SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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CITY OF CLEARWATER,

Petitioner,

vs.

JUDI ACKER,

Respondent.

Case No.: 93,800

ANSWER BRIEF ON THE MERITS OF RESPONDENT, JUDI ACKER

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed with 14 point New Times Roman.

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STATEMENT OF THE CASE AND FACTS

The Claimant/Respondent is in agreement with the Statement of the Case and Facts contained in the Petitioner's Initial Brief on the Merits. The Claimant/Respondent also notes that since the Florida Supreme Court has deferred a decision as to whether or not to accept jurisdiction, the Respondent's Answer Brief deals only with the merits of the case. She understand that she may be given an opportunity, if the court deems it appropriate, to argue regarding the issue of whether the Petitioner has truly set forth a basis for the Florida Supreme Court to accept jurisdiction in this case.[1]

[1] For ease of reference herein, the Respondent, Judi Acker, will be referred to as follows: Ms. Acker, Respondent, or Claimant. The Petitioner, City of Clearwater, will be referred to by name, as the Petitioner or Employer/Carrier or as the E/C. The Department of Insurance, Division of Risk Management, will be referred to as such, or abbreviated as DOI/DRM. The Brevard County Board of County Commissioners will be referred to as such, or abbreviated as BCBCC. Finally, the Department of Labor and Employment Security will be referred to as such, or as DLES.

ISSUE ON APPEAL

THE CLAIMANT AGREES WITH THE PETITIONER THAT THE FOLLOWING CONSTITUTES THE ISSUE ON APPEAL IN THE INSTANT CASE:

> "WHERE AN EMPLOYER TAKES A WORKERS' COMPENSATION OFFSET UNDER SECTION 440.20(15), FLORIDA STATUTES (1985), AND INITIALLY INCLUDED SUPPLEMENTAL BENEFITS PAID UNDER SECTION 440.15(1)(e)(1), FLORIDA STATUTES (1985), IS THE EMPLOYER ENTITLED TO RECALCULATE THE OFFSET BASED ON THE YEARLY 5% INCREASE IN SUPPLEMENTAL BENEFITS?"

SUMMARY OF ARGUMENT

The District Court of Appeal correctly held in the case below that an employer who takes a workers' compensation offset under section 440.15, Florida Statutes (1985), is permitted to use, in that offset calculation, only those PTD supplemental benefits that were owed to the claimant at the time the offset was initially taken, and that PTD supplemental benefits owed to the claimant for years subsequent to the year in which the offset calculation is initially taken are therefore not includable in the offset calculation. This result is consistent with the only cases that have dealt with this specific issue - Hunt v. D.M. Stratton Builders, 677 So.2d 64 (Fla. 1st DCA 1996), and its progeny, including Cruse Construction v. St. Remy, 704 So.2d 1180 (Fla. 1st DCA 1997) and the recently decided case of Alderman v. Florida Plastering, 23 Fla. L. Weekly D2197 (Fla. 1st DCA, September 23, 1998). These cases have addressed the specific issue at hand and held that the rationale employed by the District Court in the instant case is correct. In fact, the District Court in Alderman specifically discussed its earlier decision in the instant case, and expressed the basis for its decision.

The briefs of the Petitioner and the amicus curiae apparently recognize the strength of the decisions in Hunt and its progeny, and therefore attempt to accomplish two objectives through their arguments. First, they attempt to

persuade this court that the result issued by the District Court in the instant case is incorrect because they contend that the Supreme Court addressed the issue in the instant case in Escambia County Sheriff's Office v. Grice, 692 So.2d 896 (Fla. 1997), in a manner inconsistent with the ruling in Hunt. Specifically, they contend that the Grice decision set forth a holding which would limit the claimant to 100% of his average weekly wage, whereas the holdings Hunt and in the District Court below would permit a claimant to receive in excess of 100% of his AWW. Their argument in this regard is unpersuasive, because the Grice Supreme Court decision, issued approximately 10 months after the District Court issued its ruling in Hunt, makes absolutely no mention of the Hunt decision at all, and thereby clearly does not recede from Hunt's conclusion that a carrier may only include those PTD supplemental benefits owed to the claimant at the time the offset is initially taken, but not thereafter.

The second objective of the Petitioner and amicus curiae is to attempt to first discredit the holding in Hunt as being merely dicta or internally inconsistent, and then distinguish the Hunt decision from the facts in the instant case. The Petitioner and amicus curiae's arguments in this regard are without merit. The holding in Hunt is not dicta, as it did not go beyond the facts before the court and was part of the majority decision. The cases cited

by Hunt, Hunter v. South Florida Sod, 666 So.2d 1018 (Fla. 1st DCA 1996) and , 666 So.2d 1018 9Fla. 1st DCA 1996) and Hyatt v. Larson Dairy, 589 So.2d 367 (Fla. 1st DCA 1991) were appropriate precedent. The contention that Hunt does not apply to the instant case because it featured a F.S. 440.15(9) is misplaced, because both F.S. 440.15(9) and 440.20(15) require consideration of the amount of PTD supplemental benefits to be used in calculation of the offset, and are therefore inextricably linked. The contention that Hunt and St. Remy (and presumably Alderman) were incorrectly decided is also not meritorious, not only because said decisions have not been overruled, but also because the cases of State, Department of Commerce v. Loggins, IRC Order 2-3137 (April 13, 1977) and State, Division of Workers' Compensation v. Hooks, 515 So.2d 294 (Fla. 1st DCA 1987) do not address specifically the question at issue in the instant case. Finally, the contention that the Hunt decision is incorrect because it permits a claimant to receive in excess of 80% of the higher of his AWW or ACE begs the very question that is at issue in this case, which was decided favorably to the claimants position by the courts in St. Remy, Alderman, and in the District Court decision below. Consequently, this court should conclude that the holdings in Hunt, St. Remy, Alderman, and the District Court decision below warrant a finding that the decision of the District Court of Appeal below should be affirmed,

and the certified question posed to this court should be answered in the negative, thereby prohibiting an employer/carrier from including in offset calculations anything beyond the amount of PTD supplemental benefits owed to the claimant at the time the offset is initially taken.

