disabled with a retroactive effective date of August 1, 1989. (R: 42) The claimant's date of injury was September 23, 1986, and accordingly, 10 years of supplemental benefits were payable on the date the employer/carrier finally conceded the respondent to be permanently and totally disabled. Prior to September 13, 1996, Ms. Pickard received no workers' compensation benefits despite the fact that she had been accepted as permanently and totally disabled by the Division of Retirement and the Social Security Administration some seven years earlier.

The petitioners' statement that prior to the actual filing of the petition claiming permanent and total disability benefits on September 13, 1996, the employer had administratively accepted Ms. Pickard as permanently and totally disabled as of August 1, 1989, is incorrect. The carrier did not concede that the claimant had been permanently and totally disabled until June 26, 1997, at which time it was agreed that the onset date of permanent total disability was July 30, 1989. (R: 42).

Paragraph 1, page 2, of the initial brief of petitioners indicates that the employer did not provide workers' compensation permanent total benefits to Ms. Pickard based on an impairment rating received from a Dr. Rohan. As authority, petitioners cite

to page 34 of the record, which simply reflects an allegation in the pretrial compliance form. There is nothing in the record to indicate any basis for the employer/carrier's failure to accept, in a timely fashion, the claimant as permanently and totally disabled.

Respondent accepts the petitioners' statement of the case and facts in all other pertinent particulars.

SUMMARY OF THE ARGUMENT

Pursuant to City of Clearwater v. Acker, [Fla.Sup.Ct.] No. SC93800, Dec. 9, 1999, no post injury cost-of-living increases to collateral benefits should be included in the employer/carrier's calculation of its Grice offset. To do so would constitute a further judicial expansion of Section 440.20(15), Fla. Stat., an ambiguous statute, which would render 42 U.S.C., Section 424a, and Section 121.101(3), Fla. Stat., providing for cost-of-living adjustments to Social Security disability insurance benefits and State Retirement benefits, respectively, meaningless.

Similarly, to include in its calculation of offset, supplemental benefits accruing subsequent to the date of accident, at which time the claimant's average weekly wage (AWW) is frozen, would contravene clear legislative intent as expressed in Section 440.15(1)(e)(1), Fla. Stat.

The District Court's reliance on City of Miami v. Bell, 634 So.2d 163 (Fla. 1994), in refusing to apply the 100 percent AWW cap retroactively to August 1, 1989, is correct.

ARGUMENT

A. JURISDICTION

Respondent joins petitioners in their argument that the Court should exercise its discretionary jurisdiction on these issues.

I. The District Court correctly refused to include any of the cost-of-living adjustments to Ms. Pickard's Social Security or in-line-of-duty disability benefits in the Grice offset calculations subsequent to August 1, 1989.

The petitioners argue that their delay in accepting the claimant as PTD should now result in their being able to reduce retroactively their obligation to pay benefits by including in their offset computation, all collateral cost-of-living increases payable to the claimant since August 1, 1989, the date petitioners should have accepted the claimant as PTD.

Petitioners argue that cost-of-living adjustments to Ms. Pickard's collateral benefits should continue to be used to annually recalculate workers' compensation reductions in payments, despite the fact that such inflation adjustments are prescribed by statute.

As will be discussed *infra,* this position is untenable under this Courts's decision in Acker. (See City of Clearwater v. Acker, [Fla.Sup.Ct.] No. 93800, Dec. 9, 1999).

Section 121.101(3)(b), Florida Statutes (1997), provides that

in-line-of-duty disability (ILOD) benefits must be increased by a factor of three percent compounded annually on July 1 of each year. Petitioners argue that these cost-of-living adjustments should be included within the cap mandated by Section 440.20(15). They argue that the so-called "operative question" under 440.20(15) is whether such increased benefits are employer-provided benefits. Clearly, after Acker, the fact that the benefits received can be characterized as "employer-provided" is not dispositive. What was clearly stated by this Court in Acker is that the cap imposed under Section 440.20(15) is the result of "a judicial interpretation of an ambiguous statute" and the effect of that statute should not be expanded through judicial interpretation if such interpretation would render another clearly worded statute meaningless. The Florida Retirement System statute providing for cost-of-living adjustments is certainly clearly worded.

Florida Statutes, Section 121.101(3), provides:

> (1) The purpose of this section is to provide cost-of-living adjustment to the monthly benefits payable to all retired members of state-supported retirement systems...
>
> (2) Commencing July 1, 1987, the benefit of each retiree and annuitant shall be adjusted on each July 1 thereafter, as follows...
>
> (3) For those retirees and annuitants who have received a cost-of-living adjustment under this section, the adjusted monthly benefit shall be the amount of the monthly benefit being received on June 30 immediately preceding the adjustment

> date plus an amount equal to 3 percent of the benefit.

