047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,679

3/12

FILED
SID J. WHITE
FEB 19 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SANTOS M. GARCIA,

Petitioner,

vs.

CARMAL STRUCTURAL, INC. and FEISCO,

Respondents

_____/

RESPONDENTS' ANSWER BRIEF ON THE MERITS

ARTURO BORBOLLA, ESQUIRE
Florida Bar No. 767417
MILLER, KAGAN & CHAIT, P.A.
Counsel for Respondents
75 Valencia Avenue
Suite 800
Coral Gables, Florida 33134
(305) 446-5228

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities (Continued)

INTRODUCTION

This case arose from an appeal from an Order of the Honorable Judith S. Nelson, Judge of Compensation Claims, entered on July 17, 1991. The Petitioner, Appellant below, is Santos M. Garcia (also referred to hereinafter as "Claimant"). The Respondents, Appellees below, are Carmar Structural Incorporated (also referred to hereinafter as the "Employer") and the Florida Construction, Commerce, and Industry Self Insurers Funds.

All references to the Record on Appeal before the District Court will be through the abbreviation (R.).

STATEMENT OF THE CASE

Benefits were claimed by a Claim for Benefits completed by attorney Marvin J. Kristal on July 17th, 1990, received by the Department of Labor and Employment Security on July 19th, 1990 and by a second Claim for Benefits completed by attorney Marvin J. Kristal on November 14th, 1990 and received by the Department of Labor and Employment Security on November 16th, 1990 (R.21-47). The parties executed a Pre-Trial Stipulation on March 22nd, 1991 which was approved by the Judge of Compensation Claims on March 25th, 1991 (R.15-18). A Final Hearing on the merits was held on July 12th, 1991 (R.13). The Judge's Order was rendered on July 17th, 1991.

The District Court of Appeal, First District, State of Florida (hereinafter referred to as "the DCA"), after considering the briefs of the parties and the respective oral arguments, filed an opinion on October 5th, 1992 and affirmed the decision of the Judge of Compensation Claims (hereinafter referred to as "JCC"). The DCA certified the following questions as being of great public importance.

> **Whether chapter 90-201, Laws of Florida, would apply to a workers' compensation case in which the accident occurred after the effective date of chapter 90-201 and before the Act was declared unconstitutional in Martinez v. Scanlan, and which has not been finally adjudicated during that period**

> **If chapter 90-201, Laws of Florida, would not apply in such a case, whether chapter 90-201, Laws of Florida, would apply (i.e., whether the retroactivity provision of that Act is constitutional)**

STATEMENT OF THE FACTS

The Respondents accept the Petitioner's Statement of the Facts as set forth in their Initial Brief on the Merits.

SUMMARY OF THE ARGUMENT

The application of Florida Statutes, section 440.15(3)(b), as amended in 1990 and re-enacted in 1991, to this July 5th, 1990 accident, does not violate Petitioner's constitutional rights as set forth in the Florida Constitution or the Constitution of the United States. The argument that the application of the 1990 amendments and the 1991 re-enactment of section 440.15(3)(b) affects the Petitioner's right against infringement of contract is without merit. At the time of Petitioner's injury, the 1990 act was in effect. Any right of the Petitioner vis-a-vis the workers' compensation insurance policy (contract) vested at the time and any contractual substantive rights are dictated by the 1990 Act.

The decision by the Florida Supreme Court in **Martinez v. Scanlan** did not hold the 1990 amendments to Chapter 440 unconstitutional retroactively. That is, the Court did not hold the Act unconstitutional and void ab initio. The Court held the voiding of 1990 amendment to be prospective only, as of June 6th, 1991. Since this Petitioner's injury occurred on July 5th, 1990, the 1990 amendments were still in effect at the time. Petitioner's rights vested at the time of the injury and those rights are identical to the rights in effect in the 1991 re-enactment. There is no basis for any finding of a constitutional violation.

