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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CITY OF CLEARWATER,

Petitioner,

vs.

JUDI ACKER,

Respondent.

Case No.: 93,800

AMICUS BRIEF OF STATE OF FLORIDA, DEPARTMENT OF INSURANCE AND DIVISION OF RISK MANAGEMENT

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See change of address 3/24/99

OA 4-7-99

SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CITY OF CLEARWATER,
Petitioner,

Case No.: 93,800

vs.

JUDI ACKER,
RESPONDENT.
_____/

CITY OF CLEARWATER,
Petitioner,

Case No.: 93,984

vs.

TERRENCE ROWE,
Respondent.
_____/

CITY OF CLEARWATER,
Petitioner,

Case No.: 93,983

vs.

LAWRENCE HAHN,
Respondent.
_____/

NOTICE OF CHANGE OF ADDRESS

Counsel for Amicus Curiae, STATE OF FLORIDA, DEPARTMENT OF INSURANCE, DIVISION OF RISK MANAGEMENT, hereby gives notice that his address has changed as follows:

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STATEMENT OF THE CASE AND FACTS

Because this is an amicus curiae brief, your amicus will make no attempt to argue the facts in issue. Rather, your amicus simply adopts as its own the statement of the case and facts as presented by Petitioner herein.

SUMMARY OF ARGUMENT

The result reached by the First District Court of Appeal in its decision below allows the claimant to receive employer-provided disability benefits which exceed the wages she earned while she was working. Not only is such a result contrary to the longstanding policy in this state of encouraging injured workers to return to gainful employment following on-the-job accidents, it flies in the face of §440.20(15), Fla. Stat., and this Court's construction of that statute in Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla. 1974); Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989); and, more recently, Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997). It is also directly contrary to the First District's own decision in City of North Bay Village v. Cook, 617 So.2d 753 (Fla. 1st DCA 1993), a decision which is not even cited by the First District in its decision below.

By its failure to amend §440.20(15) since its original enactment in 1977, the legislature has approved this Court's construction of the statute. Moreover, the construction urged by Petitioner herein has received approval from the Department of Labor, the state agency charged with the enforcement and implementation of chapter 440. That construction is entitled to great deference.

The First District erred in relying upon its decisions in Hunt v. D. M. Stratton Builders, 677 So.2d 64 (Fla. 1st DCA 1996); and

Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997) in concluding that the employer herein is not entitled to "recalculation" of its "offset" to take into account annual increases in permanent total supplemental benefits. First, those decisions construe a completely different statute, i.e., §440.15(9), Fla. Stat. Under that subsection, there is concern with the amount of combined benefits which the federal government would have allowed if it had been making the computations. There is no such direction or concern under §440.20(15).

Moreover, both Hunt and St. Remy were wrongly decided and should be overruled by this Court. These decisions allow an injured worker to receive combined benefits which exceed 80% of the worker's average weekly wage - a direct contravention of §440.15(9), not to mention decisions from the First District and the Industrial Relations Commission which date back more than 20 years. State, Department of Commerce v. Loggins, IRC Order 2-3137 (April 13, 1977) [10 FCR 212]; State, Division of Workers' Compensation v. Hooks, 515 So.2d 294 (Fla. 1st DCA 1987). Moreover, the dicta in Hunt which prohibits "recalculation" of the "offset" is based upon a fundamental misunderstanding of federal social security law. That law mandates "recalculation" of social security offsets to take into account any increases in state workers' compensation benefits.

In contrast to her former wages, none of the claimant's employer-provided disability benefits is subject to any federal

income or employment taxes. This fact actually increases the disincentive to return to work which chapter 440, and particularly the 1994 amendments thereto, are designed to prevent. By receiving 100% of her average weekly wage in tax-free disability benefits, any ill effects from the purported loss of an inflationary hedge are more than offset.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL ERRED IN REFUSING TO INCLUDE ALL OF THE CLAIMANT'S PERMANENT TOTAL SUPPLEMENTAL BENEFITS WITHIN THE 100% CAP MANDATED BY §440.20(15), Fla. Stat. (1985).

The issue in this case - whether the First District Court of Appeal erred in refusing to include all of the claimant's permanent total supplemental benefits within the 100% cap mandated by §440.20(15), Fla. Stat. (1985)[1] - is controlled by this Court's decision in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997), and by the First District's own decision in City of North Bay Village v. Cook, 617 So.2d 753 (Fla. 1st DCA 1993). Because the First District's decision herein is in direct conflict with those decisions, the certified question herein should be answered in the affirmative.

A. BACKGROUND

A proper understanding of the issue in this case must begin with a recognition of the principle underlying the payment of all compensation benefits in Florida. That principle holds that indemnity benefits under chapter 440 should provide compensation to a worker for his loss of earnings brought about by the industrial

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[1] This subsection has now been renumbered to § 440.20(14), Fla. Stat. (Supp. 1994). Ch. 93-415, § 26, p. 2410, Laws of Fla.

accident, not for his physical injuries per se. Magic City Bottle & Supply Company v. Robinson, 116 So.2d 240 (Fla. 1959). This principle was recently affirmed by the First District Court of Appeal in Brannon v. Tampa Tribune, 711 So.2d 97 (Fla. 1st DCA 1998). Wary of over-compensating an injured worker, the court held that the claimant was not entitled to the simultaneous receipt of both impairment income benefits[2] and permanent total disability benefits[3] notwithstanding the lack of an express statutory provision prohibiting such a result. In reaching its conclusion, the court noted that "Florida is a leading state in the general movement to limit workers' compensation to economic losses." 711 So.2d at 99, n.2. (Emphasis added).

