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w/app
IN THE SUPREME COURT
STATE OF FLORIDA

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CITY OF MIAMI,)
)
Petitioner,)
)
v.)
)
FRANK AROSTEGUI,)
)
Respondent.)
_____)

CASE NO. 80,560

ORIGINAL

INITIAL BRIEF OF THE CITY OF MIAMI

On Review of Two Certified Questions from
the First District Court of Appeal

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Introduction

Based on an ordinance originally adopted by the City of Miami in 1940, the City reduced disability pension benefits for its retired employees in an amount equal to workers compensation benefits to which they were entitled for the same disabling event. This action by the City was challenged in eight lawsuits, and in each case this Court, the Third District or the First District held that the City's offsets were proper.^{1/} In 1989, the Court held the City's ordinance to be invalid as of 1973, without expressing an opinion whether that invalidation applied both prospectively and retroactively, or only prospectively. *City of Miami v. Barragan*, 545 So.2d 252 (Fla. 1989).

The primary issue in this case is whether claimants injured between 1973 (the triggering date for ordinance invalidation) and 1989 (the year of the Court's ordinance invalidation) must be paid the amounts previously offset by the City. A determination by the Court adverse to the City will impose a staggering financial blow to the taxpayers of Miami, based on a multitude of present and potential claims for after-the-fact recoupments of offset sums which are floating in tribunals at various stages.^{2/}

^{1/} *City of Miami v. Graham*, 138 So.2d 751 (Fla. 1962); *City of Miami v. Giordano*, 526 So.2d 737 (Fla. 1st DCA 1988); *City of Miami v. Barragan*, 517 So.2d 99 (Fla. 1st DCA 1987), *rev'd*, 545 So.2d 252 (Fla. 1989); *City of Miami v. Knight*, 510 So.2d 1069 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1276 (Fla. 1987); *Thorpe v. City of Miami*, 356 So.2d 913 (Fla. 3d DCA 1978), *cert. denied*, 361 So.2d 836 (Fla. 1978); *West v. City of Miami*, 341 So.2d 999 (Fla. 3d DCA 1976), *cert. denied*, 355 So.2d 518 (Fla. 1978); *Hoffkins v. City of Miami*, 339 So.2d 1145 (Fla. 3d DCA 1976), *cert. denied*, 348 So.2d 948 (Fla. 1977); and *City of Miami v. West*, IRC Order 2-2647 (May 22, 1974), *cert. denied*, 310 So.2d 304 (Fla. 1975).

^{2/} Some claimants have petitions for review pending in this court, some have cases pending in the First District Court of Appeal, and some have claims pending before Judges of Compensation Claims. The Court has denied the City's request to stay these various proceedings pending the outcome of this appeal.

The second major set of issues relate to imposition of a 10% penalty on the City for not voluntarily treating the Court's 1989 ordinance invalidation decision as being retroactive and simply paying Mr. Arostegui's claim. These issues come to the Court on certified questions.

Statement of the Case and Facts

Frank Arostegui, a police officer employed by the City of Miami, suffered a compensable accident on November 2, 1976. (R. 4). The City administratively accepted Arostegui as permanently and totally disabled on February 17, 1977, with the applicable compensation rate of \$112.00 per week. (R. 5, 6). Arostegui was granted a service-connected disability pension effective March 19, 1977. (R. 55). His monthly gross disability pension was offset by an amount equal to that paid for workers' compensation from acceptance of his disability through July 31, 1989. (R. 5, 6). This offset amount, together with interest, penalties, costs and attorney's fees, constitutes the amount in dispute in this appeal.

Commencing August 1, 1989, after the Court's decision in *Barragan v. City of Miami*, 545 So.2d 252 (Fla. 1989), the City paid Arostegui prospectively on a monthly basis for his full pension benefit and workers' compensation benefit. Arostegui filed a claim for reimbursement of his past pension offsets for the period March 19, 1978 through July 31, 1989, however, together with interest, penalties, costs and attorney's fees. (R. 47, 172). The City defended on the basis that the *Barragan* decision should not be applied retroactively to entitle Arostegui to reimbursement, and certainly not to penalties. (R. 46).

A Judge of Compensation Claims rejected the City's defenses, awarded Arostegui permanent total disability benefits of \$112.00 per week for the offset period, and further awarded (i) a 10% penalty on benefits for the period of March 19, 1977 through February 10, 1978, (ii) a 20% penalty on non-"compensation" benefits due from February 11, 1978 through July 31, 1989, (iii) statutory interest on the benefits awarded dating from March 19, 1977, (iv) costs and (v) attorney's fees. (R. 177-86). The First District Court of Appeal affirmed the issue of *Barragan's* retroactivity on the basis of its *Burnett* and *Amsel* decisions,^{3/} and affirmed the 10% penalty running from March 19, 1977 through February 10, 1978. The court reversed the 20% penalty award, affirmed the award of prejudgment interest, and remanded for the judge of compensation claims to consider a 10% penalty for the balance of Arostegui's "retroactive" period (February 11, 1978 through July 31, 1989). Arostegui has not cross-appealed the 20% penalty reversal, and that issue is not presented here for review.

The First District also issued two certified questions to the Court for review: whether any penalty was appropriate under the circumstances -- the same penalty question that had been certified in *City of Miami v. Bell*, 17 F.L.W. D2182 (Fla. 1st DCA Sept. 16, 1992), *review pending*, Case No. 80,524 and four other cases^{4/} -- and "[w]hether an increase in workers' compensation benefits, awarded pursuant to section 440.21 to offset illegal deductions from an employee's pension fund, in accordance with *Barragan v.*

^{3/} *City of Miami v. Burnett*, 596 So. 2d 478 (Fla. 1st DCA), *rev. denied*, ___ So.2d ___ (Fla., Oct. 14, 1992); *City of Miami v. Amsel*, 585 So.2d 1044 (Fla. 1st DCA 1991).

