SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AMERICANA DUTCH HOTEL,
et al.,

Petitioners,

vs.

JOHNNY McWILLIAMS,

Respondent.

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

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

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ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE LOWER COURT ORDER WHICH AWARDED THE INJURED WORKERS INDEMNITY AND SUPPLEMENTAL BENEFITS WITHOUT CONSIDERATION OF THE LIMITATIONS SET FORTH IN SECTION 440.15(9), FLORIDA STATUTES (1985).

The Respondent contends that the argument raised by the Employer/Carrier was not raised below. However, the very argument that was raised below was the correct computation of the offset and whether permanent and total supplemental benefits could be included in the offset by the Employer/Carrier. It was the Employer/Carrier's belief that this issue would be resolved in City of Clearwater vs. Acker, 24 FLW S567 (Fla. 1999). The question certified to this Court by the First District Court of Appeal was:

> Where an employer takes a workers compensation offset under Section 440.20(15), Florida Statutes (1985), and initially includes supplemental benefits paid under Section 440.15(1)(e)(1), Florida Statutes (1985), is the employer entitled to recalculate the offset based on the yearly 5% increase in supplemental benefits?

This Honorable Court considered this certified question in Acker, and at the same time, in City of Clearwater v. Hahn, 24 FLW S567 (Fla. 1999) and City of Clearwater v. Rowe, 24 FLW S567 (Fla. 1999). In these three cases, Acker, Hahn, and Rowe, the Court determined that permanent total supplemental benefits would not be included in the 100% cap found in Section 440.20(15), Florida Statutes (1985). However, the Court in Rowe, went on to say:

> Nothing in this opinion should be read to change the workers' compensation offset under Section 440.15(9), Florida Statutes (1985).

City of Clearwater v. Rowe, 24 FLW @ S569. Thus, the Court, in Acker and its related cases of Hahn and Rowe, addresses the issue of whether permanent total supplemental benefits would be subject to the 100% cap under Section 440.20(15), but declined to address the issue of whether permanent total supplemental benefits could be offset under Section 440.15(9), Florida Statutes (1985).

Thus, although this Court answered the question of whether the Employer/Carrier could recalculate its offset annually to include permanent and total supplemental benefits under the 100% cap of Section 440.20(15), the Court declined to address the question of whether the Employer/Carrier could recalculate its offset annually to include permanent and total supplemental benefits under Section 440.15(9). It is this latter question, left unresolved by Acker, Hahn, and Rowe that is being addressed by the Employer/Carrier in McWilliams.

Respondent has taken the position, in reliance on Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996), that the Employer/Carrier's offset can never be more than the PIA received by a claimant from Social Security. When a claimant is eligible for Social Security disability, he will receive monthly benefits and, in addition, will receive cost of living adjustments (COLA's) designed to offset inflation. These COLA's are not subject to offset. A permanently and totally disabled injured worker will receive from the Employer/Carrier weekly benefits plus a 5% increase each year (supplemental benefits) designed to offset inflation. The Respondent argues that to allow the Employer/Carrier to recalculate the offset yearly to include supplemental benefits, would allow the Employer/Carrier to take an offset greater than would have otherwise been allowed by Social Security and would defeat the purpose of the supplementals – to offset inflation. The Respondent is incorrect in both instances.

Under 42 U.S.C. s.424 (a), the combination of Social Security disability benefits and state workers' compensation benefits cannot exceed 80% of the claimant's ACE. To the extent these payments exceed this amount, the Social Security Administration takes an offset. The federal courts have recognized that the purpose of this offset is to avoid duplication of workers' compensation and Social Security disability benefits. Sciarotta v. Bowen, 837 F. 2d 135 (3rd Cir. 1988); Merz v. Secretary of Health and Human Services, 969 F.2d 201 (6th Cir. 1992).

Under 440.15(9), Florida Statutes (1985), the Employer/Carrier can offset Social Security benefits to the extent that the combined workers' compensation and Social Security disability benefits exceeds 80% of the AWW. This Section does limit this offset as follows:

> 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 been reduced under 42 U.S.C. s.424(a)…

In order to give effect to this limiting language, the Employer/Carrier uses the greater of 80% of the ACE or 80% of the AWW. By using the greater of the ACE or AWW, the Employer/Carrier limits its offset to the same extent as that which Social Security can take.

For example, in McWilliams:

Compensation Rate	$207.99		$207.99
1998 Supps	$135.19		$135.19
PIA	$125.98		$125.98
Total Weekly Benefits	$469.16		$469.16
80% of the AWW	-249.58	80% of ACE	-258.42
Offset	$219.58		$210.74

The offset allowed by the Employer/Carrier using 80% of the AWW, in the above example, is greater than the offset available to Social Security using 80% of the ACE. Thus, the Employer/Carrier's offset would be limited to $210.74, the extent to which Social Security could offset.

