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IN THE SUPREME COURT OF FLORIDA

CITY OF MIAMI,

Petitioner,

vs. CASE NO.: 80,575

RICHARD McLEAN,

Respondent.
_____/

AMENDED ANSWER BRIEF OF RESPONDENT,
RICHARD McLEAN
ON THE MERITS
On Review of Two Certified Questions From
The District Court of Appeal

PAUL J. KNESKI, ESQUIRE
KNESKI & KNESKI
BISCAYNE BUILDING, SUITE 807
19 WEST FLAGLER STREET
MIAMI, FLORIDA 33130
(305) 358-0080

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

INTRODUCTION

The parties will be referred to by the name or as they appear on the Workers' Compensation Record of proceedings:

Petitioner, City of Miami, will at times be referred to as "the City" or as "Appellant". The Respondent, Richard McLean, will at times be referred to as "Mr. McLean" or as "Claimant".

References to the Record on Appeal will be made by the letter "R" with the corresponding page number from the Record.

STATEMENT OF THE CASE AND OF THE FACTS

For the most part, Respondent, RICHARD McLEAN, agrees with the Statement of the Case and of the Facts presented by the Petitioner, City of Miami. However, Respondent makes the following additions or corrections to the Statement of the Case and of the Facts presented by the Petitioner, City of Miami.

At page 2 of its brief, the City of Miami states that Mr. McLean's monthly gross disability pension was offset "by an amount equal to that paid for workers' compensation through July 14, 1989." The City then incorrectly states, "this offset amount, together with interest, penalty cost and attorney's fees constitutes the amount in dispute in this appeal. A Judge of Compensation Claims awarded McLean $112.00 per week for the offset period." These statements are not accurate. In the proceedings below, the parties stipulated that The City offset $485.33 in workers' compensation benefits against Mr. McLean's pension benefits each month from April 15, 1978 until July 14, 1989. (R 17-18). Mr. McLean would receive two checks from The City. One check

would be in the amount of his compensation rate of $112.00 each week ($485.33 per month). The other check would be in the amount of his monthly pension, less the $485.33 deduction taken by The City for workers' compensation benefits. All of these figures including Mr. McLean's average monthly wage were stipulated to by the parties (R 9, 15-18).

At Page 7 of the Record, The City's counsel stated, "I don't want to mislead the court... under the Barragan decision the Supreme Court articulated that an employee cannot get more than 100% of his average weekly wage".

Expressly recognizing this court's holding in Barragan and Giordano, 545 So.2d 252 (Fla.1989), that an employer can offset claimant's workers' compensation payments against claimant's pension benefits only to the extent that the sum of the two exceed claimant's average monthly wage, the Judge of Compensation Claims ruled that The City had wrongfully offset $419.10 in compensation benefits from claimant's pension each month from April 15, 1978 to July 14, 1989 (R 257). Hence the $419.10 monthly amount awarded claimant does not represent the total amount of workers' compensation benefits that The City offset from Mr. McLean's disability pension each month. This figure represents that portion of Mr. McLean's workers' compensation benefits that The City offset from his disability pension each month, which when added to his pension, does not exceed his average monthly wage. This amount, not the total amount of workers' compensation benefits which The City offset from Mr. McLean's pension, constitutes the amount in

dispute in this appeal.

The City of Miami concedes that it has yet to pay Claimant any of the benefits which are the subject matter of his claim despite rendition of several decisions in the First District Court of Appeal which hold that Barragan has retrospective application.

The parties stipulated on the Record that upon denial of the City's petition for rehearing of Barragan, commencing on July 14, 1989, it ceased offsetting worker's compensation benefits from Mr. McLean's pension. But the City did not pay Mr. McLean back for the workers' compensation benefits it had offset through July 14, 1989. (R. 14-17). Under question #17 of the Uniform Pre-Trial Stipulation Questionnaire the parties stipulated that the City filed its Notice to Controvert on 12/27/89. (R. 66). Claimant's claim was filed on 11/22/89. (R. 237). The Judge of Compensation claims entered his Order which is the subject matter of this appeal on June 5, 1991. (R 252-9). The Order provides that the City is to pay a 20% penalty on all benefits awarded which were unpaid pursuant to the Judge's Final Order of Compensation, plus statutory interest at the rate of 12% per anum. The First District Court of Appeal entered its mandate affirming the Order of the Judge of Compensation Claims on October 16, 1992.

In the instant action the First District Court of Appeal has certified two questions. The first certified question asks whether an increase in worker's compensation benefits, awarded pursuant to section 440.21, Fla. Stat. to offset illegal deductions from an employee's pension fund, in accordance with Barragan constitutes

"compensation" for the purposes of Section 440.20, Fla. Stat., (1975). The second certified question is the same question certified in City of Miami v. Bell, 17 F.L.W. D2182 (1 DCA September 16, 1992).