Moreover, although it is true that a primary goal of our workers' compensation act has always been to prevent injured workers from becoming a burden on society, it is equally true that the act has always intended to allow a portion of the economic loss caused by the compensable injury to fall on the injured worker himself. As this Court observed in City of Hialeah v. Warner, 128 So.2d 611 (Fla. 1961):

> The Workmen's Compensation Act is not a general health insurance and does not purport to place a claimant in the same position he was prior to his injury, it only endeavors to have industry to compensate to some extent for a shown loss of wage-earning capacity....

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[2] §440.15(3)(a), Fla. Stat. (Supp. 1994)

[3] §440.15(1)(b), Fla. Stat. (Supp. 1994)

(Emphasis added).

128 So.2d at 614.

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 salary lost by the industrial accident. The Preface to the Florida Act, written by the Florida Industrial Commission some years ago, states the general principle excellently:
>
> 'It has 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 his 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. (Emphasis added).

Alpert, Barker, Greene & Rodems, Fla. Practice Handbook - Workers' Compensation (1995 ed.), §1-5.

Therefore, given the goal of chapter 440 to encourage injured workers to return to work, it makes little sense to ignore the existence of other benefits to which the injured worker might become entitled following a compensable accident. In his treatise

on workers' compensation, Professor Arthur Larson has recognized the significant problem posed by the interplay between such overlapping acts of social legislation:

> Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a worker undergoes a period of wage loss due to all three conditions, it does not follow that he or she should receive three sets of benefits simultaneously and thereby recover more than his or her actual wage. The worker is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit. (Emphasis added).

Larson's Workers' Compensation Law, §97.10, p.18-9.

B. JUDICIAL CONSTRUCTION OF §440.20(15), FLA. STAT.

The problem of over-compensating for economic loss occurs when multiple benefit schemes act simultaneously to compensate an injured worker for loss of wages brought about by disability. In response to this problem, the 1977 Florida Legislature enacted §440.20(15). The predecessor of that statute, I.R.C. Rule 9, had previously been construed by this Court in Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla. 1974), to provide a 100% cap on all "employer-provided" disability benefits.

1. 100% cap on "employer-provided" benefits

In Brown, following a compensable injury, the claimant received "sick leave" benefits from her employer's group insurance carrier during a period when she also was also eligible for chapter 440 workers' compensation benefits from the employer. Recognizing the duplication of benefits that would otherwise occur, the employer contended that it should be granted a complete, dollar-for-dollar credit against her workers' compensation benefits in the amount of the "sick leave" benefits paid. 305 So.2d at 193.

Although this Court noted that such a dollar-for-dollar credit would violate §440.21, Fla. Stat. (1974), it nevertheless held that the employer should be granted a credit against the claimant's workers' compensation benefits to the extent that the combination of her sick leave and workers' compensation benefits exceeded her average weekly wage:

> 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 in the Brown decision, provided in pertinent part:

> When an employee is injured and the employer pays his full wages or any part thereof during

> the period of disability...the employer should be entitled to reimbursement to the extent of the compensation paid or awarded....

305 So.2d at 193.

Although I.R.C. Rule 9 no longer exists as a rule of procedure, there can be no doubt that this rule was enacted into law in 1977. Ch. 77-290, §5, Laws of Fla. It was first codified at §440.20(13), Fla. Stat. (1977), but was subsequently renumbered to §440.20(15), Fla. Stat., by Ch. 79-40, §16, Laws of Fla. At the time of the claimant's accident in the case at bar, this subsection remained at §440.20(15), and it remains a part of the statute today, the same having been renumbered to §440.20(14), Fla. Stat.)(Supp. 1994), by Ch. 93-415, §26, Laws of Fla.[4]

In Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), this Court extended its holding in Brown to include pension benefits within the 100% cap. The precise issue involved in Barragan concerned the validity vel non of a municipal ordinance enacted by the City of Miami. That ordinance sought to restore to the city the complete, dollar-for-dollar credit for workers' compensation benefits taken against a public employee's worker's pension benefits which had been taken away by the 1973 repeal of

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[4] This legislative history and the statutory authority underlying the Barragan decision were acknowledged by the First District Court of Appeal in Grice v. Escambia County Sheriff's Department, 658 So.2d 1208, n.1 (Fla. 1st DCA 1995).

§440.09(4), Fla. Stat. (1953).[5] The Court held that the ordinance violated §166.021(3)(c), Fla. Stat. (1987), which prohibits municipalities from legislating on any subject expressly preempted to the state government by general law. 545 So.2d at 254.

Nevertheless, the Court continued to adhere to its decision in Brown and held that the combination of workers' compensation and pension benefits provided by the employer must be capped at 100% of the average weekly wage. In the words of this Court, "the total benefits from all sources cannot exceed the employee's weekly wage." (Emphasis added). 545 So.2d at 254.

Four years later, in City of North Bay Village v. Cook, 617 So.2d 753 (Fla. 1st DCA 1993), the First District Court of Appeal considered the precise issue involved in the instant appeal.

