SUPREME COURT OF FLORIDA
TALLAHASSEE,FLORIDA

STATE OF FLORIDA
DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY,
WORKERS' COMPENSATION
ADMINISTRATION TRUST FUND

PETITIONER,

vs. **CASE NO.: 94,103**

BOISE CASCADE CORPORATION
and WAUSAU INSURANCE COMPANY,
and WILLIAM M.BOWMAN, JR.

RESPONDENT.

ANSWER BRIEF ON THE MERITS OF RESPONDENT, WILLIAM M. BOWMAN, JR.

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CERTIFICATION OF TYPE SIZE AND STYLE

This brief is typed with 14 point Courier New.

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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.[1]

[1]The Respondent will be referred to as follows: Mr. Bowman, Respondent, or Claimant. The Petitioner will be referred to as Petitioner, Workers' Compensation Administration Trust Fund or abbreviated as WCATF.

ISSUES 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.(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 Petitioner spends a great deal of time in their brief arguing that permanent total supplemental benefits should be considered as compensation and since it is compensation, they are therefore includable in the offset. There is really no debate that permanent total supplemental benefits are compensation, but the yearly increases in those benefits are not includable in the offset after the initial offset calculation is made because the Legislature intended those benefits to represent a cost of living increase and a hedge against inflation for the injured worker.

The Petitioner bases its argument on the decision in Escambia County Sheriff's Department vs. Grice, 692 So. 2nd 896 (Fla. 1997). They argue that the Grice decision implicitly approves including the annual supplemental increases in the offset calculation. The Grice decision was decided long after the decisions which prohibit the inclusion of the annual increases in supplemental benefits as part of the offset and the Grice decision did not deal with that issue.

They further make the policy argument that the Workers' Compensation Administrative Trust Fund has finite resources, is controlled by Statute and if the question that is certified is answered in the negative, it will have a serious financial impact on the Workers' Compensation Administrative Trust Fund and will also require an assessment of contributions against current carriers and self insured's for the obligations of their predecessors and will result in a windfall for the injured

worker. Solving the financial problems of the Workers' Compensation Administrative Trust Fund should be addressed to the legislature and not this Court.

In response to the argument of a negative answer to the question certified creating a windfall for the injured worker, we would point out that the WCATF, carrier and self-insured's, all received a tremendous windfall by the decision in Holley v. Ace Disposal, 668 So.2d 645, (Fla. 1st DCA 1996), which held that F.S. 440.15 (1)(f)2b, which became effective on 1/1/94 could be applied retroactively. The effect of this decision was that all injured workers who were receiving permanent total disability benefits under Chapter 440, without considering their date of accident, must now apply for social security disability benefits under penalty of having their permanent total disability benefits suspended if they did not do so. The net result of this was that the WCATF, carrier and self-insured's were then allowed to take offsets against social security disability benefits and supplemental benefits in cases where they had calculated exposure and set premiums based on full payment of permanent total disability benefits. Also, we would point out that the Workers' Compensation Administrative Trust Fund is only obligated to pay supplemental benefits where the date of accident pre-dated July 1, 1984. Since that date, the carrier's, and/or self-insured's, have the obligation to pay the supplemental benefits.

The single consideration that should be addressed by this Court is whether it's decision is consistent with the clear

ruling of the only cases that have decided this issue, which are Hunt v. D.M. Stratton Builders, 677 So.2nd 64 (Fla.lst DCA 1996); Cruse Construction vs. St. Remy, 704 So.2nd 1180 (Fla.lst DCA 1997); Alderman vs. Florida Plastering, 24 Fla. L. Weekly D-2197 (Fla.lst DCA, 9/23/98), and Acker v. City of Clearwater, 23 Fla. L. Weekly D-1970 (Fla. 1st DCA, August 17, 1998). These cases address the specific issue at hand and the function of this Court is to determine the correctness of those decisions and continue to carry out the Legislative intent to provide injured workers' with a true cost of living increase to offset the effects of inflation.