Therefore, in order to harmonize Section 121.101(3), Florida Statutes (1997), with the Grice holding, ILOD COLAs should be held outside the ambit of Section 440.20(15). An amicus brief filed with the First DCA by the State of Florida, Division of Retirement, supporting this position, is attached as Exhibit 1 to the Appendix.

The First DCA has had opportunity to treat the issue of whether post-date of accident cost-of-living increases to collateral benefits may be offset against workers' compensation benefits. The First DCA declared in Herney that the rationale behind the decisions in Acker and its decision in Alderman, now affirmed by this Court, that an offset could not be recalculated to take into account increases in PT supplemental benefits, was consistent with their conclusion that no post-injury cost-of-living increases to collateral benefits may be offset against workers' compensation benefits. The State of Florida and the Department of Insurance, Division of Risk Management v. Herney, 24 Fla. L. Weekly D2467b (Fla. 1st DCA October 19, 1999); Florida Plastering v. Alderman, [Fla.Sup.Ct.] No. 94511, Jan. 20, 2000.

In Herney, the First DCA affirmed the decision of the Judge of Compensation Claims limiting offsets for disability retirement and Social Security disability benefits received by the claimant to the amount initially received, without any consideration of cost-of-

living increases. See also, Hunter v. South Florida Sod, 666 So.2d 1018 (Fla. 1st DCA 1996) (cost-of-living increases to Social Security disability benefits accruing after the date of the industrial accident cannot be included in the offset calculation.)

The Herney Court certified the following question as one of great public importance:

> WHEN CALCULATING THE OFFSETS FOR SOCIAL SECURITY DISABILITY AND DISABILITY RETIREMENT BENEFITS PURSUANT TO ESCAMBIA COUNTY SHERIFF'S DEPARTMENT V. GRICE, 692 SO.2D 896 (FLA. 1997), IS THE EMPLOYER ENTITLED TO INCLUDE COST-OF-LIVING INCREASES TO THOSE BENEFITS?

The petitioners argue separately the Social Security disability insurance benefit cost-of-living increases should be offset under Grice. Petitioners' argument is entirely based on an analysis of Social Security Ruling 82-68, which petitioners assert by analogy provides a basis for a workers' compensation reduction on account of a claimant's receipt of Social Security cost-of-living increases.

Initially, the respondent would note that there is a long line of established authority which holds that Social Security cost-of-living allowances are not to be included when calculating offsets. See Great Atlantic & Pacific Tea Company v. Wood, 380 So.2d 558 (Fla. 1st DCA 1980); Eques v. Best Knit Textile Corporation, 382

So.2d 736 (Fla 1st DCA 1980); LaFond v. Pinellas County Board of Commissioners, 379 So.2d 1023 (Fla. 1st DCA 1980); A.C. Scott Construction and Paving Company v. Miller, I.R.C. Order 2-3906 (Sept. 11, 1970). In addition, these cases have recently been affirmed and expanded upon in Cruse, Hunt, Acker, Alderman, Wood, and Johns, in which the Court held that Social Security cost-of-living allowances should not be included in calculating the initial offset and that no further recalculation is appropriate. In these decisions, the Court reasoned that "the cost of living increases actually reflect the diminution of the value of the dollar and the fact that the claimant's average weekly wage may not ... adequately or accurately reflect a basis upon which to determine and pay workers' compensation or Social Security benefits." Wood, at 559. While some of these cases involved the interpretation of Section 440.15(9), the above-noted reasoning and policy decisions are equally applicable or relevant to a Section 440.20(15) analysis. In turn, the Social Security cost of living increases should not be included at any time in the calculation of offsets.

In addition to the authority set forth above, respondent would observe that the petitioners' reliance on the Social Security Ruling 82-68 is inapposite.

It appears that the petitioners are arguing that because the Social Security Administration will reduce its benefits payable to

a Social Security beneficiary after calculation of its initial reduction because of an increase in workers' compensation benefits, the Florida workers' compensation carrier should do the same.

In making such an argument, the petitioners fail to observe that the Social Security disability insurance benefit program and the Florida workers' compensation permanent total disability benefits scheme are ***complementary programs.***