^{4/} *City of Miami v. McLean*, Case No. 80,575; *City of Miami v. Meyer*, Case No. 80,652; *City of Miami v. Thomas*, Case No. 80,683; *City of Miami v. Fair*, Case No. 80,728.

City of Miami, 545 So.2d 252 (Fla. 1989), constitutes an 'installment of compensation' for the purposes of section 440.20, Florida Statutes?"

Summary of Argument

When the Court decided *Barragan* in 1989, it unsettled the City's common, court-approved practice of deducting from pension payments the amount paid to former employees under the workers' compensation provisions of Chapter 440. Once this long-approved practice was deemed contrary to law, the City dealt with the budgetary effects of removing this offset and fully complied with the *Barragan* decision on a prospective basis. The First District's determination that *Barragan* is to apply retroactively has caused further financial turmoil and, of course, spun off a legal debate now to be determined for the first time by this Court. The City is convinced that *Barragan* should not be applied retrospectively to award payments of windfall proportions to claimants.

Prior affirmations of the City's right of offset should put any such use of *Barragan* completely to rest. *Barragan* constituted a drastic change in law which expressly overturned several previous district court decisions regarding the same City ordinance. There can be no question that, in taking the offset, the City conducted itself with justifiable reliance on these past decisions. This good faith behavior of the City, coupled with the intent of the workers' compensation law and the obvious inequities befalling the City from a retrospective application of *Barragan*, demonstrate the appropriateness of prospective limitation.

In a second drain on the City's taxpayers, the First District has imposed a 10% statutory penalty for untimely payment of the retrospective award. This punitive penalty

on the City has no logical support in the language of the compensation law, or in the judicial gloss on the statute. Clearly, this is a circumstance where the City had no control over the conditions of non-payment, and where it possesses a totally valid excuse for not immediately issuing retroactive pension payments. The City's conduct reveals no incidents of contemptuous behavior, but simply an inability to prognosticate the decision in *Barragan* and its later retroactive application by the First District. Regardless of whether the determination of retroactivity is upheld (and the City vehemently disagrees that it should be), the tack-on penalty cannot be condoned.

Another absolute barrier to the imposition of a 10% penalty is that the increase in benefits awarded to offset pension fund deductions does not constitute an "installment of compensation" under section 440.20(5), Florida Statutes (1975). By its terms, that section of the law does not pertain in this case. Moreover, those installments were fully paid by the City, and this language of the Act properly deserves strict construction to exclude what really constitutes a payback of offsets from pension plan installments. It is clear, as well, that section 440.21(1), which was construed in *Barragan*, provides for only two things: invalidation of any "offset-establishing" agreements and the misdemeanor criminalizing of any such agreement. No civil penalty is articulated for a breach of section 440.21, further proving the nonapplicability of section 440.20 and the distorting effects of trying to impose a section 440.20 penalty on a *Barragan* breach of section 440.21.

No prejudgment interest should have been awarded, and certainly none is appropriate dating from 1977 based on retroactive liability (if any). Further penalties from the district court's mistaken issuance of its mandate should be prohibited.

Argument

The first and most fundamental issue in this appeal is the retroactivity of the *Barragan* decision. This issue not only affects Arostegui, but numerous other claimants seeking retroactive reimbursement for pre-*Barragan* disability pension offsets.^{5/} The second set of major issues address the applicability of the 10% penalty which the workers' compensation law provides for employers who inexcusably delay either paying compensation claims or denying that payment is due.^{6/}

1. The *Barragan* Decision Should Not be Given Retroactive Effect.

In its *Barragan* decision, the Court did not make a determination one way or the other as to whether the decision would have retroactive effect.^{7/} Not all precedent-setting cases are given retroactive effect, of course. See *National Distributing Co., Inc. v. Office of Comptroller*, 523 So.2d 156 (Fla. 1988). While an overruling decision will, as a general rule, be applied retroactively, this Court has scrutinized the reliance of parties on previous precedent to determine if prospectivity alone is the most equitable result. See

^{5/} Six offset reimbursements have been paid, aggregating almost \$700,000, as a consequence of the Court's denial of review in *City of Miami v. Burnett*, Case No. 79,925; *City of Miami v. Pierattini*, Case No. 79,926; *City of Miami v. Johnson*, Case No. 79,927; *City of Miami v. Majewski*, Case No. 79,928; *City of Miami v. Moye*, Case No. 79,951; and *City of Miami v. Ogle*, Case No. 80,055. The first of these cases, oddly, was one of the two decisions which held the Court's 1989 ordinance invalidation decision to be retroactive.

^{6/} The penalty issues are before the Court on two certified questions from the First District Court of Appeal. The retroactivity and other issues are before the Court under the doctrine announced in *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977); *Hillsborough Ass'n for Retarded Citizens v. City of Temple Terrace*, 332 So.2d 610 (Fla. 1976).

^{7/} The issue of retroactivity was never briefed to the Court. The only mention of retroactivity appeared as a question by the City in its motion for rehearing.

Brackenridge v. Ametek, 517 So.2d 667 (Fla. 1987), *cert. denied*, 488 U.S. 801 (1988);

Florida Forest & Park Service v. Strickland, 18 So.2d 251 (Fla. 1944).

(a) The City's justifiable reliance.

The district court held that *Barragan* should be applied retroactively to Arostegui's claim for offset reimbursement. The panel actually expressed no analysis of that issue, but merely adopted by reference previous decisions of other First District panels in *City of Miami v. Burnett*, 596 So.2d 478 (Fla. 1st DCA), *rev. denied*, ___ So.2d ___ (Fla. Oct. 14, 1992) and in *City of Daytona Beach v. Amsel*, 585 So.2d 1044 (Fla. 1st DCA 1991), both of which had construed *Barragan* to be retroactive. The district court was wrong. It is impossible to imagine a clearer instance of a decision which states a new principle of law than the overruling of past precedents on which a litigant relied as a party.

