SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ERNIE HAIRE FORD and HUMANA WORKERS' COMPENSATION SERVICE	)	
	)	Case No. : 96,152
Petitioners,	)	
vs.	)	
SHERRY CONKLIN,	)	
Respondent.	)	

PETITIONERS, ERNIE HAIRE FORD and HUMANA WORKERS' COMPENSATION SERVICES INITIAL 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

This case originated as an appeal from a workers' compensation order determining that the Employer/Carrier was correctly calculating the social security disability offset and that the offset was correctly restricted to the initial primary insurance benefit amount as permitted by section 440.15(9), Fla. Stat.[1/]

In January, 1991, Ms. Conklin suffered compensable injuries as a result of her employment with Ernie Haire Ford. (V. 1, R. 55) The Employer/Carrier ultimately administratively accepted the Claimant as permanently totally disabled as of July 18, 1996. (V. 1, R. 6) Ms. Conklin was also awarded social security disability benefits effective August, 1992. (V. 1, R. 36-37) The Claimant's average weekly wage was stipulated at $188.72, with a corresponding compensation rate of $125.82. As such, the 5% annual permanent supplemental benefit equaled $6.29. (V. 1, R. 4, 44, 142, 164) In addition, the Claimant's average current earnings (ACE) with respect to the social security system was

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[1] For ease of reference herein, the Petitioners, Ernie Haire Ford and Humana Workers' Compensation Services, will be referred to by name or as the Employer/Carrier. The Respondent, Sherry Conklin, will be referred to by name or as the Claimant.

All references to the record on appeal will be referred to as (V. R.) followed by the appropriate volume and page number references to the record on appeal.

stipulated to be $137.30 per week, with the primary insurance amount (PIA) being $92.56 per week. (V. 1, R. 62-63)

In May, 1994, the Employer/Carrier began to reduce the payment of workers' compensation benefits due to the Claimant's receipt of social security benefits. (V. 1, R. 39-41) The initial offset amount was $67.40. (V. 1, R. 44) Ms. Conklin agreed that the Employer/Carrier was entitled to an offset for the SSD benefits at that time. (V. 1, R. 43-45) In January, 1998, the Employer/Carrier filed a notice of action/change which indicated a "1998 permanent total supplemental rate of $44.04; however, due to 1998 social security offset of $92.56, permanent total supplemental will not be due and the permanent total rate of $125.82/ wk will reduce to $77.30/wk." (V. 1, R. 52-53) It was the Employer/Carrier's position that it could increase the yearly offset until it reached the maximum offset amount allowable to the federal government. In this case, an amount equal to the Claimant's primary insurance amount of $92.56.

Ms. Conklin disagreed, and filed a petition for benefits seeking an increase of PTD/PT supplemental benefits from January 1, 1998 and continuing. It was her position that the Employer/Carrier was taking an incorrect social security offset. (V. 1, R. 55-56) While acknowledging that PT supplemental benefits could be included in the initial offset calculation, it was the Claimant's position that under

the applicable First District Court of Appeal decisions an annual recalculation of the offset after the initial offset had been taken was prohibited. (V. 1, R. 156)

An expedited hearing on the merits of the claim was held in June, 1998. The Judge of Compensation Claims ruled that the Employer/Carrier was correctly determining the social security offset. (V. 1, R. 14-16) His reasoning was that:

> 13. Since the Social Security Administration may increase the reduction of Social Security Disability benefits based upon an increase in the workers' compensation benefits it is only logical, based upon Section 440.15(9), Florida Statutes that an employer/carrier may similarly increase their offset for Social Security Disability benefits yearly, based upon the claimant's receipt of increased supplemental benefits until such time as the eighty percent cap is reached or the offset would reduce the injured workers' benefits an amount greater than the initial PIA (primary insurance amount). It is also significant that in applying the reduction in this manner the injured worker continues to receive the benefit of cost of living increases and at the same time merely prevents a double cost of living allowance increase.
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> 14. In ***St. Remi*** (supra) the Appellate Court appropriately pointed out "in the circumstances of that case" that:
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> > *"Once the initial calculation for Social Security offset has been performed, the offset need not* ***be recalculated annually*** *(emphasis supplied). The term "need not" has applied in both Hunt vs. Stratton, (supra) and Cruse Construction vs. St. Remi (supra) established that the calculation shown in those cases that the maximum allowable offset had been reached and accordingly there was* ***"no need"*** *to recalculate the benefits thereafter on an annual basis." (Emphasis supplied)*
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> In the case at bar, mathematical calculation for the permanent total and permanent total supplemental benefits would establish a total availability of One

