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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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CLERK, SUPREME COURT
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CITY OF CLEARWATER,

Petitioner,

vs.

JUDI ACKER,

Respondent.

Case No.: 93,800

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

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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 Petitioner, City of Clearwater, relies on the Statement of the Case and Facts contained in its initial brief filed with the 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?

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

Before addressing the contentions raised in the Claimant's answer brief, the City of Clearwater feels compelled to explain exactly what is at issue in this case. Specifically, the issue that has been raised by the parties throughout these proceedings has to do with whether or not the yearly increases in permanent total supplemental benefits may be included in calculating a workers' compensation offset. Judge Remsnyder found that it could. The Claimant challenged that ruling, and that ruling only, in the proceedings before the First District Court of Appeal. The First District agreed with the Claimant, and ruled that the yearly increases could not be included in the offset. Because some uncertainty existed, the First District certified the above question regarding the offset to this Court as one of great public importance. The City of Clearwater has raised and addressed only that particular issue in this Court. Likewise, the Claimant has addressed only the PT supplemental issue. No other issues have been raised by the parties to this case.

In spite of the above, amici seek to inject new issues into the proceedings. For example, the Fire Fighters devote their brief to the proposition that workers' compensation benefits are to be primary, and that any offset should go to the pension fund. While this discourse is informative, it is wholly irrelevant to the specific issue before the court. Indeed, this new argument is inappropriate in light of the fact that the Claimant specifically waived the right to raise this issue in the appellate proceedings. (Appendix - Initial brief, pp. 4-6)

The amicus brief of the Florida Workers' Advocates also attempts to inject new issues into these proceedings rather than address the issue raised by the parties. For example, despite the Claimant's concession to this Court that the supplemental benefits calculated and paid to an injured worker until an employer/ carrier first asserts its offset could be included in the offset formula (Answer brief, p. 8), the Florida Workers' Advocates "refuses" to make such a concession. With all due respect, that refusal is irrelevant. The Florida Workers' Advocates also has requested the court to order additional briefing regarding the constitutionality of the definition of wages contained in section 440.02(24), Fla. Stat. (1993). It claims that the definition of wages is unconstitutional because it violates the equal protection of the Florida and United States Constitutions. (Amicus brief, p. 32) There are a couple of major problems with this particular argument. First, as with

the other issue amicus asserts, this particular issue was not raised by the parties. In fact, the Claimant's average weekly wage was stipulated to as being that which had been determined by the Judge of Compensation Claims in a 1994 compensation order. (V. 1, R. 104-22) Even more fundamental, however, is the fact that the statute under consideration in this particular case is the 1985 version, which was substantially different than the version amicus now claims is unconstitutional. Simply stated, the arguments asserted by the Florida Workers' Advocates and the Fire Fighters are irrelevant and should be disregarded by this Court. See Acton v. Ft. Lauderdale Hospital, 418 So. 2d 1099 (Fla. 1st DCA 1982), approved, 440 So. 2d 1282 (Fla. 1983) (amici do not have standing to raise issues unavailable to the parties nor may they inject issues not raised by the parties); Keating v. State, 157 So. 2d 567 (Fla. 1st DCA 1963) (amicus curiae is not at liberty to inject new issues into a proceeding).

Turning to the Claimant's brief, as she did below, Ms. Acker relies on the First District's decision in Hunt v. D.M. Stratton Builders, 677 So. 2d 64 (Fla. 1st DCA 1996), to support her claim that yearly increases in PT supplemental benefits may not be included in the offset calculation. As she did below, she also continues to claim that the Hunt decision has addressed the issue before this Court, ruled in her favor, and controls the outcome of this case. As explained in the

Petitioner's initial brief, however, the portion of the Hunt decision in which the court stated that the law did not contemplate a recalculation of the workers' compensation offset based on yearly increases in the state supplemental benefits was simply dicta. In other words, that statement was not part of or necessary to the court's opinion. It was merely an expression in the court's opinion which went beyond the facts before the court and "therefore are individual views of [the] author of [the] opinion and not binding in subsequent cases." Black's Law Dictionary, 408 (5th ed. 1979). See also Crabtree v. Aetna Cas. & Surety Co., 438 So. 2d 102, 106 (Fla. 1st DCA 1983). Moreover, the Claimant's attempt to avoid the effect of Escambia Co. Sheriff's Dept. v. Grice, 692 So. 2d 896 (Fla. 1987), by relying on Hunt is confusing at best. First, there is no conflict between Grice and Hunt. Second, even if there was, the decision of this Court would prevail. Hoffman v. Jones, 280 So. 2d 431, 440 (Fla. 1973) (district court of appeal is without power to overrule Supreme Court precedent).