It is relevant to note at this juncture that the multiple district court decisions which were rejected by the Court in *Barragan* are considered (and properly so) as the final judicial word on the principles of law for which they stood. It is not as if these were interim, or intermediate court decisions. They were tantamount to Supreme Court decisions in every jurisprudential way. District court review is "in most instances . . . final and absolute." *Ansin v. Thurston*, 101 So.2d 808, 810 (Fla. 1958). Their decisions "represent the law of Florida unless and until they are overruled by this Court" *Stanfill v. State*, 384 So.2d 141, 143 (Fla. 1980).

The *Barragan* decision recognized those effects. It announced it was overruling past precedents that were uniformly contrary and clear. Six separate appellate decisions

had reached and articulated the conclusion which *Barragan* overturned, and the Court had even declined "conflict" review in three of these cases. Most compelling is the fact that the litigant in all of those cases was the City of Miami itself, and the issue in each was exactly the issue in *Barragan*. There could not be a more lavish demonstration of justifiable reliance on past decisions than that recorded by the City.^{8/}

Prior to the *Barragan* decision in 1989, an unbroken line of district court decisions over a period of 27 years had conclusively provided judicial imprimatur for the City to offset amounts due in disability pension benefits by amounts awarded as workers' compensation payments. The *Barragan* decision held that the Florida Legislature's 1973 repeal of a long-standing, statutory offset authorization -- section 440.09(4), Florida Statutes -- had the effect of invalidating the City's comparable 1940 offset ordinance. The district court decisions in *Giordano*, *Barragan*, *Knight*, *Thorpe*, *West* and *Hoffkins*, however, had all acknowledged and explained the City's right to exercise the offset despite the legislature's repeal of section 440.09(4). A brief excursion into their rationale is instructive as to the City's clear basis for comfortable reliance on this impressive array of cases.

One of the pre-*Barragan* precedents -- *Hoffkins* in 1976 -- expressly addressed the repeal of section 440.09(4) and confirmed the manner in which the City had construed its effect vis-a-vis the City of Miami's pre-existing ordinance. The Third District in *Hoffkins* saw no reason why the City's ordinance, in existence since 1940, could not maintain its own viability to require disability pension offsets in the exact manner authorized by

^{8/} The district court obviously understood that effect of *Barragan* when it wrote in *Bell* that "the supreme court 'dropped' the *Barragan* bomb." *City of Miami v. Bell*, 17 F.L.W. D2182 (Fla. 1st DCA 1992), *review pending*, Case No. 80,524.

section 440.09(4) prior to its 1973 repeal. *Hoffkins*, 339 So.2d at 1146. That was 1976, some thirteen years prior to *Barragan*.

Eleven years after *Hoffkins*, in *Knight*, the First District issued a decision which elaborated on the theme struck in *Hoffkins* and lent it further credence. In *Knight*, the court reconciled assertions of disharmony between the City's long-standing ordinance and the equally long-standing section 440.21 of the workers' compensation law -- a statute which appeared to disallow and criminalize any form of benefits reduction. The *Knight* court analyzed a line of three cases from this Court which had strictly construed section 440.21,^{2/} and concluded they meant only

that workers' compensation benefits cannot be reduced by any benefit to which the claimant is contractually entitled independently of workers' compensation.

Knight, 510 So.2d at 1073.

The cases distinguished by *Knight* were the very ones that the Court utilized to reach the diametrically opposite result in *Barragan*! Thus, the 11-year string of decisions from *Hoffkins* through *Knight*, up to this Court's *Barragan* decision, had specifically and uniformly upheld the City's right to reduce collectively bargained-for pension payments by amounts received by claimants under the workers' compensation law, based on analyses of both section 440.21 and repealed section 440.09(4).

None of this discussion is intended to reargue the merits of *Barragan*. It does verify, however, that the reliance factor in determining whether *Barragan* should apply retroactively overwhelmingly favors the City. The result reached in *Barragan*, and the

^{2/} *Jewel Tea Co., Inc. v. Florida Industrial Commission*, 235 So.2d 289 (Fla. 1969); *Brown v. S.S. Kresge Co. Inc.*, 305 So.2d 191 (Fla. 1975); *Domutz v. Southern Bell Telephone & Telegraph Co.*, 339 So.2d 636 (Fla. 1976).

reasoning, constituted 180% departures from clear, past precedent in "City" cases, on which the City obviously and fairly had relied.

The Court's decision in *National Distributing* provides both the rationale and result to compel non-retroactivity for *Barragan*. The legislature had enacted laws consistent with its plenary power to regulate alcoholic beverages under the Twenty First Amendment to the United States Constitution. It had acted "in good faith," according to the Court, but had been stung by a "marked departure from prior precedent" of the United States Supreme Court when that court subsequently determined that Florida's laws were in violation of the Commerce Clause -- article I, section 8 of the United States Constitution. *National Distributing Co.*, 523 So.2d at 157-58. Yet the Court refused to apply the policy change retroactively in *National Distributing*. The result there cannot be different than the result here. The City has acted in no less "good faith" than the legislature did.^{10/} If the state's lawmakers were stung by a reversal of judicial precedent at the highest judicial level, no less were the City's lawmakers afflicted by this Court's reversal of six district court precedents! The parallels are inseparable.

The First District has reasoned that *Barragan* should be given retroactive application, however, because section 440.21 was the law at the time the claimant entered into his particular contract with the City, and consequently no offset rule could constitute a provision of that agreement. *Amsel*, 585 So.2d at 1046 (concerning the

^{10/} The City's "good faith" in effect has been adjudicated already. The district court in *Bell* framed its certified question on the 10% penalty in terms of the City's "good faith reliance" on the validity of its offset ordinance. 17 F.L.W. at D2184.

