

**STORAGE NAME:** h4781.fs

**DATE:** April 13, 1998

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
FINANCIAL SERVICES  
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

**BILL #:** HB 4781 (PCB FS 98-11)

**RELATING TO:** Workers' Compensation

**SPONSOR(S):** Committee on Financial Services and Representative Safley & others

**COMPANION BILL(S):** CS/SB 1092 (s)

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

(1) FINANCIAL SERVICES YEAS 6 NAYS 2

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I. SUMMARY:

In 1997, the First District Court of Appeal in Burger King Corporation/CIGNA Insurance Company v. Moreno, 689 So.2d 288 (Fla. 1997) held that s. 440.15(1)(f), F.S., which states that supplemental benefits cease at age 62 if the claimant is eligible for social security retirement benefits *and* social security benefits, did not preclude the 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. This decision in effect allows for the payment of supplemental benefits to claimants beyond 62 years of age.

In 1997, the Florida Supreme Court in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997), held that an employee's workers' compensation benefits, social security benefits, and state disability retirement benefits, when totalled, may not exceed 100 percent of the employee's average weekly wage (AWW). If the total of these benefits exceeds 100 percent of the employee's AWW, the carrier is entitled to an offset against the employee's workers' compensation benefits. This bill would:

- modify the conditions under which supplemental benefits would cease at age 62 to require termination if the employee is eligible for either social security disability benefits or social security retirement benefits, rather than be eligible to receive both;
- limit *Grice* to the specific benefits at issue in the offset in the *Grice* case;
- specify which other types of benefits (ones not specifically addressed in *Grice*) may be included in an offset;
- exclude supplemental benefits, which were also not addressed in *Grice*, from an offset; and
- prohibit employers and carriers from recouping past overpayments of benefits based on offset calculations.

The fiscal impact of the bill is indeterminate.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

**Workers' Compensation Permanent Total Disability Benefits**

Under Florida law, a person who suffers a work-related "catastrophic injury" and who does not have a substantial earning capacity is considered to be permanently and totally disabled (PTD). An injured worker determined to be PTD is entitled, under s. 440.15(1), F.S., to be paid 66 2/3 percent of his or her average weekly wage for the duration of the total disability. The following Table illustrates the amount of payments made for PTD benefits as compared to the total amount of all benefits paid for injury year 1993, the most recent year with complete data.

	Injury Year 1993
Total PTD Benefits Paid	\$36,185,959
Total of All Types of Benefits Paid	\$348,042,618
% of All Benefits for PTD	10.4%

Source: DLES, Division of Workers' Compensation, 1997 Annual Report

**Supplemental Benefits**

If an injured worker is PTD as a result of an injury resulting after June 1, 1955, the worker is entitled to receive "supplemental benefits." Supplemental benefits give injured workers an annual 5 percent increase on their benefits in order to combat inflation and ensure that the benefits retain the same level of purchasing power. Section 440.15(1), F.S.

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 disability 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. Social security disability benefits are not payable to any individual who has attained retirement age (65 years of age). 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. After the Burger King decision, supplemental benefits would cease only for persons between the ages 62 and 65--only they could ever be eligible for both social security disability and social security retirement benefits.

Workers injured prior to July 1, 1984 and determined to be PTD receive supplemental benefits from the Division of Workers' Compensation. Workers injured after July 1, 1984 receive supplemental benefits from their employers. The Division of Workers' Compensation is currently making such payments to approximately 3400 persons.

### **Social Security Benefits**

Pursuant to the federal Social Security Act, an injured employee may also be eligible for disability benefits. In order to qualify for benefits under the Social Security Act, the injured employee must meet a five-step inquiry. This inquiry requires that the following questions be addressed:

- (i) is the employee working?;
- (ii) does the employee have a severe impairment?;
- (iii) does the impairment meet or equal an impairment on a regulatory list of conditions which conclusively merits a disability determination?;
- (iv) can the employee perform past relevant work?; and
- (v) can the employee perform any other work which exists in the national economy?

If the employee is determined by the Social Security Administration to meet this inquiry, the employee is entitled to receive disability benefits.

### **Other Benefits**

#### *Disability-related*

In addition to benefits payable pursuant to chapter 440 and the Social Security Act, an employee may receive a variety of other benefits designed to provide wages during a time of disability. For instance, many employers provide "sick leave" benefits, which compensate an employee when he or she is out of work as a result of an illness or injury.

Employers may also offer disability income insurance, which provide benefits to an employee who has become disabled as a result of an injury. These disability income insurance policies may be paid for by the employer, the employee, or a combination of both the employer and employee.

Furthermore, other employees may be eligible to receive disability pension benefits. Employees of the State of Florida may become eligible to receive disability retirement or in-the-line-of-duty benefits if they become disabled as a result of an injury.

#### *Nondisability-related*

An employee disabled as a result of an injury may be entitled to receive benefits as a result of that disabling injury. However, employees may also be entitled to receive benefits which are not necessarily designed to provide wages during a time of disability. As an example, many employers offer regular retirement plans, deferred compensation plans, or 401(k) plans as a part of an employee's benefit package. These benefits can

also be paid for by the employer, the employee, or both. Benefits of this nature may be payable to the employee at the employee's voluntary election or may be triggered by reaching a certain age. But, these types of benefits do not require that an injury occur before they become payable.