Next, even though Ms. Acker claims that both §§ 440.15(9) and 440.20(15) inquiries are relevant to the issue in this case - the amount of PTD supplemental benefits to be included for offset calculations - she rather curiously fails to acknowledge, let alone address, the hypothetical contained in the City's initial brief regarding the Social Security Administration's right to reduce social security

disability benefits when there has been an increase in workers' compensation benefits due to cost of living increases. This reduction can be made even in those situations when a state is entitled to reduce workers' compensation benefits based on receipt of social security disability benefits. Merz v. Secretary of Health & Human Services, 969 F. 2d 201 (6th Cir. 1992). Perhaps Ms. Acker does not address this point because she recognizes that the SSA's position is directly opposite to the position she advocates. This Court likewise should rule that an employer/carrier may increase the offset yearly based on a claimant's receipt of increased supplemental benefits once the 100% AWW cap has been reached.

In order to uphold the First District's ruling in this matter, the Claimant also devotes a portion of her brief to the proposition that she will be deprived of benefits if the JCC's ruling is reinstated. While this argument has some superficial attractiveness, it ignores the fact that a claimant such as Ms. Acker is receiving far more in disability-related benefits than is an injured employee who only receives workers' compensation benefits. (100% of AWW versus 66 2/3% of AWW). She also barely makes mention of the fact that the workers' compensation and in-line-of-duty pension benefits she is receiving are non-taxable. As aptly noted in the amicus brief of the Department of Insurance and Division of Risk Management, this tax free status imparts a considerable benefit to the Claimant, one not shared

by non-disabled employees. (Dept. of Ins. brief, pp. 34-35) To then allow the Claimant to receive over and above 100% of her average weekly wage amounts to an unjustifiable windfall, one which thwarts the very goal of Chapter 440 -- to encourage injured workers to return to work.

Also missing from the Claimant's brief is virtually any reference to the position taken by the Department of Labor and Employment Security in this case. That position, as reflected in the Department's amicus brief, is entirely consistent with the position asserted by the City of Clearwater below and before this Court. As has long been recognized, an agency's interpretation of a statute it is charged with enforcing is entitled to great deference. Bellsouth Telecommunications, Inc. v. Johnson, 708 So. 2d 594 (Fla. 1998); Polote Corp. v. Meredith, 482 So. 2d 515, 517 (Fla. 1st DCA 1986). Thus, if an agency's construction "is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." Smith v. Crawford, 645 So. 2d 513, 521 (Fla. 1st DCA 1994) (quoting Ford Motor Co. v. N.L.R.B., 441 U.S. 88 (1979)). The result of the judge of compensation claims in this case was consistent with the Department of Labor and Employment Security's practices and interpretation of the statute at issue. This Court should uphold the Department's construction and

interpretation. See Appendix C to Department of Labor and Employment Securities Amicus Brief.

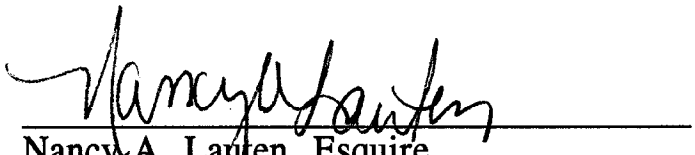
Finally, Ms. Acker contends that the only reasonable interpretation that can be given to the various statutes involved in this case is the one that she advances in her brief. In particular, she claims that the legislature obviously intended to permit receipt of benefits in excess of 100% of AWW in cases like hers. What the Claimant fails to acknowledge, however, is that during the 1998 session of the Florida Legislature two bills were introduced which would have excluded all permanent and total supplemental benefits from the 100% cap. As noted by the Department of Insurance and Division of Risk Management, neither Fla. H.B. 4781 nor Fla. C.S. for S.B. 1092 were enacted into law. This in and of itself gives great credence to the argument that the legislature approved capping benefits at 100% of AWW, and also approved including yearly increases in PT supplemental benefits in that cap. Indeed, had the legislature wished to change the law as interpreted by this Court in Grice and other cases, it could have done so. It did not, and it is respectfully suggested that any change in the construction and interpretation of the cap be left up to the legislature. See, e.g., White v. Johnson, 50 So. 2d 532 (Fla. 1952).