2. Inclusion of permanent total supplemental benefits within the 100% cap

Section 440.15(1)(e), Fla. Stat., provides that a permanently totally disabled worker shall be awarded "additional weekly compensation benefits equal to 5% of his weekly compensation rate

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[5] In 1953, the Florida legislature substantially amended §440.09(4), to provide a complete, dollar-for-dollar credit for workers' compensation benefits against the pension benefits of a state, county, or municipal employee. See Ch. 28236, §1 Laws of Fla. (1953). Also see, City of Miami v. Graham, 138 So.2d 751 (Fla. 1962), wherein this provision was construed to mean that, in effect, the claimant would receive either his workers' compensation benefits or his pension benefits, whichever was greater. Section 440.09(4) was repealed by the legislature in 1973. See Ch. 73-127, §2, Laws of Fla. Sometime thereafter, the City of Miami enacted its ordinance.

. . . multiplied by the number of calendar years since the date of the injury." Thus, the amount of these "supplemental" benefits increases with each passing year.

In Cook the claimant argued, and the JCC agreed, that these permanent total supplemental benefits must not be included within the 100% cap mandated by Barragan and by §440.20(15). 617 So.2d at 754. In other words, although the employer could limit the combination of the claimant's basic workers' compensation and pension benefits to 100% of the average weekly wage, his permanent total supplemental benefits were to be paid in addition to the 100% cap.

On appeal, the First District squarely rejected that ruling and reversed, concluding:

> Supplemental benefits are compensation payments provided under section 440.15(1)(e)1, Florida Statutes (1983), and should have been considered as part of claimant's total compensation payments in calculating the offset.

617 So.2d at 754.[6]

Nothing in Cook suggests that only those supplemental benefits being paid at the time of the "initial calculation" of the "offset" are subject to the 100% cap. Rather, all such benefits must be

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[6] The First District reached a similar conclusion in Special Disability Trust Fund v. Stephens, Lynn, Chernay & Klein, 595 So.2d 206 (Fla. 1st DCA 1992). There, the The First District concluded that permanent total supplemental benefits are "compensation" and must be reimbursed to the employer/carrier in an appropriate case pursuant to §440.49(2)(c), Fla. Stat. (1983).

considered "compensation" provided by the employer which must be capped at 100% of the AWW.

In addition, closer consideration of the First District's holding in Cook reveals that, if anything, the facts in the case at bar present an even stronger case for inclusion of all of the claimant's permanent total supplemental benefits within the 100% cap. In Cook, the claimant's accident occurred on February 4, 1984. 617 So.2d at 753. At the time of his accident, permanent total supplemental benefits were not paid directly by the employer, but by the Workers' Compensation Administration Trust Fund.[7] In contrast, the claimant's permanent total supplemental benefits in the case at bar are a direct burden upon and obligation of the employer.

Moreover, it is clear that in its recent decision in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997), this Court considered the claimant's permanent total supplemental benefits to be subject to the 100% cap. In Grice, this Court reversed the decision of the First District and held that social security disability benefits are "employer-provided" benefits which are therefore subject to the 100% cap mandated by §440.20(15). 692 So.2d at 895.

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[7] For accidents occurring on or after July 1, 1984, permanent total supplemental benefits are paid directly by the employer, not by the Workers' Compensation Administration Trust Fund. Ch. 84-267, §2, Laws of Fla.

In reaching its conclusion, this Court noted that the claimant was injured in 1985 and that his average weekly wage was $583.88. 692 So.2d at 897. Accordingly, his "compensation rate" ordinarily would be $389.25 ($583.88 x 66 ⅔%). See §440.15(1), Fla. Stat. (1985). However, §440.12(2), Fla. Stat. (1985), limits a claimant's "compensation rate" to "100% of the statewide average weekly wage...for the year in which the injury occurred...." The "maximum compensation rate" for 1985 injuries was $307.00. Florida Workers' Compensation Institute, 1997 Workers' Compensation Reference Manual 649. Therefore, an injured worker ordinarily could not receive more than $307.00 per week for a 1985 injury. Yet, this court noted that the claimant was receiving $392.00 per week in "workers' compensation benefits." 392 So.2d at 897.

This apparent enigma can be solved by looking to §440.15(1)(e)1, Fla. Stat. (1985). Under that subsection, the combination of permanent total and permanent total supplemental benefits may not exceed the maximum compensation rate in effect during the year the payment is made.

It must be observed here that the maximum compensation rate for payments made during calendar year 1991 was $392.00. Florida Workers' Compensation Institute, 1997 Workers' Compensation Reference Manual 649. This number corresponds precisely to the number set forth by this Court in its opinion. Accordingly, the difference between $392.00 and $307.00 obviously represents the payment of permanent total supplemental benefits by the employer.

There simply is no other way to explain these "excess" workers' compensation benefits.

Moreover, even if those benefits had not been specifically considered in Grice, the language used by this court in its holding is clearly broad enough to encompass them:

> We . . . hold that an injured worker, except where expressly given such a right by contract, may not receive benefits from his employer and other collateral sources which, when totaled, exceed 100% of his average weekly wage.

692 So.2d at 898.

Nothing in this holding suggests that only those benefits being provided at the time of the "initial calculation" should be considered to fall within the cap.