Daytona Beach ordinance); *Burnett*, 596 So.2d at 478 (concerning the Miami ordinance).^{11/} For a retroactivity analysis, this rationale is utterly unpersuasive.

The pre-*Barragan* cases on which the City justifiably relied had effectively held that the City's ordinance was neither inconsistent with nor voided by section 440.21. *Burnett* and *Amsel* adopted a legal fiction -- that the statute canceled contract provisions. That fiction simply made it possible to rule for the claimants, without saying that the harmonization of statute and ordinance as previously adjudicated in *Knight* was wrong. It is hardly surprising that the City should now cry "foul" at this legal revisionism. The First District's decisions should be rejected, and *Barragan* should be applied only prospectively.

(b) History and purpose of the rule.

Retroactivity is anathema to workers' compensation. Any retrospective result of substantial effect in workers' compensation cases has been studiously avoided, if at all possible. This thesis emerges both from the case law and from the underlying policy of the statutory scheme. This Court has twice previously expressed the conclusion that "[t]he statutory and decisional law pertaining on the date that an accident has occurred must prevail in a work[ers'] compensation case." *Kerce v. Coca-Cola Company - Foods Division*, 389 So.2d 1177, n.1 (Fla. 1980) (emphasis added); *Simmons v. City of Coral Gables*, 186 So.2d 493, 495 (Fla. 1966).

The workers' compensation statute rests on a policy fashioned to balance stability and predictability. On-the-job injuries and disabilities covered by the Act are

^{11/} *Burnett* states the same conclusion in the negative, by finding that section 440.21 voided the long-standing Miami ordinance as of July 1, 1973. See also, *City of Miami v. Jones*, 593 So.2d 544 (Fla. 1st DCA), rev. denied, 599 So.2d 1279 (Fla. 1992).

compensated on a prompt and stable schedule of payments, in exchange for abrogation of the employee's right to sue in tort. *Fisher v. Shenandoah General Construction Co.*, 498 So.2d 882 (Fla. 1986). Lump sum awards representing duplicative and overlapping benefits which had been bargained away -- an aggregation providing a windfall "double dip" -- is completely incompatible with either the prompt-payment assurances of the Act for workers or the you-won't-get-slammed-later assurances of the Act for employees. See section 440.20, Florida Statutes (1975); *Sullivan v. Mayo*, 121 So.2d 430 (Fla. 1960). The lump sum awards being sought here have all the suddenness, unpredictability and devastation of an adverse tort award.

For almost 50 years, Miami's ordinance effectuated a reduction in pension benefits under a contractual arrangement which reduced those payments if a disability was also compensated by workers' compensation payments. Nothing unnatural or unfair inheres in a contractual bargain of that nature.^{12/} There is no need to elaborate here on the notion that the City had every legitimate right to tailor its financial responsibilities in accordance with the offset ordinance. The policy of the workers' compensation law favoring prompt and settled periodic payment of benefits would be destabilized by a retroactive application of *Barragan*, causing the dual consequences of providing a non-periodic windfall to former employees and a treasury-busting drain on the employer.

In the past, the Court and the First District have declined to apply statutory amendments to the workers' compensation laws retroactively when the effect is to reduce

^{12/} Pension plans under ERISA are allowed by law to be "integrated" with Social Security in exactly in the same fashion. By this means, employers can provide more affordable retirement benefits without duplicating or diminishing those benefits.

the measure of damages due a claimant. See *L. Ross, Inc. v. R.W. Roberts Construction Co., Inc.*, 481 So.2d 484 (Fla. 1986); *Sir Electric, Inc. v. Borlovan*, 582 So.2d 22 (Fla. 1st DCA 1991). See also, *Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991), refusing to apply retroactively a judicial declaration of invalidity for a statute amending the workers' compensation law to reduce benefits. The same principle logically holds for a retroactive increase in the damages to be paid out by public employers.

(c) **Inequities imposed by retroactive application.**

Three times recently, the Court has stepped in to reject retrospective application of decisions which could either have unsettled scheduled benefit payments or grievously impacted state and municipal finances. *Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991); *State v. City of Orlando*, 576 So.2d 1315 (Fla. 1991); *National Distributing Co., Inc. v. Office of Comptroller*, 523 So.2d 156 (Fla. 1988). In each instance, the Court warily averted the potential for disrupting fiscal management and government budgets by exercising its prerogative of prospective application.

In *Martinez*, the Court applied prospectively a decision which held unconstitutional amendments to the workers' compensation law that had reduced benefits to eligible workers. 582 So.2d at 1171-1176. In *City of Orlando*, the Court applied prospectively its invalidation of certain municipal revenue bonds issued for investment purposes, in order to avoid any effect on bonds that may have been previously issued or approved. 576 So.2d at 1318. In *National Distributing Co.*, the Court refused to apply retrospectively the invalidation of a tax statute, where the effect would have been to provide alcoholic

beverage distributors a windfall from repayment (the excess taxes having already been passed on to customers in the pricing of goods). 523 So.2d at 158.

The principle that emerges from these three contemporary decisions is not new. The Court has long been concerned that when "property or contract rights have been acquired under and in accordance with [a previous] construction, such rights should not be destroyed" by retrospective operation of a subsequent overruling decision. *Florida Forest & Park Service v. Strickland*, 18 So.2d 251 (Fla. 1944).

