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SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

AMERICANA DUTCH HOTEL and
CIGNA Property & Casualty Co.,

Petitioners,

v.

JOHNNY McWILLIAMS,

Respondent.
_____/

CASE NO: 95,229

CLAIM NO: 265-27-9309

D/A: 9/2/85

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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This is an Appeal from an Order of the First District Court of Appeal, Tallahassee, Florida, Opinion filed 3/3/99, Rehearing denied 4/20/99, 733 So.2d 536 (Fla. 1st DCA 1999), affirming an Order from the State of Florida, Office of the Judge of Compensation Claims, District "H", dated 5/11/98.

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PRELIMINARY STATEMENT

The Petitioners, AMERICANA DUTCH HOTEL and CIGNA PROPERTY & CASUALTY COMPANY, shall be referred to herein as the “E/C” (Employer/Carrier) or by their separate names.

The Respondent, JOHNNY McWILLIAMS, shall be referred to herein as the “Claimant”.

The Judge of Compensation Claims shall be referred to herein as the “JCC”.

References to the Record on Appeal shall be abbreviated by the letter “V” and followed by the applicable volume and page number.

References to the Appendix attached to the Petitioner’s Initial Brief shall be referred to by the letter “A” and followed by the applicable appendix page number.

References to the Petitioner’s Initial Brief shall be referred to by the letters “IB” and followed by the applicable page number.

References to the Petitioner’s Initial Brief on Jurisdiction shall be referred to by the letters “IBJ” and followed by the applicable page number.

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is Courier New, 12 point.

STATEMENT OF THE CASE

Respondent respectfully submits that the Statement of the Case and Statement of Facts as set forth by the E/C in their Initial Brief on the Merits is incomplete. As such, Respondent herein supplements the Statement of the Case as set forth by Petitioner in their Initial Brief.

On or about 7/29/97, Claimant filed a Petition for Benefits ("PFB") for injuries sustained as a result of an industrial accident arising out of and during the course and scope of his employment with the Employer on 9/2/85(V2-261-264).

On 3/25/98, a hearing on the PFB was held before the Honorable JCC John Thurman(V1-1; V2-223). At that hearing, the sole issue was to determine the correct compensation rate to which Claimant should be paid workers' compensation (WC) benefits(V2-225). It was Claimant's position that for the year 1998, Claimant's weekly W/C benefits should be $217.20(V2-225). Claimant further contended that those benefits should increase at the rate of $10.40 per week, each year, with the next increase occurring on 1/1/99, and each year thereafter, based on Claimant's increase in permanent total disability supplemental benefits(Supp benefits)(V2-225). Claimant also sought costs and attorney's fees(V2-225).

The E/C contended that the Claimant should be paid W/C

benefits for the year 1998 in the total amount of $129.23(V2-225). The E/C contended that in calculating Claimant's total weekly W/C benefits, they were entitled to take into consideration:

(a) Cola's (Cost of Living Increases) as reflected in Claimant's social security disability (SSD) benefits; and

(b) The case of Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla. 1997), applied to supplemental benefits(V2-225).

Alternatively, the E/C contended that if Social Security Cola benefits were not to be taken into consideration in a calculation of Claimant's weekly worker's compensation rate, then Claimant's weekly rate was still subject to Grice, supra, and his weekly benefits should be $185.99 for 1998(V2-225). They further contended that no costs or attorney's fees were owed by the E/C(V2-225).

At no time before the JCC did the E/C make the argument that they are making for the first time on this appeal. Specifically, the E/C in this appeal states as follows:

> "This brief addresses the Social Security Disability benefit offset available under Section 440.15(9), Florida Statutes, and its application to permanent and total disability supplemental benefits."(IB-9).

At the hearing the E/C agreed that they were taking the maximum social security offset allowable for each calendar year which beginning in 1998 equaled $125.98 "without the application of

Grice"(V1-43, 44, 107). In fact, the following colloquy occurred during the hearing:

> "Mr. McCabe: But, we also agree that the maximum offset . . social security offset that they can take is $125.98 per week.
>
> Mr. Langston: And that's under Hunt v. Stratton.
>
> Judge Thurman: All Right. That's Hunt v. Stratton.
>
> Mr. Langston: Yes, sir.
>
> Mr. McCabe: And, the reason for that is because that's what they were paying Mr. McWilliams and you can't. . . .
>
> Judge Thurman: And . . . . .and that's the PIA, right?
>
> Mr. McCabe: Yeah. You can't take an offset greater than what they are paying him."(V1-43, 44).

Insofar as social security benefits is concerned, the only argument that the E/C made at the hearing was that the cost of living adjustments for social security should be taken into consideration when applying "Grice"(V1-8, 18-20, 20-23).

On 5/11/98, Judge Thurman entered his Compensation Order(V2-223-237). In that Order, the JCC rejected the E/C's argument that cost of living increases from SS benefits may be included in calculating any offset to which the E/C is entitled(V2-231, 232). The JCC also rejected the E/C's argument that Grice, supra, applies to supp benefits(V2-232). The JCC also found that Claimant's W/C benefits should be paid as argued by Claimant(V2-235, 236), and

found that Claimant's W/C benefits should increase annually at the rate of $10.40 per week, based on increase in Claimant's supp benefits per F.S. 440.15(1)(e)1(1985)(V2-236).

Based upon the foregoing, the JCC ORDERED and ADJUDGED as follows:

> "1. The E/C 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 |
> | Plus 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 1/1/99, 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 fee and taxable costs, to be paid for by the E/C, ..."(V2-236).

On 5/22/98, the E/C filed a Motion for Rehearing(V2-238-240), and on 6/10/98 the JCC entered an Order denying the motion(V2-244).

Thereafter, the E/C appealed the JCC's Order to the First District Court of Appeal(V2-246-247). The E/C raise two points on that 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 (Cola) in determining the offset, Americana Dutch Hotel v. McWilliams, 733 So.2d 536 (Fla. 1st DCA 1999) at 536. Again, the E/C did not raise, as a point on appeal, before the First District Court of Appeal the point being raised by the E/C before this Honorable Court.

Thereafter, on 3/3/99 the First District Court of Appeal entered its opinion, Americana Dutch Hotel v. McWilliams, supra. In that opinion the First District Court of Appeal held:

(1) That Grice does not apply to supplemental benefits and

(2) Grice does not apply to cost of living adjustments.

