IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,057

WARREN ZUNDELL,

Appellant,

vs.

DADE COUNTY SCHOOL BOARD, et al.,

Appellees.

ON REVIEW OF A QUESTION CERTIFIED BY
THE FIRST DISTRICT COURT OF APPEAL
AS BEING OF GREAT PUBLIC IMPORTANCE

BRIEF OF AMICUS CURIAE, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, DIVISION OF WORKERS' COMPENSATION, IN SUPPORT OF POSITION OF APPELLEES

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STATEMENT OF INTEREST OF AMICUS

This brief is filed pursuant to Florida Rule of Appellate Procedure 9.370 of behalf of the Department of Labor and Employment Security, Division of Workers' Compensation, in support of the position of the appellees in this case.

The Division of Workers' Compensation is the state agency charged with administering the provisions of the Workers' Compensation Law and promulgating regulations to carry out the directives and the intent of the Florida Legislature. The Division's administrative role is to actively and forcefully ensure that the workers' compensation system operates efficiently and with maximum benefit to both employers and employees. Section 440.44(2), Fla. Stat. (1991).

The resolution of the issues raised in this case will further define the circumstances under which workers' compensation benefits are owed to claimants with cardiovascular injuries. Cardiovascular injuries are significant within the workers' compensation system both for their cost per individual case, and the prevalence of cardiac conditions in general. This is particularly true in Florida, with its aging population.

For these reasons, the Court's decision may directly and profoundly affect costs to the Florida workers' compensation system. The Division of Workers' Compensation will be required to respond administratively to any major cost change. Therefore, the Division of Workers' Compensation has a substantial interest in the outcome of these proceedings.

STATEMENT OF THE CASE AND OF THE FACTS

Warren Zundell (claimant) brings this appeal from a decision by the First District Court of Appeal, which affirmed a decision by the Judge of Compensation Claims (JCC) denying Mr. Zundell's claim for workers' compensation benefits. *Zundell v. Dade County School Board*, 609 So. 2d 1367 (Fla. 1st DCA 1992). The JCC found that the Petitioner's intercerebral subarachnoid hemorrhage was not compensable because it failed to meet the test promulgated by this Court in *Victor Wine & Liquor, Inc. v. Beasley*, 141 So. 2d 581 (Fla. 1961) and *Richard E. Mosca & Co., Inc. v. Mosca*, 362 So. 2d 1340 (Fla. 1978).

The First District Court of Appeal considered the JCC's ruling en banc and issued three separate opinions. Relying on *Victor Wine* and *Mosca*, a majority of the district court affirmed the JCC. Finding, however, that there was no controlling precedent, the majority certified the following question to be of great public importance:

> WHETHER AN EMPLOYER IS REQUIRED TO PROVE THE EXISTENCE OF A PREEXISTING CONDITION IN COMPENSATION CASES INVOLVING HEART ATTACKS AND INTERNAL FAILURES OF THE CARDIOVASCULAR SYSTEM AS A PREREQUISITE TO THE APPLICATION OF THE TEST FOR COMPENSABILITY ESTABLISHED IN *VICTOR WINE & LIQUOR, INC. V. BEASLEY* AND *RICHARD E. MOSCA & CO., INC. V. MOSCA*?

Zundell, 609 So. 2d at 1371.

The dissent and concurrence rephrased the question certified by the majority as follows:

> WHETHER THE "RULE FOR HEART CASES" ANNOUNCED IN *VICTOR WINE & LIQUOR, INC. v. BEASLEY* AND LATER EXTENDED TO "OTHER INTERNAL FAILURES OF THE CARDIOVASCULAR SYSTEM" BY *RICHARD E. MOSCA & CO. v. MOSCA* APPLIES TO CASES IN WHICH

> THERE IS NO EVIDENCE THAT THE CLAIMANT SUFFERED FROM A "PRE-EXISTING NON-DISABLING" CARDIOVASCULAR DEFECT OR DISEASE, THEREBY REQUIRING A CLAIMANT TO PROVE THAT, AT THE TIME OF THE INJURY, HE OR SHE WAS "SUBJECT TO UNUSUAL STRAIN OR OVER-EXERTION NOT ROUTINE TO THE TYPE OF WORK HE [OR SHE] WAS ACCUSTOMED TO PERFORMING."

Id. at 1374 (Webster, J., dissenting in part, concurring in part)(alteration in original).

A second dissenting opinion in effect found that under the appropriate legal standard the claimant had established the compensability of his claim and was entitled to benefits.

This Court has tentatively accepted jurisdiction to review the decision of the District Court of Appeal and has granted permission to the Department of Labor and Employment Security to appear as amicus on behalf of the appellees.

At the time he suffered his cerebral hemorrhage, the claimant was fifty-eight years old and in apparent good health, with a history of low blood pressure and no evident cardiovascular infirmity. (R. 23)[1]

The claimant had been a junior high school mathematics teacher in Florida for thirty years. (R. 21) Since 1964 he had taught mathematics at Hialeah Junior High School.

The school had disciplinary difficulties. (R. 22) One particular student posed an ongoing problem. The claimant had experienced "confrontations" with the student, and contacted the

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[1] References to the record on appeal are designated by (R.) and a citation to the pertinent page.

student's grandmother several times because the student was "acting up in class." (R. 28)

On January 5, 1988, the claimant and the student had a more serious encounter. On this occasion, the student's disruptive behavior included wearing his hair in an unusual fashion, talking to other students and chewing gum. The claimant repeatedly attempted to control the student, apparently with little effect. When the claimant asked the student to remove a large wad of gum from his mouth, the student responded by throwing his chewing gum "like a baseball into the waste can" and then "screamed at the top of his lungs, 'The gum is gone.'" (R. 48)

The claimant accompanied the student to the vice-principal's office but the student soon returned to the classroom. The claimant stopped the student at the classroom door and blocked his reentry. The two stood "nose to nose." (R. 32) When the claimant told the student that the student was going to have to walk over him to get into the classroom, the student responded, "Well, if I hit you I'm going to get into trouble." *Id.* The claimant then became "very, very tense" and "very, very nervous." He felt the muscles in the back of his neck tighten. There was no physical contact between the claimant and the student at that point, although the claimant testified that he was afraid the student "could have raised his fist and tried to push me through the door or get back into the room." *Id.*

There is some discrepancy as to what happened next. In his deposition testimony, the claimant stated that he then simply "took

[the student] back to the [vice-principal's] office. I finally got him in the office, where he stayed, and then I went back to the classroom." (R. 176)

In his testimony before the JCC, however, the claimant stated that as he and the student turned to walk down the corridor together, "I put my arm out to sort of guide him out and he jumped back and I thought this is where I'm going to get slammed." (R. 33) He perceived the student's movement as a threat. (R. 41) Then, for the second time, the claimant had sensations of tension and nervousness.

