SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ERNIE HAIRE FORD and HUMANA
WORKERS' COMPENSATION SERVICE

Case NO. : 96,152

Petitioners,

vs.

SHERRY CONKLIN,

Respondent.

RESPONDENT, SHERRY CONKLIN'S ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief has been typed in 14 point Times New Roman.

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STATEMENT OF CASE AND FACTS

The Claimant/Respondent supplements the Statement of the case and facts contained in the Petitioner's Initial Brief so as to include the following relevant facts:

Claimant, Sherry Conklin, was injured in the course and scope of her employment on January 17, 1991. As a result of her injuries, she received TTD, TPD and/or wage loss benefits until she was voluntarily accepted as permanently and totally disabled by the carrier on July 18, 1996 (V. I, P.4, 143).

As a result of her accident, the claimant also began receiving social security disability benefits effective August, 1992 (V. I, P.36, 37, 116). Pursuant to their regulations, the Social Security Administration took a workers' compensation offset on claimant's retroactive benefits through December 31, 1993 (V. I, P.35, 36, 117). Beginning May 26, 1994, while claimant was still receiving TTD benefits, the carrier began taking an offset from the TTD benefits based on claimant's receipt of social security disability (V. I, P.39). At the time, the carrier was basing their offset on an AWW of $191.77 and a CR of $127.85 (V. I, P.34). The carrier's offset resulted in a new weekly CR paid to the claimant of $60.86 a week or $121.72 bi-weekly (V. I, P.34, 39-41).

The carrier continued to pay the claimant $60.86 a week until October, 1997 (the mediation date), despite accepting her as PTD on July 18, 1996 (V. I, P.39-41, 33).

In March, 1997, claimant's counsel filed a Request For Assistance followed by a Petition For Benefits on June 27, 1997, asking for an "increase in payment of PTD supplemental benefits pursuant to the case of Hunt v. Stratton," and penalties, interest, costs and attorney's fees (V. I, P.54-56, 174-176).

The Petition For Benefits was docketed (V. I, P.173) and set for mediation, which took place on October 7, 1997. At the mediation, the claimant's position was that she was entitled to an increase in her weekly benefits from July 18, 1996 (date accepted PTD) to the present and continuing, along with PICA, as the carrier had never paid PTD supplemental benefits, resulting in a substantial underpayment to claimant.

The carrier's position was that although an underpayment might have existed from July 18, 1996 forward, there was also an overpayment which existed prior to that time based on the carrier paying on a higher AWW/CR and not taking a social security offset from January, 1994 through May 26, 1994 when claimant received both workers' compensation and social security benefits. Therefore, they claimed entitlement to credit for the overpayment back to January 1, 1994 in accordance with Brown v. L.P. Sanitation and CNA, 689 So.2d 332 (Fla. 1st DCA 1997).

At mediation, the parties agreed on the proper AWW and CR as well as all other

relevant monetary figures as previously set forth (V. I, P.44). The claimant agreed that the carrier was entitled to an offset for social security disability benefits as of January 1, 1994 and that the AWW/CR were slightly lower than had been paid (V. I, P.43-45).

In order to determine the amount of any under or overpayments, the parties utilized the exact mathematical formula set forth in Hunt v. Stratton, to determine the proper offset that the carrier was entitled to as of January 1, 1994 (the date they first elected to exercise their offset right) (V. I, P.44). Utilizing this formula, it was determined that an overpayment existed from January 1, 1994 to July 17, 1996 in the amount of $1,663.20 (V. I, P.39), and that an underpayment existed from July 18, 1996 through October 7, 1997 (the mediation date) in the amount of $2,101.54 (V. I, P.39-41). By subtracting the underpayment from the overpayment, the parties agreed that claimant was owed $438.34 for PTD supplemental benefits from July 18, 1996 to October 7, 1997 (V. I, P.44).

After discussion of what was owed for penalties and interest, the parties agreed to a total payment to claimant of $700.00 to resolve all issues of overpayments and underpayments to date, including penalties and interest (V. I, P.45). The parties also agreed that the claimant's PT and PT supplemental payments for 1997 were $192.32 bi-weekly (or $96.16 per week) (V. I, P.46). A DWC-4 form was filed by the carrier immediately subsequent to the mediation reflecting the appropriate amounts as well as

setting forth the correct amount of the PTD supplemental increase for 1998 (V. I, P.49).