> Hundred Eleven Dollars and Forty Four Cents ($111.44) as an available offset. However, since said sum exceeds the stipulated primary insurance amount (PIA) under the Federal scheme, the claimant's reduction is thereby limited to that figure of Ninety Two Dollars and Fifty Six Cents ($92.56). Accordingly, the employee/ claimant's entitlement to permanent total and permanent total supplemental benefits for calendar year 1998, is appropriately reduced to Seventy Seven Dollars and Thirty Cents ($77.30) per week. The cap in the offset being restricted to the PIA (primary insurance amount) would otherwise preclude the employer/ carrier [from] taking what might otherwise be classified as the "total offset available" since by operation of statute the employer/carrier is restricted to taking no offset greater than that which could be taken by the Federal Government under the Social Security scheme which specifically provides that Social Security Disability benefits cannot be reduced below zero.
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> 15. The employer/carrier in the case before your undersigned has restricted their offset to the initial primary insurance benefit amounts against which no further increases in the offset may be applied with that cap having been reached under the provisions of Section 440.15(9), Florida Statutes and said offset may continue to be applied until the employee/claimant reached chronologic age sixty-two.

(V. 1, R. 14-15)

The Claimant appealed the JCC's order to the First District Court of Appeal. The First District reversed the JCC's ruling that the Employer/Carrier could recalculate the pension offset based on the yearly increase in permanent total supplemental benefits. The court concluded that recalculating the offset every year, so as to include the increase in supplemental benefits, frustrated the intended

purpose of supplemental benefits. Conklin v. Ernie Haire Ford, 24 Fla. L. Weekly D1679 (Fla. 1st DCA July 15, 1999). Relying in prior decisions of the court, the First District reversed the order. Acker v. City of Clearwater, 23 Fla. L. Weekly D1970, 1971 (Fla. 1st DCA Aug. 17, 1998).

Because this Court's decision in Escambia Co. Sheriff's Dept. v. Grice, 692 So. 2d 896 (Fla. 1997), appeared to include increases in supplemental benefits in the yearly calculation of the offset, the First District certified the following question to this Court:

> WHERE AN EMPLOYER TAKES A WORKERS' COMPENSATION OFFSET UNDER SECTION 440.20(15), FLORIDA STATUTES (1980), 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?

24 Fla. L. Weekly at D1680. The Employer/Carrier then timely filed its notice to invoke the discretionary jurisdiction of this 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?

SUMMARY OF ARGUMENT

Pursuant to Florida's longstanding policy, weekly workers' compensation benefits payable to a claimant, when combined with collateral benefits, such as federal social security disability benefits, cannot exceed 80% of the claimant's average weekly wage. Supplemental benefits provided pursuant to § 440.15(1)(e)1, Fla. Stat., are considered compensation payments, and must be considered part of a claimant's total compensation for purposes of calculating an offset. The offset is mandatory when the combined benefits from all sources, including supplemental benefits, exceed 80% of the worker's average weekly wage. In this case, the Employer/Carrier reduced the Claimant's total benefits from social security and workers' compensation benefits by the amount they could be reduced under 42 U.S.C. 424(a). The Judge of Compensation Claims correctly concluded that the offset being employed was proper. The court concluded that recalculating the offset as the Carrier did, so as to include the increase in supplemental benefits, was in accord with the very purpose of those benefits.

The First District reversed the JCC's ruling. The court concluded that recalculating the offset every year, so as to include the increase in supplemental benefits, frustrated the very purpose of those benefits. Under the First District's ruling, however, the Claimant's combined benefits would exceed the maximum amount allowable. That result thwarts the very purpose of the Florida's

longstanding policy and purpose of the offset, which is to prevent an injured worker from receiving windfall benefits, and being financially better off disabled than if she returned to work. Such a result should not be sanctioned by the court. This Court should answer the question certified in the affirmative and permit an Employer/Carrier to recalculate the workers' compensation offset based on the yearly 5% increase in supplemental benefits. This Court should then quash the decision of the First District and require that the order of the Judge of Compensation Claims be affirmed.

