IN THE SUPREME COURT OF FLORIDA

ESCAMRIA COUNTY SHERIFF'S DEPARTMENT and ESCAMBIA COUNTY RISK MANAGEMENT,

Petitioners,

vs.

THOMAS GRICE,

Respondent.

CASE NO.: 86,327

FILED
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SEP 29 1995
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BRIEF OF AMICUS CURIAE, STATE OF FLORIDA, DEPARTMENT OF INSURANCE, DIVISION OF RISK MANAGEMENT

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PRELIMINARY STATEMENT

The Petitioners, Escambia County Sheriff's Department and Escambia County Risk Management shall be referred to herein as "Petitioner" or "employer/carrier." The Respondent, Thomas Grice, shall be referred to herein as "Respondent" or "claimant." Reference to the record on appeal shall be designated by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae accepts the statement of the case and facts submitted by Petitioners herein.

In addition, your amicus would note that because the Respondent herein receives pension benefits from the Division of Retirement administered by the State of Florida (R:67), and because thousands of state employees could be affected by the Court's decision herein, your amicus requested and was granted leave by this Court to file a brief in support of Petitioners' position herein.

SUMMARY OFARGUMENT

One of the primary purposes of Chapter 440 is to shift a portion of the costs of industrial injuries onto industry and its consumers. At the same time, one of the goals of our Workers' Compensation Act is to give employees an incentive to avoid accidental injuries and to encourage a prompt return to work following such accidents. In furtherance of these objectives, the Courts of this state have limited an injured worker's recovery for lost wages so that he does not receive more than 100% of his average weekly wage from workers' compensation benefits and other collateral sources such as sick pay, private disability benefits, and pension benefits. Obviously, an injured worker has a financial disincentive to return to work if he receives more money for being disabled than he does for working.

Section *440.21,* Fla.Stat. (1985), precludes any offset for such collateral benefits until the injured worker has received 100% of his average weekly wage in combined benefits, irrespective of whether the collateral benefits were funded by the employer alone or in part by employee contributions. *Jewel* Tea *Company,* Inc. *v. Florida Industrial Commission, 235* So.2d 289 (Fla.1970); Brown v, S.S. *Kresge Company, Inc., 305* So.2d 191 (Fla.1974). Once the 100% cap has been reached, however, §440.20(15), Fla.Stat. (1985), mandates that workers' compensation benefits be reduced so that the combined benefits do not exceed the 100% cap in cases where the

employer pays the claimant's "full wages or any portion thereof during the period of disability."

Historically in this state, employees of the state or of its political subdivisions were subjected to an even greater limitation on combined benefits, at least where workers' compensation and pension benefits were concerned. Unlike an employee in the private sector, a public employee was not allowed to receive 100% of his average weekly wage in combined workers' compensation and pension benefits. Rather, §440.09(4), Fla.Stat.(1953), required a complete dollar-for-dollar offset for pension benefits. In other words, an injured worker could receive only his workers' compensation benefits or his pension benefits, whichever were greater. *City of Miami v. Graham*, *138* So.2d 751 (Fla.1962). However, §440.09(4) was repealed by the legislature in 1973, and in *Barragan v, City of Miami,* 545 So.2d 252 (Fla.1989), this Court held that public and private employees are now to be treated alike with respect to the offset issue, i.e., combined benefits may not exceed 100% of the average weekly wage.

The issue herein is not whether the claimant's workers' compensation benefits and pension benefits must **be** included within the 100% cap, for under *Barragan* they clearly must be. The only issue is whether his Social Security disability benefits must also be included. Social Security disability benefits are funded through a payroll tax, of which the employer contributes 50%. 26

U.S.C. §3111(a). Therefore, when an injured worker receives Social Security disability benefits following an industrial accident, the employer has continued to provide his "full wages or any part thereof during the period of disability" just as much as the employer in ***Brown*** did by paying the premium for the private insurance policy which later paid disability benefits. The fact that an employee may also have contributed to his Social Security disability benefits through his share of the FICA tax is irrelevant to the question whether the *employer* has paid the employee's "full wages or any part thereof during the period of disability." This fact was recognized implicitly by the First District in a similar situation in *City of Miami v. Smith,* 602 So.2d 542 (Fla.1st DCA 1992). There, the Court held that an employee was not allowed to receive combined benefits exceeding 100% of his average weekly wage despite the fact that he had contributed more than $20,000.00 of his own money toward funding the pension benefits.

