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TALLAHASSEE, FLORIDA

CASE NO: 81,057
District Court of Appeal
1st District - No. 91-1848

FLORIDA BAR NO. 844209

WARREN ZUNDELL,

Petitioner,

v.

DADE COUNTY SCHOOL BOARD
and ALEXSIS, INC.,

Respondents.

______________________________/

Appeal from Decision of
The First District Court of Appeal

ANSWER BRIEF OF RESPONDENTS

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INTRODUCTION

In this appeal from an en banc order of the First District Court of Appeal, dated December 15, 1992, the Petitioner, Warren Zundell, will hereinafter be referred to as the claimant or as the Petitioner, and the Respondents, the Dade County School Board and Alexsis, Inc., will be referred to as the employer/servicing agent. All references to the record on appeal will be preceded by the letter "R" followed by the appropriate pagination.

STATEMENT OF THE CASE AND FACTS

The respondent agrees to the Petitioner's Statement of the Case and Facts, subject to the following modifications and/or additions:

On page one of the Petitioner's initial brief, he asserts that he was injured on January 5, 1985. However, the Respondent would submit that the correct date of accident is January 5, 1988.

The claimant's treating physician, Dr. Basil Yates, testified by deposition that the claimant's employment as a school teacher would not have placed him at a greater risk of internal cardiovascular system failure than an individual in any other walk of life (R-96-97). According to Dr. Yates, if the claimant got into an argument and became angry, his blood vessel could have broken anywhere. Furthermore, Dr. Yates did not necessarily feel that it had to involve the claimant's profession as a teacher, rather the happening of an occurrence depending on how the claimant reacted to his environment and to the situation (R-97).

Dr. Yates also revealed that arteriograms taken would not reveal a prior weakening of any of the walls of the vessels in the claimant's brain (R-91). According to Dr. Yates, the only thing that an arteriogram does is outline the arteries. If there is a bulge in an artery, you could see

that, but you have no idea as to the integrity of the wall (R-91).

The claimant asserts that the student whom he was trying to discipline jumped back after the claimant put his arm out to sort of guide him (R-33). The claimant perceived this as a threat and a significant factor in what happened to him on the day of the occurrence made the basis of this claim (R-41). However, the claimant failed to mention this occurrence in September 1989 when he was deposed. In that deposition, the claimant was asked to explain what happened. His testimony in this regard may be found at R-170-174. At no time, however, does the claimant mention a second incident involving the student's making any type of jumping motion. When asked to explain this inconsistency, the claimant testified that he did not know why he failed to mention it, but probably should have (R-50). The claimant testified that he conferred with counsel before the final hearing and reviewed the deposition prior to giving his testimony (R-51).

Additionally, nowhere in the record is there any evidence that the claimant actually came into or had any physical contact with the student in this claim. In fact, the claimant testified that he only put his arm out to sort of guide the student and he jumped back (R-33). When questioned again regarding this on cross-examination, the claimant indicated that the claimant was walking and he put his arm to get to the doorway when the student moved back (R-53-54). In

fact, the claimant indicated that the movement back was more a motion away from him instead of a jump, and nowhere does he indicate that there was any physical touching or confrontation between himself and the student (R-33;53-54).

SUMMARY OF THE ARGUMENT

The Judge of Compensation Claims was correct in applying the Victor Wine rule to the instant case as Florida law requires. In order for a cardiac or internal failure of the cardiovascular system to be compensable, it must be accompanied by either a physical trauma or physical over-exertion not routine to the type of job duties to which the claimant was accustomed. In the absence of any evidence of a physical touching or physical over-exertion, the Judge was correct in denying the claim and correct in finding that the claimant's internal cardiovascular failure must be deemed non-compensable. Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla. 1961); Richard E. Mosca & Co., Inc. v. Mosca, 362 So.2d 1340 (Fla. 1978).

