SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AMERICANA DUTCH HOTEL,
et al.,

Petitioners,

vs.

JOHNNY McWILLIAMS,

Respondent.

Case Number: 95,229
Claim Number: 265 27 9309
D/Accident: 9/02/1985

_____/

PETITIONER, AMERICANA DUTCH HOTEL, ET AL
INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

The claimant, Johnny McWilliams, is a 41 year old male, date of birth 10/25/58, who sustained a compensable industrial accident and injury occurring on September 2, 1985, while working for Americana Dutch Hotel (R-II-59, 226). He was adjudicated as permanently and totally disabled effective October 10, 1988, by an Order dated June 14, 1993 (R-I-57-82; R-II-226). Since that date, the employer/carrier has been paying permanent total disability benefits and supplemental benefits pursuant to Section 440.15(1)(e)1, Florida Statutes (1985). Further, the employer/carrier is currently utilizing a social security disability offset pursuant to Section 440.15(9)(a), Florida Statutes (1985).

On March 25, 1998, a Merits Hearing was held before John Thurman, Judge of Compensation Claims (R-I-1). The issue was to determine the correct offset to which the Employer/Carrier was entitled (R-II-225). More specifically, the issue was whether supplemental benefits should be considered workers' compensation benefits, and whether such supplemental benefits are subject to the statutory cap in determining the correct compensation rate to which the claimant should be paid in workers' compensation benefits (R-II-225).

The claimant applied for and began receiving social security disability benefits in May of 1988 (R-I-84). The initial benefit paid to the claimant (PIA) was $541.70 per month, which equates to $125.98 per week (R-I-84). Currently, with the inclusion of cost of living adjustments, the claimant

receives $785.00 per month in social security disability benefits, which equates to $182.74 per week (R-I-94; R-II-230).

The claimant's average weekly wage has been stipulated to be $311.97, eighty percent of which is $249.58. He has a corresponding compensation rate of $207.98. The claimant's monthly average current earnings (ACE) is $1,389.00, eighty percent of which is $1,111.20 which equates to a weekly benefit of $258.42. (R-I-10,42,84; R-II-227). After calculating the social security offset, according to the formula in ***Hunt v. Stratton,*** 677 So.2d 64 (Fla. 1st DCA 1996), the claimant's new compensation rate is $82.01 (R-II-229).

On May 11, 1998, the JCC entered a compensation order finding that the statute addressing supplemental benefits, "(a) contemplates that the 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" (R-II-233).

Thus, the JCC directed the Employer/Carrier to pay to the claimant permanent total disability benefits at the rate of $217.20 per week for the year of 1998 made up as follows:

new compensation rate	$82.01
plus supplementals	$135.19
total:	$217.20 (R-II-236)

Since the claimant's weekly social security benefit is $125.98, the total of workers' compensation benefits, plus social security disability benefits equal

$343.18, which exceeds eighty percent of the claimant's ACE.

Further, the JCC ordered that the workers' compensation benefits payable to the claimant shall increase at the rate of $10.40 per week, each year, effective January 1, 1999, for so long as the claimant remains permanently and totally disabled and so long as a combination of the claimant's new compensation rate ($82.01) plus claimant's supplemental income benefits, per Section 440.15(1)(e)1., Florida Statutes (1985), do not exceed the maximum weekly compensation rate in effect at the time of payment (R-II-236).

On May 22, 1998, the Employer/Carrier filed a Motion for Rehearing which was denied by the Judge of Compensation Claims on June 10, 1998 (R-II-238-240, 244).

On June 9, 1998, the Employer/Carrier timely appealed the JCC's Order, arguing that supplemental benefits under Section 440.15(1)(e)1., Florida Statutes (1985), should be included in determining the proper offset to which the employer/carrier is entitled. Further, the employer/carrier argued that under Section 440.15(9), Florida Statutes (1985), the employer/carrier is entitled to an offset of their payment of workers' compensation benefits once a claimant begins receiving social security disability benefits. Moreover, under 440.15(9), the weekly benefits a claimant receives in both workers' compensation benefits and social security disability benefits shall be reduced to an amount whereby their sum does not exceed eighty percent of the average weekly wage or average current earnings (IB-3,4,7). Finally, the employer/carrier argued that the JCC erred in requiring the employer/carrier to pay the claimant at a compensation rate of $217.20 per week, to be increased at the rate of

$10.40 per week, per year thereafter, because by receiving increased supplemental benefits each year, the claimant would be receiving double cost of living increases, one from the state workers' compensation benefits, and one from the federal social security disability benefits. (IB-16)

On March 3, 1999, the First District Court of Appeal affirmed the JCC's Order. The Court held that Section 440.15(1)(e)1., the statute addressing supplemental benefits, contemplates that a claimant's regular compensation rate plus supplemental benefits can exceed a claimant's AWW, and only caps those benefits when they exceed the maximum compensation rate in effect at the time of payment. *Americana Dutch Hotel v. McWilliams*, 733 So.2d 536, 537 (Fla. 1st DCA 1999). The court also held that it is improper to recalculate the social security offset, once the initial calculation has been made. *Id. at 537-538*.

