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SUPREME COUORT OF FLORIDA

TALLAHASSEE, FLORIDA

FLORIDA PLASTERING AND ASSOCIATED INDUSTRIES INSURANCE COMPANY **CASE NO. 94,511**

Petitioners,

v.

DENNIS ALDERMAN,

Respondent.

.....\

PETITIONERS, FLORIDA PLASTERING AND ASSOCIATED INDUSTRIES INSURANCE COMPANY'S INITIAL BRIEF ON THE MERITS

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This Brief is typed with 14 point Times New Roman.

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PRELIMINARY STATEMENT

This is an appeal from a Final Order in a Workers' Compensation proceeding. In that Order the Judge of Compensation Claims held that a Workers' Compensation carrier may offset Workers' Compensation benefits to the extent that the total of Workers' Compensation, Disability Retirement and Social Security Benefits exceed the claimant's average weekly wage.

The Respondent, Claimant above, appealed this Order to the District Court of Appeal, First District. The District Court of Appeal, First District, reversed this Order of the Judge of Compensation Claims and held that the employer/carrier may not recalculate the offset each time that the claimant's benefits change in the future, thus permitting the claimant to receive benefits from Workers' Compensation and other collateral sources that exceed his average weekly wage. The District Court of Appeal, First District certified the following question to the Supreme Court of Florida:

WHERE AN EMPLOYER TAKES A WORKERS' COMPENSATION OFFSET UNDER SECTION 440.20(15) FS (1985), AND INITIALLY INCLUDES SUPPLEMENTAL BENEFITS PAID UNDER SECTION 440.15(1) (e)(1) FS (1985), IS THE EMPLOYER ENTITLED TO RECALCULATE THE OFSET BASED UPON THE YEARLY INCREASE IN SUPPLEMENTAL BENEFITS?

STATEMENT OF THE CASE AND FACTS

Dennis Alderman sustained an injury by accident arising out of and in the course of his employment on April 16, 1989. As a result of his injury he was rendered a quadriplegic. At the time of his injury his average weekly wage was $702.34. His employer, Florida Plastering, through its carrier, Associated Industries Insurance Company, commenced paying Permanent Total Disability benefits as well as supplemental benefits on November 15, 1989. The Claimant also received Social Security Disability Benefits for himself and his dependents. The carrier took an offset for these benefits.

In June, 1992, the claimant began to receive Disability Retirement Benefits through a program that was wholly paid for by the employer.

The claimant filed a claim for benefits seeking a determination of the amount of the benefits to which he was entitled. After the hearing, the Judge of Compensation Claims entered his Order holding that the claimant was not entitled to receive benefits from Workers' Compensation and other collateral sources which when totaled, exceed 100% of his average weekly wage. The JCC further held that the employer/carrier was entitled to recalculate these benefits annually so that the total benefits from Social Security, Disability Retirement and Workers' Compensation, including supplemental benefits, did not exceed the claimant's average weekly wage.

The Claimant perfected an appeal to the District Court of Appeal, First District. In its Opinion dated November 19, 1998 the District Court of

Appeal, First District, held that the employer/carrier was entitled to calculate the benefits when the claimant started to receive Social Security benefits in 1990 and recalculate them in June, 1992 when the claimant started to receive Disability Retirement benefits from a program entirely paid for by the employer so that the total benefits from Social Security, Disability Retirement income and Workers' Compensation including supplemental benefits would not exceed 100% of the claimant's average weekly wage. The District Court of Appeal, First District, further held that after June of 1992 the employer/carrier could not recalculate the benefits even though the combination of Social Security, Disability Retirement and Workers' Compensation, including supplemental benefits exceed 100% of his average weekly wage. 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) FS (1985), AND INITIALLY INCLUDES SUPPLEMENTAL BENEFITS PAID UNDER SECTION 440.15 (E)(1), FS (1985), IS THE EMPLOYER ENTITLED TO RECALCULATE THE OFFSET BASED UPON THE YEARLY INCREASE IN SUPPLEMENTAL BENEFITS?**

Florida Plastering and Associated Industries Insurance Company have timely filed their Notice to Invoke Discretionary Jurisdiction of this Court.

The District Court of Appeal, First District has certified the identical question to the Supreme Court of Florida in the following cases:

1. *Acker v. City of Clearwater*
   23 Fla. L. Weekly D1970
   (Fla. 1st DCA Aug. 17, 1998)

2. *Hahn v. City of Clearwater*
   23 Fla.L.Weekly D2120
   (Fla. lst DCA, Sept. 9, 1998)

3. *Rowe v. City of Clearwater*
   23 Fla.L.Weekly D2120
   (Fla. lst DCA Sept.9, 1998)

4. *Dept. of Labor and Employment Security v. Boise Cascade Corp*
   23 Fla.L.Weekly D2124
   (Fla. 1st DCA Sept.1998)

ISSUE ON APPEAL

WHERE AN EMPLOYER TAKES A WORKERS' COMPENASTION 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 INCREASE IN SUPPLEMENTAL BENEFITS?

