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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By

Chief Deputy Clerk

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

CASE NO. 94,103

D/A: 7/1/74

Petitioner,

LT. CASE NO. 97-04038

vs.

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

Respondent.

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Petitioner, Department of Labor & Employment Security's,  
Initial Brief on the Merits

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ON APPEAL FROM THE OPINION OF THE FIRST DISTRICT  
COURT OF APPEAL DATED SEPTEMBER 11, 1998

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PRELIMINARY STATEMENT

In this Brief, the Petitioner, STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, WORKERS' COMPENSATION ADMINISTRATION TRUST FUND, will be referred to as "**the Division.**" The Respondent, WILLIAM M. BOWMAN, JR., will be referred to as 'Mr. Bowman' or "the claimant." BOISE CASCADE CORPORATION and WAUSAU INSURANCE COMPANY, will be referred to as "Employer/Carrier," or "**E/C.**"

References to the Record on Appeal will be referred to as "**R- ' "** followed by the volume and page number.

STATEMENT OF THE CASE

This is an appeal from the First District Court of Appeal's (DCA) Opinion dated September 11, 1998 prohibiting the Division of Workers' Compensation (Division) from including the yearly increases in PTD supplemental benefits in the social security offset taken.

This **case** originated as an appeal from a workers' compensation order determining that "[t]he Administrative Trust Fund should not take a **setoff** against increases in the supplemental benefits after their initial calculation in 1975 based upon the recent decision in Hunt v. D.M. Stratton, Jr. . . ." (R-Vol. III, p. 449). This Order **was** appealed to the First District Court of **Appeal**, which affirmed the Judge of Compensation Claim's (JCC) ruling.

The First **DCA's** Opinion was issued on September 11, 1998. This Opinion 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?

The State of Florida, Department of Labor & Employment Security, timely filed its Notice to Invoke Discretionary Jurisdiction of this Court on October 9, 1998.

STATEMENT OF THE FACTS

William Bowman, the claimant, suffered a compensable accident on July 1, 1974 while working for Boise Cascade Company, the employer. (R-Vol. II, p.229, Vol. I, p.98, Vol. III, pp. 445-446). The claimant **was** a lead maintenance worker in a plant manufacturing composite cans for the citrus industry and hurt his back while trying to **catch a** falling plate from a dye press. (R-Vol. I, pp. 39, 54-56, 76). The claimant worked for the employer for seven years. (R-Vol. I, p. 36). On June 26, 1975 the claimant was put on disability leave. (R.-Vol. III, p. 312). The claimant began receiving social security disability benefits in August, 1975. (R-Vol. I, p. 46; Vol. II, p. 237).

After the workers' compensation accident, the carrier began paying the claimant workers' compensation benefits based on the average weekly **wage** of \$256.33. (R-Vol. I, p. 236). The PTD benefits owed by the E/C were limited, however, to the maximum compensation rate of \$80.00 per week (1974 maximum compensation rate). (R-Vol. I, pp. 91, 98). The claimant's initial social security benefit (P.I.A.) was \$402.00. (R-Vol. II, p. 237). Because he had dependants, the claimant actually **received \$703.60** in social security disability (the maximum family benefit). (R-Vol. II, p. 237). Eighty percent of his average current earnings **was \$880.00**. (R-Vol. II, p. 237).



The claimant's PTD supplemental benefits were paid **by** the Division through the Workers' Compensation Administration Trust Fund due to the date of accident in this case. (R-Vol. I, pp. 44, 94, **.98**). The Division is currently paying the supplemental benefits.

Even though the claimant received social security disability benefits, the E/C never took **a** social security offset on the PTD benefits they paid and are paying. (R-Vol. I, p. 92). The Division, however, has taken a social-security offset each year against the PTD supplemental benefits owed to the claimant, reducing the amount of PTD supplemental benefits paid to the claimant. Each **year** the Division recalculates the amount of offset **available** using the formula contained in the DWC-33 form. See Appendix "**B**". This formula requires the Division to include the amount of PTD supplemental benefits owed in the **year** the offset is calculated in the offset calculation.

