ORIGINAL

SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CITY OF CLEARWATER,

Petitioner,

vs.

JUDI ACKER,

Respondent.

Case No.: 93,800

PETITIONER, CITY OF CLEARWATER'S
INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed with 14 point New Times Roman.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITY

STATEMENT OF THE CASE AND FACTS

This case originated as an appeal from a workers' compensation order determining that yearly increases in PT supplemental benefits are to be included in calculating a pension offset.[1/]

In an order dated August 8, 1994, the Judge of Compensation determined that the Claimant had suffered compensable psychiatric and physical injuries as a result of her employment as a police officer with the City of Clearwater. (V. 1, R. 71-126) That decision was appealed to the First District Court of Appeal, which affirmed the JCC's ruling. (V. 2, R. 289) The City of Clearwater ultimately administratively accepted the Claimant as permanently totally disabled as of June 25, 1994. (v. 1, R. 130-31) The prior order had found the Claimant's average weekly wage to be $594.23, with a corresponding compensation rate of $315.00. As such, the 5% annual permanent total supplemental benefit equaled $15.75. (V. 1, R. 122)

As of June 24, 1994, eight calendar years had elapsed since the date of accident, so the permanent total supplemental amount was $126.00. Adding

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[1] For ease of reference herein, the Petitioner, City of Clearwater, will be referred to by name or as the Employer. The Respondent, Judi Acker, will be referred to by name or as the Claimant.

All references to the record on appeal will be referred to as (V., R.) followed by the appropriate volume and page number references to the record on appeal.

$126.00 to the compensation rate of $315.00 equaled $441.00, which according to the Claimant, should have been her indemnity payment from June 25, 1994 through December 31, 1994. The maximum compensation rate in 1994 was $444.00 per week. (v. 1, R. 46-58)

In the following years, the combination of permanent total disability benefits and the PT supplemental benefits exceeded the maximum compensation rate for the year of payment, so the Claimant's payments were capped at that amount. In 1995, the maximum compensation rate was $453.00, in 1996, it was $465.00, and in 1997, the maximum compensation rate was $479.00. (V. 1, R. 23-24, 136-145) Ms. Acker had previously been awarded an "In-line of Duty" disability pension effective September 1, 1986. Until January 1, 1996, the Claimant received a monthly "In-line of Duty" disability pension of $1441.20. (V. 1, R. 8-9)[2/]

The Employer/Servicing Agent had initially denied compensability of the industrial accident; therefore, the Claimant only received her monthly "In-Line of duty" disability pension until her claim for a retroactive award of workers' compensation benefits was granted by the JCC in August, 1994. (V. 1, R. 18) That award was affirmed on appeal, which resulted in two lump sum checks being

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[2] Like the workers' compensation program, the City of Clearwater's pension plan is self-insured and self-funded. (V. 1, R. 12)

issued by the City to the Claimant in November, 1995. A check for $117,785.92 represented payment of TPD and wage loss from July 15, 1989, the date of the decision in Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989). (V. 2, R. 291) A check in the amount of $36,200.39 represented payment of permanent total and permanent total supplemental benefits from June 25, 1994 through November 29, 1995. The Claimant has been receiving periodic permanent total disability benefits and permanent total supplemental payments since November 29, 1995. (V. 2, R. 291)

Beginning with the original computation of the offset in 1995, the City had included all additional permanent total supplemental benefits in the calculation of the offset. (v. 1, R. 29) It was the Claimant's position that the City had the right to include the supplemental benefits when making its first calculation after accepting her as permanently and totally disabled. However, she asserted that the City should not have included the subsequent supplemental benefits in calculating of the offset. (v. 1, R. 4, 54-59)

A hearing was held on the claim in May, 1997. The Judge of Compensation Claims observed that supplemental benefits were designed to provide a "cost of living" increase to a claimant who is permanently totally disabled and, as such, including them in the calculation for the offset appeared to nullify the benefit. (V.