Even if this Court were to find the Petitioner's substantive rights were affected by the retroactive application of the 1991 re-enactment, the Order of the Judge of Compensation Claims must still be affirmed. The Legislature is authorized to retroactively apply curative measures as embodied in the re-

enactment provisions of 1991 affecting Chapter 440. **Martinez v. Scanlan** specifically held that the 1990 amendments were unconstitutional not because the Legislature lacked the power to enact it, but because of the form of its enactment. The Florida Legislature has the authority to cure, confirm, and validate any provision it had the power to enact in the first place.

The Petitioner is not entitled to full compensation for wage loss under section 440.15(3)(b) where he earns no wages for any time period. The clear language of section 440.15(3)(b) does not provide for a separate formula in calculating wage loss where a claimant earns no money. Any attempt by the Petitioner to presume what the Legislature intended is without merit. The statute itself does not provide for alternative provisions when the claimant earns no wages. Any remaining language setting the maximum exposure at 66-2/3 percent is merely a remaining vestige of the old law which was inadvertently maintained by the Legislature. From this we cannot presume the Legislature meant anything different from what is set forth in the statute.

ARGUMENT

POINT I

THE APPLICATION OF CHAPTER 90-201, LAWS OF FLORIDA, TO THIS JULY 5TH, 1990 ACCIDENT, DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS AS SET FORTH IN THE FLORIDA CONSTITUTION OR IN THE UNITED STATES CONSTITUTION

a. Introduction:

Chapter 90-201, Laws of Florida (the Comprehensive Development Act of 1990), was enacted by the Legislature and became effective on July 1st, 1990. On December 5th, 1990, the Second Circuit Court in **Scanlan v. Martinez**, Case No. 90-3137 (Fla. 2nd Cir. Ct. December 5th, 1990) held that chapter 90-201 was unconstitutional. The case then went to the First District Court of Appeal. On appeal, the First District certified the case to the Supreme Court as being of great public importance and requiring immediate resolution. The Supreme Court accepted jurisdiction under Article IV, section 3(b)(5), Florida Constitution.

Between the enactment of chapter 90-201 and the Florida Supreme Court's decision in **Martinez v. Scanlan**, 582 So. 2d 1167 (Fla. 1991), the Florida Legislature convened in a declared special session in January of 1991 to address the problems with the workers' compensation amendments as embodied in chapter 90-201, Laws of Florida. In that session, the Legislature separated the international trade and workers' compensation provisions embodied in chapter 90-201 into two distinct and separate bills and re-enacted both laws. Chs. 90-1, 90-5,

Laws of Florida. The Legislature expressly provided these two acts would be applied retroactively to July 1st, 1990, the original effective date of chapter 90-201.[1]

On June 6th, 1991, this Honorable Court filed the opinion of **Martinez v. Scanlan**, 582 So. 2d 1167 (Fla. 1991). This Court held that chapter 90-201 was unconstitutional because it violated the single subject requirement. This Court, in its decision, correctly recognized that the unconstitutionality was not because the Legislature lacked the power to enact chapter 90-201, but because of the form of its enactment, to wit: the single subject violation. This Court's ruling of unconstitutionality and the effective date of voiding chapters 90-201 is the date of the filing of the opinion (June 6th, 1991). This Court specifically held the decision to apply prospectively only from the date of the filing of the opinion. **Id.**, **at** 1176.

b. The application of the 1990 or 1991 amendments to 440.15(3)(b) to this case does not violate any constitutional mandates

Petitioner's argument at the DCA level and before this Court is that application of the 1990 or 1991 amendments to section 440.15(3)(b), Florida Statutes, to this July 5th, 1990 accident violates constitutional mandates as embodied in the Florida Constitution and the Constitution of the United States of

[1]The Legislature also noted that in the event such retroactive application is held by a Court of law to be unconstitutional, the act shall apply prospectively from the date the Act becomes law. Section 54, chapter 90-1, Laws of Florida.

America.[2] The Petitioner relied on **Martinez v. Scanlan**, **supra**, to support the position that the 1990 Act cannot apply to this case and that the 1989 law must be applied. Respondents disagree with Petitioner's interpretation of this Court's opinion in **Martinez v. Scanlan**, **supra**.