The claimant testified that he had never, either before or after the confrontation with this student, experienced the extreme tension and nervousness he did then. During the incidents giving rise to those feelings, first the altercation in the classroom doorway and then the incident in the hallway, the claimant felt himself to be significantly threatened. (R. 41)

After bringing the student to the vice-principal's office, the claimant returned to the classroom. He felt unwell and sent a student for assistance. Soon a rescue squad arrived and took him to the hospital, where he was admitted with a diagnosis of possible cerebral hemorrhage. (R. 107)

During the claimant's ten-day hospitalization, Basil Yates, M.D., the claimant's treating neurosurgeon, performed an arteriogram which showed no evidence of an aneurism or arteriovenous malformation. (R. 109) A CAT scan did show evidence of bleeding into the subarachnoid area of the brain. (R. 137) A

second arteriogram performed on February 3, 1988 also failed to reveal any aneurism or arterial lesion. Dr. Yates stated that "[i]t is generally accepted that if two arteriograms do not show an aneurysm or other arterial malformation, that it is generally assumed that it does not exist." (R. 137)

The claimant's blood pressure has been lower since his release from the hospital, but as of April 3, 1991, the date of his testimony, he had not returned to work. He was not taking medication for his blood pressure, and he has no work restrictions other than to avoid situations causing stress or leading to an argument, which would cause a rise in his blood pressure. (R. 89-90)

SUMMARY OF ARGUMENT

The JCC and the District Court of Appeal both denied compensation to the claimant according to the principles set out in *Victor Wine & Liquor, Inc. v. Beasley*, 141 So. 2d 581 (Fla. 1961) and *Richard E. Mosca & Co.*, 362 So. 2d 1340 (Fla. 1978). The District Court of Appeal certified two questions to this Court. This brief will address the question as it was posed by Judge Webster, as we believe that formulation focuses more precisely on the legal issue presented here.

Both the workers' compensation laws as interpreted by this Court and sound public policy support the interpretation of *Victor Wine* adopted by the majority below. This Court and other courts have been applying the *Victor Wine* test for over thirty years.

During that time, there have been over eighty published decisions applying, interpreting or distinguishing the test first articulated in *Victor Wine*. In many of these cases, claimants suffered from preexisting cardiovascular disease. In some cases, they apparently did not; at least, the facts do not reflect the presence -- or absence -- of preexisting cardiovascular disease. Significantly, none of these courts have demanded proof, or even evidence, of preexisting disease as a prerequisite to application of the *Victor Wine* standard.

Indeed, the majority's application of *Victor Wine* to the facts in the instant case is appropriate and entirely consistent with precedent. Even courts observing record evidence of preexisting disease in their compensability analysis have not relied on that factor to guide or limit application of *Victor Wine*. Rather, the isolated references to preexisting disease in these decisions appear to be no more than recitation from *Victor Wine*.

Moreover, the Legislature has failed to address or amend the courts' continuing interpretation of *Victor Wine*. By declining to do so over time, while substantially rewriting the workers' compensation law in many other respects, the legislature has by its silence acquiesced in the courts' decisions.

This is not to say that the legislature has ignored the role that preexisting conditions play in workers' compensation injuries. The workers' compensation law requires an offset for any portion of a claimant's permanent impairment which is "fairly attributable" to a preexisting condition. Unlike doctrines of compensability such

as that set forth in *Victor Wine*, the apportionment requirement does not assist fact finders in determining whether an injury falls within the scope of the workers compensation law. Rather, apportionment allocates benefits and the cost associated with those benefits once a court has determined that an injury is compensable.

It is hardly "immaterial", as asserted in one of the dissenting opinions, that employers will have to bear costs not attributable to work-related injuries should this Court limit the application of *Victor Wine* to cases in which the employer is able to prove the existence of cardiovascular disease. Courts and medical experts alike acknowledge that the presence of preexisting cardiovascular disease can be difficult to establish. Given the aging population of the American work force as a whole and that of Florida in particular, coupled with the prevalence of cardiovascular disease, such an assertion flirts with expansion of Florida's workers compensation system to incorporate a doctrine of positional risk.[2] In other words, heart attacks occuring on the job are compensable; heart attacks occuring at home are not. It goes without saying that positional risk theory has never been the law in Florida. Moreover, workers' compensation is not designed to be and should not be construed to provide general health insurance for people employed in this state. The *Victor Wine* rule ensures that employers will be responsible for those risks which their

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[2] Positional risk theory acknowledges the statistical probability of medical conditions such as heart disease among working populations and conditions the risk of insuring related medical events -- such as heart attacks -- on occupational location, as opposed to cause. *See* n.15 *infra*,

employment creates, and not for the risks resulting from their employees' underlying medical conditions.

Finally, we urge this court to reject the interpretation of "injury" offered by the dissent. Arguing that the majority misperceives the nature of a compensable injury, the dissent reads "by accident arising out of and in the course of employment" to eliminate the requirement for physical trauma or contact, as well as for unusual strain or exertion, in determining the compensability of injuries in which there is no proof of a preexisting condition. The dissent instead argues for the adoption of a test which would allow compensation in cases where the claimant could show only routine emotional strain. Such a test, if adopted by this court, would constitute a significant and costly departure from current law.

In cardiovascular injury cases, the issue is not proof of preexisting condition. It is whether the claimant's injury is the result of an accident; and if not, whether it was simply the result of an emotional strain, in which event relief will be denied, or whether the claimant engaged in an identifiable effort stemming in part from some nonroutine physical exertion, in which event relief will be granted.

For these reasons, this Court should answer the certified question posed by Judge Webster in the affirmative, and uphold the determinations of the JCC and First District Court of Appeal.

ARGUMENT

I.

THE STANDARD OF CAUSATION APPLICABLE IN CASES OF INTERNAL CARDIOVASCULAR FAILURE UNDER *VICTOR WINE* AND SUBSEQUENT CASES APPLIES TO INSTANCES IN WHICH THERE IS NO EVIDENCE OF PREEXISTING CARDIOVASCULAR DISEASE.