2, R. 306) However, she noted that decision in City of North Bay Village v. Cook, 617 So. 2d 753 (Fla. 1st DCA 1993), specifically held that they were includeable. Additionally, Judge Remsnyder noted that a review of the facts in Escambia Co. Sheriff's Dept. v. Grice, 692 So. 2d 896 (Fla. 1997) also appeared to approve inclusion of subsequent supplemental benefits in calculating the offset. (V. 2, R. 306) Based on those two decisions, the JCC felt compelled to find that the City had been appropriately including the subsequent benefits in the calculation of the pension offset. (V. 2, R. 306)

The Claimant appealed the JCC's order to the First District Court of Appeal. (V. 2, R. 308-09) The First District reversed the JCC's ruling that the City of Clearwater could recalculate the pension offset every year based on the 5% increase in permanent total disability supplement benefits. The court 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 D1970, 1971 (Fla. 1st DCA Aug. 17, 1998). Relying on prior decisions of the court, the First District reversed the JCC's order. Cruse Construction v. St. Remi, 704 So. 2d 1100 (Fla. 1st DCA 1997); Hunt v. D.M. Stratton Builders, 677 So. 2d 64 (Fla. 1st DCA 1996).

Because this Court's decision in Escambia Co. Sheriff's Dept. v. Grice, 692 So. 2d 896 (Fla. 1997), appeared to include increases in supplemental benefits in the yearly calculation of the offset, the First District certified the following question to this Court:

> WHERE AN EMPLOYER 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)(1), FLORIDA STATUTES (1985), IS THE EMPLOYER ENTITLED TO RECALCULATE THE OFFSET BASED ON THE YEARLY 5% INCREASE IN SUPPLEMENTAL BENEFITS?

23 Fla. L. Weekly at D1971. The City of Clearwater then timely filed its notice to invoke the discretionary jurisdiction of this Court.

ISSUE ON APPEAL

WHERE AN EMPLOYER 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)(1), FLORIDA STATUTES (1985), IS THE EMPLOYER ENTITLED TO RECALCULATE THE OFFSET BASED ON THE YEARLY 5% INCREASE IN SUPPLEMENTAL BENEFITS?

SUMMARY OF ARGUMENT

Pursuant to Florida's longstanding policy, weekly workers' compensation benefits payable to a claimant, when combined with collateral benefits, such as federal social security or disability pension benefits, cannot exceed 100% of the claimant's average weekly wage. Supplemental benefits provided pursuant to §440.15(1)(e)1, Fla. Stat., are considered compensation payments, and must be considered part of a claimant's total compensation for purposes of calculating an offset. The offset is mandatory when the combined benefits from all sources, including supplemental benefits, exceed 100% of the worker's average weekly wage. Escambia Co. Sheriff's Dept. v. Grice, 692 So. 2d 896 (Fla. 1997). In this case, the City of Clearwater reduced the Claimant's total benefits from the combined disability pension and workers' compensation source, to 100% of her average weekly wage. The Judge of Compensation Claims concluded that the offset being employed was proper, and that the City could continue to include the annual supplemental benefits in calculating the offset.

The First District reversed the JCC's ruling. The court concluded that recalculating the offset every year, so as to include the increase in supplemental benefits, frustrated the very purpose of those benefits. Under the First District's ruling, however, the Claimant's combined benefits would exceed 100% of her

average weekly wage. That result thwarts the very purpose of the Florida's longstanding policy and purpose of the offset, which is to prevent an injured worker from receiving windfall benefits, and being financially better off disabled than if she returned to work. Such a result should not be sanctioned by the court. This Court should answer the question certified in the affirmative and permit an Employer to recalculate the workers' compensation offset based on the yearly 5% increase in supplemental benefits. This Court should then quash the decision of the First District and require that the order of the Judge of Compensation Claims be affirmed.

