IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,239

RAYMOND O. DIXON

Petitioner/Cross-Respondent,

-vs-

GAB BUSINESS SERVICES, INC.
and
BIO LAB, INC.

Respondents/Cross-Petitioners.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENTS

INITIAL BRIEF OF CROSS-PETITIONERS

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PRELIMINARY STATEMENT

In the Answer and Initial Brief of Respondents/Cross-Petitioners, the parties will be referred to as they appeared before the Judge of Compensation Claims (JCC), the Honorable John Thurman, and as they appeared before the First District Court of Appeal. Respondent and Cross-Petitioner, Bio Lab, Inc., will be referred to as the "Employer," and Respondent and Cross-Petitioner, GAB Business Services,

Inc., will be referred to as the "Carrier." Collectively, Respondents and Cross-Petitioners will be referred to as the Employer/Carrier or the "E/C." The Petitioner/Cross-Respondent will be referred to as the "Claimant." Witnesses will be referred to by their proper names. References to the record on appeal will be designated as follows: Volume and page will be represented by volume number followed by a dash, followed by the page number. For example Volume 1, page one will be 1-1.

STATEMENT OF CASE

This case initially involved a recalculation of the appropriate offset taken by the E/C against the Claimant's Permanent Total Disability Benefits ("PTD"). (1-88). The E/C based its claim on the position that the proper method of calculating collateral offsets is in accordance with the formula outlined by the Florida Supreme Court in *Escambia County Sheriff's Dept. v. Grice*, 692 So. 2d 896 (Fla. 1997). *Grice* provided that the E/C was entitled to take an offset to the extent that the Claimant's combined Workers' Compensation and collateral benefits exceed the Average Weekly Wage ("AWW"). (1-175).

Prior to the Hearing, the parties entered into a Pretrial Stipulation on March 13, 1998. (1-76). Prior to the Merits Hearing, all issues were resolved except the *Grice* offset. A Hearing was conducted before the JCC on July 23, 1998. (1-175). The JCC entered as evidence the Pretrial compliance questionnaire dated March 13, 1998. (1-1). Furthermore, the E/C entered into evidence the Met Life Disability Policy and a detailed Memorandum of Law with charts regarding the offset. (1-2). The issue presented by the Claimant was the recalculation of the offset taken by the Carrier. (1-3-4).

The Claimant argued that the Florida Supreme Court's ruling in *Grice* is contrary to other portions of Chapter 440 of the Florida Statute dealing with Social Security offsets, but at no time did the Claimant raise preemption. (1-84). The Claimant argued that in a Social Security Disability offset, part of the calculation requires the greater of the Average Weekly Wage ("AWW") or the Average Current

Earnings ("ACE"). (1-84). The AWW applies to Workers' Compensation proceedings wherein the Claimant's average weekly wage is computed by taking into consideration the Claimant's earnings for a period of thirteen weeks (or ninety-one consecutive days) prior to the industrial accident. (1-51-55). The average current earnings on the other hand, is used by Social Security Disability to determine the Claimant's average current earnings during a period prior to the Claimant's benefit entitlement. (1-92-103). The time period considered by the Social Security Administration is a much greater time period than the thirteen week time period considered in Workers' Compensation. (1-17-26).

The Claimant argued that he was a high wage earner prior to working for the Employer. (1-89-104). The Claimant reasons that his prior employer paid a much higher salary than his Workers' Compensation Employer. (1-93-99). The Claimant was employed with his prior employer for many years and actually retired from the prior employer. His wage earning capability was therefore much higher than with the Workers' Compensation Employer. (1-97). After the Claimant's retirement from the prior employer, he decided to resume work again and became employed with the Workers' Compensation Employer herein, Bio Lab. (1-89). The Claimant's weekly wages were obviously less than his wages that he received from his long time prior employer. (1-89-91). Consequently, for Social Security Disability purposes, the Claimant's ACE was much higher based on his prior employment than his AWW based on his employment at the time he sustained the accident of March 28, 1994. (1-91-96). The Claimant argued that in a Social Security Disability context, the E/C

would have to take the greater of the ACE or the AWW in order to determine the calculations, and in this case, a Social Security Disability offset would require the E/C to use the ACE. (1-91-104). However, the Claimant stated that using the AWW rather than the ACE as the benefit cap as outlined in the Florida Supreme Court's decision in *Grice* is actually wrong. (1-103-104).

The E/C argued that the Florida Supreme Court's ruling in *Grice* had clearly held that an employer/carrier is entitled to offset a Claimant's benefits to the extent that the Workers' Compensation benefits combined with collateral benefits exceed the Claimant's AWW. (1-89-104). The Employer/Carrier argued that *Grice* and prior precedents have held that an E/C may offset Workers' Compensation benefits to the extent that collateral benefits combined with Workers' Compensation benefits exceed the AWW in order to prevent a Claimant from obtaining a windfall by virtue of the accident. (1-94-102).

