ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CITY OF CLEARWATER,

Petitioner,

vs.

CASE NO. 93,800
LT. CASE NO. 97-2719

JUDI ACKER,

Respondent.

Department of Labor & Employment Security's Brief As Amicus Curiae On Behalf of Petitioner

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ON APPEAL FROM THE OPINION OF THE FIRST DISTRICT
COURT OF APPEAL DATED AUGUST 17, 1998
(CORRECTED OPINION FILED SEPTEMBER 17, 1998)

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STATEMENT OF THE CASE AND THE FACTS

The Judge of Compensation Claims (JCC) entered the underlying Order on June 11, 1997 holding that yearly increases in PTD supplemental benefits are to be included in the calculation of the offset. The Order was timely appealed and the First District Court of Appeal issued its opinion reversing the Order on August 17, 1998 and certified a question to this Court. A Notice to Invoke Discretionary Jurisdiction with this Court was timely filed. A Motion to Appear as Amicus Curiae was filed by this Amicus, Department of Labor and Employment Security, on September 8, 1998.

The underlying facts of the workers' compensation case are not relevant to Amicus' position.

SUMMARY OF ARGUMENT

The First District Court of Appeal erred when it held in Acker v. City of Clearwater, 23 Fla. L. Weekly D1970 (Fla. 1st DCA August 28, 1998) that the yearly increases in PTD supplemental benefits are not included in the offset. Although this case involves a disability pension offset, the First District Court of Appeal has determined that their decision dealing with disability pension offsets will apply in social security offset cases too. State of Florida, Department of Labor & Emp. Sec. v. Bowman, 23 Fla. L. Weekly D2124 (Fla. 1st DCA September 11, 1998). This brief will focus on the inclusion of yearly increases in PTD supplemental benefits in the **social security offset**. The statute and the case law clearly intend for supplemental benefits to be considered compensation. The 5% annual increases in supplemental benefits provided for in the statute logically must be considered compensation too. The offset provision in the statute is clear and unambiguous. It requires that all weekly compensation benefits are included in the offset. The term "all weekly compensation" includes supplemental benefits as they are compensation pursuant to the statute and case law. Because supplemental benefits are compensation and as such includable in the offset, the annual

increases in them are also compensation and includable in the offset. This Court has implicitly realized that annual increases are included in the offset calculation in its decision in Escambia County Sheriff's Dept. v. Grice, 692 So. 2d 896, 897 (Fla. 1997). The JCC's Order allowing the Petitioner to continue to include the annual increases in the supplemental benefits in the offset should be affirmed. However, if this Court affirms the First District Court of Appeal's decision in Acker, supra, it should apply that decision prospectively only.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL ERRED IN RULING THAT THE PETITIONER CANNOT INCLUDE ANNUAL INCREASES IN PERMANENT TOTAL DISABILITY SUPPLEMENTAL BENEFITS IN THE OFFSET.

The Judge of Compensation Claims found that the City's inclusion of the yearly increase in permanent total disability supplemental benefits in the offset was proper and in accordance with the statute and case law. The First District Court of Appeal reversed this decision in Acker v. City of Clearwater. See Appendix "A." This appeal ensued.

The Department of Labor and Employment Security (the Department) acknowledges that the offset in the instant case was taken against the claimant's disability pension, not his workers' compensation benefits. Even so, the Department feels compelled to advise this Court of its position regarding the inclusion of annual increases in supplemental benefits in offsets taken against a claimant's workers' compensation benefits because the decision this Court makes in the case at bar may affect the inclusion of yearly increases of supplementals in the offset taken against workers' compensation benefits. Recently, the First District Court of Appeal issued its opinion in Bowman and certified the same question as in this case to this Court. See

Appendix "B." The Department has filed a Notice to Invoke the Discretionary Jurisdiction of this Court in that case. Unlike the instant case, in Bowman, there was no disability pension offset. Rather, only a social security offset was involved. Because the First District Court of Appeal certified the exact same question, it appears that the district court is treating alike those offsets due to the claimant's receipt of disability pension and those offsets due to the claimant's receipt of social security disability.

If the courts are treating these cases similarly, a decision on the issue involved in this case affects the Department because in cases with dates of accident prior to July 1, 1984, the Department through the Division of Workers' Compensation (the Division) pays supplemental PTD benefits to the claimant. § 440.15 (1)(f)1., Fla.Stat. (1995). Currently, when a social security offset is taken in a case where the Division is paying the supplemental benefits, the Division applies the offset available to the supplemental benefits owed.

