25/7/88

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,662

PAUL BARRAGAN, *

Petitioner, *

v. *

CITY OF MIAMI, *

Respondent. *

FILED
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PETITION ON A CERTIFIED QUESTION
OF GREAT PUBLIC IMPORTANCE
FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

BRIEF OF THE PETITIONER, PAUL BARRAGAN

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STATEMENT OF THE CASE AND FACTS

This case comes to the Supreme Court upon a question certified by the First District Court of Appeal as being one of great public importance, Fla. R. App. P. 9.030 (2)(a)(v). The underlying cause is a Workers' Compensation Claim for permanent total disability benefits.

The issue before the Deputy was whether the City of Miami was legally entitled to take a credit or offset for workers' compensation benefits from the claimant's pension benefits (R.642). The City argued that it was granted authority to take an offset by virtue of Section 40-207 (J), City of Miami Code (1972)(R.428, A.1) and by the prevailing benefits clause of the collective bargaining agreement for the period October 1, 1983 through September 30, 1985, between the City and the Fraternal Order of Police, Lodge No.20 (R.614, A.2).

The claimant contended that the offset was forbidden by Section 440.21 (1) and (2) Florida Statutes (1979)(A.3). The Deputy agreed with the claimant and ruled that the "...employer is not entitled to take a credit or offset for pension benefits received by the claimant following a compensible accident unless the sum total of the workmen's compensation benefits and pension benefits exceed the claimant's average weekly wage." (R.642-643).

On appeal, the First DCA reversed on the authority of City of Miami v. Knight, 510 So.2d 1069 (Fla.1st DCA 1987), rev.den. 12/7/87 (Fla.Supreme Court). In light of this court's

pronouncements in Jewel Tea Co. v. Florida Industrial Commission, 235 So.2d 289 (Fla.1970) and the recurrent nature of the issue presented, the First DCA certified the following question:

> DOES THE EMPLOYER'S REDUCTION OF CLAIMANT'S PENSION BENEFITS, PURSUANT TO CONTRACTUAL PROVISION FOR OFFSET OF WORKER'S COMPENSATION, PERMIT THE DEPUTY'S APPLICATION OF SECTION 440.21, FLORIDA STATUTES, TO AWARD COMPENSATION BENEFITS TO CLAIMANT "AT HIS COMBINED MAXIMUM MONTHLY WAGE"?

The Deputy found the following pertinent facts to be true. The claimant was a 13 year veteran of the City of Miami Police Department (R.642). In September 1983 he was adjudicated by the Deputy as having a 70% permanent partial disability of the body as a whole (R.641). On November 10, 1983, he was granted a disability pension by the City in the amount of $1,188 per month. Subsequently, the City's Risk Management Division administratively accepted the Claimant as permanently and totally disabled and arbitrarily listed March 18, 1984 as the date PTD benefits would commence (R.641).

When the City began paying the claimant his workers' compensation PTD benefit of $541.80 it simultaneously reduced his pension benefit by an equal amount, so that his combined benefits were as follows:

Pension Benefit	$ 646.20
Workers Compensation Benefit	541.80
Combined Benefit	$ 1188.00

Pertinent to Section 440.21 (1) Florida Statutes (1979), the Deputy also found that the claimant had contributed in excess of $16,000 to his pension fund and initially, that sum was used to pay the claimant his pension benefits (R.642). Based on these facts, the Deputy ruled that the City's action was tantamount to having the claimant pay for his own workers' compensation benefits (R.642). In accordance with this court's rulings in Jewel Tea Company v. Florida Industrial Commission, 235 So.2d 289 (Fla.1970); Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla.1974) and Domutz v. Southern Bell Telephone & Telegraph Company, 339 So.2d at 636 (Fla.1976) as well as the First DCA's holding in Department of Highway Safety & Motor Vehicles, Division of Risk Management v. McBride, 420 So.2d 897 (Fla.1st DCA 1982) the Deputy found that the claimant is entitled to combined pension and workers' compensation benefits equal to his average monthly wage of $1,499.84 (R.643). The Deputy, therefore, ordered the City to pay an additional $311.84 per month, commencing November 10, 1983 and continuing so long as the claimant remains permanently and totally disabled (R.643).

