SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ORANGE COUNTY
FIRE RESCUE and
Unisource Administrators, Inc.,

Petitioners

vs. CASE NO.: SC07-1550

ROBERT JONES,

Respondent
_____/

ON PETITION FOR REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

RESPONDENT'S AMENDED BRIEF ON JURISDICTION

Todd J. Sanders, Esq.
Fla. Bar. No.: 860920

Bichler & Kelley, P.A.
807 West Morse Blvd.
Suite 201
Winter Park, Florida 32789
(407) 599-3777
Counsel for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

PRELIMINARY STATEMENT

The Respondent, ROBERT JONES, shall be referred to herein as "Respondent" or "Claimant".

The Petitioners, ORANGE COUNTY FIRE RESCUE and UNISOURCE ADMINISTRATORS, INC., shall be referred to herein as Petitioners.

The Judge of Compensation Claims shall be referred to by the letters "JCC". The Florida First District Court of Appeals shall be referred to as the First DCA or the First District.

References to the Petitioners' jurisdiction brief shall be abbreviated by the letters "PJB" followed by the applicable page number (e.g. PJB-5).

STATEMENT OF THE CASE AND FACTS

The Respondent concurs with the Petitioners' statement of the case and facts as stated in their initial brief, except that the Respondent asserts that a more accurate description of the issue below was whether a claimant with an occupational disease can have more than one accident date as a result of that disease.

SUMMARY OF ARGUMENT

This Honorable Court does not have jurisdiction in this case because the opinion below does not expressly or directly conflict with either a decision of another district court of appeal or this Honorable Court. The Petitioners assert that the First DCA relied, "in part" on this Court's opinion in *American Beryllium Co. v. Stringer*, 392 So. 2d 1294 (Fla. 1980) in reaching its decision that multiple accident dates are possible in occupational disease cases, and that this constituted the misapplication of that case, which in turn created conflict. The Respondent contends that the First DCA did not rely, at all, on *Stringer* in reaching its ultimate decision on the issue in this case, and therefore there is no conflict.

Even If this Court finds that the First DCA did in fact rely on *Stringer* it did not misapply the case, and the decision should be upheld.

ARGUMENT

I.

THIS HONORABLE COURT DOES NOT HAVE JURISDICTION IN THIS CASE PURSUANT TO ART. V, §3(b)(3), FLA. CONST. (1980) BECAUSE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF THIS COURT ON THE SAME QUESTION OF LAW.

Petitioners assert that the decision below involved the misapplication of a decision of this Court (*American Beryllium Co. v. Stringer,* 392 So. 2d 1294 (Fla. 1980)), and that this alleged misapplication constitutes the requisite express and direct conflict necessary for this Court to properly consider the case. Logically, then, should this Court disagree that the First DCA relied on, or directly applied, *Stringer* in its resolution of the issue before it, then this Honorable Court does not have jurisdiction over this matter and the decision below should stand.

For misapplication to serve as a basis for invoking jurisdiction, the prior supreme court decision that is allegedly misapplied must be *the case* on which the lower court relied in reaching its ultimate decision on the issue before it, and this issue must involve the same question of law. The Petitioners state that the First District's majority in *Orange County Fire Rescue v. Jones*, 959 So. 2d 785 (Fla. 1st DCA 2007) "relied, *in part*" on *Stringer* "to support its conclusion that there can be multiple dates of injury

arising from the contraction of a single occupational disease." (PJB-3) (emphasis added). Assuming, *arguendo*, there was any such reliance, and it was only "in part", then this should not be sufficient to invoke jurisdiction on misapplication grounds. Petitioners cite (PJB-9) *Sacks v. Sacks*, 267 So. 2d 73 (Fla. 1972) and *Acensio v. State*, 487 So. 2d 640 (Fla. 1986) as support for their position that misapplication can create sufficient conflict for this Court to assert jurisdiction. In those cases the district courts relied *solely* on a prior supreme court decision as the basis for their ultimate finding on the relevant issue before them.