As noted in the Petitioner's initial brief, this Court has implicitly ruled that yearly permanent total supplemental benefits can be included in the calculation of the pension offset. Escambia Co. Sheriff's Dept. v. Grice. This Court should take this opportunity to (1) reaffirm the principle that an injured employee may not receive benefits from her employer and other collateral sources which exceed 100% of her average weekly wage; and (2) explicitly rule that a yearly recalculation of the offset due to receipt of PT supplemental benefits is permitted to effectuate that result. The decision of the First District should be quashed, and the certified question answered in the affirmative.

CONCLUSION

It is well established that a workers' compensation claimant is not entitled to receive more than 100% of his or her average weekly wage in combined benefits from workers' compensation and disability pensions. By approving the Claimant's method of calculating a workers' compensation/pension offset, she will be receiving in excess of that cap. This Court should rule that the First District's determination that an employer is not entitled to recalculate a workers' compensation offset based on the 5% yearly increase in supplemental benefits was error, and remand the case for approval of the JCC's final order.

Respectfully submitted,



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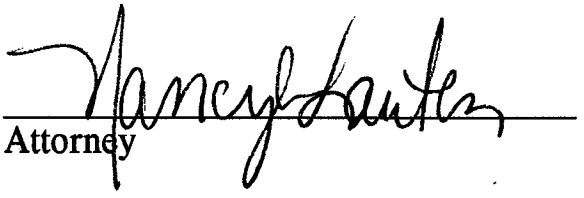

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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CITY OF CLEARWATER, Petitioner, vs. JUDI ACKER, Respondent.	)	Case No.: 93,800

PETITIONER, CITY OF CLEARWATER'S APPENDIX TO REPLY BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
TALLAHASSEE, FLORIDA

JUDITH ACKER Appellant vs. CITY OF CLEARWATER Appellee.	CASE NO.: 97-02719 CLAIM NO.: 272-36-6084 D/A: 3/25/86 & 5/12/86

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PREFACE

For ease of reference herein, the Appellant, CITY OF CLEARWATER will be referred to as the "Employer/Carrier" or "Defendant". The Appellee, JUDITH ACKER, will be referred to as the "Claimant". The term of average weekly wage will be referred to as "AWW". The term of average monthly wage will be referred to as "AMW". Reference to pages from the transcript of the Record on Appeal will be referred to as "[R-]".

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STATEMENT OF THE CASE AND OF THE FACTS

The Claimant, Judy Acker, was involved in industrial accidents on 3/25/86 and 5/12/86, while employed by the City of Clearwater. A the time of her accident, the Claimant had an average weekly wage of $594.23, with a corresponding compensation rate of $315.00. [R-289]

On 6/24/94, the City of Clearwater, hereinafter the defendant, accepted the Claimant as being permanently and totally disabled. [R-296] Consequently, the Defendant began paying Permanent Total Supplemental benefits effective 6/24/94. On 9/1/86, the Defendant began paying the Claimant a "in the line of duty" disability pension due to her inability to engage in further employment. [R-290]

The carrier, effective 1/1/96, suspended payment of the disability pension because it contended that the combination of disability pension payments plus the retroactive workers' compensation benefits exceeded the monthly cap of $2,555.19 allowable pursuant to the Barragan decision by $27,550.67 for the years 1989 through 1995.

To recoup this duplication of payments, the city suspended payment of the claimant's monthly "in-line-of duty" pension after application of the offset, as of January 1, 1996 until the total of the suspended monthly pension payments equals the $27,550.67 amount. The Defendant elected to reduce the pension benefits rather than the workers' compensation benefits. The Defendant calculated the AMW figure by multiplying the average weekly wage (hereinafter

AWW) by 4.3 weeks. [R-292 Although the Claimant began receiving her pension in 1986, the Defendant did not begin taking the offset until 1994. [R-290]

When the Defendant first began to take the offset in 1994, the Permanent Total Disability Supplemental amount to which the Claimant was entitled was $126.00 [R-290].

It subsequently clear to the Claimant that the Defendant had continued to add into the "total compensation" figure the increased amount of the Permanent Total Disability Supplemental benefits for the 1995, 1996, and 1997 calendar years. Specifically, although the Permanent Total Disability Supplemental amount, when the offset was first taken by the Defendant in 1994, was $126.00, the Carrier added the subsequent weekly Permanent Total Disability Supplemental benefits amount into the calculation of the Claimant's "total compensation". The Defendant has continued to add the increased Permanent Total Disability Supplemental amount each year since, contending that the law allows them to do so. [R-291].

