ORIGINAL

SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

AMERICAN DUTCH HOTEL and CIGNA PROPERTY & CASUALTY CO.,

Petitioner,

SUPREME COURT
CASE NO.: 95-229

V.

JOHNNY MCWILLIAMS,

Respondent

_____/

AMENDED BRIEF IN SUPPORT OF PETITION'S NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF THE SUPREME COURT OF FLORIDA

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PRELIMINARY STATEMENT

This Brief is submitted in support of Petitioners' Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida because the decision of The District Court of Appeal, First Appellate District, in the instant case expressly and directly conflicts with this Court's decision in *Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997).* Further, oral arguments are scheduled to be heard by this Court on April 7, 1999, in *Acker v. City of Clearwater, 23 Fla. L. Weekly D1970 (Fla. 1st DCA August 17, 1998)*, review granted, *Supreme* Court Case No. 93,800, which is an important *Grice*-related case. In December, the Supreme Court consolidated *City of Clearwater v. Rowe, 23 Fla. L. Weekly D2120 (Fla. 1st DCA September 9, 1998)* and *City of Clearwater v. Hahn, 23 Fla. L. Weekly D2120 (Fla. 1st DCA September 9, 1998)*, into *Acker*. Also, after granting review in *Acker*, this Court followed by granting jurisdiction to review two other *Grice*-related cases. They are *Department of Labor and Employment Security v. Boise Cascade Corp., 23 Fla. L. Weekly D2124 (Fla. 1st DCA September 11, 1998)* and *Department of Transportation v. Johns, 23 Fla. L. Weekly D2519 (Fla. 1st DCA November 10, 1998).* These cases have the same certified question as *Acker*, but the Court has not allowed oral argument in either. Thus, the decision of the First District Court in this case

also involves an issue of law already certified to be of great public importance.

In this Brief, the parties will be referred to as follows: The Petitioner, Americana Dutch Hotel and CIGNA, will be referred to "jointly" as employer/carrier, or the E/C, respectively, or the Petitioner. The Respondent, Johnny McWilliams, will be referred to as claimant, or the Respondent.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The claimant, Johnny McWilliams, sustained a compensable accident and injury arising in the course of his employment with the Americana Dutch Hotel on September 2, 1985. He was adjudicated permanently and totally disabled effective October 10, 1988 by Order dated June 14, 1993. Since that date, the E/C has been paying permanent total disability benefits and supplemental income benefits pursuant to *§440.15(1)(d)(1), Fla. Stat.*, and is currently utilizing a social security disability offset pursuant to *§440.15(9)(a), Fla. Stat.*

On March 25, 1998, a Merits Hearing *was* held before JCC John Thurman to determine the correct offset to which the E/C is entitled and specifically, whether supplemental income benefits should be considered "workers' compensation benefits" and subject to the average weekly wage

(AWW) cap. It was the position of the E/C that the claimant cannot receive workers' compensation benefits from his employer and other collateral sources, which when totaled, exceed 100% of his AWW, as held by this Court in *Grice*.

In the instant case, the claimant's AWW is $311.97, which entitles the claimant to a regular corresponding compensation rate of $207.98. However, after calculating an appropriate social security offset, according to the formula in *Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996)*, the E/C agreed that the JCC correctly set the claimant's new regular compensation rate at $82.01 per week. The JCC found in his Order that the statute addressing supplemental benefits, "(a) contemplates that a claimant's regular compensation benefits plus supplemental benefits can *exceed* a claimant's AWW; and (b) only caps those benefits when they exceed the maximum weekly compensation rate in effect at the time of payment."

Thus, the JCC found that the correct amount of total weekly workers' compensation benefits is $217.50. Since the claimant's weekly social security benefit (PIA) is $125.98, the total workers' compensation and collateral benefits equal $343.98, which exceed the claimant's AWW of $311.97.

The E/C argued below and in its Brief to the First DCA that the maximum amount of combined benefits should equal the claimant's AWW of $311.97. Accordingly, the E/C argued that because the claimant's social security disability benefits is $125.98 per week, the amount of claimant's weekly compensation benefits, including supplemental benefits, should be $185.99, pursuant to *Grice*.

The First District Court of Appeal in its decision rendered on March 3, 1999 affirmed the Order of the JCC below.

The Petitioner herein, on April 1, 1999, filed a Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida.

SUMMARY OF THE ARGUMENT

The decision of the First District Court of Appeal in the instant case expressly and directly conflicts with this Court's decision in *Grice*, by eliminating supplemental benefits payable to a permanently and totally disabled claimant from the classification of benefits, which, when totaled, cannot exceed 100% of the claimant's AWW. In *Grice*, this Court definitively held that social security benefits, as well as the total of all workers' compensation benefits (which under the facts included supplemental benefits) and pension benefits, when totaled, cannot exceed 100% of the claimant's AWW. Thus, the decision of the First District Court

of Appeal has changed the public policy, as established by this Court in *Grice*, that a total of all employer provided benefits cannot exceed an injured worker's AWW, by holding that the payment of supplemental benefits is not subject to the AWW cap, but rather the maximum compensation rate in effect during the year such benefits are paid.

Also, the decision of the First District Court of Appeal relates to an issue of law already certified to be of great public importance, and accepted by this Court in *Acker v. City of Clearwater, Supreme Court Case No.* 93,800.

ARGUMENT

POINT 1

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE SUPREME COURT OF FLORIDA ON THE SAME QUESTION OF LAW.