## SUMMARY OF ARGUMENT

The First District Court of Appeal erred when it held in State of Florida v. Boise Cascade Corp. & Wausau Ins. Co. v. Bowman, 23 Fla. L. Weekly D2124 (Fla. 1<sup>st</sup> DCA September 11, 1998) that the yearly increases in PTD supplemental benefits are not includable in the social security offset taken by the Division. The statute and the case law clearly intend for supplemental benefits to be considered compensation. The 5% annual increases in supplemental benefits provided for in the statute logically must be considered compensation too. The offset provision in the statute is clear and unambiguous. It requires that all weekly compensation benefits are included in the offset. The term "all weekly compensation" includes supplemental benefits as they are compensation pursuant to the statute and case law. Because supplemental benefits are compensation and as such includable in the offset, the annual increases in them are also compensation and includable in the offset. This Court has implicitly realized that annual increases are included in the offset calculation in its decision in Escambia County Sheriff's Dept. v. Grice, 692 So.2d 897 (Fla. 1997). The First DCA's decision affirming the JCC's order which prevents Petitioner from including the annual increases in the supplemental benefits in the offset should be

reversed. However, if this court affirms the First DCA's Opinion, it should apply that decision and the Acker decision prospectively only.

**ARGUMENT**

THE FIRST DISTRICT COURT OF APPEAL  
ERRED IN RULING THAT THE PETITIONER  
CANNOT INCLUDE ANNUAL INCREASES IN  
PERMANENT TOTAL DISABILITY  
SUPPLEMENTAL BENEFITS IN THE OFFSET.

The Judge of Compensation Claims found that the Division's inclusion of the yearly increase in permanent total disability supplemental benefits in the offset was not in accordance with case law. The First District Court of Appeal affirmed this decision in State of Florida, Department of Labor & Employment Security v. Boise Cascade Corp. & Wausau Ins. Co. v. Bowman, 23 Fla. L. Weekly D2124 (Fla. 1<sup>st</sup> DCA September 11, . 1998). See, Appendix 'A." This appeal ensued.

The First DCA, in Bowman, 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?

This same question **was** also certified by the District Court in City of Clearwater v. Acker, 23 Fla. L. Weekly D1970 (Fla. 1<sup>st</sup> DCA August. 28, 1998), City of Clearwater v. Hahn, 23 Fla. L.

Weekly D2120 (Fla. 1<sup>st</sup> DCA September 9, 1998), City of Clearwater v. Rowe, 23 Fla. L. Weekly D2120 (Fla. 1<sup>st</sup> DCA September 9, 1998), and Alderman v. Florida Plastering, 23 Fla. L. Weekly D2197 (Fla. 1<sup>st</sup> DCA September 23, 1998). The City of Clearwater cases are currently pending before this Court. A Motion for Rehearing was filed in the Alderman case. Thus, it is still pending before the First DCA.

Although the First DCA certified the same question in all of these **cases**, the facts of the instant case are not the same as the City of Clearwater cases. The City of Clearwater cases involve an offset of a claimant's workers' compensation benefits due to the claimant's receipt of **a disability pension**; whereas, this case and the Alderman case involve an offset of a claimant's workers' compensation benefits due to the claimant's receipt of **social security disability benefits**. Thus, the certified question in this **case** is erroneous as it refers to workers' compensation offset under section **440.20(15)**, Florida Statutes (1985). No offset under section **440.20(15)**, Florida Statutes, was taken in this case. Rather, the only offset taken was taken pursuant to section **440.15(10) (a)**, Florida Statutes (1974).

The District Court, in Bowman, affirmed the JCC solely on the City of Clearwater v. Acker case. Because Acker involved a disability pension offset, unlike the instant case which involves

a social security disability offset, the district court's affirmance of this case based only on Acker evidence that the court has decided to treat alike those offsets due to the claimant's receipt of disability pension and those offsets due to the claimant's receipt of social security disability.