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

The Claimant was accepted permanently totally disabled in July, 1996, and since then, the Employer/Carrier has included the yearly increases in permanent total supplemental benefits in calculating an offset to the extent that the Claimant's receipt of social security disability benefits and workers' compensation benefits exceeded 80% of her primary insurance amount. The certified question in this case is whether the Claimant is entitled to receive yearly permanent total disability supplemental benefits even though she will ultimately receive in excess of her PIA. The Judge of Compensation Claims ruled that the offset the Employer/Carrier was taking was proper, and that the Claimant was not entitled to the benefits claimed. The First District reversed and ruled that the offset could not be recalculated every year so as to include the increase in supplemental benefits. Conklin v. Ernie Haire

Ford, 24 Fla. L. Weekly D1679 (Fla. 1st DCA July 15, 1999).[2/] That ruling should be rejected by this Court.

While it is true that a primary goal of the workers' compensation act has always been to prevent injured workers from becoming a burden on society, it is equally true that the act has always intended to allow a portion of the economic loss caused by the compensable injury to fall on the injured worker himself. As this Court observed in City of Hialeah v. Warner, 128 So. 2d 611 (Fla. 1961):

> The Workmen's Compensation Act is not a general health insurance and does not purport to place a claimant in the same position he was prior to his injury, it only endeavors to have industry to compensate to some extent for a shown loss of wage-earning capacity....

128 So. 2d at 614 (emphasis added).

One commentator has expressed the rationale underlying this policy as follows:

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[2] The question certified by the First District has also been certified in Acker v. City of Clearwater, 23 Fla. L. Weekly D1970 (Fla. 1st DCA Aug. 17, 1998); Hahn v. City of Clearwater, 23 Fla. L. Weekly D2120 (Fla. 1st DCA Sept. 9, 1998); Rowe v. City of Clearwater, 23 Fla. L. Weekly D2120 (Fla. 1st DCA Sept. 9, 1998); Dept. of Labor & Employment Security v. Boise Cascades Corp., 23 Fla. L. Weekly D2124 (Fla. 1st DCA Sept. 11, 1998); Alderman v. Florida Plastering, 23 Fla. L. Weekly D2197 (Fla. 1st DCA Sept. 23, 1998); Dept. of Transportation v. Hogan, 24 Fla. L. Weekly D1679 (Fla. 1st DCA June 22, 1999); HRS District II v. Pickard, 24 Fla. L. Weekly D1749 (Fla. 1st DCA July 19, 1999). Those cases are currently pending before this Court.

> That general principle is that the compensation payments are not intended as full reimbursement to the injured man of the wages salary lost by the industrial accident. The Preface to the Florida Act, written by the Florida Industrial Commission some years ago, states the general principle excellently:
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> 'It has been erroneously said that the object of the compensation law was to place on industry and society the loss occasioned by accidental injuries and deaths. This is only partly true. In every instance the employee bears part of the loss, as the Compensation Law provides that the injured employee shall be paid compensation at the rate of 60% of his average weekly wages during his disability, the rate of such compensation not to exceed $42.00 per week. That a part of the loss should fall on the employee is considered fundamental in Compensation Law, so that no employee shall lose one of the primary incentives to avoid accidental injury.'
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> And, it might well be added, for it is surely implied, so that no employee shall lose one of the primary incentives toward restoration after injury to full function as a contributing member of society. (Emphasis added).

Alpert, Barker, Green & Rodems, Fla. Practice Handbook - Workers' Compensation (1995 ed.), § 1-5.

Therefore, given the goal of Chapter 440 to encourage injured workers to return to work, it makes little sense to ignore the existence of other benefits to which the injured worker might become entitled following a compensable accident. In his treatise of workers' compensation, Professor Arthur Larson recognized the

significant problem posed by the interplay between such overlapping acts of social legislation:

> Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a worker undergoes a period of wage loss due to all three conditions, it does not follow that he or she should receive three sets of benefits simultaneously and thereby recover more than his or her actual wage. The worker is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit. (Emphasis added).

Larson's Workers' Compensation Law, § 97.10, p. 18-9.

In keeping with these principles, it has long been the rule in Florida that when an injured employee "receives the equivalent of his full wages from whatever employer source that should be the limit of compensation to which he is entitled." Brown v. S.S. Kresge Co., 305 So. 2d 191, 194 (Fla. 1974). This rule is premised on § 440.20(14), Fla. Stat. (1995)[3/] (codification of IRC Rule 9), which provides:

> (14) When an employee is injured and the employer pays his full wages or any part thereof during the period of disability, or pays medical expenses for such employee, and the case is contested by the carrier or the carrier and employer and thereafter the carrier, either voluntarily or pursuant to an award, makes a payment of compensation or medical benefits, the employer

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[3] previously numbered § 440.20(15).

