SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

CASE NO.: 86,327

DISTRICT COURT OF APPEAL
CASE NO.: 94-1950

THOMAS GRICE,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

The respondent/claimant is a disabled deputy sheriff who was injured on January 28, 1985, while employed by the Escambia County Sheriff's Department, a self-insured and self-administered employer for workers' compensation purposes. The petitioner/employer thereafter accepted the claimant as permanently and totally disabled and began paying permanent and total disability (PTD) benefits. In addition, the claimant received Social Security Disability Benefits, and State Disability Retirement Benefits under the Florida Retirement System. The claimant's pre-injury average weekly wage was determined to be $583.88, and his compensation rate was $392.00 per week (R.32). His Social Security Disability Benefit payment amounted to $163.85 per week, and he received State Disability Retirement Benefits in the amount of $167.36 per week (R.46,47,60). For purposes of calculating claimant's social security disability payments, it was determined that eighty percent of his average current earnings (ACE) amounted to $1,514.40 per month or $349.48 per week (R.46,51).

On June 14, 1993, the County notified the claimant that it was offsetting his PTD benefits based upon the amount that his combined workers' compensation, state pension, and social security benefits exceeded his pre-injury average weekly wage. The claimant filed a claim disputing the County's right to take the offset and sought repayment of the benefits withheld plus his fees, costs, interest and penalties.

After a hearing, the JCC issued an order denying the claim and

allowing the County to "continue workers' compensation offsets to the extent that both Social Security Benefits and Pension Benefits combined to exceed claimant's pre-injury average weekly wage." In his order the JCC noted that under established case law it was clear that the combination of claimant's workers' compensation benefits and his employer funded pension benefits could not exceed claimant's average weekly wage; and that it was equally clear that a statutory offset with respect to Social Security Disability Benefits was provided by Section 440.15(9)(a), Florida Statutes. The JCC acknowledged, however, that there was no statutory or case law for guidance on the issue of whether the employer could combine all three benefits so as to compute an offset based upon the claimant's average weekly wage. Concluding that such combining or "stacking" was permissible, the JCC's order stated:

> There are no cases on point dealing with a three way combination of benefits. In this particular case, if either of the two benefits, i.e., social security or pension, were involved and those benefits were more generous, the employer would clearly be allowed to take an offset against compensation based on one or the other. For this reason, it appears that the employer should be allowed to "stack" both benefits to take an offset, provided that it does not exceed the claimant's pre-injury AWW.

On appeal, the First District Court of Appeal strictly construed the statutory offset provisions and ruled that because the Legislature provided for a social security offset against workers' compensation benefits, but did not include an offset based

upon the receipt of state disability retirement pension benefits, it was presumed that the Legislature did not intend to allow such an offset. Further, the Court ruled that the offset provision was controlled by federal law which provided that the offset shall not exceed that which the Social Security Administration would be entitled to take under 42 U.S.C, Section 424(a). Although the court concluded that the combining of all three benefits for the purpose of allowing an offset was improper, it certified the following question to the Florida Supreme Court:

> 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 BENEFITS AGAINST WORKERS' COMPENSATION BENEFITS TO THE EXTENT THAT THE COMBINED TOTAL OF ALL BENEFITS EXCEEDS THE EMPLOYEE'S AVERAGE WEEKLY WAGE?

SUMMARY OF ARGUMENT

Both the plain meaning and legislative intent of §424(a) of the Federal Social Security Act permit the stacking of disability benefits for purposes of calculating state worker's compensation offsets. The statute specifically lists those benefits which cannot be combined for purposes of computing an offset, and therefore, under principles of "expressio unius est exclusio alterius" those benefits not expressly mentioned may be combined to prevent a claimant from receiving a duplication of benefits. Further, the clear and oft cited legislative intent of §424(a) is to prevent a claimant from receiving a windfall by stacking a combination of benefits. Thus, in Boyd v. Califano, 479 F.Supp. 846 (W.D.Va. 1978) the court addressed the exact same issue presented to this court and held that a three-way combination of benefits could be offset against state worker's compensation benefits to the extent that such combination exceeded claimant's pre-injury wages.

Under Florida state law one of the primary purposes of Chapter 440 is to shift a portion of the costs of industrial injuries onto industry and its consumers. At the same time, one of the goals of our Workers' Compensation Act is to give employees an incentive to avoid accidental injuries and to encourage a prompt return to work following such accidents. In furtherance of these objectives, the Courts of this state have limited an injured workers' recovery for lost wages so that he does not receive more than 100% of his average weekly wage from workers' compensation benefits and other

collateral sources such as sick pay, private disability benefits, and pension benefits. Obviously, an injured workers has a financial disincentive to return to work if he receives more money for being disabled than he does for working.