In Hunt, the Court failed to recognize that the limiting language of 440.15(9) Florida Statutes was already given effect by use of 80% of the ACE or 80% of the AWW, whichever was greater. The Hunt Court held that the limiting language of Section 440.15(9) restricted the Employer/Carrier's offset to the PIA amount paid to the claimant. The Hunt Court limited the Employer/Carrier to the actual amount of offset taken by the Social Security Administration, rather than to the extent to which Social Security could offset.

This ruling results in the claimant receiving more than 80% of his AWW or ACE in combined benefits and allows a duplication of benefits that the offset is designed to prevent. It also defeats the purpose of shifting the burden of disability payments from the Employer/Carrier to the federal government. While it is true that Social Security cannot take an offset for COLA's, Social Security can and will offset cost of living increases paid by the state workers' compensation to the claimant. In Merz v. Secretary of Health and Human Services, 969 F.2d 201 (6th Cir. 1992), the claimant's benefits were being reduced by an offset taken by the State of Ohio. However, even after this offset, Merz's combined workers' compensation and Social Security were greater than 80% of his ACE. The Social Security Administration then took an offset to reduce the combined benefits to 80% of his ACE. The 6th Circuit affirmed the District Court's finding that this additional offset, by Social Security, was appropriate. The Circuit Court noted that

the purpose of the offset was to avoid duplication of benefits and to deny Social Security the offset, if not fully utilized by the state, would allow duplication of benefits in contravention of congressional intent.

COLA's are designed to protect the claimant from inflation. Supplemental benefits, paid by the Employer/Carrier, serve the same purpose. To refuse to allow the Employer/Carrier to offset supplemental benefits, once the combined benefits exceed 80% of the ACE, would be to allow duplication of benefits. If the Employer/Carrier is limited to the PIA amount and not the full offset amount available to the Social Security Administration, Social Security will take the remaining offset. The end result will be that the claimant will receive only 80% of the ACE in combined benefits. The Employer/Carrier will bear a greater portion of the burden of providing disability benefits and Social Security will get advantage of the offset.

In the example set forth in 20 CFR Sec. 404.408(k), the Social Security Administration recalculated a claimant's benefits to include a subsequent cost of living increase paid by the state. Clearly, Florida's permanent and total disability supplemental benefits would be subject to an offset under this example.

Although it is the Employer/Carrier's position that it should be able to offset to the full extent that Social Security could offset, alternatively at the very least they should be allowed to offset twice the PIA amount. This is the amount by which the claimant's benefits would be reduced if the Employer/Carrier was limited to an offset equaling the PIA. The Employer/Carrier would take an offset equaling the PIA and the Social Security Administration would take an offset equal to the PIA. Rather than allowing Social Security to take advantage of this offset, the Employer/Carrier should be allowed, at the very least, to take twice the PIA amount.

CONCLUSION

It is the position of the Petitioner that an Employer/Carrier is entitled to an offset of Social Security disability benefits to the extent that the combination of workers' compensation and Social Security disability exceeds 80% of the claimant's average weekly wage. However, an Employer/Carrier cannot reduce these benefits to a greater extent than the benefits would be reduced under 42 U.S.C. s.424(a). Under 42 U.S.C. s. 424(a), the Social Security Administration can reduce the claimant's benefits to the extent that the combined Social Security disability and workers' compensation exceeds 80% of a claimant's ACE.

Thus, the Employer/Carrier may reduce a claimant's workers' compensation benefits to the extent that the combined benefits exceeds the greater of 80% of the AWW or 80% of the ACE. There is no prohibition against inclusion of permanent and total supplemental benefits in this offset. In fact, because the cost of living adjustments under Social Security are not subject to offset, the permanent and total

disability supplemental benefits should be subject to offset to avoid duplication of benefits.

The Petitioner respectfully requests this Court to reverse the opinion of the District Court of Appeal and remand with a finding that the Employer/Carrier may offset workers' compensation benefits to the extent that the Social Security Administration can take an offset and that permanent and total supplemental benefits are includable in that offset to avoid duplication of benefits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioners' Reply Brief on the Merits in the Americana Dutch Hotel, et al., v Johnny McWilliams case has been duly furnished by U.S. Mail this 17th day of March, 2000, to William J. McCabe, Esquire, attorney for the Respondent, at 1450 State Road 434, West, Suite 200, Longwood, FL 32750

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