The mediation settlement agreement (V. I, P.43-45) sets forth the Hunt v. Stratton formula used in this case based on the benefits claimant was receiving in 1994, as follows:

80% of weekly AWW = $150.98, 80% of weekly ACE = $137.30
(80% AWW higher than 80% ACE)

Weekly SS benefits	$92.56
+ Compensation rate	$125.92
+ Supplemental benefits	0 (Claimant still on TTD and not receiving supplementals)
= TOTAL WEEKLY BENEFITS	$218.38
- 80% of greater of AWW and ACE	150.98
= PRELIMINARY OFFSET AMOUNT	$67.40

Comp rate	$125.92
- Offset	67.40
= New CR	$58.42 (1994)

This new compensation rate resulted in the payment of weekly benefits to claimant for each year as follows:

1994	New CR	$58.42
	+ PTD supps	0 (TTD)

	TOTAL	$58.42/week
1995	New CR	$58.42
thru 7/17/96	+ PTD supps	0 (TTD)
	TOTAL	$58.42/week
7/17/96	New CR	$58.42
	+ PTD supps ($6.29 x 5 yrs)	31.46
	TOTAL	$89.88/week
1997	New CR	$58.42
	+ PTD supps ($6.29 x 6 yrs)	37.74
	TOTAL	$96.16/week
1998	New CR	$58.42
	+ PTD supps ($6.29 x 7 yrs)	44.03
	TOTAL	$102.45/week

This formula and these figures, in conjunction with the payout, were used to determine that claimant was actually owed $438.34 after deducting underpayments from overpayments as reflected in the mediation settlement agreement (V. I, P.44-45).

Claimant assumed this matter had been completely resolved on the basis that at mediation, using the formula set forth in Hunt v. Stratton, the parties agreed on the proper "new CR" derived after applying the offset, to which it was only necessary to add each new year's supplemental benefit.

On January 13, 1998, the carrier filed a DWC-4 Notice of Action/Change to

show "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/week will reduce to $77.30/week" (V. I, P.52).

This offset was based on figures received from the firm of Government Benefits Specialists, Inc. (V. I, P.50, 53, 127). The employer/carrier recalculated the offset as if it were being taken for the first time in violation of Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997).

Claimant immediately filed a Request For Assistance for an increase in the PTD/PTD supplement from 1/1/98 and PICA, followed by a Petition For Benefits (V. I, P.54-56, 174-176). The carrier wrote a letter (V. I, P.50) and filed a Notice of Denial on 2/24/98, contending in part that the "correct social security offset is being taken as the previous offset was calculated incorrectly" (V. I, P.58). Pursuant to claimant's request, the matter was subsequently scheduled for expedited hearing on June 23, 1998 (V. I, P.2).

At mediation and at hearing, the parties stipulated to the following figures which are relevant to this proceeding:

Claimant's AWW = $188.72

CR = $125.82

5% PTD supp = $6.29 per year from D/A

80% of AWW = $150.98

Monthly PIA = $398.00 divided by 4.3 = $92.56 weekly PIA

80% monthly ACE = $590.40 divided by 4.3 = $137.30 80% weekly PIA

80% of AWW is higher than 80% ACE

(V. I, P.4, 44, 142, 164)

A final Order was entered by JCC Douglas on June 26, 1998 (V. I, P.2-16, also 17-31). The order of the Judge of Compensation Claims was timely appealed and was reversed by the First District Court of Appeal. The First District Court of Appeal, consistent with its prior rulings, 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). Because this case raised issues of great public importance, the court 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?

ISSUE ON APPEAL

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?

SUMMARY OF THE ARGUMENT

The First DCA, in the cases of Hunt v. Stratton, Cruse Construction v. St. Remy, Acker v. City of Clearwater, Alderman v. Florida Plastering, and their progeny, have made it abundantly clear that once the initial calculation of the social security offset has been performed, the offset is not to be recalculated annually. At the time the offset was originally taken in 1994, the carrier offset the maximum allowable amount of $92.56 (Claimant's PIA) from her benefits, thus establishing a "new compensation rate" in accordance with Hunt v. Stratton.

The above cited cases have since clarified 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, 727 So. 2d 903 (Fla. 1st DCA 1998).

