IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA and
DEPARTMENT OF INSURANCE,
DIVISION OF RISK MANAGEMENT — Case No.: 96,962

Petitioners,

vs.

RICHARD HERNY

Respondent.
_________________________________/

ON PETITION TO REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL OF THE FIRST DISTRICT OF FLORIDA

REPLY BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

While the Respondent accepts the Statement of the Case and Facts as set forth in the Petitioners' Brief, the facts should be supplemented as follows:

On November 17, 1988, the Petitioners began taking a Social Security Disability offset of $674.70 from his temporary compensation benefits. On September 1, 1989, the Respondent began receiving $565.31 from his in-line disability retirement benefits. On July 1, 1989, the Respondent became eligible for his first disability cost of living increase and received further increases in the following years.

On July 1st of each year, the benefits increased as follows:

July 1, 1994 to June 30, 1995 $652.15 plus $36.27 = $688.42
July 1, 1995 to June 30, 1996 $671.71 plus $36.27 = $707.98
July 1, 1996 to June 30, 1997 $691.86 plus $36.27 = $728.13
July 1, 1997 to June 30, 1998 $712.62 plus $36.27 = $748.98
July 1, 1998 to June 30, 1999 $734.00 plus $36.27 = $770.27

The Respondent also received $36.27 per month as a health insurance subsidy which is "a supplemental payment to a retiree that the Legislature incorporated to help them offset their health insurance premium" (R. Vol 2, pg. 226).

The Respondent was accepted as being permanently totally disabled as of May 4, 1992.

On April 17, 1998, the Petitioner began taking an offset retroactive to January 1, 1994 (R. Vol 1, pg. 8) and also took a Social Security Disability offset effective May 4, 1992 (R. Vol 1, pgs. 8, 70-71, Vol 2, pg. 188).

A Request for Assistance was filed alleging the Petitioner improperly calculated the offsets, improperly included the retirement benefits to which the Respondent contributed, had

improperly calculated the offset based on Cruse Construction v. Remy, 704 So.2d 1100 (Fla. 1st DCA 1998) and had improperly offset the pension prior to Escambia County v. Grice, 692 So.2d 896 (Fla. 1st DCA 1997) (R. vol 1, pgs. 29-30).

A Petition for Benefits was filed on that Request for Assistance on March 25, 1998 (R. Vol 1, pgs. 27-28).

A Pretrial was held on September 23, 1998. The Petitioners took the position, pursuant to Hunt v. D.M. Stratton Builders, 677 So.2d 64 (Fla. 1st DCA 1996) and Escambia County v. Grice, supra, the offset was properly taken (R. Vol 1, pgs, 4-6, 14-20, 31-35, 71).

In the interim, the First District Court of Appeal entered a decision in Acker v. City of Clearwater, 660 So.2d 754 (Fla. 1st DCA 1998) and Alderman v. Florida Plastering, 23 FLW D2197 which was not considered by the Petitioner in calculating the offsets (R. Vol 1, pgs. 14-16).

A hearing was held on November 2, 1998 (R. Vol 1, pg. 5) resulting in an Amended Order dated December 22, 1998 (R. Vol 2, pg. 263) The JCC noted that "the employer/carrier stipulated that based on recent cases of Acker and Alderman, supra, the figures the employer/carrier had been using to calculate the offset were incorrect." However, the Petitioner was challenging whether these cases were correct in view of Grice v. Escambia, supra (R. Vol 2, pg. 266).

JCC Remsnyder found the Respondent was terminated on August 31, 1989 and his fringe benefits were terminated as of that date (R. Vol 2, pg. 267). The Petitioner subsequently recalculated the average weekly wage to include retirement and life insurance

benefits.

She found the Petitioner first became entitled to SSDI in December 1987 and noted the offset was first applied on November 17, 1988 using the initial PIA of $674.70. She found the Petitioner became entitled to in-line-disability retirement on September 1, 1989 with a base benefit of $565.31 (R. Vol 2, pg 269).

She found the Respondent received a 3% cost of living increase every year effective July 1990, which was initially prorated at 2.25%. Effective every July 1st thereafter, the Respondent received a 3% increase (R. Vol 2, pg. 266).

JCC Remsnyder also found the Respondent received $36.27 per month for health insurance subsidy which was a "supplemental payment to the retiree that the Legislature appropriated to help them offset their health insurance premiums." She found the health insurance subsidy totalled $36.27 and noted it was not necessary for the retiree to be participating in State Health Insurance Plan to receive the benefit so long as they were receiving any form of health insurance for which they were paying a premium (R. Vol 2, pg 266).