This court should also not be persuaded by the efforts of the Petitioner and amicus curiae to suggest that because its position would still permit the claimant to receive 100% of her AWW from the combination of workers' compensation and the collateral City of Clearwater disability pension, she is not being deprived of anything. On the contrary, due to the effects of inflation, forever limiting the claimant to the amount of money she was earning in 1986 would deprive the claimant of the very benefit for which PTD supplemental benefits were initially intended - as a hedge against inflation. By ruling that the interpretations given by Hunt, St. Remy, Alderman, and the District Court below are correct, this court will remain consistent not only with those decisions, but also with legislative intent, as articulated by the 1974 legislative introduction of PTD supplemental benefits and the 1984 legislative clarification regarding these benefits, and early case law discussing the true intent behind PTD supplemental benefits, as discussed by the courts in Division of Workers' Compensation v. Vaughn, 411 So.2d 294 (Fla. 1st DCA 1982); Shipp v. State Workers' Compensation Trust Fund, 481 So.2d

76 (Fla. 1st DCA 1986); Division of Workers' Compensation Trust Fund v. Hansborough, 507 So.2d 785 (Fla. 1st DCA 1987); and Polote Corporation v. Meredith, 482 So.2d 515 (Fla. 1st DCA 1986).

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT CASE CORRECTLY CONCLUDED THAT AN EMPLOYER WHO TAKES A WORKERS' COMPENSATION OFFSET UNDER SECTION 440.20(15), FLORIDA STATUTES (1985), AND INITIALLY INCLUDES SUPPLEMENTAL BENEFITS PAID UNDER SECTION 440.15(1)(e), FLORIDA STATUTES (1985), IS NOT ENTITLED TO RECALCULATE THE OFFSET BASED ON THE YEARLY 5% INCREASE IN SUPPLEMENTAL BENEFITS.

The claimant in the instant case was accepted as permanently and totally disabled in June 1994. At that time, her average weekly wage was $594.23, with a corresponding compensation rate of $315.00, which was the maximum compensation rate for injuries occurring in 1986. At the time the Claimant was initially accepted as being permanently and totally disabled in 1994, eight calendar years had elapsed since the date of the accident, so the permanent total supplemental amount owed to her at the time the E/C first took an offset was $126.00. The Claimant acknowledged in her briefs before the District Court of Appeal that the law, as articulated in the case of Hunt v. D.M. Stratton Builders, (677 So.2d 64 (Fla. 1st DCA 1996), would permit the carrier to utilize a PTD supplemental figure of $126.00 in its offset calculations. However, the point that is at issue in this case is whether the Employer/Carrier would then be permitted to utilize future increases in

permanent total supplemental amounts, such as for 1995, 1996, 1997, 1998, etc. in its offset calculations each year. The First District Court of Appeal in the instant case concluded that "recalculating the offset every year, so as to include the increase in supplemental benefits, frustrates the intended purpose of supplemental benefits." Acker v. City of Clearwater, 23 Fla. L. Weekly D 1970, 1971 (Fla. 1st DCA, August 17, 1998). In so doing, it concluded that the Employer/Carrier could utilize a permanent total disability supplemental figure above the $126.00 in permanent total supplemental benefits that were owed to the Claimant at the time the offset was initially taken in 1994. In support of its decision, the District Court in the instant case relied upon not only Hunt, supra, but also Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997), which followed the reasoning in Hunt, and likewise concluded that a carrier may not include in its offset calculations PTD supplemental benefits beyond the amount of those benefits owed to the claimant at the time the offset was initially taken by the carrier. However, because the District Court in the instant case reasoned that its decision might be in conflict with the decision rendered by the Florida Supreme Court in Escambia Co. Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997), which could be read to permit inclusion of yearly increases in supplemental

benefits in the calculation of the offset, the First District Court certified the question noted above, under Issue on Appeal, to the Florida Supreme Court.

The Claimant maintains that the District Court's decision in the instant case is correct, and that the cases relied upon by the Employer/Carrier and the amicus curiae in this case do not demonstrate that a sufficient conflict is created by the Grice decision, among others, to prevent application of the law articulated in Hunt and followed in St. Remy, the recently decided case of Alderman v. Florida Plastering, 23 Fla. L. Weekly D 2197 (Fla. 1st DCA September 23, 1998), and in the instant case below, at the District Court level.

The initial point raised by the Petitioners in their Initial Brief on the Merits is that the case of Brown v. S.S. Kresge Co., 305 So.2d 191 (Fla. 1974), stands for the proposition that when an injured worker receives the equivalent of his full wages from whatever employer source, that should be the limit of his compensation. Since the Brown case featured sick leave, rather than the pension benefits that were received by the Claimant in the instant case, the Petitioner cites the case of Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), which states that an employer may not offset workers' compensation payments against an employee's pension benefit except to the extent that the total of the two exceeds the employee's average monthly

wage. The Claimant contends that although the general rule articulated in Brown and Barragan was that an individual cannot receive more than 100% of her average weekly wage from all employer sources, cases since Brown and Barragan have attempted to further define not only the types of benefits that are considered in connection with this issue, but also the method by which those benefits are calculated. The decisions rendered in these cases have led, in the claimant's opinion, to the conclusion that the 100% cap does not apply to the payment of permanent total disability supplemental benefits beyond those owed to the claimant at the time the carrier first takes the offset. In effect, the claimant believes that the only conclusion that can be reached by this court, in light of the way that recent case law has given effect to legislative intent, is that although the E/C may utilize in its offset calculations the amount of PTD supplemental benefits owed when the offset was first available, it cannot use any subsequent PTD supplemental benefits in the offset recalculation. To the extent that such a policy might eventually lead to a situation where a claimant eventually receives in excess of 100% of their AWW, the claimant believes that such a result is not only acceptable, but was in fact contemplated by the legislators who introduced the concept of PTD supplemental benefits in 1974. These legislators understood, and the court in the cases of Hunt, St. Remy, Acker, and Alderman, supra, has accepted, that

in order to provide injured workers with some protection against inflation, PTD supplemental benefits are necessary. Further, in order to effectuate the financial protection associated with PTD supplemental benefits, an individual must be able to receive beyond 100% of their AWW under appropriate circumstances, such as when, as in the instant case, many years have passed since the claimant's industrial accident.

