

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 31, 1998 Revised: \_\_\_\_\_

Subject: Workers' Compensation

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Johnson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>WM</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

The bill provides that workers' compensation benefits otherwise payable under chapter 440, F.S., must be reduced to the extent that the combination of workers' compensation benefits (excluding permanent total supplemental benefits), social security benefits (under U.S.C. ss. 402 or 423) and employer-funded benefits provided to the employee and the employee's dependent exceeds 100 percent of the employee's average weekly wages at the time of the injury.

"Employer-funded" benefits are defined to include any benefits for which the employer has contributed more than 50 percent of the costs of the benefits, and includes retirement benefits, disability benefits, and any other payment of wages by the employer during the period of disability.

The bill also revises the eligibility requirements for supplemental payments to require supplemental benefits to cease once an employee reaches age 62 and is eligible for social security disability or social security retirement.

This bill substantially amends section 440.15, Florida Statutes.

**II. Present Situation:**

Only workers incurring a catastrophic injury, as defined in s. 440.02, F.S., are generally eligible for permanent total disability benefits. Permanent total disability benefits are paid at a rate of 66 2/3 percent of an injured worker's pre-injury average weekly wages. Procedures for determining the average weekly wages are delineated in s. 440.14, F.S. In addition to the permanent total disability benefits, an injured worker receives an additional 5 percent of the compensation rate, increasing at a rate of 5 percent per year. However, the weekly compensation payable and the

additional 5 percent benefit, when combined, may not exceed the maximum compensation rate in effect at the time of payment, as determined pursuant to s. 440.12, F.S. (For 1998, the division has set this rate at \$494.)

Section 440.15 (1), F.S., also provides that supplemental benefits will cease at age 62, if the employee is eligible for social security benefits under 42 U.S.C. ss. 402 and 423, whether or not the employee has applied for such benefits. However, in *Burger King Corporation/CIGNA Insurance Company v. Moreno*, 689 So.2d 288 (Fla. 1997) the First District Court of Appeal held that the provision that supplemental benefits cease at age 62 if the claimant is eligible for social security retirement benefits *and* social security benefits, did not preclude award of permanent total disability supplemental benefits to a 69 year-old claimant who was receiving social security retirement benefits, but not social security disability benefits. Disability benefits are not payable to any individual who has attained retirement age (65 years of age) for social security purposes. Accordingly, the claimant was not eligible for social security disability benefits at the time she became permanently and totally disabled and would never be eligible for such benefits. This decision allows for the payment of supplemental benefits for the claimant beyond 62 years of age.

Section 440.15(10), F.S., provides that, if a claimant is receiving permanent total disability, permanent total supplemental, and social security disability, the combined benefits are capped at 80 percent of the average weekly wages, prior to reaching 62 years of age. Workers' compensation benefits are subject to an offset if the total benefits exceed 80 percent of the average weekly wages.

The claimant, in *Escambia County Sheriff's Office v. Grice*, 692 So. 2d 896 (Fla. 1997), incurred a permanent and totally disabling injury in January 1986 while employed by the Escambia County Sheriff's Department. In June 1993, the claimant was notified by the county that his permanent total disability benefit would be offset or reduced, based upon the amount that his combined workers' compensation, state pension, and social security benefits exceeded his average weekly wages.

As a result of the Florida Supreme Court decision of *Escambia County Sheriff's Office v. Grice*, an employer/carrier is generally authorized to offset or reduce workers' compensation benefits to the extent that the total benefits and other collateral sources exceed 100 percent of injured workers' average weekly wages, except where expressly given such a right by contract. It is unclear what other types of collateral sources are to be applied by the employer/carrier in determining offsets.

Private and public sector workers injured subsequent to June 30, 1955 and prior to July 1, 1984, and determined to be permanently and totally (PT) disabled, receive supplemental PT benefits through the Division of Workers' Compensation. The supplemental benefit payments are funded through an assessment on insurance companies, self-insurance funds, assessable mutuals, the Workers' Compensation Joint Underwriting Association, and self-insurers. On an annual basis, the division expends \$23 million for supplemental workers' compensation benefit payments.

The division is presently making such payments to approximately 3,500 individuals and is in the process of determining the amount of Social Security disability and collateral sources that are received by those individuals to determine whether additional workers' compensation offsets are appropriate. As of February 25, 1998, the division estimated that approximately 1,525, or 44 percent, of these individuals will be impacted by the *Grice* decision.