Thereafter, the Petitioners filed their Notice to Invoke Discretionary Jurisdiction of this Honorable Court. In their Amended Brief in Support of Petitioner's Notice to Invoke Discretionary Jurisdiction, the Petitioners contended that the decision of the District Court of Appeal in this case expressly and directly conflicted with this Honorable Court's decision in Escambia County Sheriff's Dept. v. Grice, supra (IBJ-1).

Furthermore in their Initial Brief on Jurisdiction the Petitioner's stated:

> "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."(IBJ-3).

The E/C also argued in their Initial Brief on Jurisdiction:

"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."(IBJ-4).

Finally, the E/C stated in their Initial Brief on Jurisdiction:

"Thus, the question certified to be of great public importance in Acker, when decided by this Court, should be dispositive of the instant case."(IBJ-10).

Not even in the Brief in Support of Petitioner's Notice to Invoke Discretionary Jurisdiction did the E/C raise the issue which they are now raising for the first time on appeal in their Initial Brief on the Merits.

Specifically, in the Petitioner's Initial Brief on the Merits, they state:

"This brief addresses whether receipt of combined benefits of worker's compensation and social security disability benefits can exceed the greater of 80% of the injured worker's AWW or average current earnings."(IB-6).

That point has never been argued by the E/C at any time prior to their Initial Brief on the Merits.

STATEMENT OF THE FACTS

Respondent respectfully submits that the Statement of the Facts as set forth by the E/C in their Initial Brief is incomplete. As such Respondent supplements the Statement of the Facts as set forth in the Initial Brief of Petitioner.

Claimant was born on 10/5/58, and as such was 39 years old at the time of his hearing on 3/25/98(V1-59; V2-226). Claimant does have one son, but the son turned 18 years of age on 1/16/98, and any SSD benefits that were paid on behalf of Claimant's son ended on 1/16/98(V1-185; V2-226).

Claimant went to the 11th grade in school(V1-59). His past work history included picking fruit, working at hotels washing dishes, and working as a cook(V1-60).

Claimant was initially hired by the Employer in 1985 as a dishwasher, was then promoted to a cook's helper, and then became a cook(V1-60; V2-226).

On or about 9/2/85 Claimant was involved in an industrial accident arising out of during the course and scope of his employment with the Employer (V1-60; V2-226). On that date, Claimant was fixing a breakfast order when a vegeline that you spray the grill with fell in the grease, causing the grease to explode, and knocking Claimant back against the counter and causing

him to fall(V1-60; V2-226). Claimant's lower back hit the counter as he fell(V2-226). As a result, Claimant suffered both physical(V1-67-69), and psychiatric(V1-71-73) problems. In an Order dated 6/14/93, Claimant was found permanently totally disabled (PTD) as a result of his injuries, effective 10/10/88(V1-57-82; V2-226).

Claimant applied for and began receiving SSD benefits in 5/88(V1-84). The initial benefit paid to Claimant(PIA) was $541.70 per month(V1-84).

The parties stipulated to the following facts:

1. Claimant's Average Weekly Wage (AWW) was $311.97(V1-10, 42; V2-227).

2. Claimant's compensation rate was $207.99 per week(V1-10, 42, V2-227).

3. The initial amount of SSD benefits (Claimant's PIA) is $541.70 per month, which equates to $125.98 per week(V1-84; V2-227).

4. Claimant's ACE (monthly average current earnings) was $1,389.00 per month (V2-228).

5. 80% of Claimant's ACE is $1,111.20(V1-84).

6. Claimant's supp benefits for 1998 were $135.19 per week (V2-229).

7. Claimant’s supp benefits increase at the rate of $10.40 per week every year, with the next increase due 1/1/99(V2-229).

8. At the time of the hearing in 1998, Claimant was receiving $785.00 SSD benefits, including cost of living increases, which equates to $182.74 per week(V1-94; V2-230).

9. The maximum compensation rate for 1998 is $492.00 per week(V1-16).

10. At the time of the hearing, the E/C was paying Claimant WC benefits, including supp benefits, at the rate of $126.45 per week(V1-172-179, V2-203).

At a mediation held on or about 3/24/98, the parties resolved all issues concerning past indemnity benefits(V1-55). The parties stipulated that the only issues remaining would be whether or not Grice applies, and whether the cost of living adjustment should be included in the offset calculations(V1-55).

A more specific reference to facts will be made during Argument.

POINT ON APPEAL

I

WHETHER OR NOT THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE LOWER COURT ORDER WHICH AWARDED THE INJURED WORKER'S INDEMNITY AND SUPPLEMENTAL BENEFITS WITHOUT CONSIDERATION OF THE LIMITATIONS SET FORTH IN SECTION 440.15(9) FLORIDA STATUTES (1985).

SUMMARY OF ARGUMENT

I

Respondent would first respectfully submit that the point being raised by the E/C on this appeal before this Honorable Court was never raised at any time prior to the filing of the Petitioner's Initial Brief on the Merits. Therefore, since this Point was never argued before the JCC below, it cannot be raised for the first time on appeal, Dade County School Board v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999). Furthermore, since the point was never argued before the First District Court of Appeal such point, even if argued before the JCC, would be deemed waived, Ramos v. Phillip Morris Companies, Inc., 743 So.2d 24 (Fla. 3rd DCA 1999).

Furthermore, on the merits itself, the combination of worker's compensation benefits, including supplemental benefits, and social security disability benefits, can exceed the greater of 80% of the injured worker's AWW or average current earnings, because the

maximum amount of offset that the E/C can take may not exceed that which the Federal government would otherwise have taken, F.S. 440.15(9)(a)(1985), Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996). In other words, the Federal government could not take an offset which exceeds the total amount of social security benefits due a Claimant, Hunt v. Stratton, supra.

Furthermore, in determining the maximum social security offset that the Social Security Administration could take, the SSA does not take into consideration social security cost of living increases, 42 U.S.C. § 424a(a)(8); Great Atlantic and Pacific Tea Company v. Wood, 380 So.2d 558(Fla. 1st DCA 1980).

In the case at bar, the amount of Social Security disability benefits being received by Claimant, not taking into consideration social security cost of living adjustments (Claimant's PIA) is $541.70 per month, which equates to $125.98 per week(V1-84; V2-227). Clearly the SSA cannot take an offset greater than this amount, because this is the maximum amount that they are paying the Claimant, excluding cost of living increases which the SSA does not take into consideration in determining its offset. In the case at bar, the JCC gave the E/C a social security offset of $125.98, which is the maximum amount that the social security government could offset against Claimant's worker's compensation benefits(V2-

229).

