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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC14-1525

Hernando County Sheriff's Office/North American Risk Services,

Petitioners,

vs.

Stavros Sikalos, Jr.,

Respondent.

On Petition for Discretionary Review from
The First District Court of Appeal of Florida Case No. 1D13-4866

PETITIONER'S BRIEF ON JURISDICTION

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PETITIONER'S BRIEF ON JURISDICTION

The employer/carrier/petitioner, by and through their undersigned attorney and pursuant to Rule 9.120(d), Florida Rules of Appellate Procedure (Fla. R. App. P.), herewith files this brief on jurisdiction seeking discretionary jurisdiction of the Florida Supreme Court as described in Rule 9.030(a)(2)(A) Fla. R. App. P. A conformed copy of the decision of the Florida 1st District Court of Appeals for which discretionary jurisdiction is sought is attached hereto and referenced in the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

1. The facts in this matter are not in dispute. The parties stipulated to the relevant facts needed for judicial determination of the issues. The issue under consideration relates to a legal question as to the injured worker's entitlement to workers' compensation benefits when combined workers' compensation, disability pension benefits, and Social Security disability benefits exceed his average weekly wage.

2. The injured worker (Claimant/Respondent) was involved in an accident on the job. At the time of the accident, his average weekly wage was $851.27 and thus his compensation rate was $567.54 per week. As a result of his accident, the claimant also received $1,470.00 per month in Social Security

disability benefits and $2,530.81 per month in in-line-of-duty disability benefits. From all sources of benefits, the claimant was receiving $6,441.23 monthly or $1,497.96 per week ($6,441.23 dollars divided by 4.3). This weekly amount exceeds his average weekly wage of $851.27 by $646.69.

3. Petitioner sought to reduce the total amount of funds received by the claimant by reducing the claimant's workers' compensation benefits by sums exceeding his average weekly wage but allowing for the minimum payout of benefits of $20.00 as required by §440.12(2), Florida Statutes. The basis of the offset was the Supreme Court's decision in the case of Escambia County Sheriff's Department v. Grice, 692 So. 2d 896(Fla. 1997) (Grice offset). Claimant objected to the Grice offset to include the amounts received by the clamant in in-line-of-duty benefits since he had contributed 3% of the cost of such benefits. The claimant had been hired by the employer in 2003 at which time, the right to in-line-of-duty disability benefits was non-contributory, i.e., the employee's entitlement to such pension disability benefits was not paid for by the claimant. In 2011, the state retirement system was amended requiring a 3% contribution by employees participating in the state retirement system. The order sought to be reviewed determined that because of the 3% contribution by the claimant, the employer/carrier was entirely precluded from offsetting any sums received by the

claimant in such in-line-of-duty disability benefits, even for such benefits for which the claimant made no contribution to, i.e., 97% of the total in-line-of-duty disability benefits were non-contributory by the claimant.

SUMMARY OF ARGUMENT

4. The claimant is asserting that he is entitled to receive $646.49 more than he was making at the time of his accident (average weekly wage) in combined workers' compensation, Social Security, and state pension benefits. Petitioner is entitled to offset workers' compensation benefits for all combined sums being received by the employee in excess of his average weekly wage. This right to offset only applies to non-contributory pension benefits (i.e., benefits not paid for by the claimant) that were totally paid for by the employer/petitioner, i.e., 97% of the benefits being paid to the injured worker.

ARGUMENT

THE JCC ERRED IN NOT ALLOWING THE EMPLOYER/CARRIER/PETITIONER THE RIGHT TO OFFSET NON-CONTRIBUTORY COMBINED BENEFITS EXCEEDING THE CLAIMANT'S AVERAGE WEEKLY WAGE.

