IN THE SUPREME COURT OF FLORIDA

ESCAMBIA COUNTY SHERIFF'S
DEPARTMENT AND ESCAMBIA COUNTY
RISK MANAGEMENT,

Petitioners,

v.

Case No.: 86,327
DCA Case No.: 94-1950

THOMAS GRICE,

Respondent.
_____/

**BRIEF OF AMICUS CURIAE,
BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS AND
FLORIDA COMMUNITY COLLEGES RISK MANAGEMENT CONSORTIUM**

Derrick E. Cox, Esquire
HURLEY & ROGNER, P.A.
201 South Orange Avenue, Suite 640
Orlando, Florida 32801
Florida Bar #0858153
(407) 422-1455

Counsel for Amicus Curiae,
Brevard County Board of
County Commissioners and Florida
Community Colleges Risk Management
Consortium

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The Petitioners, Escambia County Sheriff's Department and Escambia County Risk Management shall be referred to herein as "Petitioners" or "Employer/Carrier." The respondent, Thomas Grice, shall be referred to herein as "Respondent" or "Claimant".

STATEMENT OF THE CASE AND FACTS

Amicus Curiae accepts the statement of the case and facts submitted by Petitioners herein.

SUMMARY OF ARGUMENT

Petitioners in this case are requesting an offset to the extent that the combination of state disability retirement benefits, social security disability benefits, and worker's compensation benefits exceed the employee's average weekly wage. Amicus Curiae herein agree that this offset should be allowed in this case because two fundamental policies of the Florida Workers' Compensation system favor allowing the offset requested by Petitioners in this case. Specifically, the offset favors the policy that economic loss to an injured employee should only be borne in part by the employer, and only at a reasonable cost to the employer. This offset also favors the policy which prevents overcompensating an employee so the employee will maintain an incentive after injury to return to work as a contributing member of society.

Additionally, Section 440.20(15), Fla. Stat. (1985) allows the offset requested in this case. Moreover, this court has previously held in Brown v. S. S. Kresge Company, Inc., 305 So.2d 191 (1974) and again in Barragan v. City of Miami, 545 So.2d 252 (1989) that the statutory predecessor to Florida Statute 440.20(15) allows an offset of all employer-provided benefits to the extent that the combination of these benefits exceeds 100% of the claimant's average weekly wage.

The First District Court of Appeal's decision indicates that when the employee receives social security disability benefits, the employer is limited to the offset provided by Florida Statute

440.15(9). Under these circumstances, the employer will never be allowed to apply the offset allowed by Florida Statute 440.20(15) in situations similar to the present case, where an employee receives worker's compensation benefits, pension disability benefits (or other employer-provided benefits), and social security benefits. Since the well-established rule of statutory construction is to construe statutory sections consistently whenever possible, Amicus Curiae herein urges this court to apply the offset provided by Florida Statute 440.15(9) only when the employee receives worker's compensation benefits and social security benefits, and when no other employer-provided benefits are available. Under this interpretation of Florida Statute 440.15(9) and Florida Statute 440.20(15), an injured employee will receive benefits as follows:

1) An employee who is not entitled to social security or any other employer-provided benefits will receive worker's compensation benefits pursuant to the Florida worker's compensation statute (usually at 66.67% of the employee's average weekly wage), and the employer will not be entitled to an offset;

2) An employee who receives both worker's compensation benefits and social security benefits, but no other employer-provided benefits, will receive a combination of benefits not to exceed 80% of the claimant's average weekly wage, pursuant to the offset allowed under Florida Statute 440.15(9); and

3) An employee who receives worker's compensation benefits, social security benefits, and other employer-provided benefits such as pension benefits, will receive a combination of benefits equal to 100% of his average weekly wage, pursuant to the offset allowed under Florida Statute 440.20(15).

This interpretation applies both Florida Statute 440.15(9) and Florida Statute 440.20(15) in a consistent manner. Moreover, this interpretation is consistent with this Court's decisions in Brown

and Barragan. Finally, this interpretation promotes the two policies of providing benefits to an injured employee at a reasonable cost to the employer while giving the injured employee an incentive to return to work. For this reason, Amicus Curiae herein urges that this Court adopt this interpretation of Florida Statute 440.20(15) and Florida Statute 440.15(9) and grant the offset requested by Petitioners in this case.