ARGUMENT

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

In the case below, the First District Court of Appeal correctly affirmed the Judge of Compensation Claims that when the Workers' Compensation Administrative Trust Fund takes their initial offset against permanent total supplemental benefits, they are not allowed to continue to take offsets against the annual five percent (5%) increase in permanent total supplemental benefits. This result is consistent with the only cases that have dealt with that specific issue, Hunt v. D.M. Stratton Builders, 677 So.2d 64 (Fla. 1st DCA 1996); Cruse Construction v. St. Remy, 704 So.2d 1180 (Fla. 1st DCA 1997); Alderman v. Florida Plastering, 24 Fla. L. Weekly D-2197 (Fla. 1st DCA, 9/23/98); and Acker v. City of Clearwater, 23 Fla. L. Weekly D-1970 (Fla. 1st DCA, August 17, 1998). These cases have addressed the specific issue at hand and have held that the rational employed by the District Court in the instant case is correct.

The Petitioner argues that the Grice decision implicitly recognized and endorsed the practice of allowing annual increases in supplemental benefits to be included in offsets. The Grice decision was issued by this Court approximately ten (10) months after the decision in the Hunt case, and makes absolutely no mention of the Hunt decision and clearly does not recede from that decision. If this Court, in Grice, had intended to recede from the holding in Hunt, which prohibits the taking of an offset against annual increases in supplemental benefits, it would have done so. The Hunt decision is therefore clearly controlling as are the decisions which cite Hunt including St. Remy, Alderman, and Acker. The Alderman decision addressed the argument which is made by the Petitioner in this case, when the Court said:

> "The court held in Grice that, in the initial calculation of the offset, the employer and carrier are 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."
>
> "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 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 Cruse, affirming Hunt, was published in late December of 1997, nearly 7 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 Cruse, is still good law."

In 1974, the Florida Legislature realized that they must enact legislation to assist injured workers in their fight against inflation where they have become permanently and totally

disabled and have been locked into a maximum compensation rate in existence in the year of their injury, which quickly becomes eroded away over the years. In response to that need, the Florida Legislature pasted Florida Statute 440.15(1)(e), which became effective October 1, 1974.

> "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 provisions 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 law in effect at the date of the injury; multiplied by the number of calendar years since the date of the injury, and subject to the national weekly compensation rate set forth 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."

The Florida Workers' Compensation Act has been in existence since 1935, but prior to 1974, there was no such concept as permanent total supplemental benefits. It is clear that the Florida Legislature intended that this 5% per year supplemental increase should be intended as a cost-of-living increase and as a hedge against inflation. Cases dealing with the intention of the Legislature, with reference to the passage of the aforesaid Statute, also support this argument. In the Department of Labor and Employment Security, Division of Workers' Compensation v. Vaughn, 411 So.2d 294 (Fla. 1st DCA 1982), the Court said:

> "To partially offset the effects of inflation since the award of compensation benefits in early years, that Statute directs the fund to supplement the compensation still to be paid under such an award by adding five times the number of years since the date of the injury."

The purpose of the supplemental benefits was also commented on by the Court in Shipp v. State Workers' Compensation Trust Fund, 481 So.2d 76 (Fla. 1st DCA 1986), where the Court said:

> "...the purpose of supplemental benefits, which 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 note 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 Administrative Trust Fund v. Hansborough, 507 So.2d 785, 786 (Fla.lst DCA 1987).

Further support for the argument that the legislative intent in creating supplemental benefits was as a hedge against inflation can be seen from the 1984 legislative changes in the Workers' Compensation Law, which were discussed by the Court in Polote Corporation v. Meredith, 482 So.2d 515, (Fla. 1st DCA 1986):

> "...Section 440.15 (1)(e) states:
>
> > The injured employees shall receive from the division additional weekly compensation benefits equal to 5 percent of the injured employee's compensation rate, as established pursuant to the law in effect on the date of his injury, multiplied by the number of calendar years since the date of injury and subject to the maximum weekly compensation rate set forth in 440.12 (2).
>
> This language is ambiguous as to whether the supplemental benefit is limited by the weekly compensation rate at the time of injury or the time of payment. The latent ambiguity of this language was corrected by Chapter 84-267, Laws of Florida, which amended the 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 determined pursuant to s.

> 440.12 (2)." This is consistent with the long-standing policy of the Division of Workers' Compensation, and great weight is given to the agency determinations with regard to a statute's interpretations. SanSoucie v. Division of Florida Land Sales and Condominiums, Department of Business Regulations, 421 So.2d 623 (Fla. lst DCA 1982)."