She further found for the fiscal year 1993 - 1994, the Respondent received $633.16 in monthly retirement benefits plus $36.27 for health insurance supplement. She noted that figure included all of the COLAs the Respondent had received up to that point (R. Vol 2, pgs 266, 267). She further found there was no reduction for the in-line-of-duty disability and pension benefits received for either Social Security or Workers' Compensation benefits (R. Vol 2, pg. 267).

JCC Remsnyder found the Petitioner was entitled to a Social Security Disability and in-line disability retirement offset from May 4, 1992 through January 1, 1994, based on the initial PIA of $156.91 and a base line disability retirement of $565.31 per month, using an average weekly wage of $433.70 with a corresponding compensation rate of $289.13, with a one time increase in supplemental benefits before the offset of $72.30 (R. Vol 2, pg 269). She found that $72.30 was the amount of supplemental benefits due based on five years of supplements from the date of the accident.

She found there was no further annual re-calculation of the offset from year to year based on the increase of COLAs for Social Security Disability or in-line retirement benefits. She had therefore found that "any offset of the state retirement with the COLAs was erroneous" (R. Vol 2, pg. 270).

She also found the inclusion of health insurance supplements for the purpose of calculating the offset was erroneous and she noted the insurance supplement of $36.27 representing the health insurance supplement benefit was intended to offset the cost of the Respondent's health insurance premium.

She noted the amount of the supplement had been stable at $3.00 per year for service and was raised effective January 1, 1999 to $5.00 per year for service based on a legislative decision to increase the health insurance premium for state employees. She found there was "no indication in this legislation that supplementals are to be included in the Workers' Compensation offset calculation." Therefore, she found the health insurance supplement was not a collateral benefit and if the Legislation

intended this supplement to be subject to offset, they would have so indicated (R. Vol 2, pgs. 270-271).

She ordered the Petitioner to re-calculate the permanent total disability benefits and found if there was any overpayment between May 4, 1992 and December 31, 1993, it should not be recouped based on Brown v. L.P. Sanitation, 689 So.2d 332 (Fla. 1st DCA 1997).

She further ordered the Petitioner to re-calculate the permanent total benefits after January 1, 1994, based on the initial PIA of $674.70 and an in-line disability retirement of $565.31, excluding any sum for health insurance supplement, using an average weekly wage and compensation rate of $433.70 and $289.13, with a one time annual increase in supplemental benefits of $72.30. She held that if there was an underpayment, the Petitioner was to pay the same in a lump sum with penalties and interest, but if there was an overpayment for benefits paid after January 1, 1994, the Petitioner would be entitled to a recoupment based on a 20% reduction of future benefits as provided for in Brown v. L.P. Sanitation, supra (R. Vol 2, pg 271).

On October 29, 1999, the First District Court of Appeal affirmed the decision in its entirety. The Court "concluded that our decisions in Acker and Alderman supports the decision of the Judge of Compensation Claims." In Acker, "we held that an offset could not be recalculated to take into account increases in permanent total disability supplement benefits." The holding was based upon "the proposition that the intended purpose of supplemental benefits is to provide a cost-of-living adjustment to injured workers and, if recalculation of the offset to take such increases into account were permitted, that purpose would be

frustrated." 23 FLW at D1971.

> "In Alderman, we made it clear that the rationale of Acker extended to cost-of-living increases to collateral benefits. ....We acknowledge that, in Acker, we permitted the initial permanent total disability supplemental benefit payment to be offset, and that this suggests that the employer here should have been permitted to include at least some collateral benefit cost-of-living increases in its calculation (perhaps at least until the date as of which the claimant was accepted as permanently totally disabled). Perhaps it was the result of the panel's perception that language in previous decisions suggested (without considering the precise issue raised in Acker) that such a result was required. See e.g., Hunt v. Stratton, 677 So.2d 64 (Fla. 1st DCA 1996); Division of Workers' Compensation v. Hooks, 515 So.2d 294 (Fla. 1st DCA 1987). Perhaps it was simply attributable to the fact that Acker did not challenge the inclusion of the first supplemental benefit payment in the offset calculation. In any event, it seems to us that the rationale behind the decisions in Acker and Alderman clearly dictates the conclusion that we reach - that no post-injury cost-of-living increases to collateral benefits may be offset against Workers' Compensation benefits.
>
> We affirm the decision of the Judge of Compensation Claims which limited the offsets for disability retirement and Social Security Disability benefits received by the claimant and the amounts initially received, without any consideration of cost-of-living increases." 23 FLW at D1971.