Therefore, since the E/C is already receiving the maximum social security offset that the SSA could take, the E/C is not entitled to continue to increase the social security offset in order to hold the combination of Claimant's social security disability and worker's compensation benefits at 80% of Claimant's AWW or ACE, whichever is greater.

Therefore, the JCC in his Order of 5/11/98 has correctly calculated the amount of the offset that the E/C may take, and the First District Court of Appeal, in their opinion entered on 3/3/99, correctly affirmed the JCC's Order of 5/11/98.

ARGUMENT

I

WHETHER OR NOT THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE LOWER COURT ORDER WHICH AWARDED THE INJURED WORKER'S INDEMNITY AND SUPPLEMENTAL BENEFITS WITHOUT CONSIDERATION OF THE LIMITATIONS SET FORTH IN SECTION 440.15(9) FLORIDA STATUTES (1985).

Respondent would first respectfully submit that the argument being raised by the E/C on their Initial Brief on the Merits has not, heretofore, been raised at any time during these lengthy proceedings. The Point on Appeal before this Honorable Court is being argued for the very first time in the Petitioner's Initial Brief on the Merits.

In the Statement of the Case and of the facts portion of the E/C's Initial Brief on the Merits they state the following:

> "This brief addresses whether receipt of combined benefits of worker's compensation and social security disability benefits can exceed the greater of 80% of the injured worker's AWW or average current earnings."(IB-6).

On the first page of the argument in their Initial Brief on the Merits the E/C states:

> "This brief addresses the social security disability benefit offset available under § 440.15(9), Florida Statutes, and its application to permanent and total disability supplemental benefits."(IB-9).

Finally, after argument the E/C concludes in their Initial Brief on the Merits:

> "Accordingly, the McWilliams Court erred in allowing McWilliams to receive permanent and total supplemental benefits, which, when combined with his permanent and total disability indemnity benefits and his social security disability benefits exceed 80% of the ACE or the AWW, whichever is higher. . . .thus the decision of the First District Court of Appeal in McWilliams should be reversed and remanded because the combined benefits received by McWilliams from the Social Security Disability Administration and Florida Worker's Compensation should be limited to 80% of his ACE or AWW whichever is higher."(IB-19).

The E/C's argument that the combination of Claimant's permanent total and supplemental benefits, plus SSD, should never exceed 80% of the ACE or the AWW, whichever is higher, is a new argument never previously raised by the E/C.

For example, when the parties mediated this case on 3/24/98,

the parties stipulated that:

> ". . .Judge reserves jurisdiction on the application of Grice and whether the cost of living adjustment should be included in the offset calculations. . . ."(V1-55).

There is no mention in the Mediation Agreement that the E/C contend that the combination of Claimant's PTD, supp benefits, and SSD may never exceed 80% of Claimant's AWW or ACE whichever is greater.

Prior to the hearing on 3/25/98, the E/C filed a hearing information sheet wherein they argued that under "Grice", the Claimant's worker's compensation benefit should be reduced to the extent that the total of his permanent total disability, supplemental benefits, and social security disability benefits exceed his AWW(V1-107). At no time in their memorandum did the E/C argue that the total of the Claimant's PTD, supp benefits and social security could never exceed 80% of Claimant's AWW or ACE. In fact, the E/C in their memorandum filed prior to the final hearing stated:

> ". . .Under Hunt v. Stratton the E/C's offset of worker's compensation benefits by amount of Federal Social Security Disability Benefits which Claimant is receiving can be no more than the total of SSD benefits. According to the Social Security Administration, and effective 1/98, the Claimant no longer has dependents under the age of 18, that Claimant's PIA is $541.70 per month or $125.98 per week. Thus, CIGNA has utilized **the correct maximum offset** for each calendar year which beginning in 1998 equals $125.98 without the application of Grice."(V1-107).

Again, at the final hearing on 3/25/98, the defenses raised by

the E/C were stated as follows:

> "The E/C contended that Claimant should be paid worker's compensation benefits for the year 1998 in the total amount of $129.23, as calculated in joint exhibit #8. The E/C contended that in calculating Claimant's total weekly worker's compensation benefits, the E/C was entitled to take into consideration:
>
> (a) Cola's as reflected in Claimant's SSD 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 E/C contended that if SS Cola benefits were not to be taken into consideration in the calculation of Claimant's weekly worker's compensation rate, then Claimant's weekly worker's compensation rate was still subject to Escambia County Sheriff's Department v. Grice, supra, and Claimant's weekly benefits should be $185.99 for 1998, as reflected in joint exhibit #6."(V2-225).

The entire thrust of the E/C's position before the JCC was that the combination of Claimant's SSD, PTD, and supplemental benefits, could not exceed 100% of Claimant's AWW per the Grice decision,(V1-18-20, 20-24, V2-225). As it related to SSD, the E/C argue that cost of living increases in SSD benefits should be considered benefits, and should be taken into consideration in reaching the Grice cap of 100% of a Claimant's AWW. However, at no time did the E/C argue that they could take a greater social security offset based on annual supplemental benefits paid to the Claimant. In fact at the hearing, the following colloquy occurred concerning the amount of the E/C's SS offset:

"Mr. McCabe: But, we also agree that the maximum offset . . . social security offset that they can take is $125.98 per week.

Mr. Langston: And that's under Hunt v. Stratton.

Judge Thurman: All Right. That's Hunt v. Stratton.

Mr. Langston: Yes, sir.

Mr. McCabe: And, the reason for that is because that's what they were paying Mr. McWilliams and you can't. . . .

Judge Thurman: And . . . . .and that's the PIA, right?

Mr. McCabe: Yeah. You can't take an offset greater than what they are paying him.

Judge Thurman: Right."(V1-43,44).

Additionally the following colloquy occurred at the initial hearing:

"Mr. McCabe: Well, yeah. After taking all the offsets, according to Hunt, he has a new compensation rate of $82.01. But, that Cruise case basically says, now you keep adding the 5% and even when he gets over 80%, even when the combination of the $82.01 base rate, the SSD that he is getting of $125.98, and the supplemental benefits go over 80%, so be it. They can do so. Okay?

Mr. Langston: And I agree, however, again, the Cruise case doesn't talk about the cap of the AWW and that's what we are talking about."(V1-45, 46).

When the E/C appealed the JCC's Order of 5/11/98 to the First District Court of Appeal, they again never argued that the combination of Claimant's PTD, supplemental benefits, and SSD can never exceed 80% of Claimant's AWW or ACE whichever is higher.

Rather, the E/C raised two points on appeal before the First District Court of 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." Americana Dutch Hotel v. McWilliams, supra at 536.

