

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2422

LOWER COURT CASE NO. 1D03-4547

JEROME LOVETT,

Petitioner,

v.

MIAMI-DADE COUNTY

Respondent.

RESPONDENT'S
BRIEF ON JURISDICTION

On Discretionary Review from the
Third District Court of Appeal
State of Florida

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PREFACE

Petitioner seeks to invoke this Court’s discretionary jurisdiction to review the First District Court’s decision in *Miami-Dade County v. Lovett*, Case No. 03-4547 (Fla. 1st DCA Nov. 30, 2004). For brevity, this Brief will refer to that decision as the “Opinion.” Petitioner argues that the Opinion expressly and directly conflicts with this Court’s decisions in *Escambia County Sheriff’s Department v. Grice*, 692 So.2d 896 (Fla. 1997), and *Dixon v. GAB Business Services*, 767 So. 2d 443 (Fla. 2000). These decisions will be abbreviated as *Grice* and *Dixon*. The Respondent has supplied all emphasis unless otherwise indicated.

For purposes of this Brief, the Petitioner, Jerome Lovett, will be referred to as “Lovett.” The Respondent, Miami-Dade County, will be referred to as the “County.”

STATEMENT OF THE CASE AND FACTS

The only facts relevant to this Court’s decision to accept or reject Lovett’s request for discretionary review are those facts contained within the four corners of the decision allegedly in conflict. *Reaves v. State*, 4485 So.2d 829, 830 (Fla. 1986).

Lovett was a County employee and suffered a compensable accident in June 1993 and thereafter was accepted as permanently and totally disabled. His

average weekly wage (AWW) is \$840.00, his compensation rate (CR) is \$425.00, 80% of his monthly average current earnings (ACE) is \$2,984.00, 80% of his weekly ACE is \$693.95, and his monthly AWW is \$3612.00 or \$3,640.00, depending on the calculation.

Lovett received \$265.05 per week in Social Security Disability (SSD) Benefits and \$1,600.38 per month in Florida Retirement System (FRS) in-line-of duty benefits. The County calculated an offset based on this Court's decision in *Grice*. It added Lovett's CR of \$425.00, his SSD benefit of \$265.05, and his FRS benefit of \$372.19, for a total of \$1,062.24, and then subtracted Lovett's \$840.00 AWW from the total benefits, which resulted in an offset of \$222.24. After the offset, Lovett's CR was reduced to \$202.76. This new CR, along with Lovett's FRS and SSD benefits, constituted the equivalent of 100% of his AWW.

Lovett filed a claim against the County and the JCC found, in pertinent part, that the County's calculation violated 440.15(9), Florida Statute, and *Dixon*. The First DCA overruled the JCC, finding that the JCC misapplied *Dixon* and ruling that the County took the correct offset.

SUMMARY OF ARGUMENT

There is no express and direct conflict between the Opinion and this Court's decisions in *Grice*, *Dixon*, and applicable state and federal law. Lovett

argues that by allowing the County to combine or “stack” social security benefits with disability pension benefits and workers’ compensation benefits in calculating the offset, the Opinion “conflicts with §440.15(9), Fla. Stat. [now §440.15(10), Fla. Stat.] in regard to a workers’ compensation/Social Security offset and conflicts with 42 U.S.C. 424a(a)(2)(B) in regard to a Social Security disability/disability pension offset”(Pet. 5). The alleged conflict between stacking benefits and §440.15(9), Fla. Stat., and 42 U.S.C. 424a(a)(2)(B) was not a new legal issue before the First DCA, but had already been dealt with and disposed of in *Grice*, where this Court did not find any conflict between §440.15(9), Fla. Stat. (1997) and stacking benefits. In fact, *Grice* was decided in part on previous cases that applied the social security disability benefit offset pursuant to §440.15(9), Fla. Stat. (1997). Moreover, the law that allows the federal government to take an offset from workers’ compensation benefits when the state does not elect to take the offset also allows the federal government to take an offset from **any** government benefit received by the individual on account of their disability. 42 U.S.C. §424a(2). Therefore, both state statute, by its incorporation of the federal statute, and federal law allow the stacking of benefits in calculating an offset. The Opinion is consistent with *Grice*, and therefore there is no conflict.