5. The District Court's opinion denying a Grice offset for in-line-of-duty disability benefits exceeding the claimant's average weekly wage for claimant's 97% of the employee non-contributory benefits is directly contrary to a line of

Supreme Court cases that preclude an injured worker from receiving combined benefits from various sources for a workplace injury that exceed the injured worker's average weekly wage as of the date of accident. Grice addressed the issue of whether an employee was allowed to total or stack the combination of workers' compensation, disability pension, and social security disability for sums in excess of the average weekly wage. The court found that the employer/carrier was allowed to offset the workers' compensation "to the extent his workers' compensation, disability retirement, and social security disability benefits exceed his average weekly wage." Id. at page 898. The court further noted "(o)nce the 100% cap has been reached, workers' compensation must be reduced pursuant to §440.20(15), Florida Statutes" (now §440.20(14), F.S.) and ". . . 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." Id. at page 898. The only limitation the court placed upon the offset was that the offset is allowed in all cases "except where expressly given such a right by contract" to receive benefits from his employer and other collateral sources which when totaled, exceed 100% of his average weekly wage (which is not the case in this instance). In summary, Grice concluded that to allow an injured worker to receive more in combined benefits

post-injury in a disabled status when compared to his earnings in a non-disabled condition at the time of his injury would be a violation of §440.20(14), Florida Statutes (previously §440.20(15), Florida Statutes).

In Barragan v. City of Miami, 545 So. 2d 252(Fla. 1989), the Supreme Court specifically stated that "The employer may not offset workers' compensation payments against an employee's pension benefits except to the extent that the total of the two exceed the employee's average monthly wage." At page 255. In the case of Brown v. S. S. Kresge Company, Inc., 305 So. 2d 191(Fla. 1975), the court stated that: " . . . it is reasonable to conclude that workers' compensation benefits when combined with sick leave insurance benefits provided by the employer should not exceed claimant's average weekly wage because under a logical interpretation of the IRC Rule 9 (substantially the same as §440.20(14), F.S.) when an injured employee receives the equivalent of his full wages from whatever employer source that should be the limit of compensation to which he is entitled." In Domutz v. Southern Bell Telephone & Telegraph Company, 339 So. 2d 636(Fla. 1976), the court stated that: ". . . the decisive factor (in determining an offset for combined benefits from different sources for a workplace injury) was not who had contributed to the plan, but rather whether the combination of the benefits from the employer exceeded the claimant's average

weekly wage." In Domutz, the claimant's combined benefits did not exceed the claimant's average weekly wage and accordingly, no offset was allowed.

In taking the offset in this case, it should be specifically noted that the petitioner is not seeking an offset against workers' compensation benefits for sums below the average weekly wage. It is only those sums in excess of the average weekly wage for which an offset is sought. The decisive factor in determining whether there should be an offset for combined benefits is whether the combination of benefits from the employer exceed the claimant's average weekly wage. General Telephone Co. of Florida v. Willcox, 509 So. 2d 1270(Fla. 1st DCA 1987); Dept of Highway Safety & Motor Vehicles, Division of Risk Management v. McBride, 420 So. 2d 897(Fla. 1st DCA 1982); Belle v. General Electric Co. , 409 So. 2d 182(Fla. 1st DCA 1982).

6. The lower court in this case cited the Supreme Court opinion in City of Hollywood v. Lombardi, 770 So. 2d 1196(Fla. 2000) as the basis for saying that where the claimant contributes toward the payment of in-line-of-duty disability benefits that §440.20(14), Florida Statutes, as interpreted by Grice would no longer apply; §440.21, Florida Statutes, would be implicated; and no offset could be taken even when considering the non-contributory disability benefits which were entirely paid for by the employer (i.e., 97% of the pension benefits). Contrary

to the court's decision below in this case, the claimant in Lombardi actually agreed that an offset could be taken on a pro rata basis taking credit for the contributions he made to the pension plan. See Footnote 18 of Lombardi, page 1206.

7. Appellant agrees with an interpretation of Lombardi that for pension benefits contributed to by the claimant, no Grice offset can be taken. That would be in violation of §440.21, Florida Statutes. What is not discussed in Lombardi, however, is the issue in this case where 3% of the pension plan is contributory and 97% is non-contributory, fully paid for by the employer. 97% of the pension plan was the responsibility of the employer, fully paid for by the employer, with no implication of §440.21, Florida Statutes. Accordingly, there would be no underlying statutory prohibition disallowing an offset for non-contributory benefits.