Because there is no statutory authority permitting the Employer/Carrier to recalculate the offset under Section 440.15(1)(e)(1) Florida Statutes, 1985 on an annual basis and such an action is in contrast to the purpose and intent of the legislature in providing supplemental benefits, therefore, this Court should affirm the findings of the First District Court of Appeal.

The question certified by the First District is only partially relevant to the instant case as the Petitioner has not taken an offset under FLA. STAT. Ch. 440.20(15)(1985).

ARGUMENT

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

The Claimant/Respondent was accepted by the Employer/Carrier as permanently totally disabled in July of 1996. However, due to the fact that Ms. Conklin had been receiving social security disability benefits for several years, the Employer/Carrier chose to take a retroactive offset back to January of 1994. From January of 1994 when the Employer/Carrier calculated its initial offset, until they accepted her as permanently totally disabled in July of 1996, there were no supplements payable to the Claimant. The Employer/Carrier's initial offset calculation, however, subtracted the full amount of the Claimant's PIA from 80% of her AWW to establish the appropriate compensation rate. The certified question in this case is whether the Employer/Carrier is allowed to recalculate that offset every year. The Judge of Compensation Claims ruled that the initial offset could be recalculated annually, and that the Claimant was not entitled to the additional benefits. This decision was ultimately reversed by the First District finding that the offset could not be recalculated annually 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). Based on the current Florida law as well as the nature and purpose of supplemental benefits, the ruling of the First District should be upheld.

Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996) and the subsequent case of Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997) clearly control the instant case. The court in Hunt set out the specific formula to be followed to determine the proper offset, Id. at 67.

This offset must be initially calculated as of the date the carrier first wishes to or is entitled to take the offset. In the present case, the first date that the carrier is entitled by law to take an offset is January 1, 1994. This date is the first date that claimant received her full social security disability benefits without an offset being retroactively taken by the Social Security Administration (V. I, P.35, 36) and also coincidentally is the earliest the employer/carrier could recoup the offset pursuant to Brown v. L.P. Sanitation, 689 So.2d 332 (Fla. 1st DCA 1997).

As the carrier began offsetting on January 1, 1994, the Hunt formula using the stipulated figures works as follows:

Weekly SS benefits	$92.56
+ Compensation rate	125.82

+ Supplemental benefits	0	(Claimant on TTD, carrier not liable for supplemental benefits)
= TOTAL WEEKLY BENEFITS	$218.38	
- 80% of the greater of AWW and ACE	150.98	
= PRELIMINARY OFFSET AMOUNT	**$67.40**	

According to Hunt, the preliminary offset must be used unless it exceeds the maximum federal social security offset. Hunt at 67.

Hunt also references the applicable statute, F.S. § 440.15 (9)(a)(1991) as follows:

> We interpret the first sentence of section 440.15(9)(a) as setting out the general parameters for determining the offset to which the employer/carrier is entitled, whereas the second sentence imposes an absolute limitation on the amount of the offset so calculated, so as not to reduce a claimant's total disability benefits more than they would have been reduced if the federal government had taken the offset (emphasis supplied). Hunt at 66.

In the present case, since the preliminary offset amount does not exceed the maximum allowable offset (the PIA), it should be used as the final offset. Continuing with the Hunt formula, we get:

CR	$125.82
- Offset	67.40

= New CR	$58.42
+ Supplemental benefits (1994)	0
= TOTAL WEEKLY WORKERS' COMPENSATION BENEFITS	$58.42 (1994)

Hunt simplifies what would otherwise be a complicated problem.

By utilizing the formula based on the benefits the claimant is receiving at the time the offset is initially taken a "new compensation rate" is arrived at. Once this new compensation rate is determined, the claimant's base benefits forever remain the same and all that needs to be done is add the applicable supplemental benefits for each new year.

> Once the initial calculation of the social security offset has been performed, the offset need not be recalculated annually. However, the total amount of benefits receivable after the offset will change annually to account for the cost of living increase provided as PTD supplemental benefits. There is no reasonable basis for concluding that permanently totally disabled claimants whose benefits are reduced by social security offset thereby become ineligible for the statutorily provided PTD supplemental benefits. (Emphasis added). Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997) at 1101.