ARGUMENT

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)(1), FLORIDA STATUTES (1985), IS ENTITLED TO RECALCULATE THE OFFSET BASED ON THE YEARLY 5% INCREASE IN SUPPLEMENTAL BENEFITS

This appeal involves another aspect of the workers' compensation benefit/disability pension benefit offset issue addressed by this Court in Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989). The Claimant was accepted permanently totally disabled in June, 1994, and since then, the City has included permanent total supplemental benefits in calculating the total amount of workers' compensation benefits being paid for the purpose of determining the pension offset. The certified question in this case is whether yearly permanent total disability supplemental benefits are to be included in calculating the offset amount. The Judge of Compensation Claims ruled that they are, and that "the City has been appropriately including the subsequent supplemental benefits in the calculation of the pension offset." The First District disagreed, and ruled that the offset could not be recalculated every year so as to include the increase in supplemental

benefits. Acker v. City of Clearwater, 23 Fla. L. Weekly D1970 (Fla. 1st DCA Aug. 17, 1998).[3] That ruling should be rejected by this Court.

It has long been the rule in Florida that 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." Brown v. S.S. Kresge Co., 305 So. 2d 191, 194 (Fla. 1974). This rule is premised on § 440.20(14), Fla. Stat. (1995)[4] (codification of IRC Rule 9), which provides:

> (14) When an employee is injured and the employer pays his full wages or any part thereof during the period of disability, or pays medical expenses for such employee, and the case is contested by the carrier or the carrier and employer and thereafter the carrier, either voluntarily or pursuant to an award, makes a payment of compensation or medical benefits, the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded, plus medical benefits, if any, out of the first proceeds paid by the carrier in compliance with such voluntary payment or award, provided the employer furnishes satisfactory proof to the judge of compensation claims of such payment of compensation and medical benefits. Any payment by the employer over and above compensation paid or awarded and medical benefits, pursuant to subsection (13), shall be considered a gratuity.

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[3] The question certified by the First District has also been certified in Hahn v. City of Clearwater, 23 Fla. L. Weekly D2120 (Fla. 1st DCA Sept. 9, 1998); Rowe v. City of Clearwater, 23 Fla. L. Weekly D2120 (Fla. 1st DCA Sept. 9, 1998); Dept. of Labor & Employment Security v. Boise Cascades Corp., 23 Fla. L. Weekly D2124 (Fla. 1st DCA Sept. 11, 1998); Alderman v. Florida Plastering, 23 Fla. L. Weekly D2197 (Fla. 1st DCA Sept. 23, 1998).

[4] previously numbered § 440.20(15).

Accordingly, the combination of items such as workers' compensation benefits and sick leave or pension benefits may not exceed the employee's average weekly wage. Id. See also City of Miami v. Smith, 602 So. 2d 542, 543 (Fla. 1st DCA 1991).

In Barragan v. City of Miami, supra, the court was faced with a City of Miami ordinance which provided for an offset of pension benefits against workers' compensation benefits. The claimants were police officers who suffered work related injuries, and had been granted workers' compensation benefits and disability pension benefits. The City, in conformity with its ordinance, reduced the disability pension benefits payable to the claimants by the amount of workers' compensation benefits available. The court ultimately invalidated the City ordinance finding that it was contrary to state law, § 440.21, Fla. Stat., which stated:

> 440.21 Invalid agreements; penalty.-
>
> (1) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.083.

(2) No agreement by an employee to waive his right to compensation under this chapter shall be valid.

The court, recognizing that total benefits from all sources could not exceed an employee's weekly wage, then ruled that:

> The employer may not offset workers' compensation payments against an employee's pension benefits except to the extent that the total of the two exceeds the employee's average monthly wage.

545 So. 2d at 255.

These principles were recently reiterated in Escambia Co. Sheriff's Dept. v. Grice, 692 So. 2d 896 (Fla. 1997). There, the court held that an injured employee, "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." In other words, once the 100% cap has been reached, "workers' compensation must be reduced pursuant to section 440.20(15), Florida Statutes." Thus, the county was allowed to offset Grice's "workers' compensation benefits to the extent that this total of his workers' compensation, disability retirement, and social security disability benefits exceed his average weekly wage." 692 So. 2d at 898.