The E/C argued that the proper method of offsetting benefits in this case was to add the Claimant's Workers' Compensation benefits to his collateral benefits, and to the extent that the sum of these benefits exceeded his AWW, the E/C was entitled to an offset.

At one time, the JCC on record indicated that the Florida Supreme Court in *Grice* specifically held that to the extent that the Claimant's Workers' Compensation benefits and the combined collateral benefits exceed the Claimant's AWW, the E/C is entitled to an offset. (1-24-25). However, the JCC entered an Order totally contrary to the *Grice* opinion by ruling that the E/C is entitled to an offset only

to the extent that the Claimant's Workers' Compensation benefits combined with the collateral benefits exceed the Claimant's ACE rather than the Claimant's AWW. 692 So. 2d 896 (Fla. 1997). The First District Court of Appeal reversed the JCC's holding based on *Grice*, but certified the primary issue to this Court. (1-175).

In this case, the Claimant's ACE amounted to $484.42 per week, whereas the Claimant's AWW amounted to $260.00 per week. (1-8-12). Utilizing the ACE, the E/C would not be entitled to an offset since the Claimant's Workers' Compensation benefits and his collateral benefits did not exceed $484.42 per week. (1-102-104). Utilizing the AWW (in accordance with *Grice*), the E/C would be entitled to an offset because the Claimant's Workers' Compensation benefits combined with the collateral benefits did exceed the AWW of $260.00 per week. Nevertheless, the JCC, despite the Florida Supreme Court's 1997 ruling in *Grice*, held that the E/C may only receive the benefit of an offset to the extent that the Claimant's Workers' Compensation benefits combined with collateral benefits exceeded the ACE rather than the AWW. (1-175).

The issue in this case does not involve a question regarding disputed facts, offsets, or calculations. (1-187). Rather, this case presents one legal issue: is the Florida Supreme Court decision in *Grice* right or wrong? (1-107). The E/C relied on *Grice* to take an offset to the extent that the Workers' Compensation benefits combined with certain collateral benefits exceeded the Claimant's AWW. (1-89-104). The Claimant on the other hand questioned the authority and accuracy of *Grice*, and argued that, in this case, the AWW should be disregarded and therefore the E/C

should only be allowed to take an offset to the extent that the Claimant's Workers' Compensation benefits combined with the collateral benefits exceed the ACE. (1-84). The Claimant acknowledges that his position is contrary to *Grice*, but argues that *Grice* is wrong. (A.B. 11-13). The E/C argues that not only is *Grice* right, but it, after all, is the ruling of the Florida Supreme Court and thus, must be followed. (1-54-58,65). The First District Court of Appeal agreed, but certified the following question to the Florida Supreme Court:

> Whether the holding in *Escambia County Sheriff's Dept. v. Grice*, 692 So. 2d 896 (Fla. 1997), capping total benefits received by a worker at 100 percent of his or her average weekly wage, applies when Social Security Disability is one of the benefits received by the worker, and 80 percent of his or her average current earnings, as computed by the Social Security Administration, greater than his or her average weekly wage?

However, the First District Court of Appeal improperly awarded attorney's fees to the Claimant, despite the fact that a judgment in the Claimant's favor by the JCC was actually reversed on appeal. Florida Statutes §440.34(2) provides the only basis for an award of attorney's fees in a Workers' Compensation case, and requires that benefits actually be secured by the Attorney for the Claimant. In this case, benefits awarded to the Claimant by the JCC were stripped away on appeal, and thus, no benefits were secured and no fees can be awarded under Florida law.

STATEMENT OF FACTS

The Claimant is a sixty-two year old male, who was born on July 28, 1937. (1-91). He became employed by Bio Lab, Inc., a subsidiary of Great Lakes Chemical Corp., as a sales representative. On March 28, 1994, he sustained a compensable accident. (1-89). The accident occurred when the Claimant's car was hit by another car while on his way to make a delivery for the Employer. (1-89, 198).

The parties entered into a Joint Stipulation, agreeing that the AWW is $260.00 with a CR of $173.33, until such a time as to Claimant's health insurance benefits are discontinued. (1-73). The Claimant was accepted as permanently and totally disabled ("PTD") effective June 8, 1995. (1-89). He later began receiving Social Security Disability benefits. The E/C asserted its entitlement to take a Social Security Disability offset as of February 5, 1997. (1-91). As of February 5, 1997, the Social Security Disability offset was calculated to be $49.41 per week. (1-91).