The E/C has been ordered to pay regular workers' compensation benefits, including supplemental benefits, which when totaled with social security benefits received by the claimant, exceed 100% of the claimant's AWW. The E/C argues that this is in direct conflict with the *Grice* decision. This Court in *Grice* stated, "an injured worker, except where expressly given such a right by contract, may not receive benefits from his employer and

other collateral sources, when totaled, exceed 100% of his AWW." See *Grice* at 898. In reaching this conclusion, this Court also stated, "the [employer/carrier] may offset [the claimant's] workers' compensation benefits to the extent that the total of his workers' compensation, disability retirement, and social security disability benefits exceed his AWW." Id.

The Decision of the First DCA *eliminates supplemental income benefits payable* to a permanently and totally disabled claimant pursuant to §440.15(1)(d)(1), Fla. Stat., from those classifications of benefits that must be used in calculating and arriving at the AWW cap and accordingly, is expressly and directly in conflict with this Court's decision in *Grice*.

In the instant case, the First DCA made the following statements regarding whether supplemental benefits are subject to *Grice*:

> "We recognize that a close review of the facts in the Grice case reveals that increases in supplemental benefits appear to have been included in the yearly calculation of the offset. We note, however, that the precise issue raised in the instant case was not addressed in the Grice case. Quoting *Acker*, 23 *Fla.L.Weekly* D1971."

As this Court recalls, in *Grice*, the claimant was injured in January of 1985 while employed by the Escambia County Sheriff's Department. Thereafter, the claimant began receiving permanent total disability benefits, social security disability benefits, and state retirement benefits under the Florida State Retirement System. In 1985, the maximum compensation rate

was $307.00. In its explanation in *Grice*, this Court noted that in the year 1991, the claimant was receiving $392.00 weekly in workers' compensation benefits, which was the maximum compensation rate for that year. This explanation clearly shows that the $392.00 compensation being received by the claimant included supplemental benefits, in addition to his regular compensation rate. In addition to the $392.00, the claimant also received $167.36 weekly in State disability retirement benefits and $163.85 weekly in social security benefits. Therefore, this Court in *Grice*, definitively held that the total of social security disability benefits, as well as the total of all workers' compensation benefits (which under the facts included supplemental benefits) and pension benefits, cannot exceed 100% of such injured worker's AWW.

Also, while the Petitioners herein agree with the First District Court of Appeal, that the *Grice* decision did not specifically mention the term "supplemental benefits", the *Grice* decision continually discusses the "total of his workers' compensation benefits" and, more importantly, this Court specifically notes in its opinion that the claimant, *Grice*, was receiving $392.00 weekly in workers' compensation benefits. Again, given that the maximum compensation rate in 1985 was $307.00, it is clear that when this Court speaks of weekly workers' compensation benefits, the Court is

considering both permanent total disability *and supplemental benefits*.

Further, supplemental benefits are considered workers' compensation benefits under the Florida Workers' Compensation Law. *§440.15(1)(e)(1), Fla. Stat.,* provides that "the injured employee shall receive additional weekly compensation benefits equal to 5% of his weekly compensation rate." Therefore, given the statutory definition of supplemental benefits as "compensation benefits", it is clear that when this Court speaks of the "total of his workers' compensation benefits", the Court is including the claimant's permanent total disability and supplemental benefits.

Also, the clear public policy articulated in the *Grice* decision, which has been a consistent tenet throughout workers' compensation case law beginning with *Brown v. S.S. Kresge Co., Inc., 305 So.2d 191 (Fla. 1974),* is that an injured worker may not receive benefits from his employer and all other collateral sources, which exceed 100% of his AWW. This public policy decision to which this Court has consistently prescribed would clearly apply to the instant case, such that the claimant's current supplemental benefits should be includable in the *Grice* calculation. This long-standing public policy decision of capping benefits at the AWW, in combination with the actual utilization of supplemental benefit figures by the Supreme Court in the *Grice* decision, coupled with the legislative intent of preventing a

claimant from receiving a double windfall from both a federal and state system, clearly illustrates that the Court intended that supplemental benefits be included in the calculation to ensure that the claimant does not receive benefits in excess of his AWW.

The decision of the First District Court of Appeal in this case has changed the standing public policy as established by the Court, that an injured worker cannot receive benefits from his employer and all other collateral sources in excess of his AWW, by ruling that the payment of such benefits is limited only by the maximum compensation rate in effect at the time supplemental benefits are paid to a claimant.

Accordingly, the decision of the First District Court of Appeal expressly and directly conflicts with this Court's decision in *Grice*.

POINT II

THE DEICISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE RELATES TO AN ISSUE OF LAW ALREADY CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE.

As noted in the Preliminary Statement of this Brief, on February 1, 1999, this Court granted review in *Acker v. City of Clearwater*, *Supreme Court Case No. 93,800* and other *Grice*-related cases. In *Acker*, this Court accepted the following certified question:

> "Where an employer takes a workers' compensation offset under section 440.15(1)(e)(1), F.S. (1985), is the employer entitled to recalculate the offset based on the yearly five percent increase in supplemental benefits?"

In *Acker*, the E/C took an offset to the extent that the permanent total disability benefits, supplemental benefits, and pension disability benefits exceeded 100% of the claimant's AWW. For each subsequent year, the E/C continued on a yearly basis to recalculate the offset by adding the 5% yearly increase in supplemental benefits. The First District Court of Appeal in *Acker* concluded that recalculating the offset every year so as to include the increase in supplemental benefits frustrated the intended purpose of the supplemental benefits. Thus, the question certified to be of great public importance in *Acker*, when decided by this Court, should be dispositive of the instant case.

