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## COLLATERAL OFFSETS TO WORKERS' COMPENSATION BENEFITS<sup>1</sup>

Mathew D. Staver<sup>2</sup>

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An employee who is injured in the course and scope of employment may be entitled to receive indemnity and medical benefits. However, the employer/carrier (E/C) also may be entitled to offset certain collateral benefits against workers' compensation indemnity benefits. The purpose behind the offset rules is to prevent an injured employee from reaping a windfall from the work accident so that the employee is not compensated more after than before the accident.

### Social Security Offsets

F.S. §440.15(9) provides the E/C with an offset when the employee is receiving Social Security disability benefits and weekly workers' compensation benefits. An employee's benefits may be reduced by the E/C to the extent that the sum of the employee's workers' compensation benefits and the Social Security disability benefits exceeds 80 percent of the average weekly wage (AWW). *American Bankers Insurance Co. v. Little*, 393 So. 2d 1063 (Fla. 1980); *Trilla v. Braman Cadillac*, 527 So. 2d 873 (Fla. 1st DCA 1988); *Whitman v. Hillsborough County School Board*, 386 So. 2d 877 (Fla. 1st DCA 1980).

An E/C can take an offset when the employee is receiving temporary total disability (TTD), temporary partial disability (TPD) or permanent total disability (PTD) benefits. *Good Housekeeping Gas Company v. Kitler*, 492 So. 2d 700 (Fla. 1st DCA 1986). Social Security disability is considered a weekly benefit and may be offset against workers' compensation weekly benefits. However, weekly Social Security benefits may not be offset against monthly compensation benefits. *Id.* at 701-02.

In 1994, the legislature enacted F.S. §440.15(1)(f)(2)(b). This section of the statute requires the employee to cooperate with the employer/carrier in applying for Social Security disability benefits. The E/C is not required to make any payment of PTD benefits for any period during which the employee willfully fails or refuses to cooperate with the E/C in applying for these benefits. This statute is retroactive to accidents that occurred prior to January 1, 1994. *ACE Disposal and Florida Air Condition Contractors v. Clarence Holley*, 668 So. 2d 645, 653 (Fla. 1st DCA 1996).

As of January 1, 1994, F.S. §440.15(1)(b) states that only catastrophic injuries as defined by Chapter 440 constitute PTD. F.S. §440.02(34) states that catastrophic injury includes any injury that would otherwise qualify the claimant to receive Social Security disability benefits. This section of the statute is not retroactive.

a) *Calculating the offset.* Once "the initial calculation of the Social Security offset has been performed, the off-

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This article is submitted on behalf of the Workers' Compensation section, David Mitchell, chair, and Pamela L. Foels, editor.

set 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.” *Cruse Construction v. Remy*, 23 Fla. L. Weekly 197 (Fla. 1st DCA 1997). See also *Hunt v. Stratton*, 677 So. 2d 64, 67 (Fla. 1st DCA 1996). For example, if the Social Security offset results in a \$50 per week offset, that amount remains the same so long as the Social Security offset is available.

b) *Monthly v. weekly*. Effective October 1, 1989, the Florida Legislature amended §440.15(3)(b)1 to provide that wage loss benefits would be based on an employee's average *weekly*, rather than *monthly*, wages. With this statutory amendment, the door was opened for the Social Security disability offset to be applied to wage loss benefits as well. However, it was not until recently that the First District Court of Appeal officially ruled on this issue. In *University Medical Center v. Sumpter*, 591 So. 2d 288 (Fla. 1st DCA 1991), the First DCA stated that when F.S. §440.15(3)(b)1 was amended, changing wage loss benefits from monthly to weekly, it had the effect of creating for the first time the E/C's right to a Social Security offset against wage loss benefits paid to an injured employee. Now, the E/C's liability can be reduced not only when the employee is receiving TTD, TPD, or PTD, but also when the employee is receiving wage loss benefits.