Based upon the Defendant's decision to continue to recalculate the offset based upon each new year's increase in Permanent Total Disability Supplemental benefits, the Claimant filed a Request for Assistance and Petition for Benefits, contending that the Defendant's actions amounted to a violation of the case of Hunt v. Stratton, 667 So.2d 64 (Fla. 1st DCA 1996). In addition to this issue, the Claimant also claimed that the method relied upon by the

Defendant for calculating AWW, i.e. AWW x 4.3 weeks = AMW; lacked a rational basis, and that the proper method for this calculation was AWW x 52 weeks divided by 12 months. Additionally, she argued that any applicable offset should be taken from the workers' compensation benefits, not the pension. Finally, she contended that the overpayment, if any, for 1989 through June 25, 1994, was a gratuity payment, and/or, in the alternative, the overpayment, if any, should be taken against the workers' compensation benefits and not from the Claimant's vested disability pension. [R-292]

On 5/14/97, a hearing was held by the Judge of Compensation Claims. The specific claim raised by the Claimant was for disability pension benefits owed to her that have not been paid to her for all periods from 6/25/94 to present, along with penalties, interest, costs and attorney's fees. The carrier defended the claim by contending that all pension benefits had been timely and accurately paid, in that the pension offset properly included the Permanent Total Disability Supplemental benefits and their yearly increases; that no overpayment occurred, since it contends that the $27,550.76 is the amount owed as the offset that would have been taken if the workers' compensation benefits had been periodically paid in a lump sum pursuant to the order of 8/8/94; that if the Claimant receives Social Security Disability benefits, then the City claims the applicable offset; No PICA due and owing. [R-288]

In her Order, the Judge issued the following rulings that regarding the issues that were the subject of the hearing:

- The employer made an overpayment to the claimant, and that overpayment was not a gratuity, so the city is entitled to recoup the overpayment. [R-300]
- The city was correct in computing the offset by multiplying the AWW by 4.3 weeks to obtain an AMW, as opposed to the method advocated by the Claimant, which involved obtaining an AMW by multiplying the AWW by 52 weeks, and then dividing by 12. [R-301]
- The city may continue to take the offset against the claimant's pension benefits, and is not limited to offsetting the claimant's workers' compensation benefits. [R-302]
- The City was correct in including the Permanent Total Disability Supplemental benefits beyond the amount of the benefits to which the Claimant was entitled to receive when the offset was originally taken since it was her finding that the yearly increases in Permanent Total Disability Supplemental benefits were "compensation" and therefore limited by the principle that an individual cannot receive, in total benefits from the employer, move than 100% of their AMW. [R-306]

- Finally, the court found that penalties, interest, costs and attorney's fees were not payable. [R-306]

Based upon the Judge of Compensation Claims' findings, the Claimant appealed the decision primarily because of the ruling that the Defendant was permitted to continue to include, in its calculation of the offset, Permanent Total Disability Supplemental benefits beyond the amount of those benefits to which the Claimant was entitled at the time the offset was originally taken by the Defendant. Although the Claimant's Notice of Appeal indicated an intention to also appeal the Judge of Compensation Claims' decision to offset pension benefits as opposed to workers' compensation benefits, and to appeal the Judge of Compensation Claims' finding approving the AWW to AMW calculation relied upon by the employer, i.e., AWW x 4.3 weeks = AMW, the Claimant hereby notes that she abandons any appeal of the latter two issues, and concentrates her appeal on the issue of whether the Judge of Compensation Claims erred in allowing the Defendant to include, in the offset calculation, Permanent Total Disability Supplemental benefits beyond those to which the Claimant was entitled at the time the offset was initially taken.

SUMMARY OF ARGUMENT

On May 14, 1997, a hearing was held in connection with several issues raised by the Claimant. Specifically, the Claimant argued that the offset taken by the carrier was improper because it was taken from the Claimant's pension benefits, rather than her workers' compensation benefits, was based upon improper calculation of the Claimant's average monthly wage, and because it included Permanent Total Disability Supplemental benefits beyond the amount of the benefits to which the Claimant was entitled to receive when the offset was originally taken. The Claimant hereby abandons his challenge to the Judge's finding that the carrier was permitted to offset the Claimant's pension benefits, and the Judge of Compensation Claims' conclusion that the Employer's method for calculating the AMW was correct. However, the Claimant continues to dispute the Judge of Compensation Claims' finding that the Employer was permitted to include all PTD Supplemental benefits in its calculation of the offset, because the Claimant believes that case law mandates a finding that the offset calculation cannot include any amount of PTD Supplemental benefits beyond the amount of those Permanent Total Disability Supplemental benefits to which the Claimant was entitled at the time that the carrier initially takes the offset, which, in the instant case, was $126.00.