The case relied upon by the First DCA for reversal, City of Miami v. Knight, supra, was based upon facts indistinguishable from the facts in this case. Knight distinguished the Supreme Court cases decided above and held, on the authority of Hoffkins v. City of Miami, 339 So.2d 1145 (Fla.3rd DCA 1976) cert.den. 348 So.2d 948 (Fla.1977), that the City's ordinance as incorporated in the collective bargaining

agreement authorized the pension offset and therefore, Section 440. 21 (2) Florida Statutes (1979) was not violated. The opinion did not discuss subsection (1) of Section 440.21.

The issue in this appeal is whether Knight was correctly decided.

SUMMARY OF THE ARGUMENT

The City's reduction of Mr. Barragan's pension, effectively eliminated the value of his workers' compensation benefits. This court's decisions in Jewel Tea Company v. Florida Industrial Commission, 235 So.2d 289 (Fla.1979); Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla.1974) and Domutz v. Southern Bell Telephone & Telegraph Company, 339 So.2d 636 (Fla.1976), interpreting Section 440.21 Florida Statutes (1979) prohibits such an offset. These cases cannot be distinguished on the basis that Mr. Barragan agreed to the offset, because Section 440.21 bars such agreements.

City Ordinance Section 40-207 (J) which authorizes the offset is null and void because the legislature has preempted the field of workers' compensation and the ordinance conflicts with Section 440.21. Even if the legislature had not preempted the field, general law is superior to municipal enactments and the ordinance would have to give way to Section 440.21.

The certified question should be answered in the affirmative, the decision in City of Miami v. Knight, supra, disapproved, the decision of the First DCA quashed and the cause remanded with instructions to reinstate the Deputy's order.

ARGUMENT

I

THE DEPUTY WAS AUTHORIZED BY SECTION 440.21 FLORIDA STATUTES (1979) AND THE DECISIONS OF THIS COURT TO AWARD WORKERS' COMPENSATION BENEFITS TO THE CLAIMANT IN AN AMOUNT THAT WOULD PROVIDE HIM WITH COMBINED COMPENSATION AND PENSION BENEFITS EQUAL TO HIS AVERAGE MONTHLY WAGE.

A. THE PENSION OFFSET ADOPTED BY THE CITY EFFECTIVELY NULLIFIED THE CLAIMANT'S WORKERS' COMPENSATION BENEFITS.

The Petitioner/Claimant (hereinafter Claimant) contends in this brief that the case relied upon by the First DCA for reversal, City of Miami v. Knight, 510 So.2d 1069 (Fla.1st DCA 1987), conflicts with several decisions of this court as well as other decisions of the First DCA. A proper analysis of Knight requires a full understanding of the economic effects of the pension offset adopted by the City and the Deputy's attempt to remedy that offset in light of this court's decisions. A full understanding of those decisions is also required.

The Claimant will discuss the economic facts in this subsection. This court's decisions interpreting Section 440.21 Florida Statutes (1979) and their conflict with Knight will be discussed in subsection B. Finally, in subsection C, it will be demonstrated that the Municipal Home Rule Powers Act, Section 166.011 et seq., Florida Statutes (1973) does not empower the

City to authorize a pension offset in contravention of Section 440.21 Florida Statutes (1979) and this court's decisions.