ARGUMENT

SECTION 440.20(15), FLA. STAT. (1985), BARS A FLORIDA WORKERS' COMPENSATION CLAIMANT FROM RECEIVING A COMBINATION OF SOCIAL SECURITY DISABILITY, PENSION, AND WORKERS' COMPENSATION BENEFITS WHICH EXCEEDS HIS AVERAGE WEEKLY WAGE.

In 1935, the Legislature of this State for the first time enacted a workers' compensation act. Chapter 17481, Laws of Florida (1935). In considering the purpose of this legislation, this Court early on noted in *Puffy Hotel Co. v. Ficara*, 150 Fla, 442, 445, 7 So.2d 790, 791 (1942):

> Workmen's Compensation is a product of industrialism and proceeds on the theory that economic loss to the individual by injury in line of duty should be borne *in part* by the industry in which he is employed in order that his dependents may not want. (Emphasis added).

The language emphasized above clearly shows that, while the legislature intended to shift the *primary* cost of industrial injuries onto industry and its consumers, it never intended to compensate an injured worker for more than 100% of his losses. One commentator has expressed the rationale underlying this policy as follows:

> That general principle is that the compensation payments are not intended as full reimbursement to the injured man of the wages or salary lost by the industrial accident. The Preface to the Florida Act, written by the Florida Industrial Commission some years ago, states the general principle excellently:

> 'It has often been erroneously said that the object of the compensation law was to place on industry and society the loss occasioned by accidental injuries and deaths. This is only partly true. In every instance the employee bears part of the loss, as the Compensation Law provides that the injured employee shall be paid compensation at the rate of 60% of his average weekly wages during his disability, the rate of such compensation not to exceed $42.00 per week. That a part of the loss should fall on the employee is considered fundamental in compensation law, so that no employee shall lose one of the primary incentives to avoid accidental injury.'
>
> And, it might well be added, for it is surely implied, so that no employee shall lose one of the primary incentives toward restoration after injury to full function as a contributing member of society.

Alpert & Riviere, *Florida Practice Handbook, 1 Workers' Compensation*, §1-5 *(1991).*

In fact, the concept of limiting an employee's recovery to not more than 100% of his losses in order to facilitate accident avoidance and an early return to work permeates the entire Act, For example, offsets are permitted against an injured employee's compensation benefits when he simultaneously receives unemployment compensation [§440.15(10), Fla.Stat.(1985)], Social Security disability benefits [§440.15(9), Fla.Stat.(1985)], or Social Security retirement benefits [§440.15(3)(b)4, Fla.Stat.(1985)]. In general, an injured worker receives only 66⅔% of his average weekly wage while disabled [§440.15, Fla.Stat.(1985)] or, if he returns to work at a lesser wage, 95% of the difference between 85% of his pre-injury wage and the wages he is able to earn after the accident

[§440.15(3)(b)1, Fla.Stat.(1985)]. Maximum compensation rates are imposed [§440.12, Fla.Stat.(1985)], as are time limits during which an injured worker may receive various classifications of workers' compensation benefits [§440.15, Fla.Stat.(1985)]. When an employer continues an injured worker's wages after an accident, the employer is entitled to be reimbursed for those wages from the claimant's compensation checks. [§440.20(15), Fla.Stat.(1985)]. Where there has been an overpayment of compensation by the carrier to an injured worker, the carrier is entitled to recoup the overpayment under some circumstances. *Belam Florida Corporation v. Dardy*, 397 So.2d 756 (Fla.1st DCA 1981). In order to avoid duplication of benefits and a windfall to the employee, an employer/carrier is allowed a lien against the proceeds of any judgment or settlement which the injured worker may receive from a third-party tortfeasor on account of the compensable accident [§440.39, Fla.Stat.(1985)].

This underlying concept has also surfaced in cases where, following an industrial accident, an injured worker begins receiving not only workers' compensation benefits, but sick pay, private disability, and pension disability benefits as well. From this line of cases, one overriding principle has become clear: that an injured worker, except where expressly given such right by contract, may not receive benefits from his employer and other collateral sources which, when totalled, exceed 100% of his average weekly wage. It is from these holdings that the claimant herein

seeks an exception. Your amicus respectfully suggests that such an exception, besides being contrary to Florida Supreme court authority, would be inconsistent with §440.20(15), Fla. Stat. (1985), and the underlying purpose of our Workers' Compensation Act.