Until the Barragan decision, the City of Clearwater, pursuant to an ordinance, required injured workers to elect to receive either disability pension benefits or workers' compensation benefits. There was in effect a total offset

provision. (V. 2, R. 199, 216-222) Because benefits under the disability pension were greater than workers' compensation benefits (75% of AWW vs. 66 2/3%), most claimants, including Ms. Acker, elected to receive disability pension payments. (V. 1, R. 16; V. 2, R. 296) After Barragan, the City started offsetting the amount of workers' compensation benefits due the Claimant from the disability pension payments due, so that total benefits do not exceed 100% of AWW. (V. 1, R. 15) Ms. Acker does not contest that procedure or the City's method for calculating her average monthly wage. There also is no dispute in this case about whether PT disability supplemental benefits are includable in the offset. Ms. Acker has conceded they are, no doubt because she recognized that supplemental benefits are considered compensation payments within the meaning of § 440.02(6), Fla. Stat. (1985). See, e.g., Div. of Workers' Compensation v. Hooks, 515 So. 2d 294 (Fla. 1st DCA 1987) (supplemental benefits payable under § 440.15(1)(e) are subject to 80% cap of social security offset). However, she contended, and the First District agreed, that they are includable only in the amount a claimant is entitled to at the time the carrier initially takes the offset.

Applicable to the instant dispute are City of North Bay Village v. Cook, 617 So. 2d 753 (Fla. 1st DCA 1993) and Escambia Co. Sheriff's Dept. v. Grice, 692 So. 2d 896 (Fla. 1997). Cook, like the instant case, dealt with an award of

previously offset workers' compensation benefits pursuant to Barragan v. City of Miami. There, the claimant was injured in a 1984 work accident. He was accepted as PTD and was receiving the maximum compensation rate allowable since the date of the accident. He was also receiving the 5% supplemental benefits as set forth in § 440.15(1)(e)1, Fla. Stat. In 1985, the claimant also began receiving disability retirement pension benefits from the City. According to the law in effect at the time, the pension payment was reduced by the amount of Mr. Cook's workers' compensation benefits. 617 So. 2d at 754. In June, 1990, Mr. Cook filed a claim for benefits, "asserting that he was entitled to the previously-reduced workers' compensation benefits pursuant to Barragan." Id. The employer/carrier did not necessarily disagree with that entitlement; however, it claimed that the supplemental benefits paid to the claimant had to be "added to the permanent total disability and pension benefits, but the sum cannot exceed the average monthly wage cap as set forth in Barragan." Id. The JCC disagreed and awarded Cook the full offset benefits.

The First District reversed. In doing so, the court determined that the permanent and total supplemental benefits payable pursuant to § 440.15(1)(e)1, Fla. Stat., fell within the statutory definition of "compensation" set forth in § 440.02(6), Fla. Stat. Therefore, the supplemental benefits should have been

considered "as part of claimant's total compensation payments in calculating the offset." 617 So. 2d at 754. 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 PT 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.

It appears from the facts in Escambia Co. v. Grice, supra, that this Court approved inclusion of subsequent supplemental benefits within the calculation of the offset. Specifically, that Escambia County's disability pension offset included at least 6 years of PT supplemental benefits. As reflected in the opinion, the claimant's accident occurred in 1985. His AWW was $583.88, with an original CR of $307.00, which was the maximum CR for 1985. At the time the set off controversy arose, Mr. Grice was being paid $392.00 per week, which was the maximum CR in effect in 1991. The only way he would have been receiving more than a compensation rate of $307.00, was if he was being paid permanent total disability and PT supplemental benefits. As basic calculations show, Mr. Grice's supplemental benefit was $15.35 per week ($307.00 x .05% = $15.35). Multiplying that by the 6 calendar years since the date of accident, results in a

figure of $92.10. Mr. Grice's 1991 compensation payment would thus equal $399.10 ($307.00 + $92.10); however, it would be capped at $392.00, the maximum CR in effect for 1991, the year of payment. See § 440.15(1)(e)(1), Fla. Stat. (1984). That was in fact the figure used by the court in determining whether Grice's benefits from all sources exceeded 100% of his average weekly wage.