SUMMARY OF ARGUMENT

The Respondent was accepted as being permanently totally disabled on May 4, 1992 and, at that time, the Petitioner was aware the Respondent was receiving both Social Security Disability and State Disability Retirement benefits as a result of his industrial injury. However, the Petitioner did not take an offset until January 1, 1994 and then improperly offset State Retirement Disability COLAs on a yearly basis thereafter. Further, they improperly added the receipt of a health insurance subsidy into the calculation. It should be noted the Respondent did not have health insurance benefits at the time of the industrial accident and therefore, no sum was included in the average weekly wage calculation (for any group insurance benefits).

The JCC and the First District Court of Appeal correctly found, as the Petitioner acknowledged, that based on Acker and Alderman, the Petitioner was improperly calculating the offset.

440.18 is silent on when an Petitioner can take an offset. In Acker, the First District Court of Appeal did permit the initial permanent total disability supplemental benefit payments to be offset which suggests the employer should have been permitted to include at least some collateral benefit cost-of-living increases in its calculations. In the instant case, the Judge of Compensation Claims correctly found the Petitioners had all the necessary information with which to take an offset as of May 4, 1992, the date on which the Respondent was permanently totally disabled.

The First District Court of Appeal found that an offset was limited for disability retirement, Social Security Disability

Benefits received by the Respondent and the amounts initially received, without any consideration for cost-of-living increases.

The First District Court of Appeal correctly found, as did the Judge of Compensation Claims, that the $36.27 health insurance subsidy was not a collateral benefit to be included in the calculation. The supplemental payment was appropriated by the Legislature to help retirees offset their health insurance premiums and, at no time, did the Legislature indicate the sum was to be considered a collateral benefit for the purposes of calculation of an offset. Since the health insurance subsidy was not included in the average weekly wage and compensation rate, it should not be a collateral benefit, subject to an offset, nor was it a vested benefit. Monroe Regional Medical Center v. Ricker, 489 So.2d 785 (Fla. 1st DCA 1986).

If this Court addresses the timing of the offset, this Court should find an offset for disability retirement and Social Security Disability Benefits should not include any cost-of-living increases. Alternatively, COLAs should be limited to include only the PTD, SSDI and COLAs as of May 4, 1992, the date on which the Respondent was permanently totally disabled. The JCC's decision should be affirmed.

ARGUMENT

I. THE JCC AND THE DISTRICT COURT ERRED IN REFUSING TO INCLUDE ANY COST-OF-LIVING ADJUSTMENTS TO HERNY'S SOCIAL SECURITY DISABILITY AND IN-LINE-OF-DUTY DISABILITY BENEFITS IN THE CAP ON BENEFITS MANDATED BY 440.20(15, FLORIDA STATUTES

It is the First District Court's holding in Acker v. City of Clearwater, 23 FLW D1970 (Fla. 1st DCA Aug. 17, 1998), review granted, 727 So.2d 903 (Fla. 1999), it progeny, Alderman v. Florida Plastering, 23 FLW D2578 (Fla. 1st DCA Nov. 19, 1998) review granted, 732 So.2d 326 (Fla. 1999), and this Court's most recent pronouncement in City of Clearwater v. Acker, 24 FLW S567 (Fla. 1st DCA 1999) that the cost-of-living adjustments are not to be included in the caps on benefits mandated by 440.20(15). This Court has rejected the arguments advanced both in the Briefs and Oral Argument in City of Clearwater v. Acker, supra, and the arguments advanced in the Initial Brief in the instant case. The arguments added nothing new to the issue and the Petitioner is improperly requesting this court to recede from its ruling in City of Clearwater v. Acker, supra. The JCC's Order and the decision of the First District Court of Appeal in the instant case should be affirmed.

II. THE JCC AND THE DISTRICT COURT ERRED IN REFUSING TO INCLUDE THE HEALTH INSURANCE SUBSIDY WITHIN THE CAP ON BENEFITS MANDATED BY 440.20(15), FLORIDA STATUTES

A. THE HEALTH INSURANCE SUBSIDY

The health insurance subsidy was paid pursuant to Section 112.363, Florida Statutes (1991). The subsidy was computed by multiplying the years of creditable state service by $3.00 and was raised by the state Legislation effective January 1, 1994 to $5.00 per year, based on the Florida Legislature's decision to increase the health premium cost for state employees. According to subsection (1), the purpose of the section is to provide a monthly subsidy payment to retired members in paying the costs of health insurance, and is intended to be payable to retired state employees generally, under any state-administered retirement system.

The purpose, therefore, is to assist state retirees regardless of disability, in paying health insurance premiums and was not intended as a disability benefit.

In this case, the Respondent did not have group insurance with the state at the time of the accident and was insured under his wife's policy. There was no inclusion in the average weekly wage calculation of any sum for group insurance, and therefore, the subsidy should not be considered a collateral benefit.

