IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DEPARTMENT OF TRANSPORTATION and
CRAWFORD & COMPANY,
Petitioners

v. CASE NO. 95,925

JIMMY HOGAN
Respondent
_____/

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioners' Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The general rule is that there should be not offset or deduction of a claimant's workers' compensation benefits without express statutory authority. The holding in *Escambia County Sheriff's Dept. v. Grice,* 692. So. 2d 896 (Fla. 1997) that section 440.20 places a cap of 100% of a claimant's average weekly wage should be limited to disability benefits actually paid by an employer. It should not be expanded to include social security disability benefits.

There are two specific statutes governing the right of offset for social security disability benefits and permanent total disability supplemental benefits. Neither of these authorize an offset for the yearly increases in supplemental benefits after the initial deduction has been calculated and the employer begins making payments. Furthermore, the purpose of the annual increases in the supplemental benefits is to protect injured workers from the harsh effects of inflation. This purpose would obviously be thwarted if this Court were to accept Appellant's position and forever freeze the total amount of all benefits an injured worker is entitled to at 100% of his or her average weekly wage at the time of the accident.

I. WHETHER 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

The answer to this question is an emphatic no. The holdings in *Escambia County Sheriff's Dept. v. Grice,* 692. So. 2d 896 (Fla. 1997) and *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989) do not place a cap on the total amount of benefits an injured worker is entitled to collect. Rather, they place a cap on the total amount of disability benefits provided by the employer. Therefore, the cap of 100% of a claimant's average weekly wage does not apply to claimants such as Mr. Hogan who are receiving social security disability benefits.

The reasoning in *Escambia* and *Barragan* and the cases cited therein is strictly limited to situations where the employer is supplying health insurance or disability benefits to the injured worker other than workers' compensation benefits. In *Brown v. S.S. Kresge Co., Inc.,* 305 So. 2d 191 (Fla. 1974), this Court stated that ordinarily workers' compensation benefits are not to be reduced because of a worker receiving other benefits.

> Section 440. 21, Florida Statutes, provides that: "No agreement by an employee to waive his right to compensation under this chapter shall be valid." This statutory language would appear to preclude any

> implication that fringe benefit group insurance provided by employer for his employees would ipso facto reduce their compensation benefits.
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> In Larson on Workmen's Compensation Law, Volume 3, Section 97.51, pg. 508.205, it is stated:
>
> > "As to private pensions or health and accident insurance, whether provided by the employer, union or the individual's own purchase, there is ordinarily no occasion for reduction of compensation benefits."

305 So. 2d at 194. However, the Court went on to state in dicta that it was "reasonable to conclude that workmen's compensation benefits when combined with *sick leave insurance benefits provided by employer* should not exceed claimant's average weekly wage." *Id.* (emphasis supplied). The Court based this conclusion on I.R.C. Rule 9, which was codified as section 440.20(15), Florida Statutes (1985).

In *Domutz v. Southern Bell Telephone & Telegraph Co.,* 339 So. 2d 636 (Fla. 1976), this Court quashed an IRC order allowing a setoff for pension benefits on the grounds that the pension benefits and workers' compensation benefits combined did not exceed the claimant's average weekly wage. The Court specifically noted that it was "not faced here with a determination of whether pension benefits paid by the employer should be credited against workmen's compensation benefits if, in fact, the total benefits awarded exceeded the average weekly wage." 339 So. 2d at 637.

This Court in *Barragan v. City of Miami,* 545 So.2d 252 (Fla. 1989), reiterated the general rule that an employer could not deduct health insurance benefits from

workers' compensation benefits.

> In *Jewel Tea Co. v. Florida Industrial Commission*, 235 So. 2d 289 (Fla. 1969), the Court held that this statute prevented a private employer from deducting group health insurance benefits from an injured claimant's workers' compensation benefits. In pointing out that the employer could not accomplish the same result by deducting the compensation payments from the insurance benefits, the Court said:
>
> > Regardless of whether you say the workmen's compensation benefits reduce the group insurance benefits or visa [sic] versa, the result violates the Statute. Claimant is entitled to workmen's compensation in addition to any benefits under an insurance plan to which he contributed.

545 So. 2d at 254. In *Barragan*, the City had illegally deducted from two police officers' pension disability benefits a sum equal to their workers' compensation benefits. This Court ruled the deputy commissioner could increase the amount of workers' compensation benefits beyond what the police officers were normally entitled to make up for the illegal deductions. The Court in dicta stated: "However, the total benefits from all sources cannot exceed the employee's weekly wage," *citing Domutz* and *Brown*. However, as explained above, neither *Domutz* or *Brown* stand for the proposition that the total benefits cannot exceed the employee's weekly wage. *Domutz* specifically refrained from addressing the issue. *Brown* stated that workers compensation benefits when combined with *sick leave insurance benefits provided by employer* should not exceed a claimant's average weekly wage.

Hence, this Court's decision in *Escambia County Sheriff's Dept. v. Grice*, 692

So.2d 896 (Fla. 1997), was based on a faulty premise. The Court quoted *Barragan* as stating that the "total benefits from all sources cannot exceed the employee's weekly wage." As explained above, this statement was dicta which did not accurately reflect the holdings cited. This Court in *Escambia* further stated that section 440.20(15) should be interpreted so that an injured employee should not receive benefits from his employer and "other collateral resources" which when totaled would exceed 100% of his or her average weekly wage, citing *Brown* as support. However, as explained above, *Brown* limited its reasoning to *sick leave insurance benefits provided by employer.* Hence, section 440.20(15) and the holding in *Escambia* should not apply to benefits not provided by the employer.