C. LEGISLATIVE APPROVAL OF STATUTORY CONSTRUCTION

It is well settled that the legislature is presumed to know the existing laws when it enacts a statute. Collins Investment Company v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964). Thus, the legislature is presumed to have known the construction placed upon I.R.C. Rule 9 when it enacted that rule into law in 1977. Ch. 77-290, §5, Laws of Fla.

In addition, when a statute is re-enacted, the legislature is presumed to have an awareness of the judicial construction placed upon the re-enacted statute, and to have adopted that construction, absent a clear expression to the contrary. Sam's Club v. Bair, 678

So.2d 902 (Fla. 1st DCA 1996); Wood v. Fraser, 677 So.2d 15 (Fla. 2d DCA 1996). As the Second District Court of Appeal explained in Deltona Corporation v. Kipnis, 194 So.2d 295 (Fla. 2d DCA 1967):

> [W]here a statute is re-enacted, and the judicial construction thereof presumed to have been adopted in the re-enactment, the courts are barred and precluded from changing the earlier construction.

194 So.2d at 297.

Since its original enactment in 1977, §440.20(15) has been re-enacted without change every two years. See §11.2421, Fla. Stat. (1997); Ch. 95-347, §1, Laws of Fla.; Ch. 93-272, §1, Laws of Fla.; Ch. 91-44, §1, Laws of Fla.; Ch. 89-64, §1, Laws of Fla.; Ch. 87-83, §1, Laws of Fla.; Ch. 85-59, §1, Laws of Fla.; Ch. 83-61, §1, Laws of Fla.; Ch. 81-2, §1, Laws of Fla.; Ch. 79-281, §1, Laws of Fla. Woodgate Development Corp. v. Hamilton Investment Trust, 351 So.2d 14, 16 (Fla. 1977); Betancourt v. Metropolitan Dade County, 393 So.2d 21 (Fla. 3d DCA 1981).

Thus, the legislature has given its approval to the holdings in Brown, Barragan, Cook, and Grice. Any change in the construction of the statute should therefore come by way of legislative amendment.[8] Also see White v. Johnson, 50 So.2d 532

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[8] In fact, during the 1998 session of the Florida Legislature, bills were introduced in both houses which would have excluded permanent total supplemental benefits from the 100% cap altogether. See Fla. HB 4781 (1998) and Fla. CS for SB 1092 (1998). Neither of these bills was enacted into law. Accordingly, there is even more evidence that the legislature has approved the judicial construction placed upon §440.20(15), and therefore any

(Fla. 1952)(legislative inaction can be taken as an indication of the legislature's acceptance of prior construction of statute); Flagship National Bank of Broward County v. Hinkle, 479 So.2d 828 (Fla. 1st DCA 1985) (since pertinent statutory language had not changed, any change to apportionment doctrine should be made by legislative amendment of the statutory language rather than by judicial reinterpretation of the same statutory language).

D. AGENCY APPROVAL OF STATUTORY CONSTRUCTION

In addition to receiving legislative approval, the statutory construction urged by Petitioner and your amicus has received agency approval. It is well settled that an agency's interpretation of a statute that it is charged with enforcing is entitled to great deference and will be approved by this Court unless it is clearly erroneous. BellSouth Telecommunications, Inc. v. Johnson, 708 So.2d 594 (Fla. 1998). Stated another way, if the agency's construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute. Smith v. Crawford, 645 So.2d 513, 521 (Fla. 1st DCA 1994).

The Department of Labor, Division of Workers' Compensation, is the agency charged with the implementation of chapter 440, our workers' compensation statute. Purcell v. Padgett, 658 So.2d 1237 (Fla. 1st DCA 1995). The Division of Workers' Compensation filed

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change in that regard should come from that body.

an amicus brief in this cause with the First District Court of Appeal and has filed a brief in this Court supporting the Petitioner's position. Also see State, Dept. Of Labor& Employment Security v. Bowman, 23 Fla.L. Weekly D2124 (Fla. 1st DCA September 11, 1998). Accordingly, unless that interpretation is clearly erroneous, it should be approved by this Court.

E. THE FIRST DISTRICT ERRED IN RELYING UPON ITS DECISIONS IN HUNT AND ST. REMY

Without citing its decision in Cook, the First District in the case at bar held that permanent total supplemental benefits which are being paid at the time of the "initial calculation" of the "offset" are subject to the 100% cap imposed by §440.20(15), but that the offset should not be "recalculated" annually to take into account subsequent increases in those benefits. In reaching this result, the First District relied on its previous decisions in Hunt v. D. M. Stratton Builders, 677 So.2d 64 (Fla. 1st DCA 1996); and Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997). For several reasons, such reliance is misplaced.

1. Hunt and St. Remy are distinguishable

The First District erred in applying the formula it set forth in Hunt to a situation for which it was never designed to apply.

In Hunt, the First District set forth a formula to follow in

calculating an offset under §440.15(9), Fla. Stat[9]. That subsection generally limits the two-way combination of workers' compensation and social security disability benefits which an injured worker may receive to 80% of the claimant's average weekly wage (AWW):

> 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 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 percent of the employee's average weekly wage.

While this statutory language is relatively straightforward, this subsection was amended in 1975 to add the following language:

> 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).

Ch. 75-209, §6, p.462, Laws of Fla.