Furthermore, a pre-existing condition is not a necessary element of proof prior to applying Victor Wine and Richard E. Mosca because requiring proof of a pre-existing condition is contrary to the very reason for establishing a special test for determining compensability in heart attack and cardiovascular cases. Additionally, there have been a number of decisions from this Court which have applied Victor Wine and Mosca, supra, without any mention of a pre-existing condition and there have been no cases which hold that an employer has an initial burden of proof prior to applying the Victor Wine standard.

If this Court were to hold that an employer had to prove a pre-existing condition before applying the rule in Victor Wine, this would violate the general concept that the burden of proof is on the claimant to demonstrate compensability in all instances. Abrogation of the Victor Wine test in this type of situation would allow compensation to be paid in many cases where it could not be reliably proven that the industry brought about the injury. This Court has held that it is not willing to redefine workers' compensation coverage to include situations where psychological causes may have physical effects. The legislature is the appropriate body to take such action and caution should be taken against such an attempt by this Court to legislate.

The rule set out in Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla. 1961), and later extended to other internal failures of the cardiovascular system by Richard E. Mosca & Co., Inc. v. Mosca, 362 So.2d 1340 (Fla. 1978), should apply to cases in which there is no evidence that the claimant suffered from a pre-existing, non-disabling cardiovascular defect or disease as well as those cases where the claimant does suffer from one. In either case, the claimant should be required 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," if the heart attack or internal failure is to be found compensable here. This was not done

in the instant case, and therefore, the Judge of Compensation Claims' finding approved by the First District Court of Appeal denying compensability in the instant case must be affirmed.

ARGUMENT

IT WAS NOT ERROR FOR THE FIRST DISTRICT COURT OF APPEAL TO AFFIRM THE JUDGE OF COMPENSATION CLAIMS' FINDING, AFTER HE HEARD ALL THE EVIDENCE AND JUDGED THE DEMEANOR AND CREDIBILITY OF THE WITNESSES AND DENIED COMPENSABILITY FOR THE CLAIMANT'S INTERNAL CARDIOVASCULAR FAILURE WHERE THE RECORD CONTAINED COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT HIS FINDING.

From the outset, the basis for the claimant's appeal has been the allegation of a lack of competent, substantial evidence contained in the record to support the Judge of Compensation Claims' findings which were adverse to the claimant's position. The Respondent would assert that the First District Court of Appeal has held repeatedly that it will not retry the claim at the appellate level and substitute its judgment for the Judge of Compensation Claims on factual issues that are supported by competent, substantial evidence. Swanigan v. Dobbs House, 442 So.2d 1026 (Fla. 1st DCA 1983). Therefore, in their opinion, the First District Court of Appeal affirmed the Judge of Compensation Claims' order by finding that it was undisputed that the factual determinations in the Judge's order were supported by competent, substantial evidence.

As the First District Court of Appeal pointed out in their en banc opinion, the Supreme Court has determined

that because of certain unique factors in cases which involve heart attacks and internal failures of the cardiovascular system, the causation element must be proven in a particular fashion. Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla. 1961); Richard E. Mosca & Co., Inc. v. Mosca, 362 So.2d 1340 (Fla. 1978).

Therefore, the Judge of Compensation Claims below predicated his findings on these two seminal cases. The Petitioner, however, would like this Court to believe that there is no precedent in Florida for applying the Victor Wine rule to the instant case. The Petitioner argues that Victor Wine, supra, and the many cases that follow it, make it clear that the concern regarding compensability of heart attacks is that industry should not shoulder the burden for heart attacks that occur on the job by claimants who are predisposed to them, and that there can be no such concern with the Petitioner when there was no medical evidence of any pre-existing cardiovascular condition, disabling or otherwise, to explain the subarachnoid hemorrhage he suffered.