A. Cases preceding *Victor Wine* merely established that injuries aggravating preexisting conditions can be compensable.

The majority and two dissenting opinions of the First District Court of Appeal in *Zundell* reflect differing interpretations of *Victor Wine* and its progeny. An analysis of the origin of Victor Wine is therefore essential.

In the early heart cases on which *Victor Wine* relies, this Court was concerned with the following questions: whether there had been an accident,[3] and to what extent a heart attack "arose out of"[4] employment and was compensable at all when the claimant

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[3] "Accident" was originally defined as "only an unexpected or unusual event, happening suddenly. . . . Where a pre-existing disease is accelerated or aggravated by an accident arising out of and in the course of the employment, only the acceleration of death or the acceleration or aggravation of disability reasonably attributable to the accident shall be compensable." Ch. 14781, §2(19), Laws of Fla. (1935)(presently found at §440.02(1), Fla. Stat. (1987)). In 1953 the legislature added the words "or result" after "unusual event." Ch. 28238, §1, Laws of Fla. (1953).

[4] "Injury," was, and still is, defined in pertinent part as "personal injury or death by accident arising out of and in the course of employment . . . ." Ch. 17481, §2(5), Laws of Fla. (1935)(presently found at section 440.02(19), Fla. Stat. (1991)).

suffered from preexisting disease. In *Protectu Awning Shutter Co. v. Cline*, 154 Fla. Rpts. 30, 16 So. 2d 342 (1944), the claimant's heart disease did not "preclude recovery," because after suffering his heart attack he fell and fractured his skull, which was the cause of his death. The court approved the award of compensation because "the injury which actually produced death was the fracture." *Id.*

Clarifying *Protectu Awning*, the Court held in *Davis v. Artley Construction Co.*, 154 Fla. Rpts. 481, 18 So. 2d 255 (1944), that an injury which consisted of an aggravation of a preexisting condition could be compensable. The Court relied in its discussion of causation on cases from Florida and other jurisdictions. Some of these cases involved preexisting conditions; others did not.

One year later, the Court explained *Davis* in reaching its decision in *Cleary Brothers Construction Co. v. Nobles*, 23 So. 2d 525 (Fla. 1945). In *Cleary Bros.*, an autopsy of an employee whose family filed a claim for death benefits revealed long-existing heart disease. While acknowledging that aggravation of a preexisting disease may be compensable, the Court concluded that the claimant's injury was not caused by an accident. There was no literal accident, no slip, trip, stumble, fall, push, jostle or knock.[5] Nor had the claimant "been subjected to any unusual strain

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[5] In *Duff Hotel v. Ficara*, 150 Fla. 442, 7 So. 2d 790 (1942), issued two years before *Davis*, the Court had held that an unexpected injury within the course of employment was compensable; the employee's inguinal hernia was accidental although not caused by a literal accident. It is unclear why the *Cleary* court failed to note or follow the *Ficara* analysis, although it clarified later, in *Victor Wine*, that it would do so.

or overexertion uncommon to the type of work he was accustomed to doing." *Id.* at 526.

Thus, leading up to its decision in *Victor Wine*, the Court had determined that a preexisting physical condition would not preclude a finding of compensable injury. In the absence of a literal accident, however, the court held that a workplace injury associated with a preexisting condition is compensable only if caused by some unusual workplace strain or overexertion.

B. *Victor Wine* was not premised on the presence of preexisting heart disease.

To summarize briefly, the claimant in *Victor Wine* suffered two mild, nondisabling premonitory heart attacks during the course of one day; four days later, while at work, he suffered a third major heart attack, later diagnosed as infarction of the myocardium due to arteriosclerotic coronary thrombosis and cardiac arrest. The Deputy Commissioner found that the claimant had suffered no symptoms until he had been forced to work at top speed, carrying and stacking cases of whiskey, and keeping up with two co-employees. He had never had to work that fast before, and the work caused him great strain. The Deputy Commissioner concluded that there was competent medical evidence to support a causal connection between the claimant's work duties and his heart attack. The Industrial Relations Commission affirmed the decision.

The Supreme Court issued two opinions in *Victor Wine*. In its original opinion, the Court phrased the issue before it: "Is a heart attack suffered by an employee, while at his usual work with

its accustomed physical exertions, a compensable injury 'by accident'?" *Victor Wine*, 141 So. 2d at 583. The Court first acknowledged a distinction between workers' compensation and health insurance. It then cited *Cleary Brothers Construction Co.*, apparently for the proposition that it is not sufficient for a claimant to have been injured at work for the precipitating incident to be compensable; he had to show "unusual stress or overexertion uncommon to the type of work he was accustomed to doing." The Court also referred to the standard applied in *Firestone Tire & Rubber Co. v. Hudson*, 112 So. 2d 29, 32 (Fla. 2d DCA 1959): whether there had been an "accident," which necessarily required that the claimant be exposed to a danger not ordinarily risked by the public. Briefly, it concluded that there was no competent evidence to support the Deputy Commissioner's finding that the claimant "was subjected to overexertion uncommon to the type of work that he was accustomed to or that claimant's heart attack was an accident which arose 'out of and in the course of employment.'" *Victor Wine*, 141 So. 2d at 584.

Nowhere in its initial opinion did the majority indicate that it was premising its decision on the presence of a preexisting cardiovascular condition. Indeed, the majority opinion simply does not address the issue. The only explicit mention of the claimant's preexisting condition appears in the dissent from the initial opinion, in which Justice Drew remarks that the "distinguishing feature in this case is the lack of a previous history of myocardial infarctions," and mentions in a footnote medical

testimony indicating that the claimant had a preexisting non-disabling atherosclerotic condition. *Id.* at 586 (Drew, J., dissenting).

On rehearing, the Court issued a unanimous opinion. It clarified *Cleary*, stating that it was not requiring a literal or sudden accident as prerequisite to a finding of compensability[6] and reaffirmed that an internal failure or gradual injury may be compensable notwithstanding the absence of a blow or fall.

