SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DEPARTMENT OF TRANSPORTATION and CRAWFORD & COMPANY,	)	
Petitioners,	)	Case No.: 95,925
vs.	)	
JIMMY HOGAN,	)	
Respondent.	)	

PETITIONERS, DEPARTMENT OF TRANSPORTATION AND CRAWFORD & COMPANY REPLY BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed with 14 point New Times Roman.

STATEMENT OF THE CASE AND FACTS

The Petitioners, Department of Transportation and Crawford & Company, rely on the Statement of the Case and Facts contained in their initial brief filed with the court.

ISSUE ON APPEAL

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?

ARGUMENT

AN EMPLOYER WHO TAKES A WORKERS' COMPENSATION OFFSET UNDER SECTION 440.20(15), FLORIDA STATUTES (1985), AND INITIALLY INCLUDES SUPPLEMENTAL BENEFITS PAID UNDER SECTION 440.15(1)(e)(1), FLORIDA STATUTES (1985), IS ENTITLED TO RECALCULATE THE OFFSET BASED ON THE YEARLY 5% INCREASE IN SUPPLEMENTAL BENEFITS

Mr. Hogan, as he did below, relies on the First District's decision in Hunt v. D.M. Stratton Builders, 677 So. 2d 64 (Fla. 1st DCA 1996), to support his claim that yearly increases in PT supplemental benefits may not be included in the offset calculation. As he did below, he also continues to claim that the Hunt decision has addressed the issue before this Court, ruled in his favor, and controls the outcome of this case. As explained in the Petitioners' initial brief, however, the portion of the Hunt decision in which the court stated that the law did not contemplate a recalculation of the workers' compensation offset based on yearly increases in the state supplemental benefits was simply dicta. In other words, that statement was not part of or necessary to the court's opinion. It was merely an expression in the court's opinion which went beyond the facts before the court and "therefore are individual views of [the] author of [the] opinion and not binding in subsequent cases." Black's Law Dictionary, 408 (5th ed. 1979). See also Crabtree v. Aetna Cas. & Surety Co., 438 So. 2d 102, 106 (Fla. 1st DCA 1983). Moreover, the Claimant's attempt to avoid the effect of Escambia Co. Sheriff's Dept. v. Grice, 692

So. 2d 896 (Fla. 1987), by relying on Hunt is confusing at best. First, there is no conflict between Grice and Hunt. Second, even if there was, the decision of this Court would prevail. Hoffman v. Jones, 280 So. 2d 431, 440 (Fla. 1973) (district court of appeal is without power to overrule Supreme Court precedent).

Additionally, not cited in the Hunt decision is a decision from the former Industrial Relations Commission which specifically held that the 5% supplemental benefit must be included within the 80% cap of § 440.15(9). In Dept. of Commerce v. Loggins, IRC Order 2-3137 (April 13, 1997) [10 FCR 212], the claimant became permanently totally disabled as a result of a compensable accident, entitling him to the maximum compensation rate of $80.00 per week. He also began receiving social security disability benefits in the amount of $266.80 per month. These combined benefits were sufficient to trigger the 80% cap of § 440.15(10) [§ 440.15(9)]. Although the judge of industrial claims reduced the claimant's compensation rate so that the total of his workers' compensation and social security disability benefits would not exceed 80% of his AWW, the judge ruled that the claimant was entitled to his 5% supplemental benefit over and above and notwithstanding the 80% limitation. 10 FCR at 212.

On appeal, the claimant contended that § 440.15(1)(e) "specifically provides that the supplemental benefits provision is subject to the maximum weekly

compensation rate" but is "silent as to the limitation imposed by § 440.15(10)(a)" [§ 440.15(9)]. 10 FCR at 212-213. The Industrial Relations Commission rejected that argument and reversed. Writing for the Commission, Justice Leander Shaw observed:

> We do not find the two sections [§ 440.15(1)(e) and § 40.15(9)] to be repugnant, ambiguous or incompatible. Section 440.15(10) [§ 440.15(9)], 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.

(emphasis added), 10 FCR at 213. There was no indication from the Commission that consideration of the 5% supplemental benefits should be limited to those being paid at the time of the "initial calculation." See also Great Atlantic & Pacific Tea Company v. Wood, 380 So. 2d 558 (Fla. 1st DCA 1980) (specifically approving the Industrial Relations Commission's holding in Loggins).