c) *Dependent benefits*. In addition to the offset for Social Security disability benefits received by the employee, the E/C also may take an offset when the employee's *dependents* are receiving Social Security disability benefits. *Modern Plating Co. v. Whitton*, 394 So. 2d 515 (Fla. 1st DCA 1981). Prior to the decision in *Modern Plating*, there was a line of cases ruling that dependent benefits should not be included in the computation of the Social Security disability offset. See *Hersey v. Orkin Exterminating Company*, I.R.C. Order No. 2-3622 (November 30, 1978); *Contractors Services v. Garoutte*, I.R.C. Order No. 2-3514 (August 28, 1978); and *Oroweat Foods Co. v. Valle*, I.R.C. Order No. 2-3512 (August 25, 1978). However, these decisions were overruled by *Modern Plating*. Additionally, in 1979, F.S. §440.15(9)(a) was amended to include the words “and his dependents.” Therefore, the total amount of benefits received by the claimant and his dependents should be considered in calculating the amount that should not exceed 80 percent of the claimant's AWW or average current earnings (ACE). *Dax & Trim Development Co. v. Mullens*, 590 So. 2d 539 (Fla. 1st DCA 1992). It also should be noted that this change in the statute to permit consideration of the benefits to an employee's dependents is *procedural* in nature. Therefore, it is applicable regardless of the date of the accident. *State of Florida Department of Transportation v. Davis*, 416 So. 2d 1132 (Fla. 1st DCA 1981); *General Development Corp. v. Price*, 404 So. 2d 859 (Fla. 1st DCA 1981).

Dependent benefits should not be confused with auxiliary benefits. Auxiliary benefits are those benefits received by widows and survivors for reasons unrelated to a disability. For example, if an employee was a spouse or dependent of a deceased individual, the employee will receive Social Security benefits because of his or her status as a surviving widow or surviving dependent. These benefits are known as auxiliary benefits and are not being received as a result of a disability. Therefore, these auxiliary benefits cannot be used to offset the carrier's liability. The offset provisions of §440.15(9)(a) only apply to an employee or his dependents who are receiving Social Security *disability* benefits related to the industrial accident. *Wise v. E.L. Copeland Builders*, 435 So. 2d 339 (Fla. 1st DCA 1983).

d) *PTD supplemental benefits*. Pursuant to F.S. §440.15(1)(e), an injured worker who is PTD is entitled to receive additional weekly compensation benefits equal to five percent of the base compensation rate multiplied by the number of years since the date of the injury. These benefits are known as PTD supplemental benefits and also are subject to a Social Security disability offset. *State of Florida, Division of Workers' Compensation Trust Fund v. Hooks*, 515 So. 2d 294 (Fla. 1st DCA 1987). Therefore, the E/C's liability is reduced even further by allowing supplemental benefits to be offset. See also *Hyatt v. Larson Dairy, Inc.*, 589 So. 2d 367 (Fla. 1st DCA 1991) (PTD supplemental benefits are included in the total amount of weekly benefits *before* calculating the offset). For accidents occurring after July 1, 1990, PTD supplemental benefits stop at age 62 if the employee is eligible for Social Security benefits under 42 U.S.C. §§402 and 423, even if the employee has not applied for these benefits. *Burger King Corp. v. Moreno*, 689 So. 2d 288 (Fla. 1st DCA 1997). Sections 402 and 423 of the federal code refer to Social Security retirement and disability benefits, respectively. Thus, for any accident occurring after July 1, 1990, the PTD supplemental benefits will cease at age 62 only if the claimant would qualify to receive both Social Security disability and

Social Security retirement benefits. If the claimant is eligible only for one versus the other, then supplemental benefits must continue. Of course, a claimant is not theoretically eligible to receive Social Security disability benefits at age 62, because disability benefits convert to retirement benefits at that age. However, if the claimant already is receiving Social Security disability benefits and then converts to retirement, PTD supplemental benefits cease. Some have relied upon the *Burger King* case to state that even though supplemental benefits may stop at age 62, they must be reinstated at age 65.

e) *Federal cost of living increases.* Although PTD supplemental benefits can be offset if the employee is receiving Social Security disability benefits under 42 U.S.C. §§402 and 423, Social Security supplemental income (SSI) received under 42 U.S.C. §1381 (supplemental Social Security income for persons who are over 65, blind, or disabled) are *not* included in the offset calculation. *Carballo v. Warren Mfg. Co.*, 407 So. 2d 603 (Fla. 1st DCA 1981). Therefore, cost of living increases from federal Social Security benefits are excluded from offset computations. *Great Atlantic & Pacific Tea Co. v. Wood*, 380 So. 2d 558 (Fla. 1st DCA 1980); *Eques v. Best Knit Textile Corp.*, 382 So. 2d 736 (Fla. 1st DCA 1980). Since there is no provision in the federal law for including federal Social Security disability cost of living increases in computing the federal offset, it follows that the state offset cannot exceed the amount that the federal offset otherwise would have been. *Consequently, the amount of the offset is calculated at the time of the initial entitlement and the federal cost of living increases cannot be included in the calculation.*

