IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA and
DEPARTMENT OF INSURANCE,
DIVISION OF RISK MANAGEMENT

Petitioners

CASE NO.: 96,962

vs.

RICHARD HERNY,

Respondent.
_____/

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

INITIAL BRIEF OF PETITIONERS

McCRANIE & LOWER, P.A.
DAVID A. MCCRANIE
One San Jose Place, Suite 32
Jacksonville, Florida 32257
(904) 880-1909
Fla. Bar No. 351520
Attorney for Petitioners

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STATEMENT OF THE CASE AND FACTS

Richard Herny, the claimant in this workers' compensation case, is a 65-year-old man (DOB: 4/28/34) (R: 38)[1] who was injured in an accident arising out of and in the course of his employment with the Florida Department of Transportation ("DOT") on 9/9/87 (R: 31). The employer provided him with temporary total disability benefits[2] following his accident. Effective 5/4/92, the employer began paying permanent total disability and permanent total supplemental benefits pursuant to §440.15(1) and (1)(e), Fla. Stat. (1987). (R: 188). His average weekly wage at the time of the accident was $433.70 (R: 37).[3] In addition to his workers' compensation benefits, Herny became eligible for social security

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[1] At the time of his accident, Herny was 53 years old.

[2] §440.15(2)(a), Fla. Stat. (1987).

[3] At various times following this accident, differing figures for the average weekly wage have been used. Initially, based upon the notice of injury, the employer calculated the average weekly wage at $345.69 (R: 170). Thereafter, based upon the 13-week wage statement (R: 222), the average weekly wage was recalculated to $343.80. On 5/21/92, the value of Herny's retirement and life insurance benefits were added to the average weekly wage, bringing the total to $389.82 (R: 170). On 4/7/98, the value of Herny's sick and annual leave were added to the average weekly wage, bringing the total to $432.82 (R: 169, 220). At the mediation conference held on 9/30/98, the parties agreed that the average weekly wage is $433.70. (R: 36-37).

disability benefits[4] as a result of his industrial accident. Those benefits were awarded effective December 1987 (R: 145-149, 244).[5] His initial benefit, before any cost-of-living adjustments, was $674.70 per month (R: 244), or $156.91 per week.[6] By January 1994, cost-of-living adjustments had brought these benefits to $848.00 per month (R: 148), or $197.21 per week.

In addition to his workers' compensation and social security disability benefits, because Herny was an eligible employee of the State of Florida, he also became eligible for "in-line-of-duty" disability benefits[7] as a result of the injuries he sustained in

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[4] 42 U.S.C. §423.

[5] The report from the Social Security Administration dated 7/16/98 erroneously indicated that those benefits commenced in December 1997 (R: 145). Other records indicate, however, that the correct commencement date was December 1987 (R: 146-149, 244).

[6] Throughout this brief, monthly benefits will be converted to weekly benefits by dividing the monthly benefit amount by 4.3. This method of calculation was approved by the First District Court of Appeal in Great Atlantic & Pacific Tea Company v. Wood, 380 So.2d 558 (Fla. 1st DCA 1980).

[7] Under §121.091(4)(a), Fla. Stat. (1987), a member of the Florida Retirement System who becomes permanently totally disabled because of an injury suffered in the line of duty is eligible for a monthly disability benefit "regardless of service." [A member suffering from a disability not "in the line of duty" is eligible for a monthly benefit only after completion of 5 years of creditable service. §121.091(4)(a), Fla. Stat. (1987)]. A "disability in line of duty" is "an injury or illness arising out of and in the actual performance of duty required by a member's employment . . ." §121.021(13), Fla. Stat. (1987). For purposes of §121.091(4), a member is considered totally and permanently

the industrial accident (R: 128). He began receiving those benefits in September 1989 (R: 128).

Herny's initial in-line-of-duty disability benefit was $565.31 per month (R: 129), or $131.47 per week. Each July 1, recipients of in-line-of-duty disability benefits are entitled to cost-of-living adjustments to those benefits in the amount of three percent (3%), compounded annually.[8] In addition to cost-of-living adjustments, Herny received a health insurance subsidy from the State of Florida pursuant to §112.363, Fla. Stat. (1987), in the amount of $36.27 per month (R: 134).[9]

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disabled if he is prevented, by reason of a medically determinable physical or mental impairment, from rendering "useful and effective service" as an officer or employee. See §121.091(4)(b), Fla. Stat. (1987).

