IN THE SUPREME COURT
STATE OF FLORIDA

CITY OF MIAMI,

Petitioner,

-vs-

Case No. 80,560

FRANK AROSTEGUI,

Respondent.
_____/

# RESPONDENT'S ANSWER BRIEF

On review of a Certified Question
from the First District Court of Appeal

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## Table of Contents

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES (con't)

## TABLE OF AUTHORITIES (con't)

## Florida Statutes



## Other Authorities

## Introduction

Effective July 1, 1973, the State Legislature repealed Florida Statute 440.09(4). That Law, while in effect, allowed the City of Miami and other municipalities to reduce pensions awarded for in-line of duty disability by the amount of workers compensation benefits being paid by the municipality on account of that same disability. Effective July 1, 1973, the State Legislature made it clear, via repeal, that municipalities could no longer take said offsets. The City of Miami continued to do so under the color of an Ordinance originally adopted by the City in 1940. From the time of repeal of Florida Statute 440.09(4), on July 1, 1973, until the District Court of Appeal, Third District, ruled in Thorpe vs City of Miami, 356 So.2d 913 (Fla. 3d DCA 1978) cert denied, 361 So.2d 836 (Fla. 1978), there had been challenges to the offsetting of disability pension benefits by the City of Miami. (There had been no workers compensation claims on this issue to reach either the District Court of Appeals or to have substantive rulings by the Supreme Court). Law suits filed by Mr. Hoffkins (see Appendix "A") and Mr. West[1] resulted in decisions favorable to Petitioner by the Third District Court of Appeal and in both cases review was denied by the Supreme Court but the record will reveal that these two individuals were injured prior to July 1, 1973, and, therefore, the offsets were

[1]West vs City of Miami, (Workers Compensation Claim) 9 FCR 61 (1974) cert. denied 310 So.2d 304 (Fla. 1975), West must have been injured before July 1, 1973 because he reached maximum medical improvement before that date!

appropriate, see Jones vs City of Miami, 593 So.2d 544 (Fla. 1st DCA 1992), cert denied _____So.2d_____(Fla. 1992), Thorpe, supra, in 1978, was therefore the first District Court of Appeals opinion to affirm that the actions the City of Miami had been taking since July 1, 1973, were appropriate for injuries occurring after July 1, 1973, resulting in disability pensions and compensation awards.

Petitioner's raise in their Initial Brief argument regarding the retroactivity of the Court's decision in City of Miami vs Barragan, 545 So.2d 252 (Fla. 1989), based upon an assertion of detrimental reliance on decisions of a Supreme Court. Petitioner has already received the attention of this Court on that same issue by Motion for Rehearing filed in Barragan, supra, and by exhaustive briefing in City of Miami vs Burnett, 596 So.2d 478 (Fla. 1st DCA) rev. denied, _____ So.2d_____ (Fla. October 14, 1992). Retroactivity is now raised for yet a third time in Petitioner's Initial Brief notwithstanding the limited scope of the certified question.

Petitioner's here are the City of Miami (self-insured) standing in the shoes of an employer pursuant to §440.02(4), §440.03 (1975).

The Respondent, Frank Arostegui, was an employee of Petitioner when he suffered a compensable accident on November 2, 1976 (R-4). (References to the Record of Proceedings will be preceded by the capital letter "R" followed by the page number or numbers and refer to the Record filed on appeal to the District Court of Appeal, First District in Case Number 91-00675).

This matter presents itself to the Supreme Court on two issues. Issue

number 1, is whether or not the Supreme Court should accept jurisdiction; and Issue number 2, is the Certified Question:

> "Whether an increase in workers' compensation benefits, awarded pursuant to §440.21 to offset illegal deductions from an employee's pension fund, in accordance with Barragan vs City of Miami, 545 So.2d 252 (Fla. 1989), constitutes an "installment of compensation" for purposes of §440.20, Florida Statutes?"