Section 440.21, Fla.Stat.(1985), precludes any offset for such collateral benefits until the injured worker has received 100% of his average weekly wage in combined benefits, irrespective of whether the collateral benefits were funded by the employer alone or in part by employee contributions. Jewel Tea Company, Inc. v. Florida Industrial Commission, 235 So.2d 289 (Fla.1970); Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla.1974). Once the 100% cap has been reached, however, §440.20(15), Fla.Stat.(1985), mandates that workers' compensation benefits be reduced so that the combined benefits do not exceed the 100% cap in cases where the employer pays the claimant's "full wages or any portion thereof during the period of disability."

The issue herein is not whether the claimant's workers' compensation benefits and pension benefits must be included within the 100% cap, for under Barragan they clearly must be. The only issue is whether the Respondent's Social Security disability benefits must also be included. Social Security disability benefits are funded through a payroll tax, of which the employer contributes 50%. 26 U.S.C. §3111(a). Therefore, when an injured worker receives Social Security disability benefits following an industrial accident, the employer has continued to provide his "full wages or any part thereof during the period of disability"

just as much as the employer in **Brown** did by paying the premium for the private insurance policy which later paid disability benefits. The fact that an employee may also have contributed to his Social Security disability benefits through his share of the FICA tax is irrelevant to the question whether the **employer** has paid the employee's "full wages or any part thereof during the period of disability." This fact was recognized implicitly by this Court in a similar situation in **City of Miami v. Smith**, 602 So.2d 542 (Fla.1st DCA 1992). There, the Court held that an employee was not allowed to receive combined benefits exceeding 100% of his average weekly wage despite the fact that he had contributed more than $20,000.00 of his own money toward funding the pension benefits.

ARGUMENT

I

FEDERAL LAW PERMITS THE AGGRAGATION OF SOCIAL SECURITY BENEFITS WITH STATE RETIREMENT DISABILITY BENEFITS FOR PURPOSES OF COMPUTING AN OFFSET AGAINST WORKERS' COMPENSATION BENEFITS, WHICH IF NOT TAKEN, PERMITS THE CLAIMANT TO ACCRUE A COMBINATION OF BENEFITS IN EXCESS OF 100% OF THE WORKERS' PRE-INJURY AVERAGE WEEKLY WAGE.

Federal law is implicated when calculating offsets under Florida State Workers' Compensation law by virtue of §440.15(9)(a), Fla.Stat., which provides in relevant part:

> Weekly compensation benefits payable under this Chapter for disability resulting from injuries to an employee who becomes eligible for benefits under 42 U.S.C. (s). 423 shall be reduced to an amount whereby the sum of such compensation benefits payable under this Chapter and such total benefits otherwise payable for such period to the employee and his dependents, had such employee not been entitled to benefits under this Chapter, under 42 U.S.C. ss. 423 and 402, does not exceed 80% of the employee's average weekly wage. However, this provision shall not operate to reduce an injured workers' benefits under this Chapter to a greater extent than such benefits would have otherwise been reduced under 42 U.S.C. S. 424(a). (Emphasis added).

Thus, Florida law provides that the employer/carrier cannot take an offset greater than that which would have been taken by the Social Security Administration under §424(a) of the Social Security Act. Section 424(a) mandates that offsets be taken when a combination of benefits exceed 80% of a Social Security disability recipient's

"average current earnings" or ACE.[1] In other words, under Florida law the claimant is allowed to receive, in combined benefits, 80% of the average weeky wage or 80% of the ACE, whichever is greater. Trilla v. Braman Cadillac, 527 So.2d 873 (Fla.1st DCA 1988); A.C. Scott Construction and Paving Company, Inc. v. Miller, I.R.C. ord. 2-3906 (September 11, 1979).

The purpose of both State and Federal offset provisions are to prevent the payment of excessive combined benefits which exceed a workers' pre-disability income thereby discouraging workers from returning to work. In rejecting a challenge to §424(a) on due process and equal protection grounds, the United States Supreme Court in Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971), examined the legislative history of the Federal offset provision and noted that prior to its inception in 1965 a typical worker injured in the course of his employment and eligible for both State and Federal benefits received compensation for his disability in excess of his take home pay prior to the disability. Hearings on H.R. 6675 before the Senate Committee on Finance, 89 Cong., 1st Sess., Pt.2, p.904. The Court stated:

> "It was strongly urged that this situation reduced the incentive of the worker to return to the job, and impeded the rehabilitative efforts of the State programs. Furthermore, it was anticipated that a perpetuation of the duplication of benefits might lead to the erosion of the workmans' compensation programs. The legislative response was

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[1] Under Federal law average current earnings are calculated differently than AWW ... in this case, the record shows that 80% of claimant's ACE is $349.48, while 80% of the AWW is $467.10. (R. 46,51).

> Section 224, which, by limiting total State and Federal benefits to 80% of the employee's average earnings prior to the disability, reduced the duplication inherent in the program and at the same time allowed a supplement to workers' compensation where the State payments were inadequate." Id. at 258.