### **Offsets Under Chapter 440**

Section 440.15(10), F.S. provides that the combination of Social Security disability benefits and workers' compensation benefits cannot exceed 80 percent of the employees average weekly wage (AWW), until the worker reaches age 62. If the combination of workers' compensation benefits and Social Security benefits exceeds 80 percent of the employee's AWW, the employer is entitled to take an offset against the workers' compensation benefits.

The statutes do not, however, specifically address offsets from workers' compensation benefits based on any other types of benefits.

### **Escambia County Sheriff's Department v. Grice**

In 1997, the Florida Supreme Court in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997), held that an employee's workers' compensation benefits, social security benefits, and state disability retirement benefits, when totalled, may not exceed 100 percent of the employee's average weekly wage (AWW).

In *Grice*, the employee, Thomas Grice, received:

- workers' compensation benefits,
- state disability retirement benefits, and
- social security disability benefits.

The Florida Supreme Court held that the employer/carrier was entitled to reduce the workers' compensation benefits to the extent that the total of these benefits exceeded 100 percent of his AWW.

The holding in the *Grice* decision was based on section 440.20(14), F.S., which more generally states that an employer/carrier is entitled to reimbursement for wages that are voluntarily paid:

When an employee is injured and the employer pays his full wages or any part thereof during the period of disability . . . and thereafter the carrier, either voluntarily or pursuant to an award, makes a payment of compensation or medical benefits, the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded . . . .

Section. 440.20(14), F.S.

In addition to the statutory bases for *Grice*, s. 440.15(13) states that:

[i]f an employee has received a sum as an indemnity benefit under any classification or category of benefit under this chapter to which she or he is not entitled, the employee is liable to repay that sum to the employer or the carrier or to have that sum deducted from future benefits . . . ; however, a partial payment of the total repayment may not exceed 20 percent of the amount of the biweekly payment.

It is this under this provision that insurers are going back and recovering past overpayments based on the *Grice* offset.

### **Effects of *Grice* and Unanswered Questions**

#### *Offsets of Workers Compensation Benefits*

As a result of the *Grice* decision, carriers have the authority to reduce workers' compensation benefits to those permanently and totally disabled workers receiving other disability benefits (at least including retirement disability and Social Security disability) that together exceed 100 percent of the employee's AWW. Some carriers have already been taking such offsets, so the actual affect on benefit payments is unknown. Some carriers are also recovering past over-payments by reducing future workers' compensation benefits up to the statutory limit (not in excess of 20 percent of each future payment).

#### *State Employees Affected*

As a result of the *Grice* decision, the Division of Risk Management (Department of Insurance) which is responsible for paying workers' compensation benefits to 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 exceed 100 percent of the employee's AWW. However, the Division of Risk Management is not yet recovering past over-payments by further reducing worker's compensation benefits by up to 20 percent. The Division of Risk Management has determined that there are approximately 300 potentially affected disabled employees (those permanently and totally disabled employees who are receiving workers' compensation, in-line-of-duty retirement disability, and Social Security disability).

An outstanding issue is whether regular retirement benefits, as opposed to disability retirement benefits, are included within the 100 percent cap. Presently, the Division of Risk Management is not counting regular retirement benefits in making offsets. However, the Division is currently litigating a case before a Judge of Compensation Claims in Tallahassee which would permit the Division to include regular retirement benefits in the calculation of offsets. If the Division were to include regular retirement benefits in the offset calculation, an additional 125 state retirees would be affected.

#### *"Collateral Sources"*

The Court in the *Grice* case specifically included Mr. Grice's workers' compensation benefits, social security benefits, and state disability retirement benefits in calculating an offset. The Court did not specifically discuss other types of benefits, however, the Court

stated that an employee "may not receive benefits from his employer and other *collateral sources* which, when totalled, exceeds 100% of his average weekly wage." Grice, 692 So.2d at 898 (emphasis added). The *Grice* Court did not define the phrase "other collateral sources."

### *Supplemental Benefits*

Another issue that is unclear after *Grice*, is whether supplemental benefits are to be included in the meaning of "other collateral sources". The question presented to the *Grice* Court did not mention supplemental benefits. However, within the last two years, there have been two cases from the First District Court of Appeal dealing with the issue of whether supplemental benefits, payable under s. 440.15(1)(f), F.S., are included in the social security offset permitted by s. 440.15(10), F.S.

In Hunt v. D.M. Stratton, 677 So.2d 64, (Fla. 1st DCA 1996), a Judge of Compensation Claims (JCC) rejected the claimant's argument that the employer/carrier (E/C) could not take an offset in excess of the total of his social security benefits. The court reversed the JCC's decision and proceeded to explain the method for calculating an offset under s. 440.15(9)(a), F.S. (current s. 440.15(10), F.S.). The court explained that an E/C is entitled to an offset to the extent that the total of workers' compensation benefits, PTD supplemental benefits, and social security benefits exceeds 80 percent of the claimant's AWW. However, the court stated that, in no event, may the offset exceed the total amount of social security benefits due the claimant. Id. at 67. In performing the offset calculation, the court stated that the supplemental benefit is to be considered in the initial calculation, but that "the law does not contemplate a recalculation of the offset based on any increases thereafter." Id.