[8] Under §121.101, the initial cost-of-living adjustment is derived by dividing the number of months the member has received an initial benefit by 12, and multiplying the result by 3. See §121.101(3)(a), Fla. Stat. (1987). Thereafter, cost-of-living adjustments amount to three percent (3%) of the benefit, compounded annually each July 1. See §121.101(3)(d), Fla. Stat. (1987).

[9] Under §112.363, for periods from 1/1/91 through 12/31/98, an eligible employee receives a health insurance subsidy payment equal to his number of years of creditable service, multiplied by $3.00. See §112.363(3)(c), Fla. Stat. (R: 134). Herny had 12.09 years of creditable service (R: 134). Thus, for the periods pertinent to this appeal, Herny would have received $36.27 (12.09 x $3.00) in health insurance subsidy benefits. Effective 1/1/99, his health insurance subsidy would have increased to $60.45 (12.09 x $5.00). See §112.363(3)(d), Fla. Stat. Thus, by 1/1/94, Herny's total in-line-of-duty disability benefit, including all cost-of-living adjustments and the health insurance subsidy, was $669.43 per month (R: 39, 186, 243).

Beginning on 11/17/88 (R: 181), while Herny was still receiving temporary total disability benefits, the employer began reducing those benefits pursuant to §440.15(9), Fla. Stat., so that the combination of those benefits and his social security disability benefits did not exceed 80% of his average weekly wage.[10]

On 1/1/98, pursuant to §440.20(15), Fla. Stat. (1987), and this Court's decision in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997), the employer made a further reduction in Herny's workers' compensation benefits so that the combination of those benefits, his social security disability benefits, and his in-line-of-duty disability benefits did not exceed 100% of his average weekly wage (R: 185). On 4/7/98, this reduction was calculated retroactively to 1/1/94, the effective date of §440.15(13), Fla. Stat. (Supp. 1994) (R: 189).

On 3/25/98, Herny filed a petition for benefits, contending that the employer's reduction in his workers' compensation benefits was improper (R: 27-28). A hearing was held on that petition on 11/2/98 (R: 3-24).

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[10] At that time, the employer was using an average weekly wage of $343.80 so that the total workers' compensation benefits paid amounted to $118.13 per week (R: 181-182) [$118.13 + $156.91 = $275.04, or 80% of $343.80].

On 12/22/98, the Judge of Compensation Claims ("JCC") entered the order on appeal (R: 263-273) (Appendix "1"). In that order, the lower court concluded that the following benefits were subject to the §440.20(15) ("Grice") cap: (1) Herny's permanent total disability benefits; (2) those permanent total supplemental benefits owed to Herny as of 5/4/92 ($72.30); (3) Herny's initial social security disability benefit of $156.71 per week; and (4) Herny's initial in-line-of-duty disability benefit of $565.31 per month ($131.47 per week) (R: 269). In other words, to the extent that the combination of those benefits exceeded 100% of the average weekly wage, Herny's workers' compensation benefits could be reduced accordingly. In addition, the lower court concluded that this cap would be effective for benefits payable on and after 1/1/94 (R: 271).

On the other hand, the lower court also concluded that: (1) no subsequent increases in permanent total supplemental benefits beyond those owing as of 5/4/92 are subject to the cap; (2) no cost-of-living adjustments to social security disability benefits are subject to the cap; (3) no cost-of-living adjustments to in-line-of-duty disability benefits are subject to the cap; and (4) none of Herny's health insurance subsidy is subject to the cap.

(R: 269-270). The employer filed a timely notice of appeal on 1/12/99 (R: 274-275).

On 10/29/99, the First District Court of Appeal affirmed the decision of the lower court in its entirety (Appendix “2"). In its opinion, the district court of appeal certified two questions as ones of great public importance. The employer filed a timely notice to invoke the discretionary jurisdiction of this Court on 11/5/99. On 12/9/99, this Court issued its decision in City of Clearwater v. Acker, et al, 24 Fla. L. Weekly S567 (Fla. Dec. 9, 1999), in which it answered one of the certified questions posed by the district court in the case at bar.