The calculation of the Social Security Disability offset is illustrated in the chart below:

Average Weekly Wage (AWW)	260.00
Weekly Compensation Rate (CR) (AWW * 0.6667)	173.34
Number of Years Since Accident	3
PTD Supplementals (CR * 0.05 * # yrs. post-IA)	26.00
Monthly Social Security Benefits (PIA)	1,021.70
80% of Average Current Earnings (ACE)	1,666.40
Weekly Average Current Earnings (ACE/4.3)	387.53
80% of Average Weekly Wage (AWW * 0.80)	208.00
Weekly CR + PTD Supplementals	199.34

Weekly Social Security Benefits (PIA + Dependents - Cost of Living Increased/4.3)	237.60
Total Benefits	436.94
Subtract Greater of 80% AWW or 80% ACE	387.53
Total Offset Available	49.41
Weekly benefits payable (CR + PTD Supp - Offset)	149.93

In December of 1997, the E/C ceased taking the Social Security offset and began taking an offset based on *Escambia County Sheriff's Dept. v. Grice*, 692 So. 2d 896 (Fla. 1997). (1-90). According to *Grice*, the E/C may offset Workers' Compensation benefits paid to a Claimant to the extent that the combination of the Workers' Compensation benefits combined with other collateral benefits exceed the Claimant's AWW. (1-93).

In addition to the Claimant's Social Security Disability benefits, the E/C learned that the Claimant was receiving collateral benefits from a Metropolitan Life Long Term Disability Policy. (1-93). The Claimant's benefits from the Metropolitan Life Long Term Disability Policy ("Disability Policy" or "Met Life") were directly related to his employment with the Employer, and benefits were specifically paid to the Claimant as a result of his injury with the Employer on March 28, 1994. (1-106). In addition to the Claimant's Workers' Compensation benefits, his Social Security Disability benefits and the Disability Policy, the Claimant also received $1,312.21 per month from the Illinois Municipal Retirement Fund ("Retirement Fund"). (1-93). The benefits from the Retirement Fund were based upon the Claimant's retirement from his previous employer. (1-93). Since the receipt of these benefits were <u>not</u>

related in any way to the work accident of March 28, 1994, the E/C did not utilize these benefits whatsoever in respect to calculating its offset.

The E/C did, however, utilize the following benefits in the calculation of the offset: (1) the weekly Workers' Compensation rate of $173.34; (2) the weekly Social Security Disability benefits of $237.60, which represented the amount of the Claimant's initial entitlement to said benefits; and (3) the Met Life Long Term Disability Policy benefits. (1-89-98). The Disability Policy does not contain any clause prohibiting Workers' Compensation from taking an offset against the disability benefits. (1-92). The Claimant's Met Life benefits were based upon sixty percent (60%) of the Claimant's base salary of $1,127.00. (1-93). The Claimant began receiving Met Life benefits effective June 27, 1994, with payments of $676.20 per month. (1-93). Met Life imposed a Social Security offset effective September 1, 1994, in the amount of $167.00, which lowered the Claimant's Met Life benefits to $509.20 per month. (1-93). According to Met Life, the Social Security offset was to be in effect until at least April of 1998. (1-93). Met Life subsequently imposed an additional offset effective September 1, 1997, due to the Claimant's receipt of Social Security and Workers' Compensation benefits, which reduced the Claimant's monthly Met Life benefits to the $100.00 policy minimum. (1-94). Furthermore, Met Life stated that the remaining $45.00 would be withheld for the period of October 1, 1999, through October 31, 1999, and the Claimant will receive a partial benefit of $55.00. (1-82).

The Claimant does not dispute the E/C's calculations contained in the Hearing Information Sheet and the Memorandum of Law, but contends that the E/C should be permitted to take an offset only to the extent that the Claimant's Workers' Compensation benefits with the combined collateral benefits exceed the ACE rather than the AWW. (1-85). In other words, the Claimant stipulated to the accuracy of the E/C's offset calculations which were submitted by the E/C to the JCC. (1-72-76). All of the facts and figures were stipulated to between the Claimant and the E/C, and therefore the case revolved around the interpretation of one legal issue: Whether the E/C, pursuant to *Grice*, is allowed to take an offset to the extent that the Workers' Compensation benefits with the combined collateral benefits exceed the Claimant's AWW. The Claimant contends that *Grice* should be ignored and that the E/C should only be entitled to an offset to the extent that the Claimant's Workers' Compensation benefits with the combined collateral benefits exceed the Claimant's ACE. (1-72).

Essentially, the Claimant argues that the JCC should disregard the Florida Supreme Court decision in *Grice* and require the E/C to utilize the ACE rather than the AWW as the ceiling beyond which the Claimant could not receive benefits. (1-64-65). It is also important to note that the offset taken by the E/C under *Grice* is only $230.50, while the offset that could be taken by the Social Security Administration, if the E/C did not take any type of offset, would be $237.60. Therefore, the E/C's offset under *Grice* is not greater than that which the Social Security Administration could take.