Further, the Legislature never indicated that such supplemental payment was to be include in any offset calculation and there is no reason why it should be inferred as a collateral benefit.

The state argued that health insurance subsidy is "an employer provided benefit, like Workers' Compensation, Social Security and in-line-duty disability benefits."

However, there is no statute or case law definition of "employer provided" benefits. Each sum claimed as a "employer provided benefit" needs to be examined on a case by case basis. A health insurance subsidy, like Social Security taxes are not of a "sufficient present day value" or "vested" to be considered a collateral benefit. The Florida Legislation returned the power and authority to alter the terms of entitlement to the health insurance subsidy and the amount of benefits. In fact, it changed the amount of these benefits. Based on the recovery in Monroe Regional Medical Center v. Ricker, 489 So.2d 785 (Fla. 1st DCA 1986), and an analogous AWW calculations, the health insurance subsidy does not have a present day value and/or vested to be considered a collateral benefit. The Order of the JCC and the 1st DCA should be affirmed.

III. THE JCC AND THE DISTRICT COURT ERRED IN ALLOWING ONLY FIVE YEARS OF PERMANENT TOTAL SUPPLEMENTAL BENEFITS TO BE SUBJECT TO THE 440.20(15), FLORIDA STATUTES, CAP INSTEAD OF SEVEN YEARS OF SUCH BENEFITS

The real issue in this case is when the offset can be taken. The statute is silent on the question of the timing of the offset.

Depending on the facts of the case, the timing of that offset can either result in a windfall to the Respondent or have an adverse effect on the Respondent. While it is acknowledged the Respondent had the benefit of two additional years of permanent total supplements and cost of living benefits to include in the offset, the Respondent established a lifestyle based on those increased benefits.

Once the offset was taken, the Respondent's reduced benefits no longer allowed him to maintain his lifestyle. The improper timing of the offset allowed the Respondent to enjoy the luxury of a higher standard of living only to pay the penalty later, when the Petitioner chose an arbitrary date in which to take an offset. This Court should create a uniform standard for the timing of offset. The Judge of Compensation Claims attempted to do in this case.

In December 1987, the Respondent began receiving SSDI and on November 17, 1998, the state began offsetting temporary benefits.

On September 1, 1989, the Respondent began receiving in-line disability. The Petitioner did not attempt to offset the same nor could they properly offset the same.

On May 4, 1992, the Respondent was accepted as being permanently totally disabled at which time, 440.15(10)(a) continued to remain applicable. As of May 4, 1992, the Respondent was

receiving both forms of collateral benefits and there is no reason why the Petitioner should be allowed the luxury of deciding what date on which to take an offset, leaving the Respondent at the financial whim of the Petitioner. In an attempt to create uniformity, the Judge found the Petitioner was entitled to a Social Security Disability and in-line disability retirement offset from May 4, 1992, the date on which the Respondent was accepted as being permanently totally disabled, through January 1, 1994. She found there was no further re-calculation of the offset from year to year, based on an increase in the cost of living adjustments, Social Security Disability or in-line disability retirement. She correctly found any offset of the state retirement is erroneous based on Alderman, supra.

The Judge ordered the Petitioner to re-calculate the permanent total benefits and found if there was an overpayment between May 4, 1992 through January 1, 1994, they could not recoup them based on Brown v. L.P. Sanitation, supra.

She found if there was an underpayment for any period after May 4, 1992, the Petitioner was to make payment of that in a lump sum with penalties and interest.

As in Brown v. L.P. Sanitation, supra, the JCC allowed the Petitioner to take a 20% reduction in future benefits to recoup a retroactive Social Security offset from January 1, 1994. Based on that case, the Judge of Compensation Claims properly found that if there was any overpayment for benefits paid after January 1, 1994, any recoupment was to be based on that case. The Judge's logic is supported by Acker and Alderman, supra and promotes uniformity in the application of the offset.

The Respondent disagrees with the appellants' observation at trial that "the only new issue arising on May 2, 1992, was that the employer, by accepting the employee as PTD, was required to pay PT supplemental benefits." The parties do agree there is no requirement in F.S. 440.20(14) that an offset can be taken at any particular point. However, the Judge did not allow the Petitioner to take its offset effective January 1, 1994. The Judge ordered the offset to begin the date the Respondent was accepted as being permanently totally disabled, May 4, 1992, and made provisions as to how the underpayment or overpayment was to be handled from May 4, 1992 through January 1, 1994, based on Brown v. L.P. Sanitation, case. The JCC's Order on that point should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Order of the JCC and the 1st DCA be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular mail this 18th day of January, 2000 to the following:

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