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

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

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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).

In support of her position that cost of living adjustments to in-line-of-duty disability benefits should not be subject to the §440.20(15) cap, Respondent relies upon the First District's decision in State, Department of Insurance v. Herny, 24 Fla.L.Weekly D2467 (Fla. 1st DCA Oct. 29, 1999). Obviously, that decision is not controlling because Herny certified to this Court the very issue being discussed herein. Review is pending in that case in this Court's case number 96,962.

Moreover, as stated in Petitioner's initial brief, Acker does not compel a different result. §440.15(1)(e), Fla. Stat., the statutory provision at issue in Acker, contains its own internal "cap" which limits the combination of permanent total and permanent total supplement 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, Inc., 305 So.2d 191 (Fla. 1974); Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989).

In addition, Respondent makes the rather astounding argument that SSR 82-68 "does not apply to workers compensation benefits in Florida." (Answer Brief p.11). That is clearly not the case. The very title of that ruling indicates that it concerns "inclusion of increases in workers' compensation and certain other public disability benefits in computing offset." (Emphasis added). Also see 20 CFR §404.408(k) and the examples contained therein.

II. (AS STATED BY RESPONDENT) THE FIRST DCA ERRS WHEN IT DIRECTS THE JCC TO ALLOW THE PETITIONERS TO INCLUDE IN THEIR "INITIAL CALCULATION" SUPPLEMENTAL BENEFITS PAYABLE IN 1989.

Pickard's argument on this issue has not be preserved for review and is not properly before this Court. Because Pickard seeks affirmative relief from the First District's decision, she should have filed a notice of cross-appeal if she wanted such relief from this Court.

The function of a cross-appeal is to call into question error in the judgment appealed which, although substantially favorable to the respondent, does not completely accord the relief to which she believes herself entitled. Webb General Contracting v. PDM Hydrostorage, Inc., 397 So.2d 1058 (Fla. 3d DCA 1981). Such error may not be raised in an answer brief where no notice of cross-appeal has been filed. Nealy v. City of West Palm Beach, 442 So.2d 273 (Fla. 1st DCA 1983). In addition, this Court has recently refrained from addressing this very issue where it considered that the issue was not properly before it. City of Clearwater v. Acker, 24 Fla.L.Weekly S567 (Fla. Dec.9, 1999). Likewise, the Court should refrain from addressing the issue in the case at bar.

Even if the Court chooses to address the issue, however, Petitioners respectfully submit that the district court did not err as alleged and that the challenge should be rejected on its merits.

The position urged by Pickard on this point is directly contrary to the First District's holding in City of North Bay Village v. Cook, 617 So.2d 753 (Fla. 1st DCA 1993). It is also directly contrary to another more recent decision from the First District, to wit: Department of Transportation v. Johns, 23 Fla.L.Weekly D2519 (Fla. 1st DCA Nov. 10, 1998), approved, 25 Fla.L.Weekly S49 (Fla. Jan. 20, 2000). In addition, there are sound policy reasons underlying the decision to include permanent total supplemental benefits within the 100% cap on benefits mandated by §440.20(15).

First, there is the matter of stare decisis. As stated above, the position urged by Pickard is directly contrary to a decision on the same point of law which was decided by the First District seventeen years ago. Yet, Respondent does not even cite the Cook decision in her brief. As Justice Harding has observed in State v. Shoppe, 653 So.2d 1016 (Fla. 1995):

> The doctrine of stare decisis provides stability to the law and to the society governed by that law. While no one would advocate blind adherence to prior law, certainly a change from that law should be principled. Where a rule of law has been adopted after reasoned consideration and then strictly followed over a course of years, the rule should not abandoned without a change in the circumstances that justified its adoption.

653 So.2d at 1023 (Harding, J., dissenting).

As in most other areas of the law, stare decisis is vitally important in the field of workers compensation jurisprudence. Uncertainty in this area of the law tends to promote rather than deter litigation and conflicts with the oft-cited maxim that our workers' compensation act is to be a "self-executing system." Florida Erection Services, Inc. v. McDonald, 395 So.2d 203 (Fla. 1st DCA 1981).