8. The 1st District Court of Appeal in Lombardi in its opinion in City of Hollywood v. Lombardi, 738 So. 2d 491(Fla. 1st DCA 1999) specifically responded to the issue that is the subject of this case and stated that if there was an employee contribution, the Grice offset would be allowed on a pro rata basis considering the contribution to the disability plan. Specifically, the 1st District Court of Appeal ruled at page 498:

Under the circumstances, we reverse and remand with instructions to

> determine whether claimant's disability pension has a provision comparable to that in *Barragan*. (There is none in this case allowing for the state pension plan to take an offset against sums below the average weekly wage.) If such a provision exists, we direct the E/SA to pay for workers' compensation benefits and to apply any offset arising from the AWW cap, as provided in Section 440.20(15) and *Grice*, to *Lombardi*'s disability retirement pension benefits. If, on the other hand, no such provision exists, then we direct the JCC to consider Section 440.21(1) and claimant's pro rata contributions to the disability retirement plan in determining any offset to workers' compensation benefits.

See also HRS, State of Florida v. Pascual, 785 So. 2d 509(Fla. 1st DCA 2000).

The Supreme Court in Lombardi specifically did not rule on the pro rata contribution directive of the lower court when the claimant does not pay for the entirety of the pension benefits, which is the issue in this case. The Supreme Court in Lombardi did not rule on this issue for two reasons. First, the reference to the Barragan decision above noted in the remand instructions from the lower court was determined by the Supreme Court to be an illegal contract. However, in looking at Barragan, there was a provision for an offset by the pension plan (not workers' compensation) which allowed for an offset dollar for dollar against pension benefits payable below the average weekly wage. In this instance, unlike Barragan, there is no such offset provision. No offset is being sought except for combined funds in excess of the claimant's average weekly wage consistent with

Grice. See page 1205 of the Lombardi decision. In addition, unlike Barragan, there is no issue in this case as to whether workers' compensation or the pension plan has the right to offset and which is primary. There is no offset provision in the state retirement program.

The second reason why the Supreme Court in Lombardi did not consider the pro rata contribution issue is that in Lombardi, the claimant actually agreed to the offset based on a pro rata basis. See Footnote 18, page 1206, Lombardi citing HRS v. Pascual, supra. This is exactly the petitioner's position in this instance.

9. Contrary to the lower court's findings and conclusions in this case and considering the stipulated facts, the issue in this instance was not discussed in Lombardi and no decision was made supporting the denial of a pro rata consideration of a Grice offset based upon the contributions being made by the employer/carrier/petitioner to the pension plan. Allowing for a pro rata offset giving credit to the claimant's contributions to the pension plan and also recognizing the employer's contributions has the effect of recognizing §440.21, F.S. (Lombardi) and §440.20(14), F.S. (Grice).

CONCLUSION

The injured worker should not be allowed to receive more benefits in a disabled status than he was making in wages at the time of the accident. Accordingly, a Grice offset should be allowed against workers' compensation benefits for combined sums received in excess of the average weekly wage. Grice, supra. Provided, however, if any of the disability pension benefits were paid by the injured worker, these amounts should not be subject to such an offset. Lombardi, supra. 97% of the disability pension benefits were paid by the employer exclusively. These benefits should be included in calculating the offset against sums in excess of the average weekly wage. Grice, supra. 3% of the disability benefits were paid by the claimant. These pension benefits should not be included in calculating the offset.

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type in this brief is 14 point Times New Roman, which complies with Rule 9.210(a)(2), Florida Rules of Appellate Procedure (2005).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document has been furnished by electronic mail to Michael J. Winer, Esquire, 110 North 11th Street, 2nd Floor, Tampa, FL 33602, on this 7th day of August, 2014.

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APPENDIX

Conformed copy of First District Court of Appeal Opinion dated June 25, 2014

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

HERNANDO COUNTY SHERIFF'S OFFICE/ NORTH AMERICAN RISK SERVICES,

Appellants,

v.

STAVROS SIKALOS, JR.,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D13-4866

Opinion filed June 25, 2014.

An appeal from an order of the Judge of Compensation Claims.
Ellen H. Lorenzen, Judge.

Date of Accident: December 1, 2011.

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Michael J. Winer of the Law Office of Michael J. Winer, P.A., Tampa, for Appellee.

PER CURIAM.

In this workers' compensation case, the Employer/Servicing Agent (E/SA) appeals an order of the Judge of Compensation Claims (JCC) denying an offset

asserted by the E/SA against Claimant's workers' compensation disability benefits. For the following reasons, we affirm the order on appeal.