We begin by examining the economic realities of this case. Below are listed the relevant monthly statistics that are involved:

Average Month Wage	$ 1499.84
Pension	1188.00
Workers' Compensation Benefit	541.80

Instead of paying the Claimant a pension of $1188 and a Workers' Compensation Benefit of $541.80 [1] the City obeyed the requirements of its offset ordinance, Section 40-207 (J), City of Miami Code (1972) and paid the Claimant:

Pension	$ 646.20
Compensation	541.80
Total	$ 1188.00

The practical effect of the offset was to eliminate the Workers' Compensation as an economic benefit to the Claimant. So far as Mr. Barragan's pocketbook is concerned these payments are the same as:

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[1] We ignore for a moment this court's rulings in Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla.1975) and Domutz v. Southern Bell Telephone & Telegraph Company, 339 So.2d 636 (Fla.1976) that total benefits from all sources cannot exceed the employer's average weekly wage. The Deputy used monthly, rather than weekly figures in his order and that practice will be continued here in order to avoid confusion.

Pension	$ 1188.00
Compensation	0
Total	$ 1188.00

Following the dictates of this court's decisions, the Deputy restored as much of the Workers' Compensation Benefit as he could without the combined benefits exceeding the Claimant's average monthly wage. He did this by ordering the City to pay Mr. Barragan an additional $311.84 per month (R.643). This is the equivalent of:

Pension	$ 1188.00
Compensation	311.84
Total	$ 1499.84 (Average Monthly Wage)

Or

Pension	$ 958.04
Compensation	541.80
Total	$ 1499.84

B. SECTION 440.21 FLORIDA STATUTES (1979) AND THE DECISIONS OF THIS COURT PROHIBIT EMPLOYERS FROM APPLYING OFFSETS THAT NULLIFY WORKERS' COMPENSATION BENEFITS WHETHER OR NOT THE EMPLOYEE HAS CONTRACTUALLY AGREED TO THE OFFSET.

Section 440.21 (1) Florida Statutes (1979)(A.3) invalidates any agreement by an employee to pay any portion of the Workers' Compensation Premium paid by his employer to a

carrier or to contribute to a benefit fund or department maintained by the employer for the purpose of providing compensation benefits.

In Jewel Tea Company v. Florida Industrial Commission, 235 So.2d 289 (Fla.1970) the employee contributed to a group insurance plan. When the employee was injured, the employer deducted from the benefits paid under the plan the amounts paid the employee in weekly workers' compensation benefits.

This court held that the offset taken against the group insurance benefits violated the predecessor of Section 440.21 (1). In response to the employer's argument that it did not fail to pay workers' compensation benefits or require the employee to contribute toward his own compensation benefits, but merely reduced the group insurance benefits, this court said:

> "Regardless of whether you say the workmen's compensation benefits reduced the group insurance benefits or visa versa, the result violates the Statute. Claimant is entitled to workmen's compensation in addition to any benefits under an insurance plan to which he contributed." 235 So.2d at 291.

The similarities between the facts in Jewel Tea Company and this case are striking. In Jewel Tea the claimant contributed to a group insurance package, Mr. Barragan contributed to his pension fund. The employer in Jewel Tea reduced the claimant's insurance benefits by an amount equal to his compensation benefits, the City of Miami reduced Mr. Barragan's pension benefits by an amount equal to his

compensation benefits. Both _Jewel Tea_ and the City violated Section 440.21 (1).

The next pertinent case considered by this court was _Brown v. S.S. Kresge Company, Inc._, 305 So.2d 191 (Fla.1975). In _Brown_ the employer argued that it was entitled to a credit against workers' compensation benefits for sick leave benefits that it had previously paid to the claimant. It attempted to distinguish _Jewel Tea_ on the basis that _Brown_ had not contributed toward the cost of the group insurance policy that provided the sick leave benefits.

This court rejected that argument and held that the offset was forbidden by the predecessor of Section 440.21 (2) Florida Statutes (1979) (A.3) which prohibits any agreement by an employee to wave his right to compensation. The court went on to hold, however, that the combined workers' compensation and sick leave benefits could not exceed the employee's average weekly wage, 305 So.2d at 194. The _Brown_ case clearly forbids the waiver of workers' compensation benefits that occurred here, when Ordinance 40-207 (J) was implicitly included in the collective bargaining agreement that governed Mr. Barragan's employment relationship with the City. As was demonstrated above, the economic effect of the offset against the claimant's pension was to totally eliminate his workers' compensation benefit.