Then, with no further discussion of the facts or explanation as to the origins of what has become known as the rule in *Victor Wine*, the Court stated:

> Facing the precise problem at hand wherein the claimant's activity of picking up and stacking heavy cases of wine was found to have contributed substantially to the precipitating or bringing on of an acute heart condition by accentuating the normal progress of the pre-existing arteriosclerosis, we adopt the following rule for heart cases: When disabling heart attacks are involved and where such heart conditions are precipitated by work-connected exertion affecting a pre-existing non-disabling heart disease, said injuries are compensable only if the employee was at the time subject to unusual strain or over-exertion not routine to the type of work he was accustomed to performing.
>
> Thus, if there is competent substantial medical testimony, consistent with logic and reason, that the strain and exertion of a specifically identified effort, over and above the routine of the job, combined with a

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[6] The Court had earlier abandoned the requirement of a literal "accident" in *Ficara*. *See* n.3 *supra*. Since then it had reaffirmed that rule in *Gray v. Employers Mutual Liability Ins. Co.*, 64 So. 2d 650 (Fla. 1953). The Legislature acted promptly to incorporate the holding in *Gray* into the Workers' Compensation Law by amending the definition of "accident" to read, "an unexpected or unusual event *or result*, happening suddenly . . . ." *See* n.1 *supra*. The Legislature has retained this change, and has made no other changes in the definition of "accident."

> pre-existing non-disabling heart disease to produce death or disability sooner than it would otherwise have occurred from the normal progression of the disease, the employee has a right to some compensation.

Victor Wine, 141 So. 2d at 588-89.

The origin of the Court's rule is obscure. It is unclear from the opinion itself whether the Court based its holding on a construction of "an unexpected or unusual event or result, happening suddenly," or "arising out of and in the course of employment." The cases discussed in section I.A., above, which analyze the compensability of aggravation of preexisting conditions are not mentioned by the *Victor Wine* court except to distinguish its view of injury by accident. The Court discusses internal failure and exposure injuries, but never mentions or analyzes preexisting conditions. It never explains the relevance of the claimant's atherosclerotic condition, except in passing in the original dissent. Other than in its statement of the rule itself, the Court never distinguishes "heart" cases from the other types of internal failures it discusses. Yet the Court stated that it "adopts" a rule referring specifically to "pre-existing non-disabling" heart conditions.

Nor is the Court applying the definition of "by accident" as contained in the statute. Rather, it imposes a judicial gloss on the statutory term. The Legislature never distinguished between heart and nonheart cases. It distinguished preexisting conditions only in that should an injury prove compensable, the part of the incapacity which preexisted the injury is not compensable. *See* §440.02(1), Fla. Stat. (1987).

The assertion that *Victor Wine* applies exclusively to cases in which there exists a preexisting cardiovascular condition is therefore questionable. A careful examination of the case suggests that although the Court refers to "pre-existing" in its holding, the presence or absence of preexisting heart disease was not a decisive element in its analysis.

C. Courts have not limited application of the *Victor Wine* standard to cases in which there is evidence of preexisting cardiovascular disease.

Although subsequent cardiovascular injury cases have continued to cite language from *Victor Wine* that incorporates a reference to preexisting disease, these decisions have not limited application of Victor Wine to cases in which there is evidence of preexisting cardiovascular condition. In several of the more recent cases, the presence or absence of disease preceeding an internal failure appeared to have no relevance to the standard for determining compensability. Instead, these cases, discussed later in this section, simply apply *Victor Wine* in analyzing medical or legal causation.

Medical causation exists if there is a job-related incident that, to a reasonable degree of medical probability, causes an injury, disease or death. Legal causation, particularly in cases of internal cardiovascular failure, is more complex. There are two lines of inquiry as to legal cause in a case of internal cardiovascular failure, depending upon the the circumstances surrounding it. If the claimant is involved in an identifiable accident which either immediately or subsequently results, to a

reasonable degree of medical probability, in a cardiovascular injury, the claim is compensable. If, however, there is no identifiable accident, a claimant must prove legal causation; that is, he must show that he was engaged in some unusual strain or overexertion not routine to his employment. *Popiel v. Broward County School Board*, 432 So. 2d 1374, 1375 (Fla. 1st DCA 1983); *Victor Wine*, 141 So. 2d at 588-89.

Consequently, the underpinning of compensability in cardiovascular cases in the Florida workers' compensation setting is that the heart attack must stem, at least in part, from an accident or an identifiable physical activity. *Silvera v. Miami Wholesale Grocery Company*, 400 So. 2d 439, 441 (Fla. 1981).

In cases issued after and applying *Victor Wine*, this Court discussed both medical and legal causation issues but neither mentioned nor analyzed the preexisting condition component of *Victor Wine*. *See, e.g., Croft v. Pinkerton-Hayes Lumber Co.*, 386 So. 2d 535 (Fla. 1980); *Martin v. Kirby Knitting Mills of Miami, Inc.*, 249 So. 2d 428 (Fla. 1971); *see also E.H. Marhoefer v. Frye*, 199 So. 2d 723 (Fla. 1967).

Recent internal failure cases focus on the statement in *Victor Wine* that compensability requires that a "specifically identifiable effort" be associated with the heart attack. This requirement was first analyzed at length by this Court in *Richard E. Mosca & Co. v. Mosca*, 362 So. 2d 1340 (Fla. 1978)[7], and in a

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[7] *Mosca* is perhaps best known for establishing that *Victor Wine*, which had previously been applied only to heart attack cases, would in the future apply to all internal failures of the

companion case, *Tintera v. Armour & Co.*, 362 So. 2d 1344 (Fla. 1978). In both cases, the Supreme Court reversed the Industrial Relations Commission and affirmed orders by the Judges of Industrial Claims denying compensation for claims associated with internal vascular failures.

The *Mosca* court explained that the claimant failed to meet the *Victor Wine* test because he had adduced "no evidence to show that the ruptured aneurysm was caused by any unusual strain or overexertion resulting from a specifically identifiable effort by him not routine to the type of work he was accustomed to performing." *Mosca,* 362 So. 2d at 1344. An unusual or nonroutine physical strain could occur alone or together with mental or emotional strain; but emotional strain alone was insufficient to support an award of compensation.

In *Tintera*, the same analysis was used to deny compensation following the claimant's heart attack, with one important difference. The opinion fails to indicate that the claimant suffered from a preexisting cardiac condition. Rather, the Judge of Industrial Claims attributed the claimant's injury to severe emotional stress connected with work, and with working long hours. The Industrial Relations Commission found the claimant's stress could be attributed to his participation in an inventory, heavy traffic, a minor car accident, reprimands from his manager, his divorce, and fears of losing his job. *See Tintera v. Armour & Co.*,

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cardiovascular system. This is the rule under which the *Victor Wine* rule applies to the subarachnoid hemorrhage suffered by the claimant in the instant case.