In order to facilitate the offset calculation, the Division has, by rule, promulgated a form (LES Form DWC-33) which should be completed annually by any entity who intends to offset compensation benefits due to a claimant's receipt of social security disability, whether it is the insurance carrier or the

Division (in pre-1984 cases). See Appendix "B." The DWC-33 requires the entry of certain sums to correctly calculate the offset. One of the variables is the "5% PT Supplement." Prior to the First DCA's decision in Acker, if a DWC-33 was completed annually, it included in the "5% PT Supplement" blank the amount of current supplemental benefits. Because the amount of PTD supplemental benefits increases every year, it had the effect of increasing the offset available to the Division every year. The Division has the first right of offset, so in Division-paid PTD supplemental cases, the Division offsets the PTD supplemental benefits owed (simply because the Division owes no other compensation). Highlands Co. Sch. Bd. v. Dept. of Labor & Emp. Sec. & Juan Carrisquillo, 1998 Fla. App. LEXIS 12456 (Fla. 1st DCA October 7, 1998).

If the offset amount on line "a" of the DWC-33 is greater than the amount of PTD supplemental benefits owed to the claimant, then the Division takes a complete offset and the claimant receives no money from the Division. Further, any difference between the offset amount on line "a" and the amount of offset taken by the Division (amount of PT supplemental benefits owed) is permitted to be claimed by the carrier as an additional offset against permanent total disability payments. If the offset amount (line "a") is less than the PTD supplemental

amount owed by the Division, then the Division subtracts the offset amount from the PTD supplemental benefit owed and pays the claimant the difference. Any decision in the case at bar determining that the annual increases in supplemental benefits are not includable in the annual calculation of the offset would increase the Division's payment on claims where the supplemental benefits are the Division's responsibility. In other words, a decision in this regard would decrease the available offset amount taken by the Division.

The District Court of Appeal erred by ignoring the applicable statute in this case. Supplemental benefits received by a PTD claimant are "compensation" and as such are includable in the calculation of the offset. Section 440.15(1)(e)1., Fla.Stat. (1991) classifies supplemental benefits as compensation. It provides that ". . . the injured employee shall receive additional weekly compensation benefits equal to 5 percent of his weekly compensation rate, as established pursuant to the law in effect on the date of his injury, multiplied by the number of calendar years since the date of injury." § 440.15(1)(e)1., Fla.Stat. (1991) (emphasis supplied). This statute clearly and unambiguously indicates that PTD supplemental benefits are considered compensation as it expressly states that they are "additional weekly compensation benefits."

Section 440.02(6), Fla.Stat. (1991) also indicates that supplemental benefits are "compensation." This section defines "compensation" as ". . . the money allowance payable to an employee or to his dependents as provided for in this chapter." § 440.02(6), Fla.Stat. (1991). Clearly, supplemental PTD benefits fall under this definition as these benefits are a money allowance paid to a claimant pursuant to Chapter 440. Furthermore, the First District Court of Appeal in City of North Bay Village v. Cook, 617 So.2d 753, 754 (Fla.1st DCA 1993) stated that "[s]upplemental benefits are compensation payments provided under section 440.15(1)(e)1, Florida Statutes (1983) . . ." (citing Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989)) (emphasis supplied). Further, in Special Disability Trust Fund v. Stephens, Lynn, Chernay & Klein, 595 So.2d 206 (Fla. 1st DCA 1992), the First District Court of Appeal was asked to decide whether the Special Disability Trust Fund must reimburse PTD supplemental benefits. Id. at 207. The Court answered affirmatively, reasoning that although the Special Disability Trust Fund statute (§ 440.49, Fla.Stat.) did not expressly provide for reimbursement of these benefits, they were reimbursable nevertheless because they "clearly constitute compensation" and the Fund statute provided for reimbursement for all compensation for PTD. Id. at 209. In other words,

compensation encompasses PTD payments and PTD supplemental payments. Accordingly, it is clear that both the statute and the case law intend supplemental benefits to be considered compensation.

The offset provision in Chapter 440 (§ 440.15(10)(a), Fla.Stat. (1991)) provides that "[w]eekly compensation benefits payable under this chapter for disability . . . shall be reduced . . ." § 440.15(10)(a), Fla.Stat. (1991) (emphasis supplied). Because supplemental benefits are "compensation" as defined by Chapter 440 and the Cook and Stephens cases and because the statute (§ 440.15(10)(a), Fla.Stat.) mandates that "compensation" must be reduced (i.e. offset), supplemental benefits are included in the offset. If supplemental benefits themselves are considered compensation, then logically when this benefit amount increases each year, the increased supplemental amount is "compensation" and as such includable in the offset pursuant to the statute mandating that compensation benefits are offset. Just because this benefit amount increases each year does not change its classification as supplemental benefits. The statute itself does not distinguish between the initial supplemental benefit amount and the yearly increased amount. The statute merely provides that supplemental benefits are equal to 5% of the claimant's

compensation rate on the date of accident multiplied by the number of years since the accident.