In Victor Wine & Liquor, Inc. v. Beasley, 414 So.2d 589 (Fla. 1962), this Court held that for a heart attack to be compensable, the claimant must show that he or she was subject to unusual strain or overexertion not routine to the type of work that he or she was accustomed to performing. In

Richard E. Mosca & Co., Inc. v. Mosca, 362 So.2d 1340 (Fla. 1978), the Court further determined that:

> 1) Heart attacks and internal failures of the cardiovascular system are to be treated in the same manner for the purposes of establishing the causation element in compensation cases and
>
> 2) Emotional strain is too elusive a factor independent of any physical activity in determining whether there is a causal connection between a heart attack or other failure of the cardiovascular system and claimant's employment. Mosca at 1342.

The Petitioner, however, and the minority of the First District Court of Appeal have urged that internal cardiovascular failure, allegedly precipitated by emotional stress, may be compensable because Victor Wine and Richard E. Mosca, supra, are distinguishable in that those cases reveal some kind of pre-existing condition prior to the compensable incident, which the claimant in this case allegedly did not have.

The only medical testimony presented in this case was that of Dr. Yates. He felt that the claimant did not suffer from a pre-existing condition based on several arteriograms which failed to reveal any evidence of an aneurysm (a bulge in the arterial wall), arterial malfunction or lesion (R-91). However, when Dr. Yates was asked whether

the arteriogram would reveal a prior weakening of the vessels in his brain, he responded:

> You can't tell that. The only thing an arteriogram does is outline the arteries. If there is a bulge in the artery you can see that but you have no idea of the integrity of the walls.
> (R-91-92).

Therefore, Dr. Yates' opinion regarding whether the claimant suffered from a pre-existing condition based on several arteriograms, was not conclusive, as he indicated that the arteriogram could not reveal a prior weakening of vessels in the claimant's brain.

The claimant also failed to meet his burden in showing his condition to be even work connected, in light of Dr. Yates' testimony that the claimant's risk of injury was no greater at work than anywhere else (R-97). Additionally, there is no evidence in the record of any physical trauma or physical over-exertion not routine to the type of job duties to which the claimant was accustomed. The claimant himself testified that every school has discipline problems and he had experienced prior discipline problems with the same student involved in the occurrence made the basis of this claim (R-26-28). Maintaining discipline is part and parcel of a teacher's duties, and the claimant had personal

experience in this regard having broken up numerous fights between students in the past (R-56).

The Petitioner argues before this Court that there is no question that his injury arose out of and in the course and scope of his employment. F.S. §440.02(17) defines injury to mean personal injury or death by accident arising out of and in the course of employment. . . F.S. §440.02(1) defines "accident" to be only an unexpected or unusual event or result happening suddenly. This definition, however, excludes a mental or nervous injury due to stress, fright, or excitement only. Therefore, this Court in Mosca v. Mosca, 362 So.2d 1340 (Fla. 1978), held that:

> 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. at 1342.

Therefore, the emotional stress experienced by the Petitioner is alone insufficient to support an award of compensability, as the Judge and the Court below so agreed.

The Petitioner's argument that an accident causing injury arose out of and in the course and scope of his employment even without applying Victor Wine, supra, and its progeny also fails. The claimant alleges that merely the

verbal exchange between himself, and his student and the alleged "jump" on the part of the student, was a sufficient physical response to find compensability. However, even if true (which the record does not support and the employer/servicing agent vehemently denies), he still has failed to present evidence showing that he sustained any sort of physical trauma or touching. It is uncontradicted that at no time was the claimant touched by his student, nor did the student ever actually threaten to strike him or make a violent gesture toward him. In order for compensability to inure, there must be some showing of a specifically identifiable physical strain, effort, exposure, or event, which are absent in the case at bar. Wolbert, Saxon & Middleton v. Warren, 444 So.2d 511 (Fla. 1st DCA 1984).