IRC #2-3222 (Aug. 30, 1977). In the thorough recital of the claimant's woes set forth in the opinion, mention of preexisting disease is conspicously absent. Nevertheless, the trial, appellate and Supreme Court applied *Victor Wine* to require and affirm denial of compensation based on the lack of unusual strain or overexertion.

The First District has applied the *Victor Wine* standard without reference to evidence of a preexisting condition in at least five cases decided after *Tintera*. Based on the recitation of facts, it is not apparent that the records in *Southern Culvert Pipe Co. v. Oswalt*, 382 So. 2d 1365 (Fla. 1st DCA 1980), *Armour & Co. v. Cannon*, 384 So. 2d 264 (Fla. 1st DCA 1980), *Sonitrol Southeast, Inc. v. Northcutt*, 386 So. 2d 76 (Fla. 1st DCA 1980), *Harold B. Wilkinson Farms v. Byrd*, 390 So. 2d 393 (Fla. 1st DCA 1980), and *Ivy H. Smith Co. v. Kates*, 395 So. 2d 263 (Fla. 1st DCA 1981), contained evidence of a preexisting heart condition. All of those decisions nevertheless apply the *Victor Wine* standard.

Similarly, this Court relied on both *Mosca* and *Tintera* to reach a decision in *Silvera v. Miami Wholesale Grocery, Inc.*, 400 So. 2d 439 (Fla. 1981), without reference to preexisting condition.[8] Although the court discussed the facts at length and the dissent elaborated on the claimant's personal and physical

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[8] Specifically, the Court held that to be compensable, the "identifiable effort" must be job-related, must stem in part from some nonroutine physical exertion, but may also involve "psychological pressures closely associated with the physical activity." *Silvera*, 400 So. 2d at 441.

risks,[9] it does not mention preexisting heart disease. Rather, the Court focused on the legal cause requirement.

The First District Court of Appeal has issued numerous opinions subsequent to, and relying upon, this Court's *Silvera* decision, restating its premise in a slightly different fashion: emotional strain alone is insufficient to establish a legal cause in cases of internal cardiovascular failure. These cases do not distinguish standards of compensability for instances in which the record reflects presence or absence of a preexisting heart disease or other internal condition. Although quoting the Victor Wine language, these cases analyze internal cardiovascular failures in the context of strain or overexertion, and a non-routine employment activity standard -- in other words, the legal cause standard suggested by Victor Wine. *See City of Opa Locka v. Quinlan*, 451 So. 2d 965 (Fla. 1st DCA 1984); *Diaz v. City of Miami*, 427 So. 2d 1085 (Fla. 1st DCA 1983); *Hodgen v. Burnup & Sims Engineering*, 420 So. 2d 885 (Fla. 1st DCA 1982); and *Joy Footwear Corp. v. Folgueral*, 409 So. 2d 188 (Fla. 1st DCA 1982).

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[9] The dissent elaborated:

> Claimant, a Panamanian national, had been under must [sic] stress in the eight years proceeding [sic] his heart attack. He was the deputy commander of all the armed forces of Panama before he was jailed in 1970. He escaped to the Canal Zone and sought political asylum in this country. For the next several years he attempted several business ventures which failed before going to work with Miami Wholesale Grocery. He was under a lot of stress due to fear of losing his job. Furthermore, he was overweight and a heavy smoker.

Silvera, 400 So. 2d at 441 (Boyd, J., dissenting).

D. Because the Florida Legislature has not addressed the standard adopted by the Court in *Victor Wine*, it may be presumed to have acquiesced in the interpretation accorded it by the courts.

In his dissent in *Zundell*, Judge Webster notes that "the legislature has demonstrated that it is quite capable of establishing exceptions to the general provisions regarding compensation when it concludes that it is appropriate to do so." *Zundell*, 609 So. 2d at 1374. The implication is that it has not done so with regard to preexisting condition because it does not believe that any special standard should exist. Similarly, Judge Ervin argues that establishing a special burden of proof is a legislative task.

Since this Court issued *Victor Wine* in 1962, the Legislature has amended the Workers' Compensation Law many times, and has substantially rewritten the entire law more than once.[10] Yet it has never enacted an amendment altering the effect of that decision or any of the subsequent decisions interpreting it, including those decisions which apply the *Victor Wine* analysis in cases where the court's decision does not mention whether there was a preexisting decision. The Legislature has not changed the definition of "accident," nor has it enacted any special standards for teachers.[11]

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[10] *See, e.g.*, Ch. 90-201, Laws of Fla. (1990); Ch. 91-1, Laws of Fla. (1991); ch. 79-40, Laws of Fla. (1979).

[11] The legislature has granted certain occupations special consideration as to reimbursement for work-related injuries. *See, e.g.*, section 440.091, Fla. Stat. (1991)(presumption that law enforcement officers acting under certain circumstances were within course of employment); section 185.34, Fla. Stat. (1991)("[a]ny

The legislature cannot abrogate case law through silence. It must repudiate case law expressly to eliminate its precedential value. *See Kash-N-Karry v. Johnson*, 18 Fla. L. Weekly D1109, D1110 (Fla. 1st DCA Apr. 28, 1993)(upholding "special hazard rule" and expressing principle that legislature must use explicit language to repeal a rule established by case law); *Victor Wine*, 141 So. 2d at 587-88 (noting that legislature conformed statute to case law by amending definition of "accident"). In fact, legislative silence, under some circumstances, is in essence tacit approval of judicial interpretation. *See United States v. Rutherford*, 442 U.S. 544, 554, n.10, 99 S.Ct. 2470, 2476, 61 L.Ed 2d 68 (1979)("[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned")(citations omitted).

Moreover, the Legislature is presumed to be aware of the law. *State ex rel. Quigley v. Quigley*, 463 So. 2d 224 (Fla. 1985). It

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condition or impairment of health of any and all police officers employed in the state caused by tuberculosis, hypertension, heart disease, or hardening of the arteries, resulting in total or partial disability or death, shall be presumed to be accidental and suffered in the line of duty . . . .); *see Pfeiffer v. State, Dep't of Natural Resources*, 436 So. 2d 350, 351 (Fla. 1st DCA 1983)(declining to apply section to Marine Patrol officer, who was not "police officer" under statute), *pet. for review denied*, 447 So. 2d 887 (Fla. 1984); section 112.18, Fla. Stat. (1991)(same regarding firefighters); *Caldwell v. Division of Retirement, Fla. Dep't of Admin.*, 372 So. 2d 438, 441 (Fla. 1979)(noting that section relieves firefighters from need to prove occupational causation).

has revisited workers' compensation repeatedly and thoroughly since 1962. Its silence may fairly be construed as an acquiescence to both the *Victor Wine* standard and its interpretation in cases since that time, including those in which preexisting condition plays no role in judicial analysis.