In Social Security parlance, Florida is what is known as a "reverse offset" state. When a claimant receives concurrent compensation from the Florida workers' compensation carrier and disability insurance benefits (DIB) from the Social Security Administration (SSA), the workers' compensation carrier is entitled to reduce its payment to a claimant because the claimant is receiving DIB from the SSA. 42 U.S.C. Section 424a(d); 20 C.F.R. Section 404.408(b)(1)(1995). Only 12 states have provisions for reduction of workers' compensation benefits when a claimant is concurrently receiving DIB. In the remaining states, the SSA will reduce its payment on account of the claimant's receipt of workers' compensation payments, which are referred to as planned disability benefits (PDB) in the Social Security Act. Both the Social Security law and Chapter 440 have complementary provisions providing for Federal recognition of the reduction allowed to the workers' compensation carrier. Because the Federal government will

recognize Florida's "reverse offset" by allowing a reduction by the workers' compensation carrier, the Social Security Administration will not concurrently reduce its payment of DIB to the Florida claimant. (SSA, Office of Policy, Program Operations Manual System (POMS), Chapter 520, Workers' Compensation/Public Disability Benefit Offset.) However, with regard to the State of Florida ILOD benefits, payable to a Social Security disability insurance claimant, there is no similar compact. Contrary to petitioners' implication in the first sentence on page 13 of their brief where petitioners alter the language of the ruling by inserting the words "[workers' compensation]" between the words "public disability" and "benefit," Social Security Ruling 82-68 is not applicable to the Florida workers' compensation scheme. That Ruling explains how the Social Security Administration will offset benefits payable where the beneficiary receives an increase in a planned disability benefit which, in this case, would be State of Florida ILOD benefits. Thus, the State of Florida, Division of Retirement, pays benefits under a complementary statute. (See Florida Statutes 121.101(7)(b) providing that supplemental cost-of-living adjustments to the disability retiree's benefit shall not be paid if the claimant is also receiving Social Security insurance benefits). Therefore, when a claimant receives ILOD benefits in Florida, the SSA has the right to reduce its payment to the in-

line-of-duty (ILOD) claimant subject to the same guidelines which would have been applicable to the receipt of WC benefits were Florida not a "reverse offset" state. POMS 52001.035C.1. In other words, pursuant to 42 U.S.C., Section 424a, the SSA will reduce its disability payments for the claimant's receipt of a planned disability benefit (PDB) which, in this case, is the State ILOD disability benefit. (See SSR 86-6A attached). Therefore, the Social Security Administration can reduce Federal disability benefits on account of increases received by an ILOD beneficiary for cost-of-living adjustments. On the other hand, the cited Florida Statute 121.101(7)(b) trumps the Social Security reduction by eliminating ILOD cost-of-living increases for Social Security beneficiaries. Contrary to what the petitioners would have the Court believe by inserting the words "workers' compensation" in brackets in Social Security Ruling 82-68, that Ruling does not apply to workers' compensation benefits in Florida. Moreover, to the extent the cited statute and SSA ruling clearly refer to treatment of COLAs by each payor, petitioners' citation to SSR 82-68 is supportive of respondent's position that COLAs in these programs do not give rise to workers' compensation reductions.

II. The First DCA errs where it directs the JCC to allow the petitioners to include in their "initial calculation" supplemental benefits payable in 1989.

The Hunt v. Stratton case, relied upon by the First DCA, sets forth a judicially created formula for calculating the workers' compensation offset. That case, however, did not specifically address the issue of supplemental benefits accruing prior to "initial calculation." Inasmuch as claimant's compensation rate is frozen as of the date of accident, any reduction taken by the carrier on account of accrued supplemental benefits payable, since a date of accident, contravenes legislative intent to provide inflation protection as expressed in Section 440.15(1)(e)(1), Florida Statutes (1985). This principle was extensively discussed by this Court in Acker. However, the specific issue of supplemental benefits and COLAs accruing prior to the date the claimant is accepted as PTD was not before the Court as it is now.

The principle of judicial construction set forth in Acker, that further expansion of the 100 percent cap would not be favored if it would render another statute meaningless, applies equally to cost-of-living increases accruing prior to the effective date of permanent total disability.

In this case, where the "initial calculation" is not made until 10 years after the date of accident, imposing a rule that supplemental benefits accruing prior to the date of initial

calculation are subject to offset, would deprive Ms. Pickard of an additional 50 percent of her weekly compensation rate, as opposed to the benefits which should have been payable to her had the carrier timely accepted her as permanently and totally disabled. As a practical consideration, failing to preserve the claimant's right to receive all of her supplemental benefits based upon an arbitrary date of "initial calculation" would provide a strong disincentive to the carrier to timely provide the PTD benefits that the claimant is entitled to under the Workers' Compensation Act. Respondent asks the Court to take note of the fact that the claimant's compensation rate is two-thirds of average weekly wage prior to injury. (Fla. Stat. 440.15(1)(a)). In-line-of-duty retirement paid by the State of Florida is at least 42 percent of annual salary. (Fla. Stat. 121.091(4)(f)(1)). For this reason, where a claimant is determined to be permanently and totally disabled from an on-the-job injury, the combination of the workers' compensation benefit and the state in-line-of-duty disability benefit will ordinarily exceed 100 percent of average weekly wage and will require application of the <u>Grice</u> cap without consideration of supplemental benefits. Respondent, therefore, asks the Court to reverse the District Court's decision that supplemental benefits accruing prior to August 1, 1989, are subject to offset.