Furthermore, the offset provision in the statute (section 440.15(10)(a), Fla.Stat. (1991)) does not exclude any type of compensation from the offset. In other words, the offset statute does not provide that only the amount of supplemental benefits applicable when the offset is initially taken is the amount included in the offset. Rather, the offset provision states that the reduction/offset is to apply to all weekly compensation benefits. § 440.15(10)(a), Fla.Stat. (1991). Although the PTD benefit amount the claimant receives will not usually change from year to year, the supplemental amount the claimant is entitled to will increase by 5% each year. § 440.15(1)(e)1., Fla.Stat. (1991). Accordingly, because the initial amount of supplemental benefits is considered a weekly compensation benefit and increases in that amount are also considered a weekly compensation benefit, the statute mandates that they be included in the offset. § 440.15(10)(a), Fla.Stat. (1991).

Additionally, a careful review of the amounts used by this Court in the Grice decision evidences this Court's intention to include the yearly increases in PTD supplemental benefits in offset calculations. In 1985, the year of the accident, Mr. Grice's average weekly wage (AWW) was $583.88 with a

corresponding compensation rate of $307.00 (maximum comp rate for 1985). Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896, 897 (Fla. 1997). When the offset amount was disputed, in 1991, he received $392/week. Id. Because he received the maximum amount of PTD compensation ($307/week) available for his date of accident, his receipt of $392/week in 1991 must have included PTD supplemental benefits. According to § 440.15(1)(e)1., Fla.Stat. (1983), the PTD supplemental amount Mr. Grice was entitled to in 1991, the year the offset dispute arose, was $92.10/week ($307/week x .05 x 6 years since the accident). When this amount is added to the $307/week compensation amount, it yields a total payment of $399.10/week. Mr. Grice did not receive $399.10/week in 1991 because this amount exceeded the maximum compensation rate for 1991. The maximum compensation a claimant could receive in 1991 was $392/week. Thus, Mr. Grice was only entitled to receive $392/week in 1991 and this Court's opinion in Grice indicates this was the amount he received. The $392/week figure was used by this Court to determine whether his benefits from all sources exceeded 100% of his average weekly wage. The amount his benefits exceeded 100% of his AWW was the allowable offset amount. As indicated in the prior calculations, the figure of $392 **included** the annual increases in supplemental benefits for six years.

The First DCA's opinion in Acker holding that yearly increases in supplemental benefits are not includable in the offset is in direct contravention to the offset provision in Chapter 440. Chapter 440 and the case law clearly state that supplemental benefits, including any increases in them, are compensation. § 440.02(6), Fla.Stat. (1991); § 440.15(1)(e)1., Fla.Stat. (1991); Cook 617 So.2d at 754; Stephens 595 So.2d at 209. The offset statutory provision requires that "weekly compensation benefits" be offset. § 440.15(10)(a), Fla.Stat. (1991). The term "weekly compensation benefits" is an all-inclusive term which includes both workers' compensation benefits and supplemental benefits. By use of this all-inclusive term, the offset statute clearly contemplates that the entire amount of the supplemental benefits being paid is subject to whatever offset is available. Consequently, the First DCA's opinion in Acker stating otherwise is not in conformance with the unambiguous statutory language which compels inclusion of supplemental benefits, including the annual increases, in the allowable offset. The figures used by this Court in Grice also supports this conclusion.

It is well settled that social security cost of living increases are not included in the offset. LaFond v. Pinellas Co. Bd. Of Commissioners, 379 So.2d 1023, 1024 (Fla. 1st DCA 1980).

By prohibiting the Division of Workers' Compensation and carriers from including the yearly increases in PTD supplemental benefits in the offset too, the claimant is allowed to obtain a windfall of two cost of living increases in one year. What will eventually happen is that the claimant will receive more than 100% of his/her average weekly wage due to his/her receipt of the yearly increases in social security and workers' compensation (supplemental benefits). This Court, in Grice, stated 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." Grice 692 So.2d at 898. In order to prevent this from occurring, the Division or the carrier (whoever pays the supplemental benefits) must be allowed to include the yearly increases in these benefits in the offset calculation.