In State, Division of Workers' Compensation v. Hooks, 515 So.2d 294 (Fla. 1st DCA 1987), the court noted that permanent total disability supplemental benefits are includable within those benefits subject to the 80% cap of the social security offset, but that social security disability cost-of-living increases (hereinafter referred to as SS COLA's) are not includable, provided that the entitlement to SSD begins after the workers' compensation accident. Since the law, pursuant to Barragan, and presumably Grice, is that money received by the employee from workers' compensation, disability pension, and social security disability benefits will all be considered in determining whether the total of those benefits exceeds 100% of the Claimant's average weekly wage, the question is how, and to what extent, those benefits are calculated in determining whether they exceed the AWW. The Claimant contends that the decisions in Hunt, Alderman, St. Remy, and Acker have resolved this question by concluding, as noted above, that

although permanent total disability supplemental benefits are generally includable, pursuant to Hooks, supra, in the offset calculation, only the PTD supplemental benefits that the Claimant is receiving at the time the offset is initially calculated (in this case, the $126.00 figure) are includable . Since none of the cases relied upon by the Employer/Carrier and the amicus curiae have directly addressed this issue, or contradicted the holdings in Hunt, Alderman, St. Remy, and Acker, supra, the First District Court of Appeal's decision in Acker must be affirmed, and the certified question posed to this court should be answered in the negative.

The Petitioner cites the case of City of North Bay Village v. Cook, 617 So.2d 753 (Fla. 1st DCA 1993), and notes that the Claimant in Cook was injured in 1984 and accepted as being permanently and totally disabled. In 1985, that Claimant began receiving disability retirement pension benefits from the city. The Court in Cook concluded that the permanent total supplemental benefits fell within the statutory definition of compensation, and that the permanent total supplemental benefits should therefore be considered as part of the Claimant's total compensation payments in calculating the offset. Cook, supra at 754. The Petitioner then states that "while the opinion does not specifically state that annual increases in supplemental benefits are to be included in future calculations of the offset, the rationale employed by

the court, i.e., that PTD supplemental benefits are compensation, gives no logical or rational way to distinguish subsequent increases since those increases would also constitute "compensation" under the Workers' Compensation Act (Petitioner's Brief at page 15).

The Petitioner's and amicus curiae's reliance on Cook is unwarranted. Although the Claimant acknowledges that permanent total disability supplemental benefits are "compensation" as that term is defined in 440.02(6)[Fla. Stat. (1991)], she contends that reliance on Cook for anything beyond that point is misplaced. The Cook decision does not specifically state that annual increases are to be included in future calculations of the offset. This is because Cook merely states that PTD supplemental benefits, as a category, are includable in some amount in the offset calculation. It does not (unlike Hunt, supra) discuss the amount of the PTD supplemental benefits that are includable. As a result, merely because PTD supplemental benefits are compensation does not mean that subsequent increases, beyond the amount of PTD supplemental benefits owed at the time of the initial calculation, are to be considered as the Employer/Carrier and amicus curiae urge. Cook did not address this specific issue, and is therefore of no precedential value. Additionally, it was decided prior to Hunt, and therefore cannot be said to in any way contradict the finding in Hunt.

The Petitioner next addresses the Florida Supreme Court's decision in Grice, supra, contending that "it appears from the facts of Grice that this court approved inclusion of supplemental benefits within the calculation of the offset." (Petitioner's brief, at p. 15). The amicus brief of the DOI/DRM follows this reasoning, and concludes that even if though the specific issue at hand in the instant case - whether an employer has a right to include PTD supplemental benefits beyond those owed to the claimant at the time of the initial calculation - was not addressed by the Grice court, the language used by that court in its holding is sufficiently broad to encompass that question.

Although the Employer/Carrier and the amicus curiae argue that Grice either expressly or impliedly considered the precise issue at hand in the instant case, the Claimant disagrees. She contends that even the Judge of Compensation Claims in the instant case was uncertain whether anyone "argued that issue to the court" (R-306 of record on appeal). Specifically, the Claimant notes that there is nothing in either the First DCA (Grice v. Escambia County Sheriff's Department, 658 So.2d 1208 (Fla. 1st DCA 1995)) or Florida Supreme Court (Escambia County Sheriff's Department v. Grice, supra) decisions which indicate that either court addressed, or was asked to address, this issue. As noted by the DCA in Acker, the decision in Hunt, supra, was issued on July 15, 1996, and the Grice v. Florida Supreme Court,

692 So.2d 896 (Fla. 1997) was issued on May 1, 1997. Had the Florida Supreme Court in Grice intended to recede from the holding in Hunt that the E/C may take an offset using the amount of PTD benefits owed at the time of the initial offset calculation, but not beyond that amount, it would have done so. For the Petitioner and amicus curiae to therefore suggest that the Florida Supreme Court in Grice, supra, somehow addressed the Hunt court's ruling regarding the amount of PTD supplemental benefits to be included in the offset is not meritorious, since the Grice case issued approximately ten months after the Hunt decision, makes absolutely no mention of the Hunt case, either to express agreement or disagreement. It is therefore clearly not controlling on the issue in the instant case. The Hunt decision is therefore controlling, as are the decisions which cite Hunt, i.e. St. Remy, Alderman, and Acker, supra. In fact, the recent decision in Alderman, supra, addresses the fallacy of this argument by the Petitioner and amicus curiae in the instant case. Alderman noted as follows:

> "The court held in Grice that in the initial calculation of the offset, the E/C are entitled to offset amounts paid to the employee for state disability retirement and SSD against workers' compensation to the extent that the combined total of all benefits exceeds the employee's AWW.
>
> However, as pointed out in the Acker opinion, Grice did not concern the issue of recalculation, nor did it address

> the Hunt opinion. To the contrary, Grice involved the initial calculation of the offset after a claimant begins receiving collateral benefits. If the court had intended to overrule Hunt, it could have done so expressly in Grice. Moreover, our decision in St. Remy, affirming Hunt was published in late December 1997, nearly seven months after the Supreme Court issued the Grice opinion. Therefore, Hunt's prohibition against recalculation to account for cost-of-living increase, as reaffirmed in St. Remy, is still good law. [Alderman, supra at D2198]"

Perhaps because the Petitioner and the amicus curiae recognize that the only case law which has directly addressed the issue at hand is not Grice, but rather Hunt and its progeny, the Petitioner and amicus curiae attempt to discredit the holding in Hunt, and its relevance to the facts in the instant case. They contend that because they view the fact pattern in Hunt to be distinguishable from the facts in the instant case, they contend that reliance on Hunt is unwarranted, and that therefore, the District Court erred in applying the formula it set forth in Hunt to the facts of the instant case. Specifically, the Petitioner and amicus curiae contend that in Hunt, the only issue was whether a F.S. 440.15(9) offset could exceed the total amount of social security benefits due a Claimant and his family. As a result, they contend that the court's statement, that the law did not contemplate a recalculation of the workers' compensation offset based on yearly increases in the state PTD supplemental benefits, was merely dicta, and therefore not controlling. More

specifically, DOI/DRM contends that the issue in Hunt was the formula to follow in calculating a 440.15(9) offset, which limits the two-way combination of workers' compensation and social security disability benefits to 80% of average weekly wage or ACE, whichever is higher. DOI/DRM argues that the Hunt ruling simply means that under no circumstances could the workers' compensation benefits be reduced to a greater extent than such benefits would have been reduced under the Social Security system. In contrast, DOI/DRM contends that the instant case features not a question regarding the 440.15(9) 80% cap, but instead the "100% cap" discussed in 440.20(15). It argues that the latter section does not address the "offset" the federal government would take pursuant to Social Security law, and that because the facts of the instant case suggest that there is no evidence that Ms. Acker received social security disability benefits, the First District Court below erred in applying the Hunt formula. The DOI/DRM notes that under 440.20(15), the issue is whether a given benefit is an "employer provided" benefit. If so, DOI/DRM argues that it is subject to the 100% cap, and that permanent total disability supplemental benefits are clearly employer provided benefits.

The Claimant contends that the District Court was correct when, in St. Remy, Alderman, and Acker, supra, it concluded that although Hunt did deal

with the situation involving offset calculations in the context of the receipt of social security disability benefits and workers' compensation benefits, its conclusions are directly applicable to facts such as those in the instant case, because Hunt addressed for the first time the issue in the instant case: What is the amount of PTD supplemental benefits to use in the offset calculation - the amount of said benefits owed to the claimant at the time the carrier initially takes the offset or the amount of PTD supplemental benefits at any given moment, even though many years have passed, and many additional annual supplemental increases may have been paid since the carrier initially took the offset? Hunt, of course, answered this question as follows:

> "While the existing workers compensation supplemental benefits 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. Hunt, supra at 67."

Although the E/C and amicus curiae argue that Hunt, along with its progeny Bonifay Manufacturing Company v. Harris, 691 So.2d 1170 (Fla. 1st DCA 1997) and Lil' Champ Food Stores v. Ross, 682 So.2d 649 (Fla. 1st DCA 1996), as well as, of course, St. Remy, Alderman, and Acker, supra, are inapplicable, their rationale for dismissing Hunt's precedential value is unpersuasive. First, both the E/C and DOI/DRM argue that the language from Hunt noted above is merely dicta, and is therefore not worthy of the

status of precedent on this issue. This argument is without merit. Dicta is defined as follows: "opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinions which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent." [Blacks Law Dictionary, Sixth Edition (1995)]."

Based upon that definition, the above passage from Hunt is clearly not dicta. It did not go beyond the facts before the court. It was not made in a dissenting or concurring opinion. It was part of the majority opinion, and therefore can be assumed to have been intended to express the opinion of the court with regard to an issue of major concern, not only to the parties in Hunt, but also to the workers' compensation system in general. Given the fact that a finding in support of the inclusion of all PTD supplemental benefits in the offset calculations, rather than simply those owed at the time the offset is initially taken, would effectively eliminate, in the case of most injured workers, the yearly increases in benefits brought about by PTD supplemental benefits, the suggestion that the Hunt court statements were merely dicta is disingenuous, and has obviously not been accepted by the District Court.

Second, both the Petitioner and the DOI/DRM urge this court to reject Hunt's applicability because they contend that the cases cited by Hunt - Hunter v. South Florida Sod, 666 So.2d 1018 (Fla. 1st DCA 1996) and Hyatt v. Larson Dairy, 589 So.2d 367 (Fla. 1st DCA 1991) - are not controlling, and therefore were, presumably, not sufficiently solid precedent to support the conclusion reached by Hunt. The Petitioner and DOI/DRM argue that Hunter merely stands for the proposition that SS COLA's are not includable in offset calculations unless the claimant was receiving SSD prior to the industrial accident, and that Hunter did not address the "recalculation issue." Similarly, they argue that in Hyatt, the court noted that weekly supplemental benefits are to be considered when computing the SSD disability offset, the combined PTD supplemental and SSD benefits in that case equaled 80% of the average weekly wage, and that the Hyatt court also did not address the recalculation issue.