The cases involving offsets for pension disability and other collateral benefits may be broadly divided into two groups: those involving employees of private companies, and those involving employees of the state or one of its political subdivisions. Of course, following this Court's holding in *Barragan v. City of Miami*, 545 So.2d 252 (Fla.1989), these two classes of employees are now treated identically insofar as this issue is concerned. Nevertheless, in analyzing the issue at bar, it will be helpful to trace separately the history of these two lines of cases.

A. OFFSETS FOR PRIVATE EMPLOYEES

In Chapter 17481, Section 22, Laws of Florida (1935), the legislature enacted the initial version of §440.21, Fla.Stat. The 1985 version of the statute provided:

> 440.21 Invalid agreements; penalty.--
> (1) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this chapter shall be guilty of a

> misdemeanor of the second degree, punishable as provided in s.775.083.
>
> (2) No agreement by an employee to waive his right to compensation under this chapter shall be valid.

Even though it was enacted in 1935, this statute did not receive its first judicial construction until 1969. In *Jewel Tea Company, Inc. v. Florida Industrial Commission*, 235 So.2d 289 (Fla.1969), the employer had been ordered to pay workers' compensation benefits from 7/6/62 to 11/10/62, a period during which the claimant also received $60.00 per week in disability benefits from Blue Cross/Blue Shield. The claimant had contributed a portion of his salary toward the Blue Cross/Blue Shield premium. The employer contended that it was entitled to a *complete offset* for these benefits, i.e., to reduce the claimant's workers' compensation benefits by the amount of disability benefits received under the private disability policy.

This Court rejected that contention, finding that such an offset would violate §440.21:

> Regardless of whether you say the workmen's compensation benefits reduce the group insurance benefits or visa [sic] versa, the result violates the Statute. Claimant is entitled to workmen's compensation in addition to any benefits under an insurance plan *to which he contributed.* (Emphasis added).

235 So.2d at 291.

The language emphasized above has engendered a great deal of confusion. At first blush, the opinion would seem to indicate that

the critical factor in determining an employer's entitlement to an offset is whether the injured worker has funded the collateral benefits. [The opinion indicates only that the *claimant* contributed a portion of his salary towards the purchase of a group insurance disability policy; it does not indicate whether the *employer* made any contributions toward the premium at all]. Note, however, that the Court did not address the amount of the claimant's average weekly wage, nor did the Court address whether the claimant's combined workers' compensation and disability benefit exceededed his average weekly wage. Accordingly, the Jewel *Tea* court did not purport to address the issue of an employer's entitlement to an offset in such a case.

That issue was squarely presented for consideration, however, when §440.21 received its next judicial construction in Brown *v. S.S. Kresge Company, Inc.,* 305 So.2d 191 (Fla.1974). In that case, following a compensable injury, the claimant received "sick leave" benefits from the employer's group insurance carrier, Aetna Insurance Company, from 3/16/71 to 7/8/71, during which time she also received workers' compensation benefits from the employer pursuant to Chapter 440. Unlike the claimant in Jewel *Tea*, Ms. Brown had *not* contributed to the cost of the group insurance policy, the premium having been fully funded by the employer. As did the employer in Jewel Tea, the employer in *Brown* complained on appeal that it should have been given a complete credit for the

group insurance benefits paid from 3/16/71 to 7/8/71, arguing that, unlike the claimant in *Jewel Tea*, Ms. Brown had contributed nothing toward the cost of the group insurance plan.

Despite the fact that the group insurance plan had been fully funded by the employer, this Court held, consistent with its holding in Jewel Tea, that allowing the complete, dollar-for-dollar offset urged by the employer would violate §440.21:

> This statutory language would appear to preclude any implication that fringe benefit group insurance provided by employer for his employees would ipso facto reduce their compensation benefits.