Lovett additionally argues that the Opinion is contrary to *Dixon*, but Lovett misunderstands *Dixon*'s holding. Lovett states that "this Court held in *Dixon* that including all of the Social Security disability in the 'Grice offset' violated the statutory Social Security offset provision" (Pet. 4). In fact, *Dixon*'s holding is much narrower. This Court in *Dixon* carved out a narrow exception to the *Grice* offset in cases where the individual receiving disability benefits has an ACE that is so significantly higher than their AWW that 80 percent of the ACE is greater than the AWW. In these cases, and **only** in these cases, does the Court restrict an employer's offset of workers' compensation benefits, but only to the extent that the claimant's benefits exceed 80 percent of the AWW or ACE, whichever is greater. In the case at bar, Lovett does not meet this narrow exception, and, therefore, the ruling in *Dixon* does not apply. There is no conflict between *Dixon* and the Opinion.

ARGUMENT

I. THIS COURT LACKS JURISDICTION DUE TO THE ABSENCE OF AN EXPRESS AND DIRECT CONFLICT BETWEEN THE FIRST DISTRICT'S OPINION AND ANY PRINCIPLE OF LAW PREVIOUSLY PRONOUNCED BY THIS COURT

a. The Opinion is consistent with *Grice*.

In its Opinion, the First DCA correctly understood *Grice* to allow the stacking of benefits. In *Grice*, the question certified to the Supreme Court was the following:

When an employee receives workers' compensation, state disability retirement, and social security disability benefits, is the employer entitled to offset amounts paid to the employee for state disability retirement and social security disability against workers' compensation benefits to the extent that the **combined total of all benefits** exceeds the employee's average weekly wage?

Grice, 692 So.2d at 897.

The only new issue before the Court in *Grice* was whether an employer was allowed to total, or stack, the combination of benefits: workers' compensation, disability pension, and social security disability. This Court noted that, while there was no specific statutory provision for offsetting pension disability benefits, prior case law had well-established the legitimacy of the offset. It reiterated its holding in *Brown*, which interpreted §440.20(15), Fla. Stat. (1985), to mean that “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.” *Brown v. S.S. Kresge Co.*, 305 So. 2d 191, 194 (Fla. 1974). Following statute and case law, this Court held that an injured worker may not receive benefits from his employer and other collateral sources, which, when totaled, exceed 100% of his average weekly wage.

At the time *Grice* was decided, §440.15(9), Fla. Stat., was in effect and included the provision relating to federal statute 42 U.S.C. §424a. That federal statute contained the language relating to the federal government's ability to calculate an offset of their benefits by adding the workers' compensation benefits and any other government benefits given as a result of the disability. This Court's decision in *Grice* affirms the sound reasoning that stacking benefits is not in violation of §440.15(9), Fla. Stat., or 42 U.S.C. §424a.

In essence, the offset prescribed in *Grice* is not an offset against social security disability benefits or pension disability benefits, but an offset against the total of **all** benefits that arise from the employee's disability. Whereas in a straight social security offset, the employer can take an offset on anything greater than 80% of the AWW or ACE (whichever is greater), under the *Grice* offset, an employer can only take an offset after the combined initial benefits exceed 100% of the claimant's AWW. §440.15(9) Fla. Stat., §440.20(15) Fla. Stat., 42 U.S.C. §424a, and case law dealing with Social Security disability offsets and pension disability benefits provided sound support for the Court's decision in *Grice*.

In subsequent cases, although the First DCA and this Court have refined *Grice*¹, no decision had receded from the its basic ruling, which is that an employer can total or “stack” all initial disability benefits for the purpose of calculating an offset. The Court in *Grice* had already disposed of any arguments claiming conflict between stacking benefits and state and federal statutes dealing with offsets. There is no express and direct conflict with the Opinion and *Grice*.

b. The Opinion is consistent with *Dixon*.