The Claimant contends that the Petitioner and amicus curiae have missed the point regarding Hunt's citation of these two cases. Hunter was cited by the Hunt court only for the proposition that the SS COLA's are generally not includable in the offset, and Hyatt is cited only for the proposition that PTD supplemental benefits are generally includable in the 80% offset calculation, although it obviously did not address the Hunt issue

regarding the amount of those benefits which are includable. The relevance of citing them in Hunt is clear - to provide historical background/legal precedent to articulate the current state of the law and to announce the need for a re-evaluation which would effectively introduce a new standard for evaluating this issue, akin to a statement that "prior cases have instructed that while PTD supplemental benefits are generally includable, as a category of benefits, in the offset, SS COLA's are generally not, and that further, there is a need to embark on the next question to be answered, which stands on the general offset law foundation built by those cases, but responds to an issue not yet addressed by our court - what amount of PTD supplemental benefits are includable in the offset. The amount being paid at the time of the initial calculation, or all PTD supplemental benefits, forever?" As a result, the citations of Hunter and Hyatt were appropriate.

In its third effort to discredit the relevance of Hunt to the facts in the instant case, the DOI/DRM argues that the District Court in the instant case erred in applying the Hunt formula to the instant case, because it argues that the Hunt formula applies to the 440.15(9) inquiry/offset which limits the two-way combination of workers' compensation and social security disability to 80% of the AWW or ACE, whichever is higher, whereas it believes that the instant case is controlled under 440.20(15), wherein the issue is whether a

given benefit is an employer provided benefit, and if so, is subject to the 100% cap discussed by the Florida Supreme Court in Grice. Because it contends that 440.20(15) does not address the offset the federal government would take pursuant to Social Security law, because there is no evidence that the Claimant is receiving social security disability benefits, it argues that the First District Court erred in applying Hunt. The Claimant disagrees with the logic of this argument, both in general terms and specifically, because of the DOI/DRM's frequent reliance on case law involving 440.15(9) offsets to support its argument in the instant case, which it contends involves a pure 440.20(15) inquiry.

In general terms, this distinction between a 440.15(9) (a/k/a an "80%" inquiry), and a 440.20(15) (a/k/a a "100%" inquiry) is without merit, because the two sections are used together in many cases. In fact, a common scenario is to use the 440.15(9) inquiry initially, when for example, the Claimant is receiving only workers' compensation permanent total benefits and social security disability. That inquiry reveals the extent to which the employer/carrier may reduce the Claimant's PTD benefit due to their receipt of social security disability benefits. This typically marks the point at which the Employer/Carrier first takes the offset after utilizing the 440.15(9) offset

formula. The 440.20(15)/Grice "100% cap" is then used if either the Claimant gets another type of benefit, such as in the instant case, the City pension, or if the Claimant's total benefits are approximating 100% of her average weekly wage. As a result, since case law frequently utilizes both the 440.15(9) 80% inquiry and the 440.20(15)/Grice 100% cap inquiry in the same case, it is disingenuous to conclude that Hunt is therefore not applicable to the instant case merely because of the lack of receipt of social security disability benefits by Ms. Acker. To the extent that the issue in the instant case - the amount of PTD supplemental benefits to be included for offset calculations - affects both the 440.15(9) inquiry and the 440.20(15) inquiry, these sections are inextricably linked. The Hunt holding is therefore directly applicable to the instant case, even in the absence of a direct 440.15(9) calculation, due to the fact that the Claimant in the instant case had not received social security disability benefits.

More specifically, the DOI/DRM's argument is unpersuasive, and even hypocritical, because after contending that Hunt is not applicable in the instant case because the instant case is, in its judgment, a pure 440.20(15) inquiry, whereas the Hunt case involved a 440.15(9) inquiry, it relies upon several cases, particularly the Florida Supreme Court decision in Grice, which

involved the receipt of SSD benefits. The DOI/DRM cannot therefore rely upon Grice, which due to the receipt of social security disability benefits by the Claimant in that case, necessarily involved, at some point, a 440.15(9) inquiry along with a 440.20(15) inquiry, and yet say that the 440.15(9) inquiry in Hunt is not applicable to the facts in the instant case. Additionally, the DOI/DRM's argument citing State, Department of Commerce v. Loggins, IRC Order 2-3137 (April 13, 1977) and Hooks, supra, also fly in the face of its 440.15(9) versus 440.20(15) distinction. Loggins and Hooks, which the DOI/DRM argues are evidence that the Hunt decision is wrong, involve the 440.15(9) 80% limitation inquiry.

The fourth point raised by the DOI/DRM to attempt to refute Hunt's applicability is that even if Hunt and St. Remy (and therefore, presumably, Alderman), supra, are applicable, they were wrongly decided. It cites the Loggins case for the proposition that the 5% supplemental benefit must be included within the 80% cap of 440.15(9). It contends that because the Loggins decision made no indication that the 5% supplemental benefits should be limited to those PTD supplemental benefits being paid at the time of the initial calculation, this means that all PTD supplemental benefits should be included. Of course, the DOI/DRM ignores the fact that, as in Grice,

supra, there is no evidence to suggest that the parties in Loggins asked the court to address the specific question at issue in the instant case. Neither the briefs of the Petitioner or the amicus curiae to this court, nor the briefs that they presented to the First DCA, have provided any evidence to refute the Claimant's contention that Hunt was the first case to address the question of whether all PTD supplemental benefits, or only those owed at the time of the initial calculation of the offset, are includable in the offset. To the extent that Loggins offers no evidence to suggest that its court addressed that issue, it is of no precedential value and is not persuasive.