The Petitioner's posit that because the claimant's case was adjudicated after the **Scanlan** decision, supra, to wit: July 12th, 1991, the law which must be applied is the 1989 law. The Respondents would argue that in accordance with the **Scanlan** decision, **supra**, the 1990 amendment to 440.15(3)(b) controls the rights of the Petitioner vis-a-vis his "contractual relationship" with the employer and the carrier in this case. It is undisputed that the date of a claimant's injury defines the applicable law. **See e.g.**, **Sullivan v. Mayo**, 121 So. 2d 424 (Fla. 1960). Here the 1990 amendments were in effect and must control.

The Petitioner is requesting that this Court define the "prospective only" holding to mean something different than its plain meaning. Petitioner cites to cases such as **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602 (1966) and **State v. Barquet**, 262 So. 2d 431 (Fla. 1972) to support its position that the prospective only language should be given a different meaning. Both these cases dealt with penal statutes and criminal law. In essence, the Petitioner would request that this Court define its prospective only language to mean that the voiding of chapter 90-201 occurred after June 6th, 1991 and any cases not **tried** which fall within this

---

[2]Section 440.15(3)(b) is the only provision at issue in this case. The Amicus Brief and Petitioner's Brief attempts to include all of chapter 440 in its appeal. The Petitioner and the Amicus have no standing to raise other provisions not at issue at the JCC level or at the DCA level.

supposed "window" are to be controlled by the 1989 law. The Respondents disagree. The Petitioner is in essence requesting a re-argument or re-hearing of the decision in **Martinez v. Scanlan** decision. The **Martinez v. Scanlan** decision is the controlling law in this case and mandates that the 1990 amendments apply to this date of accident.

It is the Respondents' position that based on **Martinez v. Scanlan**, 582 So. 2d 1167 (Fla. 1991), the 1990 amendments to the Workers' Compensation Act apply to this date of accident. This Court was specific in the **Martinez v. Scanlan** decision and set forth the following language in its holding:

> **Considering all factors, we conclude that we can, and should, hold the effective date of voiding chapter 90-201 as the date of the filing of this opinion (June 6th, 1991). Our decision shall operate prospectively only. Scanlan, Id, at 1176 (emphasis added)**

This Court recognized that there would be significant hardships imposed on individuals if the decision would have been given retroactive effect. Based on this, it is clear the decision in **Martinez** rendered by this Court is to be applied only after June 6th, 1991. Since the claimant's accident occurred on July 5, 1990, we need not revert to the 1989 law.

The Petitioner argues in the Initial Brief that this Court lacks the power to issue a prospective only ruling and, in essence, give validity to the 1990 amendments for a period between July 1st, 1990 and the re-enactment curative statute in 1991. This Court in **Martinez v. Scanlan** addressed the issue of the effective date of the ruling. Prior to engaging in the analysis, this Court noted that

penal statutes declared unconstitutional are inoperative from the time of its enactment, not only and simply from the time of the Court's decision. **Martinez** at 1174 (citing **Russo v. State**, 270 So. 2d 428 (Fla. 4th DCA 1972). The Court further stated the following:

> **In determining whether a statute is void ab initio, however, this Court seemingly has distinguished between the constitutional authority, or power, for the enactment as opposed to the form of the enactment. McCormick v. Bounetheau, 139 Fla. 461, 190 So. 882 (1939). Here we are declaring chapter 90-201 unconstitutional not because the Legislature lacked the *power* to enact it, but because of the *form* of its enactment (emphasis added). Id., at 1174.**

The Court's distinguishing between criminal and civil cases is historically correct both for the Florida Supreme Court as noted by **Martinez, supra**, and by the Supreme Court of the United States of America. In **American Trucking Association Incorporated v. Smith**, 110 S.Ct. 2323 1990), the Supreme Court addressed the retroactive application of their decisional law in the criminal sphere versus the civil sphere. The Court noted:

> **In proposing that we extend the retroactivity doctrine recently adopted in the criminal sphere to our civil cases, the dissent assumes the Court reasons for adopting a per se rule of retroactivity in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed. 2d 649 (1987), are equally applicable in the civil context. But there are important distinctions between the retroactive application of civil and criminal decisions that make the Griffith rationale far less compelling in the civil sphere.**
>
> **In adopting the per se rule of retroactivity for criminal cases, Griffith relied on what, in essence,**

