IN THE SUPREME COURT OF FLORIDA

HRS DISTRICT II AND
ALEXSIS RISK MANAGEMENT,

CASE NO.: 96,801

Petitioners

vs.

ANN L. PICKARD,

Respondent
_____/

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

INITIAL BRIEF OF PETITIONERS,
HRS DISTRICT II and
ALEXSIS RISK MANAGEMENT

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STATEMENT OF THE CASE AND FACTS

Ann L. Pickard, the claimant in this workers' compensation case, is a 57-year-old woman (D.O.B.: 8/9/42) (R: 54) who was injured in an accident arising out of and in the course of her employment with the Department of Health and Rehabilitative Services ("HRS") on 9/23/86 (R: 33). At the time of her accident, her average weekly wage was $316.47, including the value of her employer-provided health insurance (R: 137).[1] She continued working for HRS following her accident, albeit part-time (R: 64), until 7/28/89 (R: 67).[2] At that point, both she and her doctors believed that she could no longer continue working (R: 67), and she therefore resigned her employment.

She thereupon applied for in-line-of-duty disability benefits pursuant to §121.091(4) Fla. Stat. (1985), and began receiving those benefits in August 1989. (R: 46). She also applied for social security disability benefits pursuant to 42 U.S.C. §423 and began receiving those benefits in January 1990 (R: 7). In

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[1]Petitioners initially disputed the amount of Pickard's average weekly wage, but did not challenge the JCC's determination in that regard in the district court, and do not do so here.

[2]Pickard initially testified that she continued to work until 7/23/90 or 7/28/90.(R:69). She later testified, however, that she was unsure whether she had retired in 1989 or 1990 (R: 70-71). Other records indicate that it was in fact 7/28/89 when she actually retired (R: 46), and the JCC so found (R: 116).

addition, she received annual cost-of-living adjustments to each of those benefits. Her in-line-of-duty disability cost-of-living adjustments were made in July each year[3], while her social security cost-of-living adjustments came in January each year. (Petitioners' supplement to the record on appeal, p. 1).

Other than medical benefits, the employer provided no workers' compensation benefits to Pickard following her resignation from employment in July 1989 (R: 116) because it contended that she had reached maximum medical improvement from her accident on 7/30/87 with a 0% impairment rating from Dr. Rohan (R: 34). Nine years later, on or about 10/17/96, Pickard filed a "Petition/Claim for Benefits" seeking, among other things, an award of "PTD [permanent total disability] from 7/30/89 to present plus supplementals." (R: 29). Prior to the actual filing of that petition, however, on 9/13/96 the employer had administratively accepted Pickard as permanently totally disabled (R: 40) and agreed that the onset date of her disability was 7/30/89 (R: 2, 42).

There was disagreement, however, over the precise amount of workers' compensation benefits owed to Pickard in view of her concurrent receipt of in-line-of-duty and social security disability benefits since August 1989. Relying upon §440.20(15),

[3] See §121.101, Fla.Stat.

Fla.Stat. (1985), and this Court's decision in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1st DCA 1997), the employer argued that Pickard's combined benefits, including her permanent total supplemental benefits[4] and cost-of-living adjustments, should be limited to 100% of her average weekly wage for all applicable periods. Pickard, on the other hand, contended that her workers' compensation benefits should not be affected at all by her receipt of the other disability benefits, at least for the past benefits due. The matter was initially heard by the judge of compensation claims ("JCC") on 7/3/97 (R: 1).

On 12/3/97, the JCC entered a preliminary order (R: 115-121) in which he found "nothing to distinguish this case from the facts of Grice." (R: 118). He therefore concluded that Pickard's permanent total supplemental benefits are subject to the 100% cap on employer-provided benefits imposed by §440.20(15):

> The First District Court of Appeals [sic] in City of North Bay Village v. Cook, 617 So.2d 753 (Fla. 1st DCA 1993), held unequivocally the permanent total supplement should be included in the calculation of a monthly wage cap for offset purposes. Accordingly, I find the permanent total supplement in this case is included in the Grice cap (R: 119-120). (Emphasis added).

[4] §440.15(1)(e), Fla. Stat. (Supp. 1986)

The 12/3/97 order from the JCC was not a final order, however, in that it did not purport to award any benefits. Rather, the decretal portion of the order was withheld pending an agreement of the parties as to the exact figures applicable. (R: 120).