## Statement of the Case and Facts

Respondent's agree with the Statement of the Facts propounded by Petitioner's in their Initial Brief but dispute that there are two Certified Questions presented to the Court for review. The Certified Question issued in City of Miami vs Bell, review pending Case No. 80,524, questions whether or not the City of Miami can be legally excused from paying a penalty pursuant to §440.20(7), on the amount of pension offset monies withheld in the past because the City did so in "good faith reliance" on the validity of the City ordinance authorizing the pension offset in view of the appellate decisions approving its validity. No such "finding" of good faith reliance appears in the AROSTEGUI Certified Question.

## Summary of the Argument

The Court should not accept jurisdiction in this case since the question of what is and what is not an installment of compensation has been clearly and explicitly decided by the District Court's of Appeal in the past. The Court should certainly not use the vehicle of explaining what is an installment of compensation to expand its review to include yet a third bite of the apple for the City of Miami on the issue of retroactivity of Barragan, supra. Because it is raised, we will respond to Petitioner's arguments on retroactivity as we have done before but we still fail to understand how a claim of non-retroactivity can be made when clearly Messrs. Barragan and Giordano received, with the approval of the Court, retroactive benefit payments as have Burnett, Case No. 79,925; Pierattini, Case No. 79,926; Johnson, Case No. 79,927; Majewski, Case No. 79,928; Moye, Case No. 79,951 and Ogle, Case No. 80,055.

As in the past, we will respond to the Petitioner's argument of detrimental reliance on past decisions by showing that the offsets in question were taken long before any decisions of any Courts and that by returning to the victim that which is unlawfully taken from him cannot by any stretch of the imagination be considered a windfall to the victim as suggested by Petitioner's.

We will clearly show that the award by the Compensation Judge is for a set number of weeks of compensation at a set amount per week. By making said award the Judge of Compensation Claims was awarding benefits within his

jurisdiction and in accordance with the opinion of this Court in Barragan, supra. To even suggest that these benefits are not "installments of compensation" questions this Court's decision in Jewel Tea Co., Inc. vs Florida Industrial Commission, 235 So.2d 289 (Fla. 1970) and the plain language of the Penalty Statute.

We shall point out to the Court by reviewing the language of the statute under which penalties were imposed that said penalties were in fact administrative penalties which could only be excused by the timely filing of an appropriate Notice to Controvert or by proof that non-payment resulted from conditions over which the employer had no control. We will further show that the penalty section in effect at the time of Respondent's industrial injury did not provide for a "punitive" penalty. The word punitive was inserted in the statute for the first time in 1979, long after Mr. Arostegui's injuries took place.

Lastly, we will comment on the assertions of Petitioner's that "pre-judgement interest" should not have been awarded and also comment that the District Court has not mistakenly issued its Mandate giving rise to possible liability for additional penalties.

## ARGUMENT

Respondent believes that the most important question faced by the Court at this time is whether or not to accept jurisdiction of the Certified Question posed in this case by the District Court of Appeal. That question is simply:

> "Whether an increase in workers' compensation benefits, awarded pursuant to §440.21 to offset illegal deductions from the employee's pension fund, in accordance with Barragan vs City of Miami, 545 So.2d 252 (Fla. 1989), constitutes an "installment of compensation" for purposes of §440.20 Florida Statutes?"

In affirming the award of the 10% penalty, the District Court of Appeal recognized that this Court has previously commented:

> "Regardless of whether you say the workers compensation benefits reduce the group insurance benefits or visa versa, the result violates the Statute. Claimant is entitled to workmens compensation in addition to any benefits under an insurance plan to which he contributed." Jewel Tea Co., Inc. vs Florida Industrial Commission, 235 So.2d 289 (Fla. 1970) (quoted in Barragan vs City of Miami, supra, at 545 So.2d 254, 291 (Fla. 1989).

The Florida Statute in question, §440.21 F.S., not only prohibits the activities described therein but also provides for misdemeanor penalties for violation thereof.