Other Federal cases have further examined this legislative history and intent of the Federal offset provision found in Section 424(a). In Iglinsky v. Richardson, 433 F.2d 405 (5th Cir. 1970), the Court upheld a Social Security Administration ruling that §424(a) was inapplicable to payments made under a State workers' compensation program as reimbursment for medical expenses. The Court again examined the legislative history and stated:

> "In response to concern voiced about the payment of Federal Disability Insurance Benefits concurrently with benefits payable under State Workmans' Compensation programs, Congress enacted Section 335 of the 1965 amendments to the Social Security Act. Pub. L. 89/97, 79 stat. 406 (July 30, 1965). Now codified as 42 U.S.C. §424(a), the amendment is designed to prevent the payment of excessive combined benefits. Thus, §424(a) requires a reduction in Federal disability benefits from the total benefits paid under State and Federal programs which exceed 80% of the claimant's average monthly earnings before the onset of his disability." See s.rep. 404, 89th Cong., 1st Sess., 1965 U.P.S. Code Cong. & Adm. news, pp. 1943, 2040.

In defending the regulation which precluded offsets from Federal disability benefits for amounts attributable to medical expenses under State workers' compensation plans, the Court stated that disability insurance benefits were designed to partially replace the income of a person who had lost the ability to work through illness or injury. Further, workmans' compensation offset

provisions were enacted to insure that a claimant who was also entitled to benefits under a State compensation program did not, by virtue of his right to payment from two sources, receive excessive compensation for the same injury. Because the Federal disability insurance program did not provide for payment of medical expenses, there was no duplication of benefits, and the regulation prohibiting offsets for medical expenses was upheld. Id.

In Sciarotta v. Bowen, 837 F.2d 135 (3rd Cir. 1988), the Court examined a New Jersey workers' compensation offset provision which had the effect of permitting a disabled worker to receive a total benefit package in excess of 80% of his pre-disability earnings.[2] Under New Jersey law workers' compensation benefits were paid as a combination of two separate entitlements: a base compensation payment, and a "special adjustment benefit payment" designed to counter-act the effects of inflation on the base payment. However, New Jersey only applied an offset to the special adjustment benefit, and not to the base payment. Thus, New Jersey did not apply an offset even when the combination of workers' compensation payments and Federal disability benefits exceeded 80% of the pre-disability earnings, and even when the elimination of the entire special adjustment benefit was insufficient to reduce total payments below the 80% ceiling. In rejecting the claimant's argument that the SSA was precluded from imposing an offset on

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[2] 42 U.S.C. §424(a)(d), permits state's to recoup for themselves the savings created by the §424(a) reduction and precludes the Social Security Administration from implementing a second, double offset under certain circumstances.

disabiity benefits because New Jersey had imposed its own statutory offset, the Court relied on the legislative history of the Federal offset provisions and held that Congress intended to impose a ceiling on the total benefits an injured worker could receive, and although state's were free to reduce their own payments to comply with that ceiling, legislative history supported the position that the Federal Government could further reduce benefits if the State reduction was insufficient. The Court further stated:

> "We note that the committee report's repeated references to the '"80% limitation,"' and to the '"maximum"' payment of 80%, support the Secretary's view. See Id. at 2041. Morever the report makes clear that the '"committee"' believes that it is desirable as a matter of sound principle to prevent the payment of excessive combined benefits." Id. at 2040. See Richardson v. Belcher, 404 U.S. 78, 83, 92 S.Ct. 254, 258, 30 L.Ed. 2d 231 (1971) purpose of Federal offset provision is to reduce excessive benefit payments by "limiting total State and Federal benefits to 80% of (pre-disability earnings)."

In Swain v. Schweiker, 676 F.2d 543 (11th Cir. 1982), the Court rejected a Florida workers' compensation claimant's argument that once a State law "provides for" a reduction of State benefits when an injured worker receives Federal disability benefits, the SSA is precluded from imposing its offset on Federal benefits even in periods when the State offset provisions is not operating. Id. at 545-46. Under the claimant's interpretation of the statute, the SSA was precluded from reducing Federal benefits merely because of the "existence of a statute pursuant to which a reduction maybe made, regardless of whether the reduction was actually made." In rejecting such literal interpretation, the Court stated:

"It is clear from the legislative history that the purpose of §424(a) is to prevent the payment of excessive combined benefits." **Kananen v. Matthews**, 555 F.2d 667, 670 (8th Cir. 1977) (citing S.Rep. 404, 89th Cong., 1st Sess., reprinted [(1965)] U.S. Code Cong. & Ad.News 1943, 2040). Such payment "was thought to cause two evils: first, it reduced a workers' incentive to return to the work place and hence impeded rehabilitation efforts; and second, it created fears that the duplication of benefits would lead to an erosion of State workers' compensation programs." **Freeman v. Harris**, 625 F.2d 1303, 1306 (5th Cir. 1980); **Accord, Richardson v. Belcher**, 404 U.S. 78, 83, 92 S.Ct. 254, 258, 30 L.Ed. 2d 231 (1971).