305 So.2d at 194.

Nevertheless, this Court went on to hold that, to the *extent the combination of sick leave benefits and workers' compensation benefits exceed the claimant's average weekly wage*, an offset against the claimant's workers' compensation benefits *would not* violate §440.21. That result was reached because of the Court's interpretation of a then-existing procedural rule of the former Industrial Relations Commission, I.R.C. Rule 9:

> However, it is reasonable to conclude the workmen's compensation benefits when combined with sick leave insurance benefits provided by employer should not exceed claimant's average weekly wage because *under a logical internxetation of the I.R.C. Rule 9 when an injured employee receives the equivalent of his full waaes from whatever employer source that should be the limit of compensation to which he is entitled.* (Emphasis added).

305 So.2d at 194.

I.R.C. Rule 9, referenced above, provided that:

> When an employee is injured and the employer pays his full waaes or anv part thereof during the period of disabilitv . . . the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded. . . . (Emphasis added).

305 So.2d at 193.

Admittedly, this I.R.C. rule no longer appears in our Workers' Compensation Rules of Procedure. However, it is critical to note that the legislature later codified Rule 9 as a substantive part of Chapter 440. In *Belle v. General Electric Company*, *409* So.2d 182, 184, n.1 (Fla.1st DCA 1982), the First District noted:

> Section 440.20(15), Florida Statutes (1979), is a substantial codification of former industrial relations commission rule 9, referred to in *Brown, 305* So.2d at 193.

In fact, §440.20(15), Fla.Stat. (1985), is ***identical*** in pertinent part to the former I.R.C. rule:

> When an employee is injured *and the employer pays his full waaes or anv nart thereof during the period of disability . . . the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded* . . . . (Emphasis added).

This former rule of procedure was first enacted into law by Chapter 77-290, Section 5, Laws of Florida. It was first codified at §440.20(13), Fla.Stat. (1977), but was subsequently renumbered to §440.20(15), Fla.Stat., by Chapter 79-40, Section 16, Laws of Florida. At the time of the claimant's accident in the case at

bar, this section remained at §440.20(15), and it remains a part of the statute today, the same having been renumbered to §440.20(14), Fla.Stat.(1994), by Chapter 93-415, Section 26, Laws of Florida.

Therefore, because the former I.R.C. rule has now become a part of the statutory fabric of Chapter 440, it is clear that the same result would be reached in ***Brown*** if that case were decided today, even though the rule no longer exists as a rule of procedure. As explained by Judge Wentworth, writing for the Court in *Dept. of Hiahwav Safetv & Motor Vehicles v. McBride*, 420 So.2d 897 (Fla.1st DCA 1982), "[t]he rulings in *Hoagey* ***[Jewel]*** and *Brown* effectively synthesize the interplay between Sec.440.21 and Sec.440.20(15). . . ." Thus, with all due respect to the First District, your amicus respectfully suggests that the Court may have overlooked §440.20(15) when it recently stated that "there is no statutory provision in chapter 440 authorizing the limitation directed in the ***Barraaan*** opinion." *Citv of Miami v, Bell,* ***606*** So.2d 1183, 1192, n.7 (Fla.1st DCA 1992), *rev'd* on *other grounds,* 634 So.2d 163 (Fla.1994). Also see *City of Miami v. Bell*, ***636*** So.2d 207 (Fla.1st DCA 1994) (acknowledging that parts I and III of its original decision had been quashed by the Supreme Court, but reaffirming its opinion in all other respects).[1]

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[1] The First District has now acknowledged the error in the above-quoted statement in *Bell*. *Grice v. Escambia County Sheriff's Department*, 20 Fla. L. Weekly D1863, 1865, n.1.

It is also critical to note that the factor which distinguishes *Brown* from *Jewel* Tea is not whether the collateral benefits were funded by the employee or by the employer. Indeed, when read together, those cases rather clearly hold that until the employee has received 100% of his average weekly wage, §440.21 precludes *any* offset, *no matter how the collateral benefits were funded*. Rather, the distinguishing factor between the two cases is that the employee in Brown received a combination of benefits which *exceeded his averaae weeklv waae.*

This distinction was made clear by this Court in *Domutz v. Southern Bell Telenhone & Telegraph Company, 339* So.2d 636 (Fla.1976), where the Court clarified its *Brown* decision:

> There [in *Brown]* the issue was whether sick leave benefits provided by an employer should be credited against workmen's compensation injury benefits, *and we determined that the decisive factor was not who had contributed to the plan, but rather whether the combination of the benefits from the employer exceeded the claimant's averaae weeklv waae.* (Emphasis added).