CONCLUSION

The decision of the First District Court of Appeal in the case at hand clearly conflicts with this Court's decision in *Grice* and modifies the long-standing public policy for the State of Florida, as established by this Court, that benefits received by a claimant cannot exceed his AWW.

Further, since this is another *Grice*-related case, this Court should be consistent by granting jurisdiction to review the same.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five (5) copies of Petitioners' Brief in Support of Notice to Invoke Discretionary Jurisdiction have been furnished via Federal Express to Sid J. White, Clerk of the Supreme Court of Florida, Tallahassee, Florida 32399-1927, this 19th day of April, 1999 and a true copy hereof has been furnished via U.S. Mail to Bill McCabe, Esquire, 1450 SR 434 West, Suite 200, Longwood, Florida 32750 this 19th day of April, 1999.

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APPENDIX

A) Conformed copy of Final Compensation Order of Honorable John Thurman, Judge of Compensation Claims, dated May 5, 1998.

B) Decision of the First District Court of Appeal, dated March 3, 1999.

C) Petitioners Notice to Invoke Discretionary Jurisdiction in the State of Florida, Tallahassee, Americana Dutch Hotel and CIGNA Property & Casualty Co., Petitioner vs. Johnny McWilliams, Respondent.

STATE OF FLORIDA
DEPARTMENT OF LABOR & EMPLOYMENT SECURITY
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
DISTRICT "H"

EMPLOYEE:

JOHNNY McWILLIAMS
P. O. Box 555-112
Orlando, FL 32855

EMPLOYER:

AMERICANA DUTCH HOTEL
1850 Hotel Plaza Blvd.
Lake Buena Vista, FL 32830

CARRIER:

CIGNA PROPERTY & CASUALTY CO.
P. O. Box 8187
Jacksonville, FL 32239

ATTORNEYS:

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Counsel for Employer/Carrier

CLAIM NO: 265-27-9309
D/A: 09/02/85

FINAL COMPENSATION ORDER

After proper notice to all parties, a merit hearing was held in this claim in Orlando, Orange County, Florida, on March 25, 1998, before the undersigned Judge of Compensation Claims. The Claimant, Johnny McWilliams, was represented at the hearing by his attorney, William J. McCabe. The Employer/Carrier was represented by their attorney, Herbert A. Langston, Jr.

I. **Stipulations.** The parties stipulated to the following:

(a) That Claimant was involved in an industrial accident arising out of and during the scope and course of his employment with the Employer on September 2, 1985.

(b) That there was an employer/employee relationship on the date of the accident.

(c) That workers compensation insurance was in effect on the date of the accident.

(d) That the accident of September 2, 1985, was accepted as compensable.

(e) That the injuries sustained as a result of the accident of September 2, 1985, were accepted as compensable.

(f) That there was timely notice of the pre-trial hearing and final hearing.

(g) That the JCC has jurisdiction over the subject matter and the parties.

(h) That the Claimant's average weekly wage was $311.97, with a corresponding compensation rate of $207.99.

(i) That the maximum compensation rate for 1985 was $307.00 per week.

(j) That the maximum compensation rate for 1998 is $492.00 per week.

The above stipulations are proper, found to be factual, and are adopted by the undersigned.

II. **Exhibits**. The following documentary items were admitted into evidence:

(a) Joint Exhibit No. 1 - Memorandum of and Order on Mediation Agreement.

(b) Joint Exhibit No. 2 - Compensation Order of June 14, 1993.

(c) Joint Exhibit No. 3 - Request for Social Security Disability Benefit Information sheet.

(d) Joint Exhibit No. 4 - Health Advocates, Inc. Social Security Offset Calculation Sheet for 1998 reflecting the total workers compensation benefits Claimant should receive without applying Grice to supplemental benefits and without taking into consideration Social Security Cost of Living Increases ("Cola").

(e) Joint Exhibit No. 5 - Health Advocates, Inc. Social Security Offset Calculation Sheet for 1997 showing the amount of compensation benefits Claimant should receive, not taking into consideration Grice and not taking into consideration Cola's.

(f) Joint Exhibit No. 6 - Health Advocates, Inc. Social Security Offset Calculation Sheet for 1998 reflecting the total workers compensation benefits Claimant should receive taking into consideration Grice, but not taking into consideration Cola.

(g) Joint Exhibit No. 7 - Health Advocates, Inc. Social Security Offset Calculation Sheet for 1997 reflecting the total workers compensation benefits Claimant should receive taking into consideration Grice but not taking into consideration Cola.

(h) Joint Exhibit No. 8 - Health Advocates, Inc. Social Security Offset Calculation Sheet for 1998 reflecting the total workers compensation benefits Claimant should receive taking into consideration Grice and taking into consideration Cola.

(i) Joint Exhibit No. 9 - Health Advocates, Inc. Social Security Offset Calculation Sheet for 1997 reflecting the total workers compensation benefits Claimant should receive taking into consideration Grice and taking into consideration Cola.

(j) Joint Exhibit No. 10 - Pre-trial Stipulation.

(k) Employer/Carrier Exhibit No. 1 - E/C's Hearing Information Sheet.

(l) Employer/Carrier Exhibit No. 2 - Deposition of Christy Baldwin taken March 12, 1988.

(m) Employer/Carrier Exhibit No. 3 - Deposition of Johnny McWilliams taken January 20, 1998.

(n) Claimant's Exhibit No. 1 - Claimant's Hearing Information Sheet.