Instead, there are two specific statutes which apply when a claimant is receiving supplemental benefits and social security disability benefits. The statute governing supplemental benefits is section 440.15(1)(e), Florida Statutes (1985), which specifically states: "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 s. 440.12(2)."* (emphasis supplied).

Section 440.12(2), Florida Statutes (1985), in pertinent part provides that compensation shall not exceed an amount per week which is:

> (a) Equal to 100 percent of the statewide average weekly wage, determined as hereinafter provided for the year in which the injury occurred; however, the increase to 100% from 66 2/3 percent of the statewide average weekly wage shall apply only to injuries occurring on or after August 1, 1979;

As can be seen, the cap placed on the amount of supplemental benefits is based on the statewide average weekly wage, not the claimant's average weekly wage. This cap is also based solely on a combination of weekly compensation plus supplemental benefits, and does not take into account social security disability or any other type of disability benefits. This statute has a built in adjustment for inflation in that the cap is presumably increased each year when the Department recalculates the statewide average weekly wage.

The offset for social security benefits is governed by a different statute, section 440.15(9), Florida Statutes (1985), which provides:

> (a) 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 80 percent of the employee's average weekly wage. 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). This reduction of compensation benefits is not applicable to any compensation benefits payable for any week subsequent to the week in which the injured worker reaches the age of 62 years.

In *Hunt v. Stratton,* 677 So. 2d 64 (Fla. 1st DCA 1996), the First District Court of Appeal fully explained how this offset provision should be calculated. The first step is to calculate 80% of the average weekly wage and 80% of the weekly average current earnings and use the greater of the two. The second step is calculate the workers' compensation benefits (including the supplemental benefits) with the social security disability benefits and determine the difference between that figure and the first figure. The third step is then to calculate whether this difference (referred to as the preliminary offset) exceeds the offset the federal government would be entitled to under 42 U.S.C. § 424(a). Under that section the offset cannot exceed the total of the social security disability benefits. As Mr. Hogan's social security disability benefits alone exceeded 80% of his average weekly wage, Appellant was not obligated to pay any benefits in 1990.

The issue is whether an employer is entitled to an offset for the subsequent 5% yearly increases in supplemental benefits. The Court in *Hunt* held that "[w]hile the existing workers' compensation supplemental benefit is considered in the initial calculation of the workers' compensation offset, the law does not contemplate a recalculation of the offset based upon any increases thereafter." 677 So. 2d at 67.

Appellant argues that the statute should be construed so as to require an offset based on subsequent increases. However, such a construction would violate the

general principle that no offset should be allowed absent express statutory authority. *Brown v. S.S. Kresge Co., Inc.,* Larson on Workmen's Compensation Law, Volume 3, Section 97.51, pg. 508.205. Hence, this Court should construe section 440.15(9) so that the offset provision does not apply to the yearly increases in supplemental benefits after the original offset is calculated.

Furthermore, as the First District Court of Appeal has explained, the purpose of future supplemental benefits is to compensate for future inflation.

> The purpose of permanent total disability supplemental benefits is clear. The legislature intended to partially offset the effect of inflation by requiring that Employers or the Workers' Compensation Administration Trust Fund, depending on the date of accident, increase benefits being paid by 5% times the number of years since the accident. *See Department of Labor and Employment Security, Div. of Workers' Comp. v. Vaughan*, 411 So.2d 294, 295 (Fla. 1st DCA 1982). In *Shipp v. State Workers' Comp. Trust Fund*, 481 So.2d 76, 79 (Fla. 1st DCA 1986), we stated:
>
> > [T]he purpose of supplemental benefits ... is to protect recipients of periodic benefits from the long-term effects of inflation that reduce the value of a fixed amount of benefits.... Supplemental benefits are intended as an incentive to continue periodic payments and avoid the potential for inflation to diminish the value of such payments.
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> We conclude that recalculating the offset every year, so as to include the increase in supplemental benefits, frustrates the intended purpose of supplemental benefits.

Acker v.City of Clearwater, 23 Fla. L. Weekly D1970, 1971 (Fla. 1st DCA, August 17, 1998).

In conclusion, there are several specific statutory provisions which authorize an employer to deduct or offset the amount of workers' compensation benefits it is required to pay. However, none of these apply to Mr. Hogan's situation. Given these express statutory restrictions insuring that an injured employee is not going to get a windfall and that an employer is not going to pay more than it would otherwise, there is no need for this Court to create an additional restriction. Given the general principles that an offset should not generally be allowed and that the five percent yearly increases in supplemental benefits are to protect recipients from inflation, this Court should adopt the First District Court of Appeal's reasoning and decisions in *Hunt* and *Acker*.

CONCLUSION

As Appellant is not providing benefits in excess of 100% of Mr. Hogan's average weekly wage and as there is no specific statutory authority for taking an offset on the yearly increases in supplemental benefits, this Court should affirm the First District Court of Appeal's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail on this ___ day of _____, 1999 to Nancy Lauten, P.O. Box 1438, Tampa, FL 33601.

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Randall O. Reder