f) *Wage loss and retirement.* F.S. §440.15(3)(b)(4) (1990) provides the E/C with an offset when the employee is receiving Social Security retirement benefits while receiving workers' compensation wage loss benefits. Specifically, the statute states that if an employee is entitled to both wage loss benefits and Social Security retirement benefits under 42 U.S.C. §§402 and 405, the Social Security retirement benefits shall be primary, and the wage loss benefits shall be supplemental only. The sum of the two benefits shall not exceed the amount of wage loss benefits which otherwise would be payable. However, this offset is not applicable to any wage loss benefits payable to an employee for any month after the employee reaches 70 years of age. *It should be noted that this offset is applicable only to wage loss benefits, not to TTD, TPD, or PTD benefits. Dental Arts Lab, Inc. v. Costantino*, 531 So. 2d 999 (Fla. 1st DCA 1988).

g) *PTD and attorneys' fees paid by the claimant.* In *National Linen Service v. Tolliver*, 686 So. 2d 797 (Fla. 1st DCA 1997), a judge of compensation claims (JCC) found that there was no basis for the claimant to be awarded an attorney's fee in reference to a claim for PTD. The JCC then ordered the claimant to pay his own fees. The claimant attorney then began deducting attorneys' fees directly from the claimant's biweekly checks. This, of course, lowered his net benefits. In the offset calculations, the E/C utilized the entire PTD benefit without subtracting the amount the claimant was paying his attorney. The court noted that under §440.15(10)(a), an E/C cannot take a Social Security disability offset greater than the offset which Social Security itself could take. Under 20 C.F.R. §404.408, items which Social Security may not take into consideration when calculating their offset include attorneys' fees. Since Social Security cannot take an offset using attorneys' fees, neither can the carrier. Consequently, in order to calculate an offset where the claimant is paying attorneys' fees from the biweekly benefits, the carrier must first subtract from the total PTD benefits the amount the claimant is paying the attorney and then use that figure to begin processing the offset.

In other words, if the claimant is receiving \$100 per week in PTD benefits but paying the attorney \$25 per week, then the carrier should consider the claimant's weekly benefit at \$75 per week rather than \$100. Hence, the carrier's offset is decreased by the same amount the claimant is paying the attorney and thus, in reality, the carrier ends up paying the claimant attorney's fee by virtue of taking a lesser offset.

## **Procedure for Social Security Offsets**

a) *Request form.* F.S. §440.15(9)(c) requires the employee to sign a DWC-14 request for Social Security disability and a DWC-20 request for unemployment benefits. It is important to remember that if an employee willfully fails or refuses to sign the forms, the carrier can suspend the employee's benefits. *See also Colonel's Table v. Malena*, 412

So. 2d 64 (Fla. 1st DCA 1982). This requirement applies *only* to individuals who are in receipt of Social Security disability benefits and are less than 62 years of age. *Barruzza v. Suddath Van Lines*, 474 So. 2d 861 (Fla. 1st DCA 1985). It does not apply to individuals over age 62 receiving retirement benefits. However, the employer may still require an employee over age 62 to authorize the release of unemployment information. *Id.* at 864.

b) *Self-executing*. The offset provisions of §440.15(9) are self-executing in nature. *Department of Public Health, Division of Risk Management v. Wilcox*, 543 So. 2d 1253 (Fla. 1989). The offset may be taken administratively by the E/C once it is determined that the claimant is receiving Social Security benefits. *Florida Power & Light Co. v. Aitkins*, 377 So. 2d 57 (Fla. 1st DCA 1979). This is determined by submitting a signed DWC-14 to a local Social Security Administration office. The completed DWC-14 will be returned by the same office noting the type and amount of benefits being received. *Quail Ridge v. Johnson*, 584 So. 2d 199 (Fla. 1st DCA 1991).