The Court further stated that the District Court's interpretation which it overruled would have allowed the very result Congress acted to prevent in §424: the receipt of duplicate State and Federal benefits.

ARGUMENT

II

THE PLAIN MEANING OF §424(a) PERMITS THE STACKING OF COMBINED BENEFITS FOR PURPOSES OF COMPUTING AN OFFSET AGAINST WORKERS' COMPENSATION BENEFITS UNLESS ONE OF THE BENEFITS IS SPECIFICALLY EXCEPTED UNDER THE STATUTE.

Section 424(a)2(b) specifically lists those benefits which are precluded from being used to calculate offset amounts. Section 424(a) provides in pertinent part as follows:

> If for any month prior to the month in which an individual attains the age of 65-
>
> (1) such individual is entiteld to benefits under §423 of this title, and
>
> (2) such individual is entitled for such month to-
>
> (A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workman's compensation law or plan of the United States or a State, or
>
> (B) periodic benefits on account of his or her total or partial disability (whether or not permanent) under any other law or plan of United States, a State, a political subdivision (as that term is used in §418(b)2 of this title), or an instrumentality of two or more States (as that term is used in §418(g) of this title), other than (i) benefits payable under Title 38), (ii) benefits payable under a program of assistance which is based on need), (iii) benefits based on service all or substantially all of which was included under an agreement entered into by a State and the Secretary under §418 of this title), and (iv) benefits under a

> law or plan of the United States based on service all or substantially all of which his employment is defined in §410 of this title.

Section 424(a) therefore permits offsets of Social Security disability payments against benefits under "any other law or plan...of a state" unless the plan is one of the specific exceptions listed above. Because the claimant's State disability retirement benefits in the instant case clearly fall under the category of "any other law or plan of the United States, a State or political subdivision," and such benefits are not one of the listed exceptions, then under principles of "expressio unius est exclusio alterius", the expressed mention of such exceptions implies that those benefits not expressly accepted are, therefore, permitted to be used when calculating such offset amounts.

In Kenanen v. Matthews, 555 F.2d 667 (1977), the Court construed §424(a) according to the principles set forth in United States v. Kelly, 519 F.2d 251, 256 (8th Cir. 1975):

> "In the early decision of United States v. Standard Brewery, 251 U.S. 210, 40 S.Ct. 139, 65 L.Ed. 229 (1920), the Court observed: nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it."

In Halvering v. Hammel, 311 U.S. 504, 61 S.Ct. 368, 85 L.Ed. 303 (1941), the Court stated:

> "True, courts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual

> meaning of its words where acceptance of that meaning would lead to absurd results ... or would thwart the obvious purpose of the statute ... But courts are not free to reject that meaning where no such consequences follow and where, as here, it appears to be consonent with the purposes of the act as declared by Congress and plainly disclosed by its structure."

In Kananen, the Court applied such principles of statutory construction and determined that no portion of §424(a) limited its application to payments for SSD disabilities caused by the same physical or mental condition causing the workers' compensation injury. Thus, the Court held that whenever a person was unable to engage in substantial gainful activity, for whatever reason, and was, therefore, entitled to benefits under §423 of the Act, and was also entitled to workers' compensation, the offset provision of §424(a) was applicable. It further stated that the clear legislative purpose of §424(a) was to prevent the payment of excessive combined benefits. Id.

Justice Douglas' dissent in Richardson v. Belcher, supra., further supports the argument that those benefits not specifically excepted for purposes of computing offsets, may be combined with other benefits to yield offset calculations for benefits received in excess of pre-injury wages. Justice Douglas stated "there are many other important programs, both public and private, which contain provisions for disability payments effecting a substantial portion of the work force, and which do not require an offset under the Social Security Act."

> Thus, had Belcher's supplemental disability payment come from a Veteran's Administration

> Program, a Civil Service Retirement Act, or Railroad Retirement Act Annuity, a private disability insurance policy, a self-insurer, a voluntary wage continuation plan, or the proceeds in an action in tort arising from the disabling injury, there would have been no reduction in his Social Security benefits. Id. at 259.

Federal Regulations interpreting the Social Security Act also permit the aggragation of all total work related benefits, aside from the above referenced exceptions, for purposes of computing Social Security disability offsets. Section 404.408(a)(2)(i) provides that offsets are permitted when:

> "the individual entitled to the disability insurance benefit is also, for that month, concurrently entitled to a periodic benefit (including workers' compensation or any other payments based on a work relationship [(on account of a total or partial disability)] whether or not permanent [(under a law or plan of the United States, a State, a political subdivision, or an instrumentality of two or more of these entities, ...)]."