SUMMARY OF ARGUMENT

In a series of cases, starting with *Brown v. S.S. Kresge Co.*, 305 So. 2d 191 (Fla. 1974), the Supreme Court of Florida has held that once the 100% cap of the average weekly wage has been reached, Workers' Compensation benefits must be reduced so that the total of all benefits plusWorkers' compensation do not exceed the claimant's average weekly wage. In *Escambia County Sheriff's Department v. Grice*, 692 So. 2d 896 (Fla. 1997), the Supreme Court of Florida reiterated that holding. A claimant's Workers' Compensation benefits and collateral benefits such as Social Security Benefits and Disability Retirement Benefits may change each year. A claimant's Social Security Benefits may be decreased if his dependents cease to be dependents. They may increase each year with the cost of living adjustments. In either event, *Brown*, supra, and *Grice*, supra, require a recalculation as the benefits decrease or increase.

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 INCREASE IN SUPPLEMENTAL BENEFITS,

The issue involved in this appeal is whether the claimant is entitled to receive benefits from his employer and other collateral sources which, when totaled, exceed 100% of his average weekly wage. Inherent in this issue is the question of whether the claimant's benefits should be calculated annually.

In *Escambia County Sheriff's Department v. Grice*, 692 So. 2d 896 (Fla. 1997), this court held:

> "Once the 100% cap has been reached Workers' Compensation must be reduced pursuant to Section 440.20(15) Florida Statutes which states: 'When an employee is injured and an 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 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 sub-section (14), shall be considered a gratuity.' "

In arriving at this conclusion this court relied on its prior cases of *Barragan v. City of Miami*, 545 So. 2d 152 (Fla. 1989), *Brown v. S.S. Kresge Co.*, 305 So. 2d 191 (Fla. 1994) and *Domutz v. Southern Bell Telephone and Telegraph Company*, 339 So. 2d 626 (Fla. 1976) In *Barragan*, supra, this court stated:

> "However, the total benefits from all sources cannot exceed the claimant's average weekly wage." Page 254

In *Brown*, supra, and *Domutz*, supra, this court reiterated this holding.

In *Brown*, supra, this court interpreted F.S. 440.15(FS 1985) to mean: "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 191 at 194.

These decisions do not limit the calculation of benefits to an initial calculation. If the claimant's collateral sources are reduced (e.g. his dependents are no longer dependents), his Workers' Compensation would increase so long as the total benefits do not exceed 100% of his average weekly wage.

This is certainly consistent with the court's opinion in *Grice*, supra. In *Grice*, supra, this court took into account yearly increases in supplemental benefits and Social Security and calculated the benefits on a yearly basis. See *Acker v. City of Clearwater*, 23 Fla.Weekly, D2197 (Fla. 1st DCA, Aug. 17, 1998). In the case at bar the District Court of Appeal overlooked this fact when it stated:

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"*Grice* involved the initial calculation of offset after the claimant begins receiving collateral benefits."

See *Alderman v. Florida Plastering*, 23 Fla.L.Weekly D2578. Nov. 19, 1998 DCA, 1st District.

Barragan, Brown and *Domutz*, supra, stand for the position that once the 100% cap (100% of the average weekly wage) has been exceeded, Workers' Compensation benefits should be reduced so that the total benefits do not exceed 100% of the average weekly wage. These cases call for a recalculation of benefits whenever the cap is exceeded.

In *Hunt v. D.M. Stratton*, 677 So. 2d 64 (Fla. 1st DCA 1996), the District Court of Appeal, in dicta, stated that the law did not contemplate a recalculation of Workers' Compensation offset based upon yearly increases in the state's supplemental benefits. Later on the District Court of Appeal elevated this dicta to the status of a holding in *Cruse Construction v. St. Remi*, 704 So. 2d 1100 (Fla. 1st DCA 1997) and *Acker*, supra.

Hunt and *Cruse*, supra, did not involve the issue of whether the claimant's benefits from Workers' Compensation and collateral sources could exceed 100% of the average weekly wage. They involve the issue of supplemental benefits where the total benefits did not exceed 100% of the average weekly wage. The case at bar involves an injured worker whose total benefits from Workers' Compensation, including supplemental benefits, Social Security, and Disability Retirement Benefits, exceed 100% of his average weekly wage. As this court held in *Barragan, Brown, Domutz,* and *Grice*, supra, 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. Regardless of the amounts of

compensation, including supplemental benefits, plus other collateral benefits such as Social Security and Disability Retirement, the cap on the injured worker's benefits is his average weekly wage. This is the holding of this court in interpreting F.S. 440.20(15) in *Barragan, Brown, Domutz*, and *Grice*, supra.

To determine whether the claimant's benefits exceed 100% of his average weekly wage may require annual recalculation of benefits.

CONCLUSION

It is therefore respectfully submitted that the Certified Question should be answered in the affirmative.

It is further submitted that the decision of the District Court of Appeal, First District in the case of *Alderman v. Florida Plastering and Associated Industries,* should be set aside and that the Order of the Judge of Compensation Claims be affirmed.

Respectfuly submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to:

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DATED: January 25, 1999