II.

THE ARGUMENTS RAISED BY JUDGES WEBSTER AND ERVIN DO NOT REQUIRE A DIFFERENT OUTCOME IN THIS CASE.

A. The majority has correctly applied the "arising out of" or legal causation requirement.

According to the dissent, "[t]he present case illustrates the extremes to which we have gone in emphasizing the 'arising out of'[12] element rather than the 'by accident' component of workers' compensation law in our deliberations regarding whether a particular employee's injury may be deemed compensable." *Zundell*, 609 So. 2d at 1374 (footnote omitted). Initially it may appear that a new definition of "accident" under the workers' compensation law is proposed, but that is not so.

The dissent advances an analysis contrasting the two components of the single statutory definition of "accident."[13]

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[12] The workers' compensation law defines "injury" as "personal injury or death arising out of and in the course of employment . . . ." §440.02(14), Fla. Stat. (1987).

[13] "Accident" is used in two different ways in the workers' compensation law. "By accident" partially defines "injury," which is "a personal injury or death *by accident* arising out of or in the course of employment . . . . ." Section 440.02(14), Fla. Stat. (1987). *See Fisher v. Shenandoah Gen. Const. Co.*, 498 So. 2d 882 (Fla. 1987)(exclusive remedy provision law does not bar a claimant from seeking tort recovery if the employer's actions show a

Unexpected cause, which is equated to the "arising out of" element or legal cause, is distinguished from unexpected result, which is an "accident," or medical cause. *Zundell*, 609 So. 2d at 1379, 1382. The majority's error, the dissent asserts, is to overemphasize legal cause by applying the Victor Wine standard in cardiovascular cases where there is no evidence of a preexisting cardiovascular condition.[14] The dissent maintains that evidence of simple medical cause should suffice instead in such cases.

In effect, the dissent urges departure from *Victor Wine* as it has been applied by this Court and the First District Court of Appeal. In *Tintera v. Armour & Co.*, 362 So. 2d at 1346, the Court quoted with approval the reasoning of the Industrial Relations Commission, that "*Victor Wine* is premised upon recognition of the fact that a great portion of our work force comes upon the work scene with heart defects that would result in heart attacks in any

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deliberate intent to injure or if the employer engages in conduct substantially certain to result in injury or death)("By limiting the definition of injury to accident, the statute, by necessary implication, excludes intentional torts of the employer from its coverage.")(Adkins, J., dissenting).

The law also defines an "accident" as "an unexpected or unusual event or result, happening suddenly." §440.02(1)(1991), Laws of Fla.

Florida law, both in its definitions and its interpretation through the courts, acknowledges both that an injury must be accidental and that an accident or its equivalent must occur. *See* 1A Arthur Larson, *The Law of Workmen's Compensation* §37.20 at 7-13 (1993).

[14] The dissent concedes that a special standard of proof is appropriate when there is evidence of preexisting cardiovascular disease. *Zundell*, 609 So. 2d at 1382.

event." In *McCall v. Dick Burns, Inc.*, 408 So. 2d 787 (Fla. 1st DCA 1982), the court explained:

> The reasoning behind the requirement of both a legal and medical causation analysis in heart cases, as well as in pre-existing disease cases, stems in good part from the view that the natural progress of a disease might precipitate a collapse during working hours. In such cases absent proof of some identifiable effort on the job which within reasonable medical probability can be said to have a causal connection to the collapse, there arises serious doubt that the collapse was either accidental or causally related to the employment.

Id. at 790 (citation omitted).

The implications of adopting the standard advanced by the dissent are great. Should this Court apply it in heart attack cases, there might difficulty continuing to make any distinctions as to compensability based on the nature of the underlying injury. There is the distinct possibility that the doctrine of positional risk, which has never been part of workers' compensation law in Florida, might become an inevitability.[15]

The majority has appropriately emphasized, or given weight, to the legal cause requirement in the instant case based on legal precedent and policy considerations as expressed in case law.

B. The apportionment provision of the workers' compensation law cannot substitute for an appropriate determination of compensability.

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[15] *See* 1A Arthur Larson, *The Law of Workmen's Compensation* §38.83(b) at 7-319 (1993)("As to situations not involving any personal-risk element whatever, we have seen that the better rule goes beyond the old rule demanding increased or peculiar risk contributed by the employment, and accepts actual risk - even positional risk.")(footnotes omitted).

Further, the dissent argues that the apportionment section of the workers' compensation law[16] fulfills the policy of "reliev[ing] the employer from having to pay compensation for injuries suffered by the employee during the course of employment due to the normal progression of a preexisting disease," *Zundell*, 609 So. 2d at 1381 (footnote omitted), and obviates the need for a special cardiovascular standard of proof. This mistakes the nature of apportionment.

Victor Wine adopts a rule of compensability. There are many rules within the workers' compensation framework that determine compensability. For example, an injury which is the result of habitual use of alcohol or narcotics is not compensable. §440.02(1), Fla. Stat. (1991). An injury to a volunteer not working for a governmental entity is not compensable. §440.02(11)(d)(3), Fla. Stat. (1991). An injury which occurs more than two years prior to a claim for benefits is not compensable. §440.19(1)(a), Fla. Stat. (1991).

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[16] Section 440.02(1), Fla. Stat. (1987), which defines "accident," reads in pertinent part:

> Where a preexisting disease or anomaly is accelerated or aggravated by an accident arising out of and in the course of employment, only acceleration of death or acceleration or aggravation of the preexisting condition reasonably attributable to the accident shall be compensable, with respect to death or permanent impairment.

Permanent impairment benefits may be apportioned; temporary disability, medical and wage-loss benefits may not be. *See* §§ 440.15(5)(a) and (b), Fla. Stat. (1987).

Compensability is a threshold issue. If an injury does not meet the applicable factual and legal standards of compensability, then the workers' compensation law does not determine the rights and responsibilities of the injured party or that party's employer.