The only cumulative conclusion that can be reached by applying *National Distributing* and additional Florida precedents is that the policy considerations for retrospective limitation are present in this case. There is no legal, equitable, or just basis to impose a retroactive application on *Barragan*.^{13/}

2. The City Should Not be Subjected to the 10% Statutory Penalty for its Refusal to Pay a Compensation Claim.

Following *Bell's* lead, the 10% penalty issue is the subject of the district court's first certified question. The latter engendered the most controversy before the First District in *Bell*, prompting a 10-page discussion of the issue in the majority decision, a 6-page dissent from Judge Booth, and an even 6 to 6 division among the judges on the district court as to whether the issue should be considered *en banc*. The City respectfully suggests that, under the circumstances of this case, as well, a 10% penalty on the City is totally unwarranted.

^{13/} See also, *City of Miami v. Gates*, 592 So.2d 749 (Fla. 3d DCA 1992), in which the Third District recently concluded that pension plan claimants should not be barred by a class action settlement which did not anticipate *Barragan's* conclusion that the City's offset ordinance was invalid.

The nub of the district court's decision has to be that, with respect to the penalty-imposing provisions of the workers' compensation statute, the Court's reversal of 27 years of precedents on which the City relied was not a condition "over which [the City] had no control." *Bell*, 17 F.L.W. at D2184 (construing section 440.20(7), Florida Statutes (1985)). In this case, it is the 1975 provisions of the statute which control the penalty question since the claimant's compensable injury occurred in 1976. See § 440.20(5), Fla. Stat. (1975). The 1975 version of the Act lends no more righteousness to imposing a 10% penalty than did the 1985 statute applying in *Bell*. This ruthless application of the statute is exposed for inconsistency and unfairness by Judge Booth in her *Bell* dissent:

The majority forgives [the employee's] failure to claim the offset in this 1988 claim because, under the existing law, there was no basis for such a claim. A different rule is applied to [the City], however, who must now pay the offset amounts based on the retroactive application of a change in the law and pay a penalty to boot. Where was [the City's] opportunity to avoid the penalty? What was the effect of the ordinance remaining on the books that authorized the offset? . . . Only a soothsayer with a crystal ball could have predicted in 1985, when the original claim arose, or in 1987, when the offsetting began, that *Barragan* would be decided (July 1989) and, eventually (October 1991), be held to apply retroactively.

Bell, 17 F.L.W. at D2185. The City would suggest that this dissent has the better reasoned analysis.

The 10% penalty is a statutory mechanism to compel the prompt payment of workers' compensation claims, or in the alternative the prompt invocation of administrative processes. Compare *Sigg v. Sears Roebuck & Co.*, 594 So.2d 329, 330 (Fla. 1st DCA 1992). Nowhere in the history or lore of the workers' compensation laws has there been a judicial determination that this penalty should be levied on an employer who has followed the law for 13 years, under six separate and judicially-final appellate

court decisions, when those decisions are unexpectedly overturned and then, 2 years later, this reversal is ruled to apply retroactively. None of the statutory subsections invoked by the First District's majority can be manipulated to condone this penalty under these circumstances. They are square pegs in ill-fitting round holes.

The penalty in section 440.20(5) is only triggered upon the employer's knowledge of the employee's injury. §440.20(2), Fla. Stat. (1975). This triggering event is ill-suited to the imposition of a 10% penalty here. The City's knowledge of Arostegui's injury dates from 1976, when the City in fact began timely and penalty-free compensation payments. No contortions can fit the blindside of *Barragan* into this precisely crafted statutory scheme.

Nor can the punitive nature of a 10% penalty, based on the purposes for which it is levied, rest comfortably alongside the City's innocence. As Judge Booth quite logically found in her *Bell* dissent, the only statutory provision that fits this circumstance is that which makes "the penalty . . . inapplicable where non-payment results from conditions over which the employer or carrier had no control." *Bell*, 17 F.L.W. at D2185. That exoneration from the imposition of the penalty obviously comes in play here. Other less compelling decisions affecting a compensation loss have rejected the imposition of penalties when the employer has a valid excuse for non-compliance. See *Florida Community Health Center v. Ross*, 590 So.2d 1037 (Fla. 1st DCA 1991); *Four Quarters Habitat, Inc. v. Miller*, 405 So.2d 475 (Fla. 1st DCA 1981).

On a policy level, the retroactive imposition of a penalty on a retroactive award is unconscionable. It does not punish behavior which is contumacious or in disregard of the claimant's rights. It merely enriches Arostegui for the City's lack of prescience --

failing to anticipate the reversal of an unbroken line of appellate decisions, and then failing to further anticipate that some two years later the reversing decision would be applied retroactively. Surely the City's skill at prognosticating should not be held to a higher standard than the First and Third District Courts of Appeal, both of which were equally off the mark (according to *Barragan*)^{14/} in the *Knight* and *Hoffkins* decisions. See *Hanover Insurance Co. v. Florida Industrial Comm.*, 234 So.2d 661, 663 (Fla. 1970), invalidating a 10% penalty based on "the complicated nature of the cause and the pleadings herein" If there is just a scintilla of validity in the City's analysis of *National Distributing* (and the City believes it is compelling), no penalty is warranted for the City's decision not to voluntarily disburse vast sums from the City's coffers in the 10th month of its 1988-89 fiscal year.^{15/} The very thought of applying a punitive financial burden on top of retroactivity is apparently a second bombshell which does not rest comfortably with the district court judges. The issue has been certified here for resolution, following a 6-6 *en banc* deadlock in *Bell*.

As regards statutory construction, there is precise verbiage in the applicable, 1975 statute which itself suggests the inappropriateness of a 10% penalty. Section 440.20(5) discusses imposition of the 10% penalty dependent on the employer's "fault in causing the delay" in payment. Of course, all words in a statute have meaning,^{16/} and all penal

^{14/} *City of Miami v. Barragan*, 545 So.2d at 254-255 (Fla. 1989).

^{15/} The City's fiscal year runs from October 1, to September 30. The *Barragan* decision became final on July 14, 1989.