SUMMARY OF ARGUMENT

The district court erred in failing to include any of the cost-of-living adjustments to Respondent's social security disability and in-line-of-duty disability benefits within the cap on benefits mandated by §440.20(15). This failure will result in the Respondent receiving substantially more than 100% of his average weekly wage in employer-provided benefits. This result provides a financial disincentive to returning injured employees to work - one of the primary goals of our workers' compensation act.

Likewise, the district court erred in refusing to make the Respondent's health insurance subsidy subject to the cap. The health insurance subsidy is a cash benefit which Respondent would not be receiving but for his disability. There is therefore no reason to exclude this benefit from the cap.

The district court further erred by including only five (5) years of permanent total supplemental benefits within the cap. At a bare minimum, the "initial calculation" of the offset would have occurred in 1994, thus mandating that seven (7) years of permanent total supplemental benefits be included.

ARGUMENT

I. THE JCC AND THE DISTRICT COURT ERRED IN REFUSING TO INCLUDE ANY COST-OF-LIVING ADJUSTMENTS TO HERNY'S SOCIAL SECURITY DISABILITY AND IN-LINE-OF-DUTY DISABILITY BENEFITS IN THE CAP ON BENEFITS MANDATED BY §440.20(15), FLA. STAT. (1987).

Both the JCC and the district court held that none of the cost-of-living adjustments to Herny's social security disability and in-line-of-duty disability benefits are subject to the cap on benefits mandated by §440.20(15). The district court did, however, certify that question to this Court as one of great public importance. Petitioners respectfully submit that the JCC and the district court erred in their conclusion.

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

§121.101(3), Fla. Stat., provides that in-line-of-duty disability benefits must be increased by a factor of three percent (3%), compounded annually, on July 1 of each year. Notwithstanding, this Court's holding in City of Clearwater v. Acker, 24 Fla. L. Weekly S567 (Fla. Dec. 9, 1999), 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-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.

Nor does the fact that these benefits were intended as a partial hedge against inflation change the result. The same argument could be made with respect to the underlying benefits themselves. The failure to include these benefits within the statutory cap thwarts one of the primary goals of our Workers' Compensation Act - to provide an incentive for disabled workers to return to work.

Moreover, this Court's Acker decision does not compel a different conclusion. §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. §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).

B. 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 following 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 further reduced after calculation of the initial offset because of an increase 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, paragraph 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 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 eighty percent limitation, and then not readjusting on the basis of a later, increased award, would result in combined benefits that could substantially exceed the eighty 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, paragraph 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, paragraph 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 JCC AND THE DISTRICT COURT ERRED IN REFUSING TO INCLUDE THE HEALTH INSURANCE SUBSIDY WITHIN THE CAP ON BENEFITS MANDATED BY §440.20(15).

Both the JCC and the district court concluded that the health insurance subsidy provided by §112.363, Fla. Stat., is not subject to the cap on benefits mandated by §440.20(15). Petitioners respectfully submit that the JCC and the district court erred in so concluding.

A. JURISDICTION

This case is before the court pursuant to questions certified by the district court as ones of great public importance. Art. V, §3(b)(4), Fla. Const. Although the issue concerning the health insurance subsidy 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). Accordingly, this Court should exercise its jurisdiction and reverse the district court on this point.

B. THE HEALTH INSURANCE SUBSIDY

At all times pertinent to this appeal, Herny received an additional $36.27 per month from the State of Florida in the form of a health insurance subsidy. The purpose of the health insurance subsidy is to provide a monthly subsidy payment to retired members of the Florida Retirement System in order to assist such members with the paying of the cost of health insurance. See §112.363(1), Fla. Stat. The JCC concluded that this subsidy was not a "collateral benefit" because the legislature did not specifically indicate that this benefit was subject to the §440.20(15) cap. (R: 270-271). The district court affirmed the JCC's exclusion of this benefit from the cap on the grounds that it is not intended as a "disability benefit." 24 Fla. L. Weekly at D2468. State, Department of Insurance v. Herny, 24 Fla. L. Weekly D2467 (Fla. 1st DCA Oct. 29, 1999). Petitioners respectfully submit that both the JCC and the district court erred.