Ultimately, the E/C has the burden of proving that it is entitled to the offset against Social Security benefits. *Colonel's Table v. Malena*, 412 So. 2d 64 (Fla. 1st DCA 1982); *Dept. of Highway Safety v. McBride*, 420 So. 2d 897 (Fla. 1st DCA 1982). The offset will not be permitted in the absence of evidence that it is warranted. *Thomas v. Sun-land Training Center*, 408 So. 2d 685 (Fla. 1st DCA 1982).

c) *Not retroactive*. The offset cannot be taken retroactively. It can only be taken prospectively once the E/C determines that the claimant is receiving\*92 Social Security benefits. *Pate v. Maddox Foundry & Machine*, 414 So. 2d 524 (Fla. 1st DCA 1982); *Pensacola Buggy Works v. Jernigan*, 377 So. 2d 245 (Fla. 1st DCA 1979); *Florida Dept. of Transportation v. Lindsey*, 383 So. 2d 956 (Fla. 1st DCA 1980). When an E/C withholds the payment of benefits and does not assert the right to a Social Security disability offset at the time the benefits were withheld, but later pays these benefits in a lump sum either voluntarily or by court order, the E/C may not take a Social Security disability offset at the time of the lump sum payment. *South Florida Water Management District v. Ciacci*, 19 Fla. L. Weekly D1549 (July 19, 1994). Therefore, in order to take a Social Security offset from a lump sum payment of retroactive benefits, the E/C should claim a right to the offset at the time the benefits are controverted. Prior to January 1, 1994, failure to contemporaneously raise a Social Security offset at the time of the controvert may result in the employer/carrier waiving the right to offset these benefits if the benefits are later paid voluntarily or by court order. *Brown v. L.P. Sanitation*, 689 So. 2d 332 (Fla. 1st DCA 1997). Furthermore, the offset cannot exceed the federal offset based on 80 percent of the employee's average current earnings. *Trilla v. Braman Cadillac*, 527 So. 2d 873 (Fla. 1st DCA 1988); *Winn Dixie Stores Inc. v. Crawford*, 376 So. 2d 482 (Fla. 1st DCA 1979). In other words, the state offset cannot be greater than that which the federal government would otherwise have been entitled to had it taken the offset.

According to *Brown v. L.P. Sanitation*, the carrier may recoup benefits overpaid pursuant to the statutory provision effective January 1, 1994. Thus, for any benefit paid after January 1, 1994, the recoupment of any overpaid benefits can extend retroactively to January 1, 1994, even if the date of accident occurred prior to that time. The carrier may recoup up to 20 percent of the claimant's biweekly benefits pursuant to §440.15(13).

d) *\$20 minimum*. F.S. §440.12(2) indicates that an employee injured after December 31, 1974, shall receive a minimum of \$20 per week in workers' compensation benefits. However, if the offset provisions of §440.15(9)(a) are applied to reduce the employee's compensation, the minimum compensation provisions of §440.21(2) do not apply. F.S. §440.15(9)(d); *see also Klase v. Wendy's Old Fashioned Hamburgers*, 466 So. 2d 441 (Fla. 1st DCA 1985).

## **Miscellaneous Provisions**

a) *Unemployment*. In addition to the Social Security offset, F.S. § 440.15(10) provides for an offset if the employee is receiving unemployment compensation benefits. Specifically, no compensation benefits are payable if the claimant is classified as TTD or PTD while receiving unemployment compensation benefits. To receive unemployment benefits, an individual must be able and available to work and must perform a job search. F.S. § 443.091(1)(c).

An employee on TTD or PTD is not able to work and is not required to perform a job search. Therefore, it would be incompatible to receive unemployment benefits while on TTD or PTD status and receiving workers' compensation benefits.

If an employee is entitled to wage loss or TPD and unemployment, the unemployment benefits are *primary* and the wage loss or TPD benefits are only supplemental in nature. The sum of the two benefits cannot exceed the amount of the wage loss or TPD benefits which would otherwise be payable to the claimant. See *Ocean Manor v. Garbalos*, 512 So. 2d 256 (Fla. 1st DCA 1987); *Borden, Inc. v. Butler*, 377 So. 2d 795 (Fla. 1st DCA 1979); *Stoker / Ashland v. Douglas*, 455 So. 2d 514 (Fla. 1st DCA 1984). In this instance, an individual receiving wage loss or TPD is able and available to work and is required to perform a job search. As long as there is no duplication of benefits, an individual can receive both benefits, but the employer is allowed the offset to the extent that the sum of the two benefits exceeds the amount of wage loss or TPD benefits otherwise payable to the employee.