While the First District Court of Appeal ruled in favor of the E/C, it certified the question of whether *Grice* applies when Social Security is one of the benefits received by the Claimant and eighty percent (80%) of his ACE is greater that the AWW. The Claimant filed a petition to review the opinion of the First District Court of Appeals. The E/C also filed a petition regarding the awarding of attorney fees to the Claimant by the First District Court of Appeal under §440.34(2), when the Claimant was not the prevailing party on appeal and did not secure any benefits for his Client. In fact, the Claimant actually lost all benefits awarded by the JCC at the First District Court of Appeal.

SUMMARY OF ARGUMENT

The JCC erred as a matter of law by ruling that the Employer/Carrier's collateral offset was limited to the extent the total combined benefits exceeded the Claimant's Average Current Earnings rather than the extent to which the total benefits exceeded the Average Weekly Wage. In *Escambia County Sheriff's Dept. v. Grice*, 692 So. 2d 896 (Fla. 1997), the Florida Supreme Court ruled that an employer/carrier was permitted to take an offset to the extent that the Claimant's Workers' Compensation benefits and collateral benefits exceed the AWW, regardless of whether the collateral benefits were funded by the employer alone or in part by employee contributions. Therefore, the certified question presented to this Court must be answered in the affirmative.

The *Grice* decision controls this case. The cap on the benefits is the Claimant's AWW under Workers' Compensation Law and not the ACE under Social Security statutes. The AWW and the ACE are totally separate matters. The reasoning behind *Grice* is that a Claimant should not receive a windfall as a result of an industrial accident. In other words, the Claimant should not receive compensation in excess of his AWW while he is injured as a result of an industrial accident.

The AWW is directly tied into the Claimant's earnings at the time of the accident. On the other hand, the ACE is not directly tied into the earnings at the time of the accident but is

instead a retroactive survey of the Claimant's earnings long before the industrial accident. In most cases the ACE will take into consideration the Claimant's earnings even before the employment in which the Claimant is injured.

Nowhere in the Florida Supreme Court's decision in *Grice* is the ACE mentioned. Instead, the Employer/Carrier is permitted to take an offset to the extent that the Claimant's Workers' Compensation benefits combined with collateral benefits exceeds the Claimant's AWW.

The Claimant argued that the Florida Supreme Court opinion is wrong, despite the fact that it was decided in 1997. This is also despite the fact that *Grice* followed previously well settled case law. Though the JCC and the Claimant may not like *Grice*, the fact is *Grice* is the law to be applied and has been the consistent law in the collateral offset arena for many years. Fortunately, the First District Court of Appeal recognized this fact and reversed the JCC.

Utilizing the formula (as found in *Grice*) that the Employer/Carrier is permitted to take an offset to the extent that the Claimant's Workers' Compensation Benefits and combined collateral benefits exceed the AWW, the Employer/Carrier properly took the offset for the years 1995 through 1998. The parties stipulated to the relevant figures and, thus, they are not in dispute. The primary question at issue is whether the Employer/Carrier may offset benefits to the extent such benefits exceed the AWW irrespective of the ACE. The Employer/Carrier followed the *Grice* opinion in utilizing the AWW as the ultimate cap on the Claimant's benefits, and

therefore this Court should affirm the First District Court of Appeal's Order and answer the certified question in the affirmative.

The Claimant for the first time on appeal has raised federal preemption. Since the Claimant did not raise preemption before the Judge of Compensation Claims and did not argue in his brief or in oral argument before the First District Court of Appeal the issue of preemption, that argument is now waived. However, even if the argument is not waived, there is no federal preemption in this case. The offset which the Employer/Carrier is taking is no greater than that to which Social Security would be otherwise entitled to take, even if this were a straight Social Security Disability offset. However, there is no conflict in this case because this offset takes into consideration collateral benefits and does not solely consider Social Security Disability. The Federal Government allowed the states to take an offset and Florida has permitted that offset to be taken by the Employer/Carrier. There is no federal preemption issue in this case.

It is also the E/C's contention that the First District Court of Appeal erred in awarding attorney's fees to the Claimant since he actually had his case reversed in favor of the E/C. On appeal, Florida Statutes §440.34(2) only permits attorney's fees in Workers' Compensation cases if benefits are actually secured by the Claimant's Attorney. In this case, not only were no benefits secured, but the Claimant's Attorney lost on appeal, thereby divesting his Client of any benefit received at the initial Merits Hearing before the JCC. There is absolutely no basis in law for awarding attorney fees in this case.

ANSWER BRIEF TO PETITION

I.

