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IN THE SUPREME COURT
STATE OF FLORIDA

CITY OF MIAMI,

Petitioner,

v.

KENNETH A. LEIBNITZER,

Respondent.

CASE NO. 80,998

ORIGINAL

INITIAL BRIEF OF THE CITY OF MIAMI

On Review of a Certified Question 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. *Barragan v. City of Miami*, 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*, 9 FCR 61 (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. Leibnitzer's claim. This issue comes to the Court on a certified question. *City of Miami v. Leibnitzer*, 18 Fla. L. Weekly D194 (Fla. 1st DCA Dec. 22, 1992).

Statement of the Facts and the Case

Kenneth A. Leibnitzer, a firefighter employed by the City of Miami, suffered a compensable accident on July 10, 1979. (R. 2). The City accepted Leibnitzer as permanently and totally disabled on July 30, 1980, with a weekly compensation rate of $211.00. (R. 2,3). Leibnitzer was granted a service-connected disability pension on July 30, 1981. (R. 3). His gross disability pension was offset by $91.33 monthly until August 1, 1989. (R. 4, 400). This offset amount, together with interest, penalties, costs and attorneys' fees, constitutes the amount in dispute in this appeal.

After the Court's decision in *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989), Leibnitzer filed a claim for reimbursement of his pension offset, together with interest, penalties, costs and attorneys' fees on February 18, 1991 and the City sent its notice to controvert on February 28, 1991. (R. 61). The City defended, *inter alia*, on the basis that the *Barragan* decision should not be applied retroactively to entitle Leibnitzer to reimbursement. (R. 61).

A Judge of Compensation Claims rejected the City's defenses, awarded Leibnitzer permanent total disability benefits of $211.00 per week for the offset period, and further awarded a 10% penalty, interest on the benefits awarded, costs and attorneys' fees. (R. 393-402). The First District Court of Appeal affirmed the award *in toto*, but certified to the

Court the same penalty question that had been certified in *City of Miami v. Bell*, 606 So. 2d 1183 (Fla. 1st DCA 1992), *review pending*, Case No. 80,524.

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 (1979). 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 1980 based on retroactive liability (if any). No further penalties would be warranted should the district court issue its mandate during the pendency of these review proceedings.

Argument

The first and most fundamental issue in this appeal is the retroactivity of the *Barragan* decision. This issue not only affects Leibnitzer, but numerous other claimants seeking retroactive reimbursement for pre-*Barragan* disability pension offsets.[3/] 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.[4/]

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.[5/] 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 Brackenridge*

3/ 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.

4/ The penalty issue is before the Court on a certified question 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).

5/ The issue of retroactivity was never briefed to the Court. The only mention of retroactivity appeared in discussion by the City in its motion for rehearing.

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 Leibnitzer'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 including *City of Miami v. Burnett*, 596 So. 2d 478 (Fla. 1st DCA), *rev. denied*, ____ So. 2d ____ (Fla. Oct. 14, 1992) and *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.[6/]

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 section

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6/ 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*, 606 So. 2d at 1185.

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,[7] 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 reasoning,

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[7] *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).

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.[8/] 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 Daytona Beach ordinance);

8/ 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.

Burnett, 596 So. 2d at 478 (concerning the Miami ordinance).[9/] 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).

9/ *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).

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 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 employers. *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.[10/] 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.

10/ 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.

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 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*.[11/]

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 certified question.[12/] 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

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11/ *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.

12/ Because Leibnitzer's injury occurred in 1980, it is section 440.20(7), Florida Statutes (1979), which governs the penalty issue.

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.

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*, 606 So. 2d at 1188 (construing section 440.20(7), Florida Statutes (1985)). In this case, it is the 1979 provisions of the statute which control the penalty question since the claimant's compensable injury occurred on July 30, 1980. *See* § 440.20(7), Fla. Stat. (1979). The 1979 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, 606 So. 2d at 1191. 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(7) is only triggered upon the employer's knowledge of the employee's injury. §440.20(2), Fla. Stat. (1979). This triggering event is ill-suited to the imposition of a 10% penalty here. The City's knowledge of Leibnitzer's injury dates from 1980, 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 nonpayment results from conditions over which the employer or carrier had no control." *Bell*, 606 So. 2d at 1192. 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 Leibnitzer 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*)[13/] in the *Knight* and *Hoffkins* decisions. *See Hanover Insurance Co. v. Florida Industrial Comm'n*, 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.[14/] 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, 1979 statute which itself suggests the inappropriateness of a 10% penalty. Section 440.20(7) does not just declare a "penalty." It expressly declares a "punitive penalty." Of course, all words in a statute have meaning,[15/] and all penal statutes are to be strictly construed.[16/] Use of

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13/ *Barragan v. City of Miami*, 545 So. 2d at 254-255.