III. **Witnesses.** There was no live testimony taken from any witnesses in this case. The facts in this case were stipulated to by the parties. Claimant, Johnny McWilliams, was present at the hearing.

IV. **Issues.** The sole issue in this case, as narrowed immediately prior to the merit hearing, was to determine the correct compensation rate to which Claimant should be paid workers compensation benefits. It was the position of Claimant that for the year 1998, Claimant's weekly workers compensation benefits should be $217.20 per week, as calculated in Joint Exhibit No. 4. Claimant also contended that the workers compensation benefits of $217.20 per week should increase at the rate of $10.40 per week each year, with the next increase occurring on January 1, 1999, and each year thereafter, based on Claimant's increase in permanent total disability supplemental benefits. Claimant also sought costs and attorney's fees.

V. **Defenses.** The Employer/Carrier contended that Claimant should be paid workers compensation benefits for the year 1998 in the total amount of $129.23, as calculated in Joint Exhibit No. 8. The Employer/Carrier contended that in calculating Claimant's total weekly workers compensation benefits, the Employer/Carrier was entitled to take into consideration:

(a) Cola's as reflected in Claimant's Social Security Disability Benefits, and

(b) That the case of Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997), applied to supplemental benefits.

Alternatively, the Employer/Carrier contended that if Social Security Cola benefits were not to be taken into consideration in a calculation of Claimant's weekly workers compensation rate, then Claimant's weekly workers compensation rate was still subject to Escambia County Sheriff's Dept. v. Grice, supra, and Claimant's weekly benefit should be $185.99 for 1998, as reflected in Joint Exhibit No. 6.

The Employer/Carrier further contended that no costs or attorney's fees were owed by the Employer/Carrier.

VI. **Statement of the Facts.**

Claimant, Johnny McWilliams, was born on October 5, 1958, and as such, was 39 years old at the time of his hearing on March 25, 1998. Claimant does have one son, Johnny Jerome McWilliams, but the son turned 18 years of age on January 16, 1998, and any Social Security Disability that was paid on behalf of Johnny Jerome McWilliams ended on January 16, 1998. Therefore, it is not necessary to take into consideration any dependent Social Security Disability benefits since they do not apply in this case after January 16, 1998.

Claimant was initially hired by the Employer in 1985 as a dishwasher. Claimant was then promoted to a cook's helper, and then became a cook for the Employer.

Claimant was involved in an industrial accident on September 2, 1985. On that date, Claimant was fixing a breakfast order when a vegeline that you spray the grill with fell in the grease. As a result, the grease exploded, knocking Claimant back up against the counter and causing him to fall. Claimant's lower back hit the counter as he fell.

In an Order dated June 14, 1993, Claimant was found permanently totally disabled as a result of his injuries, effective October 10, 1988.

Claimant is also currently receiving Social Security Disability benefits. The initial benefit paid to Claimant ("PIA"), is $541.70 per month, or $125.98 per week. At the time of the hearing, the Employer/Carrier was paying Claimant workers compensation benefits, including supplemental benefits, at the rate of $126.45 per week. As noted hereinabove, it was Claimant's position that he should be receiving, for the year 1998, $217.20 per week.

VII. **Findings.** In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the evidence presented to me. All of the facts in this case are unrefuted. Therefore, the opinion in this case does not hinge in any way upon any findings of fact, but rather is purely a question of law. Based upon the foregoing, the evidence and applicable law, I make the following determinations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. The stipulations of the parties are approved and adopted by me.

3. In making the determination set forth below, I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary to the resolution of this claim. I have not attempted to painstakingly summarize the substance of any of the witnesses, nor have I attempted to state non-essential facts. Because I have not done so, does not mean that I have failed to consider all of the evidence.

4. As stated hereinabove, Claimant was 39 years old at the time of his hearing. The Claimant, in an Order dated June 14, 1993, was found to be permanently totally disabled, effective October 10, 1988, as a result of injuries sustained in his industrial accident.

5. The following facts are unrefuted:

(a) Claimant's average weekly wage is $311.97.

(b) Claimant's compensation rate is $207.99 per week.

(c) The initial amount of Social Security Disability benefits Claimant began receiving (Claimant's "PIA") is $541.70 per month, which equates to $125.98 per week.

6. The parties, as reflected in the Memorandum of and Order on Mediation Agreement, reached an agreement concerning all past workers compensation benefits due and owing Claimant; an agreement concerning medical treatment for Claimant; and also stipulated that Claimant's attorney is entitled to a fee for obtaining these benefits. The parties also stated that:

> "Judge reserves jurisdiction on the application of Grice and whether the cost of living adjustment should be included in the offset calculations and amount of fee."

7. Claimant was receiving weekly workers compensation benefits from the Employer/Carrier, including supplemental benefits, in the amount of $126.45 per week, at the time of the hearing.

8. The parties stipulated, and I so find, that Claimant's new compensation rate, taking into consideration the Employer/Carrier's entitlement

to a Social Security offset as allowed in F.S. 440.15(9)(a)(1985), is $82.01 per week. This offset, calculated in accordance with this Court's decision in Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996), is as follows:

Monthly Average Current Earnings (ACE)	$1,389.00
x 0.80	x 0.80
80% of monthly ACE	$1,111.20
80% of monthly ACE	$1,111.20
divided by 4.3 (weeks/month)	÷ 4.3
80% of weekly ACE	$ 258.42
Average weekly wage (AWW)	$ 311.97
x 0.80	x 0.80
80% of AWW	$ 249.58

In the case at bar, the greater figure is 80% of Claimant's ACE, and therefore the figure to be utilized in calculating Claimant's Social Security offset is $258.42.