The courts of this state have long held that the combination of all employer-provided benefits following a compensable accident should be limited to 100% of the average weekly wage. Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla. 1974), (the combination of workers' compensation and "sick leave" benefits provided by the employer should be limited to 100% of the average weekly wage). This holding was codified by the 1977 enactment of

§440.20(15) and has been affirmed by this Court as recently as 1997, when the Court held in Grice:

> We . . . hold 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% of his average weekly wage.

692 So.2d at 898.

The fact that §112.363 does not specifically state that this benefit is subject to the §440.20(15) is of no consequence. In fact, none of the benefits held by this Court to be subject to the cap contain such a provision. In addition, although state retirees are entitled to the health insurance subsidy regardless of disability, the fact remains that this retiree (Mr. Herny) receives the cash subsidy for no other reason than that he is disabled. But for his in-line-of-duty disability, the respondent herein would not receive the health insurance subsidy.

The health insurance subsidy is an "employer-provided" benefit just as the workers' compensation, social security, and in-line-of-duty disability benefits are. The fact that the health insurance subsidy is specifically targeted to assist in the purchase of health insurance for disabled and retired workers does not make it any less so. The benefit provided by §112.363 is a cash benefit,

and notwithstanding its intended purpose, there is no requirement that the recipient spend the money on health insurance.

III. THE JCC AND THE DISTRICT COURT ERRED IN ALLOWING ONLY FIVE YEARS OF PERMANENT TOTAL SUPPLEMENTAL BENEFITS TO BE SUBJECT TO THE §440.20(15) CAP INSTEAD OF SEVEN YEARS OF SUCH BENEFITS.

Under the district court's scheme, those permanent total supplemental benefits being paid at the time of the "initial calculation" of the "offset" are included within the §440.20(15) cap. Subsequent increases in those benefits, however, are not subject to the cap. The question of when the "initial calculation" occurs therefore becomes critical.

In the case at bar, the JCC concluded that five (5) years of permanent total supplemental benefits, or $72.30 per week, must be included within the cap. In other words, those permanent total supplemental benefits payable on 5/4/92, the date of the commencement of Herny's permanent total disability, must be included within the cap. (R: 269-270). Yet, the lower court concluded that the §440.20(15) cap could not be imposed on benefits payable before 1/1/94 (R: 271). The district court of appeal affirmed the JCC's order in its entirety. In this, Petitioners respectfully submit, both the JCC and the district court erred.

A. JURISDICTION

This case is before the court pursuant to questions certified by the district court as ones of great public importance. Art. V, §3(b)(4), Fla. Const. Although the issue concerning the health insurance subsidy 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). Accordingly, this Court should exercise its jurisdiction and reverse the district court on this point.

B. THE "INITIAL CALCULATION" SHOULD HAVE INCLUDED SEVEN (7) YEARS OF PERMANENT TOTAL SUPPLEMENTAL BENEFITS, NOT FIVE (5) YEARS

It is undisputed that the Petitioners did not attempt to apply the §440.20(15) cap to Herny's benefits in this case until 1/1/98 (R: 185) and that on 4/7/98 petitioners applied that cap retroactively to all benefits payable after 1/1/94 (R: 189). Therefore, at a minimum, under the district court's scheme, the "initial calculation" would have occurred on 1/1/94. Therefore,

those permanent total supplemental benefits payable as of that date ($101.22)[11] should have been subject to the cap.

[11] $433.70 x ⅔ x .05 x 7 = $101.22.

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 recalculate the workers' compensation benefits owed in this case to include all cost-of-living adjustments to Herny's social security and in-line-of-duty disability benefits, together with the health insurance subsidy, within the 100% cap on employer-provided benefits mandated by §440.20(15) and that such cap should also include seven (7) years of permanent total supplemental benefits.

Respectfully submitted,

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DAVID A. MCCRANIE, ESQUIRE
MCCRANIE & LOWER, P.A.
One San Jose Place, Suite 32
Jacksonville, Florida 32257
(904) 880-1909
Fla. Bar No. 351520

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Nancy L. Cavey, P. O. Box 7539, St. Petersburg, FL 33734-7539, attorneys for respondent, by U.S. Mail this _____ January, 2000.

_____
DAVID A. MCCRANIE
MCCRANIE & LOWER, P.A.