339 So.2d at 637.

The First District has also now clearly held in the case at bar that this is so:

> We begin our discussion by observing that Section 440.21, Florida Statutes, precludes any offset for such leave, group insurance disability, pension or other like benefits, *wh e hpa d or furnished in whole or in part by the employer, or contributed to bv the emwlovee,* so long as the combination of such

> benefits and the workers' compensation benefits payable does not exceed the employee's average weekly wage, [Citations omitted]. (emphasis added).

20 Fla. L. Weekly D1863-1864.

Accordingly, as discussed further below, to the extent that the combined benefits exceed the average weekly wage in a given case, the fact that the claimant may have partially funded the collateral disability benefits is irrelevant in determining whether there should be an offset.

B. OFFSETS FOR PUBLIC EMPLOYEES

Initially, this Court's holdings in Jewel *Tea* and ***Bxown*** applied only to employees in the private sector. At least where pension benefits were concerned, a substantially *greater* offset was mandated for employees of the state or one of its political subdivisions. ***Bawraaan v. City of Miami,*** *545* So.2d *252, 254* (Fla.1989).

In Chapter 28236, Section 1, Laws of Florida (1953), the Florida Legislature substantially amended §440.09(4), Fla.Stat., to provide:

> When any employee of a state or any political subdivision thereof . . . receives compensation under the provisions of this chapter . . . and such employee . . . is entitled to receive any sum from any pension or other benefit fund to which the same employer may contribute, the amount of any payment from such pension or benefit fund allocable to any week with respect to which such employee . . . receives compensation

> under this chapter shall be reduced by the amount of the compensation for such week....[2]

The interpretation of this statute was at issue in *Citv of Miami v. Graham,* 138 So.2d 751 (Fla.1962). In that case, the claimant had been awarded permanent total disability benefits by the Deputy Commissioner. In addition, he had applied for and was receiving his pension benefits from the City. After the Deputy Commissioner entered his order awarding workers' compensation benefits, the City began offsetting the claimant's pension benefits by the amount of workers' compensation benefits which the Deputy had awarded. This offset was challenged by the claimant as being in violation of the Deputy's order.

In rejecting that challenge, this Court noted the legislative intent behind §440.09(4), Fla.Stat.:

> That an employee shall not receive both a pension and workmen's compensation from his employer when the employer is the state or any political subdivision thereof or a quasi-public corporation therein.

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[2] Even though this statute seems to indicate that it is the pension benefits which should be reduced by the amount of the workers' compensation benefits, not vice versa, the courts in this State have without exception refused to recognize any such distinction. For example, it has been held that §440.09(4) "provided that any worker's compensation benefits payable to the injured public employees should be reduced by the amount of pension benefits that were also payable." *Citv of Miami v. Bell, 634* So.2d 163, 166 n.1 (Fla.1994). Also see, *Jewel Tea Company, Inc. v. Florida Industrial Commission,* 235 So.2d 289, 291 (Fla.1969); *Barragan v, Citv of Miami, 545* So.2d *252* (Fla.1989); *City of Miami v. Bell,* 606 So.2d 1183 (Fla.1st DCA 1992), *rev'd on other grounds,* 634 So.2d 163 (Fla.1994).

138 So.2d at 754.

This Court then proceeded to hold:

> When an employee of the state or a political subdivision thereof or a quasipublic corporation therein, is entitled to a pension, and is awarded workmen's compensation, *if such pension is greater than the amount of compensation awarded, the compensation shall be deducted therefrom: and where, as in the case at bar, the pension is less than the amount of compensation awarded, the employer shall pay only the amount of compensation awarded the emwlovee.* (Emphasis added).

138 So.2d at 754.

Thus, unlike for *private* employees, the combination of pension benefits and workers' compensation benefits for *public* employees was not simply limited to 100% of the average weekly wage. Rather, §440.09(4) provided for a *complete, dollar-for-dollar* offset, so that when the pension benefits exceeded the workers' compensation benefits, no workers' compensation benefits *at all* were payable. *See Barraaan v. City of Miami,* 545 So.2d 252, 254 (Fla.1989).