In cases with dates of accident prior to July 1, 1984, the Department through the Division of Workers' Compensation pays supplemental PTD benefits to the claimant. § 440.15(1) (f)1., Fla.Stat. (1997). Currently, when an offset is taken in a case where the Division is paying the supplemental benefits, the Division applies the offset available to the supplemental benefits owed.

In order to facilitate the offset calculation, the Division has, by rule, promulgated a form (LES Form DWC-33) which should be completed annually by any entity who intends to offset compensation benefits due to a claimant's receipt of social security disability, whether it is the insurance carrier or the Division (in pre-1984 cases). See Appendix "B." The DWC-33 requires the entry of certain sums to correctly calculate the offset. One of the variables is the "5% PT Supplement." Prior to the First DCA's decision in Acker, if a DWC-33 was completed annually, it included in the "5% PT Supplement" blank the amount of current supplemental benefits. Because the amount of PTD

supplemental benefits increases every year, it had the effect of increasing the offset available to the Division every year. However, the offset amount available never exceeded the amount the claimant received in social security benefits. Hunt v. D.M. Stratton, Jr. 677 So.2d 64,66 (Fla. 1<sup>st</sup> DCA 1996). The Division has the first right of offset, so in Division-paid PTD supplemental cases, the Division offsets the supplementals owed (simply because the Division pays no other compensation). Highlands Co. Sch. Bd. v. Dept. of Labor & Emp. Sec. & Juan Carrisquillo, 1998 Fla. App. LEXIS 12456 (Fla. 1<sup>st</sup> DCA October 7, 1998).

If the offset amount on line "a" of the DWC-33 is greater than the amount of PTD supplemental benefits owed to the claimant, then the Division takes a complete offset and the claimant receives no money from the Division. Further, **any** difference between the offset amount on line "a" and the amount of offset taken by the Division (amount of PT supplemental benefits owed), is permitted to be claimed by the carrier as an additional offset against permanent total disability payments. If the offset amount (line "a") is less than the PTD supplemental amount owed by the Division, then the Division subtracts the offset amount from the PTD supplemental benefit owed and pays the claimant the difference. Any decision in the case at bar

determining that the annual increases in supplemental benefits are not includable in the annual calculation of the offset would increase the Division's payment on claims where the supplemental benefits are the Division's responsibility. In other words, a decision in this regard would decrease the available offset amount taken by the Division.

The District court of Appeal erred by ignoring the applicable statute in this case. Supplemental benefits received by a PTD claimant are "compensation" and as such are includable in the calculation of the offset. Section 440.15(1)(e), Fla.Stat. (1974) classifies supplemental benefits as compensation. It provides that ". . . , the injured employee shall receive additional weekly compensation benefits equal to 5 percent of his weekly compensation rate, as established pursuant to the law in effect on the date of his injury, multiplied by the number of calendar years since the date of injury." Section 440.15(1)(e), Fla.Stat. (1974) (emphasis supplied). This statute clearly and unambiguously indicates that PTD supplemental benefits are considered compensation as it expressly states that they are "additional weekly compensation benefits."

Section 440.02(11), Fla.Stat. (1974) also indicates that supplemental benefits are "compensation." This section defines "compensation" as ". . . the money allowance payable to an