^{16/} *Gretz v. Florida Unemployment Appeals Commission*, 572 So.2d 1384, 1386 (Fla. 1991).

statutes are to be strictly construed.^{17/} Use of the term "fault" necessarily infers exercise of the penalty only in circumstances where the employer's conduct is somehow blameworthy in delaying payment of compensation. For what, one must ask, is the City being faulted, and thereby penalized? The City's only volitional behavior in this whole brouhaha was not sending a check to Arostegui after the *Barragan* decision, for full retroactive reimbursement of prior offset benefits.

There is yet a further reason to deny Arostegui a 10% penalty. The City controverted Arostegui's claim for retroactive benefits under *Barragan* within 16 days of his claim (R. 47; *Arostegui*, 17 F.L.W. at D2246), thus beating by 5 days the end of the 21-day period for controverting the demand. See §440.20(4), Fla. Stat. (1975). Thus, the only available statutory point of entry for disputing the 10% penalty was met by the City, and should have relieved it of paying the 10% penalty. See §440.20(5), Fla. Stat. (1975) (10% penalty is added "unless notice is filed under subsection (4)" -- that is, within 21 days of employer's knowledge).

3. A Retroactive *Barragan* Payment Does Not Constitute an "Installment of Compensation" for Purposes of Section 440.20, Florida Statutes (1975).

The second question certified by the district court asks the Court to determine whether a lump sum, retroactively-paid *Barragan* offset, if ordered, constitutes an "installment of compensation" for purposes of applying the 1975 penalty provisions of

^{17/} E.g., *Philip C. Owen, Chartered v. Department of Revenue*, 597 So.2d 380 (Fla. 1st DCA 1992); *Gardinier, Inc. v. Department of Pollution Control*, 300 So.2d 75, 78 (Fla. 1st DCA 1974); *Turner v. Department of Professional Regulation*, 591 So.2d 1136, 1137 (Fla. 4th DCA 1992).

section 440.20.^{18/} The City believes the answer is a resolute "no." The district court's decision states that "[i]t does not appear" that a retroactive *Barragan* award is "part of an 'installment of compensation' as contemplated by section 440.20" (17 F.L.W. at D2246) -- a conclusion which seems eminently accurate. Yet the court felt "constrained" to reach an unwarranted result by a sentence from the *Jewel Tea* decision^{19/} which was quoted by the Court in *Barragan*. (17 F.L.W. at D2246). That constraint was unnecessary, and inappropriate.

The question of whether 10% should be added to retroactive awards, as a penalty for failing to pay on a timely basis an "installment of compensation" as referenced in section 440.20(5), Florida Statutes (1975), implicates both statutory construction and an understanding of prior decisional law. The district court obviously thought, as a matter of statutory construction, that a lump sum pension payment, ordered retroactively, was not the type of penalty-prompting "installment" which section 440.20(5) contemplated. That conclusion appears irrefutable.

In 1975, section 440.20(5) provided for a 10% penalty

If any installment of compensation payable without an award is not paid within 14 days after it becomes due . . . unless notice is filed [within 21 days]

The purpose of the penalty, obviously, was to force an expeditious discharge of the obligations of employers to pay or controvert the claims of workers. There is no connection between that statutory purpose and the City's obligation to pay a pension

^{18/} Virtually the same question has been certified in *City of Miami v. McLean*, 605 So.2d 953 (Fla. 1st DCA 1992), *review pending*, Case No. 80,575.

^{19/} *Jewel Tea Co. v. Florida Industrial Commission*, 235 So.2d 289 (Fla. 1969).

catch-up payment, if now approved by the Court. The statutory purpose is in no way enhanced, let alone served, by the imposition here of the prompt non-payment penalty. By its terms, moreover, the penalty is simply not applicable under the statute. Notice was filed within 21 days, so as to stop the effect of the statute in any event.

Aside from statutory construction, there are two intersecting lines of judicial precedent that affect the certified question. The first, and the City would argue relevant line, relates to the decision in *Brantley v. ADH Building Contractors, Inc.*, 215 So.2d 297 (Fla. 1968). That decision held that certain payments under the Act are not "compensation" as contemplated by the Act. *See also, State Department of Transportation v. Davis*, 416 So.2d 1132 (Fla. 1st DCA 1982) (statutory offset in Chapter 440 for social security does not equate latter with "compensation"); *and see Whiskey Creek Country Club v. Rizer*, 599 So.2d 734 (Fla. 1st DCA 1992); *Cox Oil & Sales, Inc. v. Boettcher*, 410 So.2d 211 (Fla. 1st DCA 1982). As the district court recognized, those types of payments do not trigger a penalty for failure to pay an installment of "compensation." *See* 17 F.L.W. at D2246. A catch-up award for retroactive pension benefits is in the same genre.

This view of the issue was taken by Judge Booth in her *Bell* dissent. There, she complained that the City had always paid its former employee in excess of the amount owed for workers' compensation; it had simply reduced his separate contractual pension benefits.

The other line of cases relate to the authority and jurisdiction of the Judges of Compensation Claims, as defined in the *Barragan* decision. So far as is relevant here, that decision quoted from and adopted the rationale of *Jewel Tea* to the effect that a judge of compensation claims has jurisdiction to award an increase in compensation

benefits to the extent of a pension offset, because it makes no difference whether the pension or the workers' compensation benefit is reduced for the employee. The net effect, *Barragan* says, must be that both the full contractual amount (a pension in *Barragan*) and the full workers' compensation benefit must be paid, subject of course to a cap that may not exceed the employee's average monthly wage. Put another way, *Barragan* held that both a workers' compensation benefit and a contractual benefit (be it insurance, pension or sick leave benefits) are payable in full, and in order to remedy any offset therefrom, the Judges of Compensation Claims have jurisdiction to order an "increase [in] the amount of worker's compensation" as necessary to make the claimant whole. One benefit plus another must always equal the sum of the two (subject only to the cap of average monthly wages).