The legislature, however, saw fit to repeal §440.09(4) in *1973.* See Chapter 73-127, Section 2, Laws of Florida. After the repeal, "there was no state statute on this subject which authorized public employees to be treated any differently than private employees." *Barraaan v. City of Miami,* 545 So.2d 252, 254 (Fla.1989).

Undaunted by the action of the state legislature, however, the City of Miami enacted a local ordinance which restored to the city

the dollar-for-dollar offset which had been taken away by the repeal of §440.09(4):

> Any amounts which may be paid or payable under the provisions of any state workers' compensation or similar law to a member...on account of any disability...shall be offset against and payable in lieu of any benefits payable out of funds provided by the city under the provisions of the retirement system on account of the same disability....

510 So.2d at 1073.

This ordinance was challenged in a series of cases commencing with *Hoffkins v. City of Miami,* 339 So.2d 1145 (Fla.3rd DCA 1976), *cert. den.*, 348 So.2d 948 (Fla.1977). The *Hoffkins* court upheld the validity of the ordinance, as did the First District in *Citv of Miami* v. *Knight,* 510 So.2d 1069 (Fla.1st DCA), *rev. den.*, 518 So.2d 1276 (Fla.1987). However, citing this Court's pronouncements in Jewel Tea and the recurrent nature of the dispute, the First District certified the question to this Court as one of great public importance in *Citv of Miami* v. *Barragan,* 517 So.2d *gg* (Fla.1st DCA 1988).

In *Barraaan v. City of Miami,* 545 So.2d 252 (Fla.1989), this Court noted that §166.021(3)(c), Fla.Stat.(1987), limits cities from legislating on any subject expressly preempted to the state government by general law. Finding that Chapter 440 preempted local regulation on the subject of workers' compensation, this Court held that the ordinance, which provided the same complete, dollar-for-dollar offset formerly allowed by §440.09(4), was

inconsistent with §440.21. Accordingly, this Court held the ordinance invalid and disapproved the decisions in *Hoffkins* and *Knight*. *545* So.2d at 255.

This Court did *not*, however, completely disallow any offset. Rather, the Court disallowed *only* the complete, dollar-for-dollar offset granted by the ordinance. Consistent with its holdings in *Brown* and *Domutz*, and with §440.20(15), the Court still ordered an offset to the extent that the combination of benefits exceeded the claimant's average monthly [weekly] wage. *545* So.2d at 255.

Your amicus respectfully submits that this lesser offset was ordered not because the Court was "legislating," as suggested by Justice McDonald in his dissent and by the Respondent in the case at bar, but because this result was mandated by §440.20(15), Fla.Stat.(1985):

> [U]nder a logical interpretation of I.R.C. Rule 9 [§440.20(15)] when an injured employee receives the equivalent of his *full wages* from whatever *employer source* that should be the limit of compensation to which he is entitled. (Emphasis added).

305 So.2d at 194.

C. THE CASE AT BAR

After *Barragan*, it is clear that both public and private employees are to be treated alike insofar as offsets against workers' compensation benefits are concerned. That is, regardless whether the collateral benefits are funded by the employer or by

the employee, §440.21, Fla.Stat., precludes any such offset until a claimant has received a combination of benefits which equals his pre-injury wage. Equally clear, however, is that thereafter §440.20(15), Fla.Stat. (1985), mandates that total benefits be reduced so that they do not exceed the employee's average weekly wage whenever the employer pays the claimant's 'full wages or *any part thereof"* during his period of disability.

Respondent herein does not argue that the combination of pension benefits and workers' compensation benefits should be allowed to exceed the average weekly wage. Indeed, that argument is precluded by the *Barragan* decision. The only question is whether the claimant's Social Security disability benefits should be included in the 100% cap. Admittedly, your amicus has found no *case law specifically* addressing the issue herein, i.e., whether the three-way combination of Social Security disability, workers' compensation, and pension benefits should not exceed the average weekly wage. Nevertheless, the failure to allow such a three-way reduction would clearly be inconsistent with this Court's holdings in Brown, *Domutz*, and *Barragan*, and with §440.20(15).