In its Amended Brief in Support of Petitioner's Notice to Invoke Discretionary Jurisdiction of this Honorable Court, the basis alleged by the E/C was that the First DCA's decision expressly and directly conflicted with this Honorable Court's decision in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997). As this Court well knows, its decision in Grice, supra, dealt with whether or not a combination of Claimant's benefits, including PTD, supp benefits, SSD and in line of duty disability benefits could exceed 100% of a Claimant's AWW. This Honorable Court's decision in Grice, supra, did not deal in any way with whether or not the combination of Claimant's PTD, supp benefits and SSD could ever exceed 80% of Claimant's AWW or ACE whichever is greater.

The E/C's argument in their Amended Brief in Support of Petitioner's Notice to Invoke Discretionary Jurisdiction is based

on the 100% AWW cap in Grice, supra, and has nothing to do with the 80% cap in F.S. 440.15(9)(a)(1985).

Finally the E/C in their Amended Brief in Support of their Notice to Invoke Discretionary Jurisdiction concluded:

> "Thus, the question certified to be of great public importance in Acker, when decided by this Court, should be dispositive of the instant case."(IBJ-10).

The question before this Honorable Court in City of Clearwater v. Acker, 24 F.L.W. S567 (Fla. 1999) was as follows:

> "WHERE AN EMPLOYER TAKES A WORKER'S COMPENSATION OFFSET UNDER SECTION 440.20(15), FLORIDA STATUTES, (1985), AND INITIALLY INCLUDE 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? City of Clearwater v. Acker, supra at S567. This Honorable Court answered the aforesaid question in the negative.

Again, City of Clearwater v. Acker, supra, the case which the E/C stated in their Amended Brief in Support of Petitioner's Notice to Invoke Discretionary Jurisdiction would be dispositive of the instant case, does not in any way address the issue that the E/C now raises for the first time in their Initial Brief on the Merits. Furthermore, since the E/C admitted in their Amended Brief in Support of their Notice to Invoke Discretionary Jurisdiction that the decision in Acker would be dispositive of the case at bar, then this Honorable Court should affirm the JCC'S Order of 5/11/98, and the FIRST DCA'S opinion of 3/3/99, because both of those decisions

are in accord with this Court's ruling in Acker, supra.

It is a basic rule of Appellate law that, absent jurisdictional or fundamental error, a claim not raised in the trial court may not be considered for the first time on appeal, Dade County School Board v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999), Ward v. Ward, 742 So.2d 250 (Fla. 1st DCA 1996). Since the point being raised by the E/C for the first time in their Initial Brief on the Merits was not raised before the JCC below, and may not be considered for the first time on appeal.

Furthermore, even if the E/C's argument was somehow raised before the JCC below, it was not raised before the First DCA and therefore would be deemed abandoned, Ramos v. Phillip Morris Companies, Inc., 743 So.2d 24 (Fla. 3rd DCA 1999),(error not raised in Appellate Brief is waived).

Therefore it is respectfully requested that this Honorable Court affirm the First DCA's opinion entered 3/3/99 on the grounds that the argument being raised by the E/C is impermissibly being raised before this Honorable Court in the Initial Brief on the Merits for the first time.

Respondent further respectfully submits, however, that even if this Honorable Court rejects Respondent's argument set forth hereinabove, the JCC's Order of 5/11/98, and the First DCA's

opinion in the above referenced matter entered 3/3/99, should be affirmed on the merits. Specifically, the combination of PTD benefits, supplemental benefits, and SSD benefits may exceed 80% of a Claimant's AWW or ACE once the E/C is already taking the maximum SS offset allowable under the law, specifically the maximum amount that the SSA can take. As discussed in greater detail hereinbelow, F.S. 440.15(9)(a)(1995) provides that a worker's compensation carrier may not take a SS offset to a greater extent than:

> ". . .Such benefits would have otherwise been reduced under 42 U.S.C. § 424(a)."

Clearly, the SSA cannot take an offset greater than the total amount of SSD benefits that they are paying the Claimant. Since the SSA does not consider SS cost of living adjustments in determining the amount of the offset that they can take, the maximum SS offset that the SSA could take is the PIA, or initial amount being paid to an injured worker without taking into consideration SS cost of living increases. In this case, as admitted by the E/C in both their legal memorandum and at the hearing, they are taking the maximum SS offset allowable, which is $125.98 per week. That is because that is the maximum amount that SS could offset since that is Claimant's PIA. A detailed argument follows.

F.S. 440.15(9)(a)(1985) provides as follows:

"Weekly compensation benefits payable under this Chapter for

> disability resulting from injuries to an Employee who becomes eligible for benefits under 42 U.S.C. § 423 shall be reduced to an amount whereby the sum of such compensation benefits payable under this Chapter and such total benefits otherwise payable for such period to the Employee and his dependents, had such Employee not been entitled to benefits under this Chapter, under 42 U.S.C. §§ 423 and 402, does not exceed 80% of the Employees AWW. **However, this provision shall not operate to reduce an injured worker's benefits under this Chapter to a greater extent than such benefits would have otherwise been reduced under 42 U.S.C. § 424(a). . . .**"

In Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996), the First DCA set out a step by step formula for calculating the SS offset. When the JCC calculated Claimant's offset in the case at bar, the JCC calculated the SS offset in the exact same manner as set forth by the First DCA in Hunt v. Stratton, supra.

Step 1 is to determine the greater of 80% of the AWW or 80% of the weekly ACE and use it for the following calculations, Hunt v. Stratton, supra, at 67. In this case, this Initial Calculation is as follows:

Monthly ACE	$1,389.00
x 0.80	x 0.80
80% of Monthly ACE	$1,111.20
80% of Monthly ACE	$1,111.20
÷ 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

(V2-228)

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 SS offset is $258.42 (V2-228).

The next step in determining the SS offset as set forth in Hunt v. Stratton, 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 SS benefits (PIA)	$ 541.70
÷ 4.3 (weeks/month)	÷ 4.3
Weekly SS benefits	$ 125.98
Weekly SS benefits	$ 125.98
+ compensation rate (2/3 AWW)	207.99
+ supp benefits (1998)	135.19
Total weekly benefits	$ 469.16
Total weekly benefits	$ 469.16
- 80% of greater of AWW and ACE	- 258.42
Preliminary offset amount (V2-228).	$ 210.74

The next step is to determine whether the preliminary offset amount exceeds the offset which the Federal government could have otherwise taken, i.e. whether the preliminary offset amount exceeds the total amount of SS benefits due a Claimant and his family, which is the maximum Federal SS offset allowed under 42 U.S.C. §

424(a), and therefore the maximum worker's compensation offset allowed under § 440.15(9)(a)(1985), Hunt v. Stratton, supra at 67.