The DOI/DRM also contend that the Hunt and St. Remy decisions are erroneous because the Hunt decision did not discuss the Hooks case, supra, which it believes dealt with the same issue. In Hooks, the Claimant was receiving PTD and SSD benefits, and the court concluded that PTD supplemental benefits are includable within the 80% offset calculation under 440.15(9). Again, the Claimant does not now, nor has she ever, dispute that some amount of PTD supplemental benefits are includable in either a 440.15(9) 80% offset or in a 440.20(15)/Grice 100% offset. The Claimant simply contends that the law is now settled, per Hunt, St. Remy, Alderman, and Acker, supra, and that the amount to be included is only the amount of

PTD supplemental benefits owed at the time the offset is initially calculated. Again, as in Loggins, supra, the DOI/DRM is arguing that because the Hooks court said that PTD supplemental benefits, in general,are includable, this must mean that all PTD supplemental benefits are includable. As in Loggins, there is no evidence that the Hooks court was asked to address this specific question, and certainly there is no evidence that they did so. Consequently, since the Hooks court did not address the question at hand, and the Hunt court did, the Hooks decision, issued prior to Hunt, cannot possibly be used as a basis for concluding that the Hunt decision on the issue is incorrect.

Finally, the DOI/DRM contends that the Hunt decision is erroneous, and therefore inapplicable to the facts of the instant case, because the Hunt formula results in combined benefits which exceed 80% of the AWW or ACE. At first blush, the Claimant questions why the DOI/DRM, which only a few pages earlier in its brief, had argued that the 440.15(9) 80% offset inquiry was not the one applicable to the instant case fact pattern, would care about whether the result to the Claimant exceeds 80%. However, on a more substantive basis, the DOI/DRM is merely raising the argument that is at the heart of this case - can an individual, through the receipt of PTD supplemental benefits, receive greater than 100% of his average weekly wage (per the

Grice 440.20(15) inquiry) or greater than 80% of his AWW/ACE (per the 440.15(9) inquiry)? The answer, the Claimant submits, is yes, because of the need to effectuate the legislature's intent of providing a true cost of living benefit. As noted below in greater detail, unless an individual is able to receive greater than 100% of his average weekly wage, through non-offsetable (beyond those owed at the time of the initial offset) PTD supplemental benefits, a claimant will never be able to maintain a hedge against inflation. The Hunt, St. Remy, Alderman, and Acker decisions, supra, recognized the need to effectuate the legislature's intent in this regard. The Florida Supreme Court decision in Grice, supra, as noted above, did not address this issue specifically, and therefore is not controlling.

The Employer/Carrier has not identified any case which directly contradicts the conclusion reached by the Hunt court. The Employer/Carrier's suggestion that the Grice decision must be read to acknowledge approval of subsequent supplemental benefits in the calculation of the offset does not address the merits of the Claimant's argument, i.e. that the Grice court failed to address and acknowledge the Hunt finding regarding the issue of the amount of PTD supplemental benefits to be included in the offset, that Grice is therefore not controlling, and consequently cannot stand

in the way of a decision by this court to answer the certified question in the negative, follow the decisions in Hunt, St. Remy, Alderman, and Acker, and affirm the decision of the District Court of Appeal in the instant case.

In the final portions of their briefs, the Petitioner and amicus curiae attempt to argue that if the court accepts its position that the Claimant is indeed limited to 100% of his average weekly wage, the Claimant is not being "deprived of" anything. The DOI/DRM, on pages 32-33 of its brief, contends that the First DCA's ruling in the instant case, denying the employers efforts to include future increases in supplemental PTD benefits in the offset calculation, will allow the Claimant to receive benefits which exceed the wages she earned while working, creating "a powerful disincentive to return to work" (brief of DOI/DRM at p.32). It states that such a policy would not only be contrary to long standing state policy, but would also be inconsistent with the 1994 amendments to the Florida Workers' Compensation Act, including §440.015, Fla. Stat. (Supp. 1994) expressed intention of facilitating a worker's return to gainful employment, the employer's right to continued vocational evaluation and testing even for PTD workers, and the employer's right to withhold PTD payment for a failure to appear for vocational evaluation. The claimant believes that any argument

to this effect is inappropriate in the instant case, since the E/C has never, since it accepted the claimant as PTD, expressed any interest in facilitating her return to work or scheduling a vocational evaluation.

The DOI/DRM also argues that if the DCA's decision is accepted, the claimant in 1998 would receive $657.23 per week in PTD, PTD supplemental benefits, and pension benefits, which is 110.6% of her average weekly wage, and that if one accounts for the fact that the money is tax free, it actually is closer to 129.6%, and that this clearly would be inconsistent with the goal of facilitating a return to gainful employment. It therefore notes that by paying the Claimant 100% of the average weekly wage benefits, tax free, any ill effects associated with its argument are more than alleviated. Similarly, in its brief, BCBCC argues that in general terms, claimants are protected from the long term affects of inflation because claimants in general receive collateral benefits which also have a cost of living adjustment in them. It then attempts to argue that because thousands of people suffer non-work related disabilities and may receive pension disability benefits and social security benefits with annual cost of living increases, the Claimant should be happy with the 100% cap, because they are in a financially better position because they receive workers' compensation benefits in addition to these other collateral benefits,

and that they thereby have no valid claim that they have been left unprotected by the affects of inflation.

The arguments raised by the Petitioner and the amicus curiae are not only without merit in general terms, but also as to the way they would apply to the claimant in the instant case. They contradict every economic reality regarding inflation, and the very notion of common sense. To suggest that by answering the certified question in the affirmative, the claimant is not being deprived of anything, is erroneous, not only because it is based upon a Grice decision which is inapplicable, for the reasons noted above, but also because a suggestion that a individual should be limited to 100% of the average weekly wage at the time of the injury completely ignores the concept of inflation, which has certainly been a consideration of the legislature and courts of Florida since the 1970's, when the concept of permanent total disability supplemental benefits was first introduced into the Florida Workers' Compensation Law.