Once compensability has been established, apportionment applies. Apportionment is the legislature's method of allocating to the employer the burden of paying benefits for that portion of a claimant's compensable permanent impairment for which it is responsible. *Escambia County Council on Aging v. Goldsmith*, 500 So. 2d 626 (Fla. 1st DCA 1986).

Although apportionment does require an employer to pay only that part of the claimant's permanent impairment benefits not attributable to the natural progression of disease, the argument that its existence should eliminate the requirement of unusual strain or overexertion fails to recognize that medical, wage-loss, and temporary partial disability benefits are not subject to apportionment. An employer might be liable for those benefits despite a claimant's preexisting disease.[17]

Finally, an employer must request apportionment and raise the issue of preexisting condition. The burden of proof is on the employer to demonstrate its entitlement to apportionment. *Goldsmith*, 500 So. 2d at 636; *Holloway v. Curcia Bros., Inc.*, 203 So. 2d 499, 502 (Fla. 1967). The burden of proving compensability

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[17] It also ignores the distinction the legislature has made between compensability and disability. Preexisting condition is not relevant to compensability, but rather to disability.

under *Victor Wine* is appropriately placed upon the employee. These two very different procedural postures further demonstrate that the *Victor Wine* rule and the apportionment provision are not equivalent and do not serve the same purpose.

C. The result of Judge Webster's analysis supports a denial of compensation to the claimant in this case.

Judge Webster phrased the certified question as whether *Victor Wine* applies to cases in which there is no evidence of preexisting cardiovascular disease, so as to require a claimant without preexisting disease to prove that he or she was subject to unusual and nonroutine strain or overexertion.

Judge Webster declined to extend the rule in *Victor Wine* to cases in which there was no evidence of preexisting disease. He did not inform us what test he would use to determine compensability if *Victor Wine* is not applied. However, under ordinary workers' compensation standards, he believes, the claimant's encounter with the student would be sufficient to establish that he had suffered an accident. *Zundell*, 609 So. 2d at 1373.

Heart attacks following identifiable accidents need not satisfy the legal test of *Victor Wine*. *Popiel v. Broward County School Board*, 432 So. 2d 1374 (Fla. 1st DCA 1983). Incidents considered "accidents" for purposes of compensability in cases of cardiovascular injury are distinguishable from the incident which occurred in the instant case. *See Dean Jaye Constr. v. Johnson*, 486 So. 2d 664, 665 (Fla. 1st DCA 1986)(heart attack following

exposure to polyurethane), *review denied*, 494 So. 2d 1150 (Fla. 1986); *Petitt v. Ben F. Walker Framing Co.*, 176 So. 2d 897, 899 (Fla. 1985)(heart attack the result of heat prostration); *City of Lakeland v. Cushman*, 445 So. 2d 1128, 1129 (Fla. 1st DCA 1984)(heart attack occurring after police officer shot, beaten and run over by a police vehicle); *Popiel v. Broward County School Bd.*, 432 So. 2d 1374, 1375 (Fla. 1st DCA 1983)(battery by thief); and *B&R Electric, Inc. v. Hicks*, 412 So. 2d 63 (Fla. 1st DCA 1982)(carrying 100-200 pound electrical pole).

An award of compensation affirmed by this Court with no identifiable accident was subsequently disapproved. In *Tracy v. Americana Hotel* 234 So. 2d 641, 642 (Fla. 1970), this Court reinstated a compensation award to a chambermaid who suffered a ruptured aneurysm caused by a rise in blood pressure due to anger at a co-worker who removed the contents of her linen cart and by "snapping" a sheet across a bed, finding there has been an accident, or unexpected result. Eight years later in *Mosca*, this Court disapproved *Tracy*, and receded from it insofar as it was inconsistent with the following statement:

> [B]efore a ruptured aneurysm can qualify as an accident arising out of employment, the rupture must be shown to have been caused by an unusual strain or overexertion by the claimant resulting from a specifically identifiable effort by him not routine to the type of work he is accustomed to performing.

Mosca, 362 So. 2d at 1342. Had Ms. Tracy sustained a compensable accident, the Court would not have needed to distinguish her case.

Mosca also makes it very clear that emotional strain alone is an insufficient basis to establish a causal connection between

employment and internal failures of the cardiovascular system. "Emotional strain is too elusive a factor to be utilized, independent of any physical activity, in determining whether there is a causal connection between a heart attack or other internal failure of the cardiovascular system and the claimant's employment." *Id.* Other courts have acknowledged and applied this distinction. *See Wolbert Saxon & Middleton v. Warren*, 444 So. 2d 511, 513 (Fla. 1984)(citation omitted); *Pfeiffer v. State, Dep't of Natural Resources*, 436 So. 2d 350, 351 (Fla. 1st DCA 1983), *pet. for review denied*, 447 So. 2d 887 (Fla. 1984); *Hodgen v. Burnup & Sims Engineering*, 420 So. 2d 885, 886 (Fla. 1st DCA)(citations omitted).

The JCC in the instant case found the student did not touch the claimant, "take a swing" at him, make any menacing moves towards him, threaten him or make a violent gesture towards him; and that there was no physical trauma or physical overexertion. (R. 210-211) The JCC "question[ed] the claimant's credibility" as to the incident which allegedly put him in fear, the student's gesture, as the claimant omitted mentioning this supposedly significant incident at his deposition. (R. 210)

Judge Webster does not take issue with the JCC's findings of fact. He argues rather that there was an accident, the confrontation, which "ordinar[il]y" would be sufficient to establish compensability. *Zundell*, 609 So. 2d at 1373. Case law and precedent show otherwise. The encounter between the student and the claimant was not the kind which has supported a finding of

compensability in other cases. There was no physical contact, and the claimant's "fear" was of questionable legitimacy. Since Judge Webster did not propose a different standard for compensability from that which exists in the law at present, which the claimant does not meet, the effect of his dissent is to support the majority's denial of benefits to the claimant.

III.

THE DECISION OF THE JUDGE OF COMPENSATION CLAIMS IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD; UNDER THE ANALYSIS REQUIRED BY FLORIDA LAW, THE CLAIMANT WAS CORRECTLY DENIED COMPENSATION.