At issue in *Stringer* was when the statute of limitations begins to run in occupational disease cases. With respect to this issue the Court in *Stringer* simply quoted the relevant portions of §440.151, Fla. Stat., and explained that the statute in such cases begins to run, not when the disease is contracted or diagnosed, but when it results in "disability" as defined by the statute. The decision below simply reiterated this point, and cited several cases where it so-held[1], including *Hoppe v. City of Lakeland*, 691 So. 2d 585 (Fla. 1st DCA 1997), and the First DCA noted that the source of the quote it used from *Hoppe* was *Stringer*. It is on this single, technically unnecessary

[1] "'[W]here the opinion below establishes no point of law contrary to the decision of th[e Supreme] Court [of Florida] or another district '" review under Art. V, §3(b)(3), Fla. Const. is unavailable. *First Union National Bank v. Turney*, 932 So. 2d 768 (Fla. 1st DCA 2002) (citation omitted).

attribution, which just so happened to be a supreme court case, that the Petitioner asserts that the court below relied on and misapplied this case. Surely such a thin thread is not grounds for invoking the extraordinary remedy of discretionary jurisdiction.

As noted, the issue below was whether a worker with an occupational disease can have more than one accident date as a result of such disease, not when the statute of limitations runs in an occupational disease case, and in answering this question - *this precise issue* - in the affirmative, the First DCA relied not on *Stringer*, but on *Michels v. Orange County Fire/Rescue*, 819 So. 2d 158 (Fla. 1st DCA 2002), and *City of Mary Esther v. McArtor*, 902 So. 2d 942 (Fla. 1st DCA 2005). And, in both of those cases (neither of which either cited or relied on *Stringer*), the First DCA found that a claimant with an occupational disease had incurred a new accident date for the same disease. Therefore, it is clear that the decision below did not rely on or misapply *Stringer* in resolving the issue before it.

II.

THE FIRST DISTRICT COURT OF APPEAL DID NOT MISAPPLY THIS COURT'S DECISION IN *AMERICAN BERYLLIUM CO. v. STRINGER*

What the petitioners seek here is a reversal of not just the decision below, but also of *Michels v. Orange County Fire Rescue,* which has been

the state of occupational disease law since 2002, and *City of Mary Esther v. McArtor*, which was decided in 2005. Both of those cases were based in no small part on *Sledge v. City of Fort Lauderdale*, 497 So. 2d 1231 (Fla. 1st DCA 1986) which was decided twenty one years ago. No such drastic action is warranted.

The Petitioners paint a bleak picture for the future of employer carriers should the decision below stand, arguing that it has created a situation in which such employer/carriers "may be liable in perpetuity, regardless of when the occupational disease first manifested itself by a disability." (PJB-5). As noted, to the extent this statement is even correct, it has been so since at least 2002. The decision below simply stated this in no uncertain terms in the event there was any confusion on the matter.

Petitioners note that the Claimant "*first* became disabled in December 1992" (PJB-6) (emphasis added), acknowledging that the Claimant did in fact have more than one period of disablement. Section 440.151(3) clearly states that when an employee with an occupational disease experiences "disablement" as a result of that disease, this "shall be treated as the happening of *an* injury by accident . . . ." (emphasis added). Note that the statute does not say only the *first* such disablement constitutes an injury, nor does it say that such disablement constitutes *the* injury by accident that

renders the disease compensable. Rather, it says any such disablement constitutes *an* injury, which can reasonably be read to imply that an employee with an occupational disease can have more than one "injury" as a result of the disease, and therefore more than one date of accident. And, as the court in *Michels* (as well *McArtor* and *Jones*) acknowledged, it is the date of accident that determines the benefits to which a claimant is entitled. The logical extension of the Petitioners' argument is that this principle either must be abandoned, or that an exception to it should be carved out for occupational disease cases. Neither course is warranted, at least not via a decision by this Court. Such a drastic measure is properly taken by the Legislature.

Petitioners state that the decision below was contrary not only to *Stringer*, but also the legislative intent behind §440.151 (PJB-4), and acknowledge that this statute has not been amended since *Stringer*. (PJB-5). However, as the Court is no doubt aware, the Legislature enacted sweeping amendments to Chapter 440 in 2003, and reenacted §440.151 by not changing it even though at that time *Michels* had been decided. "[O]nce a court has construed a statutory provision, subsequent reenactment of that provision may be considered legislative approval of the judicial interpretation." *Sam's Club v. Bair*, 678 So. 2d 902 (Fla. 1st DCA 1996),

(citing *Seddon v. Harpster*, 403 So. 2d 409 (Fla. 1981). Thus, the Legislature is deemed to have approved the result in *Michels*, a result which clearly indicated that there can be multiple accident dates in occupational disease cases (otherwise how could the claimant there have been entitled to a higher average weekly wage as a result of his third, and final period of disability?).