Second, the legislature has at least tactily given its approval to the inclusion of permanent total supplemental benefits within the §440.20(15) cap. When a statute is re-enacted, the legislature is presumed to have an awareness of the judicial construction placed upon the re-enacted statute, and to have adopted that construction, absent a clear expression to the contrary. Sam's Club v. Bair, 678 So.2d 902 (Fla. 1st DCA 1996). As the Second District Court of Appeal explained in Deltona Corporation v. Kipnis, 194 So.2d 295 (Fla. 2d DCA 1967):

> [W]here a statute is re-enacted, and the judicial construction thereof presumed to have adopted in the re-enactment, the courts are barred and precluded from changing the earlier construction.

194 So.2d at 297.

Since the Cook decision in 1983, §440.20(15) has been re-enacted without change every two years. See §11.2421,

Fla.Stat.(1997). Thus, the legislature has given its approval to the First District's holding in Cook. Any change in the construction of that statute should therefore come by way of legislative amendment. In fact, during the 1998 and 1999 sessions of the Florida legislature, bills were introduced in both houses which would have reached precisely the result urged by Pickard herein. See Fla. HB 4781 (1998) and Fla. CS for SB 1092 (1998); SB 1166 (1999). None of these bills was enacted into law. It is therefore evident that the legislature has approved the judicial construction placed upon §440.20(15) by the Cook case, and therefore any change in that regard should come from that body.

Third, the statutory construction of §440.20(15) urged by Pickard is directly contrary to that urged by the applicable state agency. It is well settled that an agency's interpretation of a statute that it is charged with enforcing is entitled to great deference and will be approved by this Court unless it is clearly erroneous. Bellsouth Telecommunications, Inc. v. Johnson, 708 So.2d 594 (Fla. 1998). Stated another way, if the agency's construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute. Smith v. Crawford, 645 So.2d 513 521 (Fla. 1st DCA 1994).

The Department of Labor, Division of Workers' Compensation, is the agency charged with implementation of Chapter 440, our workers' compensation statute. Purcell v. Padgett, 658 So.2d 1237 (Fla. 1st DCA 1995). The Division of Workers' Compensation filed an amicus brief in Acker supporting the petitioners' position. Also see State, Department of Labor & Employment Security v. Bowman, 23 Fla.L.Weekly D2124 (Fla. 1st DCA Sept. 11, 1998). Accordingly, unless that interpretation is clearly erroneous, it should be approved by this Court.

Finally, the position urged by Respondent is at odds with one of the basic notions underlying Chapter 440 itself - that of encouraging injured workers to return to work. By paying the worker more than what he earned while he was working, that incentive is removed entirely.

III. 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

Respondent argues that application of this Court's Grice decision to benefits owed but unpaid since August 1, 1989 is impermissible because such an application would affect her vested contract rights. Petitioners disagree.

Citing §121.011(3)(d), Fla. Stat., Respondent argues that her in-line-of-duty disability benefits are a contractual right and that she is therefore entitled to "full ILOD benefits." (Answer Brief, p.15). Petitioners do not disagree. In fact, under the construction of §440.20(15) urged by Petitioners, Pickard's in-line-of-duty disability benefits would not be reduced by one cent.

Petitioners do disagree, however, with Pickard's implied assertion that she is entitled to a combination of in-line-of-duty, social security, and workers' compensation benefits which exceed 100% of her average weekly wage. She has no such contractual or statutory right.

Petitioners respectfully reiterate that the general rule concerning the retrospective application of judicial decisions should apply in this case because the criteria for application of the exception to that rule are not present.

First, Grice does not expressly state that it is to have prospective effect only. Therefore, the judicial construction of §440.20(15) contained in Grice should relate back to the enactment of the statute. Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944).

Second, Grice was not an "overruling" decision. As stated in the initial brief, Grice did not overrule any previous decision of this Court. Rather, Grice was consistent with this Court's previous decisions which capped all employer-provided benefits at 100% of the average weekly wage.

Third, even if Grice had overruled a prior decision of this Court, retrospective application would not be prohibited because it would not affect any of Pickard's vested rights. As stated above, no contract, court decision, or statute has ever guaranteed an injured worker a right to receive a combination of workers' compensation, social security disability, and in-line-of-duty benefits which exceed the wages he earned while he was working.

CONCLUSION

For the foregoing reasons, and for those expressed in the initial brief, Petitioners respectfully submit that the decision of the district court should be quashed and the cause remanded with directions to recalculate 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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