9. The next step in determining Claimant's Social Security Disability offset as set forth in Hunt v. Stratton, supra, is to determine the total amount of benefits Claimant is receiving on a weekly basis without any offset, and the difference between that figure and the figure from the first step hereinabove.

Monthly Social Security Benefits	$ 541.70
divided by 4.3 (weeks/month)	÷ 4.3
Weekly Social Security Benefits	$ 125.98
Weekly Social Security Benefits	$ 125.98
+ Compensation rate (2/3 AWW)	+ 207.99
+ Supplemental benefits (1998)	+ 135.19
Total Weekly Benefits	$ 469.16
Total Weekly Benefits	$ 469.16
- 80% of the greater of AWW and ACE	- 258.42
Preliminary offset amount	$ 210.74

10. The next step is to determine whether the preliminary offset amount exceeds the offset which the federal government would have otherwise taken, i.e. whether the preliminary offset amount exceeds the total amount of Social Security benefits due a claimant and his family, which is the maximum federal Social Security offset allowed under 42 USC §424(a), and therefore the maximum workers

compensation offset allowed under section 440.15(9)(a). I find in the case at bar, that since the preliminary offset ($210.74) exceeds the total amount of Social Security benefits due Claimant ($125.98), the latter is the maximum allowable offset.

11. Finally, the total weekly amount of workers compensation benefits due is determined:

Compensation rate	$ 207.99
- Offset	- 125.98
New compensation rate	$ 82.01
New compensation rate	$ 82.01
+ Supplemental benefits	+ 135.19
Total weekly workers compensation benefits	$ 217.20

12. I further find that Claimant's supplemental benefits for 1998 are $135.19 per week. I find that Claimant's supplemental benefits increase at the rate of $10.40 per week every year, with the next increase due January 1, 1999. Therefore, Claimant's supplemental benefits for the year 1999 will be as follows:

Supplemental benefits for 1998	$ 135.19
+ 5% increase as allowed in F.S. 440.15(1)(e)1(1985)	+ 10.40
Supplemental benefits for 1999	$ 145.59

13. As stated previously, it is Claimant's position that he is entitled to weekly compensation for 1998 at the rate of $217.20 as calculated as follows:

New compensation rate (as calculated hereinabove)	$ 82.01
+ Supplemental benefits for 1998	+ 135.19
Amount which should be paid to Claimant	$ 217.20

(See Joint Exhibit No. 4).

14. It is Claimant's position that his compensation benefits for 1999 will be as follows:

New compensation rate (as calculated hereinabove)	$ 82.01
+ Supplemental benefits for 1999	+ 145.59
Amount which should be paid to Claimant	$ 227.60

15. Claimant contends that his compensation benefits should increase at the rate of $10.40 per year thereafter, with no additional offsets taken other than the initial Social Security offset previously calculated hereinabove.

16. If the Employer/Carrier's argument were accepted, and the Employer/Carrier could take into consideration Claimant's Cola increases on Social Security Disability, coupled with applicability of Escambia County Sheriff's Dept. v. Grice, supra, then the benefits that Claimant would be entitled to receive for 1998 would be as follows:

Current Weekly Social Security Disability Benefits (including cost of living increases)	$ 182.74
+ Compensation rate	+ 207.99
+ Supplementals for 1998	+ 135.19
Total weekly benefits	$ 525.93
- 80% AWW/ACE	- 258.42
Preliminary offset amount	$ 267.51
Preliminary offset amount	$ 267.51
- PIA (max offset for SSA, including Cola)	- 182.74
New comp rate	$ 84.77
Escambia County Sheriff's Dept. v. Grice	
AWW	$ 311.97
- Weekly SSD	- 182.74
Total workers compensation benefit	$ 129.23
Amount of supplementals actually being paid Claimant:	
Total weekly compensation benefit	$ 129.23
- New compensation rate	- 84.77
Actual sup's being paid to Claimant	$ 44.46

(See Joint Exhibit No. 8)

17. By comparison, taking into consideration Grice and Cola, the amount that should have been paid to Claimant in 1997 according to the Employer/Carrier would be a total of $132.97 per week (see Joint Exhibit No. 9). Thus, according to the Employer/Carrier's initial argument that they can include both Cola for Social Security Disability and that Escambia County Sheriff's Dept. v. Grice, supra, is applicable, the amount of workers compensation benefits that the

Employer/Carrier will actually pay Claimant will decrease annually by the amount that Claimant's Social Security Disability increases.

18. Under the Employer/Carrier's second position, that being that Cola for Social Security Disability does not apply, but the total amount of benefits paid to Claimant is still governed by Grice, supra, then Claimant for 1998 would be entitled to the following amount:

Average weekly wage	$ 311.97
- Weekly Social Security Disability	- 125.98
Total weekly workers comp benefit	$ 185.99

(See Joint Exhibit No. 6)

Under this position, the amount of supplemental benefits Claimant is actually receiving would be the following:

Total weekly compensation benefit	$ 185.99
- New comp rate (as calculated based on Claimant's initial Social Security offset as calculated hereinabove)	- 82.01
Actual sup rate paid	$ 103.98

Under this alternative argument of the Employer/Carrier, the amount that Claimant will receive in 1999 will be as follows:

AWW	$ 311.99
- Weekly Social Security Disability	- 125.98
Total weekly workers comp benefits	$ 185.99

(This is also the same amount that the Employer/Carrier would contend Claimant should have received in 1997 - see Joint Exhibit No. 7)

In other words, under this argument of the Employer/Carrier, once a combination of Claimant's Social Security Disability plus new compensation rate plus supplemental benefits equals Claimant's average weekly wage ($311.97), the amount of total weekly workers compensation benefits Claimant would receive would remain fixed at $185.99 per week, and Claimant would never have any increases in that workers compensation benefit despite the 5% supplemental benefits as provided for in F.S. 440.15(1)(e)1(1985).