ARGUMENT

SECTION 440.20(15), FLA. STAT. (1985), ALLOWS THE EMPLOYER TO OFFSET AMOUNTS PAID TO THE EMPLOYEE FOR STATE DISABILITY RETIREMENT BENEFITS AND SOCIAL SECURITY DISABILITY BENEFITS AGAINST WORKERS' COMPENSATION BENEFITS TO THE EXTENT THAT THE COMBINED TOTAL OF ALL BENEFITS EXCEEDS THE EMPLOYEE'S AVERAGE WEEKLY WAGE.

Amicus Curiae herein fully support the arguments previously made by Petitioners and Amicus Curiae, State of Florida, Department of Insurance, Division of Risk Management. Rather than reiterate the arguments already made by Petitioners and Amicus Curiae, Amicus Curiae herein will attempt to concisely state why Petitioners should be allowed to offset both social security disability benefits and state disability benefits to prevent a claimant from receiving a combination of benefits in excess of 100% of the claimant's average weekly wage.

A. Two fundamental policies of the Florida Workers' Compensation System favor allowing the offset requested by Petitioners in this case.

The offset requested by Petitioners in this case promotes two fundamental policies of the Florida Workers' Compensation System. First, the workers' compensation system proceeds on the theory that economic loss to an injured employee should only be borne in part by the employer, and only at a reasonable cost to the employer. Duffy Hotel Co. v. Ficara, 750 So.2d 790, 791 (1942). The offset requested by Petitioners is consistent with this policy by limiting the amount of all employer-provided benefits to 100% of the

employee's average weekly wage.

A second policy of the workers' compensation system is to prevent overcompensating an employee so the employee will maintain an incentive after injury to return to work as a contributing member of society. The offset requested by Petitioners is consistent with this policy because the offset prevents the employee from receiving more money following an injury than the employee was earning prior to an injury.

Conversely, by disallowing the offset requested by Petitioners in this case, these two fundamental policies will be violated. Specifically, the employer will end up paying more than its fair and reasonable portion of benefits to the employee. Moreover, if the injured employee receives more money by not working than the employee received while working, then the employee has lost virtually all incentive to return to work. Since an employer should not be required to pay, and an employee should not be entitled to receive, more than 100% of the employee's average weekly wage in employer-provided benefits following an industrial accident, the requested offset should be allowed in this case.

Additionally, by disallowing the offset in this case, the claimant will actually receive an even larger windfall when the tax consequences are considered. Specifically, prior to an industrial accident, 100% of the claimant's salary is generally taxable income. However, following an accident, the claimant receives worker's compensation benefits, which are tax-free. I.R.C. §104(a)(1). Therefore, in this case, the claimant's workers'

compensation benefits at 66.67% of the claimant's average weekly wage, plus the supplemental worker's compensation benefits received by the claimant, are tax-free. In addition, depending on the claimant's other income, 50%-100% of the social security benefits received by the claimant are tax-free. I.R.C., §86. As a result, if the requested offset is disallowed in this case, then the claimant will not only receive more than 100% of his salary, but a large portion of the benefits received by the claimant will be tax-free. This result gives the claimant a huge financial disincentive to return to work, contrary to the policy of encouraging injured workers to return to work following an industrial accident. Therefore, the offset requested by Petitioners should be allowed.

B. The Florida Workers' Compensation Statute and Florida case law allow the offset requested in this case.

Section 440.20(15), Fla. Stat. (1985), provides as follows:

> "When an employee is injured and the employer pays his full wages or any part thereof during the period of disability . . . the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded . . ."

Recognizing the two fundamental policies of the Florida Workers' Compensation System mentioned above, this Court has repeatedly interpreted this statute, or its predecessor, to specifically allow an offset to the extent that the combination of worker's compensation benefits and other employer-provided benefits exceeds the claimant's average weekly wage. Specifically, in Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (1975), this Court

limited the combination of sick leave insurance benefits and worker's compensation benefits to 100% of the claimant's average weekly wage. Moreover, in Barragan v. City of Miami, 545 So.2d 252 (1989), this Court allowed an offset for the combination of pension benefits and workers' compensation benefits to the extent that the combination of these benefits exceeded the claimant's average monthly wage. This principle was also reiterated by this Court in Domutz v. Southern Bell Telephone and Telegraph Company, 339 So.2d 636 (1976). Therefore, this court has consistently interpreted Florida Statute 440.20(15), or its predecessor, to allow an offset to the extent that any combination of employer-provided benefits exceeds 100% of the claimant's average weekly wage.