On March 18, 1999, the Employer/Carrier filed a Motion for Rehearing, Clarification and Certification. Thereafter, on March 31, 1999, the Employer/Carrier filed a Notice Invoking the Discretionary Jurisdiction of the Supreme Court to review the decision of the First DCA. It was the position of the Employer/Carrier that the First DCA's decision expressly and directly conflicted with the decision of the Supreme Court of Florida and passed upon a question already certified to be of great public importance. On April 20, 1999, the First DCA denied the Employer/Carrier's Motion for Rehearing, Clarification and Certification. On April 19, 1999, the Employer/Carrier submitted its Amended Brief in Support of Petitioner's Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida. On December 3, 1999, the Supreme Court entered an Order accepting jurisdiction and dispensing with

oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

On December 9, 1999, the Supreme Court entered its opinion in *City of Clearwater v. Acker*, 24 FLW S567 (Fla. 1999), and held that an employer/carrier is not entitled to recalculate an offset taken pursuant to Section 440.20(15), Florida Statutes (1985) based on the yearly 5% increase in supplemental benefits. However, this Court specifically stated that:

> Nothing in this opinion should be read to change the workers' compensation offset under Section 440.15(9), Florida Statutes (1985). That offset provision is different from Section 440.20(15), Florida Statutes (1985), because of the federal social security offset provision.

The Court in *Acker* did not address the issue of the workers' compensation offset available under Section 440.15(9), Florida Statutes. The final paragraph of the consolidated opinion purports to leave the social security disability offset intact. This Brief addresses whether receipt of combined benefits of workers' compensation and social security disability benefits can exceed the greater of eighty percent of the injured worker's average weekly wage or average current earnings.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal, in holding in its decision below that McWilliams was entitled to receive full supplemental benefits, failed to consider and erroneously applied Section 440.15(9), Florida Statutes (1985). This statutory section requires that the combination of social security disability benefits and workers' compensation benefits shall not exceed eighty percent of the AWW or ACE, whichever is higher. Accordingly, the offset under this statutory section must be recalculated each time the claimant receives an increase in permanent and total supplemental benefits to maintain the eighty percent cap. If recalculation is not permitted and the eighty percent cap is not reached, the Social Security Administration will take an offset so the full eighty percent cap is utilized. *Sciarotta v Bowen*, 837 F. 2d 135 (3rd Cir. 1988). Failure to utilize the full eighty percent cap allows the claimant to receive duplicative benefits from both the state of Florida workers' compensation system and the Federal Social Security Administration. Clearly such a result provides a powerful disincentive to return to work and is contrary to the longstanding policy of the state of Florida which encourages injured workers to return to gainful employment following an on-the-job accident. Moreover, in Florida, the employer/carrier should receive the benefit of the full offset rather than conceding a portion of that offset to the Social Security Administration because Florida is a "reverse offset" state. In Florida, to reduce costs in the workers' compensation system, industry enjoys the offset, not the Federal Social Security Administration.

Further, the First District Court of Appeal also erred in limiting the offset to no more than the initial amount of the social security disability benefits received by a

claimant. In limiting the offset to the PIA, the First District Court of Appeal allowed the eighty percent cap to be exceeded. In limiting the offset to the PIA, the First District relied on its prior decision in ***Hunt v Stratton***, 677 So.2d 64 (Fla. 1st DCA 1996). The ***Hunt*** court had concluded that the 1975 amendment to Section 440.15(9), Florida Statutes limited the offset to the initial amount received by the claimant (PIA or family max). In fact, the 1975 amendment provided that the injured worker could not receive more than the greater of eighty percent of his AWW or ACE. ***American Bankers Insurance Company v Little***, 393 So.2d 1066 (Fla. 1981).

It is the clear intent of Section 440.15(9), Florida Statutes (1985) that workers' compensation benefits when combined with social security disability benefits cannot exceed eighty percent of the AWW or ACE, whichever is higher. In determining this offset the employer/carrier is not limited to the PIA and is entitled to recalculate the offset to include permanent and total supplemental benefits.