> **was a single justification: That it was unfair to apply different rules of criminal procedure to two defendants whose cases were pending on direct review at the same time. See Id., at 322, 323, 107 S.Ct. at 713. In expounding this theory, the Court did not explain why the pendency of a defendant's case on direct review was the critical factor for determining the applicability of the decisions. It is at least arguable, as Justice White pointed out in the dissent, that the speed in which cases proceed through the criminal justice system should not be the key factor for determining whether 'otherwise identical situated defendants may be subjected to different constitutional rules.' Id., at 331, 107 S.Ct. at 718 (WHITE, J. dissenting)**
>
> **American Trucking Association v. Smith, 110 S.Ct. at 2341.**

The Court in **Martinez v. Scanlan** also noted that penal statutes declared unconstitutional are inoperative from the time of their enactment. **Martinez**, 582 So. 2d at 1174. Therefore, the argument set forth by the Petitioner that cases applying **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602 (1966) should be used to further his argument that the amendments of chapter 90-201 should be held void ab initio logically fails. This Court was aware of the situation it faced in **Martinez**, **supra**, and followed precedent both from its own decisional law and the decisional law of the United States Supreme Court. The dissent by Justice Barkett on this issue is exactly what the Petitioner seeks in this appeal.

There is sufficient authority to support this Court's prospective only ruling in **Martinez v. Scanlan**. For example, in **Gulesian v. Dade County School Board**, 281 So. 2d 325 (Fla. 1973), the Court upheld a finding of unconstitutionality of a statute purporting to authorize school districts to levy ad valorem taxes in

excess of 10 mills without a vote of the electorate. The Court, however, affirmed the trial judge's holding that this ruling would apply prospective only. The Court agreed with the reasoning of the trial judge and found that retroactive application of the ruling would require refunds from the school board which would result in great hardship. The Court weighed the interest of the individual taxpayers as compared to the needs of the school children of the county. Equitable considerations were given great weight. **Id**, at 327.

In **ITT Community Development Corporation v. Seay**, 347 So. 2d 1024 (Fla. 1977), a Florida statute providing the method for determining just valuation for tax purposes was held to be unconstitutional. The Court, however, held that the decision would be prospective only and would not affect any valuation previously determined pursuant to the statute. See also **Interlachen Lakes Estates Incorporated v. Snyder**, 304 So. 2d 433 (Fla. 1973) (statute authorizing platted land unsold as lots to be valued for tax assessment purposes on the same basis as unplatted acreage of similar character until 60% of such land had been sold is held to be unconstitutional; however, decision was held to apply prospective only from the date of the opinion because persons had relied on the statute, assuming it to be valid)

In the case **Aldana v. Holub**, 381 So. 2d 231 (Fla. 1980), this Court struck down Florida's Medical Medication Act as unconstitutional in its entirety based on violations of due process. This Court, in deciding whether to apply the case retroactive or prospective only chose to apply the unconstitutionality ruling prospective only.

Decisions from the United States Supreme Court have also supported the decision in **Martinez v. Scanlan** holding the voiding of chapter 90-201 to be prospective only. In **Cipriano v. City of Houma**, 395 U.S. 701, 80 S.Ct. 1897, 23 L.Ed. 2d 647 (1969), the Court struck down as unconstitutional a statute in the State of Louisiana which allowed only property tax payers the right to vote in elections approving the issuance of revenue bonds by utility companies. Again, the decision was to apply prospective only. The United States Supreme Court noted the hardships that would be imposed on cities, bond holders, and others connected with municipal utilities if the decision were given full retroactive effect. The Court went on to note that if a decision from the United States Supreme Court produces substantial inequitable results, if retroactive application is given, there exists ample authority for avoiding the injustice or hardship by holding non-retroactivity. **Id.**, at 706, 89 S.Ct. at 1900. This decision by the United States Supreme Court is by far not the only decision which has allowed prospective only applications. The decision of **Martinez v. Scanlan**, 582 So. 2d at 1175 sets forth the United States Supreme Court authorities supporting its position.[3]