The Claimant claims that Hunt v. D.M. Stratton Builders, 677 So. 2d 64 (Fla. 1st DCA 1996), specifically addressed the issue, ruled in her favor, and that the JCC's holding to the contrary amounts to reversible error. Likewise, the First District, in ruling on the instant case, stated that Hunt controlled. Reliance on Hunt is nevertheless unwarranted. In Hunt, the issue before the court was whether a social security offset could exceed the total amount of social security benefits due a claimant and his family. The court correctly held that it could not. The court then went on to state, in dicta, that the law did not contemplate a recalculation of the workers' compensation offset based on yearly increases in the state's supplemental benefits.

Admittedly, Hunt v. D.M. Stratton Builders, 677 So. 2d 64 (Fla. 1st DCA 1996), and Cruse Constructions v. St. Remi, 704 So. 2d 1100 (Fla. 1st DCA 1997), would seem to suggest that an employer/carrier may only compute the offset one time and that would be for the initial year permanent total disability

benefits are due, thereafter a disability pension or social security disability offset could never be increased. To quote the District Court "while the existing workers' compensation supplemental benefits are considered in the initial calculation of the offset, the law does not contemplate a recalculation of the offset based upon any increases thereafter." The First District cites as authority for that proposition, 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). A review of Hunter reveals that the court prohibited increasing social security disability offsets as a result of cost of living increases in the social security benefits, and did not consider permanent total disability supplemental benefit increases. Hyatt merely recognized that weekly supplemental benefits are to be considered when computing these social security disability offsets.

The court also analyzed and applied the state and federal statutes and regulations dealing with social security disability pension offsets to reach its conclusion 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 increase in a particular benefit." Alderman v. Florida Plastering, 23 Fla. L. Weekly D2197, 2198 (Fla. 1st DCA Sept. 23,

1998). In sum, the First District determined that neither the permanent total disability supplemental benefits paid under the workers' compensation law in the State of Florida nor the Federal Social Disability insurance benefit cost of living increases may be the basis of an offset recalculation. With all due respect, the First District is incorrect.

To decide this issue, the plain language of the various statutes must be looked at. The starting point is § 440.15, Fla. Stat., which provides in pertinent part:

> (9) EMPLOYEE ELIGIBLE FOR BENEFITS UNDER THIS CHAPTER AND FEDERAL OLD-AGE SURVIVORS, AND DISABILITY INSURANCE ACT.
>
> (a) Weekly compensation benefits payable under this chapter for disability resulting from injuries to an employee who becomes eligible for benefits under 42 U.S.C. s. 423 shall be reduced to an amount whereby the sum of such compensation benefits payable under this chapter and such total benefits otherwise payable for such period to the employee and his or her dependents, had such employee not been entitled to benefits under this chapter, under 42 U.S.C. ss. 423 and 402, does not exceed eighty percent of the employee's average weekly wage.
>
> However, this provision shall not operate to reduce an injured workers' benefits under this chapter to a greater extent than such benefits would have otherwise been reduced under 42 U.S.C. s. 424(a). This reduction of compensation benefits is not applicable to any compensation benefits payable for any week subsequent

> to the week in which the injured worker reaches the age of 62 years.

This statute requires that an injured worker's weekly compensation benefits be reduced by the amount that "they and social security benefits, in the aggregate, exceed eighty percent of the injured worker's average weekly wage." Dept. of Public Health v. Wilcox, 543 So. 2d 1253, 1254 (Fla. 1989). The language of the statute is unequivocal, and the offset is mandatory to the extent the "combined benefits exceed eighty percent of the worker's salary." Id. at 1254-55. If the offset is not taken under a state workers' compensation system, then, pursuant to 42 U.S.C. §424(a), the Social Security Administration is required to take the set-off so that the combined benefits the injured worker receives does not exceed 80% of his average current earnings. Id.; 42 U.S.C. §424(a),(d). See also Swain v. Schweiker, 676 F. 2d 543, 544-45 (11th Cir. 1982).