Based on the language from the Hunt case, an E/C in Cruse Construction v. St. Remy, 704 So.2d 1100, 1101 (Fla. 1st DCA 1997), argued that a permanently and totally disabled claimant "is not entitled to receive the statutorily provided cost of living increase (the "PTD Supplement"), because that would mean recalculating the benefits annually." The First District Court of Appeal dismissed this argument and stated that in this case and in Hunt the claimants' total benefits, including the supplemental benefits, may exceed 80 percent of the AWW because of the requirement that the offset not exceed the total amount of the social security benefits. Id. The court explained:

Once the initial calculation of the social security offset is performed, the offset need not be calculated annually. However, the total amount of benefits receivable after the offset will change annually to account for the cost of living increase provided as PTD supplemental benefits. There is no reasonable basis for concluding that permanently totally disabled claimants whose benefits are reduced by social security offset thereby become ineligible for the statutorily provided PTD supplemental benefit.

Id.

Despite these cases, the Division of Workers' Compensation is currently including supplemental benefits each time a calculation of the offset is performed under s. 440.15(10), F.S.. This means that the Division of Workers' Compensation is taking an

offset to the extent that social security benefits and workers' compensation benefits (including supplemental benefits) exceed 80 percent of the employee's AWW. The Division of Workers' Compensation is not, however, recovering any past overpayments of workers' compensation supplemental benefits.

**B. EFFECT OF PROPOSED CHANGES:**

The bill would amend s. 440.15(1)(f), F.S., relating to supplemental benefits, to modify the conditions under which supplemental benefits would cease at age 62 to require termination if the employee is eligible for either social security disability benefits or social security retirement benefits, rather than be eligible to receive both.

The bill limits *Grice* to the specific benefits at issue in the offset in the *Grice* case. This bill also specifies which other types of benefits (ones not specifically addressed in *Grice*) may be included in an offset. Lastly, the bill excludes supplemental benefits, which were also not addressed in *Grice*, from an offset.

In calculating an offset of workers' compensation benefits, the bill authorizes a reduction of workers' compensation benefits when the total amount of:

- workers' compensation benefits;
- social security benefits; and
- employer-funded benefits (excluding nondisability retirement and pension benefits);

exceeds 100 percent of the employee's average weekly wage. Supplemental benefits, payable under s. 440.15(1)(f), F.S., would not be included in the calculation of an offset.

Also, for workers' compensation benefits payable before October 1, 1998, employers and carriers would be precluded from recouping from employees past overpayments of workers' compensation benefits when the combination of:

- workers' compensation;
- social security; and
- employer-funded benefits (including, but not limited to, nondisability retirement or pension benefits

exceeds 100 percent of AWW.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

The bill prohibits employers and carriers from recouping past overpayments of benefits to employees when the total of workers' compensation, social security, and employer-funded benefits (including, but not limited to, non-disability retirement and pension benefits) exceeds 100 percent of the employee's AWW.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

The bill amends s. 440.15, F.S.

E. SECTION-BY-SECTION RESEARCH:

N/A

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

The Department of Insurance, Division of Risk Management is responsible for paying workers' compensation benefits, including supplemental benefits for injuries after July 1, 1984, to injured state employees. The bill responds to the *Burger King* case by restricting eligibility for supplemental benefits to those persons who are 62 and eligible for social security retirement or social security disability benefits. This change would reduce the amount of benefits paid by the Division of Risk Management because supplemental benefits would cease at age 62, rather than be payable beyond age 62. The fiscal impact of this change is indeterminate.

In addition, the bill limits *Grice* to the benefits at issue in the *Grice* case and specifies which other benefits may be included in an offset. The bill also excludes supplemental benefits from an offset calculation. Lastly, the bill prohibits employers and carriers from recouping past overpayments based on offsets. These changes affect the Division of Risk Management, but the exact fiscal impact is indeterminate because it is not known how many state employees are subject to recoupment for past overpayments and how many state employees will be eligible for workers' compensation benefits, social security benefits and disability related benefits in the future.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

By excluding supplemental benefits from consideration in an offset, the bill limits the sources that potentially could have been included in an offset after the *Grice* case. As a result, the bill may have the effect of increasing workers' compensation benefits payments for persons receiving supplemental benefits.

The bill also prevents employers and carriers from recouping past overpayments of benefits when the total of workers compensation, social security, and employer-funded benefits (including, but not limited to, non-disability retirement and pension benefits) exceeds 100 percent of the employee's AWW. Therefore, the bill would have the effect of preserving workers' compensation benefits paid by employers or carriers who otherwise might elect to reduce employees' workers' compensation payments in order to recover past overpayments based on an offset.

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

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B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON FINANCIAL SERVICES:

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