> shall be entitled to reimbursement to the extent of the compensation paid or awarded, plus medical benefits, if any, out of the first proceeds paid by the carrier in compliance with such voluntary payment or award, provided the employer furnishes satisfactory proof to the judge of compensation claims of such payment of compensation and medical benefits. Any payment by the employer over and above compensation paid or awarded and medical benefits, pursuant to subsection (13), shall be considered a gratuity.

Accordingly, the combination of items such as workers' compensation benefits and sick leave or pension benefits may not exceed the employee's average weekly wage. Id. See also Domutz v. Southern Bell Telephone & Telegraph Co., 339 So. 2d 636 (Fla. 1976); City of Miami v. Smith, 602 So. 2d 542, 543 (Fla. 1st DCA 1991).

In Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989), the court was faced with a City of Miami ordinance which provided for an offset of pension benefits against workers' compensation benefits. The claimants were police officers who suffered work related injuries, and had been granted workers' compensation benefits and disability pension benefits. The City, in conformity with its ordinance, reduced the disability pension benefits payable to the claimants by the amount of workers' compensation benefits available. The court ultimately invalidated the City ordinance finding that it was contrary to state law, § 440.21, Fla. Stat., which stated:

> 440.21 Invalid agreements; penalty.-

> (1) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.083.
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> (2) No agreement by an employee to waive his right to compensation under this chapter shall be valid.

The court, recognizing that total benefits from all sources could not exceed an employee's weekly wage, then ruled that:

> The employer may not offset workers' compensation payments against an employee's pension benefits except to the extent that the total of the two exceeds the employee's average monthly wage.

545 So. 2d at 255.

These principles were reiterated in Escambia Co. Sheriff's Dept. v. Grice, 692 So. 2d 896 (Fla. 1997). There, the court held that an injured employee, "except where expressly given such a right by contract, may not receive benefits from his employer and other collateral sources which, when totaled, exceed 100% of his average weekly wage." In other words, once the 100% cap has been reached, "workers' compensation must be reduced pursuant to section 440.20(15), Florida Statutes." Thus, the county was allowed to offset Grice's "workers' compensation benefits to the extent that this total of his workers' compensation, disability

retirement, and social security disability benefits exceed his average weekly wage." 692 So. 2d at 898.

There is no dispute in this case about whether PT disability supplemental benefits are initially includable in the offset. Ms. Conklin has conceded they are, no doubt because she recognizes that supplemental benefits are considered compensation payments within the meaning of § 440.02(6), Fla. Stat. (1985). See, e.g., Special Disability Fund v. Stephens, Lynn, Chernay & Klein, 595 So. 2d 206 (Fla. 1st DCA 1992) (supplemental permanent total disability benefits clearly constitute compensation); Div. of Workers' Compensation v. Hooks, 515 So. 2d 294 (Fla. 1st DCA 1987) (supplemental benefits payable under § 440.15(1)(e) are subject to 80% cap of social security offset).[4/] However, she contended, and the First District agreed, that they are includable only in the amount a claimant is entitled to at the time the carrier initially takes the offset.

Applicable to the instant dispute are City of North Bay Village v. Cook, 617 So. 2d 753 (Fla. 1st DCA 1993) and Escambia Co. Sheriff's Dept. v. Grice, 692 So.

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[4] § 440.15(1)(e)(1), Fla. Stat. (1985), provides in pertinent part that: ". . . the injured employee shall receive additional weekly compensation benefits equal to 5 percent of his weekly compensation rate, as established pursuant to the law in effect on the date of his injury, multiplied by the number of calendar years since the date of the injury. 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)".

2d 896 (Fla. 1997). Cook dealt with an award of previously offset workers' compensation benefits pursuant to Barragan v. City of Miami. There, the claimant was injured in a 1984 work accident. He was accepted as PTD and was receiving the maximum compensation rate allowable since the date of the accident. He was also receiving the 5% supplemental benefits as set forth in § 440.15(1)(e)1, Fla. Stat. In 1985, the claimant also began receiving disability retirement pension benefits from the City. According to the law in effect at the time, the pension payment was reduced by the amount of Mr. Cook's workers' compensation benefits. 617 So. 2d at 754. In June, 1990, Mr. Cook filed a claim for benefits, "asserting that he was entitled to the previously-reduced workers' compensation benefits pursuant to Barragan." Id. The employer/carrier did not necessarily disagree with that entitlement; however, it claimed that the supplemental benefits paid to the claimant had to be "added to the permanent total disability and pension benefits, but the sum cannot exceed the average monthly wage cap as set forth in Barragan." Id. The JCC disagreed and awarded Cook the full offset benefits.