The Petitioner argues that the contract between the employee, the employer, and the carrier would be infringed upon by application of the 1990 amendments. This position is inconsistent with this Court's decision in **Martinez v. Scanlan**, 582 So. 2d 1167. The law is well established that the contract

---

[3]This Court in **Martinez**, **supra**, did not hold section 440.15 unconstitutional. The unconstitutionality applied only to the form of the enactment. This is a significant distinction.

between the parties in a workers' compensation case embraces the provisions of the statutes as they exist at the time of the injury. **Hardware Mutual Casualty Co. v. Carlton**, 9 So. 2d 250 (Fla. 1942); **Fidelity and Casualty Company of New York v. Bedingfield**, 60 So. 2d 49 (Fla. 1952); **Fink v. Fink**, 64 So. 2d 770 (Fla. 1953).[4]

The law in workers' compensation is clear that the time the claimant suffers an injury is pivotal in determining the contractual rights vis-a-vis the employer, the claimant, and the insurance carrier. See e.g., **Sullivan v. Mayo**, 121 So. 2d 424 (Fla. 1960), cert. denied 133 So. 2d 647 (Fla. 1961). In the case at bar, the claimant suffered an injury on July 5th, 1990. At that time, the law in effect was the 1990 amendments to chapter 440. Employers and insurance companies alike rely on the existing law in order to assess premiums, determine budgets and make other administrative decision with regard to their respective companies. If this Court in **Martinez**, 582 So. 2d 1167, had declared Chapter 440, as amended in 1990, void ab initio, the impact on commerce and the insurance industry would have been significant. There would be no certainty as to liabilities and exposure.

c. Petitioner is not in a protected class

The Petitioner alleges that he should be in a protected class. Reference to the Americans with Disabilities Act is made to include claimant as "disabled." The

[4]The Petitioner agrees with the authority and cites this authority in support of their position that the time of trial controls the rights of the parties in a workers' compensation action.

Respondents would state that the claimant has not been determined to be an American with a disability within the ambit of the American with Disabilities Act ("ADA"). Even if claimant were found to be an American with a disability within the ambit of the ADA, this statute did not come into effect until after the claimant's accident and cannot be the basis to apply the strict scrutiny analysis. No determination has been made regarding the level of scrutiny which should apply to ADA cases.

The workers' compensation law is economic legislation. The legislature acts to regulate industry and commerce when it enacts workers' compensation laws. It is a remedial cause of action for workers, separate and distinct from general common law. Workers' compensation is a creature of statute and emanates from the power of the Legislature to regulate business, industry and the economy. Economic legislation need not be given strict scrutiny.

d. There is no violation of separation of powers

It is also posited by the Petitioner that the Court's decision in **Martinez v. Scanlan**, if interpreted strictly, would result in "judicial legislation". The cases cited by the Respondents, at pp. 11-13 in this brief, **supra**, supporting this Court's prospective only ruling in **Martinez v. Scanlan**, along with the decisions of the United States Supreme Court cited supra at pp. 11-13 in this brief, refute any argument that the Court acted outside its authority. The Legislature enacted this law and the Court is merely giving this law effect. Again, this Court in **Martinez**

was clear that the constitutional violation regarding chapter 90-201 was the form of its enactment. At no time did the Legislature lack power to enact chapter 90-201. No contention is made by Petitioner that the Legislature lacked power to enact Chapter 440, either in 1990 or in 1991.