Because the claimant's State disability retirement pension in the instant case is a law or plan of a State as defined by the regulation, and is clearly payment based on a work relationship, it may be aggragated with other benefits for purposes of calculating an offset. Section 404.408(b)(2)(ii) provides the only exceptions under that Rule and specifically exempts offsets where:

> "the benefit is a Veteran's Administration benefit, a public disability benefits (except workers' compensation) payable to a public employee based on employment covered under Social Security, a public benefit based on need, or a wholly private pension or private insurance benefit."

Because the claimant's State disability retirement pension is

not a specifically enumerated exception, under principles of "expression unius est exclusio alterius" such benefits may be combined with other disability benefits for purposes of computing an offset.

Although the plain meaning of both the statue and the regulation interpreting §424(a) clearly permit the stacking of benefits to compute a Social Security offset, counsel for the Petitioner has located only four case law decisions involving a three-way combination of benefits for purposes of computing Social Security disability offsets. All four cases involve disabled workers who qualified for Social Security disability benefits, black lung disability insurance benefits under the Federal Coal Mine Health and Safety Act of 1969, and State worker's compensation benefits. In all four cases claimants argued they were penalized for receiving State workers' compensation benefits, and contended they received less in benefits under the three combined programs than they would have had they received only Social Security disability and black lung disability benefits.

In Boyd v. Califano, 479 F. Supp. 846 (W.D.Va. 1978), the Court held such double offsets were proper and stated that:

> "The court concurs with the Secretary's contention that the propriety of the double offset must be measured by what can only be viewed as the underlying purpose of both Federal programs: the replacement of earnings lost a result of inability to work due to a physical disability." Id.

The court reasoned that State compensation plans and the Federal black lung program both share the common design of replacement of

income for workers who became disabled. The court stated:

> "Given such an understanding, it is neither unexpected nor unreasonable that Congress chose to offset State benefits from Federal black lung awards so as to prevent duplication of benefits and insure the primacy of State systems. Such intent was specifically noted on pages 27 through 29 of H.R.Rep. No. 92-460, 90 2d. Cong., 1st Asses. (August 5, 1971), where in the purposes of the offset provisions of 30 U.S.C. §922 were described as follows: ... the prevention of duplication of benefits to the extent that combined benefits equal or even exceed the worker's earnings before he became disabled. The rationale is to avoid creating a situation where it is more profitable to collect benefits than attempt to become rehabilitated and return to work." Id.

Because all three programs were designed to provide replacement of income for disabled workers, and since the two Federal benefit programs were further designed to prevent duplication of replacement income, the Court determined that it was of no great significance that the claimant was the subject of a double offset, and the combined effect of all three awards still assured the claimant the replacement income as intended under all three legislative programs. See, also, **Hall v. Harris**, 487 F.Supp. 535 (W.D.Va.1980) (upholding double offsets as designed to prevent duplication of lost income and reasoning that claimant's statutory interpretations would have the practical effect of providing him more funds than were necessary to provide appropriate replacement for what the statutory provisions deemed to be his pre-disability income). But, see, **Freeman v. Harris**, 625 F.2d 1303, (5th Cir. 1978); **Kinney v. SEC. of HHS.**, 1983 WL 44226 (E.D. Ky.) (holding that such double offsets were inappropriate given the intent of the

Federal Coalmine and Safety Act to incourage application for State workers' compensation benefits.)

Because the clear intent of §424(a) is to prevent claimants from receiving a windfall in duplicated benefits, the reasoning and holding of both **Boyd**, and **Hall**, **supra**, is the more appropriate analysis to apply to the instant case.

In the instant case, the claimant is allowed to receive, in combined benefits, 80% of the average weekly wage or 80% of the ACE, whichever is greater. In this case, 80% of the average weekly wage is $467.10 while 80% of the ACE is $349.48. Even factoring in the claimant's pension benefits of $725.22 per month (R: 60) (excluding any cost-of-living adjustments) or $167.36 per week ($725.22 x 12 ÷ 52 = $167.36, the claimant still receives more in combined benefits than he would under the federal social security offset provisions:

$167.36	[weekly pension benefits]
163.85	[weekly social security benefits]
+252.67	[weekly WC benefits after offset]
$583.88	[100% AWW]

This figure still exceeds the $349.48 which the claimant would have received with the Social Security offset and, threfore, the offset does not exceed that which would have been taken by the Social Security Administration and is completely proper in the instant case.

ARGUMENT

III

UNDER FLORIDA STATE LAW AN INJURED WORKER SHOULD NOT RECEIVE A COMBINATION OF SOCIAL SECURITY DISABILITY, PENSION, AND WORKERS' COMPENSATION BENEFITS WHICH EXCEED HIS PRE-INJURY AVERAGE WEEKLY WAGE.