The claimant recognizes that the general rule in Florida is that an individual cannot receive more than 100%

of his AWW from all employer sources, Brown v. S.S. Kresge Co., Inc., 305 So.2d 191 (Fla. 1974), and that PTD Supplemental benefits in general are subject to the offset. City of North Bay Village v. Cook, 617 So.2d 753 (Fla 1st DCA 1446). Additionally, the claimant is aware that an employer is even permitted, pursuant to the holding in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997) to "stack" a claimant's workers' compensation (including PTD Supplemental benefits), disability pension, and Social Security Disability benefits, to determine the extent to which the total of all three benefits exceeds the Claimant's average monthly wage. To the degree that the total exceeds the Claimant's average monthly wage, the employer/carrier is entitled to an offset.

However, although the cases of Brown, Cook, and Grice, help to define which benefit classifications are to be considered in determining the Claimant's total income for offset purposes, none of those cases address the issue which is present in the instant case - i.e., what amount of Permanent Total Disability Supplemental benefits are to be considered in computing the offset. Only one case of which the Claimant is aware has addressed that specific issue. That case is Hunt v. Stratton, 677 so.2d (Fla. 1st DCA 1996), which concluded that while the existing workers' compensation supplement benefit is considered in the initial calculation of the workers' compensation offset, the law does not contemplate a recalculation of the offset based

upon any increases thereafter. This conclusion, which was followed by the courts in Bonifay Manufacturing Company v. Harris, 691 So.2d 1170 (Fla. 1st DCA 1997) and Lil' Champ Food Stores v. Ross, 691 so.2d 649 (Fla. 1st DCA, 1996), was neither addressed by, nor receded from, by the Florida Supreme Court Grice case, supra, and therefore remains the law directly on point with regard to the issue. Since the Judge of Compensation Claims' ruling was contrary to the holding in Hunt, her findings in this regard constitute reversible error, and should be reversed.

ARGUMENT

THE JUDGE OF COMPENSATION CLAIMS' CONCLUSION, THAT THE EMPLOYER/CARRIER HAS CORRECTLY CALCULATED THE DISABILITY PENSION OFFSET AT ALL TIMES, CONSTITUTES REVERSIBLE ERROR BECAUSE IT VIOLATES THE HOLDING IN HUNT v. STRATTON, WHICH HELD THAT ALTHOUGH 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 IN THE PERMANENT TOTAL DISABILITY SUPPLEMENTAL AMOUNT THEREAFTER.

As noted in the statement of the facts and of the case, the Judge of Compensation Claims found that the Employer was permitted, in calculating the offset, to include the total permanent total disability supplemental benefits in effect at any given time that the offset is taken, rather than limiting the Employer to include in the calculations only the Permanent Total Disability Supplemental amount to which the Claimant was entitled at the time the offset was initially taken, which in the instant case was $126.00 in December 1994. [R-290] The practical effect of the Judge of Compensation Claims' finding is to allow the Employer to recalculate the offset each January, to account for the Permanent total Disability Supplemental benefits that become effective on that date. For instance, although the record demonstrates that the Permanent Total Disability Supplemental Benefit was $126.00 when the Employer first took an offset in the instant case in 1994. [R-290], that amount had increased by $15.75 in 1995, $15.75 in 1996, and $15.75 in 1997. The employer has included, since 1/1/95,

this additional $15.75 figure in Permanent Total Disability Supplemental increases in its calculation of the total workers' compensation benefits received by the claimant on a monthly basis. This amount was then deducted from the average monthly wage to determine the offset, i.e. the amount of money the Claimant can receive in disability pension benefits in a given month. The Claimant believes that this method, advocated by the Employer and approved by the Judge of Compensation Claims, violates the law articulated in Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996), because Hunt held that although the existing workers' compensation supplemental benefit is considered in the initial calculation of the workers' compensation offset, the law does not contemplate a recalculation of the offset based upon any increases thereafter. As a result, the Claimant believes that the Employer's calculation of the claimant's total workers' compensation earnings should not include anything above the initial Permanent Total Disability Supplemental amount of $126.00 that was in effect where the Employer first took an offset in December 1994. The Claimant believes that since the Judge of Compensation Claims' findings violated Hunt v. Stratton in this regard, her Order in this regard constitutes reversible error.

The general rule articulated by the courts of Florida is that an individual cannot receive more than 100% of his average weekly wage from all employer sources. Brown v. S.S. Kresge Co., Inc. 305 So.2d 191 (Fla. 1974). Numerous

cases since Brown 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.

In 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 cost of living increases are not includable, provided that the entitlement to Social Security Disability begins after the workers' compensation accident. If the Claimant is already getting Social Security Disability benefits prior to the date of the industrial accident, then the amount of Social Security disability benefits, including the cost of living increases, that the claimant is receiving on the date of the workers' compensation accident, is used. Hunter v. South Florida Sod, 668 So.2d 1018 (Fla. 1st DCA 1996).