The carrier's position, based on the figures provided to them by Government Benefits Specialists (GBS), is that they are entitled to recalculate the offset every year,

so long as the offset amount does not exceed the claimant's PIA. This is in direct conflict with the First District Court's opinions in both Hunt and Cruse Construction, as well as the First District's subsequent decisions in Acker v. City of Clearwater, 727 So. 2d 903 (Fla. 1st DCA 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); Alderman v. Florida Plastering, 732 So. 2d 326 (Fla. 1st DCA 1998); and HRS District II v. Pickard, 24 Fla. L. Weekly (Fla. 1st DCA 1999).

Additionally, the Employer/Carrier/Petitioner also incorrectly argues that the Social Security Administration may reduce the amount of disability benefits due a Claimant because of state workers' compensation cost-of-living increases. They cite 20 CFR § 404.408 in support of their contention. However, 20 CFR 404.408(b)(i) specifically states that:

> The reduction of a benefit otherwise required by paragraph (a)(i) of this section IS NOT MADE if the workers' compensation law or plan under which the periodic benefit is payable provides for the reduction of such periodic benefit when anyone is entitled to a benefit under Title II of the Act on the basis of the earnings records of an individual entitled to a disability benefit under Section 223 of the Act.
>
> (Emphasis added)

As 440.15(9)(a), Fla. Stat. (1991) specifically takes this reduction, making Florida a reverse offset state, the Social Security Administration does not take any

prospective reduction for Claimant's who receive workers' compensation in Florida. This also makes all social security statutes regarding recalculation of the social security offset in subsequent years inapplicable in the state of Florida.

Although 20 CFR 404.408(k) states that an increase in workers' compensation benefits may change Social Security's reduction, there is no indication that the opposite is true in a reverse offset state such as Florida. In support, Claimant/Respondent would direct the Court to the next section of 20 CFR 404.408 which provides the methodology for recalculating the social security offset in subsequent years. Specifically, 20 CFR 404.408(l)(1)-(3), provides that when redetermining an offset in subsequent years, the 80% average current earnings provision is increased to a higher level based on the statutory formula set forth in 20 CFR 404.408(l)(2)(i) which takes into account cost-of-living increases. Florida has no specific statute in effect permitting the recalculation of the workers' compensation offset in subsequent years to take into account an increase in the Claimant's base compensation rate due to inflation the way social security does. The Petitioner cannot simply borrow a federal statute and apply it under state law. The creation of any exceptions to the current law should be left to the legislature.

Although the intricacies of the social security yearly recalculations are an interesting intellectual exercise, they are simply inapplicable since, as previously noted,

per 20 CFR § 404.408(b)(i), the Social Security Administration takes no offset in states such as Florida which have workers' compensation laws that take the offset first.

Despite the Petitioner's attempt to make the analogy, the present case does not present the Court with the same issues as Escambia County Sheriff's Dept. v. Grice, 692 So. 2d 896 (Fla. 1997); rather, it falls directly in line with Hunt v. D.M. Stratton, 677 So. 2d 64 (Fla. 1st DCA, 1996) and Cruse Construction v. St. Remy, 704 So. 2d 1100 (Fla. 1st DCA, 1997). Hunt specifically notes in its formula that if the preliminary offset is less than the maximum federal social security offset, the preliminary offset should be used in determining the "new compensation rate." Id. at 67. The fact that the amount of the supplement payable at the time of the initial calculation of the offset may be included in the offset calculation does not mean that calculation can be redone annually, and that conclusion does not logically follow from the Grice ruling as implied by the Petitioner. In fact, the only reason that the PT supplement was initially includable in the offset in Grice was because the Employer in that case was making their initial calculation at a point where 6 years of supplemental benefits were due. The Petitioner is essentially asking this court to make a law on an issue that could easily be addressed by the legislature if it is determined that a provision for recalculation of the offset in subsequent years is appropriate.

The carrier's reliance on the figures and opinions provided by GBS is inherently

erroneous because the computer program used by GBS does not comply with the Cruse Construction case (V. I, P.91, 92) and, despite alleging it does, the program does not properly comply with the formula used in the Hunt case (V. I, P.96). For example, the carrier asked GBS to run calculations back to January 1, 1994, the date they first began taking the offset (V. I, P.130-131). According to their representative, GBS' computer calculations always assume that the claimant is receiving PTD benefits and, therefore, automatically include the PTD supplementals in their calculations (V. I, P.98). Since the claimant was not entitled to PTD supps until July 18, 1996 any calculations which include PTD supplemental benefits prior to that date are automatically wrong!