The District Court of Appeal, First District, has already defined "any installment and unpaid installment" within the meaning of the penalties section to apply to not only unpaid compensation but incorrectly paid compensation indicating

that portion withheld is essentially an unpaid installment Santana vs Atlantic Envelope Company, 560 So.2d 528 (Fla. 1st DCA 1990). Penalties are compensation, Lockett vs Smith, 72 So.2d 817 (Fla. 1954).

The Judge of Compensation Claims in his Order (affirmed by the District Court of Appeal) adjudged that the employer, City of Miami, owed Frank Arostegui compensation for permanent total disability at $112.00 per week from March 19, 1977 to and including July 31, 1989 (R-184). This award was consistent with the Court's decision in Barragan, supra, and provided that a set number of weekly installments of compensation must be paid because, in effect, they had never been paid. Barragan, supra, tells us that regardless of whether or not the City of Miami called each weekly payment made during the period of time in question compensation, when it was in fact part of the pension, does not excuse the true payment of compensation required by Chapter 440. Since the City, in its capacity as employer, is being required to make compensation weekly payments by a Judge of Compensation Claims it is hard to imagine that the benefits awarded are not installments of compensation. See also Angela King vs Lord Colony Enterprises/Liberty Mutual Insurance Company, 400 So.2d 856 (1st DCA 1981). While Florida Statute 440.02 (the definition section) does not define an "installment" of compensation, the section under which the penalty is awarded does give us some clue as to what the Legislature meant by an installment of compensation. §440.20(2) F. S. (1975) provides:

> "The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death on which date all compensation then due shall be paid. Thereafter, compensation shall be paid in installments bi-weekly except where the Judge of Compensation Claims determines that payments in installments should be made monthly or at some other period."

Therefore, the Judge's award of compensation benefits at $112.00 per week, from March 19, 1977 to and including July 31, 1989, (R-184), provides for a calculable number of installments of compensation and the District Court in its Certified Question has not suggested otherwise. We therefore respectfully suggest that the Court decline to accept jurisdiction on this issue because what is or is not an installment of compensation is clear from existing decisional Law. The only entities that could possibly be effected by a ruling that reimbursement of pension offsets in accordance with the Barragan, supra, decision are not installments of compensation would be municipalities. The Legislature has required that municipalities be treated as any other employer in matters of workers compensation Boatright vs City of Jacksonville, 334 So.2d 339,344 (1st DCA 1976), Hodges vs State Road Dept., 171 So.2d 523 (Fla. 1965), State of Florida, Department of Public Health vs Wilcox, 504 So.2d 444,445 (3rd DCA 1987), reversed on other grounds 543 So.2d 1253 (Fla. 1989). A ruling for Petitioner would send a signal to municipalities that if they pass ordinances in conflict with State Law and are later required to make restitution for benefits illegally or improperly withheld as a result of those ordinances, that they would not suffer an additional penalty because reimbursement

would not be considered an "installment" of compensation.

## THE BARRAGAN DECISION SHOULD BE GIVEN RETROACTIVE EFFECT.

In the very first paragraph of Petitioner's argument on the retroactivity issue, Petitioner's talk of equity. It therefore becomes necessary for Respondents to remind the Court that the ordinance under which the City of Miami asserted its right to take pension offsets (long before any decisional Law on the subject) was an Ordinance that "flies in the face of State Law and cannot be sustained", Barragan, supra. The conflict with State Law was with Florida Statute 440.21, which provides for criminal misdemeanor penalties for its violation. It is therefore appropriate to refer to the amounts of money withheld from Respondent's pension as illegal deductions. The Pension Administrator testified that said reductions did not inure to the benefit of the Respondent but were either handed over to the Petitioner or credited to the Petitioner's obligations to keep the pension fund actuarially sound (R-166-168). In other words, the Petitioner, through all of these years, has had the benefit of the use of those funds which it has been ordered by the Judge of Compensation Claims to refund to Respondent. Why then would equity dictate that Petitioner be allowed to keep these sums which have been deducted from Respondent's pension and given over to Petitioner in violation of State Law? Equity would dictate that the Barragan, supra, decision continue to be interpreted as giving retroactive effect since that is the given interpretation by the general rule and there is no basis for departure form that rule Florida Forest & Park Service vs Strickland,