When a claimant begins receiving Social Security disability benefits, his employer, while not providing his "full wages," has clearly provided some "part thereof" within the meaning of §440.20(15). As any employer knows, the Social Security Administration is funded through a payroll tax, the Federal

Insurance Contributions Act (FICA). Half of that tax is assessed against the employee [26 U.S.C. §3101(a)], and half against the employer [26 U.S.C. §3111(a)]. In that sense then, Social Security disability benefits are analagous to benefits received from a private disability policy whose premiums are 50% funded by the employer. Therefore, just as the employer in *Brown* did by funding the Aetna disability policy, an employer continues to pay a "part thereof" of the claimant's "full wages," in addition to workers' compensation and pension benefits, when the claimant receives Social Security disability benefits. Accordingly, consistent with *Brown*, *Domutz*, and §440.20(15), the Social Security disability benefits clearly should be included in those benefits which cannot exceed 100% of the average weekly wage.

This result is certainly supported by the First District's decision in *City of North Bay Village v. Cook*, 617 So.2d 753 (Fla.1st DCA 1993). In that case, the Court held that the claimant's PTD supplemental benefits paid pursuant to §440.15(1)(e)1, Fla.Stat. (1983), should be included in the benefits considered under the 100% cap. This was so despite the fact that the claimant's accident therein occurred before July 1, 1984. Because of the date of accident, the PTD supplemental benefits were not paid directly by the employer/carrier, but by the Workers' Compensation Administration Trust Fund. See §440.15(1)(e)1, Fla.Stat.(Supp.1990). Nevertheless, because the

Workers' Compensation Administration Trust Fund is funded by involuntary assessments against self-insured employers and workers' compensation carriers, 5440.51, Fla.Stat.(1985), the Court implicitly recognized that the employer did pay a "part thereof" of the employee's wages, as did the employer in Brown by funding the disability benefits provided by Aetna.

Moreover, the mere fact that the employee may also have contributed to the funding of his Social Security disability benefits through his portion of the payroll tax should not preclude an offset. Under §440.20(15), the only relevant inquiry is whether the *employer* has continued to pay the claimant's "full wages or *any part thereof* during the period of disability." In addition to this Court's pronouncement on this issue in *Domutz*, this result is certainly supported by the First District's holding in Citv *of Miami v. Smith, 602* So.2d 542 (Fla.1st DCA 1992).

In that case, the claimant was receiving both workers' compensation benefits and pension benefits from the City of Miami. Unlike previous opinions from this Court and from the First District which failed to note whether the employees therein had contributed to their City of Miami pensions, the First District in *Smith* specifically noted that Mr. Smith had contributed over $20,000.00 of his personal money toward the pension. 602 So.2d at 542. Despite this very substantial employee contribution, the First District held:

> [T]here is no statutory authority in the present case to remove the average monthly wage cap established in *Barragan* and earlier cases.

602 So.2d at 543.

As demonstrated herein, the Courts of this state have been vigilant in guarding against over-compensating injured workers. Indeed, your amicus has discovered only one case wherein the claimant was allowed to receive combined benefits exceeding his average weekly wage, that being *City of Pensacola v. Winchester*, 560 So.2d 1273 (Fla.1st DCA), pet. for rev. *den.*, 574 So.2d 140 (Fla.1990). However, that case does not support the claimant's position herein. In rejecting a similar argument in *Smith*, the First District held:

> Although this court in *City of Pensacola and Travelers Ins. Co. v. Winchester*, 560 So.2d 1273 (Fla.1st DCA 1990), awarded pension benefits and workers' compensation benefits exceeding the claimant's average monthly wage, the court relied on a contractural agreement in the pension plan which expressly stated that a disabled pensioner is entitled to pension benefits in addition to workers' compensation benefits.

602 So.2d at 543.

The claimant herein is a participant in Florida's State Retirement System established by Chapter 121, Fla.Stat. (1985). There is no *"Winchester"* provision in Chapter 121.

D. THE FIRST DISTRICT'S HOLDING

In its holding below, the First District recognized that the claimant's interpretation of *Barragan* is incorrect:

> As for the claimant's interpretation of the *Barragan* decision, we do not agree that the existence of the offset provision was the basis for the court's allowance of an offset of the amount by which the combined pension and workers' compensation benefits exceeded the average weekly wage....Thus, as indicated by these and other decisions, the critical factor is not the existence of a contractual provision for offset, but whether the combination of benefits *furnished by the employer*, together with workers' compensation benefits, exceeded the employee's average weekly wage. (emphasis in original).