In addition to the effect of Social Security Disability benefits on the calculation of the offset, many cases have addressed the effect of disability pension benefits on the overall calculation of the offset. Although many municipalities throughout Florida originally took the position that an injured worker could be forced to choose between workers' compensation and disability pension benefits, this issue was resolved by the court in Barragan v. City of Miami, 545 So.2d 252, 255 (Fla. 1989):

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

The general rule articulated in Barragan is subject only to the exception that the limitation of total benefits owed to a Claimant at the AMW figure will not apply if there is a specific provision in the employee's contract which would permit the employee to receive more than 100% of his average monthly wage in total benefits. City of Miami v. Smith, 602 So.2d 542 (Fla. 1st DCA 1991).

Since the law, pursuant to the decision in Barragan is therefore that money received by the employee from workers' compensation (including Permanent Total Disability benefits), disability pension benefits, and Social Security Disability benefits will all be considered in determining whether the total of those benefits exceeds 100% of a claimant's average monthly wage, the issue to be addressed is how those benefits are calculated in determining whether they exceed the average monthly wage.

In the instant case, the Judge of Compensation Claims found that the Claimant's AWW was $594.23 with a corresponding compensation rate of $315.00. [R-289] These figures were in effect at the time that the carrier initially took the offset in December 1994. The Judge of Compensation Claims accepted the carrier's contention that the Claimant's AMW was $2,555.19. The Judge of Compensation

Claims confirmed that the employer accepted the Claimant as Permanently and Totally Disabled in December 1994, and after the court's ruling that the claimant's injuries were compensable, the employer began taking an offset retroactive to December 1994. As of the date the Employer began taking an offset, therefore, the amount of Permanent Total Disability Supplemental benefits was $126.00. Appropriately, this Permanent Total Disability Supplemental amount reflects the fact that at the time the Employer first began taking the offset, it had been eight years since the date of the accident (CR of $315.00 x .05% x eight years = $126.00, the initial Permanent Total Supplemental amount for the year of 1994). The claimant maintains that the employer should not be permitted to use any figure higher than this Permanent Total Disability Supplemental benefit amount of $126.00 in its calculation of the Claimant's total earnings for offset purposes. She believes, therefore, that the Judge of Compensation Claims erred in her ruling that the Employer was correct in its decision to include subsequent annual increases in the Permanent Total Disability Supplemental benefit amount for the calendar years since the Employer first took the offset, retroactive to 1994. In short, she believes that the Judge of Compensation Claims violated the law in Hunt v. Stratton, supra and, therefore, committed reversible error.

The Claimant contends that the issue noted above, as defined by the Claimant's argument, can be fully addressed

by looking at three primary cases - Hunt v. Stratton, 667 So.2d 64 (Fla. 1st DCA 1996) and its progeny, and Grice vs. Escambia County Sheriff's Department, 658 So.2d 1208 (Fla. 1st DCA 1995) and Escambia County Sheriff's Department vs. Grice,692 So.2d 896 (Fla. 1997).

In the Grice case decided by the First District Court of Appeal at 658 So.2d 1208 (Fla. 1st DCA 1995), the court, as noted previously in this brief, confronted the issue of offset. The Claimant in that case was injured in 1985, and accepted as being permanently and totally disabled at some date thereafter which was not made clear by the court's decision. The case did indicate that the Claimant in Grice had an AWW of $583.88, yielding a compensation rate of $392.00 per week. He apparently received $163.85 per week in Social Security Disability benefits, and a state disability retirement benefit of $208.75 per week. On 6/14/93, the employer notified the Claimant that it was offsetting the Permanent Total Disability benefits based upon the amount that his combined workers' compensation, state pension, and social security benefits exceeded his AWW.

The First District Court of Appeal, in its ruling expressed concern that there existed no statutory provision, either federal or state, which authorized the aggregation of Social Security benefits together with state retirement disability benefits for computing an offset against workers' compensation benefits. In that regard, the court concluded

that combining the three benefits for the purpose of allowing an offset is improper:

> "Under a strict interpretation of the statutory framework, it appears to us that since the legislature provided for a Social Security offset against workers' compensation benefits, but did not include an offset based upon the receipt of state disability retirement pension benefits, it must be presumed that the legislature did not intend to allow such an offset. In this case, the pension plan contains no offset provision, and the state retirement system has not sought an offset. We therefore conclude that the combining of the three benefits for the purpose of allowing an offset is improper."