THE CERTIFIED QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE SINCE, UNDER *GRICE*, THE EMPLOYER/CARRIER'S COLLATERAL OFFSET IS NOT LIMITED TO THE EXTENT THE TOTAL COMBINED BENEFITS EXCEEDED THE CLAIMANT'S AVERAGE CURRENT EARNINGS, BUT INSTEAD IS CAPPED ONLY TO THE EXTENT TO WHICH THE TOTAL BENEFITS EXCEED THE AVERAGE WEEKLY WAGE.

Florida Courts have often struggled with whether an employer/carrier had a right to an offset where a combination of benefits furnished by an employer and Workers' Compensation benefits exceed an employee's average weekly wage. On May 1, 1997, the Florida Supreme Court quashed and remanded the First District Court of Appeals decision in *Escambia County Sheriff's Dept. v. Grice*, 692 So. 2d 896 (Fla. 1997). The Florida Supreme Court reviewed the certified question of:

> When an employee receives Workers' Compensation, state Disability Retirement, and Social Security Disability benefits, is the employer entitled to offset amounts paid to the employee for State Disability Retirement, Social Security Disability against Workers' Compensation benefits to the extent that the combined total of all benefits exceed the employee's average weekly wage?

Id. at 897.

In *Grice*, the Claimant argued that he was entitled to Workers' Compensation Disability benefits, with the only offset being that which is statutorily allowed for Social Security Disability benefits. *Id.* at 896. However, the Florida Supreme Court concluded that Escambia County may offset the Claimant's Workers'

Compensation benefits to the extent that the total of his Workers' Compensation, Disability Retirement, and Social Security Disability benefits exceed his average weekly wage. *Id.* at 896.

The Florida Supreme Court, using the logic from *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989), concluded that an employer/carrier was permitted to take an offset to the extent that the Claimant's combined benefits exceed his AWW, regardless of whether the collateral benefits were funded by the employer alone or in part by employee contributions. *See Grice*, 692 So. 2d at 896. The Florida Supreme Court concluded that the total benefits from all sources cannot exceed the employee's AWW. *Id.* (*citing Brown v. S.S. Kresge Co.*, 305 So. 2d 191 (Fla. 1974), and *Domutz v. Southern Bell Telegram & Telegraph Co.*, 339 So. 2d 636 (Fla. 1976)). The Florida Supreme Court went on to hold that once the hundred percent (100%) cap has been reached, Workers' Compensation must be reduced pursuant to §440.20(15). *See Grice*, 692 So. 2d at 896-898.

Using the logic from *Brown*, 305 So. 2d 191 (Fla. 1974), the Florida Supreme Court interpreted Florida Statutes §440.20(15) to mean that, when an injured employee receives the equivalent of his full wages from whatever employer source, the equivalent of his full wages should be the limit of compensation to which he is entitled. Therefore, the Florida Supreme Court concluded that relevant statute and case law mandate that an injured worker, except when expressly given a right by contract, may not receive benefits from his employer and other collateral sources which, when totaled, exceed one hundred percent (100%) of his average weekly wage.

See Grice, 692 So. 2d at 896. The ACE was not even mentioned by the Court as being a factor in these calculations.

In *Grice*, the combination of the Claimant's Workers' Compensation, Disability Retirement, and Social Security Disability benefits exceeded his AWW. The Florida Supreme Court concluded that Escambia County was entitled to offset his PTD benefits to the extent that his combined Workers' Compensation, state Disability Retirement, and Social Security Disability Benefits exceeded his AWW. *Id.*

This logic has been used in other cases as well, such as *Acker v. City of Clearwater*, 660 So. 2d 754 (Fla. 1st DCA 1995). The Claimant in *Acker* was adjudged permanently and totally disabled. *Id.* The carrier informed the Claimant that an offset would be taken pursuant to Florida Statutes §440.20(15). *Id.* The offset was taken to the extent that the PTD benefits, PTD supplemental benefits, and pension disability benefits exceeded one hundred percent (100%) of the Claimant's average weekly wage. *Id.* The offset was initially calculated by adding together all benefits paid, including the permanent total supplemental benefits. *Id.* The carrier continued to recalculate the offset, adding the five percent (5%) increase in supplemental benefits. *Id.* This Court stressed the fact that, in the absence of an expressed contract, an injured employee may not receive benefits from his employer and other collateral sources, which when totalled, exceed one hundred percent (100%) of his average weekly wage. *Acker*, 660 So. 2d 754 (Fla. 1st DCA 1995). Again, the ACE was never even mentioned by the Court as a relevant factor in calculating the offset. The Claimant's AWW was the key.