SUMMARY OF THE ARGUMENT

The City contends that the First District Court of Appeal was wrong in applying this Court's decision in Barragan v. City of 3Miami, 545 So.2d 252 (Fla.1989) retroactively, to require the payment to Mr. McLean of workers' compensation wrongfully deducted from his pension. This contention has no merit. The City recognizes the general rule of law that a decision operates both retroactively and prospectively, except where the court specifies otherwise. The City also recognizes that this Court in Barragan did not so specify that its decision was to operate prospectively only. The City nonetheless argues against retroactivity of the Barragan decision on the ground that it justifiably relied upon Hoffkins v. City of Miami, 339 So.2d 1145 (3 DCA.1976) and its progeny, other overruled District Court of Appeal decisions. This argument has no merit for several reasons. The City has failed to present any evidence of Record in the proceedings below that it in good faith detrimentally relied upon prior precedent in deducting workers' compensation benefits from Mr. McLean's pension, or that the retroactive application of Barragan has led to financial turmoil. The appellate decisions leading up to Barragan negate the City's claim to detrimental reliance upon overruled cases. The City started taking offsets from its employees' pensions in 1973,

the year in which the statute authorizing such offsets was repealed, in a manner held unlawful by the Third District Court of Appeal in City of Miami v. Gates, 393 So. 2d. 586 (3 DCA. 1981). The City began doing this nearly three years before Hoffkins was decided. As of July 1, 1973, when the City's pension ordinance was void, the ordinance could no longer constitute part of the law comprising the contract for benefits between the City and its employees. Mr. McLean suffered his compensable injury in 1976.

Furthermore, the City's argument ignores all of the earlier decisions of this Court which have held workers' compensation offsets to be unlawful.

Finally, the City's argument ignores the fact that this Court denied the City's Motion for Rehearing of the Barragan decision, in which the City argued that Barragan should not have retroactive application.

The Judge of Compensation Claims was correct in awarding a 20% penalty on account of the City's failure to pay Claimant his benefits or to timely file a notice to controvert. The City claims that the penalty should not apply because it acted in good faith. Again, the City has presented no evidence of Record to support this claim. The fact that the City failed to pay the workers' compensation benefits which it had previously withheld from Mr. McLean's pension after this Court in Barragan refused the City's Petition for Rehearing predicated upon the retroactivity issue, refutes the City's argument that it relied in good faith on prior precedent. The answer to the first question certified by the First

District Court of Appeal is that for the foregoing reasons, and because imposition of the penalty will serve the purpose of the penalty statute, the City should not be excused from the payment of the penalty mandated by Florida Statute, 440.20 (1975). The language of the statute does not provide for any exception to mandatory payment of the penalty on account of good faith or detrimental reliance upon prior precedent.

The answer to the second question certified by the First District Court of Appeal is that workers' compensation offsets do constitute "compensation" for purposes of the penalty statute. The fact that the City must now pay back in one lump sum all of the installments of compensation which it owes and withheld for the period April 15, 1978 through July 14, 1989, does not change the fact that the monies which the City withheld are installments of compensation within meaning of 440.20 of the Fla. Stat.

The City may not be exempted from paying Mr. McLean pre-judgment interest on the workers' compensation benefits it wrongfully withheld from him. Again, there is no merit to the City's argument that it acted in good faith.

The Court should decline the City's request that it rule upon the possibility that the City may owe further penalties for failure to abide by the mandate of the First District Court of Appeal. This issue is not ripe for judicial review since the First District Court of Appeal has not imposed such a penalty. Furthermore, if such a penalty is assessed, it will be imposed on account of the City's failure to follow the pertinent Rules governing stay of the

District Court of Appeal's mandate.

FIRST ARGUMENT

THE DECISION OF THIS COURT IN BARRAGAN v. CITY OF MIAMI OPERATES RETROACTIVELY.

A. THE SUPREME COURT DID NOT LIMIT BARRAGAN TO PROSPECTIVE APPLICATION ONLY.

B. THE CITY'S CLAIM OF DETRIMENTAL RELIANCE ON OVERRULED CASES IS NOT SUPPORTED BY THE RECORD AND HAS NO MERIT IN LAW OR FACT.

In its brief the City of Miami argues that the First District's decision in this case should be reversed because City of Miami v. Barragan, 545 So.2d 99 (Fla. 1989) should not be given retroactive application. In Barragan, supra, this Court held that the City of Miami's ordinance authorizing the City to deduct workers' compensation payments from disability retirement pension payments was an unlawful ordinance after June 30, 1973, when the former state statute providing for such offsets, sec. 440.09(4), Fla. Stat., was repealed by Laws of Florida, Ch. 73-127. This Court stated that workers' compensation is a subject from which cities are preempted from enacting legislation by the Home Rule Powers Act. The Court held,

> "Under state law, sec. 440.21 prohibits an employer from deducting workers' compensation benefits from an employee's pension benefits. Yet, the City of Miami has passed an ordinance which permits this to be done. The ordinance flies in the face of state law and cannot be sustained Barragan v. City of Miami, supra, at 254-255.