However, because the district court felt that the question presented was of significant impact on the workers' compensation system, it certified the following question to the Florida Supreme Court:

> WHEN AN EMPLOYEE RECEIVES WORKERS' COMPENSATION, STATE DISABILITY RETIREMENT, AND SOCIAL SECURITY DISABILITY BENEFITS, IS THE EMPLOYER ENTITLED TO OFFSET AMOUNTS PAID TO THE EMPLOYEE FOR STATE DISABILITY RETIREMENT AND SOCIAL SECURITY DISABILITY AGAINST WORKERS' COMPENSATION BENEFITS TO THE EXTENT THAT THE COMBINED TOTAL OF ALL BENEFITS EXCEEDS THE EMPLOYEE'S AVERAGE WEEKLY WAGE?

In Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997) the Florida Supreme Court accepted the above certified question for review, and answered it in the affirmative:

> "We..conclude that the county may offset Grice's workers' compensation benefits to the extent that the total of his workers' compensation, disability retirement, and Social Security disability benefits exceed his average weekly wage..the total benefits from all sources cannot exceed the employee's weekly wage..Once the 100% cap has been reached, workers' compensation must be reduced pursuant to section 440.20 (15), Florida Statute, which states:

> "Where 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 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 (14) shall be considered a gratuity. §440.20(15), Fla. Stat (1985).

In Brown v. S.S. Kresge, Co., this court interpreted the foregoing language to mean "when an injured employee receives the equivalent of his full wages from whatever source that should be the limit of compensation to which he is entitled" 305 So2d at 194.

We find that the county's interpretation of the relevant statutes and case law is the proper one and hold that an injured worker, except where expressly given such a right by contract, may not receive benefits from his employer and other collateral sources which, when totaled, exceed 100% of his average weekly. Here, the combination of Grice's workers' compensation, disability retirement, and Social Security disability benefits exceed his AWW. Thus, the county is entitled to the offset it seeks."

It is clear from a review of the Judge of Compensation Claims' Order in the instant case, that her approval of the Employer's decision to use all of the Claimant's Permanent Total Disability Supplemental benefits, as opposed to only

the amount of the supplement at the time the offset was initially taken, was based heavily upon the Florida supreme Court's decision in Grice:

> "It appears to the undersigned that the supplemental benefits are designed to provide a "cost of living" increase to the Claimant who is permanently totally disabled. As such, including them in the calculation for the offset appears to nullify the benefits. However, the majority decision in Cook (City of North Bay Village v. Cook, 617 So.2d 753 (Fla.1st DCA 1993) held that they were includable. Additionally, a review of the facts contained in Grice would appear to also approve the inclusion of the subsequent supplemental benefits within the calculation of the offset unless no one argued that issue to the court. Based upon those two decisions, the undersigned feels compelled to find that the city has been appropriately including the subsequent supplemental benefits in the calculation of the pension offset" [R-306]

It is the Claimant's contention that the Judge's statement "unless no one argued that issue to the court" is significant. What it suggests is that although the court in Cook clearly suggests that Permanent Total Disability Supplemental benefits are includable in determining a claimant's total compensation, for purposes of the offset calculation, that case says nothing about whether the Permanent Total Disability Supplemental benefits which are includable in the offset calculations are the Permanent Total Disability Supplemental benefits to which the Claimant is entitled at the time the offset is initially taken only, or whether the employer may use the subsequent annual increases to the Permanent Total Disability Supplemental as each year passes. The Claimant believes that the offset calculations can only include the Permanent Total Disability

Supplemental benefits to which the Claimant was entitled when the employer initially took the offset, which was $126.00 in the instant case.

The Claimant notes that the Judge of Compensation Claims in the instant case was perceptive when she wondered whether anyone argued this issue in either of the Grice decisions. The Claimant's review of the Grice decisions suggests that neither the First DCA nor the Supreme Court of Florida addressed, or was asked to address, this issue, which is remarkable, since the answer to this issue has profound ramifications on injured workers who depend upon the cost of living benefits provided by the Permanent Total Disability Supplemental benefits. Again, there is no language in either of the Grice decision which addresses this matter.

The only case which seems to address the issue of whether a carrier may, for offset purposes, include all Permanent Total Disability Supplemental benefits, or only those to which the Claimant was entitled at the time of the offset was initially taken by the carrier, is the case of Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996). Although, Hunt dealt with a situation involving offset calculations involving the receipt of Social Security Disability benefits and workers' compensation benefits, the Claimant believes that its conclusions are directly applicable to the instant case.