This theory is further supported by the recent case of City of Holmes Beach v. Grace, 17 FLW S261 (Fla. 1992). This case involves a police officer who struggled with a suspect, during which time the suspect struck the police officer several times with his elbow and, while attempting to place handcuffs on the suspect, he moved, resulting in a gun accidentally discharging and killing the suspect. The claimant was diagnosed with suffering a post traumatic stress disorder relating to this incident and the lower courts found that the striking by the suspect of the claimant, which was an integral part of the incident, was a significant circumstance in the causal etiology of the claimant's

psychiatric illness. This Court, however, disagreed with those cases which approved compensation awards for mental or nervous injuries caused by accidents in which the claimant suffered some physical touching, but almost no physical trauma. Therefore, this Court found that the claimant did not suffer a physical injury when the suspect's elbow struck him as he attempted to place on handcuffs and, therefore, his disability was not caused by an accident as defined by §440.02(1). Therefore, clearly in the instant case there was also no physical injury to the claimant when the student jumped back and, even if there were some minimal touching (which, once again, the employer/servicing agent vehemently denies), the claimant's disability in the instant case was not caused by an accident as defined by §440.02(1), and therefore, his argument fails on this theory as well.

Finally, the claimant argues that there is no precedent in Florida for applying the Victor Wine rule to the instant case because there was no pre-existing, non-disabling cardiovascular condition to explain the subarachnoid hemorrhage. Firstly, the first prong of the test in Victor Wine, supra, does indicate that in order for a heart attack to be compensable, the heart attack must be precipitated by a work connected exertion affecting a pre-existing, non-disabling heart disease. However, when this Court extended Victor Wine, supra, to other internal failures of the cardiovascular system, it did not specifically state this

factor. In fact, this very Court held that before a ruptured aneurysm, namely an internal failure of the cardiovascular system, can qualify as an accident arising out of employment, the rupture must be shown to have been caused by an unusual strain or over-exertion by the claimant resulting from a specifically identifiable effort by him, not routine to the type of work he is accustomed to performing. This is the test set forth by this Court in Richard E. Mosca & Co., Inc. v. Mosca, 362 So.2d 1340 (Fla. 1978), which must be followed when dealing with internal failures of the cardiovascular system.

Therefore, the First District Court of Appeal's decision in the instant case in rejecting the theory that a pre-existing condition is a necessary element of proof prior to applying Victor Wine and Richard E. Mosca was correct for the following reasons:

1. Requiring proof of a pre-existing condition is contrary to the very reason for establishing a special test for determining compensability in heart attack and cardiovascular cases;

2. There have been a number of decisions from this Court which have applied Victor Wine and Mosca without any mention of a pre-existing condition; and

3. There have been no cases which hold that an employer has an initial burden of proof prior to applying the Victor Wine standard.

The First District Court of Appeal in its majority opinion was also correct to point out that they have applied the tenets of Victor Wine and Mosca, supra, in numerous cases where there is no mention of a pre-existing condition. See, e.g., Diaz v. City of Miami, 427 So.2d 1085 (Fla. 1st DCA 1983); City of Opa Locka v. Quinlan, 451 So.2d 965 (Fla. 1st DCA 1984); Hodgen v. Burnup & Sims Engineering, 420 So.2d 885 (Fla. 1st DCA 1982). In both City of Opa Locka and Diaz, supra, the facts surrounding the incident are recited and there is absolutely no mention of any pre-existing condition. In those cases, and in Hodgen, supra, the general rule is restated that emotional strain alone is not sufficient to establish a causal connection between employment and heart attacks or internal failures of the cardiovascular system. In addition, there is no prior Florida precedent which indicates that Victor Wine, supra, shall only be applied where the employer has proven a pre-existing condition. Such a rule would violate the general concept that the burden of proof is on the claimant to demonstrate compensability in all instances and the rule enumerated in Richard E. Mosca, supra, that the link between emotional stress alone in injuries of this type is too tenuous to provide for compensability. Therefore, both the Judge of Compensation Claims' order and the First District Court of Appeal's majority opinion must be upheld.