On 1/21/98, Pickard filed a Motion for Clarification (R: 133-134) and a Motion for Oral Argument (R: 130-131). A hearing on the Motion for Clarification was held on 3/9/98 (R: 5-23), and on 3/10/98 the JCC issued the order on appeal (R: 136-143)(Appendix "2"). In that order, notwithstanding his continued observation that the facts in the case at bar are indistinguishable from those in Grice (R: 140), the JCC abandoned his previous position regarding inclusion of permanent total supplemental benefits within the cap imposed by §440.20(15), ruling instead:

> If the State retirement plan resembles the City retirement plan as discussed in the case of City of North Bay Village v. Cook, 617 So.2d 753 (Fla. 1st DCA 1993), the State Retirement Bureau may be entitled to an offset.
>
> * * *
>
> I conclude cost of living increases in the social security disability benefit, the Florida State Retirement Benefit, and the permanent total supplemental benefits are outside the scope of Grice. (R: 139-140).

He therefore determined that, based on the average weekly wage of $316.47 per week (R: 137), Pickard's permanent total disability benefits should be limited to $64.15 per week (R. 140). This

amount was determined by taking the AWW of $316.47 per week and subtracting from it both her initial social security disability benefit of $128.95 per week and her initial in-line-of-duty disability benefit of $123.37 per week. (R: 140). In addition to the $64.15 per week in permanent total benefits, however, the JCC required the employer to pay the full amount of Pickard's permanent total supplemental benefits for each applicable period (R: 141). The net effect of the JCC's order was to apply the 100% cap of §440.20(15) to the permanent total disability benefits owed since August 1, 1989. Excepted from that cap, however, were all of Pickard's permanent total supplemental benefits, as well as all cost-of-living adjustments to her in-line-of-duty and social security disability benefits.

A timely notice of appeal was filed by the employer on 3/16/98 (R: 145-146). Pickard cross-appealed the JCC's application of the §440.20(15) cap to any workers' compensation benefits owed since 8/1/89.

While this cause was pending before the district court, the court issued its decisions in Acker v. City of Clearwater, 23 Fla.L.Weekly D1970 (Fla. 1st DCA Aug. 17, 1998), rev. granted, 727 So.2d 903 (Fla. 1999); Hahn v. City of Clearwater, 23 Fla.L.Weekly D2120 (Fla. 1st DCA Sept. 9, 1998), rev. granted, 727 So.2d 903

(Fla. 1999); Rowe v. City of Clearwater, 23 Fla.L.Weekly D2120 (Fla. 1st DCA Sept. 9, 1998), rev. granted, 727 So.2d 903 (Fla. 1999); State, Department of Labor & Employment Security v. Bowman, 23 Fla.L.Weekly D2124(Fla. 1st DCA Sept. 11, 1998), rev. granted, 727 So.2d 904 (Fla. 1999); and Alderman v. Florida Plastering, 23 Fla.L.Weekly D2578 (Fla. 1st DCA Nov. 19, 1998), rev. granted, 732 So.2d 326 (Fla. 1999).

Based upon those decisions, on 7/19/99 (Appendix "3") the district court reversed the JCC's order to the extent that it failed to include within the cap those permanent total supplemental benefits being paid at the time of the "initial calculation" of the "offset:"

> When calculating the offset, a claimant's initial compensation rate and PTD supplemental benefits should be considered. Because the JCC's offset calculation fails to include the amount of PTD supplemental benefits to which claimant was first entitled in 1989 . . . we reverse the order only to such extent and remand with directions to recalculate the offset by including the 1989 supplemental benefit in the calculation.

24 Fla.L.Weekly at D1750.

The district court affirmed, however, the JCC's exclusion of all other cost-of-living adjustments from the §440.20(15) cap. 24 Fla.L.Weekly at D1749-1750. The district court also certified as

a question of great public importance the same question which it certified in Acker. 24 Fla.L.Weekly at D1750.

With respect to the cross-appeal, the district court reversed the order on appeal "to the extent that it allows the 100% AWW cap and resultant offset arising under §440.20(15) and Grice to be applied to benefits owed since August 1, 1989." 24 Fla.L.Weekly at D1750. "Because the effect of this new application is to reduce claimant's benefits," reasoned the district court, "we decline to apply it retroactively to August 1, 1989." 24 Fla.L.Weekly at D1750.