The language of *Barragan* and *Jewel Tea* is indeed in terms of "an increase" in the workers' compensation benefit. In a situation where the employee has been paid the full amount of non-controverted workers' compensation benefits from the outset such as the situation here, however, the "catch-up" amount may not and should not, for penalty purposes, be treated as an increase in the workers' compensation benefit. It is a catch-up of past pension benefits, because the offset was in fact taken out of pension payments. The City had always paid the full amount of workers' compensation due to Arostegui.

For purposes of the penalty provisions of the statute, then, it only makes sense not to treat the reimbursable shortfall (if ordered) as an installment of workers' compensation. Its treatment that way for jurisdictional purposes does not compel the result that the district court felt constrained to reach.

Whether deemed an "increase in compensation," a pension payback or another descriptive category of award, the amounts paid retroactively (if compelled by this court) do not constitute "compensation" under this statute. Nothing in *Barragan* or *Jewel Tea* compels the notion that these retroactively restored amounts "be treated as 'compensation' under Chapter 440 or for the purposes of penalties." *Bell*, 17 F.L.W. at D2185 (Booth, J., dissenting).

In any event, *Barragan's* interpretation of section 440.21 has nothing at all to do with the imposition of penalties under section 440.20. According to *Barragan*, section 440.21 voids agreements which reduce pension benefits by virtue of compensation paid and criminalizes any such agreement. The institution of a civil penalty is nowhere mentioned in the text of section 440.21, and that lack of expression most reasonably infers that the legislature did not intend a civil penalty for such a violation. *Thayer v. State*, 335 So.2d 815 (Fla. 1976). While section 440.20 identifies various penalties for situations not applicable here, it makes no provision for a civil penalty for offsets such as that addressed in *Barragan*.

A *Barragan*-based payment is not a turn of events contemplated by sections 440.20 or 440.21, or comprehended by the defined scope of the term "compensation" as "the money allowance payable ... as provided for in this chapter." §440.02(11), Fla. Stat. (1975) (emphasis added). Even if a retroactive payment of pension deductions is confirmed by this Court, it does not constitute "compensation," or an "installment of compensation." The second certified question should be answered in the negative and the 10% penalty reversed.

4. **No Prejudgment Interest Should be Awarded on the Judgment.**

The First District affirmed the award of prejudgment interest on the principal and penalty portions of the judgment. For two reasons, that award was improper.

First, the allowance of prejudgment interest is provided only for the tardy payment of "any installment of compensation." The previous arguments in this brief have demonstrated that the putative pension payments under *Barragan* are not equivalent to payments of compensation under Chapter 440. On this basis, the prejudgment interest cannot be added to the retroactive award of offset pension benefits.

There is a second ground for relieving the City from paying prejudgment interest. The City has always acted in good faith, and in equity is entitled to avoid paying prejudgment interest prior to the date of claim for a retroactive award. That difference is hardly minor; it constitutes some 10+ years of prejudgment interest. See *Broward County v. Finlayson*, 585 So.2d 1211 (Fla. 1990), in which the Court abjured a mechanistic application of prejudgment interest against a county for back pay of salary to its employees where the county had acted in good faith consistent with a then applicable collective bargaining agreement. The same can readily be said of the City's compliance with 27 years of pre-*Barragan* offset-permitting decisions.

5. **No Further Penalties are Authorized Against the City Pending Supreme Court Review.**

Notwithstanding that a timely notice to invoke the discretionary jurisdiction of the court was filed by the City, the First District issued its mandate in this case. As a consequence, the case has been remanded to the judge of compensation claims.

Rule 9.310(b)(2) affords the City a stay of the decision, however, and it was error for the First District to issue a mandate.

Rule 4.161(d), Fla.W.C.R.P., does not appear to require a contrary result. That Rule directs that any benefits be paid within 30 days of the issuance of the district court's mandate unless a stay is obtained from the Florida Supreme Court, but that Rule (which is applicable both to public and private employers) does not derogate or abrogate the automatic stay to which a public body is entitled. The City has sought a recall of the mandate from the First District, but that court has not yet ruled.

In this proceeding, the City has been penalized by retroactivity, penalties, interest, costs and attorneys' fees. It is justifiably concerned with further areas for penalization. The First District's remand has left open the possibility that an additional, new, 20% penalty will be levied against the City for nonpayment of retroactive amounts affirmed by the First District, within 30 days of the First District's mandate. This consequence would be yet a further inequity in this proceeding, for it would punish the City for proceeding with review in this Court despite the certification of two questions by the First District's opinion. The Court should clarify that the First District's errant issuance of a mandate, even if it is not recalled, does not constitute a ground on which to levy an additional penalty of any type against the City for its nonpayment of any award pending review in this Court.

Conclusion

The *Barragan* decision should not be given retroactive effect by this Court. If the Court does extend retroactivity, the district court's imposition of a 10% penalty should be reversed. Prejudgment interest and further penalties are inappropriate.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of this brief was mailed on December 8, 1992, to Mark L. Zientz, Esq., William & Zientz, 9130 S. Dadeland Blvd., #1100, Miami, Florida 33156.



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Appendix (Decision of District Court)

Workers' compensation—Offset—Disability pension—Supreme court's decision invalidating city ordinance which permitted city to offset employee's permanent total disability benefits against his disability retirement pension benefit, except to extent combined benefits exceed employee's average wage, applies retroactively to compensable injuries occurring after the date state statute authorizing such a setoff was repealed—Penalties—Error to impose penalty for failure to make timely payment under order approving lump sum payment of remedial treatment—Penalty properly awarded on retroactively awarded amount to offset illegal deductions—Question certified whether an increase in workers' compensation benefits, awarded pursuant to section 440.21 to offset illegal deductions from an employee's pension fund, constitutes an "installment of compensation" for purposes of section 440.20, Florida Statutes

CITY OF MIAMI, Self-Insured, Appellant, v. FRANK AROSTEGUI, Appellee. 1st District. Case No. 91-675. Opinion filed September 23, 1992. Appeal from an order of Judge of Compensation Claims Henry H. Harnage. A. Quinn Jones, III, City Attorney, and Kathryn S. Pecko, Assistant City Attorney, and Jay M. Levy, Miami, for appellant. Mark L. Zientz, of Williams & Zientz, Miami, for appellee.