Because Paul Barragan had not really been paid his workers' compensation benefits, he was still owed compensation. The decision in Barragan was that the workers' compensation had not

been paid since the date that the offset was first taken beginning with Barragan's retirement on November 10, 1983. This Court decided Barragan on April 20, 1989. The City's petition for rehearing was denied on July 14, 1989. The City admits in its brief that as of August 1, 1989, it ceased taking the offset from Mr. McLean's pension benefits, but that it declined to pay him for the workers' compensation benefits it illegally offset between the date of retirement to August 1, 1989.

The City now wants Barragan to be limited to prospective application only.

THE SUPREME COURT DID NOT LIMIT BARRAGAN TO PROSPECTIVE APPLICATION ONLY. IT THEREFORE HAS RETROSPECTIVE APPLICATION.

The City admits that when this Court decided Barragan v. City of Miami, 545 So.2d 252 (Fla.1989), it did not indicate that its decision was to have only prospective application. (City's brief at page 6). Under the general rule stated in Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla.1944), when a court of last resort overrules any of its earlier decisions, such overruling operates retroactively and prospectively unless the court specifies otherwise. Citing Melendez v. Dries and Krump Mfg Co., 515 So.2d 735 (Fla.1989); Black v. Nesmith, 475 So.2d 963 (1 DCA.1985); and Cassidy v. Firestone Tire and Rubber Co., 495 So.2d 801, 802 (1 DCA.1986), cert. denied, 484 U.S. 802, 108 S. Ct. 45, 98 L. Ed. 2d. 10 (1987), the First District Court of Appeal applied this general principle in City of Daytona Beach v. Amsel, 585 So.2d 1044, 1046 (1 DCA.1991), to hold that this Court's decision in

Barragan applies both retrospectively and prospectively. As explained by the First District in Amsel, supra,

> "Since the Barragan decision is silent on the question of retrospective application, it must be presumed to have been both retrospective as well as prospective application."

In subsequent decisions, City of Miami v. Burnett, 596 So.2d 478 (1 DCA.1992), and City of Miami v. Bell, 17 F.L.W. D 2182 (1 DCA September 16, 1992), the First District Court of Appeal reaffirmed the retroactivity of Barragan. Addressing many of the arguments now raised anew by the City of Miami, the First District stated in Bell, supra,

> "...we find no valid legal basis to support the City's arguments against the retroactive application of the Barragan decision..."

THE CITY'S CLAIM THAT ON THE FACTS OF THIS CASE BARRAGAN SHOULD HAVE RETROSPECTIVE APPLICATION ON ACCOUNT OF ITS ALLEGED DETRIMENTAL RELIANCE ON OVERRULED CASES IS NOT SUPPORTED BY THE RECORD AND HAS NO MERIT.

Consistent with Burnett and Bell, supra, the First District Court of Appeal held in these proceedings below that Barragan requires the City to pay Mr. McLean back the workers' compensation benefits it illegally offset from his pension. Without asserting any valid legal or factual basis, the City states in its brief that the district Court was wrong in construing Barragan to be retroactive. The City recognizes the general rule that an overruling decision will be applied retroactively. Citing National Distributing Co., Inc. v. Office of Comptroller, 523 So.2d 156 (Fla. 1988); Florida Forest and Park Service v. Strickland, supra, and Brackenridge v. Ametek, Inc., 517 So.2d 667 (Fla.1987), the

City contends, nonetheless, that Barragan should not be applied to the facts of the case at bar, because to do so would create an inequitable result. The City reaches this conclusion without presenting any evidence to support the assertion repeated in its brief, that it justifiably relied upon prior overruled district court decisions to its detriment. The Record reveals that the City has not presented one shred of evidence to demonstrate that it justifiably relied upon past precedent, what it describes as, "an unbroken line of District Court decisions over a period of twenty-seven years (which) had conclusively provided judicial imprimatur for the City to offset amounts due in disability pension benefits by amounts awarded as workers' compensation payments". The City did not raise detrimental reliance as a defense at the pre-trial hearing. It did not call any witnesses to testify. Nor did it present any evidence of Record that it acted in good faith in taking the offsets or that the First District's retroactive application of Barragan has caused it "financial turmoil", as it now asserts in its brief. Since these assertions are not supported by any evidence of Record they should be stricken from the City's brief. Unsupported statements of counsel do not constitute evidence. Why the City took the pension offsets from Mr. McLean's pension, whether for good motives or bad motives; can only be left to speculation.

Neither National Distributing Co, Inc. nor Strickland nor Brackenridge hold that the Supreme Court's decisions overruling District Court of Appeal decisions must be given prospective

application only, or even that prospective application is desirable. This Court did say that in a proper case when a party could show that it had in fact relied to its detriment upon the overruled case, prospective overruling could be considered. However, this Court did not indicate that was always the case. Otherwise all overruling decisions would be prospective only, contrary to the general rule. The loser in the Supreme Court could just claim that it had relied upon the overruled decision.

National Distributing Co, Inc. v. Office of the Comptroller, supra, does not mandate retrospective application of Barragan. It is a decision in which this Court expressly declared its decision to be limited to prospective application. In contrast, this Court in Barragan did not limit its decision to prospective application. It refused the City's petition for rehearing which requested such a declaration.