Thus, the calculations under §440.15(9) became inextricably linked to the cap on benefits which would have been imposed by the federal government had it been making the calculations.

In contrast to the Hunt case, the case at bar involves not the proper construction of §440.15(9), Fla. Stat., but of §440.20(15).

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[9] At the time of the Hunt decision and at the time of the clamant's accident herein, this statute was numbered §440.15(9). Effective January 1, 1994, it was renumbered to §440.15(10), Fla. Stat. (Supp. 1994). Ch. 93-415, §20, p.2399, Laws of Fla.

There is no requirement and indeed no authority whatsoever under §440.20(15) for considering the "offset" which the federal government would have taken under 42 U.S.C. §424(a). Indeed, from all that appears in the JCC's order, the claimant herein does not even receive social security disability benefits. Thus, the First District erred in applying its Hunt formula to the facts of this case[10].

Under §440.20(15), the operative question is whether a given benefit is an "employer-provided" benefit. Grice (social security disability benefits are "employer-provided" benefits). If it is, then it is subject to the 100% cap. Clearly, permanent total supplemental benefits meet the "employer-provided" test. Therefore, under Cook and Grice, they must be included within the cap.

2. Hunt and St. Remy were wrongly decided

Even if the Hunt and St. Remy cases were applicable to the facts of this case, your amicus respectfully submits that they were wrongly decided and should be overruled by this Court.

a. Pre-Hunt decisions

As noted above, the issue in Hunt was the proper method to be

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[10] Similarly, the First District erred when it recently held that this Court had implicitly approved its Hunt decision when this Court failed expressly to overrule it in Grice. Alderman v. Florida Plastering, 23 Fla. L. Weekly D2197, 2198 (Fla. 1st DCA September 23, 1998).

followed in calculating an employer's offset under §440.15(9), Fla. Stat. Not cited in the Hunt decision is a previous decision from the former Industrial Relations Commission which specifically held that the 5% supplemental benefits must be included within the 80% cap of §440.15(9). State, Department of Commerce v. Loggins, IRC Order 2-3137 (April 13, 1977)[10 FCR 212].

In Loggins, the claimant became permanently totally disabled as a result of a compensable accident, entitling him to the maximum compensation rate of $80.00 per week. He also began receiving social security disability benefits in the amount of $266.80 per month. These combined benefits were sufficient to trigger the 80% cap of §440.15(10)[§440.15(9)]. Although the judge of industrial claims reduced the claimant's compensation rate so that the total of his workers' compensation and social security disability benefits would not exceed 80% of his AWW, the judge ruled that the claimant was entitled to his 5% supplemental benefit over and above and notwithstanding the 80% limitation. 10 FCR at 212.

On appeal, the claimant argued that §440.15(1)(e) "specifically provides that the supplemental benefits provision is subject to the maximum weekly compensation rate" but is "silent as to the limitation imposed by §440.15(10)(a)" [§440.15(9)]. 10 FCR at 212-213. The Industrial Relations Commission rejected that argument and reversed. Writing for the Commission, Justice Leander Shaw observed:

> We do not find the two sections [§440.15(1)(e)

> and §440.15(9)] to be repugnant, ambiguous or incompatible. Section 440.15(10) [§440.15(9)], F.S., provides in no uncertain terms that a claimant is not to receive more than 80% of his average weekly wage in combined benefits from workmen's compensation and social security. The Judge's interpretation to the contrary is in derogation of the clear intent and wording of the statute.(Emphasis added).

10 FCR at 213.

There was no indication from the Commission that consideration of the 5% supplemental benefits should be limited to those being paid at the time of the "initial calculation." Also see Great Atlantic & Pacific Tea Company v. Wood, 380 So.2d 58 (Fla. 1st DCA 1980) (specifically approving the Industrial Relations Commission's holding in Loggins).

Also not cited in the Hunt decision is a previous decision from the First District in State, Division of Workers' Compensation v. Hooks, 515 So.2d 294 (Fla. 1st DCA 1987) on this same issue.

In Hooks, the claimant was a permanently totally disabled worker who was also receiving social security disability benefits. The Division of Workers' Compensation, the agency responsible for the payment of permanent total supplemental benefits under §440.15(1)(e) for pre-7/1/84 accidents, argued that those benefits were subject to the 80% cap on combined benefits imposed by §440.15(9).

The deputy commissioner rejected that contention, concluding that "such benefits were intended by the legislature as a hedge against inflation" and that including the supplemental benefits

within the 80% cap "would thwart the legislative intent to provide a cost of living increase to disabled employees." 515 So.2d at 295.

On appeal, the First District reversed, holding:

> The legislature's intent to include supplemental benefits within those benefits subject to the 80 percent cap of the social security offset is clear. Section 440.15(10)[§440.15(9)], Florida Statutes expressly includes supplemental benefits within those benefits subject to the 80 percent limitation in computing the offset. The statute provides for no other interpretation than for such inclusion. (Emphasis added).

515 So.2d at 295.

Concerning the effects of inflation on including these benefits, the First District continued:

> While we appreciate the deputy's concern for the effects of inflation and the need to compensate a disabled employee with no ready means to counter its impact, we are bound to give effect to the legislature's clearly expressed intent to subject such benefits to this limitation. (Emphasis added).