The Workers' Compensation Administration Trust Fund (WCATF) has finite resources controlled by statute. The WCATF's money is used for a myriad of expenses associated with workers' compensation, such as rehabilitation expenses of claimants (§440.50, Fla.Stat.); PTD supplemental benefits owed by the Division (§ 440.50, Fla.Stat.); the operating budget of the JCCs (§ 440.45, Fla.Stat.); the travel expenses of the Chief Judge, JCCs and DLES employees (§ 440.47, Fla.Stat.); the expenses of the Workers' Compensation Oversight Board (§ 440.4416,

Fla.Stat.); and the expenses associated with the administration of Chapter 440 by the Division (§ 440.44, Fla.Stat.). Any change in the current practice of the Division's including the increases in supplemental benefits in the allowable offset would impact the fiscal soundness of the WCATF (especially if the Division was required to repay carriers for prior offsets).

In at least one other offset scenario, this Court has held that a change in a workers' compensation offset provision has prospective application only. See City of Miami v. Bell, 634 So.2d 163(Fla. 1994). In Bell, this Court was asked to determine whether its decision in Barragan applied prospectively only. Id. At 165. In Barragan, this Court held a city ordinance allowing a disability pension offset against workers' compensation benefits was invalid. Barragan 545 So.2d at 254-255. This Court, in Bell, held the Barragan decision was prospective only. Bell 634 So.2d at 166. Thus, the City of Miami only had to reimburse claimants for incorrect offsets taken after the effective date of the Barragan decision. Id. The Department respectfully requests that if this Court affirms Acker, it also follows its decision in Bell and holds that the Acker decision has prospective application only.

In Bell, this Court reasoned that retroactive application of the offset change set forth in Barragan would have an unfair

fiscal impact on the City of Miami because the City budgeted for salary and benefits based on the then-existing and valid ordinance and case law applying it. Id. A decision holding that Acker has retroactive application would similarly have a negative and unfair fiscal impact on the Division and every other insurance carrier or self-insured taking offsets. Prior to the First DCA's decision in Acker, the Division was following the industry practice of including the yearly increases in PTD supplemental benefits in the offset. Industry practice is a relevant consideration because the worker's compensation system is designed to be self-executing. See § 440.015, Fla.Stat. (1997).

The Division of Workers' Compensation, pursuant to § 440.51(1), Fla.Stat. (1997), must estimate in advance its cost of the administration of Chapter 440 and must base this estimate on the previous year's expenses. This estimation is used in the calculation of the assessment rate for the WCATF assessed against all carriers and self-insureds writing workers' compensation insurance in Florida. Thus, the Division budgets and collects the money it will require to operate for the next fiscal year in the current fiscal year. Applying Acker retroactively will substantially alter payments which the Division has already forecasted and budgeted.

The Workers' Compensation Administration Trust Fund is a statutorily created Fund with a **cap on assessments (4%)**, meaning there is a finite amount of money in the Fund. See § 440.50, Fla.Stat. (1997); § 440.51(1)(b), Fla.Stat. (1997); § 440.51(4), Fla.Stat. (1997). The Fund is funded through assessments on Employer/Carriers' workers' compensation premiums. See § 440.51(1)(b), Fla.Stat. (1997); § 440.51(4), Fla.Stat. (1997). A decision holding that the Division can not include yearly increases in supplemental benefits in the offset and must repay the offsets improperly calculated before Acker would dramatically increase the Division's expenditures for supplemental benefits from the Workers' Compensation Administration Trust Fund, which is merely one of the many expenditures the Fund makes. At the very least, because the Fund is comprised of assessments paid by **current** carriers and self-insureds, a holding that Acker has retroactive application would require the **current** carriers and self-insureds to incur and pay the obligations of **former** carriers and self-insureds. In Bell, this Court acknowledged the unfairness of requiring current contributors to pay yesterday's fiscal obligations. Bell So.2d 634 at 166.

CONCLUSION

The Judge of Compensation Claims' Order finding that the employer/carrier could include the annual increases in permanent total supplemental benefits in the offset taken by the employer/carrier is supported by the statute and case law and thus should be affirmed. The First District Court of Appeal's opinion should be reversed and the certified question answered affirmatively. Alternatively, if this Court affirms the First District Court of Appeal's opinion in this case, it should also hold that that decision applies prospectively only.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this brief has been typed in proportionately spaced 12 pitch Courier New font.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: William H. Yanger, Jr., Esq., Counsel for Respondent, 324 South Hyde Park Avenue, Suite 210, Tampa, FL 33606; Nancy A. Lauten, Esq., Counsel for Petitioner, P.O.Box 1438, Tampa, FL 33601; Derrick Cox, Esq., Amicus Counsel for Brevard County, 200 S. Orange Avenue, 20th Floor, Orlando, FL 32801; and to David McCranie, Esq., Amicus Counsel for the Department of Insurance, Division of Risk Management, Suite 309, 3733 University Boulevard West, Jacksonville, FL 32217, this 13th day of October, 1998.

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