The First District reversed. In doing so, the court determined that the permanent and total supplemental benefits payable pursuant to § 440.15(1)(e)1, Fla. Stat., fell within the statutory definition of "compensation" set forth in § 440.02(6), Fla. Stat. Therefore, the supplemental benefits should have been considered "as part of claimant's total compensation payments in calculating the offset." 617 So.

2d at 754. While the opinion does not specifically state that annual increases in supplemental benefits are to be included in future calculations of the offset, the rationale employed by the court, i.e., that PT supplemental benefits are compensation, gives no logical or rational way to distinguish subsequent increases, since those increases would also constitute "compensation" under the workers' compensation act.

It appears from the facts in Escambia Co. v. Grice, supra, that this Court approved inclusion of subsequent supplemental benefits within the calculation of the offset. Specifically, that Escambia County's disability pension offset included at least 6 years of PT supplemental benefits. As reflected in the opinion, the claimant's accident occurred in 1985. His AWW was $583.88, with an original CR of $307.00, which was the maximum CR for 1985. At the time the set off controversy arose, Mr. Grice was being paid $392.00 per week, which was the maximum CR in effect in 1991. The only way he would have been receiving more than a compensation rate of $307.00, was if he was being paid permanent total disability and PT supplemental benefits. As basic calculations show, Mr. Grice's supplemental benefit was $15.35 per week ($307.00 x .05% = $15.35). Multiplying that by the 6 calendar years since the date of accident, results in a figure of $92.10. Mr. Grice's 1991 compensation payment would thus equal $399.10 ($307.00 + $92.10); however, it would be capped at $392.00, the maximum CR in effect for

1991, the year of payment. See § 440.15(1)(e)(1), Fla. Stat. (1984). That was in fact the figure used by the court in determining whether Grice's benefits from all sources exceeded 100% of his average weekly wage.

The Claimant and the First District in Acker, et al., feel that Hunt v. D.M. Stratton Builders, 677 So. 2d 64 (Fla. 1st DCA 1996), specifically addressed the issue, ruled in her favor, and that the JCC's holding was incorrect. Reliance on Hunt is nevertheless unwarranted. In Hunt, the issue before the court was whether a social security offset could exceed the total amount of social security benefits due a claimant and his family. The court correctly held that it could not. The court then went on to state, in dicta, that the law did not contemplate a recalculation of the workers' compensation offset based on yearly increases in the state's supplemental benefits.

Admittedly, Hunt v. D.M. Stratton Builders, 677 So. 2d 64 (Fla. 1st DCA 1996), and Cruse Constructions v. St. Remi, 704 So. 2d 1100 (Fla. 1st DCA 1997), would seem to suggest that an employer/carrier may only compute the offset one time and that would be for the initial year permanent total disability benefits are due, thereafter a disability pension or social security disability offset could never be increased. To quote the District Court "while the existing workers' compensation supplemental benefits are considered in the initial calculation of the offset, the law does not contemplate a recalculation of the offset based upon any

increases thereafter." Acker, 23 Fla. L. Weekly at D1971. The First District cites as authority for that proposition, Hunter v. South Florida Sod, 666 So. 2d 1018 (Fla. 1st DCA 1996), and Hyatt v. Larson Dairy, 589 So. 2d 367 (Fla. 1st DCA 1991). A review of Hunter reveals that the court prohibited increasing social security disability offsets as a result of cost of living increases in the social security benefits, and did not consider permanent total disability supplemental benefit increases. Hyatt merely recognized that weekly supplemental benefits are to be considered when computing these social security disability offsets.

The court also analyzed and applied the state and federal statutes and regulations dealing with social security disability pension offsets to reach its conclusion that "[o]nce this initial offset is determined, the judge may not order recalculation based on any cost-of-living increases in the claimant's collateral benefits thereafter." . . . and "[o]ur decision in Hunt prohibits recalculation of an offset based on any cost-of-living increase in a particular benefit." Alderman v. Florida Plastering, 23 Fla. L. Weekly D2197, 2198 (Fla. 1st DCA Sept. 23, 1998). In sum, the First District determined that neither the permanent total disability supplemental benefits paid under the workers' compensation law in the State of Florida nor the Federal Social Disability insurance benefit cost of living increases may be the basis of an offset recalculation. With all due respect, the First District is incorrect.

