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

REPLY BRIEF OF PETITIONERS

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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).

Subsequent to the filing of the initial brief herein, this Court has issued its decisions in Florida Plastering v. Alderman, 25 Fla.L.Weekly S49 (Fla. Jan. 20, 2000); and Florida Department of Transportation v. Johns, 25 Fla.L.Weekly S49 (Fla. Jan. 20, 2000). In those cases, this Court answered the same question which it had answered in its decision in City of Clearwater v. Acker, 24 Fla.L.Weekly S567 (Fla. Dec. 9, 1999). The Court did not decide the question presented herein, to wit, whether cost-of-living adjustments to in-line-of-duty disability and social security disability benefits are subject to the cap on employer-provided benefits mandated by §440.20(15).

Petitioners respectfully submit that those decisions in no way control the outcome in the case at bar. Otherwise, Petitioners simply repeat and reiterate the argument presented in their initial brief as to this point.

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).

Petitioners restate and reiterate the argument presented in their initial brief with respect to this issue. As stated therein, Mr. Herny receives the health insurance subsidy mandated by §112.363 precisely because and for no other reason than that he is disabled. The fact that other retirees may also receive the same benefit is of no moment.

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.

Petitioners restate and reiterate the argument presented in their initial brief with respect to this issue. In addition, Petitioners respectfully submit that the Respondent and the JCC have misinterpreted the holding of the First District Court of Appeal in Brown v. L.P. Sanitation, 689 So.2d 332 (Fla. 1st DCA 1997).

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 specified in 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), Fla. Stat.(Supp. 1994), to reduce Brown's workers compensation benefits by an additional

amount in order to recoup 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. Accordingly, that issue was not before the court. Brown, therefore, did not hold that there could be no recoupment for overpayment of benefits occurring before January 1994.

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 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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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 _____ March, 2000.

_____
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