SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DEPARTMENT OF TRANSPORTATION and
FLORIDA DEPARTMENT OF INSURANCE,

Petitioners,

Case No.: 94,366

vs.

TONY JOHNS,

Respondent.
_____/

REPLY BRIEF OF PETITIONERS,
DEPARTMENT OF TRANSPORTATION AND
FLORIDA DEPARTMENT OF INSURANCE

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ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL ERRED IN REFUSING TO INCLUDE ALL OF THE CLAIMANT'S PERMANENT TOTAL SUPPLEMENTAL BENEFITS WITHIN THE 100% CAP MANDATED BY §440.20(15), FLA. STAT. (1985).

Respondent does not address, either directly or indirectly, Petitioners' argument that this Court's construction of §440.20(15) has received approval both from the legislature and the state agency charged with implementation and enforcement of chapter 440. As noted in the initial brief, the construction urged by Petitioners herein is in accord with that of the Division of Workers' Compensation, and unless that construction is clearly erroneous, it should be upheld by this Court.

Moreover, Respondent does not address Petitioners' contention that the First District Court of Appeal's Hunt decision, which underlies the First District's decision in the case at bar, was itself wrongly decided and should be overruled by this Court. Nor does Respondent acknowledge the fact that the Social Security Administration itself, in the context of taking its offset, periodically reduces social security disability benefits in order to insure that the combination of workers' compensation and social security benefits does not exceed 80% of the ACE.

Rather, Respondent sets forth four main points in defense of the First District's holding in this matter. Nones of these points has merit, however, as a review of them will reveal.

. SECTION 440.15(1)(e)1 AND SECTION 440.20(15) ARE

NOT IN CONFLICT

The Respondent's main point is that §440.20(15), as interpreted by this Court in Brown, Barragan, and Grice, is in conflict with §440.15(1)(e)1. Specifically, the Respondent reasons that because §440.15(1)(e)1 purports to cap the combination of permanent total and permanent total supplemental benefits at the maximum compensation rate during the year the payment is made, that can be the only cap on these benefits. Any other cap, contends the Respondent, amounts to legislation by judicial fiat. (Answer Brief, p. 6-7).

As demonstrated in Petitioners' initial brief, however, this identical argument has already been rejected by the Industrial Relations Commission in Loggins. In Loggins, the claimant argued, and the judge of industrial claims agreed, that he was entitled to have his permanent total supplemental benefits paid in addition to the 80% cap on combined workers' compensation and social security benefits mandated by §440.15(9). 10 FCR at 212. The claimant reasoned that because §440.15(1)(e)1 "specifically provides that the supplemental benefits provision is subject to the maximum weekly compensation rate" but is "silent as to the limitation imposed by [§440.15(9)]," under the doctrine of expressio unius est exclusio alterius, the only cap on benefits should be the maximum weekly compensation rate. 10 FCR at 212-213.

The Industrial Relations Commission rejected that argument and reversed. Writing for the Commission, Justice Leander Shaw observed:

> We do not find the two sections [§440.15(1)(e)1 and §440.15(9)] to be repugnant, ambiguous, or incompatible. Section [440.15(9)], F.S., provides in no uncertain terms that a claimant is not receive more than 80% of his average weekly wage in combined benefits from workmen's compensation and social security. The Judge's interpretation to the contrary is in derogation of the clear intent and wording of the statute. (Emphasis added).

10 FCR at 213.

This argument was also rejected by this Court in Grice:

> In the instant case, Grice argues that he is entitled to workers' compensation and disability benefits, with the only offset being that which is statutorily allowed for social security disability benefits. We disagree and 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. (Emphasis added).

692 So.2d at 898.

Likewise, §440.15(1)(e)1 and §440.20(15) are not repugnant. As this Court has repeatedly held, §440.20(15) provides in no uncertain terms that "when an injured employee receives the equivalent of his full wages from whatever employer source that should be the limit of compensation to which he is entitled." 305 So.2d at 194.