18 So.2d 251 (Fla. 1944).

## JUSTIFIABLE RELIANCE?

Once the Florida Legislature repealed Florida Statute 440.09(4), there was no exemption remaining for municipalities from the provision of Florida Statute 440.21. Beginning on July 1, 1973, the City of Miami expressly under the terms of its ordinance continued to take pension offsets relying only upon the validity its ordinance and not decisions of a Court of supreme jurisdiction, Barragan, supra. The illegal pension offsets from Mr. Giordano began December 3, 1973. (See Appendix "B" ) Giordano vs City of Miami, 545 So.2d 242 (Fla. 1989). The Petitioner's can cite no decision rendered by any Court anywhere that is dated between July 1, 1973 and December 3, 1973, allowing the City to begin taking pension offsets from Mr. Giordano's disability pension. The conduct sought to be excused by a non-retroactivity ruling (in this case the taking of the pension offsets) must follow the decision upon which reliance is claimed, Brackenridge vs Ametek Inc., 517 So.2d 667 (Fla. 1987), cert denied 488 U.S. 801 (1988).

Petitioners cite as "most compelling" (page 8 of Petitioner's Initial Brief) that the litigant in those cases which "affirmed" the City's continued taking of pension offsets was the City of Miami itself. The argument would be much more compelling if, following the entry of one of those decisions cited by the City of Miami, the City of Ft. Lauderdale (for example) passed a pension offset ordinance and began taking pension offsets. Clearly, the City of Ft. Lauderdale could then have said it detrimentally relied upon Hoffkins vs City of Miami, 339 So.2d 1145 (Fla. 3d DCA

1976) cert. denied, 348 So.2d 948 (Fla. 1977), or Thorpe vs City of Miami, 356 So.2d 913 (Fla. 3d DCA 1978) cert. denied, 361 So.2d 836 (Fla. 1978), or West vs City of Miami, 341 So.2d 999 (Fla. 3d DCA 1976) cert. denied, 355 So.2d 518 (Fla. 1978), in passing its ordinance and beginning an offset. The City of Miami cannot logically make such an argument yet it chooses to do so.

Neither Strickland, supra, nor Brackenridge, supra, allow for detrimental reliance be premised upon the continuation of conduct already begun. The conduct must begin in reliance upon the decisional Law as opposed to the decisional Law merely supporting the conduct. Detrimental reliance in this case is nothing more than an excuse contrived later on to explain conduct begun before any decision upon which reliance is asserted.

Petitioner has not explained why it ignored the decision in Jewel Tea, supra, (a Supreme Court Decision) or Domutz vs Southern Bell Telephone & Telegraph Co., 339 So.2d 636 (Fla. 1976) or Brown vs S.S.Kresge Co., Inc., 305 So.2d 191 (Fla. 1975) when it continued to take its offsets after July 1, 1973. They would have been the decisions of a Supreme Court upon which reliance could be placed to stop taking the offsets. Petitioner indicates that it should not have to pay retroactively because it selectively decided to rely upon decisions of the Third District Court of Appeals which happened to erroneously approve the continuation of the City's pension offset actions.

## HISTORY

The Statute of Limitations to claim compensation benefits under the Florida Workers' Compensation Act runs if no claim for benefits is filed within two years of the date of the injury itself, the date of the last payment of compensation or the date of the last provision of medical care, F. S. 440.19, City of Miami vs Beall, 18 Fla L Week D 79 (1st DCA 1992). The Statute of Limitations is the only bar to the filing of a claim for past compensation going back to the date of the accident. When the Statute of Limitations has not run, a claim for compensation benefits may be filed today asking for an adjustment for past compensation benefits (along with penalties, interest, costs and attorneys fees) going back to the date of the accident even if that injury was as far back as 1973 (or earlier). It is not only required but expected that compensation Orders relate back as far as is necessary to correct mistakes of an employer/carrier or self-insured under the self-administering rules of our compensation Act. On the date of Mr. Arostegui's compensable accident i.e.: November 2, 1976, §440.09(4), F.S., had already been repealed for more than three years and Mr. Arostegui had the right to expect and the City of Miami had the obligation to know, that pension offsets were not appropriate, see Jewel Tea, supra.