The claimant's position on appeal is that the JCC's findings of fact must be overturned. An appellate tribunal may not reevaluate or reweigh the facts or substitute its judgment for factual conclusions of the trier of fact. *Croft v. Pinkerton-Hayes Lumber Co.*, 386 So. 2d 535, 536 (Fla. 1980). The function of the Supreme Court is to ascertain whether the order of the JCC is supported by competent substantial evidence that accords with reason and logic. *Scott v. Kerr*, 156 So. 2d 847, 848 (Fla. 1963).

The JCC found that the student never touched the claimant, tried to hit him, threaten him, move menacingly or gesture violently towards him. He found no physical touching or overexertion, and questioned whether the claimant had been put in fear. (R. 210-11)

There is competent substantial evidence in the record to support each of these findings. The only evidence as to touching is that the claimant put his arm out to guide the student to walk

with him down the school corridor. (R. 33) The claimant did not mention this incident in his deposition but only later, in his testimony, which caused the JCC to question its significance. (R. 210) The student and the claimant did stand nose to nose, and exchanged words. (R. 32, 48) The only evidence as to any threat from the student, however, was the claimant's subjective impression that, at one point, the student "could have" raised his fist or pushed the claimant. (R. 32) There was also the claimant's testimony before the JCC concerning the walk down the corridor, when the claimant thought the student jumping back meant that he was "going to get slammed." (R. 33) Again, the JCC had concerns as to the significance of the incident. It is a fair reading of JCC's decision that he doubted the claimant's credibility on this point. (R. 210)

Nevertheless, the claimant argues that he should prevail because he has shown he has suffered an injury by accident, which is all he need provide as proof in an ordinary workers' compensation claim; the rule in *Victor Wine* does not apply as there is no proof of preexisting condition.

If the claimant could prove that he suffered an accident, the rule in *Victor Wine* would not apply to him. *Wolbert, Saxon & Middleton*, 444 So. 2d at 516. That the incident at issue was not an accident was demonstrated in section II.C. of this brief. That *Victor Wine* does and should apply is demonstrated in section I. The claimant was therefore required to establish either that he had suffered an accident or had been subjected to an unusual strain or

overexertion of a specifically identifiable effort not routine to the work he was accustomed to performing. *Silvera*, 400 So. 2d at 440. As this Court stated in *Silvera*, the "identifiable effort" must be job-related and must "stem in part from some nonroutine physical exertion." *Silvera*, 400 So. 2d at 441.

Those cases cited by this Court in *Mosca*, 362 So. 2d at 1342-44, illustrate the kinds of stresses which have been found to be unusual effort or overexertion not routine to an individual's employment.[18] In the instant case, the claimant's physical exertion consisted of walking down school corridors and speaking to the student. There is no evidence in the record as to whether or to what extent these specific activities were nonroutine. Nor was there evidence as to how this encounter differed particularly from other types of disciplinary encounters that the claimant had with other students.

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[18] The Court considered the following to illustrate unusual efforts or exertions not routine to an individual's employment: *Clayton v. Lease-Way Transportation Corp.*, 236 So. 2d 765(Fla. 1970)(concrete mixer driver throwing fifty to seventy pound plank); *Warman v. Metropolitan Dade County*, 228 So. 2d 908 (Fla. 1969)(heavy equipment operator who rarely used hand shovel digging in an embankment); *Peltier v. Barber*, 190 So. 2d 569 (Fla. 1966)(worker who usually picked up tool sheds loading tool shed bogged in sand onto a trailer); *G&L Motor Corp. v. Taylor*, 182 So. 2d 609 (Fla. 1966)(accountant who performed no manual labor pushing car off highway after running out of gas); *Yates v. Gabrio Electric Co.*, 167 So. 2d 565 (Fla. 1964)(electrician lifting 100-125 pound blocks onto pickup truck); and *Wilkes v. Oscar's Transfer & Storage*, 164 So. 2d 810 (Fla. 1964)(carrying fifty to seventy-five pounds of materials up four flights of stairs instead of delivering them as usual to the first floor). The claimant's effort was not unusual nor a nonroutine exertion in *Simmons v. Stanley*, 197 So. 2d 514 (Fla. 1967)(claimant who stacked 100-125 cases a day unstacking 175 cases over a two-day period).

The JCC was therefore correct in denying compensation for the claimant's hemorrhage.

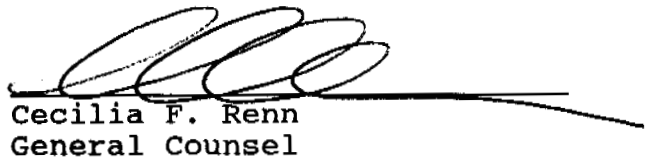
CONCLUSION

The amicus respectfully requests this Court to accept jurisdiction in this case to answer the issue raised by the opinions by the First District Court of Appeal. That issue is whether the *Victor Wine* rule of causation applies in cases of cardiovascular injury when there is no evidence that the claimant suffered from a preexisting non-disabling cardiovascular defect or disease.

We ask this Court to clarify that the law in Florida has been that the *Victor Wine* rule of causation applies to all cardiovascular injuries, regardless of whether the claimant suffered from a preexisting, nondisabling cardiovascular disease or defect. Judicial restraint, regard for precedent and for the policy considerations described in previous cases should guide this Court in reaching this conclusion. The amicus urges this Court to adopt Judge Webster's formulation of the certified question and answer it in the affirmative.

Finally, we ask this Court to affirm the decision of the JCC, which applies correct legal principles and is supported by competent substantial evidence.

Respectfully submitted this 14th day of June, 1993.



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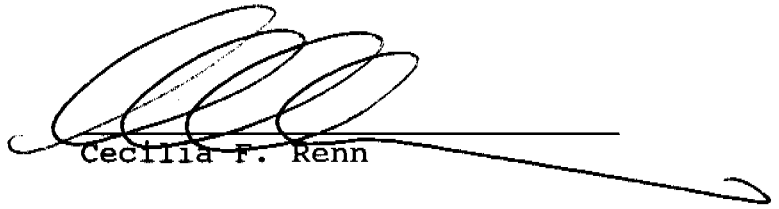
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by U.S. Mail, this 14th day of June, 1993, to Steven M. Dunn, Esquire, DUNN & JOHNSON, P.A., Suite 980, 4770 Biscayne Boulevard, Miami, FL 33137; and to Sylvia Krainin, Esquire, and Steven Kronenberg, Esquire, 15600 N.W. 67th Avenue, Miami Lakes, FL 33014.



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