The specific issue in this case is whether the combination of worker's compensation benefits, state disability retirement benefits and social security benefits can exceed 100% of the claimant's average weekly wage. As previously argued by Petitioners and Amicus Curiae for the State of Florida, social security benefits are an employer-provided benefit because social security benefits are funded through a payroll tax, of which the employer contributes 50%. 26 U.S.C. Section 311(a). Since social security benefits are provided by the employer, similar to sick leave or pension benefits, social security benefits must also be included in the offset provided by Florida Statute 440.20(15).

In addition to this compelling argument, there is another reason why social security benefits should be included when offsetting benefits pursuant to Florida Statute 440.20(15), and

this reason is based on a logical interpretation of the relationship between Florida Statute 440.20(15) and Florida Statute 440.15(9). When applying these two sections of the worker's compensation statute to this case, only two results are possible. The first result, and the conclusion reached by the First District Court of Appeal, is that when an employee receives worker's compensation, social security, and pension or other employer-provided benefits, the employer can only take the social security offset allowable under Florida Statute 440.15(9), and offsets for pension benefits, sick leave benefits, or any other employer-provided benefits are expressly disallowed. This interpretation is inconsistent with the above-referenced decisions of this Court and with Florida Statute 440.20(15), which allow an offset for these other employer-provided benefits, as indicated previously above. In fact, this Court has never held in any of its prior decisions that the 440.20(15) offset is disallowed when a claimant receives social security disability benefits. Moreover, this interpretation severely limits the 440.20(15) offset because there are many instances where an employee will qualify for worker's compensation benefits, pension benefits (or other employer-provided benefits), and social security disability benefits, and each and every time the claimant obtains social security disability benefits, the 440.20(15) offset will be disallowed.

The second interpretation, and the interpretation urged by Amicus Curiae herein, is to apply the Florida Statute 440.15(9) offset only when the employee receives worker's compensation

benefits and social security benefits, and when no other employer-provided benefits are available. Under this second interpretation, an injured employee will receive benefits as follows:

1) An employee who is not entitled to social security or any other employer-provided benefits will receive worker's compensation benefits pursuant to the Florida worker's compensation statute (usually at 66.67% of the employee's average weekly wage), and the employer will not be entitled to an offset;

2) An employee who receives both worker's compensation benefits and social security benefits, but no other employer-provided benefits, will receive a combination of benefits not to exceed 80% of the claimant's average weekly wage, pursuant to the offset allowed under Florida Statute 440.15(9); and

3) An employee who receives worker's compensation benefits, social security benefits, and other employer-provided benefits such as pension benefits, will receive a combination of benefits equal to 100% of his average weekly wage, pursuant to the offset allowed under Florida Statute 440.20(15).

This second interpretation is consistent with this Court's decisions in Brown, Domutz, and Barragan. Moreover, this interpretation promotes the two policies of providing benefits to an injured employee at a reasonable cost to the employer, while giving the injured employee an incentive to return to work. For this reason, Amicus Curiae herein urges that this Court adopt the second interpretation of Florida Statute 440.20(15) and Florida Statute 440.15(9), and that this Court grant the offset requested by Petitioners in this case.

C. Analysis of the First District Court of Appeal's decision.

The First District Court of Appeal's decision appears to be

primarily based on the fact that since Florida Statute 440.15(9) specifically allows a social security offset, and since there is no specific provision allowing an offset for the combination of social security benefits and other employer-provided benefits, the only allowable offset is for social security benefits. As indicated above, Amicus Curiae herein argues that Florida Statute 440.20(15) does specifically allow an offset for all employer-provided benefits. In fact, the First DCA acknowledged the statutory authority for this offset in its decision. See Grice v. Escambia County, 20 FLW D1863 (Fla. 1st DCA 1995), Footnote 1. As previously stated, since social security benefits are employer-provided benefits, Florida Statute 440.20(15) does specifically allow an offset for the combination of social security, state disability retirement, and worker's compensation benefits.

The First District Court of Appeal's decision also states that there is no statute or case law allowing an offset by "stacking" worker's compensation, pension, and social security benefits. Amicus Curiae herein points out that "stacking" would certainly be allowable under Florida Statute 440.20(15) if the employee received, for example, a combination of worker's compensation benefits, employer-provided sick leave benefits, and state disability retirement benefits. Under this scenario, an offset would be allowable to the extent that the combination of these three benefits exceeded 100% of the claimant's average weekly wage. Since social security benefits are simply another employer-provided benefit, Petitioners should be allowed to combine, or "stack",

social security benefits with other employer-provided benefits when calculating the applicable offset.