When the initial calculation of the offset occurs prior to the claimant being found PTD, as in this case, the issue can be simplified to an easier formula to comply with F.S. 440.15(9)(a)(1991) and 42 U.S.C. § 423 and § 402, which provide that the total base benefits claimant receives cannot exceed 80% of the AWW or ACE whichever is higher, by using several easy steps:

1) Start with the maximum base amount the claimant can receive, which is 80% of the AWW or ACE, whichever is higher (in our case, 80% AWW is higher at $150.98);

2) Subtract from that amount the maximum offset the carrier may ever take, which is either the PIA or FMAX;

3) The difference is the claimant's base "new CR" forever;

4) To the new CR, add the PTD supplemental benefit, if applicable for the particular year.

In our case, this formula derives the exact figures used in the mediation settlement agreement (V. I, P.44) or by following Hunt or by following the social security offset worksheet originally used by the Division and carrier (V. I, P.34).

Formula: $150.98 (80% of AWW or ACE whichever is higher)

- 92.56 (Claimant's PIA and, therefore, maximum allowable offset)

$ 58.42 NEW CR (maximum base amount payable to claimant)

By using this formula, which interestingly is set forth on the first page of every GBS social security offset calculation report (V. I, P.119, 121, 124, 126, 128, 130, 132), the carrier is automatically taking the maximum allowable offset under the law. In fact, this formula was identical to the formula used by the carrier in this case, when they began taking the offset in May of 1994. The only difference on the form was the use of a slightly higher AWW and CR (V.I, P.34). Therefore, the Carrier in its payments to the Claimant from 1994 to 1996 was already deducting the maximum of the Claimant's PIA.

This formula has been used for years and achieves the same result as the Hunt

formula. What Hunt and Cruse Construction clarify is that the claimant who is permanently, totally disabled is entitled to have added to this "new CR" their annual supplemental benefits. This entitlement has been upheld in the subsequent cases of Acker, Hahn, Rowe, and Alderman. In Hunt and Cruse Construction, the carrier had been paying PTD supplementals for many years. Since they were taking the offset for the first time, the Court allowed them to factor the existing supplements into the initial calculation only. In our case, when the carrier began taking the offset in 1994, they subtracted the claimant's PIA of $92.56/week (the maximum offset available by law) to arrive at the conclusion that claimant was entitled to a new CR of $58.42/week.

The Employer/Carrier/Petitioner makes several arguments in its initial brief about the intent of the legislature and the goals of the workers compensation system. It should be clarified that none of the factors raised by the Petitioner including the concerns over incentives to return to work, and motivation to recover are applicable to the Claimants who are permanently totally disabled. No matter how great the incentive, these people are permanently precluded by disability from being able to return to the work force. The legislative goal of encouraging people to return to work is not meant to be pushed on to the totally disabled employee. These permanently disabled employees will continue to bear a portion of the loss for their injuries which the employer will not be responsible for, and the likelihood of the Claimant receiving a

windfall is minimal. Unfortunately, the petitioner in this case would like this court to believe that a 5% supplement intended to offset inflation and the general increases in the cost of living is providing claimants with a windfall. As noted in Coca-Cola Company v. Long, 436 So.2d 411 (Fla 1st DCA 1983), the purpose of supplemental benefits is to "provide minimal relief against inflation for a worker who is permanently and totally disabled . . ." Id. at 412. Although at some point the injured worker may actually receive more than 80% of their AWW in subsequent years where no annual recalculation is permitted, this increased income is still proportionately less in today's dollar than it was at the time the Claimant was earning those wages. Therefore, even though eventually the actual number of dollars received by the Claimant may increase above 80% of the Claimant's actual pre-injury wages, the increase in money will only serve to sustain the Claimant's standard of living that was established when they originally became totally disabled. To do otherwise would result in a continually diminishing standard of living for the totally disabled worker.

The First District Court of Appeal specifically acknowledged the importance of the concept of supplemental benefits in Hunt by stating: "We note that both the federal and state disability schemes include incremental increases in benefits to account for future increases in the cost of living (federal cost-of-living adjustments and state supplemental benefits)." Hunt at 67.