PTD supplemental benefits became a part of the Florida Workers' Compensation Statute effective October 1, 1974, when the following passage was inserted into the Workers' Compensation Act in Section 440.15(1)(e):

> "In case of permanent total disability resulting from injuries which occurred subsequent to June 30, 1955, for which the liability of the employer for compensation has not been discharged under the provision of subsection 440.20(10), the injured employee shall receive from the division additional weekly compensation benefits equal to 5% of the injured employees 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 the injury, and subject to the national weekly compensation rate set for in subsection 440.12(2). Such benefits shall be paid out of the workers' compensation trust fund. This applies to payments due after October 1, 1974. [Fla. Stat. (Supp. 1974)]."

There can be no dispute that prior to October 1, 1974, the concept of PTD supplemental benefits did not exist in Chapter 440 of the Florida Statutes. It therefore must be presumed that the legislature had a specific purpose in mind when it added this section. It is the Claimant's contention that the only reasonable interpretation that can be given to this addition is that the Florida Legislature intended to provide the injured worker, who was declared to be PTD, with some type of cost of living increase, as a hedge against inflation. It must have been recognized that injured workers prior to the addition of this section of the Florida Statutes, would often see their PTD benefits, which may have been appropriate at the time of the injury, of less and less value as the years passed, due to inflation.

Case law also supports the Claimant's position, i.e. that the PTD supplemental benefits were designed to provide a hedge against inflation. This purpose was stated as follows in the Department of Labor and Employment Security, in Division of Workers' Compensation v. Vaughn, 411 So.2d 294, 295 (Fla. 1st DCA 1982):

> "To partially offset the affects of inflation since the award of compensation benefits in earlier years, that statute directs the fund supplement the compensation still to be paid under such an award by adding 5% times the number of years since the date of the injury."

This point was also discussed by the court in Shipp v. State Workers' Compensation Trust Fund, 481 So.2d 76 (79) (Fla. 1st DCA 1986):

> "The purpose of supplemental benefits, . . . is to protect recipients of periodic benefits from the long term effects of inflation that reduce the value of a fixed amount of benefits. The effects of inflation are the same irrespective of the method of calculating supplemental benefits. We know that lump sum payments are not a favored remedy. (See 440.20(12)(a), Florida Statutes 1981). Supplemental benefits are intended as an incentive to continue periodic payments and avoid the potential for inflation to diminish the value of such payments. [Also see Division of Workers' Compensation, Workers' Compensation Administration Trust Fund v. Hansborough, 507 So.2d 785, 786 (Fla. 1st DCA 1987)]."

Additional legislative support for the concept of PTD supplemental benefits as a hedge against inflation can be seen from the 1984 legislative

changes to the Workers' Compensation Act, which were discussed by the court in Polote Corporation v. Meredith, 482 So.2d 515, 517 (Fla. 1st DCA 1986):

> "Section 440.15(1)(e) states: the injured employee shall receive from the Division additional weekly compensation benefits equal to 5% of the injured employees 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 the injury and subject to the maximum weekly compensation rate set forth in 440.12(2). The language is ambiguous to whether the supplemental benefits is limited by the weekly compensation rate at the time of the injury or the time of payment. The latent ambiguity of this language was corrected by Chapter 84-267, Laws of Florida, which amended this section to read that the weekly compensation and the additional benefits shall not exceed the maximum weekly compensation rate in effect at the time of payment as to term pursuant to 440.12(2). This is consistent with the longstanding policy of the Division of Workers' Compensation and great weight is given to the agency determinations with regard to statutes interpretations." SanSouci v. Division of Florida Land Sales and Condominiums, Department of Business Regulations, 421 So.2d 623 (Fla. 1st DCA 1982)."

The effect of this clarification by Chapter 84-267, Laws of Florida, cannot be overstated. It is clear that the legislature, when deciding to address, in Chapter 84-267, the question of whether the supplemental benefit was limited by the weekly compensation rate at the time of the injury, or the time of payment, intended to maintain the position discussed above, i.e. that

the purpose of PTD supplemental benefits is to act as a hedge against inflation. This is the only reasonable interpretation that can be given to Chapter 84-267. This is because that chapter's decision to add "at the time of payment" seems to suggest an interest in allowing PTD supplemental benefits to have their intended effect as a hedge against inflation. Otherwise, the legislature would have said "weekly rate in effect at the time of injury," so that the claimant would be limited to the maximum compensation rate in effect at the time of his injury.

It is clear from the case law noted above that the Florida Legislature's desire to assist permanently and totally disabled workers in avoiding the affects of inflation were not lost in the First District Court of Appeal. The courts in Vaughn, Shipp, Hansborough, and Meredith, recognized that the purpose of PTD supplemental benefits is to help the injured worker avoid the effects of inflation, and to actually act as an incentive to injured workers to continue periodic payments rather than accept a lump sum settlement. In the case of Ms. Acker, it is clear that she has never settled her workers' compensation claim. If the employer/carrier's position in the instant case is accepted, it will have the practical effect of doing away with any increase in the Claimant's PTD supplemental benefits, because it will forever freeze the