515 So.2d at 295.

The court further recognized its previous decisions excluding social security cost-of-living adjustments (COLAS) and monthly wage loss benefits from the 80% cap. 515 So.2d at 295. Nevertheless, the court concluded:

> [W]e cannot extend those holdings to exclude supplemental benefits from calculation of those benefits subject to that limitation. That relief must come from the legislature. (Emphasis added).

515 So. 2d at 295.

b. The Hunt formula results in combined benefits which exceed 80% of the AWW or ACE

Nine years after Hooks, without any intervening change in the statutory language, the First District addressed exactly the same issue but reached a different result in Hunt. Expressing frustration that the Division of Workers' Compensation had failed to promulgate a rule setting forth the specific method for calculating offsets under §440.15(9) as it had previously suggested, 677 So.2d at 66, the court proceeded to set forth its own four-step formula. 677 So.2d at 67.

Step one, according to the court, is to determine the greater of 80% of the claimant's AWW and 80% of the claimant's average current earnings (ACE). The greater of these two figures is then used in step two of the calculations. In Hunt, 80% of the AWW ($245.21) was the greater of the two figures. 677 So.2d at 67.

Step two involves comparing the results in step one with the "total amount of benefits the claimant is receiving on a weekly basis without any offset . . . ." 677 So.2d at 67. Included in these "total weekly benefits," according to the court, are the claimant's permanent total supplemental benefits being received at the time the calculation occurs. The First District noted in Hunt that the claimant's permanent total supplemental benefits were $51.10 per week, or the amount of such benefits payable during the fifth year following his accident ($204.35 x .05 x 5). 677 So. 2d

at 67. Comparing the greater of 80% of the AWW or 80% of the ACE ($245.21) with the "total weekly benefits" ($336.15), the court determined the "preliminary offset amount" to be $90.94. 677 So.2d at 67.

The third step, according to the court, is to "determine whether the preliminary offset amount exceeds the offset which the federal government would otherwise have taken, i.e., whether the preliminary offset amount exceeds the total amount of social security benefits due a claimant and his family, which is the maximum federal social security offset allowed." 677 So.2d at 67. Under the facts of Hunt, the First District determined that the "maximum allowable offset" was $80.70, because the "preliminary offset amount" ($90.94) exceeded the total amount of social security benefits due to claimant and his family ($80.70). 677 So.2d at 67.

Finally, at step four, the "total weekly amount of workers' compensation benefits "due is determined by subtracting the "offset" from the "compensation rate." 677 So.2d at 67. In Hunt, the court held that the claimant was entitled to $123.65 in permanent total disability benefits and $51.10 in supplemental benefits, for a total weekly workers' compensation benefit of $174.75. 677 So.2d at 67. Thus, the combination of workers' compensation and social security benefits equaled $255.45 per week. 677 So.2d at 66.

The fact that these combined benefits exceeded both 80% of the

AWW and 80% of the ACE, in clear contravention of the statute, not to mention the decisions in Loggins, Woods, and Hooks, was apparently of little concern to the First District:

> We recognize that this finding will result in the claimant receiving $255.45 per week in disability benefits, more than 80% of his AWW. However, it is well settled that when, as in this case, the application of statutory provisions appears to indicate a conflict between or among them, the courts are required to read the provisions in a manner that resolves the apparent conflict. (Emphasis added).

677 So.2d at 66.

Your amicus respectfully submits that the fallacy of the First District's Hunt formula lies in the fact that it focuses upon what the amount of the "offset" should be, i.e., the amount by which the claimant's workers' compensation benefits should be reduced vis-a-vis the amount by which his social security benefits would have been reduced:

> [T]he workers' compensation offset cannot be greater than the offset which the federal government would otherwise have taken. (Emphasis added).

677 So.2d at 65.

In point of fact, the statute says no such thing. Rather, the first portion of §440.15(9) allows the injured worker to receive combined benefits not exceeding 80% of the AWW. The federal statute, 42 U.S.C. §424(a), allows the worker to receive combined benefits not exceeding 80% of the ACE. Therefore, a straightforward reading of the 1975 amendment shows that its clear

intent is to allow the claimant to receive in combined benefits 80% of his AWW or 80% of his ACE, whichever is higher. In fact, this Court has already approved this simple, straightforward construction in American Bankers Insurance Company v. Little, 393 So.2d 1066 (Fla. 1981):

> There is a difference in computation between the federal formula, which considers the 'average current wage,' and the state calculation, which utilizes the 'average weekly wage.' [The] 1975 Amendment to the Florida statute allows the employee the higher figure. (Emphasis added).

393 So.2d at 1065, n.3

Using this straightforward approach, the result in Hunt should have been:

$245.21	Higher of 80% AWW or 80% ACE
- 80.70	Weekly SS benefits
$164.51	Total workers' compensation benefits
- 51.10	Permanent total supplemental benefits
$113.41	Permanent total disability benefits

The result of such an approach is that the combination of the permanent total ($113.41), permanent total supplemental ($51.10), and social security benefits ($80.70) equals the higher of 80% of the claimant's AWW or 80% of his ACE ($245.21) - precisely the result contemplated by the statute and by the previous decisions in Loggins, Wood, and Hooks.

c. "Recalculation" under Hunt

In addition to the foregoing error, the First District compounded its error in Hunt by stating in dicta:

> While the existing workers' compensation supplemental benefit is considered in the initial calculation of the workers' compensation offset, the law does not contemplate a recalculation of the offset based upon any increases thereafter. (Emphasis added).