. SECTION 440.20(15) DOES NOT DEPRIVE THE RESPONDENT OF PROTECTION AGAINST INFLATION

Respondent next cites several decisions from the First District Court of Appeal noting that the purpose of permanent total supplemental benefits is to provide a hedge against inflation. He then proceeds to paint a bleak picture of a permanently totally

disabled worker watching helplessly as the purchasing power of his benefits is gradually eroded over time. Although Petitioners have no doubt that permanent total supplemental benefits are intended for the purpose asserted by the Respondent, the picture painted by him is nevertheless flawed for several reasons.

First, as stated in the initial brief, Respondent ignores the fact that, as a recipient of in-line-of-duty disability benefits, he has another hedge against inflation, to wit, §121.101(3), Fla. Stat. (1991), which provides for an increase of 3% in those benefits, compounded annually. The Respondent's entitlement to these benefits from the Florida Retirement System will be completely unaffected by this Court's decision herein. Therefore, even if his workers' compensation benefits were reduced to zero, he would still be entitled to this annual 3% cost-of-living adjustment, thus eventually bringing his combined employer-provided benefits to an amount exceeding his pre-injury wage.

Moreover, as also noted in the initial brief, because of the exemption of these benefits from federal employment and income taxation, Respondent <u>already</u> receives benefits equivalent to the "take-home" pay he would receive if he were working and earning annual wages of $26,000.00 - an amount representing 122.51% of his pre-injury wage. Surely such a result more than counters any suggestion that the Respondent has been left unprotected against inflation.

. <u>THE 100% CAP ON EMPLOYER-PROVIDED BENEFITS WAS NOT ABROGATED BY THE REPEAL OF SECTION 440.15(12), FLA.</u>

STAT. (1991)

The Respondent correctly notes that the 1990 Florida Legislature enacted the following amendment to chapter 440, codified at §440.15(12), Fla. Stat. (1991):

> **(12) Employee eligible for benefits under this chapter and pension disability benefits payable by a public employer. -** Where any person receives compensation under this chapter by reason of the disability of an employee of the state or any political subdivision of the state, and such person is also entitled to receive any sum, by reason of the same disability, from any pension plan or other benefit fund with respect to which the same employer provides the majority of the current funding, nothing in this chapter shall be construed to prevent the reduction of pension benefits paid by said employer by the amount of workers' compensation payments paid by the employer. However, no such reduction may result in compensation benefits payable under this chapter and under the pension plan or other benefit fund which, in sum, total less than 100 percent of the money rate at which the service rendered by the employee was recompensed, excluding overtime, under the contract of hiring in force at the time of the employee's injury. Nothing in this subsection shall be construed to abrogate the terms of any contract of employment or the stated conditions of employment at the time of hiring.

Ch. 90-201, §20, p. 745, Laws of Fla.

The Respondent is incorrect, however, in asserting that "[t]he Legislature quietly repealed this law the very next year." (Answer Brief, p. 15). In point of fact, this statutory provision remained in effect until it was repealed by Ch. 93-415, §20, p. 2400, Laws of Fla. Thus, the repeal of this provision was not effective until January 1, 1994. Ch. 93-415, §112, p. 215, Laws of Fla.

It is well settled that the law in effect on the date of the accident governs substantive matters in workers' compensation proceedings. Sullivan v. Mayo, 121 So.2d 424 (Fla. 1960); Recon

Paving, Inc. v. Cook, 439 So.2d 1019 (Fla. 1st DCA 1983); City of Crestview v. Howard, 657 So.2d 73 (Fla. 1st DCA 1995). Because the claimant's accident in the case at bar occurred on 8/27/92 (R: 2) while §440.15(12) was still in effect, this case should be governed by that statutory provision. Accordingly, there is even more authority for capping the claimant's combined workers' compensation and pension benefits at 100% of the average weekly wage.

