SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

FLORIDA PLASTERING and
ASSOCIATED INDUSTRIES,

Petitioners,

CASE NO. 94,511

v.

DENNIS ALDERMAN

Respondent,
_____/

RESPONDENT, DENNIS ALDERMAN'S REPLY BRIEF

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed with 10 point courier.

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Preliminary Statement

This is an appeal from a final order in a Workers' Compensation claim denying Respondent certain workers compensation benefits and finding Petitioner is entitled to recalculate its offset each year to include increases in both social security and workers' compensation supplemental benefits.

Statement of the Facts

Respondent was employed by Petitioner, Florida Plastering, as a plasterer. On April 16, 1989, he fell from a scaffold sustaining a spinal cord injury which rendered him a quadriplegic. Petitioner, Associated Industries Insurance Company (AIIC), began paying PTD benefits on November 15, 1989 and began taking a Social Security offset on July 7, 1990. The Respondent's disability benefits were $142.55 per month, but did not commence until June 1992 (Vol II, P. 179). At the final hearing, the parties stipulated as follows: the AWW = $702.34; the initial compensation rate = $362.00; eighty percent (80%) of the AWW = $561.87; the monthly average current earnings = $2,566.00; eighty percent (80%) of the monthly average current earnings = $2,052.80; eighty percent (80%) of the weekly average current earnings = $477.40; the monthly social security benefits = $1,362.60; and the weekly social security benefit = $316.88.

Statement of the Case

In his workers compensation claim, Respondent filed a petition for benefits which was received by the Petitioners on June 21, 1996. At the final hearing the Judge of Compensation Claims (JCC) narrowed and summarized the issues as follows: whether the Social Security offset taken by the employer/carrier was correct.

The JCC entered his compensation order on November 5, 1997. The JCC, relied upon the opinion in *Escambia County Sheriff's Department v. Grice*, 692 so.2d 896 (Fla. 1997) (**Grice**), determined that the "employer/carrier is entitled to recalculate its offset each year to include social security increases so that the total of the employee's benefits from Social Security, disability pension and workers' compensation including supplemental benefits do not exceed his average weekly wage of $702.34".

Respondent perfected an appeal to the District Court of Appeal, First District. In its opinion dated November 19, 1998, the District Court of Appeal, noted that **Grice** did not concern the issue of recalculation, reversed the JCC and remanded the case holding that the Petitioners were entitled to calculate their initial offset when the Respondent began receiving his social security benefits in 1990, but could not recalculate its offset to include any cost-of-living increases thereafter. However, the District Court of Appeals did allow the Petitioners to recalculate the offset to include the addition of a new collateral benefit

received by the Respondent at a later date, but not for supplemental or cost of living increases. The District Court of Appeal, First District certified the following question to the Supreme 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?

SUMMARY OF ARGUMENT

It has never been the legislature's intent, nor the Court's holding to limit an injured employee, who is permanently and totally disabled, to his pre-injury wages for life. Petitioner's argument that it be allowed to recalculate its offset yearly to include the supplemental benefits and cost of living adjustments is absurd since it would limit the injured employee to his pre-injury wages.

CERTIFIED 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?

ARGUMENT

Petitioners, in their initial brief, cite numerous Supreme Court cases to support their conclusion that the certified question be answered in the affirmative. Yet none of the cases cited by the Petitioners dealt with the issue of recalculating an employer/carrier's offset yearly to include supplemental benefits and cost of living adjustments.

In *Vesta Mae Brown v. S.S. Kresge*, 304 So.2d 191 (Fla. 1974) (**Brown**), the employer sought a credit against the workers compensation benefits awarded an employee for sick leave benefits provided as part of the employee's fringe benefits package. The Court stated that section 440.21, Florida Statues, which provided that: "No agreement by an employee to waive his right to compensation under this chapter shall be valid", precluded the employer from asserting a credit for fringe benefits provided to its employees. Id. at 194. However, the Court stated that it was "reasonable to conclude that workers' compensation benefits when combined with sick leave insurance benefits provided by the employer should not exceed claimant's average weekly wage because under a logical interpretation of I.R.C Rule 9 (now 440.20(14)) when a injured employee receives the equivalent of his full wages from whatever source, that should be the limit of compensation to which his is entitled". Id. The Court refused to allow a credit, since state agencies could not promulgate rules and regulations

that exceed statutory authority. Since **Brown** dealt with temporary total disability benefits and not permanent total disability benefits, it did not address supplemental benefits or a yearly recalculation of the employer/carrier's offset or credit.

In *Domutz v. Southern Bell Telephone & Telegraph Company*, 399 So.2d 636 (Fla. 1976) (**Domutz**), the sole question considered by the Court was "whether an employer is entitled to a credit against workmen's compensation benefits in the amount of pension benefits which petitioner received, but to which he had not contributed, where the total award including the pension benefits did not exceed the petitioner's average weekly wage." Id. at 637. The Court held that no credit would be allowed when the petitioner's "average weekly wage far exceed the total benefits received from his employer." Id. This case dealt with a credit for a collateral source and did not address supplemental benefits or a yearly recalculation of the employer/carrier's offset or credit.

Barragan v. City of Miami, 545 So.2d 191 (Fla. 1989) (**Barragan**), like those cases mention above, also dealt with the employer's offset of worker compensation payments against an employee's pension benefits. The Court, relied upon its decisions in **Domutz** and **Brown**, to hold that no offset could be taken except to the extend to total of the benefits provided exceeded the employee's AWW. Like **Domutz** and **Brown**, this case dealt with a credit for a collateral source and did not address supplemental

benefits or a yearly recalculation of the employer/carrier's offset or credit.