On 8/3/99, Petitioners filed in the district court a motion for rehearing or clarification and a motion for rehearing en banc with respect to the issue on cross-appeal. The motions for rehearing and rehearing en banc were denied by the district court on 10/15/99, although the court did write to clarify its original opinion, holding that "the offset is applicable to benefits paid on and after May 1, 1997, the date the Grice decision was released by the Florida Supreme Court." 24 Fla.L.Weekly at D2368. (Appendix "4")

On 10/21/99, Petitioners filed a timely notice to invoke the discretionary jurisdiction of this Court pursuant to Art. V, §3(b)(4), Fla. Const. Petitioners also filed simultaneously with

the district court a motion to stay the issuance of its mandate pending review of this cause in this Court. That motion was granted by the district court by order dated 11/4/99. On 10/26/99, this Court issued an order postponing its decision on jurisdiction, but ordering the filing of briefs on the merits.

SUMMARY OF ARGUMENT

The result reached by the First District Court of Appeal in its decision below allows Pickard to receive employer-provided disability benefits which exceed the wages she earned while she was working. Not only is such a result contrary to the longstanding policy in this state of encouraging injured workers to return to gainful employment following on-the-job accidents, it flies in the face of §440.20(15), Fla. Stat., and this Court's construction of that statute in Brown v. S.S. Kresge Company, 305 So.2d 191, (Fla.1974); Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989); and, more recently, Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997).

Moreover, by refusing to apply the §440.20(15) cap to workers' compensation benefits payable before May 1, 1997 (the date of this Court's Grice decision), the district court has misinterpreted this Court's decisions concerning the retrospective application of judicial decisions and has improperly interpreted §440.15(13), Fla. Stat.(Supp. 1994).

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO INCLUDE ANY OF THE COST-OF-LIVING ADJUSTMENTS TO PICKARD'S SOCIAL SECURITY OR IN-LINE-OF-DUTY DISABILITY BENEFITS WITHOUT THE 100% CAP MANDATED BY §440.20(15), Fla. Stat. (1985).

This Court has recently answered the question whether annual increases in permanent total supplement benefits are subject to the §440.20(15) cap on benefits. City of Clearwater v. Acker, 24 Fla.L.Weekly S567(Fla. Dec. 9, 1999). Still unanswered, however, are the questions whether cost-of-living adjustments to social security disability or in-line-of-duty disability benefits are subject to the cap. Petitioners respectfully submit that they are, notwithstanding this Court's holding in Acker.

A. JURISDICTION

In its July 19, 1999 opinion, the district court certified as a question of great public importance "the same question certified in Acker" 24 Fla.L.Weekly at D1750. That certified question involved only the employer's right to "recalculate" its "offset" to take into account annual increases in permanent total supplement benefits paid pursuant to §440.15(1)(e), Fla. Stat. The district court did not specifically certify, however, whether cost-of-living adjustments to other collateral disability benefits, to wit, social

security disability and in-line-of-duty disability, are subject to the cap. Nevertheless, this issue was adjudicated by the district court:

> This court has repeatedly held that offsets should not be recalculated based on annual increases in PTD supplemental benefits and cost-of-living adjustments. (Emphasis added).

24 Fla.L.Weekly at D1750.

It is clear that once this Court has jurisdiction it may, at its discretion, consider any issue affecting the case. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Jacobson v. State, 476 So.2d 1282 (Fla. 1985); Savoie v. State, 422 So.2d 308 (Fla. 1982). Accordingly, this Court should exercise its jurisdiction and reverse the district court on these points notwithstanding its Acker decision.

B. IN-LINE-OF-DUTY DISABILITY COST-OF-LIVING ADJUSTMENTS

Section 121.101(3), Fla. Stat.(1997), provides that in-line-of-duty disability benefits must be increased by a factor of 3%, compounded annually, on July 1 of each year. Notwithstanding this Court's holding in Acker, Petitioners respectfully submit that these cost-of-living adjustments must be included within the cap on benefits mandated by §440.20(15).

The operative question under §440.20(15) is whether such increased benefits are "employer-provided" benefits. If they are, then they are subject to the cap. Clearly, these are benefits provided by the employer. If the in-of-line-of-duty disability benefits themselves are "employer-provided" benefits, then the cost-of-living adjustments mandated by §121,101(3) are no less so. They should be included within the cap.