ARGUMENT

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 LIMITATION SET FORTH IN SECTION 440.15(9) FLORIDA STATUTES (1985).

Workers' compensation benefits have been subject to two caps on overall payments to injured workers, the eighty percent social security disability cap and the 100% AWW cap. In the recent decision of *City of Clearwater v Acker*, 24 FLW S567 (Fla. 1999), the court dwelt almost exclusively with the 100% AWW cap. It was only in the final paragraph of its opinion that the court addressed the eighty percent social security disability cap.

> Nothing in this opinion should be read to change the workers' compensation offset under s. 440.15(9), Florida Statutes (1985). That offset provision is different from s. 440.20(15), Florida Statutes (1985), because of the Federal Social Security offset provisions.

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. Section 440.15(9), Florida Statutes as originally enacted read:

> 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. s. 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. ss. 423 and 402, does not exceed eighty percent of the employee's average weekly wage.

This subsection was amended in 1975 to add the following:

> 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. s. 424(a).

McWilliams had an average weekly wage of $311.97. Eighty percent of that average weekly wage would be $249.58. His compensation rate, before reduction, was $207.98. Eighty percent of his ACE monthly was $1,111.20. This results in a weekly amount of $258.42. McWilliams' PIA per month was $541.70 which results in a weekly amount of $125.98. His supplemental benefits accrued at $10.40 per year. At the trial court level, the offset was initially computed by adding the compensation rate and the PIA with the supplemental benefits. From that total was subtracted eighty percent of the ACE. Since the initially computed offset amount exceeded the PIA of $125.98, the lower court limited the allowable offset to $125.98. Accordingly, the compensation rate after reduction, was determined to be $82.01. The lower court then held that McWilliams was entitled to receive the new compensation rate plus his social security benefits and his full supplemental benefits. This opinion erred in two respects. The first error occurred when the offset amount was limited to the PIA, and the second error occurred in awarding McWilliams full supplemental benefits. Each of these errors resulted in McWilliams receiving greater than eighty percent of his average weekly wage or ACE. The First District Court of Appeal affirmed this result by relying on its previous decisions in *Hunt v D. M. Stratton Builders*, 677 So.2d 64 (Fla. 1st DCA 1996) and *Cruse Construction v St. Remy*, 704 So.2d 1100 (Fla. 1st DCA 1997). As demonstrated below *Hunt and St. Remy* were wrongly decided.

The issue addressed by the First District Court of Appeal in *Hunt* was the proper method to be followed in calculating an employer's offset under Section

440.15(9), Florida Statutes. The result in *Hunt* is that supplemental benefits are received in full and not included in the eighty percent cap. This conclusion was reached despite the case of *State Department of Commerce v Loggins*, IRC Order 2-3137(April 13, 1977)[10 FCR 212]. *Loggins* involved a claimant who became permanently and totally disabled as a result of a compensable accident. He was receiving a maximum compensation rate of $80.00 per week. Subsequently, he began receiving social security disability benefits of $266.80 per month. The combination of the these benefits triggered the eighty percent cap of Section 440.15(9), Florida Statutes (1977). The Judge of Industrial Claims capped Loggins' benefits at eighty percent of his AWW but ruled that Loggins was entitled to his 5% supplemental benefit over and above the eighty percent limitation. The claimant argued to the Industrial Relations Commission that supplemental benefits are only limited to the maximum weekly compensation rate in effect at the time of payment as set forth in Section 440.15(1)(e), Florida Statutes (1977). The Industrial Relations Commission rejected that argument and reversed. They held:

> We do not find the two sections to be repugnant, ambiguous, or incompatible. Section 440.15(10), F.S., provides in no uncertain terms that a claimant is not to receive more than 80% of his average weekly wage in combined benefits from workmen's compensation and social security. The Judge's interpretation to the contrary is in derogation of the clear intent and wording of the statute.

10 FCR @ 213.

There is no language in the *Loggins* case that excludes the 5% supplemental benefits from the eighty percent cap. In fact, the court stated unequivocally that a claimant is not to receive more than eighty percent of his average weekly wage in combined benefits.