employee or to his dependents as provided for in this chapter." § 440.02(11), Fla.Stat. (1974). Clearly, supplemental PTD benefits fall under this definition as these benefits are a money allowance paid to a claimant pursuant to Chapter 440. Furthermore, the First District Court of Appeal in City of North Bay Village v. Cook, 617 So.2d 753, 754 (Fla.1<sup>st</sup> DCA 1993) stated that "[s]upplemental benefits are compensation payments provided under section 440.15(1) (e)1, Florida Statutes (1983) . . . ." (citing Barrasan v. City of Miami, 545 So.2d 252 (Fla. 1989)) (emphasis supplied). Further, in Special Disability Trust Fund v. Stephens, Lynn, Chernav & Klein, 595 So.2d 206 (Fla. 1<sup>st</sup> DCA 1992), the First District Court of Appeal was asked to decide whether the Special Disability Trust Fund must reimburse PTD supplemental benefits. Id. At 207. The Court answered affirmatively, reasoning that although the Fund statute (Section 440.49, Fla.Stat.) did not expressly provide for reimbursement of these benefits, they were reimbursable nevertheless because they 'clearly constitute compensation' and the Fund statute provided for reimbursement for all compensation for PTD. Id. At 209. In other words, compensation encompasses PTD payments and PTD supplemental payments. Accordingly, it is clear that both the statute and the case law intend supplemental benefits to be considered compensation.

The offset provision in Chapter 440 (§ 440.15(10) (a), Fla.Stat. (1974)) provides that "[w]eekly compensation benefits payable under this chapter for disability . . . shall be reduced . . ." § 440.15(10) (a), Fla.Stat. (1974) (emphasis supplied). Because supplemental benefits are "compensation" as defined by Chapter 440 and the Cook and Stephens cases and because the statute (§ 440.15(10) (a), Fla.Stat.) mandates that "compensation" must be reduced (i.e. offset), supplemental benefits are included in the offset. If supplemental benefits themselves are considered compensation, then logically when this benefit amount increases each year, the increased supplemental amount is "compensation" and as such includable in the offset pursuant to the statute mandating that compensation benefits are offset. Just because this benefit amount increases each year does not change its classification as supplemental benefits. The statute itself does not distinguish between the initial supplemental benefit amount and the yearly increased amount. The statute **merely** provides that supplemental benefits are equal to 5% of the claimant's compensation rate on the date of accident multiplied by the number of years since the accident.

Furthermore, the offset provision in the statute (section 440.15(10) (a), Fla.Stat. (1974)) does not exclude any type of compensation from the offset. In other words, the offset statute

does not provide that only the amount of supplemental benefits applicable when the offset is initially taken is the amount included in the offset. Rather, the offset provision states that the reduction/offset is to apply to **all** weekly compensation benefits. § 440.15(10) (a), Fla.Stat. (1974). Although the PTD benefit amount the claimant receives will not usually change from year to year, the supplemental amount the claimant is entitled to will increase by 5% each year. § 440.15(1) (e), Fla.Stat. (1974). Accordingly, because the initial amount of supplemental benefits is considered a weekly compensation benefit and increases in that amount are also considered a weekly compensation benefit, the statute mandates that they be included in the offset. Section 440.15(10) (a), Fla.Stat. (1974).

Additionally, a careful review of the amounts used by this Court in the Grice decision evidences this Court's intention to include the yearly increases in PTD supplemental benefits in offset calculations. In 1985, the year of the accident, Mr. Grice's average weekly wage (AWW) was \$583.88 with a corresponding compensation rate (comp rate) of \$307.00 (maximum comp rate for 1985). Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896, 897 (Fla. 1997). When the offset amount was disputed, in 1991, he received \$392/week. Id. Because he received the maximum amount of PTD compensation (\$307/week) available for

his date of accident, his receipt of **\$392/week** in 1991 must have included PTD supplemental benefits. According to Section **440.15(1) (e)1., Fla.Stat. (1983)**, the PTD supplemental amount Mr. Grice was entitled to in 1991, the year the offset dispute arose, was **\$92.10/week** (**\$307/week** x **.05** x 6 years since the accident). When this amount is added to the **\$307/week** compensation amount, it yields a total payment of **\$399.10/week**. Mr. Grice did not receive **\$399.10/week** in 1991 because this amount exceeded the maximum compensation rate for 1991. The maximum compensation a claimant could receive in 1991 was **\$392/week**. Thus, Mr. Grice was only entitled to receive **\$392/week** in 1991 and this Court's Opinion in Grice indicates this was the amount he received. The **\$392/week** figure was used by this Court to determine whether his benefits from all sources exceeded 100% of his average weekly wage. The amount his benefits exceeded 100% of his AWW was the allowable offset amount. As indicated in the prior calculations, the figure of \$392 included the annual increases in supplemental benefits for six years.