The next relevant case is _Domutz v. Southern Bell Telephone & Telegraph Company_, 389 So.2d 636 (Fla.1976), where the court held that the employer could not set off against

workers compensation benefits, pension benefits to which the employee had not contributed. Brown was cited as authority for the holding.

Two cases from the First DCA are worth noting before we go on to discuss City of Miami v. Knight, supra. In Department of Highway Safety & Motor Vehicles, Division of Risk Management v. McBride, 420 So.2d 897 (Fla.1st DCA 1982) the court upheld a Deputy's order denying an offset against compensation for pension benefits which the claimant was receiving.

The employee in Chancey v. Florida Public Utilities, 426 So.2d 1140 (Fla.1st DCA 1983) received 100% of his salary following an industrial accident. Two-thirds was paid in the form of workers' compensation benefits and one-third was paid by the employer pursuant to Chancey's employment contract. The employer reduced Chancey's accumulated sick leave time at a rate of 8 hours per day for each day he was out of work, rather than in proportion to the additional one-third of his wages that were being paid by the employer. A proportionate reduction would have resulted in a two and two-thirds hour per day reduction instead of an 8 hour per day reduction.

The DCA held on the authority of Brown, supra, that only a proportionate reduction in sick leave benefits was permissable. The proportion attributable to the compensation benefits could not be used to reduce the accumulated sick leave benefits.

The two First DCA cases just cited faithfully apply the principles laid down by this court in the Jewel Tea line of cases. Why then did the DCA come to an opposite conclusion in City of Miami v. Knight, 510 So.2d 1069 (Fla.1st DCA 1987)?

It distinguished Jewel Tea, Brown and Domutz on the ground that those cases represent "... only the proposition that workers' compensation benefits cannot be reduced by any benefit to which the claimant is contractually entitled independently of workers' compensation." 510 So.2d at 1073. On the other hand, the court held that Knight's entitlement to a specific pension amount "... was not contractually independent of his entitlement to workers' compensation benefits, but rather was explicitly dependent thereon." 510 So.2d at 1073.

According to the court, the reason why Knight's pension entitlement was dependent on his compensation benefits was that the offset provision contained in Section 40-207 (J) of the City Code was part of Knight's employment contract, 510 So.2d at 1073. The distinction relied upon by the First DCA is wrong for two reasons.

First, the facts stated in Jewel Tea, Brown and Domutz are insufficient to permit the conclusion that there was no reciprocal dependence between the compensation and non-compensation benefits involved in those cases. In the absence of facts to the contrary, and there are none, it is logical to assume that the employers in those cases had some contractual basis for claiming the setoffs that they attempted to enforce.

This conclusion is logical, but it is no more based on fact than the distinction conjured up by the First DCA.

The second and more cogent reason for rejecting that distinction is the language of Section 440.21. Subsection one of that statute states emphatically that there shall be "(n)o agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation...."

Subsection two is equally as emphatic. It states that "(n)o agreement by an employee to waive his right to compensation under this chapter shall be valid."

No agreement, means no agreement. It is, therefore, impossible to validate a forbidden setoff or credit by asserting that the setoff or credit is authorized by an agreement to reduce pension benefits by the amount of compensation benefits. Jewel Tea made clear that it doesn't matter which benefit is reduced, the compensation benefit or the non-compensation benefit, the effect is the same and Section 440.21 forbids the reduction.

At this point the law is clear. Setoffs or credits that have the effect of reducing workers' compensation benefits are illegal. The only question that remains is whether the City may do, what private employers may not. That question will be answered in the negative in Subpoint C.

C. THE MUNICIPAL HOME RULE POWERS ACT, SECTION 166.011 ET. SEQ. FLORIDA STATUTES (1973) DOES NOT PERMIT MUNICIPALITIES TO ADOPT ORDINANCES NULLIFYING SECTION 440.21 (1) AND (2) FLORIDA STATUTES (1979).