WHETHER AN EMPLOYER IS REQUIRED TO PROVE THE EXISTENCE OF A PRE-EXISTING CONDITION IN COMPENSATION CASES INVOLVING HEART ATTACKS AND INTERNAL FAILURES OF THE CARDIOVASCULAR SYSTEM AS A PRE-REQUISITE TO THE APPLICATION OF THE TEST FOR COMPENSABILITY ESTABLISHED IN VICTOR WINE & LIQUOR, INC. v. BEASLEY AND RICHARD E. MOSCA & CO., INC. v. MOSCA, AS SUCH QUESTION HAS BEEN CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE BY THE FIRST DISTRICT COURT OF APPEAL.

The First District Court of Appeal, in its decision in the instant case, stated that if they were to find that unless there is proof of a pre-existing condition, a cardiovascular failure may be compensable without proof of an unusual physical strain or over-exertion not routine to the job, would require this Court to make a number of substantial changes in existing law. Those changes would include: (1) a finding that proof of an emotional strain which may be routine to a particular job would be sufficient to demonstrate compensability of internal cardiovascular failures; (2) a requirement that an employer would have the burden of proof to demonstrate a pre-existing condition prior to the employee having to prove the requisite conditions for compensability of an internal cardiovascular failure, and (3) a determination that the failures of the internal cardiovascular system should be treated differently than heart attacks. The First District Court of Appeal, however,

declined to make these substantial changes, as they found no legal support for the appellant's position.

The First District Court of Appeal reasoned that: (1) requiring proof of a pre-existing condition is contrary to the very reason for establishing a special test for determining compensability in heart attack and cardiovascular cases; (2) there have been a number of decisions from this Court which have applied Victor Wine and Mosca without any mention of a pre-existing condition; and (3) there have been no cases which hold that an employer has an initial burden of proof prior to applying the Victor Wine standard.

If one were to hold that the employer had to prove a pre-existing condition before applying the rule in Victor Wine, this would violate the general concept that the burden of proof is on the claimant to demonstrate compensability in all instances. Furthermore, the rule enumerated in Richard E. Mosca & Co., Inc. v. Mosca, 362 So.2d 1340 (Fla. 1978), that the link between emotional stress alone and injuries of this type is too tenuous to provide for compensability would be violated as well.

Adding to this burden, is the recent enactment of the Americans with Disabilities Act, 42 USC 12101 etseq. (1990) (ADA), which clearly impacts upon the administration of workers' compensation in this state.

Because the ADA seeks to prevent discrimination against the disabled during the employment process, including

the pre-employment stage, there are regulations and prohibitions against certain types of inquiries. In the pre-offer stage, an employer is prohibited from inquiring whether an individual has a disability, the nature of any disability, and whether an individual has a prior workers' compensation history. Therefore, an employer would be precluded at this stage from making any inquiry into the employee's pre-existing condition.

At stage two, or the post-offer stage, an employer may require a medical examination and/or inquiry after making an offer of employment, and before that applicant begins the employment and may condition an offer of employment on the results of such an examination and/or inquiry. If such an employment entrance medical examination is required, it must be required of <u>all</u> entering employees with the same job classification and <u>cannot</u> be used to screen out individuals with disabilities. Furthermore, if an offer of employment is withdrawn due to the results of a medical examination and/or inquiry, the reasons must be job related and consistent with business necessity, and the performance of the essential job functions cannot be accomplished by that individual with reasonable accommodation.

The last stage of the ability of an employer to inquire into an individual's physical history is stage three during employment. Once the employment relationship begins, the Americans with Disabilities Act substantially limits the

employer regarding medical examinations and/or inquiries. The employer may require medical examination of its employees that are job related and consistent with business necessity only. Therefore, an employer could perform a physical examination as long as it was confined to determining whether the employee was able to perform actual job related functions.