In the case at bar, since the preliminary offset, $210.74, exceeds the total amount of SS benefits due Claimant, $125.98, the latter is the maximum allowable offset(V2-229).

Finally, the total weekly amount of worker's compensation benefits due is determined:

Compensation rate	$207.99
- offset	-125.98
New compensation rate	$ 82.01
New compensation rate	$ 82.01
+ supp benefits	+135.19
Total weekly worker's comp benefits (V2-229).	$217.20

In the case at bar, the JCC calculated the E/C's SS offset exactly in accordance with Hunt v. Stratton, and determined that Claimant's new compensation rate was $82.01 per week, after taking into consideration the SS offset (V2-227-229).

The JCC also noted that Claimant's supp benefits for 1998 was $135.19 per week, as stipulated by the parties, and therefore the total amount of compensation that Claimant should receive for the year 1998 is $217.20 (V2-229).

The JCC also found that Claimant's supp benefits increase at the rate of $10.40 per week every year, with the next increase due 1/1/99(V2-229). The JCC found, therefore, that the compensation benefits to be paid to Claimant shall increase at the rate of $10.40 per week each year, effective 1/1/99, for so long as Claimant remains PTD, and so long as a combination of Claimant's new compensation rate ($82.01) plus his 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)(V2-236).

In Americana Dutch Hotel v. McWilliams, supra, the First DCA affirmed the JCC's calculation of the E/C's offset, and of the amount of compensation benefits to be paid Claimant. Furthermore the First DCA in Americana Dutch Hotel v. McWilliams, supra, in relying on the First DCA's decision in Alderman v. Florida Plastering, 23 Fla. L.W. D2578 (Fla. 1st DCA 11/19/98), a case affirmed by this Honorable Court in Florida Plastering v. Dennis Alderman, 25 Fla. L.W. S49 (Jan. 28, 2000), stated that:

> "It is improper to recalculate a worker's compensation offset, once the initial calculation has been made, based upon any cost of living increases in collateral benefits. . . " Americana Dutch Hotel v. McWilliams, supra at 537, 538.

Therefore, based on the JCC's calculations, the total amount of benefits that the Claimant will receive for the following years

is as follows:

1998

New compensation rate	$ 82.01
+ supp benefits	+135.19
+ SSD (PIA)	+125.98
Total weekly benefits	$343.18

1999

New compensation rate	$ 82.01
+ supp benefits	+145.59
+ SSD (PIA)	+125.98
Total weekly benefits	$353.58

2000

New compensation rate	$ 82.01
+ supp benefits	+155.99
+ SSD (PIA)	+125.98
Total weekly benefits	$363.98

While it is true that the above sums do exceed 80% of Claimant's ACE of $258.42, such calculation of the SS offset by the JCC does not violate the provisions of F.S. 440.15(9)(a)(1985) for numerous reasons:

1. If the E/C were allowed to recalculate the SS offset on an annual basis to take into consideration increases in permanent total supplemental benefits, so that the total combined amount of Claimant's new comp rate, plus supplemental benefits, plus SSD

benefits never exceeded 80% of Claimant's AWW, then the E/C would be violating F.S. 440.15(9)(a)(1985), because they would be taking an offset to a greater extent than such benefits would have otherwise been reduced under 42 U.S.C. § 424(a).

The history behind F.S. 440.15(9)(a)(1985) was explained by the First District Court of Appeal in GAB Business Services, Inc. v. Dickson, 739 So.2d 637 (Fla. 1st DCA 1999). As explained in GAB Business Services, Inc. v. Dickson, supra, and Lofty v. Richardson, 440 F.2d 1144, 1148 (6th Cir. 1971), when the Social Security Act was passed in 1935, there was no provision in it for disability benefits. When disability benefits were first added in 1956, an offset for worker's compensation was required.

Two years later, however, the offset was repealed because it was believed that duplication of benefits was slight. Numerous complaints, largely by Employers and Employer based organizations, were made to Congress that Employers were duplicating payments, because they were responsible for both worker's compensation and one half of SSD benefits. Consequently, Congress reenacted the offset in 1966. In so doing, Congress adopted 42 U.S.C. § 424(a) which permitted the SSA, **in the absence of a State Worker's Compensation SSD offset provision, to take an offset to the extent that combined SSD and worker's compensation benefits exceeded 80%**

of the worker's ACE.

In 1973, Florida amended its worker's compensation law to allow, under § 440.15(9)(a), that the E/C, instead of the SSA to take the SSD offset, See American Banker's Insurance Company v. Little, 393 So.2d 1063 (Fla. 1980). Under the scheme, the State and Federal laws effectively guarantee payment of the maximum disability benefits allowable under either the SS or worker's compensation law, and they shifted the source of payments from predominately State generated payments to predominately Federally generated payments. Despite this shifting of the offset, **the Florida and Federal Statutes contain provisions designed to insure that the injured Employee does not receive less under the two acts than he or she would under either, GAB Business Service, Inc. v. Dixon, supra, American Banker's Insurance Company v. Little, supra.**

Therefore, it is clear from the statutory language in F.S. 440.15(9)(a)(1985), and GAB Business Service, Inc. v. Dixon, supra, Hunt v. Stratton, supra and Trilla v. Braman Cadillac, 527 So.2d 873 (Fla. 1st DCA 1988), that the worker's compensation offset cannot be greater than the offset which the Federal government would have otherwise taken.

The Federal government does not take into consideration cost of living increases when calculating its offset under 42 U.S.C. §

424(a). Specifically, 42 U.S.C. § 424a(a)(8) and 20 C.F.R. § 404.408(j) preclude the inclusion of Social Security cost of living increases when the Federal government calculates its SS offset under 42 U.S.C. § 424a. Therefore, as early as A.P.C. Scott Construction v. Miller, IRC Order 2-3906 (Fla. 1979), the Industrial Relations Commission held that since the amount of the Federal disability offset is not altered under the Federal law by any amount of subsequent Federal SS cost of living increases, the State carrier's compensation offset may not be increased by factors not considered in determining the maximum Federal offset. In other words, since the Federal government does not take into consideration SS cost of living increases in determining their offset, SS cost of living increases may not be taken into consideration by a worker's compensation carrier in determining the E/C's offset, Alderman v. Florida Plastering, 23 F.L.W. D2197 (Fla. 1st DCA 1998), aff Florida Plastering v. Alderman, 25 F.L.W. S49 (Fla. 2000), Eques v. Best Knit Textile Corp., 382 So.2d 736 (Fla. 1st DCA 1980), Great Atlantic and Pacific Tea Company v. Wood, 380 So.2d 558 (Fla. 1st DCA 1980), Lafond v. Pinnellas County BOCC, 379 So.2d 1023 (Fla. 1st DCA 1980).