Moreover, even if the 1994 repeal of this statute were to be given retroactive effect, that would not compel a different result. As Judge Ervin observed in Cook, "it appears that subsection (12) was merely . . . a codification of the Barragan decision." 617 So.2d at 754 (Ervin, J., dissenting).[1] Given the clearly expressed intent to encourage a return to work by the injured worker, it seems highly unlikely that the Legislature, meeting in special session in 1993, intended in the same breath to overrule more than 20 years of precedent, thereby allowing an injured worker to receive more than his pre-injury wage in employer-provided disability benefits. Rather, it seems more likely that the Legislature recognized that subsection (12) was mere surplusage,

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[1] In his dissent, Judge Ervin argued that the claimant's permanent total supplemental benefits should not be subject to the cap on benefits imposed by Barragan [§440.20(15)] because: (1) §440.15(12) applied to benefits "paid by the employer;" (2) because of the date of accident, the claimant's permanent total supplemental benefits in Cook were paid not by the employer, but by the Workers' Compensation Administration Trust Fund; and (3) §440.15(12), being merely "a codification of the Barragan decision," should be given retroactive application. 617 So.2d at 754-755.

given the Barragan holding.

Moreover, even assuming arguendo that the Legislature had intended such a result, it failed to amend the controlling substantive statute, to wit, §440.20(15). A similar situation confronted the First District Court of Appeal in Vegas v. Globe Security, 627 So.2d 76 (Fla. 1st DCA 1993), rev. den., 637 So.2d 234 (Fla. 1994). At issue in Vegas was whether a claimant's earnings from "concurrent employment" must be included in his average weekly wage. The employer argued that such earnings should be excluded because of 1990 amendment to §440.02(24), Fla. Stat., which amended the definition of "wages" to include "only the wages earned on the job where he is injured" and to exclude "wages from outside or concurrent employment . . ." Ch. 90-201, §9, p. 716, Laws of Fla. In rejecting the employer's contention, the First District observed:

> Globe Security argues that the Legislature clearly intended, by amending section 440.02(24), to eradicate the long standing requirement that employers must pay disability benefits based on a worker's concurrent earnings. Whether or not this is an accurate observation, the Legislature may not, however, change substantive law by merely expressing its intent. It is also necessary to amend the controlling substantive statute, which in this case is section 440.14. (Emphasis added).

627 So. 2d at 84.

Similarly, if it was the intent of the Legislature to overrule Barragan when it repealed §440.15(12) in 1993, it should have amended §440.20(15) because that is the statutory authority underlying all of these decisions. As stated in the initial brief, §440.20(15) has in fact remained unaltered since its original

enactment in 1977.

D. THE RESPONDENT'S "INITIAL-SUBSEQUENT" DISTINCTION IS INTERNALLY INCONSISTENT

Finally, Respondent adopts the "initial-subsequent" distinction set forth by the First District in its Hunt and Acker decisions in determining whether permanent total supplemental and other cost-off living adjustments must be included within the §440.20(15) cap on employer-provided benefits (Answer Brief, p. 19). In addition to be erroneous for the reasons set forth in the initial brief, this distinction is internally inconsistent with the other arguments set forth by Respondent herein.

The Respondent finds no fault with the First District's Cook decision and in fact acknowledges that "PTD supplemental benefits are 'compensation' as that term is defined in §440.02(6), Florida Statutes." (Answer Brief, p. 16). But if the permanent total supplemental benefits being paid at the time of the "initial calculation" are "compensation" benefits, then why are "subsequent increases" in those benefits not also "compensation" benefits? Your Petitioners respectfully submit that there is no meaningful distinction between the two. Under §440.20(15), the only inquiry is whether the benefit is one provided by the employer. If the initial permanent total supplemental benefits are "employer-provided," then subsequent increases in those benefits are no less so. Accordingly, the certified question should be answered in the affirmative and the First District's decision below should be quashed.

CONCLUSION

The Petitioners' method of calculation in this case is in complete compliance with the First District's holding in Cook and with this Court's construction of §440.20(15) that "total benefits from all sources cannot exceed the employee's weekly wage." Grice at 898; Barragan at 254 (emphasis added). Accordingly, the certified question should be answered in the affirmative and the First District's decision below should be quashed. In addition, because the First District is under the mistaken impression that this Court has approved its decision in Hunt, this Court should also take this opportunity to overrule the First District's decision in Hunt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing

has been furnished to Sylvan A. Wells, Esquire, Post Office Box 265307, Daytona Beach, FL 32126, attorney for Respondent, by U.S. Mail, this _____ day of January, 1999.

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