Furthermore, the Petitioner has not challenged the constitutionality of 440.15(3)(b). There is no mention or argument either at the trial level, the DCA level, or before this Honorable Court that section 440.15(3)(b) violates any specific constitutional provisions or was enacted without legislative power. It is the timing of the application which is constitutionally being attacked in this case. Therefore, there is no argument made that 440.15(3)(b) is, in and of itself, unconstitutional.

e. There is no violation of the prohibition against ex post facto laws

Finally, the Petitioner has raised a violation of ex post facto laws. There is no violation of ex post facto law prohibition in this case. The purpose of ex post facto prohibition is to secure substantial personal rights against arbitrary and oppressive legislation and to prevent the exercise of tyranny under pretext of **penal** enactment. **See**, **e.g.**, **Glover v. State**, 474 So. 2d 886 (Fla. 1st DCA 1985). The constitutional prohibition against ex post facto laws applies only to criminal or penal matters. **Xanadu of Cocoa Beach v. Lenz**, 504 So. 2d 518 (Fla. 1st DCA 1987). This matter is not criminal or penal.

f. Conclusion on Point I

If this Honorable Court were to use the date of trial as determinative, it will result in inequities based on the date a case is adjudicated. For example, assume the claimant was involved in a compensable automobile accident on July 5th, 1990 with a co-employee. Both suffered injuries as a result of the July 5th, 1990 accident. Both lost time from work and received a permanent impairment rating. The co-employee's case was tried before **Martinez v. Scanlan**, 582 So. 2d 1167. The claimant's case was tried subsequent to **Martinez v. Scanlan**, **id**. Applying the rationale of the Petitioner, these two claimants would have different rights based on the **trial date**. To provide equality for all workers, it must be held that the **date of injury** controls. At the time this claimant was injured, the 1990 law was in effect and this provision has not been held to be unconstitutional at that time. Therefore, we should apply the 1990 law to this case and not deviate from the precedent in **Martinez v. Scanlan**, **id**.

ARGUMENT

POINT II

THE RETROACTICE PROVISION OF CHAPTER 91-1, LAWS OF FLORIDA, IS CONSTITUTIONAL

Not abandoning its previous argument, the Respondents will address the retroactivity clause in the 1991 re-enactment of the 1990 amendments to Chapter 440. Respondents maintain, however, that the retroactivity provisions are not at issue in this case and need not be applied.

Petitioner cites to **Sullivan v. Mayo**, 121 So. 2d 424 (Fla. 1960) to support its position that the retroactivity clause of the 1991 Act is unconstitutional. The Petitioner argues that **Sullivan v. Mayo**, **id**, was cited as authoritative in **Martinez v. Scanlan**, 582 So. 2d 1167. The Respondents would disagree with this characterization. **Sullivan v. Mayo**, 121 So. 2d 424 was cited in a footnote by this Court in the **Martinez v. Scanlan** decision, 582 So. 2d 1167. In the same footnote this Court also cited **Coon v. Board of Public Instruction of Okaloosa County**, 203 So. 2d 497 (Fla. 1967).

The facts in **Sullivan v. Mayo**, **id**, involved an accident date of December 1955. A petition for lump sum payment was filed in 1957. A subsequent petition for lump sum award was filed and another hearing was held in May of 1959. The Deputy Commissioner determined that the rights of the parties were governed by the Florida Statutes in force **at the time of the Deputy Commissioner's order**, as opposed to the date of the accident. The law in effect at the time of the Commissioner's order took effect July 1959, approximately two years after the date

of the accident. The District Court reversed. The Court held the law in effect at the time of the accident must apply. **Id.**, at 430.

Sullivan v. Mayo, **id.**, supports the decision of the JCC in this matter and the position set forth by the Respondents in their brief before the First District Court of Appeal and before this Honorable Court. The law in effect at the time of the Petitioner's injury was a 1990 amendment to Chapter 440. **See Martinez**, 582 So. 2d 1167. This Court in **Martinez v. Scanlan**, **id.**, did not hold the 1990 amendments void retrospectively. Therefore, the Judge of Compensation Claims correctly analyzed the decision based on the date of injury and **not** the date of trial.