Clearly, requiring the employer/carrier to prove the existence of a pre-existing condition in an employee, in light of this new legislation would place an even greater burden on the employer and violate the general concept that the burden of proof is on the claimant to demonstrate compensability in all instances. This would be tantamount to providing that the pre-existing condition would have to be established much like an affirmative defense for which the law provides no support for such a proposition.

Florida remains one of the states whose view is to refuse compensation for injuries involving internal failures of the cardiovascular system in the absence of unusual strain. North Dakota also follows this view and in the case of Suedel v. North Dakota Workmen's Comp Bureau, 218 N.W.2d 164 (N.D. 1974), the court refused to carry to "extremes" the pre-existing condition theory, since "every exertion has its effect upon the physical system." In this case, the decedent was employed in radio broadcasting and worked long hours. He developed serious headaches, was admitted to a hospital, and

later died of a ruptured aneurysm. The claimant's wife sued for compensation. Several doctors testified that stress from a job can cause the rupture of such an aneurysm, however, the compensation court denied compensation and the Supreme Court affirmed, holding that it was bound to accept the board's findings of fact. The Supreme Court of North Dakota held that the claimant's death was caused by an ordinary disease of life, to which the general public is exposed, and it refused to carry to extremes the pre-existing condition theory since every exertion has its effect upon the physical system.

In his dissent, Justice Ervin points out that in circumstances where no proof is offered that a claimant brought some personal risk contribution to the employment, in order to satisfy the "by accident" element that emotional strain be accompanied by physical trauma or contact. This completely ignores the holding in Richard E. Mosca & Co., Inc. v. Mosca, 362 So.2d 1340 (Fla. 1978), which holds that "emotional strain is too loose of a factor independent of any physical activity in determining whether there is a causal connection between a heart attack or other failure of the cardiovascular system and the claimant's employment." Clearly, this holding was not based on the premise of a pre-existing condition, but on the basis that emotional strain without any physical activity is not a concrete enough factor alone to determine a causal connection between an internal

failure of the cardiovascular system and the claimant's employment. Mosca at 1342. Therefore, the minority dissenting opinion on this point is clearly unfounded.

This is further evidenced by this Court's recent decision in University of Florida v. Massey, 17 FLW 2306 (1992). In Massey, this Court acknowledged that psychological pressures often have negative physical results citing that the stress of long hours and mounting job responsibilities could take a physical toll. However, such stresses are neither a physical cause nor an accident under our workers' compensation law. They are also not uncharacteristic of the stresses which all managers must occasionally face, as the Judge had noted in his order. Therefore, this Court held that it was not willing to redefine workers' compensation coverage to include situations where psychological causes may have physical effects. This Court held that the legislature is the appropriate body to take such action.

This is exactly the scenario in the instant case. It is undisputed that the claimant himself testified that every school has discipline problems, and that he had experienced prior discipline problems with the same student involved in the occurrence made the basis of the claim (R-26-28). Furthermore, maintaining discipline is, after all, part and parcel of a teacher's duty and the claimant had personal experience in this regard having broken up numerous fights

between students in the past (R-56). The claimant's confrontation with a student in the instant case is not uncharacteristic of the stresses which all teachers must occasionally face. Therefore, this Court should not be willing to redefine workers' compensation coverage to include those situations where psychological causes may have physical effects as in the instant case. If any branch of the government has the duty to take such action, it must come from the legislature, as this Court held in Massey, supra. Additionally, the majority opinion of the First District Court of Appeal in the instant case held that abrogation of the Victor Wine test in this type of situation would allow compensation to be paid in many cases where it could not be reliably proven that the industry brought about the injury. The First District Court of Appeal cited to this Court's decision in University of Florida v. Massey, 17 FLW S306 (Fla. May 28, 1992), which cautioned against such an attempt by this Court to legislate. Id. at S310.