In the case at bar, the maximum amount that the SSA could take as an offset under 42 U.S.C. § 424(a) would be $125.98, which is

the PIA paid to the Claimant, without taking into consideration SS cost of living adjustments. The reason that this is the maximum amount of offset that the SSA could take, is because this is the maximum amount that they are paying the Claimant (not taking into consideration cost of living adjustments which as previously noted are not taken into consideration by the SSA in calculating an offset). Clearly the SSA cannot take an offset greater than the full amount of benefits that they are paying the Claimant.

Therefore, once the E/C is receiving the maximum SS offset that the government can take, the E/C cannot take a greater offset, because then they would be taking an offset greater than that to which the Federal government could take in controvention of F.S. 440.15(9)(a)(1985).

For example, in the case at bar if the E/C's argument was accepted, then the maximum worker's compensation benefits, and supplemental benefits that the E/C would be required to pay Claimant would be $132.54 per week calculated as follows:

80% of Weekly ACE	$ 258.42
- SSD (PIA)	125.98
Balance	$ 132.54

Furthermore, under the E/C's argument, this figure of $132.54 would never change.

Furthermore, based on the E/C's argument, the actual offset

that they would then be taking for the year 2000 would be $231.44 per week. This figure is calculated as follows:

If there was no SSD the E/C would be paying the following amount:

(a) Claimant's compensation rate of $207.99.

(b) Plus supplemental benefits for the year 2000 - $155.99 Total - $363.98.

Total compensation that should be paid absent SSD $363.98 minus amount E/C contends is owed $132.54, total offset - $231.44.

This amount is $105.46 per week more than the amount of SSD benefits being paid to the Claimant (Claimant's PIA is $125.98 per week). The E/C wants to take a SS offset of $105.46 per week greater than the Federal government could take under 42 U.S.C. § 424(a). Clearly this is in violation of F.S. 440.15(9)(a)(1985). Furthermore under the E/C's argument, the amount of their offset would increase $10.40 per week, since, under the E/C's argument, Claimant would never gain the benefit of additional supplement benefits once the combination of Claimant's SSD and compensation benefits equaled 80% of Claimant's ACE.

On the other hand, under the method calculated by the JCC, the E/C's offset remains consistent at $125.98 per week, which is the maximum amount that the Federal government would be allowed to

take. For example, for the year 2000, as noted hereinabove, if there was no SSD, the E/C would be paying Claimant $363.98 for the year 2000. However, with SSD, the E/C is only required to pay Claimant in the case at bar the following sums as previously outlined hereinabove:

(a) New compensation rate - $82.01 per week

(b) Supp benefits for 2000 - $155.99, Total $238.00. Amount of offset - $363.98 minus $238.00 equals $125.98.

2. The second reason is that PTS benefits is the worker's compensation law's answer to SS's cost of living increases. PTS benefits are nothing more than a cost of living increase payable to an injured worker's compensation Claimant.

For example, in City of Clearwater v. Acker, supra, this Honorable Court stated:

> "It is undisputed that the legislature intended supplemental benefits to provide cost of living increases for permanently and totally disabled workers to account for the impact of inflation." City of Clearwater v. Acker, supra at S568.

Thus, as noted by this Honorable Court in City of Clearwater v. Acker, supra:

> ". . .This Court must assume the legislature did not intend offsets to be annually recalculated to account for cost of living increases in supplemental benefits. To hold otherwise would prevent injured workers from receiving cost of living increases and would render the supplemental benefits statute virtually meaningless." City of Clearwater v. Acker, supra at S568.

The First DCA reached the exact same conclusion in its opinion of 3/3/99 in the case at bar, Americana Dutch Hotels v. McWilliams, supra at 537.

Just as the Federal government does not include cost of living increases in calculating its offset, then neither can the State Worker's Compensation Carrier. Since supplemental benefits are cost of living increases, the State may not include them in calculating their offset because if they do then they are taking an offset greater than to which the Federal government can take because the Federal government does not take into consideration cost of living increases.

3. As previously stated hereinabove, to allow the E/C to recalculate its SS offset based on Claimant's increase in PTS benefits, so that the combination of Claimant's new comp rate, PTS and weekly SSD never exceeds 80% of Claimant's AWW or ACE whichever is greater, would completely defeat the purpose of supplemental benefits, City of Clearwater v. Acker, supra.

4. There have been numerous decisions by the First DCA that have specifically held that, although the supplemental benefits received by the Claimant are considered in the initial calculation of the SS offset, the law does not contemplate a recalculation of the offset based upon any increases thereafter, Tope v. Electro-

Protective Corp., 24 F.L.W. D1852 (Fla. 1st DCA 1999) (August 5, 1999), Cruise Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997), Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996).

For example, in Hunt v. Stratton, supra, when the First DCA set forth the step by step formula for calculating the SS offset, that Court stated as follows:

> "We note that both the Federal and State Disability Benefits schemes include incremental increases in benefits to account for future increases in the cost of living (Federal cost of living adjustments and State Supp benefits). While the existing worker's compensation supp benefit is considered in the initial calculation of the worker's compensation offset, the law does not contemplate a recalculation of the offset based upon any increases thereafter." Hunt v. Stratton, supra.

In Cruise Construction v. St. Remey, supra, the First DCA explained the above referenced paragraph. Specifically the First DCA, in Cruise Construction v. St. Remey, supra, stated:

> ". . .Once the initial calculation of the SS offset has been performed, the offset need not be recalculated 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 Supp. Benefits. There is no reasonable basis for concluding that permanently totally disabled Claimant's whose benefits are reduced by SS offset thereby become ineligible for the statutorily provided supplement benefit."

Most recently in Tope v. Electro Protective Corp., supra, the First DCA stated as follows:

> "That Claimant appeals a worker's compensation Order which permits the E/C to annually recalculate the 440.15(9), Fla. Stat., (1987), offset upon eligibility for SS benefits, so as

> to encompass annual increases in the supp benefits which pertain under § 440.15(1)(e)1, Florida Statutes (1987). Hunt v. D.M. Stratton, 677 So. 2d 64 (Fla. 1st DCA 1996), which notes that the supp benefits provide a cost of living adjustment, prohibits such annual recalculation of the Section 440.15(9) offset. See also Cruise Construction v. St. Remey, 704 So. 2d 1100 (Fla. 1st DCA 1997). The appealed Order is therefore reversed, and the case is remanded." Tope v. Electro Protective Corp., supra at D1852. See also Conklin v. Ford, 737 So.2d 602 (Fla. 1st DCA 1999).