In **Coon v. Board of Public Instruction of Okaloosa County**, 203 So. 2d 497 (Fla. 1967), the Court held that the Legislature has the power to ratify, validate, and confirm any act or proceeding which it would have authorized in the first place. **Id**, at 498. This Court in **Martinez v. Scanlan**, 582 So. 2d 1167 (Fla. 1991) specifically held that the 1990 amendments were unconstitutional **not** because the Legislature lacked the **power** to enact it, but because of the **form** of its enactment, to wit: Single subject violation. **Martinez v. Scanlan**, 582 So. 2d at 1174. In **Coon v. Board of Public Instruction**, **Id.**, the Court upheld the retroactive application of a subsequent law that cured defects in the publication of a notice of a bond election. The Court noted that because the basic purpose of the local law was valid, any incidental impact upon the duties of county officers by retroactive application would not produce its downfall. **Coon**, 203 So. 2nd at 499. The Legislature in the 1991 re-enactment specifically stated that it was to apply

retroactively to July 1st, 1990. Where the Legislature expresses an intent of retroactive application, such intent must be furthered. See e.g., **Seaboard System R.R., Inc. v. Clemente**, 467 So. 2d 348 (Fla. 3 DCA 1985). The cases cited by the Petitioner are distinguishable to the extent the Legislature, in those provisions, did not specifically address retroactivity.

The Missouri Supreme Court faced a similar situation in **Mispagel v. Highway and Transportation Commission**, 785 SW 2d 279 (Mo. banc 1990). In that case, the Petitioner was involved in an automobile accident in 1986. Petitioner filed a claim against the highway commission which was brought pursuant to a 1985 statute which was re-enacted with additions in 1989. The Commission moved to dismiss stating that the 1985 Act was unconstitutional in that it contained a bill which dealt with more than one subject. The Missouri Supreme Court noted that any defect in the enactment of the statute which was allegedly included in the bill which dealt with more than one subject, was cured when the statute was subsequently re-enacted in a bill not subject to the alleged infirmity. **Id**.

In summary, the Legislature can legalize any act it has the power to authorize in the first place. **State v. Sarasota County**, 155 So. 2d 545 (Fla. 1963). Retroactive provisions of a legislative act are not per se invalid. **Village of El Portal v. City of Miami**, 362 So. 2d 275. There is no prohibition in the U.S. Constitution or Florida Constitution against retroactive legislation. **See Crooks v. State ex rel Pierce**, 141 Fla. 597, 194 So. 237 (1940). Under **Coon**, 203 So. 2d 497, the Legislature in this case was empowered to cure the defect contained in

90-201. The Legislature re-enacted 440.15(3)(b) without any changes. That is, the 1990 version and the 1991 version are identical.

ARGUMENT

POINT III

THE PETITIONER IS NOT ENTITLED TO FULL COMPENSATION RATE FOR WAGE LOSS UNDER 440.15(3)b) WHERE HE EARNS NO WAGES FOR ANY TIME PERIOD

The Petitioner argues, in the alternative, that even if the constitutional mandates are not violated, section 440.15(3)(b) 1991, does not provide for the invocation of the 80-80 rule where the claimant earns no wages.

Florida Statutes section 440.15(3)(b)1 provides that:

> **...wage loss benefits shall be equal to 80 percent of the difference between 80 percent of the employee's average weekly wage and the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, as compared weekly; however, the weekly wage loss benefits shall not exceed an amount equal to 66-2/3 percent of the employee's average weekly wage at the time of the injury.**

The Petitioner engages in mathematical computations to attempt to prove the Legislature must have intended something not specifically mentioned in the language of the statute. The Petitioner wants this Court to presume that the Legislative intent was based on his mathematical wizardry. Respondents disagree.

After the decision of the First District Court of Appeal in this case, the decision of **S.E. Environmental Contractors Inc. and Cigna Insurance Company v. Cayasso, 18 FLWD 40 (Fla. 1st DCA December 15th, 1992)** was filed. In that