19. Initially, I reject the Employer/Carrier's argument that cost of living increases from Social Security benefits may be included in calculating any

offset to which the Employer/Carrier is entitled.

20. F.S. 440.15(9)(a)(1985) entitles the Employer/Carrier to take a Social Security offset. The Social Security offset has initially been calculated as set forth hereinabove, in accordance with Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996). The First District Court of Appeal has previously held that cost of living increases from Social Security benefits are not considered in computing the Employer/Carrier's Social Security Disability offset under F.S. 440.15(9)-(a)(1985), Great Atlantic & Pacific Tea Co. v. Wood, 380 So.2d 558 (Fla. 1st DCA 1980), LaFond v. Pinellas County BOCC, 379 So.2d 1023 (Fla. 1st DCA 1980).

Additionally, the First District Court of Appeal stated in the case of Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997), that once the initial calculation of Social Security offset has been performed, the offset need not be re-calculated annually. To accept the Employer/Carrier's argument that cost of living increases in Social Security are to be taken into consideration in calculating the Employer/Carrier's entitlement to an offset, this would require the offset to be re-calculated annually, contrary to the provisions of Cruse v. St. Remy, supra.

I have set forth additional reasons why cost of living increases also do not apply to supplemental benefits under reason 21.(2) below (dealing with why Grice does not apply to supplemental benefits),

21. I also reject the Employer/Carrier's argument that the case of Grice v. Escambia County Sheriff's Dept., 692 So.2d 896 (Fla. 1997), applies to supplemental benefits. I make this finding for the following reasons:

(1) Grice, supra, did not in any way deal with supplemental benefits as set forth in F.S. 440.15(1)(e)1(1985). It could have. For example, in Grice, supra, the claimant was receiving, inter alia, PTD benefits (claimant was also receiving SSD and state disability retirement benefits). The claimant's date of accident in Grice was 1/28/85. Therefore, although Grice was unquestionably receiving supplemental income benefits, the Florida Supreme Court makes no mention of supplemental benefits in its decision. The failure of the Supreme Court to even discuss the claimant's supplemental benefits supports my

finding that supplemental benefits do not count (are not to be considered) under the Grice formula that Claimant cannot receive benefits exceeding his average weekly wage.

(2) There is a statute dealing with supplemental benefits that: (a) contemplates that a claimant's regular compensation benefits plus supplemental benefits can exceed a claimant's AWW; and (b) only caps those benefits when they exceed the maximum weekly compensation rate in effect at the time of payment, as determined pursuant to F.S. 440.12(2). Specifically, F.S. 440.15(1)(e)1(1985) provides:

> "The weekly compensation payable and the additional benefits payable pursuant to this paragraph, when combined, shall not exceed the maximum weekly compensation rate in effect at the time of payment, as determined pursuant to F.S. 440.12(2)."

This statute does not limit the weekly compensation payable and additional benefits payable pursuant to that paragraph to a claimant's AWW. It is clear that if a claimant is PTD for a long period of time, and a claimant's compensation rate increases at the rate of 5% per year (per F.S. 440.15(1)(e)1(1985), the claimant's benefits will, within a period of time, exceed the claimant's AWW. If the Legislature intended to cap a claimant's compensation plus supplemental benefits at the AWW, it would have said so in F.S. 440.15(1)(e)1(1985). The Legislature, however, did not cap it at a claimant's AWW, but rather, capped it at the "maximum weekly compensation rate in effect at the time of payment".

The maximum comp rate in 1998 is $492.00 per week. The weekly benefits being paid to Claimant herein, $82.01, plus supplemental benefits of $135.19, fall far short of the maximum compensation rate.

Additionally, cost of living increases are not to be considered in any cap on compensation benefits, including supplemental benefits. It is clear that cost of living increases from Social Security Disability are not considered in computing the 80% wage limitation as set forth in F.S. 440.15(9)-(a)(1985) as stated previously hefeinabove. If cost of living increases are not included in the 80% cap under the aforesaid statute, there is certainly no reason to consider cost of living increases in any 100% cap of Grice, supra, even if

Grice was applicable to the facts in the case at bar.

More importantly, however, I find that one must look at the specific statute that deals with the cap or maximum that can be paid based on supplemental income benefits. F.S. 440.15(1)(e)1(1985) deals with only two benefits: (1) the weekly compensation payable; and (2) the additional benefits payable pursuant to this paragraph (supplemental benefits). It is those two benefits which, when combined, shall not exceed the maximum weekly compensation rate in effect at the time of the payment. Therefore, any cost of living increase Claimant may get from SSD does not even come into play when considering the amount Claimant can receive for weekly compensation benefits plus supplemental benefits pursuant to F.S. 440.15(1)(e)1(1985).

(3) I specifically find that the Grice case does not apply to supplemental benefits based on the First District Court of Appeal's decision in Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997).