This argument was again addressed in the case of *State, Division of Workers' Compensation v Hooks*, 515 So.2d 294 (Fla. 1st DCA 1987). *Hooks* involved a permanently and totally disabled claimant who was also receiving social security disability benefits. Hooks' supplemental benefits were being paid by the Division of Workers' Compensation as his injury occurred prior to July 1, 1984. The Division of Workers' Compensation argued that the supplemental benefits were subject to the eighty percent cap under Section 440.15(10), Florida Statutes (Supp. 1978). The deputy commissioner held that the supplemental benefits were not subject to the eighty percent cap because these benefits were intended as a hedge against inflation and to include the supplemental benefits in the eighty percent cap would thwart the legislative intent to provide a cost of living increase to disabled employees. The First DCA reversed and held that it was the legislature's intent to include supplemental benefits within the eighty percent cap stating:

> Section 440.15(10), Florida Statutes expressly includes supplemental benefits within those benefits subject to the 80% limitation in computing the offset. The statute provides for no other interpretation than for such inclusion.

515 So.2d @295.

Accordingly, this issue was laid to rest until the advent of *Hunt* some nine years later. Since the Division of Workers' Compensation had failed to promulgate a rule setting forth the method for calculating offsets, the *Hunt* court addressed this issue and took a four step approach to this calculation.

The first step was to determine the greater of eighty percent of the claimant's AWW and eighty percent of the claimant's ACE. The greater of these two numbers is then used in step two. In step two the total amount of benefits being received by the

claimant on a weekly basis is computed. The permanent total supplemental benefits, being received at the time of the calculation, are included in these total weekly benefits. The court took this total and compared it to the greater of eighty percent of the AWW or eighty percent of the ACE. This resulted in the preliminary offset amount. The third step involves a determination of whether the preliminary offset amount exceeds the offset which the federal government would otherwise have taken. Because the preliminary offset amount determined in step two exceeded the total amount of the initial social security benefits due to the claimant and his family (PIA or family max), the *Hunt* court limited the offset to the total amount of the initial social security benefits due to the claimant (PIA or family max). In step four the compensation benefits payable is determined by subtracting the offset obtained in step three from the original compensation rate. The *Hunt* court took this new compensation rate, after offset, and added to it the supplemental benefits due the claimant in the year of calculation. Thus the combined benefits in *Hunt* exceeded both eighty percent of the AWW and eighty percent of the ACE. The First DCA noted that the claimant would receive more than eighty percent of his AWW, but held that this was permissible because there was a conflict between Section 440.15(1)(e) and Section 440.15(9). They felt that it was necessary to resolve the conflict between these statutory sections. This ruling was in clear contravention of the decisions in *Loggins* and *Hooks*.

Also, the court in *Hunt* erred by holding that the 1975 amendment to Section 440.15(9) limited the offset to the initial amount of social security disability benefits (PIA or family max). Rather, Section 440.15(9), prior to amendment, held that the

injured worker could not receive more than 80 % of his average weekly wage in combined benefits. The Federal Statute, 42 U.S.C. Section 424(a), allows a worker to receive combined benefits not exceeding eighty percent of his ACE. The 1975 amendment to Section 440.15(9) allowed the claimant to receive in combined benefits either eighty percent of his AWW or eighty percent of his ACE, whichever was higher. In *American Bankers Insurance Company v Little*, 393 So.2d 1063, 1066 (Fla. 1981) this Court recognized this interpretation of the amendment and held that an employee is now entitled to receive combined benefits of not more than eighty percent of his AWW, or eighty percent of his ACE, whichever is higher.

Utilizing this approach the calculation in *McWilliams* should have been:

	$ 207.98	Comp Rate
	125.98	Weekly Social Security Benefit
+	135.19	Permanent Total Supplemental Benefits
	$ 469.15	Total Benefits Received Weekly
-	258.42	eighty percent of the ACE
	$ 210.73	Offset Amount

	$ 207.98	Original Compensation Rate
+	135.19	Supplemental Benefits
	$ 343.17	Total Workers' Compensation Benefits Received
-	210.73	Offset Amount
	$ 132.44	New Compensation Rate

The claimant would then receive $132.44 in workers' compensation benefits added to his weekly social security benefit of $125.98. This is equal to $258.42 which is eighty percent of the ACE. Using this approach the claimant's benefits are capped at the higher of eighty percent of the AWW or eighty percent of the ACE, as required by Section 440.15(9), Florida Statutes (1985).