Florida Statutes §440.21 permits an offset for sick leave, group insurance disability, pension, or life benefits, whether paid or furnished in whole or part, by the employer, or contributed by the employee, to the extent that the combination of such benefits when combined with Workers' Compensation benefits exceed the employee's average weekly wage. *See Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989); *Brown v. S.S. Krespe Co., Inc.*, 305 So. 2d 191 (Fla. 1974). An offset is permissible even in the absence of any contractual provision. The critical factor is not the existence of a contractual provision for offset, but whether the combination of benefits furnished by the employer, together with Workers' Compensation benefits, exceed the employee's average weekly wage.

In *Brown*, the Florida Supreme Court stated, "When an injured employee receives the equivalent of his former wages from whatever employee source that should be the limit of compensation to which he is entitled." 305 So. 2d at 194. Furthermore, the Florida Supreme Court stated in *Barragan* that, "the total benefits from all sources cannot exceed the employee's AWW." 545 So. 2d at 252. Again, the Court does not factor the ACE into its decision at all. It is clearly not relevant! Therefore, the certified question must be answered in the affirmative.

II.

THE EMPLOYER/CARRIER PROPERLY OFFSET THE CLAIMANT'S INDEMNITY BENEFITS TO THE EXTENT THAT THE INDEMNITY BENEFITS, WHEN COMBINED WITH COLLATERAL BENEFITS, EXCEEDED THE CLAIMANT'S AVERAGE WEEKLY WAGE.

The Claimant is a sixty year old male, who was born on July 28, 1937. His AWW is $260.00 with a CR of $173.33. (1-91). He was accepted as PTD retroactive to June 8, 1995. (1-91). He receives Social Security Disability benefits and thus, the E/C asserted its entitlement to take a Social Security Disability offset as of February 5, 1997. The initial Social Security Disability offset was calculated to be $49.41 per week. (1-91). The Social Security Disability offset was based upon a monthly Primary Insurance Amount ("PIA") of $1,021.70; eighty percent (80%) of the monthly Average Current Earnings ("ACE") at $1,666.40; and weekly PTD benefits of $199.34, which includes three years of PTD Supplemental benefits since at the time the Social Security Disability offset was calculated, the Claimant was three years post accident. (1-91-92). The Claimant's weekly Social Security benefits ($237.60), plus his weekly PTD benefits ($199.34), amounted to a total weekly benefit of $436.94. (1-91). When eighty percent (80%) of the weekly ACE, $387.53, was subtracted from the total weekly benefits the available Social Security Disability offset was determined to be $49.41. (1-91). Calculation of the Social Security Disability offset is illustrated in the chart below:

Average Weekly Wage (AWW)	260.00
Weekly Compensation Rate (CR) (AWW * 0.6667)	173.34
Number of Years Since Accident (If not PTD then enter 0)	3
PTD Supplementals (CR * 0.05 * # yrs. post-IA)	26.00
Monthly Social Security Benefits (PIA)	1,021.70
80% of Average Current Earnings (ACE)	1,666.40
Weekly Average Current Earnings (ACE/4.3)	387.53

80% of Average Weekly Wage (AWW * 0.80)	208.00
Weekly CR + PTD Supplementals	199.34
Weekly Social Security Benefits (PIA + Dependents - Cost of Living Increases/4.3)	237.60
Total Benefits	436.94
Subtract Greater of 80% AWW or 80% ACE	387.53
Total Offset Available	49.41
Weekly benefits payable (CR + PTD Supp - Offset)	149.93

On December 25, 1997, the E/C ceased taking the Social Security Disability offset and began imposing a *Grice* offset. (1-92). According to *Grice*, the E/C may offset Workers' Compensation benefits paid to the Claimant to the extent that the combination of the Workers' Compensation benefits and other collateral benefits exceed the Claimant's AWW. (1-92-93).

In addition to the Claimant's Social Security Disability benefits the E/C learned that the Claimant was receiving collateral benefits from a Met Life policy. (1-93). The E/C also learned that the Claimant was receiving $1,312.21 per month from the Illinois Municipal Retirement Fund. (1-93). However, the Claimant's retirement benefit through Illinois had vested prior to the industrial accident and was not deemed to be a collateral benefit. (1-93). Therefore, benefits received from the Retirement Fund were not considered in the calculation of the *Grice* offset. (1-93).

The E/C obtained information regarding the Claimant's Met Life benefits prior to calculating the *Grice* offset in December 1997. (1-93). The E/C confirmed that there was no wording in the Claimant's Met Life policy that would preclude the

imposing of a *Grice* offset by the E/C. (1-93). The Claimant's Met Life benefits were based upon sixty percent (60%) of the Claimant's base salary of $1,127.00. (1-93). The Claimant began receiving Met Life benefits effective June 27, 1994, with payments of $676.20 per month. (1-93). Met Life imposed a Social Security offset effective September 1, 1994, in the amount of $167.00 which lowered the Claimant's Met Life benefits to $509.20 per month. (1-93-94). According to Met Life, the Social Security offset was to be in effect until at least April of 1998. (1-93). Met Life subsequently imposed an additional offset effective September 1, 1997, due to the Claimant's receipt of Social Security and Workers' Compensation benefits, which reduced the Claimant's monthly Met Life benefits to the $100.00 policy minimum. (1-93-94).