The minority opinion further disagreed with the majority in their finding that if the Court were to hold that compensation benefits should be granted without proof of an unusual physical strain or over-exertion not routine to the claimant's job, that they would be required to make a number of substantial changes in existing law, including among other things, a finding that proof of an emotional strain which is routine to a particular job is sufficient to demonstrate

compensability of internal cardiovascular failures. The dissent disagreed with this in that it was felt that this was a case of first impression in this jurisdiction and, therefore, no substantial changes would be made in the existing law. The dissent points out that the majority has cited no prior decision in which either the Florida Supreme Court or the First District Court of Appeal addressed the precise issue now presented;

> whether the Victor Wine rule requiring evidence of an unusual strain or over-exertion not routine to the type of work the employee is accustomed to performing, is applicable to a case involving an injury suffered in the course of employment, in which no evidence is offered regarding the existence of a prior personal condition.

The minority admits that although their Victor Wine rule may have been applied in other cases in which the facts do not reveal whether the employee suffered from a pre-existing condition, e.g., Diaz v. City of Miami, 427 So.2d 1085 (Fla. 1st DCA 1983); City of Opa Locka v. Quinlan, 451 So.2d 965 (Fla. 1st DCA 1984); Hodgen v. Burnup & Sims Engineering, 420 So.2d 885 (Fla. 1st DCA 1982), they contend that such cases obviously have no precedential effect in a later case involving facts clearly disclosing the absence of a prior weakness or disease.

In City of Opa Locka v. Quinlan, supra, the First District Court of Appeal wrote its decision to include a very lengthy history and fact pattern. In that case, the facts included the police officer's duties and events which immediately preceded a heart attack while at work. Nowhere in the recitation of the facts does it mention that the claimant suffered from any pre-existing condition. In fact, the First District Court of Appeal focused on the holdings in Victor Wine, supra, which found that a heart attack or internal failure of the cardiovascular system may only be deemed compensable under Chapter 440 if it stems from a specifically identifiable non-routine physical activity connected with the claimant's employment and, further, that 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. In fact, the dissent further discussed the claimant's employment history one year following his heart attack and discussed the findings of the claimant's cardiologist. Nowhere, however, was it mentioned that the claimant suffered from any pre-existing condition.

The express mention in City of Opa Locka v. Quinlan, 451 So.2d 965 (Fla. 1st DCA 1984), of the facts surrounding the claimant's history and injury and no mention of any prior disability should also control as precedential value in this

case contrary to the opinion set forth by the dissent in the First District Court of Appeal's decision in the instant case.

Therefore, based upon the foregoing, the question as to whether an employer is required to prove the existence of a pre-existing condition in compensation cases involving heart attacks and internal failures of the cardiovascular system as a pre-requisite to the application of the test for compensability established in Victor Wine & Liquor, Inc. v. Beasley and Richard E. Mosca & Co., Inc. v. Mosca should be answered in the negative. However, the rewording of the question to be certified by Justice Webster of the First District Court of Appeal should be answered in the affirmative and made the finding of this Court, in that 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., Inc. v. Mosca, should apply to cases in which there is no evidence that the claimant suffered from a pre-existing non-disabling cardiovascular defect or disease as well as those cases where the claimant does suffer from a pre-existing non-disabling heart disease. In either case, the claimant should be required to prove that at the time of the injury he or she was "subject to unusual strain or overexertion not routine to the type of work he or she was accustomed to performing," if

the heart attack or internal failure is to be found compensable.

CONCLUSION

Based upon the above and foregoing arguments and authorities, the employer/servicing agent respectfully requests that this Honorable Court affirm the First District Court of Appeal's en banc decision of December 15, 1992 and answer the certified question to be of great public importance by the majority in the negative.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondents was furnished by mail this 11th day of June, 1993, to STEVEN M. DUNN, ESQUIRE, Suite 980, 4770 Biscayne Boulevard, Miami, Florida 33137 and to DIVISION OF WORKERS' COMPENSATION, 220 Forest Building, 2728 Centerview Drive, Tallahassee, Florida 32399-0655.

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By
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