Cruse v. St. Remy, supra, dealt with the question of whether or not total benefits may exceed 80% of a claimant's AWW, despite the provisions of F.S. 440.15(9)(a), the Social Security offset statute. The First District Court of Appeal held that it can. In so holding, the First District Court of Appeal stated:

> "... Contrary to the argument of the E/C, that case (Hunt v. Stratton, supra), clearly holds that total disability benefits may exceed 80% of average weekly wage (AWW) under the circumstances presented here. ... Once the initial calculation of the Social Security offset has been performed, the offset need not be re-calculated annually. However, the total amount of benefits receivable after the offset will change annually to account for the cost of living increase provided as PTD supplemental benefits. **There is no reasonable basis for concluding that permanently totally disabled claimants whose benefits are reduced by Social Security offset thereby become ineligible for the statutorily provided PTD supplemental benefit."**

Since the 80% cap in F.S. 440.15(9)(a)(1985) do not apply to supplemental benefits, I also find that any restriction in Grice, supra, does not apply to supplemental benefits.

(4) I find that the purpose of supplemental benefits is to allow for inflation. If a claimant was not allowed supplemental benefits after a combination of the claimant's compensation benefits, Social Security Disability

benefits, and supplemental benefits equalled the claimant's average weekly wage, then a permanently totally disabled claimant would have no way of combating inflation. It is true that a claimant who receives Social Security Disability gets cost of living increases in connection with the Social Security Disability payments, but there is no assurance how much that is going to be annually. Furthermore, the Employer/Carrier's argument that Grice applies to supplemental benefits would, if accepted, also apply to cases where the claimant was not receiving Social Security Disability. For example, in this case, if Claimant were not receiving Social Security Disability, the Employer/Carrier would have no Social Security offset, and therefore would be paying Claimant the following:

Base compensation rate	$ 207.99
+ Supplemental benefits	135.19
Total benefits	$ 343.18

This figure exceeds Claimant's AWW of $311.97 by $31.21 per week. In fact, under the Employer/Carrier's argument, even if Claimant was not receiving Social Security Disability, the Claimant, under Grice, would no longer receive the benefit of supplemental benefits after approximately ten years (at which time Claimant's supplemental benefits in the case at bar was $104.00, that coupled with Claimant's base compensation rate would be $311.99, or Claimant's AWW). Thus, under the Employer/Carrier's argument, even a claimant not receiving Social Security Disability and therefore not benefitting from any SSD cost of living increases, would have his workers compensation benefits, plus supplemental benefits, plateau after approximately ten years after the claimant reaches permanent total disability. I find that the Legislature clearly did not intend this to occur, based on the clear and unequivocal language of F.S. 440.15(1)(e)1-(1985) capping compensation benefits plus supplemental benefits at the maximum weekly compensation rate in effect at the time of payment as determined pursuant to §440.12(2)(1985), and not at Claimant's AWW as argued by the Employer/Carrier.

22. I therefore specifically find that supplemental benefits are not subject to either Social Security Disability cost of living increases, nor are they subject to Grice, supra.

23. I further specifically find that Claimant's compensation benefits

should be paid as argued by Claimant, and as set forth in Joint Exhibit No. 4. I find that Claimant's compensation benefits should increase annually at the rate of $10.40 per week, based on increase in Claimant's supplemental benefits per F.S. 440.15(1)(e)1(1985).

24. I find that Claimant is entitled to reasonable attorney's fees and costs, to be paid for by the Employer/Carrier for obtaining the benefits awarded in this Order.

WHEREFORE, it is ORDERED AND ADJUDGED as follows:

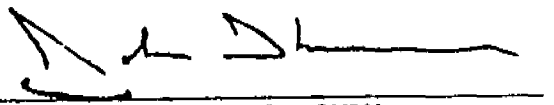
1. The Employer/Carrier shall pay Claimant permanent total disability benefits at the rate of $135.19 per week for the year 1998, made up as follows:

New compensation rate	$ 82.01
+ Supplementals	+ 135.19
Total	$ 217.20

2. That the compensation benefits to be paid to Claimant shall increase at the rate of $10.40 per week each year, effective January 1, 1999, for so long as Claimant remains permanently totally disabled, and so long as a combination of Claimant's new compensation rate ($82.01), plus Claimant's supplemental income benefits per F.S. 440.15(1)(e)1(1985) do not exceed the maximum weekly compensation rate in effect at the time of payment as determined pursuant to F.S. 440.12(2)(1985).

3. Claimant is entitled to a reasonable attorney's fees and taxable costs, to be paid for by the Employer/Carrier. The Court reserves jurisdiction over the parties hereto for the purposes of determining a reasonable amount of attorney's fees, and for the purposes of determining the appropriate taxable costs.

DONE AND ORDERED in Chambers in Orlando, Orange County, Florida, this 11 day of May, 1998.



THE HONORABLE JOHN THURMAN
JUDGE OF COMPENSATION CLAIMS

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U.S. Mail to: **Bill McCabe, Esq.**, 1450 SR 434 West, Suite 200, Longwood, FL 32750, Counsel for Claimant, **Johnny McWilliams**, P. O. Box 555-112, Orlando,

FL 32855, Claimant, Herbert A. Langston, Jr., Esq., 111 So. Maitland Avenue, Suite 200, Maitland, FL 32794-5050, Counsel for E/C, Americana Dutch Hotel, 1850 Hotel Plaza Blvd., Lake Buena Visa, FL 32830, Employer, and CIGNA Property & Casualty Insurance Companies, P. O. Box 8187, Jacksonville, FL 32239, Carrier, this 11 day of May, 1998.