III.

FEDERAL LAW DOES NOT PREEMPT STATE LAW IN THIS MATTER BECAUSE THERE IS NO CLEAR AND DIRECT CONFLICT BETWEEN FEDERAL LAW AND THE IMPLEMENTATION OF A *GRICE* OFFSET IN WHICH THE AWW IS UTILIZED TO CAP THE CLAIMANT'S TOTAL COMBINED BENEFITS.

The power of Congress to preempt state law derives from the Supremacy Clause of Article VI of the Constitution, which provides that the laws of United States "shall be the supreme Law of the Land;. . . any thing in the Constitution notwithstanding." U.S. Const. Art. VI, cl. 2. Furthermore, "Consideration of issues arising under the Supremacy Clause start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rive v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The case at hand, does not present a preemption issue. Moreover, the Claimant never raised preemption before the First District Court of Appeals. As a result, any argument presented at this stage by the Claimant has been waived. This point was stressed in *Thundereal Corp. v. Sterlin*, 368 So. 2d 923 (Fla. 1st DCA 1979). In *Thundereal*, the Court stressed that where a party does not timely submit a defense, that party waives said defense. *Id.* at 927; *see also Duer v. State*, 733 So. 2d 1084 (Fla. 5th DCA 1999). Therefore, using the logic form the above-mentioned

cases, since the Claimant did not raise preemption before the First District Court of Appeals, any argument presented at this stage by the Claimant has been waived.

The Claimant correctly points out that federal preemption occurs, inter alia, whenever a conflict exists between State and Federal law such that a State law acts as an obstacle to the full accomplishment of federal objectives. While the Claimant correctly defines the precise legal issue, he does not provide the Court with any cases to support his position. In fact, the case cited by the Claimant to support his definition of preemption (*Fidelity Fed. Sav. Loan Ass'n. v. De La Cuesta*, 458 U.S. 141, (1982)) does not provide any facts that would be helpful to the Claimant's position. It does not appear that there are cases dealing with preemption which would provide factual support to the Claimant's position. That is why none are cited in his analysis.

Instead of focusing on federal case law dealing with preemption, the Claimant focuses his argument primarily on the effect that Florida Statutes §440.15(10) has on *Grice* and the case at hand. While the aforementioned statute clearly makes reference to a federal law, it is not a federal law itself. A State Law cannot be preempted by another state law which simply refers to a Federal Statute. *See Abdullah v. American Airlines*, 181 F.3d 363 (3rd Cir. 1999); *see also Meyer v. Conlon*, 162 F.3d 1264 (10th Cir 1998).

It is undisputed that the United States Congress has given states the right to allow an Employer/Carrier to impose a Social Security offset in the stead of the Social Security Administration ("Administration"). Florida has elected to give this

offset to the Employer/Carrier rather than to the Administration. Therefore, even if a Social Security offset were at issue here instead of the *Grice* offset, there could not be any preemption since the Federal Government would not benefit from a decision either way because the Federal Government no longer receives the benefit of the offset. Thus, it cannot be stated that any federal objectives are hindered by the offset. The offset is now a matter of state law.

It is also important to note that a *Grice* offset is not a straight Social Security offset since other collateral benefits are used in this calculation. It is an entirely different being. Put simply, it is a creation of state law, as articulated by the Supreme Court of Florida in *Grice*, with the only limitation being that a claimant must receive more than 100% of his AWW for an Employer/Carrier to impose the offset. Because this offset is a separate and distinct entity apart from a straight Social Security offset, the Florida Supreme Court imposed different limitations from those mandated in Florida Statutes §440.15(10) for a Social Security offset. As a result, federal law, and more specifically, 42 U.S.C. §§423 and 424 (a) of the United States Code are not even relevant to a *Grice* offset. *See Abdullah*, 181 F.3d at 363; *Conlon*, 162 F.3d at 1264.

Therefore, the claim that this case is preempted by federal law must be denied.

INITIAL BRIEF ON CROSS-PETITION

IV.

THERE IS NO BASIS IN LAW FOR THE AWARD OF ATTORNEY'S FEES TO THE CLAIMANT BY

THE FIRST DISTRICT COURT OF APPEAL WHEN THE CLAIMANT IS NOT THE PREVAILING PARTY AND WHEN THE ATTORNEY SECURED NO BENEFITS FOR THE CLAIMANT.