This Court's Acker decision does not compel a different conclusion. Section 440.15(1)(e), the statutory provision at issue in Acker, contains its own internal "cap" which limits the combination of permanent total and permanent total supplemental benefits to no more than 100% of the statewide average weekly wage. Section 121.101(3), on the other hand, contains no such internal cap. Therefore, there is no reason why these benefits should not be subject to the 100% cap mandated by this Court's construction of §440.20(15). Brown v. S.S. Kresge Company, 305 So.2d 191 (Fla. 1974); Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989); Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997).

C. SOCIAL SECURITY COST-OF-LIVING ADJUSTMENTS

When it takes an offset under 42 U.S.C. §424a, the Social Security Administration has determined that it must "recalculate"

the social security benefits owing to the claimant with each subsequent cost-of-living increase in the state workers' compensation benefit. Any other method would result in the claimant receiving more than 80% of his ACE - a direct contravention of Congressional intent. This Court should follow the same reasoning when considering the cap on benefits mandated by §440.20(15).

In SSR 82-68, the Social Security Administration specifically addressed the question of whether social security disability benefits could be <u>further</u> reduced after calculation of the <u>initial</u> offset because of an <u>increase</u> in a claimant's workers' compensation benefits. The Administration began its ruling by noting that cost-of-living adjustments to social security disability benefits are not subject to the general rule limiting combined benefits to 80% of the average current earnings:

> Clauses (7) and (8) of section 224(a) of the Act provide a specific exception to that provision. They allow Social Security benefit increases to be passed on to the beneficiary by precluding any subsequent monthly offset from reducing the Social Security benefit below the sum of the reduced benefit for the first month of offset and any subsequent increases in Social Security benefits.

SSR 82-68, ¶4.

The Social Security Administration then noted, however, that "there is no corresponding provision which would allow increases in the public disability [workers' compensation] benefit to be passed on to the beneficiary." (Emphasis added.) SSR 82-68. They then went on to rule:

> Section 224 of the Act or section 404.408(a) of the regulations, thus, does not authorize limiting offset to the first monthly amount of public disability benefits. In fact, the legislative purpose...is clearly contrary to that result. To apply offset on the basis of the first such award, reducing the excess over the 80 percent limitation, and then not readjusting on the basis of a later, increased award, would result in combined benefits that could substantially exceed the 80 percent limitation set forth in section 224(a)(1-6). The resulting payment of combined benefits in excess of predisability earnings was specifically disapproved in the original legislative history of the offset provision and has been subsequently reaffirmed by Congress. (Emphasis added).

SSR 82-68, ¶6.

The Social Security Administration further went on to hold:

> All increases in public disability [workers' compensation] benefit after offset is first considered or imposed should be considered in the computation of the DIB [disability insurance benefit] reduction and will result in the imposition of an additional offset where appropriate....Each subsequent increase in the public disability [workers' compensation] benefit after offset is imposed may result in a further reduction of Federal disability benefits. (Emphasis added).

SSR 82-68, ¶¶8-9.

Also see 20 CFR §404.408(k) and the example contained therein. Therefore, because the Social Security Administration has now concluded that cost-of-living adjustments to workers' compensation benefits must be taken into account in computing its offset, the courts of this state should likewise take such increases in social security benefits into account in calculating the amount of workers' compensation benefits owed.

II. THE DISTRICT COURT ERRED IN REFUSING TO APPLY §440.20(15) AND THIS COURT'S GRICE DECISION TO WORKERS' COMPENSATION BENEFITS OWED BUT UNPAID SINCE AUGUST 1, 1989

In its original opinion dated July 19, 1999, the district court declined to apply §440.20(15) and this Court's Grice decision "retroactively to August 1, 1989" because "the effect of this new application [Grice] is to reduce claimant's benefits . . . ." 23 Fla.L.Weekly at D1750. Although the district court indicated that the §440.20(15) cap could not be applied "retroactively to August 1, 1989," the court did not initially indicate when the cap could be applied. On motion for clarification, however, the district court held that the §440.20(15) cap could be applied only to benefits "paid on or after May 1, 1997, the date the Grice decision was released by the Florida Supreme Court." 24 Fla.L.Weekly at D2368. In this, Petitioners respectfully submit, the district court also erred.