677 So.2d at 67.

Cited as authority for this proposition are the court's decisions in Hunter v. South Florida Sod, 666 So.2d 1018 (Fla. 1st DCA 1196); and Hyatt v. Larson Dairy, Inc., 589 So.2d 367 (Fla. 1st DCA 1991). Even a cursory review of those decisions shows, however, that neither of them supports this proposition.

In Hunter, the court held that the social security cost-of-living adjustments which the claimant was receiving at the time of his 1983 accident must be included within the 80% cap where he had been receiving social security disability benefits since 1975. There was no discussion of "recalculation" of the offset in that decision.

In Hyatt, the claimant's combined permanent total, permanent total supplemental, and social security disability benefits ($185.79 + $33.06 + $45.59) were found to equal 80% of the AWW ($330.55 x .80 = $264.44), and were thus in full compliance with Hooks and §440.15(9). As in Hunter, there is no discussion in Hyatt regarding "recalculation" of the offset once the permanent total supplemental benefits increase.

Although not expressly stated by the court, your amicus believes that the First District's dicta regarding "recalculation"

of the offset under §440.15(9) stems from its previous decisions holding that social security cost-of-living adjustments are not subject to the 80% cap imposed by that subsection. Eques v. Best Knit Textile Corporation, 382 So.2d 736 (Fla. 1st DCA 1980); Great Atlantic & Pacific Tea Company v. Wood, 380 So.2d 558 (Fla. 1st DCA 1980); LaFond v. Pinnellas County Board of Commissioners, 379 So.2d 1023 (Fla. 1st DCA 1980). Your amicus respectfully submits that there is good reason to question the continued viability of these decisions.

None of those decisions contains any meaningful discussion of the issue, and all were based upon a decision from the former Industrial Relations Commission, to-wit, A. C. Scott Construction & Paving Company, Inc. v. Miller, I.R.C. Order 2-3906 (September 11, 1979). In holding that cost-of-living adjustments could not be taken into account in computing the carrier's offset under §440.15(9), the I.R.C. had observed:

> [T]here apparently is no provision in the federal law for including federal social security disability cost of living increases in computing what the federal social security disability offset otherwise would have been....The amount of the federal disability offset is not altered under the federal law by any amount of subsequent federal social security cost of living increases. It follows that the state carrier's compensation offset may not be increased by factors not considered in determining the maximum federal offset....

I.R.C Order 2-3906 at 7.

Thus, reasoned the I.R.C., because the federal government

could not have taken social security cost-of-living adjustments into account in computing its offset, neither should the employer/carrier take such cost-of-living adjustments into account in computing its offset. Following the decisions in Miller, Eques, Wood, and LaFond, however, the Social Security Administration issued SSR 82-68.

In SSR 82-68, the Social Security Administration specifically addressed the question of whether social security disability benefits could be further reduced after calculation of the initial offset because of an increase in a claimant's workers' compensation benefits. The Administration began its ruling by noting that cost-of-living adjustments to social security disability benefits are not subject to the general rule limiting combined benefits to 80% of the average current earnings:

> Clauses (7) and (8) of section 224(a) of the Act provide a specific exception to that provision. They allow Social Security benefit increases to be passed on to the beneficiary by precluding any subsequent monthly offset from reducing the Social Security benefit below the sum of the reduced benefit for the first month of offset and any subsequent increases in Social Security benefits.

SSR 82-68, ¶4.

The Social Security Administration then noted, however, that "there is no corresponding provision which would allow increases in the public disability [workers' compensation] benefit to be passed on to the beneficiary." (Emphasis added.) SSR 82-68. They then went on to rule:

> Section 224 of the Act or section 404.408(a) of the regulations, thus, does not authorize limiting offset to the first monthly amount of public disability benefits. In fact, the legislative purpose...is clearly contrary to that result. To apply offset on the basis of the first such award, reducing the excess over the 80 percent limitation, and then not readjusting on the basis of a later, increased award, would result in combined benefits that could substantially exceed the 80 percent limitation set forth in section 224(a)(1-6). The resulting payment of combined benefits in excess of predisability earnings was specifically disapproved in the original legislative history of the offset provision and has been subsequently reaffirmed by Congress. (Emphasis added).

SSR 82-68, ¶6.

The Social Security Administration further went on to hold:

> All increases in public disability [workers' compensation] benefit after offset is first considered or imposed should be considered in the computation of the DIB [disability insurance benefit] reduction and will result in the imposition of an additional offset where appropriate....Each subsequent increase in the public disability [workers' compensation] benefit after offset is imposed may result in a further reduction of Federal disability benefits. (Emphasis added).

SSR 82-68, ¶¶8-9.

Also see 20 CFR §404.408(k) and the example contained therein. Therefore, because the Social Security Administration has now concluded that cost-of-living adjustments to workers' compensation benefits must be taken into account in computing its offset, the courts of this state should likewise take such increases in social security benefits into account in calculating the amount of

workers' compensation benefits owed. For this reason, your amicus respectfully submits that the decisions in Miller, Eques, Wood, and LaFond are no longer authoritative. Although perhaps not strictly applicable to the facts of this case, it should be noted that the First District has recently ruled that "[o]nce this initial offset is determined, the judge may not order recalculation based on any cost-of-living increases in the claimant's collateral benefits thereafter . . ." and "[o]ur decision in Hunt prohibits recalculation of an offset based on any cost-of-living increases in a particular benefit." Alderman v. Florida Plastering, 23 Fla. L. Weekly D2197, 2198 (Fla. 1st DCA September 23, 1998) (Emphasis added).