After distinguishing the Jewel Tea Company line of cases, the Knight court went on to hold that Knight's agreement to accept pension benefits reduced by any workers' compensation benefits to which he might simultaneously be entitled was not in violation of Section 440.21 (2), citing as authority, Hoffkins v. City of Miami, 339 So.2d 1145 (Fla.3rd DCA 1976).

Hoffkins was a declaratory judgment action in which the plaintiff sought to have the offset ordinance declared invalid.[2] The Third DCA upheld the trial court's ruling that the ordinance expressed the same intent as former Statute, Section 440.09 (4) Florida Statutes (1953)(A.4). That Statute had been in effect in various forms from the early days of the Workers' Compensation Law,[3] and had authorized offsets from municipal pension benefits such as the ones involved here and in Knight. However, the last incarnation of that statute was repealed, effective July 1, 1973, Ch.73-127, Section 2, Laws of Fla.

The Hoffkins trial court reasoned that no new legislation had prohibited the offset and since the statute had

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[2] The ordinance in Hoffkins was City of Miami Ordinance, Section 41-406 (15). It was identical to ordinance Section 40-207 (J).

[3] Section 5966 (9)(d) Compiled General Laws of Florida 1940.

been valid, then a city ordinance providing for the same deduction was also valid, Hoffkins, 339 So.2d at 1146, n.2. The DCA accepted that reasoning and buttressed it by citing the Municipal Home Rule Powers Act, Section 166.011 et. seq. Florida Statutes (1973) as authority for the ordinances' enactment.

Hoffkins was incorrectly decided. It is clear that prior to the enactment of the Municipal Home Rule Powers Act, the City would not have had the authority to enact such an ordinance without enabling legislation, City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla.1972). From the 1930's until July 1, 1973, Section 440.09 (4) had provided that authority.

When a statute is repealed without a savings clause or a general statute limiting the effect of the repeal, the statute is considered as if it never existed, 49 Fla.Jur.2d, Statutes, Section 209. When such a repeal takes place the right or remedy created by the statute falls with it, Yaffee v. International Company, 80 So.2d 910 (Fla.1955).

Unless the Municipal Home Rule Powers Act preserved the City's power to enact the offset ordinance, that law died with the repeal of its enabling legislation. It will be demonstrated below that Section 166.011 et. seq. did not save the ordinance.

1. THE FIELD OF WORKERS' COMPENSATION HAS BEEN PREEMPTED BY THE LEGISLATURE.

Under traditional preemption doctrine a subject is preempted by the legislature if its scheme of regulation is pervasive and if further regulation of the subject by a

subordinate legislative body would present a danger of conflict with the regulatory scheme, Tribune Company v. Cannella, 458 So.2d 1075, 1077 (Fla.1984). There can be no question that from the very beginning, the legislature's regulation of workers' compensation has been all pervasive and that under traditional preemption doctrine it has occupied the field.

However, Section 166.021 (3)(c) Florida Statutes (1973) establishes a more restrictive application of the preemption doctrine and permits municipalities to legislate unless the subject is "... expressly preempted to state or county government by the constitution or by general law...." This definition does not require the legislature to use the magic words "this subject is preempted" in order for it to exclusively occupy a subject matter area. All that is necessary is that the legislative intent appear clearly, openly and obviously. See, Tribune Company v. Cannella, supra, where a legislative announcement of public policy was held sufficient to preempt local regulation regarding delay in the release of public records.

Likewise, the workers' compensation statute clearly occupies that field. Section 440.03 Florida Statutes (1979) which has been in the law from its beginning, states that:

> "Every employer and employee as defined in s.440.02 shall be bound by the provisions of this chapter."

Section 440.02 (12) Florida Statutes (1979) includes within the definition of "employer" all political subdivisions of the state. Section 440.10 requires every employer coming within

the provisions of the statute to provide the compensation set out in the law and Section 440.11 (1) makes the statute the exclusive remedy against the employer, as to both the employee and third-party tortfeasors. Finally, Section 440.55 waives sovereign immunity and permits suits to enforce the statute against the state and any of its subdivisions in the same manner as provided in the statute with respect to other employers.