Finally in *Escambia County Sheriff's Department v. Grice*, 692 So.2d 896 (Fla. 1997) (**Grice**), the Court reiterated the holdings in **Barragan**, **Domutz**, and **Brown**. The Court allowed the employer to take an initial offset to the extend that the workers compensation benefits plus any collateral source exceeded the employee's AWW. Again **Grice**, like **Barragan**, **Domutz**, and **Brown**, dealt with a credit for a collateral source and did not address supplemental benefits or a yearly recalculation of the employer/carrier's offset or credit.

The above cases limit the total of a claimant's benefits from all sources to his pre-injury AWW. The Court in those cases interpreted the language of 440.20(14), Florida Statutes (1994) which codified I.R.C. Rule 9, to cap all employer provided benefits to 100% of a claimant's AWW. Florida Statute 440.20(14) provides as follows:

> When an employee is injured and the employer pays his full wages or any part thereof during the period of disability, or pays medical expenses for such employee, and the case is contested by the carrier or the carrier and employer and thereafter the carrier, either voluntarily or pursuant to an award, makes a payment of compensation or medical benefits, the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded, plus medical benefits, if any, out of the first proceeds paid by the carrier in compliance with such voluntary payment or award, provided the

> employer furnishes satisfactory proof to the judge of compensation claims of such payment of compensation and medical benefits. Any payment by the employer over and above compensation paid or awarded and medical benefits, pursuant to subsection (13), shall be considered a gratuity.

It is clear from the language of 440.20(14), Fla. Stat., that this section was not intended as a limit upon the benefits an employee may receive from an employer, but instead was intended as a limit upon the carrier's responsibility to reimburse the employer for benefits it provided when the carrier contested a claim. Respondent contends that the dicta of the Supreme Court in **Brown** misinterpreted I.R.C. Rule 9 (now 440.20(14)) to mean that "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." **Brown** at 194. This is especially true in light of the last sentence of 440.20(14), Fla. Stat., which categorizes as a gratuity any over payment by the employer.

In subsequent cases, the Supreme Court relied on **Brown** and continued to misinterpret 440.20(14), Fla. Stat., in **Domutz**, **Barragan**, and **Grice**. Thus, relying on 440.20(14), Fla. Stat., to limit the total benefits an employee may receive to his pre-injury wages is clearly erroneous and the Court should recede from the holding in these cases.

Nevertheless, these cases do not deal with the question certified to this Court. Nor has this Court addressed the issue of

whether an employer/carrier can recalculate its offset yearly to account for supplemental benefits and cost of living adjustments.

The District Court of Appeal, First District, addressed this issue and stated that once an employer/carrier calculates its initial offset it could not recalculate its offset yearly for supplemental benefits and cost of living adjustments. *Hunt v. D.M. Stratton*, 677 So.2d 64 (Fla. 1st DCA 1996) and *Cruse Construction v. Remy*, 23 Fla. L. Weekly at D197 (Fla. 1st DCA 1997).

Prior to 1974, supplemental benefits for permanent and total disabled employees did not exist. However in 1973, the legislature recognized that "the purchasing power of [permanent and total disabled employees] compensation benefits eroded as a result of the increase in the cost of living. [440.15(1)(e)] will help restore lost purchasing power for this limited class of injured employees." *The Report, Study and Recommendations for Changes in the Florida Workmens' Compensation Act*, 49. It is clear that the legislature intended both supplemental benefits and cost of living adjustments, not as benefits to be provided by the employer, but instead as a protection against the erosion of the injured employee's purchasing power.

It has never been the legislature's intent, nor the Court's holding to limit an injured employee, who is permanently and totally disabled, to his pre-injury wages for life. Petitioner's argument that it be allowed to recalculate its offset yearly to

include the supplemental benefits and cost of living adjustments is absurd since it would limit the injured employee to his pre-injury wages and the purchasing power of the employee's pre-injury wages would be eroded by inflation. Therefore, the Supreme Court should answer the certified question in the negative with instructions that the supplemental benefits provided in section 440.15(1)(e)(1) not be included in any calculation of the employer/carrier's offset.

CONCLUSION

Based upon the foregoing cases and arguments, Respondent, DENNIS ALDERMAN, respectfully requests the Supreme Court to answer the certified question in the negative with instructions that the supplemental benefits provided in section 440.15(1)(e)(1) not be included in any calculation of the employer/carrier's offset, and recede from its opinions in **Brown**, **Domutz**, **Barragan**, and **Grice** to the extent they place a 100% cap on any combination of workers' compensation benefits, social security benefits, disability benefits and other employer provided benefits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished via U.S. mail on this 26th day of February, 1999, to: Anthony Reinert, attorney for Petitioner, P.O. 331346, Miami, Florida 33133.

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APPENDIX"A"

**REPORT, STUDY AND RECOMMENDATIONS
FOR CHANGES IN THE
FLORIDA WORKMENS' COMPENSATION ACT
REPRESENTATIVE CHARLES C. PAPY, JR., CHAIRMAN OF
SELECT COMMITTEE ON WORKMEN'S COMPENSATION
FLORIDA HOUSE OF REPRESENTATIVES, 1974**

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January 24, 2000

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Re: FLORIDA PLASTERING ET AL
vs.
DENNIS ALDERMAN
Case No. 94-511

Dear Mr. Clerk:

Enclosed please the originals and seven copies of Respondent's, Dennis Alderman, Reply Brief on the Merits and Appendix "A".

Respectfully Submitted,

Jacob D. Maldonado

cc: Anthony Reinert