To decide this issue, the plain language of the various statutes must be looked at. The starting point is § 440.15, Fla. Stat., which provides in pertinent part:

> (9) EMPLOYEE ELIGIBLE FOR BENEFITS UNDER THIS CHAPTER AND FEDERAL OLD-AGE SURVIVORS, AND DISABILITY INSURANCE ACT.
>
> (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 or her 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.
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> However, this provision shall not operate to reduce an injured workers' 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.

This statute requires that an injured worker's weekly compensation benefits be reduced by the amount that "they and social security benefits, in the aggregate, exceed eighty percent of the injured worker's average weekly wage." Dept. of Public Health v. Wilcox, 543 So. 2d 1253, 1254 (Fla. 1989). The language of the statute is unequivocal, and the offset is mandatory to the extent the "combined

benefits exceed eighty percent of the worker's salary." Id. at 1254-55. If the offset is not taken under a state workers' compensation system, then, pursuant to 42 U.S.C. §424(a), the Social Security Administration is required to take the set-off so that the combined benefits the injured worker receives does not exceed 80% of his average current earnings. Id.; 42 U.S.C. §424(a),(d). See also Swain v. Schweiker, 676 F. 2d 543, 544-45 (11th Cir. 1982).

The purpose of the statutory offset is to prevent "the payment of excessive combined benefits," which occurs when a worker who is receiving "workers' compensation and federal disability benefits actually receive[s] more in benefits than his pre-disability take-home pay." Swain, 676 F. 2d at 546; Freeman v. Harris, 625 F. 2d 1303, 1306 (5th Cir. 1980). That situation is "thought to cause two evils: first, it reduce[s] a worker's incentive to return to the workplace and hence impede[s] rehabilitative efforts; and second, it create[s] fears that the duplication of benefits [will] lead to an erosion of state workers' compensation programs." Swain, 676 F. 2d at 546-47; Freeman v. Harris, 625 F. 2d at 1306; Dept. of Public Health v. Wilcox, 543 So. 2d at 1255. Consequently, the federal statute requires an offset of social security payments against workers' compensation benefits "so that the total benefits received by the worker under the two programs do not exceed 80% of his pre-disability income." Freeman, 625 F. 2d at 1306. Social security disability benefits therefore are available to supplement state workers'

compensation benefits, but "only when the workers' compensation payments are less than 80% of the worker's pre-disability income." The goal of §440.15(9)(a) is similar, and allows an offset based upon the amount by which the sum of the total benefits exceeds 80% of a claimant's average weekly wage, or 80% of his average current earnings, whichever is higher. See, e.g., Trilla v. Braman Cadillac, 527 So. 2d 873 (Fla. 1st DCA 1988); Sunland Training Center v. Brown, 396 So. 2d 278 (Fla. 1st DCA 1981).

There are two well established rules to be considered when computing the social security offset. The first is that the claimant may not receive greater than eighty percent of her average weekly wage (or average current earnings, whichever is higher) in combination of workers' compensation benefits, Social Security benefits and/or disability pension benefits. Second, the employer/carrier may not reduce the workers' compensation benefits to a greater extent than the workers' benefits would have been reduced had the Social Security Administration taken the offset. Hunt v. D.M. Stratton Builders.

The answer to the question before the court, therefore, appears to depend on the laws and regulations governing the reduction that may be taken by the Social Security Administration. It is clear from the cited case law that permanent total disability supplemental benefits are to be included in the formula for computing the eighty percent cap. See Division of Workers' Compensation v. Hooks, 515 So. 2d

294, 295 (Fla. 1st DCA 1987). It is also clear that the legislature did not limit the amount of the reduction to that available in the initial year permanent total disability benefits are due and/or permanent total supplemental benefits are payable. To the contrary, the statute is silent in that respect. See § 440.15(9), Fla. Stat. (1985). Further, the law recognizes that federal cost of living increases are not to be included in computing the social security disability insurance benefit offset. See, e.g., Hunter v. South Florida Sod, 666 So. 2d 1018 (Fla. 1st DCA 1996). However, the extension of the prohibition against increasing social security disability or disability pension offsets due to permanent total supplemental increases does not automatically or necessarily follow. Simply stated, it is not logical to hold that the permanent total disability cost of living supplement can be included once, but never again, without a direct legislative expression of that intent. If the supplemental benefit is to be included in the formula for computing the eighty percent cap, then at a minimum, it should continue to be included until such time as the cap is reached or the offset equals that to which the Social Security Administration rules and regulations would permit.