The First DCA's Opinion in Acker holding that yearly increases in supplemental benefits are not includable in the offset is in direct contravention to the offset provision in Chapter 440. Chapter 440 and the case law clearly state that supplemental benefits, including any increases in them, are

compensation. § 440.02(11), Fla.Stat. (1974) ; § 440.15(1) (e), Fla.Stat. (1974) ; Cook 617 So.2d at 754; Stephens 595 So.2d at 209. The offset statutory provision requires that "weekly compensation benefits" be offset. § 440.15(10) (a), Fla.Stat. (1974) . The term "weekly compensation benefits"- is an all-inclusive term which includes both workers' compensation benefits and supplemental benefits. By use of this all-inclusive term, the offset statute clearly contemplates that the entire amount of the- supplemental benefits being paid is subject to whatever offset is available. Consequently, the First DCA's Opinion in Acker stating otherwise is not in conformance with the unambiguous statutory language which compels inclusion of supplemental benefits, including the annual increases, in the allowable offset. The figures used by this Court in the Grice case also supports this conclusion.

It is well settled that social security cost of living increases are not included in the offset. LaFond v. Pinellas Co. Bd. of Commissioners, 379 So.2d 1023, 1024 (Fla. 1<sup>st</sup> DCA 1980). By prohibiting the Division of Worker's Compensation and carriers from including the yearly increases in PTD supplemental benefits in the offset too, the claimant is allowed to obtain a windfall of two cost-of-living increases in one year. What will eventually happen is that the claimant will receive more than 100% of

his/her average weekly wage due to his/her receipt of the yearly increases in social security and workers' compensation (supplemental benefits). This Court, in Grice, stated that 'an injured worker, . . ., may not receive benefits from his employer and other collateral sources which, when totaled, exceed 100% of his average weekly wage." Grice 692 at 898. In order to prevent this from occurring, the Division or the carrier (whoever pays the supplemental benefits) must be allowed to include the yearly increases in these benefits in the offset calculation.

The Workers' Compensation Administration Trust Fund (WCATF) has finite resources controlled by **statute**. The **WCATF's** money is used for a myriad of expenses **associated** with workers' compensation, such as rehabilitation expenses of claimants (8440.50, **Fla.Stat.**); PTD supplemental benefits owed by the Division (§ 440.50, **Fla.Stat.**); the operating budget of the **JCCs** (§ 440.45, **Fla.Stat.**); the travel expenses of the Chief Judge, **JCCs** and Department employees (§ 440.47, **Fla.Stat.**); the expenses of the Workers' Compensation Oversight Board (§ 440.4416, **Fla.Stat.**); **and** the expenses associated with the administration of Chapter 440 by the Division (§ 440.44, **Fla.Stat.**). Any change in the current practice of the Division, including the increases in supplemental benefits in the allowable offset, would impact

the fiscal soundness of the WCATF (especially if the Division was required to repay carriers for prior offsets).

In at least one other offset scenario, this Court has held that a change in a workers' compensation offset provision has prospective application only. See, City of Miami v. Bell, 634 So.2d 163 (Fla. 1994). In Bell, this Court was asked to determine whether its' decision in Barrasan applied prospectively only. Id. At 165. In Barragan, this Court held a city ordinance allowing a disability pension offset against workers' compensation benefits was invalid: Barrasan 545 at 254-255. This Court, in Bell, held the Barrasan decision **was** prospective only. Bell. 634 at 166. Thus, the City of Miami only had to reimburse claimants for incorrect offsets taken after the effective date of the Barrasan decision. Id. The Department respectfully requests that if this Court affirms Acker, it also follows its decision in Bell and holds that **the** Acker decision has prospective application only.