In 1935, the Legislature of this State for the first time enacted a workers' compensation act. Chapter 17481, Laws of Florida (1935). In considering the purpose of this legislation, our Supreme Court early on noted in Duffy Hotel Co. v. Ficara, 150 Fla. 442, 445, 7 so.2d 790, 791 (1942):

> Workmen's Compensation is a product of industrialism and proceeds on the theory that economic loss to the individual by injury in line of duty should be borne in part by the industry in which he is employedin order that his dependents may not want. (Emphasis added.

The language emphasized above clearly shows that, while the legislature intended to shift the primary cost of industrial injuries onto industry and its consumers, it never intended to compensate an injured worker for more than 100% of his losses. One commentator has expressed the rationale underlying this policy as follows:

> That general principle is that the compensation payments are not intended as full reimbursement to the injured man of the wages or salary lost by the industrial accident. The Preface of the Florida Act, written by the Florida Industrial Commission some years ago, states the general principle excellently:
>
> 'It has often been erroneously said that the object of the compensation law was to place on industry and society the loss occasioned by accidental injuries and deaths. This is only partly true. In every instance the employee

> bears part of the loss, as the Compensation Law provides that the injured employee shall be paid compensation at the rate of 60% of is average weekly wages during his disability, the rate of such compensation not to exceed $42.00 per week. That a part of the loss should fall on the employee is considered fundamental in compensation law, so that no employee shall lose one of the primary incentives to avoid accidental injury.'
>
> And, it might well be added , for it is surely implied, so that no employee shall lose one of the primary incentives toward restoration after injury to full function as a contributing member of society.

Alpert & Riviere, Florida Practice Handbook, 1 Workers' Compensation, §1-5 (1991).

In fact, the concept of limiting an employee's recovery to not more than 100% of his losses in order to facilitate accident avoidance and an early return to work permeates the entire Act. For example, offsets are permitted against an injured employee's compensation benefits when he simultaneously receives unemployment compensation [§440.15(10), Fla.Stat.(1985)], Social Security disability benefits [§440.15(9), Fla.Stat.(1984)], or Social Security retirement benefits [§440.15(3((b)4, Fla.Stat. (1985)]. In general, an injured worker receives only $66^{2/3}$% of his average weekly wage while disabled [§440.15, Fla.Stat.(1985)] or, if he returns to work at a lesser wage, 95% of the difference between 85% of his pre-injury wage and the wages he is able to earn after the accident[§440.15(3)(b)1, Fla.Stat.(1985)]. Maximum compensation rates are imposed [§440.12, Fla.Stat.(1985)], as are time limits during which an injured worker may receive various classifications of workers' compensationbenefits [§440.15, Fla.Stat.(1985)]. When

an employer continues an injured worker's wages after an accident, the employer is entitled to be reimbursed for those wages from the claimant's compensation checks. [§440.20(15), Fla.Stat.(1985)]. Where there has been an overpayment of compensation by the carrier to an injured worker, the carrier is entitled to recoup the overpayment under some circumstances. Belam Florida Corporation v. Dardy, 397 So.2d 756 (Fla.1st DCA 1981). In order to avoid duplication of benefits and a windfall to the employee, an employer/carrier is allowed a lien against the proceeds of any judgment or settlement which the injured worker may receive from a third-party tortfeasor on account of the compensable accident [§440.39, Fla.Stat,(1985)].

This underlying concept has also surfaced in cases where, following an industrial accident, an injured worker begins receiving not only workers' compensation benefits, but sick pay, private disability, and pension disability benefits as well. From this line of cases, one overriding theme has become clear: that an injured worker, except where expressly given such right by contract, may not receive benefits from his employer and other collateral sources which, when totalled, exceed 100% of his average weekly wage.

In deciding that set-offs should be self-executing, the Florida Supreme Court in Department of Public Health v. Wilcox, 543 So.2d 1253 (Fla. 1989) noted that this provision was enacted to prevent injured workers from receiving "windfall" benefits from the combination of Social Security Disability Benefits and Workers'

Compensation Benefits. The policy justification was that duplication of benefits would reduce a worker's incentive to return to work thereby impeding rehabilitation efforts. Id. at 1254.

Although §440.21 prohibits an employer from deducting workers' compensation benefits from an employee's pension benefits, the Florida Supreme Court has held in Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), 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 exceeds the employee's average monthly wage." Id. at 255. In so deciding the court followed the rational in Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla. 1974), which held that compensation benefits combined with sick leave benefits should not exceed claimant's average weekly wage. Further, 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. Id. at 194. See also, Domutz v. Southern Bell Tel. and Tel. Company, 339 So.2d 636 (Fla. 1976).