Claimant, hired as a Deputy Sheriff in April 2003, suffered a compensable injury on December 3, 2011. He is receiving temporary total disability benefits under section 440.15(2), Florida Statutes (2011). His average weekly wage is $851.27, and thus his compensation rate is $567.54 per week. See § 440.15(2)(a), Fla. Stat. On account of his injury, Claimant is also receiving $1,470.00 per month social security disability benefits, and $2,530.81 per month in-line-of-duty disability benefits from the Florida Retirement System (FRS). The total disability benefits Claimant is receiving from all of the above sources for his compensable injury is $6,441.23 monthly, or $1,497.96 per week ($6,441.23 divided by 4.3 weeks). The weekly amount exceeds his average weekly wage of $851.27 by $646.69.

Because of the overage, the E/SA began taking an offset against Claimant's workers' compensation disability benefits on June 28, 2013, purportedly under the authority of Escambia County Sheriff's Department v. Grice, 692 So. 2d 896 (Fla. 1997), in which the Florida Supreme Court held 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." Grice, 692 So. 2d at 898. When that occurs, the supreme court held, the employer/carrier is entitled to offset the excess by reducing the

workers' compensation disability benefits accordingly. Id. The so-called "Grice offset" is determined by totaling the disability benefits a claimant receives from all sources (including workers' compensation), calculating a weekly total, and subtracting 100 percent of the claimant's average weekly wage. See Miami-Dade County v. Lovett, 888 So. 2d 136, 137 (Fla. 1st DCA 2004). Because the offset in the instant case exceeds the amount of workers' compensation disability benefits the E/SA otherwise would pay, the E/SA paid Claimant the statutory minimum amount of $20 per week. See § 440.12(2), Fla. Stat. (2012) ("Compensation for disability resulting from injuries which occur after December 31, 1974, shall not be less than $20 per week."). When Claimant challenged the offset, the JCC by summary final order excluded Claimant's in-line-of-duty disability benefits from the offset calculation because Claimant contributes to the pension fund supplying those benefits. Claimant's pension plan, the FRS, from which the in-line-of-duty disability benefits are paid, was fully employer funded until July 7, 2011, when, due to statutory changes, FRS members began contributing three percent (3%) of their salaries to fund the plan. See generally Scott v. Williams, 107 So. 3d 379 (Fla. 2013).

The JCC relied on City of Hollywood v. Lombardi, 770 So. 2d 1196 (Fla. 2000), and we affirm on the same authority. In Lombardi, the Florida Supreme Court wrote,

> [W]e hold that where the 'pension plan is funded at least in part with employees' contributions, decreasing workers' compensation benefits on account of pension benefits runs afoul of section 440.21, Florida Statutes (1993).' . . . Thus, once it is determined that the pension plan is funded with employees' contributions, workers' compensation benefits are primary and it is the pension fund that is entitled to the benefit of the offset. . . . Our holding should not be read to mean that in all other cases the workers' compensation fund automatically receives the benefit of the offset; rather, we hold only that where the fund is employee-contributory, it would violate section 440.21 for workers' compensation benefits to be reduced.

770 So. 2d at 1205 (quoting City of Hollywood v. Lombardi, 738 So. 2d 491, 498 (Fla. 1st DCA 1999)). Section 440.21, now as in 1993, invalidates "[a]ny agreement by an employee to pay any portion of premium paid by her or his employer to a carrier or to contribute to a benefit fund or department maintained by the employer for the purpose of providing compensation or medical services and supplies as required by this chapter." Under the supreme court's reasoning, offsetting workers' compensation benefits to account for collateral benefits a claimant receives from an employee-contributory pension plan is tantamount to requiring the claimant "to contribute to a benefit fund . . . maintained by the employer for the purpose of providing" workers' compensation benefits—a circumstance prohibited by section 440.21.

The E/SA argues section 440.21 does not apply to the situation here because the in-line-of-duty disability benefit fund—the FRS—is not maintained by the Employer (the county), but by the State. We decline to read such a distinction into

the statute, however, because doing so would create disparate results for claimants employed by state government entities and claimants employed by non-state government entities participating in the FRS. See §§ 112.021(10), (11); 112.051, Fla. Stat. (2012).

AFFIRMED.

BENTON, WETHERELL, and MARSTILLER, JJ., CONCUR.