While the Hunt case initially stands for the specific proposition that an employer/carrier's offset is limited to the amount of Social Security Disability benefits the Claimant receives, it concludes by discussing a proposition with ramifications beyond those cases dealing with the calculation of offsets involving only a combination of Social Security Disability benefits and workers' compensation:

> "We note that both the federal and state disability benefits schemes include incremental increases in benefits to account for future increases in the cost of living (federal cost of living adjustments and state supplemental benefits). While the existing workers' compensation supplemental benefit is considered in the initial calculation of the workers' compensation offset, the law does not contemplate a recalculation of the offset based upon any increases thereafter. See Hunter v. South Florida Sod, 666 So.2d 1018 (Fla. 1st DCA 1996), and Hyatt v. Larson Dairy, Inc., 589 So.2d 367 (Fla. 1st DCA 1991), and cases cited therein."

Also see Bonifay Manufacturing Company v. Harris, 691 So.2d 1170, and Lil' Champ Food Stores v. Ross, 682 So.2d 649 (Fla. 1st DCA 1996), which follow Hunt.

That the Hunt case addressed an issue which had never been directly addressed previously is unmistakable. Again, although the employer/carrier in the instant case argues that the Cook case noted that Permanent Total disability Supplemental benefits are includable in the calculation of the workers' compensation offset, there is no dispute on that point. However, that point i.e. whether Permanent Total Disability Supplemental benefits are includable in the offset is not the issue in the instant case. The instant

case involves an inquiry into what is the correct amount of Permanent Total Disability Supplemental benefits to use when calculating the workers' compensation offset - the amount of the Permanent Total Disability Supplemental benefits at the time the carrier initially takes the offset, or the amount of the Permanent Total Disability Supplemental benefit 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. Although the carrier argues that the Judge of Compensation Claims was correct in accepting the latter approach, such a finding is clearly inconsistent with the holding in Hunt, which (along with the subsequent cases of Harris and Ross supra, which follow Hunt) is the only case to address this specific issue.

It is the Claimant's belief that, a careful reading of the Florida Supreme court decision in Grice shows that the decision, upon which both the Judge of Compensation Claims and the employer place great reliance, has no effect on the ruling in Hunt, and therefore does not change in any way the conclusion of Hunt that only the Permanent Total Disability Supplemental benefits to which the claimant was entitled at the time the carrier initially took its offset are includable in calculating the offset. This is made all the more significant by the fact that although the original Grice decision was decided by the First District in August 1995, the second Grice decision was filed by the Florida

Supreme court on May 1, 1997, well after the Hunt decision was filed on July 15, 1996. Certainly, if the parties to the Grice case, or the court on its own initiative, felt that their was a potential conflict between the ruling in Grice and the ruling in Hunt, that point would have been noted. The fact that the Florida Supreme Court's May 1997 decision in Grice not only failed to express an intention to recede from Hunt, but did not even mention Hunt, must be taken to mean that the Florida Supreme Court had no intention of receding from the holding in Hunt, because certainly they were aware of its potential conflict with, and impact on, the facts noted in their case.

As a result, if the Grice Florida Supreme Court decision had no effect on Hunt's conclusion - that while the workers' compensation supplemental benefit that is in effect when the carrier first takes the offset is considered in calculating the offset, no additional Permanent Total Disability benefits thereafter are included - then the Judge of Compensation Claims in the instant case erred when she concluded that the Defendant may continue to include the 5% Permanent Total Disability Supplemental benefit amount, beyond the initially calculated amount in the calculation of the offset. Since her ruling is contradicted by Hunt, the only case to address the issue, her findings in this regard constitute reversible error, and should be reversed.

CONCLUSION

The decision of the Judge of Compensation Claims which gave approval to the Employer/Carrier's decision to include all Permanent Total Disability Supplemental benefits in the calculation of the workers' compensation offset constituted reversible error. Her finding in this regard was in direct contradiction with the only case to have specifically addressed the issue, Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996). In contrast to the Judge of Compensation Claims' findings in the instant case, the Hunt court concluded that while the amount of Permanent Total Disability Supplemental benefits to which the Claimant is entitled when the carrier first takes the offset are includable in the calculation, the carrier may not include subsequent annual increases in the Permanent Total Disability Supplemental amount. The Judge of Compensation Claims improperly placed reliance on the holding in the case of Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997), which did not address the specific issue raised above, in Hunt, and thereby did not recede from the conclusion in Hunt.

Since the Judge of Compensation Claims' order violated the holding in Hunt v. Stratton, it constituted reversible erred, and must be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mark Hungate, Esq., Post Office Box 210 St. Petersburg, Florida 33731-0210.

Respectfully submitted,

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