(PER CURIAM.) The first issue presented in this appeal is the retroactive application of *Barragan v. City of Miami*, 545 So.2d 252 (Fla. 1989), to the claim of an employee injured after June 30, 1973, the last effective date of section 440.09(4), Florida Statutes (1957), repealed by chapter 73-127, Laws of Florida, effective July 1, 1973. Consistent with our holdings in *City of Miami v. Burnett*, 17 FLW D1201 (Fla. 1st DCA Mar. 24, 1992), and *City of Daytona Beach v. Amsel*, 585 So.2d 1044 (Fla. 1st DCA 1991), we hold that *Barragan* has retroactive application to July 1, 1973. Accordingly, that portion of the order of the judge of compensation claims awarding reimbursement of the amounts offset from the pension is affirmed.

The City's second point contends it was error to award penalties on the retroactively awarded setoff benefits. The judge in the present case awarded a 10% penalty on all benefits due from March 19, 1977 through February 10, 1978 pursuant to section 440.20(5), Florida Statutes (1975). A 20% penalty on benefits due from February 11, 1978 through July 31, 1989, was awarded pursuant to section 440.20(6), Florida Statutes (1975).

Section 440.20(6) provides: "If any compensation, payable under the terms of an award, is not paid within 20 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof." The judge imposed the 20% penalty for failure to timely pay pursuant to the February 10, 1978 order of Judge Henderson. Judge Henderson's order was an approval of a lump sum payment of remedial treatment. The claimant testified that all the terms and conditions of this order had been met by the City. Furthermore, this was not an award of compensation as contemplated by section 440.20(6). See, e.g., *Brantley v. A D H Building Contractors, Inc.*, 215 So.2d 297 (Fla. 1968). The award of a 20% penalty under section 440.20(6) is reversed.

We affirm the award of a 10% penalty. Section 440.20 provides, in part:

(4) If the employer controverts the right to compensation he shall file with the division on or before the 21st day after he has knowledge of the alleged injury or death, a notice in accordance with a 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.

(5) If any installment of compensation payable without an award is not paid within 14 days after it becomes due, as provided in subsection (2), there shall be added to such unpaid installment an amount equal to 10 percent thereof . . . unless notice is filed under subsection (4), or unless such nonpayment results from conditions over which the employer or carrier had no control.

In the present case, the claim was filed on November 1, 1989; the City controverted the claim on November 17, 1989. The supreme court denied rehearing in *Barragan* on July 14, 1989. As recognized in *City of Miami v. Bell*, 17 F.L.W. D2182 (Fla. 1st DCA September 16, 1992), the application of section 440.20(5), Florida Statutes (1975), to the facts of this case is a matter of great public importance and we so certify to the supreme court.

"Compensation" is defined as the money allowance payable to an employee as provided for in Chapter 440. Section 440.02(11), Florida Statutes (1975). As noted in *Burnett*, "the benefits awarded were an 'increase' in 'the amount of workers' compensation to offset illegal deductions' from the employee's pension fund pursuant to *Barragan v. City of Miami*, 545 So.2d 252, 253 (Fla. 1989). No contention has been made that the City failed to pay the workers' compensation benefits due pursuant to chapter 440." *Burnett*, 17 F.L.W. D1201, 1202 n.1. It does not appear that the amounts awarded were part of an "installment of compensation" as contemplated by section 440.20. Cf. *Brantley*, 215 So.2d at 299 (Reference to section 440.20(6) will reveal that the penalty is based on unpaid compensation. Provision for medical services and the amount of compensation for disability are treated by different sections of the Workers' Compensation Act. Furnishing medical and hospitalization services is a benefit provided, but it is not compensation as contemplated by the Act.).

We feel constrained, however, to affirm the award of penalties pursuant to section 440.20(5), Florida Statutes (1975), in view of the supreme court's reliance on the quoted portion of *Jewel Tea Co. v. Florida Industrial Commission*, 235 So.2d 289 (Fla. 1969). The supreme court held in *Barragan* that the deputy commissioner had jurisdiction to decide whether the city could reduce its pension benefits to the extent of workers' compensation payments. The supreme court cited *Jewel Tea Co.*, in which the court held that section 440.21, Florida Statutes, prevented a private employer from deducting group health insurance benefits from an injured claimant's workers' compensation benefits. In pointing out that the employer could not accomplish the same result by deducting the compensation payments from the insurance benefits, the Court said:

Regardless of whether you say the workmen's compensation benefits reduce the group insurance benefits or visa [sic] 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.

Id. at 291. *Barragan*, 545 So.2d at 254.

We remand to the judge of compensation claims for consideration of whether a penalty pursuant to section 440.20(5) should be imposed on benefits due from February 11, 1978 through July 31, 1989. We certify the following question to be one of great public importance:

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

AFFIRMED in part, REVERSED in part and REMANDED. (SMITH and BARFIELD, JJ., CONCUR. BOOTH, J., DISENTERS IN PART, WITH OPINION.)

(BOOTH, J., DISSENTING IN PART.) I dissent from the affirmation of the penalty award, for the reasons stated in my dissent in *City of Miami v. Bell*, ___ So. 2d ___ (Fla. 1st DCA 1992), Case 91-1878 (opinion filed September 16, 1992) [17 F.L.W. D2182].

* * *