The next question is whether the Social Security Administration can reduce of the social security disability insurance benefits due a claimant because of a state workers' compensation cost of living increase. The answer is yes. Social Security Regulation 20 CFR § 404.408, in fact, provides for "Reduction of benefits based on

disability on account of receipt of certain other disability benefits provided under the Federal, State or local laws or plans." Initially, this regulation provides that a reduction is required when the individual receiving social security disability benefits is also entitled to receive benefits under a state workers' compensation law. Paragraph (c) states that the total of benefits cannot exceed eighty percent of the average current earnings, and that the social security disability benefits are to be reduced monthly but not below zero. Paragraph (j) states that the social security disability benefits may not be reduced due to a recomputation of statutory increases in social security disability benefits rates such as federal cost of living increases. However, there is an instance where the social security disability reduction may be reduced, and that is when there has been an increase in the workers' compensation benefits. In particular, section 404.408(k) provides:

> (k) Effect of changes in the amount of public disability benefit. Any change in the amount of public disability benefits received will result in a recalculation of the reduction under paragraph (a) and, potentially, an adjustment in the amount of such reduction. If the reduction is made under paragraph (a)(1) of this section, any increased reduction will be imposed effective with the month after the month the Commissioner received notice of the increase in a public disability benefit (it should be noted that only workers' compensation can cause this reduction). Adjustments due to a decrease in the amount of public disability benefit will be effective the actual date the decreased amount was effective. If the reduction is made under paragraph (a)(2) of this section, any increase or decrease in the reduction will be imposed effective with the actual date of entitlement to the new amount of the public disability benefit.

> Example: In September, 1981, based on a disability which began on March 12, 1981, Theresa became entitled to Social Security disability insurance benefits with a primary insurance amount of $445.70 per month. She had previously been entitled to Social Security disability insurance benefits from March 1967 through July 1969. She is receiving a temporary total workers' compensation payment of $227.50 a month. Eighty percent of her average current earnings is $610.50. The amount of monthly disability insurance benefits payable after reduction is:
>
> 80 percent of Theresa's average current earnings. . . $610.50
>
> Theresa's monthly workers' compensation payment . . .- 227.50
>
> Total amount payable to Theresa after reduction . . $383.00
>
> On November 15, 1981, the Commissioner was notified that Theresa's workers' compensation rate was increased to $303.30 a month effective October 1, 1981. This increase reflected a cost-of-living adjustment granted to all workers' compensation recipients in her State. The reduction to her monthly disability insurance benefit is recomputed to take this increase into account-
>
> 80 percent of Theresa's average current earnings. . . $610.50
>
> Theresa's monthly workers' compensation payment beginning October 1, 1991, . . .- 303.30
>
> Total new amount payable to Theresa beginning October 1981, after recalculation of the reduction . . . $ 307.20

20 CFR § 404.408(k).

In SSR 82-68, the Social Security Administration also specifically addressed the question of whether social security disability benefits could be <u>further</u> reduced

after calculation of the initial offset because of an increase in a claimant's workers' compensation benefits. The Administration began its ruling by noting that cost-of-living adjustments to social security disability benefits are not subject to the general rule limiting combined benefits to 80% of the average current earnings:

> Clauses (7) and (8) of section 224(a) of the Act provide a specific exception to that provision. They allow Social Security benefit increases to be passed on to the beneficiary by precluding any subsequent monthly offset from reducing the Social Security benefit below the sum of the reduced benefit for the first month of offset and any subsequent increases in Social Security benefits.

SSR 82-68, ¶4.

The Social Security Administration then noted, however, that "there is no corresponding provision which would allow increases in the public disability [workers' compensation] benefit to be passed on to the beneficiary." (Emphasis added). SSR 82-68. It then went on to rule:

> Section 224 of the Act or section 404.408(a) of the regulations, thus, does not authorize limiting offset to the first monthly amount of public disability benefits. In fact, the legislative purpose...is clearly contrary to that result. To apply offset on the basis of the first such award, reducing the excess over the 80 percent limitation, and then not readjusting on the basis of a later, increased award, would result in combined benefits that could substantially exceed the 80 percent limitation set forth in section 224(a)(1-6). The resulting payment of combined benefits in excess of predisability earnings was specifically disapproved in the original legislative history

> of the offset provision and has been subsequently reaffirmed by Congress. (Emphasis added).

SSR 82-68 ¶6.

The Social Security Administration further went on to hold:

> All increases in public disability [workers' compensation] benefit after offset is first considered or imposed should be considered in the computation of the DIB [disability insurance benefit] reduction and will result in the imposition of an additional offset where appropriate....Each subsequent increase in the public disability [workers' compensation] benefit after offset is imposed may result in a further reduction of Federal disability benefits. (Emphasis added).