Other cases have adopted this reasoning in an effort to prevent claimants from obtaining a "windfall" by stacking benefits to exceed their average weekly wage. In General Telephone Company of Florida v. Willcox, 509 So.2d 1270 (Fla. 1st DCA 1987), the court allowed an employer to offset sick leave payments against workers' compensation payments on the basis that the claimant would otherwise receive a windfall by receipt of benefits that exceeded his average weekly wage. Similarly, in K-Mart v. Young, 526 So.2d

965 (Fla. 1st DCA 1988), the court reversed an order which denied the employer a credit for certain amounts of disability payments made to claimant in addition to compensation benefits. The court again noted that a claimant is not entitled to a windfall by receipt of a combination of *benefits that exceeds his or her average weekly wage. Id. at 968. In City of Miami v. Bell, 606 So.2d 1183 (Fla. 1st DCA 1992), the court again followed Barragan by permitting an offset for benefits that combined to exceed the claimant's average weekly wage.

Respondant argues that the Barragan case stands for the proposition that the employer can reduce retirement benefits when two things are present: 1. The retirement plan contains an offset provision; and, 2. The sum of both the pension benefits and workers' compensation benefits exceeds 100% of the employee's average weekly wage. However, this is an incorrect interpretation of that case. Nowhere in Barragan does the court state that retirement benefits may not be offset unless the retirement plan itself contains an offset provision. As stated above, Barragan stands for the proposition that an employer may not offset workers' compensation payments against an employee's pension benefits except to the extent that the total of the two exceeds the employee's average weekly wage.

This provision has also been applied to sick leave benefits in Brown v. S.S. Kresge Company, 305 So.2d 191 (Fla. 1974). It also applies to pension or retirement benefits, regardless of whether the employee contributed to the funding of these benefits. Domutz

v. Southern Bell Tel. and Tel. Company, 339 So.2d 636 (Fla. 1976), quoted with approval in Barraqan, supra.

The only exception to the Barraqan rule is where the employee has entered in to a separate contractual agreement as a condition of employment prohibiting the employer from claiming a pension offset. In Pensacola v. Winchester, 560 So.2d 1273 (Fla. 1st DCA 1990), the court stated there was nothing inherently unjust about a claimant's combined pension and workers' compensation exceeding his pre-injury average weekly wage so long as it was an express condition of his employment contract. In that case, the City Code specifically stated: "Any pensioner.. .shall be entitled to such pension as is hereby provided in addition to any workman's compensation that may be payable to him."

Similarly, in Marion Correctional Inst. v. Kriegel, 522 So.2d 45 (Fla. 5th DCA 1988), the court also held that sick leave benefits and workers' compensation benefits should not exceed claimant's average weekly wage, unless the sick leave benefits were included as an express condition of claimant's employment contract. In the instant case, Respondant did not expressly contract with either the Escambia County Sheriff's Department or the state retirement system to permit the receipt of full workers' compensation benefits in addition to any disability or retirement pension benefits.

Section 440.15(9) governing offsets for Social Security Disability Benefits, and Section 440.21 prohibiting offsets for pension benefits which do not exceed a claimant's average weekly

wage, are not mutually exclusive provisions, and may be invoked simultaneously by an employer/carrier to prevent claimants from receiving a windfall. The purpose of an offset is to prevent claimants from duplicating benefits from different parts of the system resulting in a windfall. As the court noted in Wilcox, supra, duplication of benefits which result in a windfall reduce a workers incentive to return to work, and therefore impedes efforts at rehabilitation.

In Burks v. Days Harvesting, Inc., 597 So.2d 858 (Fla. 1st DCA 1992), this court again stated its intent that a claimant should not receive a windfall in compensation benefits. In that case the claimant was injured and began receiving Social Security Disability Benefits in 1986. The claimant then received permission from the Social Security Administration to return to work to supplement his disability benefits which were still being paid. The claimant received an unrelated compensable workers' compensation injury in 1989 and could not return to work. The court held the employer/carrier was permitted to offset previous disability benefits from a completely unrelated injury to prevent the claimant from receiving a windfall. In short, Burks stands for the proposition that a claimant may not stack benefits to produce a windfall in excess of his pre-injury average weekly wage. As stated in Larson's Workman's Compensation Law, Section 97.10 (1989), workers' compensation is an overall system of wage loss protection distinguishable from recovery in tort, and therefore, duplication of benefits from different parts of the system should

not normally be allowed.

In Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla. 1974), the claimant received "sick leave" benefits from the employer's group insurance carrier, Aetna Insurance Company, from 3/16/71 to 7/8/71, during which time she also received workers' compensation benefits from the employer pursuant to Chapter 440. Despite the fact that the group insurance plan had been fully funded by the employer, the Court held that allowing the complete, dollar-for-dollar offset urged by the employer would violate 5440.21:

> This statutory language would appear to preclude any implication that fringe benefit group insurance provided by employer for his employees would ipso facto reduce their compensation benefits.