Yvette M. Gideon

JUDICIAL ASSISTANT

(misc\jm.ord)

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

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

AMERICANA DUTCH HOTEL and CIGNA PROPERTY & CASUALTY CO.,

Appellants,

v.

CASE NO. 98-2234

JOHNNY McWILLIAMS,

Appellee.

_____/

Opinion filed March 3, 1999.

An appeal from an order of the Judge of Compensation Claims. John P. Thurman, Judge.

Herbert A. Langston, Jr. and Kelly Christie Ongie, of Langston, Hess, Bolton, Znosko & Helm, P.A., Maitland, for Appellants.

Bill McCabe, Longwood, for Appellee.

KAHN, J.

In this case, the employer/carrier (E/C) appeal an order of the judge of compensation claims (JCC) concerning the claimant's rate of compensation and the amount of offset to which the E/C are entitled. The E/C raise two points on appeal: (1) the JCC erred in failing to apply the decision in Escambia County Sheriff's Department v. Grice, 692 So. 2d 896 (Fla. 1997), to supplemental benefits in determining the offset; and (2) the JCC erred in failing to apply Grice to supplemental benefits and cost of living adjustments (COLAs) in determining the offset. We affirm.

"B"

Under the first point, the E/C agree that the JCC correctly calculated the claimant's compensation rate of $82.01, according to the formula in Hunt v. Stratton, 677 So. 2d 64 (Fla. 1st DCA 1996). The E/C disagree, however, that the correct amount of total weekly workers' compensation benefits is $217.20. The JCC arrived at this figure by adding the compensation rate, $82.01, and the amount of supplemental benefits, $135.19. The E/C argue that, based on Grice, the maximum amount of combined benefits the claimant should receive is $311.97 per week, which is his average weekly wage (AWW). Therefore, argue the E/C, because the claimant's weekly social security disability (SSD) benefit is $125.98, the amount of his weekly compensation benefit, including supplemental benefits, should be $185.99.

We have acknowledged that the decision in Grice did not address supplemental benefits. See Acker v. City of Clearwater, 23 Fla. L. Weekly D1970 (Fla. 1st DCA Aug. 17, 1998), review pending, No. 93,800 (Fla. filed Aug. 27, 1998). In Grice, the combination of the claimant's workers' compensation, disability retirement, and SSD benefits exceeded his AWW and the employer sought to offset the claimant's permanent total disability benefits based on the excess amount. 692 So. 2d at 897-98. The supreme court agreed that such an offset was proper and held that "an injured worker, except where expressly given such a right by contract, may not receive benefits from his employer and other collateral sources which, when totaled, exceed 100% of his average weekly wage." 692 So. 2d at 898.

In Acker, the claimant challenged the E/C's practice of recalculating its offset every year based on the 5% annual increase in PTD supplemental benefits. The court found this practice improper:

> The purpose of permanent total disability supplemental benefits is clear. The legislature intended to partially offset the effect of inflation by requiring that Employers or the Workers' Compensation Administration Trust Fund, depending on the date of accident, increase benefits being paid by 5% times the number of years since the accident. . . . We conclude that recalculating the offset every year, so as to include the increase in supplemental benefits, frustrates the intended purpose of supplemental benefits.

Acker, 23 Fla. L. Weekly at D1971. In addition, the court made the following statements regarding Grice:

> We recognize that a close review of the facts in the Grice case reveals that increases in supplemental benefits appear to have been included in the yearly calculation of the offset. We note, however, that the precise issue raised in the instant case was not addressed in the Grice case.

Acker, 23 Fla. L. Weekly at D1971. The court indicated it was "bound to give effect to the intended purpose of supplemental benefits, which is to provide a cost-of-living adjustment to injured employees" and "[r]ecalculating the offset so as to include the cost-of-living adjustment would certainly erode that purpose." Id.

In addition, as the JCC explained in his order, the statute addressing supplemental benefits "(a) contemplates that a claimant's regular compensation benefits plus supplemental benefits can exceed a claimant's AWW; and (b) only caps those benefits when they exceed the maximum weekly compensation rate in effect at the

time of payment . . . ." Indeed, rather than capping the total of compensation benefits plus supplemental benefits at the claimant's AWW, as argued by the E/C, section 440.15(1)(e)1., Florida Statutes (1985), specifically provides that "[t]he weekly compensation payable and the additional benefits payable pursuant to this paragraph, when combined, shall not exceed the maximum weekly compensation rate in effect at the time of payment as determined pursuant to s. 440.12(2)." The JCC explained that the maximum weekly compensation rate for 1998 is $492.00, which is greater than the amount the claimant should receive pursuant to the JCC's order.

This court's decision in Alderman v. Florida Plastering resolves the E/C's second point on appeal. 23 Fla. L. Weekly D2578 (Fla. 1st DCA Nov. 19, 1998), review pending, No. 94,511 (Fla. filed Dec. 14, 1998). In Alderman, the court specifically stated that "it is improper to recalculate a workers' compensation offset, once the initial calculation has been made, based upon any cost-of-living increases in collateral benefits." Id. at D2198; see Acker, 23 Fla. L. Weekly at D1971; Cruse Constr. v. St. Remy, 704 So. 2d 1100 (Fla. 1st DCA 1997); Hunt v. Stratton, 677 So. 2d 64 (Fla. 1st DCA 1996). The court also explained that "Hunt's prohibition against recalculation to account for cost-of-living increase, as reaffirmed in Cruse, is still good law." Alderman, 23 Fla. L. Weekly at D2198.

AFFIRMED.

WOLF and PADOVANO, JJ., concur.