Finally as previously noted this Honorable Court in City of Clearwater v. Acker, supra, indicated that there will be no annual recalculations of an E/C offset to account for cost of living increases in supp benefits, and to do so would render supp benefit statute virtually meaningless.

5. If the E/C's position is accepted, and at no time can the Claimant's new comp rate, supp benefits and weekly SSD benefits exceed 80% of the Claimant's AWW, then Claimant respectfully submits that F.S. 440.15(9)(1985) is unconstitutional in that it is a denial of equal rights to Claimants that unfortunately receive SSD benefits. The reason for this is obvious and clear. If a permanent and totally disabled Claimant is not receiving SSD benefits then PTD and supp benefits may equal the maximum compensation rate in effect at the time of payment, F.S. 440.15(1)(e)1(1985), Department of Children v. Monroe, 744 So.2d 1163 (Fla. 1st DCA 1999). In the case at bar, the maximum compensation rate for 1998 is $492.00 per week (V1-16), and even

higher for the year 2000. Thus, in the case at bar for the year 2000, absent SSD, the Claimant would be entitled to receive $207.99 compensation rate plus $155.99 supp benefits for a total of $363.98. Additionally that figure would continue to increase at $10.40 per week, per year because of supp benefits. However, under the E/C's argument, a Claimant who unfortunately is receiving SSD such as in the case at bar, would never, under any circumstances, be entitled to receive more than $258.00 per week in combined worker's compensation and SSD benefits. Therefore, a Claimant who unfortunately is also getting SSD would get considerably less than would the same injured worker if he was not getting SSD. Claimant respectfully submits that the legislature never intended such a result. Claimant would further respectfully submit that there could be no logical basis for such a result. In fact, the First DCA in Cruise Construction v. St. Remey, supra, stated:

> "There is no reasonable basis for concluding that permanently and totally disabled Claimants whose benefits are reduced by SS offset thereby become ineligible for the statutorily provided PTD supp benefit." Cruise Construction v. St. Remey, supra at 1101.

If F.S. 440.15(9) were construed in the manner suggested by the E/C, it would be arbitrary, capricious, and clearly unconstitutional.

The E/C argue in their Initial Brief that the First DCA and

the JCC's decision result in two errors: The first error occurring when the offset amount was limited to the PIA, and the second error occurred in awarding McWilliams full supp benefits(IB-11).

Claimant disagrees. The JCC and the First DCA correctly determine that the SS offset was limited to the PIA, because as previously discussed that is the maximum amount of offset that the SSA could take. The SSA does not take into consideration SS cost of living adjustments, and they could not take an offset greater than the full amount of benefits that they are paying to the Claimant. The full amount of benefits that the SSA is paying to the Claimant, absent cost of living increases, is the PIA. Therefore the JCC and the First DCA properly limited the E/C's offset to the PIA. Also as previously noted hereinabove, the E/C agreed that it was taking the maximum SS offset allowable of $125.98.

Secondly, the First DCA and the JCC properly awarded Claimant full supplemental benefits, because the supplemental statute itself places the limit on the amount of supplemental benefits that a Claimant can receive. As previously noted, F.S. 440.15(1)(e)1(1985) provides that:

> "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 § 440.12(2). . ."

The max comp rate of 1998 was $492.00, and the amount of

compensation benefits that the E/C is paying Claimant, even for the year 2000, ($238.00) does not even approach the maximum comp rate, See also Department of Children v. Monroe, supra.

The case of State Department of Commerce v. Loggins, IRC Order 2-3137 (April 13, 1977), a case relied upon by the E/C in their Initial Brief (IB-11, 12) is clearly distinguishable from the case at bar. The Claimant's accident in Loggins, supra, occurred on 5/17/74. The statute in question, F.S. 440.15(10)(a)(1974) did not contain the following statutory language which was eventually amended in 1975, specifically:

> "However, this provision shall not operate to reduce an injured worker's benefits under this Chapter to a greater extent that such benefits would have otherwise been reduced under 42 U.S.C. § 424(a)."

Thus, prior to the insertion of the above referenced sentence, arguably F.S. 440.15(10)(a)(1974) could be interpreted in the manner interpreted by the IRC in Loggins, supra (although Claimant would contend that it would be unconstitutional as previously argued hereinabove). However, the decision in Loggins clearly cannot stand in light of the 1975 amendment outlined hereinabove, which precludes the E/C from taking a SS offset greater than that to which the SSA could take. Therefore, in a case such as the case at bar, when the E/C is already taking the maximum SS offset allowable under law, the combination of SSD and worker's

compensation benefits can exceed 80% of the Claimant's AWW or ACE, because the E/C is not permitted to take any greater offset than that which the Federal government could take.

The case of State, Division of Worker's Compensation v. Hooks, 515 So.2d 294 (Fla. 1st DCA 1987), another case relied upon by the E/C in their Initial Brief (IB-12, 13) is also distinguishable from the case at bar. In State v. Hooks, supra, the First DCA held that supplemental benefits should be includeable in calculating the 80% cap of the SS offset. However, nowhere in State v. Hooks, supra, does the First DCA state that the E/C may take an offset greater than that which the SSA can take. In the case at bar the JCC initially took into consideration the supplemental benefits that the Claimant was receiving when calculating the initial SS offset(V2-228). The JCC found that this resulted in a preliminary offset amount of $210.74 per week(V2-228). However, the JCC then found that since F.S. 440.15(9)(a)(1985) prohibits the E/C from taking an offset greater than that to which the Federal government can take, the JCC found that the maximum offset that the E/C could take in this case was the PIA or $125.98 per week(V2-228, 229).

The E/C argue that the First DCA erred in Hunt, supra, because the combined benefits in Hunt exceeded both the 80% of the AWW and 80% of the ACE (IB-14). The First DCA did not error in Hunt v.