In Brackenridge, this Court expounded on the exception to the general rule that an overruling decision of a Court of last resort applies retrospectively as well as prospectively:

> "...it is general rule that a decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its operation unless declared by the opinion to have prospective effect only. However, there is an exception to the rule which provides that where property or contract rights have been acquired under and in accordance with a previous statutory construction of the Supreme Court, such rights should not be destroyed by giving the retrospective operation to a subsequent overruling decision. (citing authority) Brackenridge v. Ametek, Inc., supra, at 668-669 (emphasis added).

Thus overruling decisions of the Supreme Court are limited to prospective application only to cases in which (1) the overruling case is limited by the Supreme Court to prospective application when it is handed down; (In contrast to this Court's decision in National Distributing Co, Inc., supra, this Court's decision in Barragan, supra, was not so limited) or (2) where there is actual proof that property or contract rights have been acquired under and in accordance with a case of previous statutory construction by the Supreme Court upon which decision the party relied to its detriment.

The City argues that it falls within this second exception to the general rule that overruling decisions of the Supreme Court are to have retrospective as well as prospective application. The City's argument is unavailing in light of the concomitant rule that the laws in force at the time a contract is made form a part of the contract as if expressly incorporated into it. City of Daytona Beach v. Amsel, 585 So.2d 1044 (1 DCA.1992), citing Barton Brands, Ltd. v. Florida Beverage Corp., 511 So.2d 988 (Fla.1987).

The City asserts another general principle of law in its brief, that The Statutory and Decisional Law pertaining on the date that an accident has occurred must prevail in a workers' compensation case, citing Kerce v. Cocacola Company-Foods Division, 389 So.2d 1177 (Fla.1980); and Simmons v. City of Coral Gables, 186 So.2d 493 (Fla.1966). This principle likewise does not support the City's position. Following this precedent, sec. 440.21 Fla. Stat. (1975) is controlling since claimant was injured in 1976. Section

440.21 (1975), Fla. Stat., expressly prohibits the City from taking the pension offset.

Once the statute authorizing such offsets was repealed in 1973 the City of Miami no longer had the right to rely on any prior precedent upholding the pension offset. As explained by the First District Court of Appeals in City of Miami v. Burnett, 596 So.2d 478 (1 DCA.1992), once the City's pension offset ordinance was void, effective July 1, 1973, it could no longer constitute part of the law comprising the contract for benefits between employer and employee. Mr. McLean was injured in 1976, three years after the pension offset ordinance was void.

The City's argument that Barragan must be given retrospective application fails to address the decretal language and the remand of Barragan for further proceedings, which constitutes an implicit determination that the decision is to have retroactive application. City of Daytona Beach v. Amsel, 585 So.2d 1044 (1 DCA.1991). In its rehearing petition filed with this Court in Barragan, the City argued that the decision should have prospective effect only. This Court denied the City's petition for rehearing.

As noted by the First District Court of Appeal in City of Daytona Beach v. Amsel, supra, in urging that the exception to the rule ought to apply, the City does not take into account the rationale underlying the Barragan decision, i.e., that pursuant to section 440.21, Florida Statutes, an employer is prohibited from deducting workers' compensation benefits from an employee's pension benefits.

"The City's ordinance which permitted this to be done "flies in the face of state law and cannot be sustained."

Attempting to bolster its argument that Barragan should not have retrospective application, The City cites several cases for the proposition that this Court should reject retrospective application of decisions which could either have unsettled scheduled benefit payments or grievously impact state and municipal finances. Martinez v. Scanland, 582 So.2d 1167 (Fla.1991); State v. City of Orlando, 576 So.2d 1315 (Fla.1991) and National Distributing Company, Inc. v. Office of Comptroller, 523 So.2d 156 (Fla.1988). None of these cases are availing to the City since it has failed to present any evidence of Record that retrospective application of Barragan will either have unsettled scheduled benefit payments or grievously impact state and municipal finances. Furthermore, none of these decisions are controlling of the facts of the case at bar. In each of these cases this Court expressly declared its decision would have only prospectively application. Thus they fall within the first exception to the general rule that overruling decisions have retrospective application, i.e., where an overruling Court specifies that its decision is to have only prospective operation. In contrast, this Court in Barragan did not specify that its decision is to have only prospective application. It refused the City's petition for rehearing which requested such a declaration.

APPELLATE DECISIONS LEADING UP TO BARRAGAN NEGATE THE CITY'S CLAIM TO DETRIMENTAL RELIANCE UPON OVERRULED CASES

The City argues against retroactivity of this Court's decision because it allegedly detrimentally relied upon Hoffkins v. City of Miami, 339 So.2d 1145 (Fla. 3rd DCA. 1976), and other overruled District Court of Appeals decisions. The appellate decisions leading up to the Barragan decision negate any claim by the City that it detrimentally relied upon overruled DCA cases.

The City's present claim that it relied on Hoffkins is factually and legally incorrect. Again, the City has not presented any evidence of Record that it took the offset because it relied on Hoffkins, supra, or any other case.