In its opinion in *McWilliams*, the First District Court of Appeal incorrectly held that his permanent and total disability supplemental benefits are not subject to the

offset under Section 440.15(9) Florida Statutes (1985). In reaching this conclusion the *McWilliams* court cited to *Alderman v Florida Plastering*, 23 FLW D2578 (Fla. 1st DCA November 19, 1998). The court in *Alderman* held that it was improper to recalculate an offset of workers' compensation benefits, once the initial calculation has been made, based upon cost of living increases in collateral benefits. It has long been the rule that cost of living adjustments to social security disability benefits were not subject to offset. *Great Atlantic and Pacific Tea Company v Wood*, 380 So.2d 558 (Fla. 1st DCA 1980). However, the employer/carrier in *McWilliams* is not attempting to offset the cost of living adjustment to social security benefits. Rather, the employer/carrier is offsetting supplemental benefits, which are cost of living increases to permanent total disability benefits, and which are considered compensation under the law. Section 440.15(1)(e) Florida Statutes (1985); *City of North Bay Village v Cook*, 617 So.2d 753 (Fla. 1st DCA 1993). In point of fact, the Social Security Administration not only includes supplemental benefits in the initial calculation, but also requires recalculation of the initial offset when a claimant receives an increase, due to cost of living increases, in workers' compensation benefits. SSR 82-68. In 20 CFR, Section 404.408(k) states:

> Any change in the amount of the public disability benefit received will result in a recalculation of the reduction under paragraph (a) and, potentially, an adjustment in the amount of such reduction.

In the example given in that section an initial offset is computed for the claimant. She subsequently receives an increase in her workers' compensation due to a cost of living adjustment. The initial offset is then recalculated to take into account the cost of living adjustment which results in a reduction of the social security

disability benefits paid. It is clear that although the Social Security Administration cannot reduce benefits paid on the basis of their own cost of living increases (COLA), they can and do reduce benefits paid on the basis of cost of living increases in workers' compensation benefits. This is done not only initially, but also as additional cost of living increases are received by the claimant. In fact, the Social Security Administration is mandated to cap the combination of social security disability and workers' compensation benefits at eighty percent of the ACE. In *Sciarotta v Bowen*, 837 F. 2d 135 (3rd Cir. 1988) the claimant was receiving social security disability benefits and was also receiving benefits under the New Jersey workers' compensation system. New Jersey, like Florida, is a "reverse offset" state and thus has the right to offset social security disability benefits. In *Sciarotta* the offset taken by New Jersey did not reduce the total payments to the claimant below the eighty percent social security cap. The court held that to the extent that the state offset did not reduce total benefits to eighty percent of the ACE, then the Social Security Administration must reduce the benefits to that cap. In *Sciarotta* the court notes that Section 424a (Social Security Disability Offset) was enacted because Congress was concerned that otherwise injured workers would receive duplicate benefits under both the federal disability system and the state workers' compensation system. The eighty percent cap was, thus, intended to eliminate that duplication. In *Sciarotta*, because the state of New Jersey did not take an offset which limited the combined benefits to the eighty percent cap, the Social Security Administration was mandated to reduce the social security disability benefit so that the combined benefits did not exceed eighty percent of the claimant's ACE.

Clearly, if the employer/carrier, or in appropriate cases, the Division of Workers' Compensation, is not allowed to recalculate the initial offset to bring the combined benefits in compliance with the eighty percent cap, then the Social Security Administration has the obligation to do so. See *Merz v Secretary of Health and Human Services*, 969 F.2d 201 (6th Cir. 1992); see also 42 U.S.C. s. 423(a). Further, allowing the employer/carrier to recalculate the offset prevents the combined benefits from exceeding the eighty percent cap, and thus fulfills the legislative intent of avoiding duplication of benefits to an injured worker. Also, in Florida, an injured worker who receives combined benefits of up to eighty percent of the ACE or AWW, and in addition receives cost of living adjustments from the Social Security Administration is protected against inflation.

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 eighty percent of the ACE or the AWW, whichever is higher. Also in holding that McWilliams is entitled to receive such supplemental benefits that exceed the eighty percent cap, and that the employer/carrier cannot recalculate the offset, the First District Court of Appeal did not properly consider or apply Section 440.15(9), Florida Statutes (1985). 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's workers' compensation should be limited to eighty percent of his ACE or AWW whichever is higher.

CONCLUSION

It is the position of the employer/carrier that it was an error to permit McWilliams to receive full supplemental benefits that exceeded the eighty percent cap as provided by Section 440.15(9), Florida Statutes (1985) and by limiting the offset amount to the initial social security disability benefit received by McWilliams (PIA or family max). Accordingly, the decision below should be reversed and remanded for recalculation of the social security offset with instructions that the combined benefits shall not exceed eighty percent of the AWW or the ACE, whichever is higher.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioners' Initial Brief on the Merits in the Americana Dutch Hotel, et al., v Johnny McWilliams case has been duly furnished by U.S. Mail this ____ day of January, 2000, to William J. McCabe, Esquire, attorney for the Respondent, at 1450 State Road 434, West, Suite 200, Longwood, FL 32750

_____

HERBERT A. LANGSTON, JR.,
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