The holding in *Dixon* is not applicable to the case at bar. In *Dixon*, the claimant had retired as a police officer and was working as a sales representative when he suffered an injury that left him permanently and totally disabled. *Id.* at 444. His AWW was \$260 week (\$1118/mo), making his weekly compensation rate \$173.33. *Id.* He also received a monthly benefit of \$100 from a group

¹ See, e.g., *Alderman v. Florida Plastering*, 748 So.2d 1038 (Fla. 1st DCA 1998) (ruling that an employer could not take an offset on cost-of-living increase); *Americana Dutch Hotel v. McWilliams*, 733 So.2d 536 (Fla. 1st DCA 1999) (finding that supplemental benefits are not subject to the *Grice* offset); *Orlando Utilities Commission v. Earls*, 767 So.2d 1232 (Fla. 1st DCA 2000) (finding that only pension monies which are paid as a result of “disability” may be included in an offset).

disability policy, and \$424.58 per month in social security disability benefits. *Id.* The total for all three benefits was \$1,269.90 per month. *Id.* However, eighty percent (80%) of Dixon's monthly ACE was \$1,666.40. *Id.* The difference between his monthly AWW and 80% of his monthly ACE was \$548.40. The employer took an offset of \$151.90 per month, the amount that the combined benefits exceeded the monthly AWW.

The question certified to this Court was:

Whether the holding in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997), capping total benefits received by a worker at 100 percent of his or her average weekly wage, applies when social security disability is one of the benefits received by the worker, and **80 percent** of his or her average current earnings, as computed by the social security administration, are greater than his or her average weekly wage.

This Court answered the question in the negative. It further held that in those cases where the 80 percent of the ACE is greater than the AWW, an employer may offset workers' compensation benefits only to the extent that the claimant's benefits exceed 80 percent of the AWW or ACE, whichever is greater. *Id.* at 445.

This Court reasoned that the question certified before it was never contemplated in *Grice* because the claimant's ACE did not exceed his AWW. However, in those instances where the facts were similar to those in *Dixon*, this Court had to read §440.15(10)(a) (the same exact provision as section as

§440.15(9), only renumbered, governing the reverse social security disability offset) and §440.20(15) (interpreted by *Brown* and adopted by *Grice*) harmoniously. To do so, the Court found that while §440.15(10)(a) permitted the employer to offset workers' compensation benefits by the amount of any social security disability benefits the claimant received, "the offset cannot be taken such that it decreases a claimant's total benefits below 80 percent of the claimant's AWW or 80 percent of the claimant's ACE, whichever amount is greater." *Id.* at 445 (citations omitted).

In applying *Dixon*, the essential inquiry is whether 80 percent of the claimant's ACE is greater his average weekly wage. In the case at bar, Lovett's monthly AWW is \$3,612.00, and 80% of his monthly ACE is \$2,984.00 (R 45; App 11, 12). Therefore, Lovett's case does not meet the threshold to apply *Dixon's* rationale.

The First DCA's application of *Dixon* is correct and consistent with *Dixon's* rationale. Lovett argues that *Dixon* in fact receded from *Grice* to the extent that it found that stacking benefits was contrary to law. This is not *Dixon's* holding. In fact, as the issue of stacking/combining benefits is so intrinsic to *Grice*, Lovett's reading of *Dixon* could only be correct if this Court expressly receded from its position that stacking/combining benefits was contrary to law. It did not do that.

CONCLUSION

For the reasons stated and upon the authorities cited, this Court should refrain from exercising its discretionary jurisdiction, as there is no express and direct conflict between the Opinion and this Court's decisions in *Grice* or *Dixon*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of January, 2005, to: Richard Sicking, Esq., 1313 Ponce de Leon Blvd., #300, Coral Gables, Florida 33134

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the type size and style of this brief is 14 point Times New Roman in accordance with Fla. R. App. P. 9.210(a)(2).

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