Claimant's total benefits (including pension and any other benefits for which she might eventually qualify) at $594.23, which was the Claimant's average weekly wage in 1986. This would mean that the Claimant's maximum total benefit would forever equate with the same rate of pay that she was earning in 1986, which was twelve years ago. To suggest that an amount of money in 1998 is able to purchase the same degree of goods and services as it was in 1986 is absurd, and completely ignores the very concept of inflation that the legislature attempted to address by creating the concept of PTD supplemental benefits in the first place. In fact, it should be pointed out that it is evident that the maximum compensation rate in Florida changes each year to do only one thing - keep up with inflation. In 1986, the maximum compensation rate was $315.00. In 1998, the maximum compensation rate is $494.00, an increase of 157% in twelve years. At that rate, the maximum compensation rate twelve years from now, in 2010, will be $775.00. As a result, in the twenty-four years from 1986 to 2010, the overall increase in maximum compensation rates would have been 246%. Another instructive example is to consider that the maximum compensation rate in 1973 was $80.00. Given the 60% compensation rate in effect at the time, an individual earning $133.33 qualified for the maximum compensation rate, which suggests that they were fairly well compensated in terms of 1973 wages. Said individual

would therefore be forever limited to $133.33 in total benefits (workers' compensation and collateral benefits), under the carrier's argument. With the increase of $4.00 per year in PTD supplemental disability benefits, by 1987, 14 years after the accident, the person would be at $136.00 before offset ($80.00 PTD plus $56.00 in PTD supplemental benefits). This would be reduced via the cap recommended by the E/C in the instant case, to $133.33, and the claimant would therefore get no cost-of-living benefits after 1987. The folly of this is that $133.33 per week was obviously a fairly good wage in 1973, since one needed only to earn $133.33 to be at a wage level that would when multiplied by the 60% compensation rate in effect at the time, subject them to the maximum compensation rate. $133.33 per week, or $3.33 per hour is well below the current minimum wage, and nowhere near the figure needed to produce the maximum compensation rate. In 1998, with a maximum compensation rate of $494.00, an individual would have to have an AWW of $741.00 per week to receive the maximum compensation rate. However, if the E/C's argument was accepted, this individual injured in 1973 would forever be limited to $133.33 in <u>combined</u> benefits. Even if he received no collateral benefits, his last cost-of-living increase would have occurred in 1987, despite the fact that $133.33 in 1998 obviously bears no economic resemblance to $133.33 in 1973. In the instant case, if the

Employer/Carrier's position is correct, she is forever limited to her 1986 average weekly wage, a position which clearly defies common sense and economic reality.

Acceptance of the Employer/Carrier's position will not only completely destroy the intention of the legislature, to create a cost of living mechanism to deflect to some degree the effects of inflation, but will also fly in the face of the very sentiments expressed by the courts in Vaughn, Shipp, Hansborough, and Meredith, supra, which recognize that the purpose of supplemental benefits is to protect recipients of periodic benefits from the long term effects of inflation. Additionally, this court, in rejecting the Claimant's position, would effectively be punishing claimants who, like Ms. Acker, have decided that they are better served by not settling their claims, rather than creating an incentive for such claimants as was discussed by the court in Shipp. The claimants in such instance would truly be punished, because by not settling their claim, it is clear that the purchasing power of their periodic payments would continue to decrease as each year passes.

For these reasons, it is completely erroneous for the E/C and amicus curiae to state that the claimant is not being deprived of anything, if its argument is accepted. The claimant is clearly being deprived of the very

thing that the legislature and the courts of the State of Florida have repeatedly intended, which is a cost of living increase to those individuals who are PTD and have concluded that a settlement of their case is not in their best interest, a decision that has been applauded by the courts of Florida, which have concluded that settlements are presumed not to be in the best interest of injured workers. For this reason, and in addition to the fact that the courts decision in Grice failed to appropriately consider the effect of the holding in Hunt, it is clear that position articulated by the Employer/Carrier flies in the face of the intention expressed by the legislature in 1974 and 1984, as well as the expressed opinions of this court in Meredith, Shipp, Vaughn, and Hansborough. As a result, the position of the E/C should be rejected by this court, and a finding should be made that the employer/carrier is only permitted to include the permanent total supplemental benefits to which the Claimant is entitled at the time of the initial calculation of the workers' compensation offset, and that they are not permitted to include any annual increases beyond the PTD supplemental benefits owed at the time of the initial calculation.

Finally, the Claimant simply makes the point that the arguments contained on pages eight through ten of the brief by the BCBCC are irrelevant

to the facts of the instant case, for several reasons. In reference to the BCBCC's statements that claimants are protected from the long term affects of inflation because claimants receiving collateral source benefits also receive cost of living adjustments from these collateral source benefits, the Claimant simply points out that the collateral source benefit that is at issue in this case, the City of Clearwater pension, does not contain a cost of living adjustment. As a result, the Claimant in the instant case is not protected from inflation due to cost of living increase in any collateral source benefits, which makes it all the more essential that she be permitted to receive the benefits of the cost of living increase associated with PTD supplemental benefits.

Simiarly, when, on pages 12 - 13 of its brief, the Department of Labor and Employment Security, states that claimants who receive social security benefits receive a cost-of-living increase, it fails to mention that Ms. Acker's only collateral source at issue in the instant case, i.e. the City of Clearwater disability pension, has no cost of living increase.

Finally, this court should recognize that although the Workers' Compensation Administration Trust Fund has finite resources controlled by statute, as the DLES notes on pp 13-14 of its brief, the existence of finite resources should not be a determinative factor. The single consideration that

should be addressed by this court is whether its decision is consistent with the clear rulings of the only cases, Hunt, St. Remy, Alderman, and Acker, to address specifically the precise issue at hand in the instant case, and whether its ruling will effectuate the legislative intent to provide injured workers with a true cost-of-living increase to offset the effects of inflation.

CONCLUSION

The First District Court of Appeal's determination in the instant case - that an employer is not entitled to include in its offset calculations any amount of PTD supplemental benefits beyond those owed to the claimant at the time the offset is initially taken - is correct. It is correct, and should be affirmed by this court, because it is consistent with the only Florida cases (Hunt, St. Remy, and Alderman) which have specifically addressed the certified question addressed to this court, and because the District Court's decision is consistent with the clearly expressed legislative intent to provide injured workers with a cost-of-living increase to offset the effects of inflation. Consequently, this court should affirm the First District's opinion in this case and answer the certified question in the negative.

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