E. RESULTS OF THE FIRST DISTRICT'S HOLDING

By applying its Hunt formula and by refusing to allow the employer to take in account future increases in the claimant's permanent total supplemental benefits, the First District will allow the claimant to receive benefits which exceed the wages which she earned while she was working. Clearly such a result provides a powerful disincentive to return to work. Not only is such a result contrary to longstanding policy in this state, it is particularly antithetical to several amendments to chapter 440 which were enacted during the special session of the Florida Legislature which was convened in November 1993.

As a result of spiraling workers' compensation costs, the

legislature amended §440.015, Fla. Stat. (1994), to provide:

> It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the workers return to gainful reemployment . . . . (Amended language underlined).

Ch. 93-415, §1, p.2352, Laws of Fla.

Moreover, the legislature affirmed the employer's right to continue vocational evaluation and testing even for permanently totally disabled workers in an effort to facilitate their return to work. §440.15(1)(e)1, Fla. Stat. (Supp. 1994); Ch. 93-415, §20, p.2390, Laws of Fla. The employer may also withhold payments for permanent total and permanent total supplemental benefits "for any period during which the employee willfully fails or refuses to appear without good cause for the scheduled vocational evaluation or testing." §440.15(1)(e)3, Fla. Stat. (Supp. 1994); Ch. 93-415, §20, p.2390, Laws of Fla.

Under the First District's holding, the employer's initial calculation" in this case would have occurred in 1994. Acker at D1970. Thus, the "initial calculation," would be performed as follows:

$133.07	Permanent total disability benefits (after reduction)
$126.00	1994 Permanent total supplemental rate
+$335.16[11]	In-line-of-duty disability benefits
$594.23	100% AWW

[11] $1,441.20 divided by 4.3 = $335.16 per week.

By 1998, the claimant would receive $657.23 per week in combined benefits, or approximately 110.60% of her AWW:

$133.07	Permanent total disability benefits (after reduction)
$189.00	1998 permanent total supplemental rate
+$335.16	In-line-of-duty disability benefits
$657.23	110.60 % AWW

The result is even more striking when one considers that, unlike her former wages, none of the claimant's employer-provided disability benefits is subject to any federal income or employment taxes. 26 U.S.C. §104(a)(1); 26 U.S.C. §3121(a)(2)(A); 26 U.S.C. §401(a); 26 U.S.C. §3121(a)(5)(A); 26 U.S.C. §3306(c)(7).

For example, the claimant's former taxable wages were $30,899.96 ($594.23 x 52 weeks). Under the First District's holding, in 1998 the employer would be required to provide her with tax-free disability benefits totaling $34,175.96 ($657.23 x 52). Taking into account employment taxes alone[12], the claimant's net earnings at the time of her accident would have been $28,536.11.[13] Again, taking into account employment taxes alone, the claimant would be required to earn approximately $37,000 per year in order to equal the 1998 tax-free benefit she would receive from her

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[12] Because federal income taxes can vary, depending upon deductions, number of exemptions, and the receipt of other income, such taxes are not used in this example. Obviously, however, the income tax factor would have an effect on most cases.

[13] FICA taxes [26 U.S.C. §3101(a)] of 6.2% and medicare taxes [26 U.S.C. §3101(b)] of 1.45% would reduce the claimant's taxable wages of $30,899.96 to a net of $28,536.11.

employer-provided disability benefits.[14] This figure represents 129.6% of her former "take-home" pay. Obviously, such a result is inconsistent with the legislature's stated goal "to facilitate the worker's return to gainful re-employment." §440.015, Fla. Stat. (Supp. 1994).

Finally, the First District contends in its decision below that it is "bound to give effect to the intended purpose of the supplemental benefits" and that "[r]ecalculating the offset so as to include the cost-of-living adjustment would certainly erode that purpose." Acker at D1971. In addition to being contrary to the opposite sentiment expressed by the court in Hooks, your amicus respectfully submits that by paying the claimant 100% of her AWW in tax-free disability benefits, any such perceived ill effects are more than alleviated.

The Petitioner's method of calculation in this case is in complete compliance with the First District's holding in Cook and with this Court's construction of §440.20(15) that "total benefits from all sources cannot exceed the employee's weekly wage." Grice at 898; Barragan at 254 (Emphasis added). Accordingly, the certified question should be answered in the affirmative and the First District's decision below should be quashed.

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[14] $37,000.00 less FICA taxes of 6.2% and Medicare taxes of 1.45% would reduce the claimant's net earnings to $34,169.50, approximately equal to her tax-free disability benefits of $34,175.96.

CONCLUSION

For the foregoing reasons, your amicus respectfully suggests that the certified question should be answered in the affirmative and that the First District's decision below should be quashed. In addition, because the First District is under the mistaken impression that this Court has approved its decision in Hunt, this Court should take this opportunity to overrule the First District's decisions in Hunt and St. Remy.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 16th day of October, 1998, to:

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