Stratton, supra, because in Hunt v. Stratton, supra, the preliminary offset amount of $90.94 per week was again greater than the total amount of SS benefits due the Claimant and his family, $80.70, and thus the latter was the maximum allowable offset. Therefore in Hunt, supra, the combination of Claimant's SSD, new comp rate, and supp benefits, would exceed 80% of Claimant's AWW, because the E/C could not take an offset greater than that to which the SSA could take. Again, as explained by the First DCA in Cruise Construction v. St. Remey, supra, the total disability benefits may exceed 80% of the AWW under the circumstances presented in Cruise Construction v. St. Remey, supra and Hunt v. Stratton, supra. The First DCA stated:

> "Specifically, when the preliminary offset amount under the formula in Hunt v. Stratton exceeds the total amount of the Federal SS offset, the final offset is limited to the Federal payment and the benefits may exceed 80% of AWW." Cruise Construction v. St. Remey, supra at 1101, f.n.1.

The case of American Bankers Insurance Company v. Little, 393 So.2d 1063 (Fla. 1981), another case relied upon by the E/C in their Initial Brief (IB-15), does not lend support to the E/C's position. In American Bankers Insurance Company v. Little, supra, the issue before this Honorable Court was whether or not E/Cs are entitled to the SS offset for current payments arising out of an accident which occurred prior to the effective date of the SS

offset statute (initially numbered F.S. 440.15(10)(1973). There is nothing in American Banker's Insurance Company v. Little, supra, that would entitle an E/C to take an offset greater than that to which the SSA can take, the position being advanced by the E/C in the case at bar.

The E/C sets forth what they argue the calculation in the case at bar should have been (IB-15). Under the E/C's argument, they would take an offset of $210.73 per week (IB-15). Again, this is greater than Claimant's PIA of $125.98 per week, and is therefore greater than the offset which the SSA administration can take. Clearly the E/C's calculation in their Initial Brief is in controvention of the provisions of F.S. 440.15(9)(a)(1985) that precludes the E/C from reducing the injured worker's benefits to a greater extent than such benefits would have otherwise been reduced under 42 U.S.C. § 424(a). In fact, other than noting that the aforesaid provision in F.S. 440.15(9)(a)(1985) came into effect in 1975 (IB-10), the E/C do not even discuss the effects of that provision in their Initial Brief.

The E/C incorrectly argue that in McWilliams, the First DCA incorrectly held that Claimant's PTD supplemental benefits are not subject to the offset under Section 440.15(9)(1985)(IB-16). The First DCA made no such decision. Instead the First DCA stated that

the supplemental benefits are not subject to the 100% AWW Grice cap, but instead are capped at the maximum weekly compensation rate in effect at the time of payment as provided by F.S. 440.15(1)(e)1(1985). As previously stated, the relationship between supplemental benefits and F.S. 440.15(9)(1985) was not an issue in McWilliams.

The E/C next argues that the SSA includes supp benefits in its initial calculation, and also requires recalculation of the initial offset when a Claimant receives a cost of living increase(IB-17). Again, the JCC in the case at bar took into consideration Claimant's supplemental benefits when calculating the initial SS offset. The regulation relied upon by the E/C in their Initial Brief, 20 C.F.R. § 44.408(k), does not authorize the SSA to take an offset greater than the total amount of SS benefits that they are paying the Claimant, yet that is exactly what the E/C is urging this Court to allow them to do in this case.

The cases of Mertz v. Secretary of Health and Human Services, 969 F.2d 201 (6th Cir. 1992), and Sciarotta v. Bowen, 837 F.2d 135 (3rd Cir. 1988), cases relied upon by the E/C in their Initial Brief (IB-17-19), again do not support the E/C's position in this case. Both Mertz, supra, and Sciarotta, supra, dealt with provisions of 42 U.S.C. 424a(d) which provided:

> "The reduction of benefits required by this section shall not be made if the law or plan described in subsection (a)(2) of this Section under which a periodic benefit is payable provides for the reduction thereof when anyone entitled to benefits under this subchapter on the basis of the wages and self employment income of an individual entitled to benefits under Section 428 of this Title, and such law or plan so provided on 2/18/81."

In Sciarotta, supra and Mertz, supra, the SSA was faced with state plans in New Jersey and Ohio respectively that only took minimal SS offsets, but did not take full SS offsets. The issue was whether or not the SSA could then also take an offset so that the full offset authorized under Social Security law could be taken, despite the fact that the States involved did have an offset plan. The Court in Sciarotta, supra, and Mertz, supra, held that the SSA could take an offset, even in those instances where there was a State offset plan, if the offset under the State plan was not a full offset.

That is not the situation in the case at bar. In the case at bar the JCC allowed the E/C to take the maximum SS offset available, specifically the full amount of Claimant's PIA of $125.98 per week. The SSA could not take an offset any larger than that because the SSA could not take an offset larger than the full amount of payments that they are making to the Claimant(excluding COLA since the Federal government does not consider COLAs in taking their offset). Therefore, pursuant to the provision of F.S.

440.15(9)(a)(1985) that precludes an E/C from taking an offset greater than that to which the SSA could take, the E/C cannot take an offset any greater than $125.98 per week. Therefore, since the preliminary offset amount in the case at bar exceeded the total amount of the Federal SS offset, the final offset is limited to the Federal payment, and the Claimant's benefits do exceed 80% of the AWW, Cruise Construction v. St. Remey, supra at 1101, fn 1.

CONCLUSION

The issue being raised by the E/C in this brief should not even be considered by this Court since this issue was never raised at any prior time during these proceedings. Although the E/C did argue that supplemental benefits should be included in the 100% AWW "Grice" cap, they never previously argued that the combination of Claimant's PTD, SSD, and supp benefits could never exceed the 80% cap as provided by F.S. 440.15(9)(1985).

However, even on the merit the JCC properly calculated the SSD offset. Specifically, although F.S. 440.15(9)(a)(1985) does provide that worker's comp benefits and SSD benefits shall not exceed 80% of the Claimant's AWW or ACE, it also provides that the E/C may not take a SS offset greater than that to which the SSA could take.

Clearly, the SSA cannot take an offset greater than the total amount of SSD benefits (PIA) that they are paying the Claimant. Since the SSA is only paying Claimant $125.98 per week, and since the E/C is already taking a $125.98 SS offset, they cannot take a greater offset, and therefore the combination of Claimant's PTD, supp benefits and SSD may exceed the 80% cap of F.S. 440.15(9)(a)(1985).

WHEREFORE it is respectfully requested that this Honorable Court affirm the JCC's Order of 5/11/98 and the First DCA's opinion of 3/3/99.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail on this 22nd day of February, 2000 to: **Herbert A. Langston, Jr., Esquire; Margaret E. Sojourner, Esquire, and George Boring, III, Esquire**, Langston, Hess, Bolton, Sznosko & Helm, P.A., P.O. Box 945050, Maitland, FL 32794-5050.

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