These provisions, on their face and without interpretation, establish that municipalities are to be treated under the Workers' Compensation Law no differently then any other employer and that they have no power to enact ordinances that deviate from the statute.

It follows, that because of the legislatures preemption of the field of workers' compensation, the City could derive power to enact its ordinance only through a specific waiver, granted by the legislature. It had such a waiver until 1973. When that authority was withdrawn through repeal, the ordinance became null and void, Yaffee v. International Company, 80 So.2d 910, 911-912 (Fla.1955). Consequently, Section 440.21, as interpreted by this court, prohibits the City from taking pension offsets, just as it bars private employers from doing so.

2. THE CITY'S OFFSET ORDINANCE CONFLICTS WITH SECTION 440.21 FLORIDA STATUTES (1979).

A City may not enact an ordinance that conflicts with general law even if the subject matter has not been preempted and the City is authorized to legislate in the field, Board of County

Commissioners of Dade County v. Wilson, 386 So.2d 556, 560 (Fla.1980). See, City of Miami v. Frankel, 363 So.2d 555, 558 (Fla.1978), authority granted by general law can be restricted by general law.

Municipal ordinances are inferior to state law and must fail when conflict arises, Rinzler v. Carson, 262 So.2d 661 (Fla.1972); City of Miami Beach v. Rocio Corp., 404 So.2d 1066, 1069 (Fla.3rd DCA 1981). An ordinance cannot conflict with any controlling provision of a state statute. If doubt exists regarding the scope of the state statute, the doubt must be resolved against the ordinance and in favor of the statute. "A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden", Rinzler v.Carson, supra, 262 So.2d at 668; Tribune Company v. Cannella, supra, 458 So.2d at 1077.

The legislature has expressly forbidden agreements that have the effect of reducing or eliminating workers' compensation benefits, Section 440.21 Florida Statutes (1979); Jewel Tea Company v. Florida Industrial Commission, 235 So.2d 289 (Fla.1970). The City's offset ordinance conflicts with the general law and therefore must fail. It follows that the reduction in Mr. Barragan's pension was improper and the Deputy correctly ordered that the deduction be restored to the extent that the combined total of pension and compensation benefits do not exceed the claimant's average monthly wage.

CONCLUSION

This court should declare that the offset ordinance is preempted and in conflict with state law. The certified question should be answered in the affirmative, the decision of the District Court should be quashed, City of Miami v. Knight, 510 So.2d 1069 (Fla.1st DCA 1987), rev.den.12/7/87 (Fla.) should be disapproved with regard to the pension offset issue and the cause remanded with directions to reinstate the Deputy's order.

Respectfully submitted,

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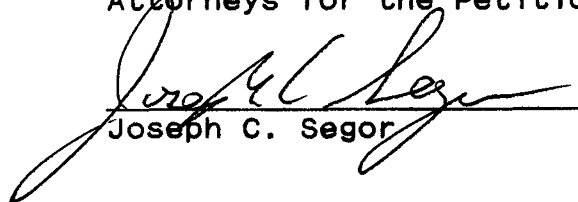
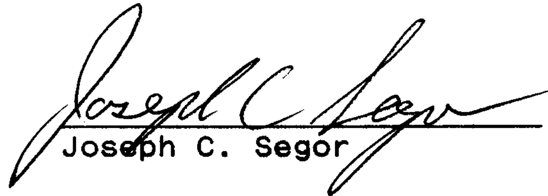


Joseph C. Segor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of the Petitioner, Paul Barragan has been mailed February 26, 1988 to: Jay M. Levy of Hershoff and Levy, P.A., 6401 S.W. 87th Avenue, Suite 200, Miami, FL 33173 and Martha Fornaris, Assistant City Attorney, 700 AmeriFirst Building, One S.E. Third Avenue, Miami, FL 33131, Attorneys for the Respondent.



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