The Petitioner's statements regarding the retroactive application of statutory amendments are totally misplaced. As a matter of fact, this Court has refused to accept jurisdiction in those cases where it was asserted that the repeal of

§440.09(4), F.S., should be given retroactive effect so as to apply to individuals whose pension offsets were as a result of accidents or injuries which occurred prior to July 1, 1973 (the date of repeal). Jones vs City of Miami, supra. All the Judge of Compensation Claims and the District Court of Appeal has done with regard to §440.09(4), F.S., is to give prospective application to the repeal of this Section which was, when in effect, an anomaly in favor of municipalities and an exemption to §440.21, F.S.

## INEQUITIES OF RETROACTIVE APPLICATION

It should be obvious that the only inequity that will result by holding Barragan, supra, to be prospective in application only is the inequity which will be created by not requiring reimbursement to the workers' compensation claimant of that which has been wrongfully withheld from him.

Once again, Petitioner's urge the Court to treat municipalities differently from other employers in the State of Florida. The Legislature has said that this is not appropriate. §440.02(4), §440.03, F.S. (1975). By Petitioner's statement that there is no "legal, equitable, or just basis to impose a retroactive application on Barragan" (Petitioner's initial Brief at page 14) the Petitioner's once again ignore that the Respondent has been the victim of, at best, a misappropriation of trust funds and at worst a theft. The Petitioner is the beneficiary of those funds and seeks not to refund them to the party from whom they were misappropriated. Yet Petitioner's urge there is no legal, equitable or just basis to impose a retroactive application of Barragan.

## 10% STATUTORY PENALTY IS APPROPRIATE

The Judge's award is for weekly compensation benefits going back to March 19, 1977 (R-184). Compensation Judge also found in his Order that the Petitioner's had not shown that the failure to pay or file a timely Notice to Controvert was due to circumstances beyond their control. The statute in effect on the date of this claimant's injury allows for relief from the 10% penalty if a timely notice to controvert is filed or if non-payment results from conditions of which the employer or carrier had not control. Certainly the City had control over the existence of its pension offset ordinance and further the City knew or should have known as of August 1, 1989, when it stopped taking pension offsets (and approximately when it paid Mr. Barragan and Mr. Giordano going back to when their offsets began) that others similarly situated as the Respondent herein should be afforded notice that benefits were not being paid and the specific reasons therefore. A non-specific notice to controvert will not avoid the penalty, Florida Erection Services vs McDonald, 395 So.2d 203 (Fla. 1st DCA 1981).

The Judge of Compensation Claims imposed the statutory 10% penalty for failure to file a timely Notice to Controvert not filed until November 17, 1989 (R-183). The applicable statute is §440.20(5) (1975), F.S. It provides that if any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in sub-section (2) there shall be added to such

unpaid installment an amount equal to 10% thereof, which shall be paid at the same time as, but in addition to, such compensation, such installment, unless notice is filed under sub-section (4), or unless such non-payment result from conditions over which the employer or carrier had no control.....

Section 440.20(2), F.S., (1975), provides that the first installment of compensation is due on the fourteenth day after the employer has knowledge of the injury and thereafter bi-weekly installments. Section 440.20(4), F.S., (1975), provides that in order to avoid the 10% penalty the employer much controvert the right to compensation and file with the Division on or before the twenty-first day after he has knowledge of the alleged injury or death, a notice in accordance with the form prescribed by the Division, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

A thorough reading of all the sub-sections contained in 440.20, F. S., leads to the conclusion that the Division much be notified of suspension of payments for any cause so that appropriate action can be taken.