Hoffkins v. City of Miami, 339 So.2d 1145 (Fla. 3rd DCA 1976), was a lower court decision holding that the City of Miami's worker's compensation offset ordinance was valid after repeal of sec. 440.09(4) Florida Statutes if it had been valid before repeal. Hoffkins' error was compounded by other District Court of Appeal decisions which relied upon it, like City of Miami v. Knight, 510 So.2d 1069 (Fla. 1st DCA 1987). In Hoffkins, supra, the Third District Court of Appeal failed to state the date of claimant's accident. However, Hoffkins' accident occurred on July 10, 1972, one year before repeal of the state statute authorizing the offset. The City cannot claim it relied on Hoffkins in offsetting Mr. McLean's workers' compensation benefits because Hoffkins is factually distinguishable. While Mr. Hoffkins' accident happened before repeal of Florida Statute 440.09 (4), Mr. McLean's accident

occurred after repeal. The City started taking pension offsets during the year of repeal, in 1973, three years before Hoffkins, supra, was decided. Hoffkins recites that the City took the offset relying on its own ordinance before the case was decided. The offsets were taken in a manner held unlawful by the Third District Court of Appeal in Gates I, as explained below. This Court has overruled Hoffkins.

The City also claims it relied upon District Court of Appeal decisions in City of Miami v. Giordano, 526 So.2d 737 (1 DCA.1988) and City of Miami v. Barragan, 517 So.2d 99 (1 DCA.1987). In Giordano's case, the Deputy Commissioner originally held that the offset was impermissible and awarded benefits back to Giordano's date of retirement date of December 3, 1973. When the City appealed the Deputy Commissioner's decision was Per Curium affirmed by the First District Court of Appeal in "Giordano I". City of Miami v. Giordano, 448 So.2d 538 (1 DCA.1986). After "Giordano I" was decided, the City paid Giordano but then refused to make any further payments so he had to file a claim again. In Barragan the First District Court of Appeal stated that the denial of benefits conflicted with the Supreme Court's decision in Jewel Tea Co. v. F.I.C., 235 So.2d 289 (Fla.1969), and the Court certified the question to the Supreme Court. Hence, the City could not have relied on "Giordano I", which was contrary to the City's position, or on Barragan, which questioned the City's position.

The City's argument that it detrimentally relied upon earlier precedent ignores several Florida Supreme Court decisions which

held worker's compensation offsets to be unlawful. Jewel Tea Co. v. Florida Industrial Commission, 235 So.2d 289 (Fla.1969), Brown v. S.S. Kresge Company, 305 So.2d 191 (Fla.1974), and Domutz v. Southern Bell Tel. & Tel. Co., 339 So.2d 636 (Fla.1976), all indicated that offsets were not allowed. Domutz was decided in 1976, the same year as Hoffkins. In Domutz, which was cited in Barragan, the Supreme Court held that workers' compensation benefits could not be credited against pension benefits. The City must have ignored these Supreme Court decisions if it relied upon prior precedent in taking the pension offsets.

Nor could the City have relied upon City of Miami v. Gates, 393 So.2d 586 (Fla. 3rd DCA 1981) ["Gates I"]. In that case, employees sued in 1977 complaining that the City of Miami had engaged in a number of breaches of trust. One of the breaches of trust complained of was the City's payment of workers' compensation benefits from the employees' pension trust fund. On May 10, 1973, (the year of repeal), the City changed the procedure for taking the workers' compensation offset. It deducted the workers' compensation payments from the pension payments of each individual employee, and then it issued a check from the pension fund to the City to pay the City for the amount of workers' compensation. The net effect was to deduct the money from the pension so that the injured worker did not receive it, and then deduct the money a second time from the pension fund so that the City never paid it. On a motion for partial summary judgment, the Circuit Court entered an order in favor of the employees, which was affirmed on appeal by

the Third District Court of Appeal in 1981. City of Miami v. Gates, 393 So.2d 586 (Fla. 3rd DCA 1981) ["Gates I"]. The Court commented upon the City's contention that it was permissible to pay the City's workers' compensation obligations from the employees' pension trust fund because both were intended for payment to the employees,

> "This claim amounts to the suggestion that, while one may not rob Peter to pay Paul, it is permissible to take from Paul himself in order to do so. It needed hardly be stated that we thoroughly disagree with such a proposition." [Gates I], at 588.

When Mr. McLean filed his present claim, the City filed a motion in the Circuit Court to adjudge him and other claimants in contempt of Court. The City contended that Gates was a bar because that litigation which began in 1977 disposed of the pension offset issue. The Circuit Judge decided that it was not a bar because the Circuit Court did not have jurisdiction over workers' compensation claims. (Appellee's Supplement to Record). The City appealed the Order of the Circuit Court, that Mr. McLean was not in contempt of Court. The Third District Court of Appeal affirmed, since the retirees could not have known of their entitlement prior to Barragan. City of Miami v. Gates, 592 So.2d 538 (Fla. 3rd DCA 1992) ["Gates II"].