305 So.2d at 194.

Nevertheless, the Court went on to hold that, to the extent the combination of sick leave benefits and workers' compensation benefits exceeded the claimant's average weekly wage, an offset against the claimant's workers' compensation benefits would not violate §440.21. That result was reached because of the Court's interpretation of a then-existing procedural rule of the former Industrial Relations Commission, I.R.C. Rule 9:

> However, it is reasonable to conclude the workmen's compensation benefits when combined with sick leave insurance benefits provided by employer should not exceed claimant's average weekly wage because under a logical interpretation of the I.R.C. Rule 9 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. (Emphasis added).

305 So.2d at 194.

I.R.C. Rule 9, referenced above, provided that:

> 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 . . . (Emphasis added).

305 So.2d at 193.

Admittedly, this I.R.C. rule no longer appears in our Workers' Compensation Rules of Procedure. However, it is critical to note that the legislature later codified Rule 9 as a substantive part of Chapter 440. In Belle v. General Electric Company, 409 So.2d 182, 184, n.1 (Fla. 1st DCA 1982), this Court noted:

> Section 440.20(15), Florida Statutes (1979), is a substantial codification of former industrial relations commission rule 9, referred to in Brown, 305 So.2d at 193.

In fact, §440.20(15), Fla.Stat.(1985), is identical in pertinent part to the former I.R.C. rule:

> 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 . . .(Emphasis added).

When a claimant begins receiving Social Security disability benefits, his employer, while not providing his "full wages," has clearly provided some "part thereof." The Social Security Administration is funded through a payroll tax, the Federal Insurance Contributions Act (FICA). Half of that tax is assessed against the employee [26 U.S.C. §3101(a)], and half against the employer [26 U.S.C. §3111(a)]. In that sense then, Social Security

disability benefits are analogous to benefits received from a private disability policy whose premiums are 50% funded by the employer. Therefore, just as the employer in Brown did by funding the Aetna disability policy, an employer continues to pay a "part thereof" of the claimant's "full wages," in addition to workers' compensation and pension benefits, when the claimant receives Social Security disability benefits. Accordingly, consistent with Brown, Domutz, and §440.20(15), the Social Security disability benefits clearly should be included in those benefits which cannot exceed 100% of the average weekly wage.

This result is certainly supported by the Court's decision in City of North Bay Village v. Cool, 617 So.2d 753 (Fla. 1st DCA 1993). In that case, the Court held that the claimant's PTD supplemental benefits paid pursuant to §440.15(1)(e)1, Fla.Stat.(1983), should be included in the benefits considered under the 100% cap. This was so despite the fact that the claimant's accident therein occurred before Jul 1, 1984. Because of the date of accident, the PTD supplemental benefits were not paid directly by the employer/carrier, but by the Workers' Compensation Administration Trust Fund. See §440.15(1)(e)1, Fla.Stat.(Supp.1990). Nevertheless, because the Workers' Compensation Administration Trust Fund is funded by involuntary assessments against self-insured employers and workers' compensation carriers, §440.51, Fla.Stat.(1985), the court implicitly recognized that the employer did pay a "part thereof" of the employee's wages, as did the employer in Brown by funding the

disability benefits provided by Aetna.

Moreover, the mere fact that the employee may also have contributed to the funding of his Social Security disability benefits through his portion of the payroll tax should not preclude an offset. Under §440.20(15), the only relevant inquiry is whether the employer has continued to pay the claimant's "full wages or any part thereof during the period of disability." In addition to the Supreme Court's pronouncement on this issue in Domutz, this result is certainly supported by the Court's holding in City of Miami v. Smith, 602 So.2d 542 (Fla. 1st DCA 1992). In that case, the claimant was receiving both workers' compensation benefits and pension benefits from the City of Miami. Unlike previous opinions which failed to note whether the employees therein had contributed to their City of Miami pensions, the Court in Smith specifically noted that Mr. Smith had contributed over $20,000.00 of his personal money toward the pension. 602 So.2d at 542. Despite this very substantial employee contribution, the Court held:

> [T]here is no statutory authority in the present case to remove the average monthly wage cap established in Barraqan and earlier cases.

602 So.2d at 543.

CONCLUSION

For the foregoing reason, the petitioner respectfully submits that the judge of compensation claims did not err and that the order on appeal should be affirmed.

A failure to do so would be contrary to the Florida Supreme Court's holdings in Brown, Domutz, and Barragan, as well as with §440.20(15), Fla.Stat.(1985). Further, it would be inconsistent with the underlying purpose of our Workers' Compensation Act: to shift a portion of the cost of industrial injuries onto industry and its consumers, while simultaneously providing an incentive to employees for accident avoidance and for a rapid post-accident return to work.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to David A. McCranie, Esquire, 9424 Baymeadows Rd., Suite 220, Jacksonville, FL 32256, and James F. McKenzie, Esquire, 905 East Hatton Street, Pensacola, FL 32503, this 2nd day of September, 1995.

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