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

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

the term "punitive" necessarily implies 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 punitively penalized? The City's only volitional behavior in this whole brouhaha was not sending a check to Leibnitzer after the *Barragan* decision, for full retroactive reimbursement of prior offset benefits.

There is yet a further reason to deny Leibnitzer a 10% penalty. The City controverted Leibnitzer's claim for retroactive benefits under *Barragan* within the 21-day period for controverting the demand. *See* § 440.20(6), Fla. Stat. (1979). Thus, the only available statutory point of entry for disputing the retroactive award was met by the City, and should have relieved it of paying the 10% penalty. *See* § 440.20(6) Fla. Stat (1979) (10% penalty is added "unless notice is filed under subsection (6)" -- 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 (1979).

A retroactively-paid *Barragan* offset, if ordered, does not constitute an "installment of compensation" for purposes of applying the 1979 penalty provisions of section 440.20. On this basis, as well, assessment of a 10% penalty must be rejected. This reasoning was expressed by the First District in two of its decisions:[17] "It does not appear" that a

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[16](...continued)

[16] *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).

[17] *City of Miami v. Arostegui*, 606 So. 2d 1192 (Fla. 1st DCA 1992), review pending, Case No. 80,560. *City of Miami v. McLean*, 605 So. 2d 953 (Fla. 1st DCA 1992), review pending, Case No. 80,575.

retroactive *Barragan* award is "part of an 'installment of compensation' as contemplated by section 440.20" (*Arostegui*, 606 So. 2d at 1194) -- a conclusion which seems eminently accurate. Yet the, court felt "constrained" to reach an unwarranted result by a sentence from the *Jewel Tea* decision[18/] which was quoted by the Court in *Barragan*. (*Arostegui*, 606 So. 2d at 1194). 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(7), Florida Statutes (1979), 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(7) contemplated. That conclusion appears irrefutable.

> In 1979, section 440.20(7) 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 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. There is no statutory basis to require the City to file an anticipatory notice, controverting claims before they are filed.

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

Aside from statutory construction, there are two intersecting lines of judicial precedent that affect this aspect of the penalty issue. The first, and the City would argue relevant line, relates to the decision in *Brantley v. A D H 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 Arostegui*, 606 So. 2d at 1193. 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. 606 So. 2d at 1190-91.

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 wage).

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 Leibnitzer. 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.

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*, 606 So. 2d at 1190 (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*. Since statutes which do impose penalties must be construed strictly in favor of one whom would be penalized and "are never intended to be extended by construction," the 10% exaction is illegal. *Hotel and Restaurant Comm'n v. Sunny Seas No. One, Inc.*, 104 So. 2d 570, 571 (Fla. 1958). *See also Adler-Built Industries, Inc. v. Metropolitan Dade County*, 231 So. 2d 197 (Fla. 1970).

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. (1979) (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."

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.

In two companion cases, *Arostegui* and *McLean*, the First District has issued mandates despite the City's timely filing of a notice to invoke the discretionary jurisdiction of the Court. The City's "Motion to Stay Issuance of Mandate" remained pending in the First District when this brief was served. Rule 9.310(b)(2) affords the City a stay of the decision.

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.

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 remands in *Arostegui* and *McLean* have 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. 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 the penalty question by the First District's opinion. The Court should clarify that no added penalties of any type should be levied 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.

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Certificate of Service

I hereby certify that a true and correct copy of this initial brief was mailed on February 1, 1993, to Richard A. Sicking, P.A., 2700 S.W. Third Avenue, Suite 1E, Miami, Florida 33129.

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Appendix (Decision of District Court)

Workers' compensation—Question certified: 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 its validity

CITY OF MIAMI, Appellant, v. KENNETH A. LEIBNITZER, Appellee. 1st District. Case No. 92-1595. Opinion filed December 22, 1992. An appeal from an order of Judge of Compensation Claims John G. Tomlinson, Jr. A. Quinn Jones, III, City Attorney, Ramon Irizarri and Kathryn S. Pecko, Assistant City Attorneys, Miami, for appellant. Richard A. Sicking, Miami, for appellee.

(PER CURIAM.) We affirm the order on appeal based upon this court's opinion in *City of Miami v. Bell*, 17 F.L.W. D2182 (Fla. 1st DCA Sept. 16, 1992). We certify to the Florida Supreme Court as a question of great public importance the same question certified in *Bell*. (JOANOS, C.J., SMITH and MINER, JJ., CONCUR.)

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