When the City deducted workers' compensation from the pensions of its disabled retirees and then deducted an equal amount from the pension fund to pay the City for the workers' compensation, the City never paid workers' compensation at all. All of the money came from the pension fund. It was a breach of trust. When the

City was caught in the 1977 Gates I case, it was required to put the money back into trust, but it never paid the debt. Then when it was caught in Barragan for not having paid the debt, it paid Barragan and Giordano from the date of retirement. It then paid Mr. McLean and the other retirees only prospectively. The City declined to comply with the Court's order, to pay the other retirees back to the dates of their disability, as Barragan and Giordano were ordered to be paid.

The City was both the employer and the trustee of its employees. It could not lawfully co-mingle the funds because of those two roles, either under the Workers' Compensation Law or under the laws and principles of trusts.

In short, Barragan, supra, was not a case in which the Supreme Court overruled itself. Rather, it was a case in which the Court sustained its own prior decisions like Jewel Tea, which was decided in 1969, Brown, which was decided in 1974, and Domutz, which was decided in 1976. The City began taking the offset pursuant to its ordinance in 1973 in a manner which was held by the First District Court of Appeal in "Gates I" to have been a breach of trust. Yet the City persisted to continue to take the offset. The City claims that it relied upon Hoffkins, which was not decided until three years after the City had begun to take the offset per the 1973 City memo. The City continued to take the pension offset after Fla. Stat. 440.21 was enacted in 1973 (before any Appellate decision interpreted that statute). Plainly, the City never changed its position. It could not have detrimentally relied upon Hoffkins and

its progeny when it had already set out to take this offset years before in 1973. The City presented no evidence of detrimental reliance in the proceedings below, in the present case, or in any of the other cases. To the contrary, the above cited precedent establishes that such a position is not true and cannot be true. To accept the City's argument is to ignore "Giordano I", to ignore "Gates I", and to ignore Jewel Tea, Brown, and Domutz.

The City claims detrimental reliance on overruled DCA cases but has presented no evidence of it. The City has claimed in the past that it took the offset based on its own ordinance only. Yet the City took the offset following repeal in 1973, long before any of the overruled cases were decided and in a manner which was previously adjudicated in "Gates I" to have been a breach of trust.

The City's argument that on equitable principles it should not have to pay back to Mr. McLean what it illegally and wrongfully took from him is wrong. Clearly as between Mr. McLean, the rightful owner of the funds which were diverted by the City's illegal scheme, and the City of Miami, which never had the right to claim his monies in the first place, the equities are with Mr. McLean, not with the City. Mr. McLean, who is facing substantial medical bills for surgery which he can not afford, will not receive a "windfall" as urged by the City, but repayment of what was his to begin with.

SECOND ARGUMENT

THE JUDGE OF COMPENSATION CLAIMS WAS CORRECT IN AWARDING A 20% PENALTY ON ACCOUNT OF THE CITY'S FAILURE TO PAY CLAIMANT HIS BENEFITS OR TO TIMELY FILE NOTICE TO CONTROVERT

The award of the 20% penalty was correct. Since Mr. McLean was injured in 1976, Florida Statute 440.20 (6) (1975) applies. Section 440.20 (6), Fla. Stat. (1975) provides that if any installment of 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% thereof.

Section 440.20 (2), Fla. Stat., (1975) provides that the first installment of compensation is due on the 14th day after the employer has knowledge of the injury and thereafter in bi-weekly installments. Section 440.20(4), Fla. Stat., (1975) provides that an employer who controverts the right to compensation must file with the Division on or before the 21st day after he has knowledge of the alleged injury, a notice in accordance with a form prescribed by the Division stating that the right to compensation has been controverted, the name of the claimant and the employer, the date of the alleged injury, and the grounds upon which the right to compensation is controverted."

Section 440.20 (3), Fla. Stat., (1975) requires the Division to be notified of suspension of payment for any cause.

Section 440.20 (8) (b), Fla. Stat., (1975) sets forth the purpose of notifying the Division so that it may take action.

Barragan was decided on April 20, 1989, and became final on July 14, 1989. It is undisputed that the City stopped taking

offsets from Mr. McLean's pension when Barragan became final in July, 1989, but that it has yet to pay Mr. McLean the compensation it illegally offset from his pension between April 15, 1978 and July 14, 1989. The City decided to comply with the Barragan decision prospectively. The City elected to not comply with it retroactively because it did not make retroactive payments when it ceased taking the offset prospectively. At that time the City did not notify the Division or the employees involved that it was taking that position. Neither did it file a timely notice to controvert or otherwise comply with the above statutes to inform the employee and the division of workers' compensation that it was taking that position. The City filed its Notice to Controvert on December 27, 1989, after Mr.McLean filed his claim and more than five months after this Court refused the City's petition for rehearing of the Barragan decision.

In City of Miami v. Bell, 17 F.L.W. D2182 (1 DCA. September 16, 1992), the First District Court of Appeal approved the award of penalties in a pension offset case, but certified the following question to this Court, which it also certifies in the case at bar:

> IS SECTION 440.20(7) APPLICABLE UNDER THE CIRCUMSTANCES OF THIS CASE, AND IF SO, CAN THE CITY OF MIAMI, BE LEGALLY EXCUSED FROM PAYING A PENALTY PURSUANT TO THAT SECTION 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 THE VALIDITY.