The purpose of the statutory offset is to prevent "the payment of excessive combined benefits," which occurs when a worker who is receiving "workers' compensation and federal disability benefits actually receive[s] more in benefits than his pre-disability take-home pay." Swain, 676 F. 2d at 546; Freeman v. Harris, 625 F. 2d 1303, 1306 (5th Cir. 1980). That situation is "thought to cause two evils: first, it reduce[s] a worker's incentive to return to the workplace and hence impede[s] rehabilitative efforts; and second, it create[s] fears that the

duplication of benefits [will] lead to an erosion of state workers' compensation programs." Swain, 676 F. 2d at 546-47; Freeman v. Harris, 625 F. 2d at 1306; Dept. of Public Health v. Wilcox, 543 So. 2d at 1255. Consequently, the federal statute requires an offset of social security payments against workers' compensation benefits "so that the total benefits received by the worker under the two programs do not exceed 80% of his pre-disability income." Freeman, 625 F. 2d at 1306. Social security disability benefits therefore are available to supplement state workers' compensation benefits, but "only when the workers' compensation payments are less than 80% of the worker's pre-disability income." The goal of §440.15(9)(a) is similar, and allows an offset based upon the amount by which the sum of the total benefits exceeds 80% of a claimant's average weekly wage, or 80% of his average current earnings, whichever is higher. See, e.g., Trilla v. Braman Cadillac, 527 So. 2d 873 (Fla. 1st DCA 1988); Sunland Training Center v. Brown, 396 So. 2d 278 (Fla. 1st DCA 1981).

There are two well established rules to be considered when computing the social security offset. The first is that the claimant may not receive greater than eighty percent of his average weekly wage (or average current earnings, whichever is higher) in combination of workers' compensation benefits, Social Security benefits and/or disability pension benefits. Second, the employer/carrier may not

reduce the workers' compensation benefits to a greater extent than the workers' benefits would have been reduced had the Social Security Administration taken the offset. Hunt v. D.M. Stratton Builders.

The answer to the question before the court, therefore, appears to depend on the laws and regulations governing the reduction that may be taken by the Social Security Administration. It is clear from the cited case law that permanent total disability supplemental benefits are to be included in the formula for computing the eighty percent cap. It is also clear that the legislature did not limit the amount of the reduction to that available in the initial year permanent total disability benefits are due and/or permanent total supplemental benefits are payable. To the contrary, the statute is silent in that respect. Further, the law recognizes that federal cost of living increases are not to be included in computing the social security disability insurance benefit offset. See, e.g., Hunter v. South Florida Sod, 666 So. 2d 1018 (Fla. 1st DCA 1996). However, the extension of the prohibition against increasing social security disability or disability pension offsets due to permanent total supplemental increases does not automatically or necessarily follow. Simply stated, it is not logical to hold that the permanent total disability cost of living supplement can be included once, but never again, without a direct legislative expression of that intent. If the supplemental benefit is to be

included in the formula for computing the eighty percent cap, then at a minimum, it should continue to be included until such time as the cap is reached or the offset equals that to which the Social Security Administration rules and regulations would permit.

The next question is whether the Social Security Administration can reduce of the social security disability insurance benefits due a claimant because of a state workers' compensation cost of living increase. The answer is yes. Social Security Regulation 20 CFR § 404.408, in fact, provides for "Reduction of benefits based on disability on account of receipt of certain other disability benefits provided under the Federal, State or local laws or plans." Initially, this regulation provides that a reduction is required when the individual receiving social security disability benefits is also entitled to receive benefits under a state workers' compensation law. Paragraph (c) states that the total of benefits cannot exceed eighty percent of the average current earnings, and that the social security disability benefits are to be reduced monthly but not below zero. Paragraph (j) states that the social security disability benefits may not be reduced due to a recomputation of statutory increases in social security disability benefits rates such as federal cost of living increases. However, there is an instance where the social security disability

reduction may be reduced, and that is when there has been an increase in the workers' compensation benefits. In particular, section 404.408(k) provides:

> (k) Effect of changes in the amount of public disability benefit. Any change in the amount of public disability benefits received will result in a recalculation of the reduction under paragraph (a) and, potentially, an adjustment in the amount of such reduction. If the reduction is made under paragraph (a)(1) of this section, any increased reduction will be imposed effective with the month after the month the Commissioner received notice of the increase in a public disability benefit (it should be noted that only workers' compensation can cause this reduction). Adjustments due to a decrease in the amount of public disability benefit will be effective the actual date the decreased amount was effective. If the reduction is made under paragraph (a)(2) of this section, any increase or decrease in the reduction will be imposed effective with the actual date of entitlement to the new amount of the public disability benefit.
>
> Example: In September, 1981, based on a disability which began on March 12, 1981, Theresa became entitled to Social Security disability insurance benefits with a primary insurance amount of $445.70 per month. She had previously been entitled to Social Security disability insurance benefits from March 1967 through July 1969. She is receiving a temporary total workers' compensation payment of $227.50 a month. Eighty percent of her average current earnings is $610.50. The amount of monthly disability insurance benefits payable after reduction is:
>
> 80 percent of Theresa's average current earnings. . . $610.50
>
> Theresa's monthly workers' compensation payment . . .- 227.50
>
> Total amount payable to Theresa after reduction . . $383.00

> On November 15, 1981, the Commissioner was notified that Theresa's workers' compensation rate was increased to $303.30 a month effective October 1, 1981. This increase reflected a cost-of-living adjustment granted to all workers' compensation recipients in her State. The reduction to her monthly disability insurance benefit is recomputed to take this increase into account-
>
> 80 percent of Theresa's average current earnings. . . $610.50
>
> Theresa's monthly workers' compensation payment beginning October 1, 1991, . . .- 303.30
>
> Total new amount payable to Theresa beginning October 1981, after recalculation of the reduction . . . $ 307.20

20 CFR § 404.408(k).

Since the Social Security Administration may increase the reduction of social security disability benefits based on an increase in the workers' compensation benefits, including cost of living increases, it is only logical, based upon § 440.15(9), Fla. Stat., that an employer/carrier may increase the offset for social security disability or disability pension benefits yearly, based on a claimant's receipt of increased supplemental benefits until such time as the eighty percent cap is reached (or as here, 100%) or the offset would reduce the injured workers benefits by an amount greater than the initial PIA (primary insurance amount). See Merz v. Secretary of Health and Human Services, 969 F. 2d 201 (6th Cir. 1992) (social security disability benefits could be reduced to extent that disability

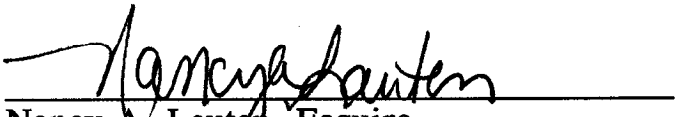
and state workers' compensation did not exceed 80% of pre-disability ACE, regardless of whether state reduces workers' compensation on basis of social security disability benefits); Sciarotta v. Bowen, 837 F. 2d 135 (3rd Cir. 1988) (to extent state does not reduce total benefits to 80% of pre-disability earnings, SSA must reduce federal benefits accordingly).

In this case, Ms. Acker is receiving 100% of her average weekly wage as contemplated by this Court in Grice and Barragan. She is not being deprived of anything -- she is receiving the maximum she is entitled to receive. Once the pension is offset, she will continue to receive 100% of her average wage under workers' compensation. The First District erred in ruling that yearly permanent total supplemental benefits cannot be included in calculation of the pension offset. This Court should reaffirm the principle that an employee may not receive benefits from his employer or other collateral sources which exceed 100% of his average weekly wage. This Court should then answer the certified question in the affirmative, quash the decision of the First District, and require that the order of the Judge of Compensation Claims be affirmed.

CONCLUSION

The First District's determination that an employer is not entitled to recalculate a workers' compensation offset based on the yearly 5% increase in supplemental benefits was error. The purpose of a disability pension offset is to prevent a claimant who is receiving workers' compensation and disability pension benefits from being financially better off disabled than if she returned to work. Thus, it has long been held that a claimant is not entitled to receive more than 100% of her average weekly wage in combined benefits from workers' compensation and disability pension. By calculating the offset the Employer/ Carrier is allowed to include PT supplementals, as the JC did in this case, the Claimant will not be receiving in excess of that cap. This Court should quash the First District's opinion in this case, answer the certified question to allow a yearly recalculation of the offset, and require that the JCC's order in this matter be reinstated and affirmed.

Respectfully submitted,



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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 to:

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