Finally, the Petitioner makes the argument that if the question that has been certified is answered in the negative, that this Court should find that the effect of that should have only prospective application, rather than being applied retroactively. They cite as a basis for that, that the Workers' Compensation Administrative Trust Fund has only finite resources and has many financial obligations. That should not be of consideration of this Court in answering this question. The Petitioners fail to mention in their brief that they have not had an obligation to pay supplemental benefits for accidents that have occurred in the past fourteen (14) years. Their obligation on the payment of supplemental benefits ended effective with accidents occurring before July 1, 1984. This Court should consider the fact that the claimant in this case, Mr. Bowman, was injured in 1974, and at that time, the maximum compensation rate in the state of Florida was $80.00 per week. (Appendix Pages 1-2) Consideration must be given to the economic impact on him, and the other injured workers' who became permanently and totally disabled.

We would also point out to the Court that in response to the Petitioner's argument that this would create a windfall for the injured worker, that a tremendous windfall was created on behalf

of WCATF, employers and self-insured's when the First District Court of Appeal, in the case of Holley v. Ace Disposal, 668 So.2d 645, (Fla. 1st DCA 1996), held that the Florida Statute 440.15 (1)(f)2b, which became effective January 1, 1994, should be applied retroactively. The effect of that retroactive application required that every injured worker in the state of Florida, without regard to the date of accident, who had been accepted as being permanently and totally disabled, or had been adjudicated to be permanently and totally disabled, was compelled to apply for social security disability benefits. As a consequence of that, the WCATF, carrier's and self-insured's would be allowed to take an offset against their compensation benefits, including supplemental benefits, based upon the receipt of social security disability benefits, if the combination of the benefits exceeded 80% of the claimant's average weekly wage at the time of their injury. That produced a hugh windfall for carriers and self-insured's who had been paying for these loses based upon a calculation of premiums which did not include the opportunity for offsets on people who had not elected to apply for social security disability. A collateral catastrophic result of that decision is that the injured workers' who were compelled to apply for social security disability benefits and who were successful, would also be entitled to the receipt of medicare care benefits, which in turn, would further deplete the resources of that already drastically depleted fund.

The Petitioner argues that they were simply following

industry practice in taking the annual offsets and this should be given great weight because the Workers' Compensation Law is suppose to be self-executing. The Workers' Compensation Law was clearly not self-executing in this case because not only did the Workers' Compensation Administrative Trust Fund improperly take annual offsets against supplemental benefits until that issue was raised in the instant case, but also, they did not bother to determine whether the amount of social security disability benefits that the claimant was receiving had decreased by virtue of the fact that some of the family benefits that were being paid would have been diminished by the fact that his children would have reached their majority, or may have died, or otherwise, become ineligible for social security disability benefits. (Appendix Pages 4-5, 7). It was not until a petition was filed for a correct determination of the claimant's supplemental benefits that the Workers' Compensation Administrative Trust Fund in fact corrected the amount of social security disability benefits that they were using as the predicate for their annual deductions. (Appendix Page 3).

The Workers' Compensation Administrative Trust Fund can operate and administer their Fund with impunity as it effects injured workers' in this state because the decisions to date have not allowed an attorney's fee to be assessed against them, as was evidenced by the decision of the First District Court in the instant case. (Appendix Page 8). We would respectfully suggest that an attorney's fee be assessed against them in this case and

perhaps that would act as an incentive for the Workers' Compensation Administrative Trust Fund to be administered a bit more fairly as it impacts injured workers'.

The cases of Hunt, St. Remy, Alderman and Acker, clearly are controlling in this matter and the question certified should be answered in the negative.

CONCLUSION

Based on the foregoing facts and authorities cited herein, the Respondent respectfully requests that this Honorable Court affirm the District Court's opinion because the District Court's opinion is clearly consistent with the expressed legislative intent to provide injured workers with a cost-of-living increase in order to offset the effects of inflation. This Court should answer the certified question in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Katrina D. Callaway, Senior Attorney, Edward A. Dion, General Counsel, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, Suite 307, Hartman Building, 2012 Capital Circle, S.E. Tallahassee, Florida 32399-2189 and Thomas H. McDonald, Esquire, RISSMAN, WEISBERG, BARRETT & HURT, P.A., 201 E. Pine Street, 15th Floor, Orlando, Florida 32801.

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