In Bell, this Court reasoned that retroactive application of the offset change set forth in Barragan would have an unfair fiscal impact on the City of Miami because the City budgeted for salary and benefits based on the then-existing and valid ordinance and case law applying it. Id. A decision holding that the Acker case has retroactive application would similarly have a

negative and unfair fiscal impact on the Division and every other insurance carrier or self-insured taking offsets. Prior to the First **DCA's decision** in Acker, the Division was following industry practice of including the yearly increases in PTD supplemental benefits in the offset. Industry practice is a relevant consideration because the workers' compensation system is designed to be self-executing. See, § 440.015, Fla.Stat. (1997) .

The Division, pursuant to § 440.51(1), Fla.Stat. (1997), must estimate in advance its cost of the administration of Chapter 440 and must base this estimate on the previous year's expenses. This estimation is used in the calculation of the assessment rate for the WCATF assessed against all carriers and self-insureds writing workers' compensation insurance in Florida. Thus, the Division budgets and collects the money it will require to operate for the next fiscal year in the current fiscal year. Applying Acker retroactively will substantially **alter payments** which the Division has already forecasted and budgeted.

The Workers' Compensation Administration Trust Fund is a statutorily created Fund with a **cap on assessments (4%)**, meaning there is a finite amount of money in the Fund. See, § 440.50, Fla.Stat. (1997); § 440.51(1)(b), Fla.Stat. (1997); § 440.51(4), Fla.Stat. (1997). The Fund is funded through assessments on



Employer/carriers' workers' compensation premiums. See, Section 440.51(1) (b), Fla.Stat. (1997); § 440.51(4), Fla.Stat. (1997). A decision holding that the Division can not include yearly increases in supplemental benefits in the offset and must repay the offsets improperly calculated before Acker would dramatically increase the Division's expenditures for supplemental benefits from the Workers' Compensation Administration Trust Fund, which is merely one of the many expenditures the Fund makes. At the very least, because the Fund is comprised of assessments paid by current carriers and self-insureds, a holding that Acker has retroactive application would require the current carriers and self-insureds to incur and pay the obligations of former carriers and self-insureds. In Bell, this Court acknowledged the unfairness of requiring current contributors to pay yesterday's fiscal obligations. Bell 634 at 166.

CONCLUSION

The Judge of Compensation **Claims'** Order finding that the Division could not include the annual increases in permanent total supplemental benefits in the offset taken by the Division is not supported by the statute and case law and thus should be reversed. The First District Court of Appeal's affirmance of the JCC should be reversed and **quashed**.

Respectfully submitted,



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CERTIFICATE OF FONT SIZE AND STYLE

I HEREBY CERTIFY that the foregoing Brief has been typed in Courier New font, twelve pitch.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of- the foregoing has been furnished by U.S. Mail to: Irvin A. Meyers, Esquire, 17 South Lake **Avenue**, Orlando, FL 32801-2797; and to Thomas H. McDonald, Esquire, 201 East Pine Street, 15<sup>th</sup> Floor, Orlando, FL 32801, this 16<sup>th</sup> day of November, 1998.

  
KATRINA D. CALLAWAY

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 94,103

D/A: 7/1/74

Petitioner,

LT. CASE NO. 97-04038

vs.

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

Respondent.

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**Appendix to Petitioner, Department of Labor &  
Employment Security's, Initial Brief on the Merits**

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Opinion of the First District Court  
of Appeal dated September 11, 1998

APPENDIX "A"

Department of Labor and Employment  
Security Form DWC-33

APPENDIX "B"

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,  
DEPARTMENT OF LABOR  
& EMPLOYMENT SECURITY,

NOT FINAL UNTIL TIME EXPIRES TO FILE  
MOTION FOR REHEARING AND DISPOSITION  
THEREOF IF FILED

Appellant,

v.

CASE NO. 97-4038

BOISE CASCADE CORPORATION  
and WAUSAU INSURANCE COMPANY

Cross-Appellants,

v.

WILLIAM M. BOWMAN, JR.,

Appellee.