In 1989, Florida Administrative Code Rule 38F-3.012 was in effect which provides that LES form BCL-12 shall be filed with the Division in Tallahassee within 21 days of either notice or knowledge of the injury or of a claim for benefits, whichever occurs first in the case of an initial controversion, and within 10 days after the cessation of benefits when a carrier initially accept benefits, but later controverts

them. It is this later provision which is most applicable to the present situation. Rule 38F-3.012, Florida Administrative Code, provides that in such instance the Notice to Controvert shall set forth the reasons for the delayed controversion and that a copy shall be furnished to the employer and the employee and any interested party who might be deprived of payment pursuant to the act.

Here, the Petitioner's decided in August, 1989, to comply with the Barragan, supra, decision prospectively. Barragan, supra, was decided on April 20, 1989, and became final on July 14, 1989. The Petitioner's also decided not to comply with it retroactively (except with regard to Messrs. Barragan and Giordano themselves) and therefore Petitioner's did not make retroactive voluntary payments when it ceased taking the offset prospectively.

What the Petitioner's did not do at that time (i.e.: August 1, 1989) was to notify the Division or the employees (including Respondent Arostegui) that it was taking the position on non-retroactivity or that said position was inconsistent with what it was ordered to do in Barragan, supra, and Giordano, supra.

The purpose of the timely notice to controvert is to assist in the self-administration of the act. When the employee is denied a benefit, he is to be furnished a timely notice so that he may decide whether he believes that the employer/self-insured is correct, in which case the matter ends. However, the Statute provides that the employee is to be given such notice so that he may then decide whether to contest denial or not. In the present case, the Petitioner did not give

such notice and provided no showing of why it could not have done so within 21 days of July 14, 1989, as the Statute and Rules require (or within, at the very latest, 21 days of August 1, 1989).

The Petitioner did not prepare a Notice to Controvert until the one dated November 17, 1989 (R-175) which was after a Claim had already been filed (R-172). It was also not specific.

The denial of the retroactive payment of benefits as of August, 1989, without filing a notice to controvert to notify all of the employees similarly situated and to fail to timely notify the Division of what the City was doing (or not doing) is the precise evil that the Penalty Statute and the Rules were designed to prevent. If the Petitioner was correct in its assertions of non-retroactivity it would have owed nothing. If Petitioner was wrong in its assertions, all of the parties effected would have been notified timely of the City's position and the penalty would have been excused pursuant to §440.20(5) F.S. (1975). The Legislature, within its constitutionally mandated jurisdiction could have imposed a greater penalty than 10%!

Petitioner's assert that the penalty involved is a punitive one (Petitioner's Initial Brief at page 16). The word punitive was not written into the penalty section until the Legislature passed Section 16 of Chapter 79-40 in 1979, but is it so bad to impose a punitive penalty on an entity which violates a section of the Compensation Law which provides for misdemeanor penalties for said violations?

(§440.21 F.S. (1975)).

Petitioner's assert that they could not have anticipated some two years after the reversing decision that Barragan, supra would be applied retroactively. (Petitioner's Initial Brief at page 17) Surely it does not take a genius level intellect to determine that if Mr. Barragan got paid back to the inception of his pension offset and Mr. Giordano likewise that maybe, just maybe, all others similarly situated would be treated similarly.

Although Petitioner's assert that the penalty is for fault or blame, it is not. It is for failure to make timely payment which resulted in conditions over which the employer had no control. Clearly, the maintenance of an ordinance which flew in the face of State Law, is a circumstance under which the Petitioner had absolute control. The Petitioner also had complete control over the filing of notices to controvert within the 21 days after Barragan, supra, became final. Timely filing would have excused the 10% penalty. Petitioner chose not to send those notices to all pensioners involved (including Respondent) for what can logically be presumed to be a fear that all would file claims for reimbursement of past pension offsets.