b) *Combined benefits offsets*. A claimant may not obtain a windfall by receiving a combination of benefits that exceeds his or her AWW. *K-Mart v. Young*, 526 So. 2d 965 (Fla. 1st DCA 1988); *Brown v. S. S. Kresge Company, Inc.*, 305 So. 2d 191 (Fla. 1974). In *Brown v. S. S. Kresge Company, Inc.*, the Supreme Court of Florida stated that "it is reasonable to conclude that workmens' [sic] compensation benefits when combined with sick leave insurance benefits provided by the employer should not exceed the claimant's average weekly wage." *Id.* at 194. Similarly, a carrier may not offset workers' compensation payments against an employer's pension benefits except to the extent that the total of the two benefits exceeds the employee's AWW. *Barrage v. City of Miami*, 545 So. 2d 252 (Fla. 1989). When an injured employee receives the equivalent of his full wages from whatever employer source, that should be the limit of compensation to which he is entitled. The decisive factor is whether the combination of benefits from the employer exceeds the employee's average weekly wage. *General Telephone Co. of Fla. v. Willcox*, 509 So. 2d 1270 (Fla. 1st DCA 1987). Although these items technically are not considered "offsets," when calculating the amount of benefits the claimant can receive, \*93 the JCC may consider the amount that the combination of benefits exceeds the claimant's average weekly wage. Therefore, the employer's liability has the potential for being reduced.

In *Escambia County Sheriff's Department v. Grice*, 692 So. 2d 896 (Fla. 1997), the Florida Supreme Court ruled that an employer/carrier may offset certain benefits paid to the claimant when the combination of these benefits exceeds the claimant's AWW. The *Grice* case involved a claimant who was receiving state disability retirement, Social Security disability benefits, and PTD benefits. The combined total exceeded the AWW and, consequently, the carrier was permitted to decrease the compensation benefits so that the total benefits did not exceed the claimant's AWW. However, if the collateral benefits, such as state disability benefits or some other disability benefits, preclude a workers' compensation offset, the carrier may not be able to take such an offset. The carrier also should consider any policy limitations within the disability benefits which may give the offset to the disability benefits against the compensation benefits. The court went on to state that the carrier may consider various collateral benefits that were either funded by the employer alone or in part by employee contribution. The unsettled question is whether *Grice* extends to benefits that have no relation to the employer or to the work related disability.

## Summary

1) For dates of accident that occur prior to October 1, 1989, TTD, TPD, or PTD can be offset against Social Security disability.

2) For dates of accident after October 1, 1989, TTD, TPD, PTD, or wage loss can be offset against Social Security disability.

3) For dates of accident either before or after October 1, 1989, wage loss can be offset against retirement which begins at age 62 but the offset ceases at age 70.

4) Social Security disability stops at age 62 and converts to retirement, and this switch of classification of benefits will effect the offset on the workers' compensation side depending upon what type of benefits the claimant is receiving from workers' compensation. For accidents before or after October 1, 1989, Social Security disability offsets cease at age 62.

5) For accidents occurring after July 1, 1990, PTD supplemental benefits cease at age 62.

6) A good rule of thumb is that disability from Social Security can be offset against the disabilities from workers' compensation (TTD, TPD, or PTD). Social Security disability is a weekly benefit and so are TTD, TPD, and PTD. Prior to October 1, 1989, wage loss was considered a monthly benefit and could not be offset against a Social Security disability weekly benefit; after that date, can be offset against Social Security disability weekly benefits.

7) Though wage loss can be offset against Social Security retirement, Social Security retirement cannot be offset against TTD, TPD, or PTD. Since retirement was a monthly benefit, it was able to be offset against wage loss which was formerly a monthly benefit. Interestingly, since wage loss has changed from a monthly to a weekly benefit, there is no case law indicating whether it can still be offset against the monthly Social Security retirement. Until case law states otherwise, we still offset retirement against wage loss. A good argument could be made that if wage loss (now a weekly benefit) can still be offset against Social Security retirement (a monthly benefit), then it is logical to permit an offset of TTD, TPD, or PTD (a weekly benefit) against Social Security retirement (a monthly benefit). There is no case law on this point.