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Opinion filed September 11, 1998.

An appeal from an order entered by Judge of Compensation Claims  
Gail Adams.

Katrina D. Callaway, Florida Department of Labor and Employment  
Security, Tallahassee, for Appellant.

Thomas H. McDonald of Rissman, Weisberg, Barrett, Hurt, Donahue &  
McLain, P.A., Orlando, for Cross-Appellants.

Irvin A. Meyers of Meyers, Mooney, Meyers, Orlando for Appellee.

PER CURIAM.

There was no legal basis under section 440.34(1), Florida  
Statutes (1973) for the assessment of attorney's fees against the  
employer and carrier. Therefore, we reverse the award of  
attorney's fees in favor of the claimant.

APPENDIX "A"

Moreover, we reject the State's argument regarding the calculation of the social security offset. In Acker v. City of Clearwater, No. 97-2719 (Fla. 1st DCA, filed August 17, 1998), we held that the offset should not be recalculated each year to include the yearly increases in permanent total disability supplemental benefits. As we did in Acker, we certify the following question:

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.?

In all other respects the order of the judge of compensation claims is affirmed.

Affirmed in part and reversed in part.

**BENTON, VAN NORTWICK and PADOVANO, JJ., CONCUR.**

**PERMANENT TOTAL OFF-L, WORKSHEET**

FLORIDA DEPARTMENT OF **LABOR AND EMPLOYMENT SECURITY**  
**DIVISION OF WORKERS' COMPENSATION**  
 2725 CENTERVIEW DRIVE, 124 FORREST BUILDING  
 TALLAHASSEE, FLORIDA 32399-0684

FOR CARRIER'S DATE STAMP
SENT TO DIVISION

EMPLOYEE NAME:	SOCIAL SECURITY #:	DATE OF ACCIDENT:
DATE OF BIRTH:	EMPLOYER NAME	

**FORMULA:**

1. Compensation Rate + Primary Insurance Amount (including dependant benefits) + 5% Permanent Total Supplement.
2. Subtract the greater of 80% Average Weekly Wage (AWW) 80% Weekly Average Current Earnings (ACE).
3. Convert monthly benefits to weekly benefits by dividing the monthly amount by 4.3.
4. Resulting difference is the offset amount.

**BENEFITS INFORMATION (Monthly/Weekly)**

Weekly Compensation	_____	
Average Weekly Wage	_____	multiplied by .80 = 80% AWW _____
Monthly PIA	_____	divided by 4.3 = Weekly PIA _____
Monthly ACE	_____	divided by 4.3 = Weekly ACE _____
Family Max	_____	divided by 4.3 = Weekly TFB _____

**Offset Calculation**

[+]	_____	Weekly Compensation
[+]	_____	Weekly PIA
[=]	_____	8% PT Supplement
-	_____	Combined Weekly Benefits
		greater of 80% AWW. 00% Weekly ACE
(a)	_____	Total Offset Available
(b)	_____	Offset Against Supplementals (Division/Carrier a + b = c)
(c)	_____	Offset Against Compensation
(d)	_____	Total Benefits Payable After Offset (Comp Rate - c = d)

Effective \_\_\_\_\_ the Division/Carrier in accordance with Section 440.15(10) F.S. will begin applying the Social Security offset to this case.

Please attach a copy of the completed DWC-14, Request for Social Security information and a Notice of Action/Change (DWC-4), as required by Rule 38F-3.035.

ANY PERSON WHO, KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD, OR DECEIVE ANY EMPLOYER OR EMPLOYEE, INSURANCE COMPANY, SELF-INSURED PROGRAM, FILES A STATEMENT OF CLAIM CONTAINING ANY FALSE OR MISLEADING INFORMATION IS GUILTY OF A FELONY IN THE THIRD DEGREE.

CARRIER CODE #	ADJUSTER NAME	CARRIER NAME, ADDRESS & TELEPHONE #
SERVICE CO./TPA CODE #	DATE PREPARED	