SSR 82-68, ¶¶8-9.

Since the Social Security Administration may increase the reduction of social security disability benefits based on an increase in the workers' compensation benefits, including cost of living increases, it is only logical, based upon § 440.15(9), Fla. Stat., that an employer/carrier may increase the offset for social security disability and/or disability pension benefits yearly, based on a claimant's receipt of increased supplemental benefits until such time as the eighty percent cap is reached or the offset would reduce the injured worker's benefits by an amount greater than the initial PIA (primary insurance amount). See Merz v. Secretary of Health and Human Services, 969 F. 2d 201 (6th Cir. 1992) (social security disability benefits could be reduced to extent that disability and state workers' compensation

did not exceed 80% of pre-disability ACE, regardless of whether state reduces workers' compensation on basis of social security disability benefits); Sciarotta v. Bowen, 837 F. 2d 135 (3rd Cir. 1988) (to extent state does not reduce total benefits to 80% of pre-disability earnings, SSA must reduce federal benefits accordingly).

Also missing from the First District's analysis is any reference to the position taken by the Department of Labor and Employment Security. That position, as reflected in the Department's amicus brief in City of Clearwater v. Acker, Case No. 93,800, is entirely consistent with the position asserted by the Employer/Carrier below and before this Court. As has long been recognized, an agency's interpretation of a statute it is charged with enforcing is entitled to great deference. Bellsouth Telecommunications, Inc. v. Johnson, 708 So. 2d 594 (Fla. 1998); Polote Corp. v. Meredith, 482 So. 2d 515, 517 (Fla. 1st DCA 1986). Thus, if an agency's construction "is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." Smith v. Crawford, 645 So. 2d 513, 521 (Fla. 1st DCA 1994) (quoting Ford Motor Co. v. N.L.R.B., 441 U.S. 88 (1979)). The Employer/Carrier's actions in this case were consistent with the Department of Labor and Employment Security's practices and interpretation of the statute at issue. (V. 1, R. 134) This Court should uphold the Department's construction and interpretation.

Ms. Conklin is receiving benefits as contemplated by the Florida and Federal statutory schemes. She is not being deprived of anything -- she is receiving the maximum she is entitled to receive. Under the current state of the law, she will also continue to receive the yearly federal cost of living allowances. Because the offset now equals the initial primary amount, she will also receive yearly PT supplemental benefit increases. Any claim of unfairness, therefore, is unfounded. This is especially so in light of the fact that claimants like Ms. Conklin are substantially better off financially than claimants who only receive PTD benefits at 66 2/3% of their average weekly wage. Creation of any exceptions should be left to the legislature.

Indeed, the Legislature has changed offset provisions when it deemed necessary. For example, the Legislature repealed section 440.09(4). Prior to its repeal, section 440.09(4) allowed a dollar for dollar offset of workers' compensation benefits to the extent that pension benefits were paid to public employees. If the employee's pension benefits exceeded the workers' compensation benefits, then the employee received no workers' compensation benefits. Once section 440.09(4) was repealed in 1973, public employees were able to receive a combination of pension benefits and workers' compensation benefits to the extent that the combination did not exceed 100% of the employee's average weekly wage. If the Legislature so chooses, the Legislature can again amend the offset in section

440.20(15) to allow supplemental benefits to exceed the employee's AWW. As of this date, the Legislature has refrained from amending the statute in this manner.[5/]

The First District erred in ruling that the Claimant is entitled to receive yearly increases in permanent total supplemental benefits. This Court should reaffirm the principle that yearly increases in PT supplements may be included in calculating offsets. This Court should then answer the certified question in the affirmative, quash the decision of the First District, and require that the order of the Judge of Compensation Claims be affirmed.

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[5] In fact, during the 1998 session of the Florida Legislature, bills were introduced in both houses which would have excluded permanent total supplemental benefits from the 100% cap altogether. See Fla. HB 4781 (1998) and Fla. CS for SB 1092 (1998). Neither of these bills was enacted into law. Accordingly, there is even more evidence that the legislature has approved the judicial construction laced upon § 440.20(15) and, therefore, any change in that regard should come from that body.

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. The purpose of a disability pension offset is to prevent a claimant who is receiving workers' compensation and disability pension benefits from being financially better off disabled than if she returned to work. Thus, 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 amount. 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 affirmed.

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 to:

Vicki L. Stolberg, Esquire
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on February 23, 2001.

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Attorney

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