The answer to this certified question is that pursuant to the applicable Florida Statute, 440.20 (1975) the City should not and

cannot be excused from the payment of the penalty. Although the City asserts in its brief that it should not be penalized because it has acted in good faith, and relied upon prior overruled decisions to its detriment, it has presented no evidence in the Record to support such assertions. Barring such evidence in the Record, this Court should not presume them to be true.

Even if the City had proved that it acted in good faith reliance upon the validity of its ordinance, the applicable statute does not provide the City with any basis for avoidance of the penalty. The language of the penalty statute is mandatory. It states that the penalty "shall be" imposed. It does not say "may be" imposed. The statute does not provide any exception to mandatory enforcement of the penalty for good faith or detrimental reliance upon prior precedent. In City of Miami v. Watkins, 579 So.2d 759 (Fla. 1st DCA 1991), the First District Court of Appeal rejected the City's contention, that the offset of workers' compensation benefits was approved by case law at the time, which would afford it a basis for avoiding the penalty.

In City of Miami v. Bell, 17 F.L.W. D2182 (1 DCA September, 1992), the First District Court of Appeal gave the following rationale for imposition of a penalty upon an award of offset benefits:

> "On August 1,(1989) the City manifested recognition of its obligation to pay (claimant) under the Barragan decision when, without an award by the Judge of Compensation Claims, it initiated payment of workers' compensation and pension benefits without the pension offset. The City decided, however, without giving notice to the Department or the

> Division, that it would not pay the monies previously withheld under the pension offset when it implemented this practice on August 1. While the City was entitled to take the risk of an adverse decision on the retroactivity of the Barragan decision, in electing to do so the City necessarily incurred the risk of having to pay the penalty..."

The City states in its brief that the statutory purpose of the penalty is in no way enhanced, let alone served, by the imposition of the prompt, non-payment penalty. This argument has no merit. The City's failure to file a notice to controvert upon this Court's refusal of its rehearing of the Barragan decision to notify the employee and the Division of the City's decision not to pay back its employees the benefits which it had unlawfully withheld, is the precise evil that the penalty statute was designed to prevent.

The imposition of penalties in the instant action serves the purpose of the penalty statute, to assist the self-administration of the Act. When an employee is denied a benefit, he is to be furnished timely notice so that he may decide whether to contest denial or not. Here, the City did not provide such notice to Mr. McLean or make any showing as to why it could not have done so, as the statute and rules require. The City did not prepare a notice to controvert until December 27, 1989, more than five months too late. In failing to provide such notice the City stood to gain from the fact that it might never hear from some of the employees who were entitled to be paid back benefits. Enforcement of the penalty discourages future non-compliance with the Act.

Even if the penalty should not be imposed on account of what the City did before Barragan was decided, it must be imposed

against the City for denying benefits in August of 1989 and not notifying the employee or the Division it was doing so. If the City had been right, it would owe nothing. If the City be wrong, the Legislature provided for a penalty for the City's hiding its denial.

As implicitly recognized by the First District Court of Appeal in Bell, the fact that the City failed to pay the pension offset benefits previously withheld after this Court in Barragan refused its Petition for Rehearing predicated upon the retroactivity issue, defeats the City's argument that it was relying in good faith on prior precedent.

THIRD ARGUMENT

> 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) DOES CONSTITUTE "COMPENSATION" FOR PURPOSES OF SECTION 440.20, FLORIDA STATUTES.

In the case at bar the First District Court of Appeal also certified the following question:

> 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 "COMPENSATION " FOR PURPOSES OF SECTION 440.20, FLORIDA STATUTES?

Compensation is defined by section 440.02 (11), Florida Statutes (1975) as follows:

> "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Chapter."

The City cites several decisions in support of the proposition that pension offsets are not "compensation" as contemplated by the applicable statute: State Department of Transportation v. Davis, 416 So.2d 1132 (1 DCA. 1982); Whiskey Creek Country Club v. Rizer, 599 So.2d 734 (1 DCA. 1992); Cox Oil and Sales, Inc. v. Boettcher, 410 So.2d 211 (1 DCA. 1982), and Brantley v. ADH Building Contractors, Inc., 215 So.2d 297 (Fla.1968). State Department of Transportation v. Davis, supra, is not relevant to issue certified by the District Court. That decision states the obvious fact that money payable under the Social Security laws is not "compensation" payable under Chapter 440 of the Florida Statutes. Whiskey Creek Country Club v. Rizer states that funeral expenses, like medical benefits, are not "compensation" within meaning of the penalty statute. Cox Oil and Sales, Inc. v. Boettcher states that nursing services are not compensation within meaning of the penalty statute. In Brantley v. ADH Building Contractors, Inc., supra, this Court held that medical expenses are not compensation within meaning of the penalty statute. At the same time the Court held that a washout settlement is an award within the contemplation of the statute imposing penalties when an award is not paid.