III. The District Court correctly refused to allow retroactive offsets of workers' compensation benefits owed but unpaid since August 1, 1989, until the issuance of the Grice decision on May 1, 1997.

Respondent concurs with the DCA's holding below that no Grice offset is permissible prior to the issuance of Grice on May 1, 1997.

The employer/carrier had conceded that the Grice case was one of first impression and that Section 440.20(15) had not previously applied the 100 percent AWW cap to the combination of Social Security, State disability retirement, and workers' compensation benefits. The DCA reasoned that Grice, having not applied an offset of workers' compensation benefits until that offset was initially asserted in June 1993, despite the fact that the claimant had previously been receiving all three types of benefits, did not provide authority for retroactive offset.

Petitioners assert that Section 440.20(15) as interpreted in Grice should be applied retroactively to workers' compensation benefits owed but unpaid since August 1, 1989. They maintain that the case at bar is distinguishable from City of Miami v. Bell, 634 So.2d 163 (Fla. 1994), relied upon by the Court below in refusing to retroactively apply the Grice offset. They argue that the Grice decision did not alter the parties' vested rights because no prior decision had ever interpreted Section 440.20(15) in such a manner

as to allow the combination of Social Security, ILOD, and workers' compensation to ***exceed*** 100 percent of average weekly wage. Petitioners contend that because no prior judicial decision so construed Section 440.20(15), the retroactive application of Grice could not affect any vested contract rights.

Respondent disagrees. The rights of the members of the State Retirement System are declared by statute to be in the nature of contractual rights. Section 121.011(3)(d) provides, in relevant part:

> ...As of July 1, 1974, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way. (Emphasis added).

Ms. Pickard's rights, as a totally disabled state employee, to receive full ILOD benefits are certainly statutorily enabled rights. The Florida Retirement System benefits plan has been determined and declared by the Legislature to "fulfill an important State interest." Florida Statute 121.1001 note 1[1]. Florida

[1]Section 3, ch. 99-389, provides that "[t]he Legislature finds that a proper and legitimate state purpose is served when employees and retirees of the state and of its political subdivisions and the dependents, survivors, and beneficiaries of such employees and retirees, are extended the basic protections afforded by governmental retirement systems that provide fair and adequate benefits and that are managed, administered, and funded in an actuarially sound manner, as required by s. 14, Article X of the Florida Constitution and Part VII of chapter 112, Florida Statutes. Therefore, the Legislature hereby determines and

Workers' Compensation benefits, of course, have long been held to be contractual in nature. See Chamberlain v. Florida Power Corp., 198 So. 486 (Fla. 1940); Stuyvesant Corp. v. Loaterhouse, 74 So.2d 554 (Fla. 1954).

To the extent that Grice is applied to reduce benefits payable to disabled state employees it impairs such rights which were otherwise vested, but for the Grice decision.

And as the DCA pointed out below, even Grice itself, was not retroactively applied. (See Exhibit 4 to Petitioners' Appendix, page 2).

It should also be noted that Section 440.15(13), Florida Statutes (Supp. 1994) and the case of Brown v. L.P. Sanitation, 689 So.2d 332 (Fla. 1st DCA 1997), both predated the Grice decision.

Nevertheless, petitioners' argue retrospective application of Section 440.15(13) is appropriate because it is a procedural enactment. As a general proposition, respondent agrees. However, because it is procedural, it cannot afford and should not be interpreted to afford substantive authority to further expand Grice.

Respondent concedes that the DCA allowed the employer/carrier in Brown to recoup payments prior to the date the employer/carrier

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declares that the provisions of this act fulfill an important state interest."

first asserted its offset in August 1994. However, the employer/carrier in Brown did not seek to recover overpayments made commencing September 1992, when Brown first became eligible for Social Security. Petitioners have no explanation for this apparently anomalous result.

Respondent suggests that the parties in Brown simply conceded the existence of an "overpayment," but the issue of the employer/carrier's ***entitlement*** to a ***retroactive offset*** needed to create the "overpayment" was never brought before the Court.

Moreover, as the JCC below observed, "overpayment presumes payment" and in this case there was no payment prior to September 13, 1996; and as the Court below observed, there was no prior case interpreting Section 440.20(15) as providing authority for reduction of workers' compensation as sought by the Escambia County Sheriff's Office, until Grice.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the decision of the District Court be affirmed in all particulars except as to the issue of supplemental benefits accrued prior to August 1, 1989; and as to that issue, respondent asks the Court to reverse and remand the cause for determination of amounts owed since August 1, 1989, with directions to exclude supplemental benefits accruing prior to August 1, 1989, from computation of offsets.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David A. McCranie, Esquire, One San Jose Place, Suite 21, Jacksonville, Florida 32257, by depositing same in the United States Mail, this ____ day of February, 2000.

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