Petitioners final assertion that it complied with §440.20(4) F.S. (1975), also shows a lack of understanding of the section. No where in that section is there reference to the filing of a claim for benefits. It was not the filing of claim which renders the City subject to knowledge of a benefit due, it is the decision in Barragan, supra, and the City's actions on August 1, 1989, which provide that knowledge.

## RETROACTIVE BARRAGAN PAYMENT DOES CONSTITUTE AN INSTALLMENT OF COMPENSATION FOR PENALTY PURPOSES

This issue has been previously discussed in this Brief at the outset with regard to the jurisdictional aspects on the Certified Question. We again reiterate, that if a Compensation Judge makes an award of compensation benefits for a specific period of time, at a specific weekly rate, which benefits, by operation of Barragan, supra, have, in effect, not been previously paid, said award is for installments of compensation and the penalty section for late payment is appropriate. Adjustments to corrections to, and additional compensation awarded by Judges of Compensation Claims have been ruled "installments" of compensation for purposes of penalty statute Santana, supra. Penalties are compensation, Lockett, supra.

## PREJUDGMENT INTEREST SHOULD BE AWARDED

The same arguments made with regard to penalties should be applicable to interest. In addition, inherent in the Workers' Compensation Act, is the intention that if an award is wrongfully withheld the person or party which should have paid it should be compelled to pay, as damages for its detention, lawful interest thereon from the date it should have been paid. The amount is to be determined by applying §687.01 F.S., establishing legal rate of interest in cases where interest accrues without special contract for rate thereof. In workers compensation proceedings, the claimant is entitled to interest on the award from the date he should have begun receiving compensation Parker vs Brinson Construction Co., 78 So.2d 873 (1955). Once the award of basic compensation benefits is made an employer is required to pay interest from the date they should have been paid Brazil vs School Board of Alachua County, 408 So.2d 842 (1st DCA 1982). In this case the Judge of Compensation Claims found and the Appellate Court has affirmed payment of benefits which should have been paid from March, 1977, through July 31, 1989 (R-184) The Judge has specifically provided for the appropriate interest rate for benefits accruing from March 19, 1977 to and including June 30, 1978 (6%) and for the increased rate of 12% on benefits accruing from July 1, 1978 to July 31, 1989 (R-185). In workers compensation, there is no discretion and no basis for denying interest on past due benefits.

## FURTHER PENALTIES MAY BE APPROPRIATE

The City has not as yet been penalized for failure to pay those benefits affirmed by the District Court of Appeal although a claim for those penalties is pending. There is no case or controversy which requires the Supreme Court's attention regarding additional penalties.

Rule 4.161(d) Fla. W.C.R.P. requires the payment of benefits within thirty days of the issuance of the Mandate of the District Court.

A public body is no more than an employer in a workers compensation proceeding. §440.02(4), §440.03, F.S,. (1975) Boatright, supra, Hodges, supra, State of Florida, Dept. of Public Health, supra, no automatic stay is appropriate.

## CONCLUSION

The Court should not entertain jurisdiction of the Certified Question because is it not one of great public importance as the Law is quite settled on what constitutes an installment of compensation for penalty purposes. In addition, the Court should not entertain Petitioner's additional complaints about the retroactivity of the Barragan, supra, decision or, if found retroactive, entertain Petitioner's complaint that it should not be penalized even though Petitioner had full control of whether or not past payments were made appropriately and full control over whether or not a Notice to Controvert was timely issued so as to avoid the imposition of penalties.

There is no legal basis upon which to excuse the payment of interest on past compensation benefits awarded and no jurisdictional basis upon which to consider Petitioner's complaint that a pending claim for 20% penalties should be denied before the Judge of Compensation Claims ever hears the case.

In all respects, it is respectfully suggested that the District Court of Appeals has appropriately handled this matter and no action by the Supreme Court is needed.

Respectfully submitted,

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**Certificate of Service**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Agreed Motion was mailed this **12th** day of **January , 1993**, to:

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**Appendix " A "**