The above cases which hold that various benefits are not compensation within meaning of the penalty statute, are distinguishable from the case at bar. In the case at bar, Mr. McLean's regular compensation installments payable over a period of approximately eleven years were illegally withheld by the City through a scheme by which it offset them from his pension benefits.

In Barragan, supra at page 254, this Court stated that through its ordinance under which it took the offsets, the City had withheld **workers' compensation benefits** in violation of Florida Statute 440.02 (11):

> "Under state law, section 440.21 prohibits an employer from deducting **workers' compensation benefits.** Yet, the City of Miami has passed an ordinance which permits this to be done." (emphasis added).

The basis of this Court's decision was that the City had illegally offset workers' compensation benefits which it was required to pay under the Workers' Compensation Act.

The fact that the City must now pay back in one lump sum all of the installments of compensation which it offset between April 15, 1978, and July 14, 1979, does not change the fact that monies which the City withheld are installments of compensation within meaning of Statute 440.20. A portion withheld from any installment is essentially an unpaid installment within meaning of the statute imposing penalties and interest for non-payment. Santana v. Atlantic Envelope Co, 568 So.2d 528 (1 DCA.1990).

FOURTH ARGUMENT

THE CITY MAY NOT BE EXCUSED FROM THE PAYMENT OF PREJUDGMENT INTEREST DUE ON THE JUDGMENT

The City argues that it should be exempt from paying pre-judgment interest because payment of pre-judgment interest is mandated only for the tardy payment of compensation. This argument has no merit because in taking the pension offsets from Mr. McLean's pension, the City deprived him of the installments of workers' compensation payments to which he was entitled between

April 15, 1978 and July 14, 1989.

The City also argues that it should not be required to pay pre-judgment interest because the City has always acted in good faith. This argument also has no merit. The City has not presented any evidence which demonstrates its good faith. As explained above, the history of the litigation related to Barragan negates the City's contention that it acted in good faith. Finally, the workers' compensation statute does not provide for the City to be relieved from paying pre-judgment interest on such basis.

FIFTH ARGUMENT

THIS COURT SHOULD DECLINE THE CITY'S REQUEST THAT IT RULE UPON THE POSSIBILITY THAT FURTHER PENALTIES MAY BE ASSESSED ON ACCOUNT OF THE CITY'S FAILURE TO EITHER ABIDE BY THE FIRST DISTRICT'S MANDATE OR TO SEEK A STAY IN ACCORDANCE WITH THE APPLICABLE APPELLATE RULES OF PROCEDURE

The City argues that the First District's mandate has left open the possibility that a new 20% penalty will be levied against the City for non-payment of retroactive amounts which the First District ordered it to pay within thirty days of its October 16, 1992, mandate. A ruling from this Court on this issue is not appropriate. This issue is not ripe for judicial review since the District Court of Appeal has not imposed such a penalty.

Nor is such a ruling warranted on the facts of this case.

An employer in a workers' compensation case who seeks review of an award or affirmance of an award by the First District Court of Appeal by petition for review in this Court may, in order to

avoid paying the award together with any penalty for untimely payment, seek a stay from the District Court of Appeal under Florida Rule of Civil Procedure 9.310 (a). Florida W.R.C.P. 4.161 (d) provides:

> "If the benefits are ordered paid by the District Court upon completion of the appeal, they shall be paid, together with interest as required by 440.20 Florida Statute,within thirty days after the Court's mandate. If the order of the District Court is appealed to the Supreme Court, benefits determined due by the District Court may be stayed in accordance with the applicable Rules of Appellate Procedure. Benefits ordered paid by this Court shall be paid within thirty days of the Court's mandate." (emphasis added).

The City's request that it be excused from complying with the First District's mandate where it has not sought stay of that mandate in accordance with the applicable appellate rule should be denied.

CONCLUSION

The decisions of the First District Court of Appeal finding Barragan to be retroactive should be affirmed. The imposition of a 20% penalty and pre-judgment interest should also be affirmed.

Respectfully submitted,

PAUL J. KNESKI, ESQUIRE
Attorney for Appellee
BISCAYNE BUILDING, SUITE 807
19 WEST FLAGLER STREET
MIAMI, FL 33130
(305) 358-0080
F.B.N.: 260770

CERTIFICATE OF SERVICE

I hereby certify, that a true and correct copy of the foregoing was mailed to all parties listed this 22nd day January, 1993.

Kathryn S. Pecko
Assistant City Attorney
Attorneys for City of Miami
300 Dupont Plaza Center
300 Biscayne Boulevard Way
Miami, FL 33131

Arthur J. England, Jr., Esq.
1221 Brickell Avenue
Miami, FL 33131

J.M. Levy, Esq.
6401 S.W. 87th Avenue
Miami, FL 33172

PAUL J. KNESKI, ESQUIRE
Attorney for Appellee
BISCAYNE BUILDING, SUITE 807
19 WEST FLAGLER STREET
MIAMI, FL 33130
(305) 358-0080
F.B.N.: 260770