A. JURISDICTION

This case is before the Court pursuant to a question certified by the district court as one of great public importance. Art. V, §3(b)(4), Fla.Const. Although the issue concerning the retroactive application of Grice was not certified by the district court, it is clear that once this Court has jurisdiction it may, at its

discretion, consider any issue affecting the case. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Jacobson v. State, 476 So.2d 1282 (Fla. 1985); Savoie v. State, 422 So.2d 308 (Fla. 1982). In addition, as discussed below, the district court's resolution of this issue conflicts with several previous decisions of this Court, to wit: City of Miami v. Bell, 634 So.2d 163 (Fla. 1994); Melendez v. Dreis & Krump Manufacting Company, 515 So.2d 735 (Fla. 1987); Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944). Accordingly, this Court should exercise its jurisdiction and reverse the district court on this point.

B. RETROSPECTIVE APPLICATION OF JUDICAL DECISIONS

The general rule concerning the application of judicial decisions in the area of civil litigation is that such decisions are to have retrospective as well as prospective application. International Studio Apartment Association, Inc. v. Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982). That is, generally speaking, unless declared by the opinion to have prospective effect only, the judicial construction of a statute will be deemed to relate back to the enactment of the statute. Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944). This rule applies with equal force in cases where the decision in question overrules a previous

judicial construction of the same statute. Melendez v. Dreis & Krump Manufacturing Company, 515 So.2d 735 (Fla. 1987).

An exception to the general rule applies, however, where a retrospective application of the overruling decision would affect vested contract rights. As stated by this Court in Strickland,

> Where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. (Emphasis added).

18 So.2d at 253.

These principles were at issue in a series of workers' compensation cases involving the City of Miami. In 1973, the City of Miami passed a local ordinance which restored to the City the complete, dollar-for-dollar credit for workers' compensation benefits against a public employee's pension benefits which had been taken away by the Florida Legislature's 1973 repeal of §440.09(4), Fla. Stat. (1953). The validity of that ordinance was subsequently upheld both by the Third and the First District Courts of Appeal. Hoffkins v. City of Miami, 339 So.2d 1145 (Fla. 3rd DCA 1976), cert. den., 348 So.2d 948 (Fla. 1977); City of Miami v. Knight, 510 So.2d 1069 (Fla. 1st DCA), rev. den., 518 So.2d 1276 (Fla. 1987). Nevertheless, because of "the recurrent nature of the

issue presented," the First District eventually certified the issue involved to this Court. Barragan v. City of Miami, 517 So.2d 99 (Fla. 1st DCA 1987).

In 1989, sixteen years after its enactment, this Court declared the ordinance invalid under sections 166.021(3)(c) and §440.21, Fla. Stat. (1987). Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989). (Notwithstanding this declaration, this Court, consistent with its previous holding in Brown v. S.S. Kresge Company, 305 So.2d 191 (Fla. 1974), also held that the combination of workers' compensation and pension benefits must not exceed 100% of the employee's weekly wage).

Because the ordinance had been adopted in 1973, the City for sixteen (16) years had apparently underpaid many of its workers based upon its reliance upon the ordinance, and in fact once the ordinance was declared invalid by this Court, many of these workers began to file claims seeking recoupment of the alleged underpayments. The question therefore arose as to the retroactive application of Barragan.

The first case to address this question was City of Daytona Beach v. Amsel, 585 So.2d 1044 (Fla. 1st DCA 1991). (It appears that the City of Daytona Beach had adopted a provision similar to the Miami ordinance in its pension fund). The First District held

that Barragan must be given a retroactive application and that the affected workers must be allowed to recoup any underpayments. In so doing, the district court held that the general rule regarding the retrospective application of judicial decisions, not the "vested rights" or "Strickland" exception, should apply. 585 So.2d at 1046.

The same result was reached by the First District in City of Miami v. Bell, 606 So.2d 1183 (Fla. 1st DCA 1992). In that case, the City, in reliance upon its ordinance and upon the contracts which it had negotiated with its employees, had reduced the claimant's monthly pension benefits dollar-for-dollar by the amount of his permanent total disability benefits for the period from 9/24/87 (the date permanent total disability commenced) until 8/1/89 (approximately two weeks after this Court denied rehearing in its Barragan decision). 606 So.2d at 1184. Relying upon its Amsel decision, the First District again held that Barragan must be given retroactive effect. Nevertheless, the district court certified to this Court the question whether the City was liable for penalties on the underpayments. 606 So.2d at 1189.