Florida Statutes §440.34(2) states that when " awarding a reasonable Claimant's Attorney's fee, the Judge of Compensation Claims shall consider only those benefits to the Claimant that the Attorney is responsible for securing. . . . For purposes of this Section, the term 'benefits secured', means benefits obtained as a result of the Claimant's Attorney's legal services rendered in connection with the Claim for Benefits. . . ." (emphasis added). This Statute the only basis for awarding attorney's fees found in a Workers' Compensation case.

In the case at hand, the Claimant's Attorney is not responsible for securing any benefits. In fact, the benefits that he secured at the Merits Hearing before the Judge of Compensation Claims were actually taken away from the Claimant on appeal. As the First District Court of Appeals' opinion indicates, the case was reversed in favor of the E/C. Therefore, the Claimant's Attorney is not responsible for securing any benefits to the Claimant since all benefits obtained at the Merits Hearing were reversed. Based on these facts, there is no basis in law for awarding attorney's fees. In fact, any award of attorney's fees in this case would be in direct contravention of the specific attorney's fee provision contained in the Florida Statutes.

The Claimant cites two cases in his Response to Appellant's Motion for Rehearing, *Wick Roofing Co. v. Curtis*, 110 So. 2d 385 (Fla. 1959) and *Florida Juice Co., Inc. v. Yeates*, 111 So. 2d 433 (Fla. 1959), to support his position. However, those rulings specifically held that the appellate court can allow an attorney a fee when the

appeal is taken by the *claimant* and the appeal is unsuccessful. *Id*. No where, in those above-referenced cases does it ever allot the claimant an attorney any fee when the appeal was initiated by the *Employer/Carrier*. In fact, the Supreme Court of Florida initiated this policy in hopes of not deterring claimant's their right of an appeal. *Wick*, 110 So. 2d at 385.

Unlike the cases cited by the Claimant the Employer/Carrier initiated the appeal. Furthermore, the Claimant was not successful in securing any benefits on appeal. The First District Court of Appeals in several cases stressed that an attorney may not receive a fee for benefits that were not secured. *Trans World Tire Co. v. Hagness*, 651 So. 2d 124 (Fla. 1st DCA 1995); *Fumigation Dep't v. Pearson*, 559 So. 2d 587 (Fla. 1st DCA 1989). Moreover, the First District Court of Appeals stated in *Wiseman v. AT&T Technologies, Inc.*, 569 So. 2d 508 (Fla. 1st DCA 1990), that when awarding attorney's fees, a deputy commissioner shall only consider <u>those benefits to the claimant that the attorney is responsible for securing</u>. Moreover, in *Barr v. Pantry Pride*, 518 So. 2d 1309 (Fla. 1st DCA 1987). The First District Court of Appeals construed the provision to mean "that an attorney's fee should be determined on the basis of the total benefits secured (won) as a result of the attorney's intervention." Therefore, since no benefits were secured by the attorney's intervention, an award of attorney's fees in the case at bar is improper.

Moreover, perhaps the Supreme Court should revisit this issue. As the First District Court of Appeals noted in *City of Miami v Burnett*, 596 So. 2d 478 (Fla. 1st DCA 1992), the issuance of attorney's fees when an attorney has not secured any benefits

is rare. Moreover, JCC's, under the current law, are obligated not to award attorney's fees to a non-prevailing Claimant. If this Court were to decide that a non-prevailing party can be awarded a fee, the clear language of the statute must be ignored or rewritten. Awarding a fee to a non-prevailing party is contrary to the statute and common sense. Thus, non-prevailing attorney's who do not secure any benefits for a Claimant should not be awarded attorney's fees.

CONCLUSION

The certified question posed by the First District Court of Appeal must be answered in the affirmative. The JCC clearly erred as a matter of law by ruling that the E/C is entitled to an offset only to the extent that the Claimant's Workers' Compensation benefits combined with the collateral benefits exceed his ACE. The Supreme Court held in *Grice* that the E/C is entitled to take an offset to the extent that the Claimant's Workers' Compensation benefits combined with collateral benefits exceed the Claimant's AWW. There are many other cases that follow the same principle.

This case involves one simple question: whether the Florida Supreme Court's decision in *Grice* is right or wrong, and whether the cap on the Claimant's combined benefits is the Federal Social Security ACE or the Workers' Compensation AWW. Clearly the relevant ceiling to the Claimant's benefits is the AWW rather than the ACE, and therefore, the certified question should be answered in the affirmative.

This case does not present a federal preemption issue and the Claimant's was waived below.

The First District Court of Appeals erred in awarding attorney's fees.

For the foregoing reasons, the certified question should be answered in the affirmative and the attorney's fee award should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondents and Cross-Petitioners has been furnished by U.S. Mail this ___ day of November, 1999, to: Monte R. Shoemaker, Esq., P.O. Box 151057, Altamonte

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