Next, even though Mr. Hogan claims that both §§ 440.15(9) and 440.20(15) inquiries are relevant to the issue in this case - the amount of PTD supplemental benefits to be included for offset calculations - he rather curiously fails to acknowledge, let alone address, the hypothetical contained in the Employer/Carrier's initial brief regarding the Social Security Administration's right to reduce social security disability benefits when there has been an increase in

workers' compensation benefits due to cost of living increases. This reduction can be made even in those situations when a state is entitled to reduce workers' compensation benefits based on receipt of social security disability benefits. Merz v. Secretary of Health & Human Services, 969 F. 2d 201 (6th Cir. 1992). Perhaps Mr. Hogan does not address this point because he recognizes that the SSA's position is directly opposite to the position he advocates. This Court likewise should rule that an employer/carrier may increase the offset yearly based on a claimant's receipt of increased supplemental benefits once the 100% AWW cap has been reached.

In order to uphold the First District's ruling in this matter, the Claimant also devotes a portion of his brief to the proposition that he will be deprived of benefits if the JCC's ruling is reinstated. While this argument has some superficial attractiveness, it ignores the fact that a claimant such as Mr. Hogan is receiving far more in disability-related benefits than is an injured employee who only receives workers' compensation benefits. (100% of AWW versus 66 2/3% of AWW). He also makes no mention of the fact that the workers' compensation and in-line-of-duty pension benefits he is receiving are non-taxable. This tax free status imparts a considerable benefit to the Claimant, one not shared by non-disabled employees. To then allow the Claimant to receive over and above 100% of his average weekly

wage amounts to an unjustifiable windfall, one which thwarts the very goal of Chapter 440 -- to encourage injured workers to return to work.

Finally, Mr. Hogan contends that the only reasonable interpretation that can be given to the various statutes involved in this case is the one that he advances in his brief. In particular, he claims that the legislature obviously intended to permit receipt of benefits in excess of 100% of AWW in cases like his. What the Claimant fails to acknowledge, however, is that during the 1998 session of the Florida Legislature two bills were introduced which would have excluded all permanent and total supplemental benefits from the 100% cap. Neither Fla. H.B. 4781 nor Fla. C.S. for S.B. 1092 were enacted into law. This in and of itself gives great credence to the argument that the legislature approved capping benefits at 100% of AWW, and also approved including yearly increases in PT supplemental benefits in that cap. Indeed, had the legislature wished to change the law as interpreted by this Court in Grice and other cases, it could have done so. It did not, and it is respectfully suggested that any change in the construction and interpretation of the cap be left up to the legislature. See, e.g., White v. Johnson, 59 So. 2d 532 (Fla. 1952).

As noted in the Petitioners' initial brief, this Court has implicitly ruled that yearly permanent total supplemental benefits can be included in the calculation of

the pension offset. Escambia Co. Sheriff's Dept. v. Grice. This Court also has ruled in Grice and Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989), that all collateral benefits, whether funded by the employer alone or in part by employee contributions, are subject to the offset when the injured worker receives in excess of 100% of his average weekly wage. This Court should take this opportunity to (1) reaffirm the principle that an injured employee may not receive benefits from his employer and other collateral sources which exceed 100% of his average weekly wage; and (2) explicitly rule that a yearly recalculation of the offset due to receipt of PT supplemental benefits is permitted to effectuate that result. The decision of the First District should be quashed, and the certified question answered in the affirmative.

CONCLUSION

The First District's determination that an employer is not entitled to recalculate a workers' compensation offset based on the yearly 5% increase in supplemental benefits was error in light of the long standing rule that a claimant is not entitled to receive more than 100% of his average weekly wage in combined benefits from workers' compensation and disability pensions. By calculating the offset the Employer/ Carrier is allowed to include PT supplementals, as the Employer/Carrier did in this case, the Claimant will not be receiving in excess of that cap. This Court should quash the First District's opinion in this case, answer

the certified question to allow a yearly recalculation of the offset, and require that the JCC's order in this matter be reversed.

Respectfully submitted,

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

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