In City of Miami v. Bell, 634 So.2d 163 (Fla. 1994), however, this Court reversed the district court's decisions regarding the retroactive application of Barragan. This Court determined that

vested contract rights of the parties would be affected by a retrospective application of Barragan, and therefore the exception to the general rule should apply:

> The City's contracts with it employees recognized the City's right to an offset. To now hold the City liable for past offsets would effectively modify completed contracts without affording the City an opportunity to renegotiate the other terms of those contracts, such as salaries and benefits. When contractual rights are adversely affected in such a manner, we are reluctant to apply a decision retroactively.
>
> * * *
>
> To the extent the offset was taken prior to Barragan, City employees have received what their contracts called for when their rights vested.

634 So.2d at 166.

As stated above, this Court's Bell decision is distinguishable from the case at bar. In contrast to Barragan, Grice was a case of first impression. Grice did not declare invalid any ordinance or statute, nor did it overrule any previous construction of an ordinance or statute by this Court. Moreover, no prior decision had ever interpreted §440.20(15) in such a manner as to allow the combination of workers' compensation, social security disability, and disability pension benefits to exceed 100% of the AWW. Therefore, unlike Barragan, a retrospective application of Grice could not affect any vested contract rights.

Moreover, notwithstanding the district court's statements to the contrary, Petitioners herein have never set forth any argument "suggesting that Grice interpreted §440.20(15) in a manner contrary to existing law." 24 Fla. L. Weekly at D1750. Rather, Petitioners maintain that in Grice this Court interpreted §440.20(15) in a manner consistent with its prior decisions, i.e., capping all employer-provider benefits at 100% of the AWW.

In the case at bar, the unstated premise underlying the district court's refusal to apply the Grice holding to unpaid workers' compensation benefits from August 1, 1989 is that, prior to Grice, an injured worker had either a contractual or a statutory right to receive more than 100% of his AWW and that such a right was taken away by this Court. That premise is incorrect. Grice holds that an injured worker never had such a right to begin with, not that he had such a right which must be taken away.

Accordingly, the general rule concerning retrospective application of judicial decisions, not the exception, should apply. That is, the Grice holding should relate back to the time of the enactment of §440.20(15), Fla. Stat., in 1977. See Ch. 77-290, §5, Laws of Fla.

In addition to the foregoing, Petitioners respectfully submit the enactment of §440.15(13) supports their position on this issue.

C. THE ENACTMENT OF §440.15(13), FLA.STAT. (SUPP.1994), AND THE RETROSPECTIVE APPLICATION THEREOF

Prior to January 1, 1994, if an employee received a benefit under chapter 440 to which he was not entitled, it was presumed that an irrevocable gift had been made to the employee who received the overpayment. Such a presumption could be dissipated, however, upon proof that a "reasonable basis" existed for the overpayment. Belam Florida Corp. v. Dardy, 397 So.2d 756, 758 (Fla. 1st DCA 1981). With the enactment of §440.15(13), Fla. Stat. (Supp. 1994), that presumption was altered by the Florida Legislature effective January 1, 1994. Ch.93-415, §20, Laws of Fla. That section provides:

> If an employee has received a sum as an indemnity benefit under any classification or category of benefit under this chapter to which he is not entitled, the employee is liable to repay that sum to the employer or the carrier or to have that sum deducted from future benefits, regardless of the classification of benefits, payable to the employee under this chapter; however, a partial payment of the total repayment may not exceed twenty percent of the amount of the bi-weekly payment.

Thus, the legislature has now weighed in on this issue and has clearly expressed its intent not only that an injured worker should not receive more in disability benefits than the statutes allow, but that there should be no "gift presumption" in the event that an

overpayment does occur. Under the terms of this legislative amendment, any overpayment of compensation must be repaid by the employee, whether in a lump sum, or by way of a deduction from future benefits. Petitioners respectfully submit that this legislative amendment lends further support to their argument that this Court's construction of §440.20(15) should not be limited to benefits "paid on or after May 1, 1997." 24 Fla.L.Weekly at D2368.

1. Retrospective Application of Subsequent Legislative Amendments

In general, the substantive rights of the parties in a workers' compensation proceeding are governed by the law in effect on the date of the accident. Sullivan v. Mayo, 121 So.2d 424 (Fla. 1960). On the other hand, no party has a vested right in any particular procedure. McCarthy v. Bay Area Signs, 639 So.2d 1114 (Fla. 1st DCA 1994).