The Division of Risk Management of the Department of Insurance, which is responsible for administering workers' compensation payments for injured state workers, is reducing workers' compensation benefits for those permanently and totally disabled workers, to the extent that the combination of Social Security disability, state disability retirement, and workers' compensation benefits (including the supplemental benefits) exceed 100 percent of a worker's pre-injury wages. Several months ago, the division notified injured state workers that it was pursuing the recovery of overpayments; however, on November 12, 1997, the department indicated that it would implement the *Grice* decision on a prospective basis; but would "... delay action on recovery until the issue can be more fully developed and the legislature is able to consider these issues." The division estimates that 300 injured state workers receiving workers' compensation and state disability retirement are effected by the decision. If the division is allowed include regular retirement benefits for the purpose of calculating the offset, then approximately an additional 200 injured workers are impacted.

At this time, it is unclear how many injured workers in the private sector (post July 1, 1984 injuries) are impacted by the *Grice* decision. According to the Division of Workers' Compensation, there are approximately 22,000 injured workers currently receiving permanent total benefits who could be impacted and the division has received notices from carriers indicating that benefits would change for approximately 650 injured workers due to the *Grice* decision.

### III. Effect of Proposed Changes:

**Section 1.** Amends paragraph (f) of subsection (1) of s. 440.15, F.S., relating to benefits, to revise eligibility requirements for supplemental payments to require supplemental benefits to cease when the employee reaches age 62 and is eligible for social security disability benefit or social security retirement benefit.

Subsection (14) is added to provide that workers' compensation benefits must be reduced to the extent that the combination of workers' compensation benefits, social security benefits under 42 U.S.C. ss. 402 or 423, and employer-funded benefits provided to the employee or employee's dependents exceeds 100 percent of the employee's average weekly wages at the time of the injury. For purposes of this subsection (14) only, "employer-funded" benefits are defined to include benefits for which the employer has contributed more than 50 percent of the costs of the benefits, and includes retirement benefits, disability benefits, and any other payment of wages by the employer during the period of disability; and "workers' compensation benefits" excludes supplemental payments for permanent total disability pursuant to s. 440.15(1)(f), F.S. Therefore the annual 5 percent supplemental benefit would not be included in the benefits subject to the cap of 100 percent of the employee's average weekly wages.

**Section 2.** Provides the act shall take effect on October 1, 1998.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

According to the National Council on Compensation Insurers, the bill may increase workers' compensation insurance by up to 1.0 percent primarily due to the provision allowing for the exclusion of supplemental benefits for purposes of calculating offsets/benefits.

However, by defining employer-funded benefits and specifying that supplemental benefits are not included in the calculation of the offset to the workers' compensation benefits otherwise payable may reduce litigation costs regarding these issues. See also Related Issues for a discussion of recent court decisions regarding supplemental benefits.

C. Government Sector Impact:

According to the Division of Risk Management (of the Department of Insurance) the bill would have the following fiscal impact on workers' compensation costs (for state employees) incurred by the division:

	FY 1998-99	FY 1999-00	FY 2000-01
Decrease in costs due to inclusion of employer-funded benefits for purposes of calculating benefits	-\$175,000	-\$175,000	-\$175,000
Increase in costs due to the exclusion of supplemental payments from the calculation of workers' compensation benefits.	\$65,000	\$130,000	\$195,000
Net Impact on Casualty Insurance Trust Fund (Negative numbers indicate decrease in costs and positive number indicates increase in costs.)	-\$110,000	-\$45,000	20,000

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Recently, the First District Court of Appeal in *Cruse Construction v. Remy* (97-1286), held that a permanently totally disabled claimant, whose benefits were reduced by social security offset, was entitled to receive the permanent and total disability supplemental benefit. Subsequently, in March 1998, the Office of Judges of Compensation Claims in the case, *Ann Pickard v. HRS District II and Alexis Risk Management*, held that "In keeping with the well established law that workers' compensation offsets only apply to the initial social security disability benefit and exclude the annual cost of living increases coupled with the holding in *Cruse Construction v. Remy*, I conclude cost of living increases in social security disability benefit, the Florida State Retirement Benefit, and the permanent total supplemental benefit are outside the scope of Grice." The Judge also held that the Grice cap continues to apply to the combination of social security, state retirement, and workers' compensation benefits, excluding the cost of living adjustments under those three programs.

**VIII. Amendments:**

None.