The First District Court of Appeal's decision also states that social security benefits should not be considered as simply another "employer-provided" source of benefits. However, the only reason given by the First District Court of Appeal for distinguishing between social security benefits and other employer-provided benefits is that since the employee contributes to social security benefits, these benefits are not "employer-provided" benefits. However, this reasoning is inconsistent with the First District Court of Appeal's prior decision in City of Miami v. Smith, 602 So.2d 542 (Fla. 1st DCA 1992), a case which allowed an offset for pension benefits, even though the employee contributed a substantial amount ($20,000.00) to the pension benefits. Based on this case, social security benefits should still be considered an employer-provided benefit even if the claimant partially contributes to this benefit.

The First District Court of Appeal also cites Jewel Tea Company, Inc. v. Florida Industrial Commission, 235 So.2d 289 (Fla. 1969) in support of its position. However, this case is not necessarily inconsistent with the present case. In Jewel Tea, the claimant was entitled to both worker's compensation benefits and group insurance benefits, and this Court found that the employer was not entitled to an offset. However, there is no indication that the combination of these two benefits exceeded 100% of the claimant's average weekly wage. If the combination of worker's

compensation benefits and group insurance benefits did not exceed 100% of the claimant's average weekly wage, then the denial of an offset would be consistent with this Court's decisions in Brown and Barragan, as well as the position of Petitioners in this case, because the only offset requested by Petitioners is for employer-provided benefits in excess of 100% of the claimant's average weekly wage. Therefore, as this Court has previously indicated in Brown and Barragan, the Jewel Tea decision is not inconsistent with the offset requested by Petitioners in this case.

Finally, the First District Court of Appeal's decision states that the Petitioners have cited no federal statutes authorizing an offset of worker's compensation based on an employee's receipt of state disability retirement benefits. Amicus Curiae herein are unaware of any federal statutes authorizing an offset of state workers' compensation benefits based on state disability retirement benefits. However, as stated above, Amicus Curiae herein contend that Florida Statute 440.20(15) does authorize an offset of workers' compensation benefits based on an employee's receipt of state disability retirement benefits. Moreover, as previously stated, Amicus Curiae herein contend that Florida Statute 440.20(15) also allows an offset when the combination of worker's compensation, pension, and social security payments exceed 100% of the claimant's average weekly wage. For this reason, the offset requested by Petitioners should be allowed.

CONCLUSION

For the foregoing reasons, Amicus Curiae herein respectfully submit that the Judge of Compensation Claims did not err, that the certified question should be answered in the affirmative, and that the decision of the First District Court of Appeal should be reversed.

Respectfully submitted this 22nd day of November, 1995.

Derrick E. Cox, Esquire
HURLEY & ROGNER, P.A.
201 South Orange Avenue, Suite 640
Orlando, Florida 32801
Florida Bar #0858153
(407) 422-1455
Counsel for Amicus Curiae,
Brevard County Board of
County Commissioners and Florida
Community Colleges Risk Management
Consortium

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Ellen Lorenzen and Mr. John Dixon, P. O. Box 172118, Tampa, Florida 33672-0188; Mr. Thomas McDonald, 201 E. Pine Street, 15th Floor, Orlando, Florida 32801; Mr. Edward A. Dion, 307 Hartman Building, 2012 Capital Circle, S. E. Tallahassee, Florida 32399-6583; Michael J. Valen, Esquire, Post Office Box 13570, Pensacola, Florida 32591-3570, Attorney for Petitioners; James F. McKenzie, Esquire, 905 East Hatton Street, Pensacola, Florida 32503, Attorney for Respondent; and David A. McCranie, Esquire, 3733 University Boulevard, West, Suite 112, Jacksonville, Florida 32217, Attorney for Amicus Curiae, on this 22nd day of November, 1995.

Derrick E. Cox, Esquire
HURLEY & ROGNER, P.A.
201 South Orange Avenue, Suite 640
Orlando, Florida 32801
Florida Bar #0858153
(407) 422-1455

Counsel for Amicus Curiae,
Brevard County Board of
County Commissioners and Florida
Community Colleges Risk Management
Consortium