The First District further clarified the importance of the availability of supplemental benefits in Cruse Construction by stating: "There is no reasonable basis for concluding that permanently totally disabled claimants whose benefits are reduced by social security offset thereby become ineligible for the statutorily provided PTD supplemental benefit." Cruse Construction at 1101 (Accord Acker v. City of Clearwater, 727 So. 2d 903 (Fla. 1st DCA 1998)).

More recently, the First District again restated its position that "Hunt's prohibition against recalculation to account for cost of living increase, as reaffirmed in Cruse, is still good law." Alderman v. Florida Plastering at D2198.

Finally, and most importantly, when ruling in the instant case below, the First District stated that "recalculating the offset every year so as to include the increase in supplemental benefits, frustrates the intended purpose of supplemental benefits." Conklin v. Ernie Haire Ford, 24 Fla. L. Weekly D1697 (Fla. 1st DCA July 15, 1999)(quoting Acker v. City of Clearwater, 727 So. 2d 903 (Fla. 1st DCA Aug 17, 1998).

In the past, and in this case, carriers used the previously stated formula to determine that the "new CR" was the maximum claimant could ever receive, thereby depriving the claimant of supplemental benefits. In the present case, the carrier's use of the GBS computer figures eliminated the claimant's supplemental benefits

completely, in direct violation of Hunt, Cruse Construction, Acker, Hahn, Rowe, and Alderman.

In 1998, by using the formula set out above, you get the following:

80% AWW	$150.98
- PIA (maximum offset)	92.56
= NEW CR	$ 58.42
+ 98 PTD Supp	44.03
= 98 TOTAL PTD & SUPP	**$102.45** (payable to claimant weekly)

By utilizing the formula set forth in Hunt, based on an initial calculation of the offset taken in 1994, you get:

Weekly SS benefits	$ 92.56
+ Comp rate	125.82
+ Supps (none owed)	0
= TOTAL WEEKLY BENEFITS	$218.38
- 80% of AWW	150.98
= PRELIMINARY OFFSET	$ 67.40
Comp rate	$125.82
- Offset	67.40

= NEW CR	**$ 58.42**
+ 98 PTD Supps	44.03
= 98 TOTAL PTD & SUPPS	**$102.45** (payable to claimant weekly)

These amounts are identical. However, the carrier, by recalculating the offset again each year, comes up with the following:

Weekly CR	$125.82
+ PIA	92.56
+ 98 PTD Supps	44.03
COMBINED WEEKLY BENEFITS	$262.41
- 80% AWW	150.98
= TOTAL OFFSET	$111.43

(Since it cannot exceed the PIA, they knock this down to the PIA of $92.56.)

They then take the entire supplement away and further reduce the compensation rate so that the total benefits payable after offset are only **$77.30** per week! Clearly, this computation is wrong in light of the Hunt, Cruse Construction, Acker, and Alderman decisions which prohibit an annual recalculation of the offset after the initial offset has been taken. Finally, in contrast to the Petitioner's assertion on page 15 of its initial brief, the Claimant/Respondent does not agree that supplemental benefits are

includable whereas, in the instant case, no supplemental benefits were payable at the time of the carrier's initial calculation of the offset. In the present case, the Petitioner's subtracted the full amount of the Claimant's PIA from 80% of her AWW when they first took their offset.

The result of the carrier's action in this case by recalculating the Claimant's benefits again in 1998 eliminates the claimant's supplemental benefits and reduces her weekly benefits by $25.15 per week making adjustment to the increasing costs of living virtually impossible.

Finally, it should be noted that the question certified by the First District is only partially relevant in the instant case as the Employer/Petitioner has not paid wages in lieu of compensation and has not taken an offset under §440.20(15)Florida Statutes (1985).

CONCLUSION

The carrier's recalculation of the offset is in violation of the First District Court's directives set forth in the many cases previously cited. The First District is correct in its determination that allowing the Employer/Carrier to recalculate the offset on an annual basis frustrates the intended purpose of supplemental benefits. The Claimant/Respondent respectfully requests this Court affirm the findings of the First District Court of Appeal and limit the Employer/Carrier to its initial calculation of the offset as first taken in 1994.

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:

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By U.S. Mail this _____ day of September 1999.

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