The Petitioners' argument is essentially one of policy (which, again, was not the case in *Stringer*), and they basically take the position that it is more important for the statute of limitations to be able to run completely when a claimant has an occupational disease caused by his employment in a particular industry or occupation than it is for such an employee to obtain medical care and other benefits when he is disabled by such a disease even though he (as did the Claimant here) continued to work in the occupation that caused his disease for a period of time after his first period of disability. The purpose of such a policy would be to eventually absolve employers of employees in such "industries" of any responsibility for providing medical care or other benefits to an employee who contracted a disease as a result of his service in such "industry." Their position also necessitates that such a claimant be paid indemnity benefits based on his average weekly wage at the time of his initial period of disability, even if this occurred many years

earlier (which was the situation in *Michels*). The First DCA in its cases commencing, at least, with *Michels*, rejected both of these policies advanced by the Petitioners. *Jones* was simply a reaffirmation of this rejection.

The Petitioners incorrectly conflate the provisions of §440.151(5) – which addresses the issue of which of a series of employers are liable in occupational disease cases - with those of §440.151(3) – which addresses the issue of when an occupational disease becomes compensable - and reach the conclusion that if "any exacerbation" of such a disease occurs §440.151(5) "would be rendered meaningless" and that "[a]ny and all employers and carriers would be potentially liable for the consequences of a single occupational disease." (PJB-8). First, any such "exacerbation" must result in a disability before it commences or "revives" the statute of limitations and/or determines what benefits to which a claimant may be entitled. Secondly, the situation contemplated by the Petitioners has been the state of the law since §440.151(5) was enacted – that is, future employers in the same industry or occupational field have always been potentially liable for the consequences of an occupational disease that an employee may have contracted while working for a previous employer in the same "industry."

This is because §440.151(5) is based on the principle of "what goes around, comes around." It recognizes that certain diseases may be prevalent

in certain occupations, and that, over the course of their career, employees will likely work for more than one employer in that occupation, and rather than have the system bogged down with litigation to identify which particular employer a claimant was working for when he contracted the disease, or to what extent a particular job contributed to the contraction of the condition, the statute makes liable the employer for whom such a claimant was working when he was last injuriously exposed to the conditions in the industry that caused his disease, and in whose service he became disabled as a result of this condition. Thus, it has always been the case that an employee may have contracted a disease while working for employer "1", but it was not until he was working for employer "2" (or "3" or "4", etc.) that the condition caused him to become disabled, and thus entitled to benefits from the later employer. This is just as true for employer "4", who may have had in its employ for a period of time an employee who contracts the disease while in its employ, but who then goes to work for employer "1" (or "2" or "3", etc.), after which time the disease becomes compensable. Thus, *Jones* has not changed anything. It simply clarified that an employer/carrier on the risk when a claimant first becomes disabled and entitled to benefits from that e/c may later be absolved of liability if the

claimant changes employers and becomes disabled again, at which time the new employer is liable.

CONCLUSION

Based on the foregoing, the Respondent respectfully asserts that this Honorable Court does *not* have subject matter jurisdiction in this matter pursuant to Art. V, §3(b)(3), Fla. Const. (1980).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this 4th day of October, 2007, to: Hinda Klein, Esq. 3440 Hollywood Blvd., 2nd Flr., Hollywood, FL 33021, Counsel for the Petitioner.

Todd J. Sanders, Esq.
Fla. Bar. No.: 0860920
Bichler & Kelley, P.A.
807 West Morse Blvd.
Suite 201
Winter Park, Florida 32789
(407) 599-3777

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief was computer-generated using Times New Roman fourteen point font on Microsoft Word, and hereby complies with the font standards as required by Fla. R. App. P 9.210 for computer-generated briefs.

Todd J. Sanders, Esq.
Fla. Bar. No. 860920