case, the Judge of Compensation Claims declined to apply the 80-80 formula to situations where a claimant has no earnings. The First District Court of Appeal reversed. The Court reasoned "the statute contains no qualifying language in this regard, and section 440.15(3)(b)2, Florida Statutes (1990), which addressed deemed earnings, expressly contemplates circumstances in which the claimant is unemployed and the remuneration the claimant 'is able to earn was zero....'" Id. The Court held that the 80-80 formula is intended to apply even during wage loss periods for which they are no earnings. Id. The Court further reasoned that 440.15(3)(b)1, Florida Statutes, also limits benefits to 66-2/3 percent of the average weekly wage. It was noted this limitation has no effect when the 80-80 formula is applied, as the mathematical operation of 80-80 formula necessarily limits benefits to less than 66-2/3 percent of the average weekly wage. The Court held, however, that "the 66-2/3 percent limitation cannot fairly be construed as negating the 80-80 formula. Rather, the 66-2/3 percent limitation appears to be merely a vestige of the earlier versions of section 440.15(3)(b)1, which contain the 95-85 formula until Chapter 90-201, section 20, Laws of Florida, replaced this with the 80-80 formula." Id.

As the Respondents argued at the DCA level, and before the Judge of Compensation Claims, retention of the 66-2/3 percent limitation was an inadvertent legislative oversight in that such a limitation seemed to be no longer mathematically necessary. The intent of the Legislature when the new Act was passed was to reduce benefits in order to give people (injured workers) incentive to go back to work, and also in response to the escalating cost of obtain workers'

compensation coverage for businesses in the State of Florida. See section 440.015, Florida Statutes; and the Preamble (LAWS 1990 C.90-201). That was the design and intent of the Legislature when the amendments were enacted. A finding that the Petitioner's wage loss benefits are reduced by 2-2/3 percent (as argued by the Petitioner) is consistent with that objective. The Judge of Compensation Claims in this case specifically recognized the legislative intent and phrased the issue at Final Hearing as to whether this Legislature intended to reduce wage loss before somebody started earning wages or simply because they passed the point of maximum medical improvement (R.11). The Judge of Compensation Claims considered the statute as enacted and held that the 80-80 formula envisioned in 440.15(3)(b) did not provide an alternative mechanism in cases where the earnings were zero. This is consistent with the pre-1990 and 1991 version of 440.15(3)(b). Both sections did not include any provision where the claimant earned no wages.

CONCLUSION

Based on the foregoing authority, the Respondents would request that this Court answer the certified questions as follows: Chapter 90-201, Laws of Florida, applies to a workers' compensation case in which the accident occurred after the effective date of Chapter 90-201 and before the Act was declared unconstitutional in **Martinez v. Scanlan**, and which has not been fully adjudicated during that time period and that Chapter 90-201, Laws of Florida, could be constitutionally applied to this date of accident.

Regarding the argument that the 80/80 formula is not applicable when the claimant earns nothing, the Respondents would request this Court deny that argument and apply the 80/80 rule across the board, as provided in the plain meaning of the statute.

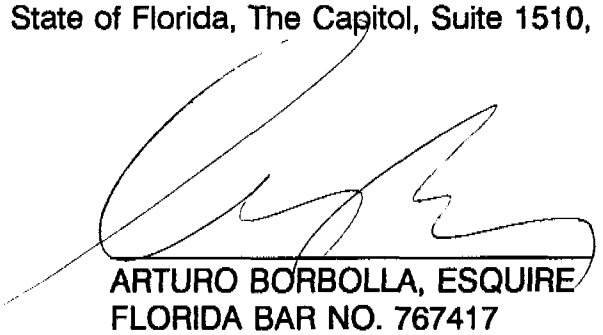
Respectfully submitted,

MILLER, KAGAN & CHAIT, P.A.
Attorneys for Respondents
75 Valencia Avenue
Suite 800
Coral Gables, Florida 33134
(305) 446-5228

By _____
ARTURO BORBOLLA, ESQUIRE
FLORIDA BAR NO. 767417

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Answer Brief on the Merits was forwarded this 15th day of February, 1993 to Jerold Feuer, Esquire, 402 NE 36 Street, Miami, Fla. 33137, to Richard Sicking, Esquire, 2700 SW 3 Avenue, Suite 1E, Miami, Fla. 33129, and to Robert Butterworth, Esquire, Attorney General, State of Florida, The Capitol, Suite 1510, Tallahassee, Fla. 32399-1050.



ARTURO BORBOLLA, ESQUIRE
FLORIDA BAR NO. 767417