Thus, absent a clear expression of legislative intent that it do so, a subsequent legislative amendment affecting the substantive rights of the parties cannot be applied retrospectively. Fallschase Development Corporation v. Blakely, 696 So.2d 833 (Fla. 1st DCA 1997). On the other hand, an amendment which is "remedial" or "procedural" may apply retroactively even if there is no

expressed legislative intent that it do so. Snellgrove v. Fogazzi, 616 So.2d 527 (Fla. 4th DCA 1993).

The question therefore becomes whether §440.15(13) may be applied in a case where the accident occurred prior to its effective date. That question in fact has already been answered by the district court in Brown v. L.P. Sanitation, 689 So.2d 332 (Fla. 1st DCA 1997).

2. Retrospective Application of §440.15(13), Fla. Stat. (Supp. 1994).

In Brown, although the precise date of the claimant's accident is not recited, it is apparent from the opinion that it occurred no later than 1992, and possibly earlier. In any event, in September 1992, Brown became eligible for social security disability benefits, thereby entitling the employer/carrier, pursuant to §440.15(9), Fla. Stat., to reduce his workers' compensation benefits so that the combination of the two benefits did not exceed 80% of his average weekly wage. 689 So.2d at 333. Nevertheless, for reasons not apparent from the opinion, the employer/carrier did not begin taking its offset until August 1994. 689 So.2d at 333.

When the employer/carrier finally commenced its offset in August 1994, they relied upon §440.15(13) to reduce Brown's workers' compensation benefits by an additional amount in order to

record the overpayment of benefits which had occurred between January 1994 [the effective date of §440.15(13)] and August 1994. 689 So.2d at 333. For reasons not explained by the opinion, the employer/carrier did not attempt to recoup any overpayments for periods before January 1994. 689 So.2d at 333. Nevertheless, Brown challenged the application of §440.15(13) to an accident occurring before its effective date. The JCC ruled, however, and the district court agreed, that §440.15(13) "is a procedural enactment because it affects a burden of proof or mode of procedure and therefore is applicable to the Claimant's date of accident." 689 So.2d at 333. The district court added that §440.15(13), which dissipates the former gift presumption, "does not rule out proof that a payment was a gift rather than an indemnity benefit." 689 So.2d at 333. Therefore, the district court added:

> Abolition of this rebuttable presumption changed only the procedural means and methods of establishing entitlement to benefits or offsets which flow from substantive rights that have remained unchanged since the date of Mr. Brown's industrial accident.

689 So.2d at 333.

In the case at bar, the district court concluded that the Grice holding could be applied only to benefits paid after May 1, 1997 "because section 440.15(13) . . . was amended to require claimant to repay any benefit to which he or she is not entitled,

and Grice provided the necessary authority for applying the one hundred percent AWW cap . . . .” 24 Fla.L.Weekly at D2368. Petitioners respectfully disagree.

First, it is well-settled that an appellate court is generally required to apply the law in effect at the time of its decision. Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986). At the time of the decisions of both the JCC and the district court, §440.15(13) and this Court’s Grice decision were already in existence.

Moreover, although the employer/carrier in Brown did not attempt to recoup any overpayments it made before January 1, 1994, given the district court’s holding that §440.15(13) is a procedural enactment, there is no reason why it could not have done so. Accordingly, in the case at bar, §440.15(13) provides further authority for the proposition that Pickard should not be allowed to keep and in fact should be required to “repay” the “overpayment” of compensation which would result if full workers’ compensation benefits were paid retroactively to 8/1/89 without regard to this Court’s Grice decision. At a bare minimum, this statute would require the repayment of any overpayment of compensation occurring after 1/1/94.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the decision of the district court should be quashed and the cause remanded with directions to reevaluate the workers' compensation benefits owed in this case to include all cost-of-living adjustments to Pickard's social security and in-line-of-duty disability benefits within the 100% cap on employer-provided benefits mandated by §440.20(15) and that such cap should be imposed on all workers' compensation benefits owed since August 1, 1989.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to R. Jeremy Solomon, Esquire, P. O. Box 13937, Tallahassee, Florida, 32317 by U.S. Mail this _____ day of February, 2001.

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