20 Fla. L. Weekly D1863 at 1864.

The Court also disagreed with the claimant that its *Winchester* decision is controlling:

> As for claimant's contention that this case is similar to *City of Pensacola, supra*, again we disagree. That case is unique in that, unlike the case before us, the City's pension plan expressly provided that the employee was entitled to full pension benefits in addition to any workers' compensation benefits payable to him.

20 Fla. L. Weekly at D1864.

Nevertheless, the Court went on to hold that including the claimant's social security benefits within the 100% cap mandated by *Barraaan* and §440.20(15) is inappropriate. The Court's reluctance to include these benefits is based on several grounds, As demonstrated below, these grounds are without merit.

First, the Court seems to suggest that including the social security benefits within the 100% cap would somehow violate §440.15(9)(a), Fla. Stat. (1985), which provides in part:

> However, this provision shall not operate to reduce any injured workers' benefits under this chapter to a greater extent than such benefits would have otherwise been reduced under 42 U.S.C. §424(a).

The statute referenced above, 42 U.S.C. §424a, provides that an individual's social security benefits shall be reduced so that the combination of the two benefits does not exceed 80% of the worker's average current earnings ("ACE"). Thus, when read together, these two offset provisions allow a disabled worker to receive a combination of Florida workers' compensation benefits and social security benefits which equal 80% of the AWW or 808 of the ACE, whichever is greater. *Trilla v. Braman Cadillac*, 527 So.2d 873 (Fla. 1st DCA 1988); *A. C. Scott Construction & Paving Company, Inc. v. Miller*, I.R.C. Order 2-3906 (September 11, 1979).

In the case at bar, 100% of the claimant's AWW is $583.88 (R:32). His compensation rate, before any offsets, is $389.25 per week ($583.88 x 66⅔% = $389.25).[3] Eighty percent (80%) of the

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[3] Because the claimant is permanently totally disabled, he is eligible for permanent total supplemental benefits pursuant to §440.15(1)(e), Fla. Stat. (1985) in addition to the normal 66⅔% of the AWW. These benefits amount to an additional 5% of the compensation rate, multiplied by the number of calendar years since the date of accident, and limited only by the maximum compensation rate in effect *on the date the payment is made*. *Polote Corporation v. Meredith*, 482 So.2d 515 (Fla. 1st DCA 1986). Thus, for payments made in the year 1995, the claimant would normally receive $583.88

Claimant's AWW is $467.10 ($583.88 x .80 = $467.10). Eighty percent (80%) of the claimant's ACE is $1,514.40 per month (R:46, 51), or $349.48 per week ($1,514.40 x 12 ÷ 52 = $349.48). The claimant's PIA (Primary Insurance Amount, i.e., the amount of social security benefits actually received by the claimant as of the first month of his entitlement)' is $710.00 per month (R:46-47, 51), or $163.85 per week ($710.00 x 12 ÷ 52 = $163.85).

Thus, under the *federal* offset provision, the claimant herein would actually receive *no* social security benefits because he already receives workers' compensation benefits which exceed 80% of his ACE. [$453.00 (claimant's weekly workers' compensation benefits in 1995) > $349.48 (80% ACE) 1. See 20 CFR §404.408(c)(2); Robert E. Francis, ***Social Security Disability Claims***, §2.15, Example 4.

However, under the *state* offset provision, the claimant would receive the following benefits:

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per week. ($583.88 x 66⅔%) t [($583.88 x 66⅔%) x (.05) x (10)] = $583.88. However this payment would be reduced to $453.00, the maximum compensation rate for 1995 injuries. In its opinion below, the First District indicated that the claimant's compensation rate is $392.00. 20 Fla. L. Weekly at D1863. Your amicus respectfully submits that this would have been the correct figure for payments made in 1991, since $392.00 is the maximum compensation rate for 1991 injuries.

[4] The First District has held that cost-of-living adjustments made by the Social Security Administration subsequent to the initial award of benefits may not be taken into account in computing the offset under §440.15(9)(a), Fla. Stat. *Eques v, Best Knit Textile Corporation*, 382 So.2d 738 (Fla. 1st DCA 1980).

$163.85	[Weekly SS benefits]
+ 303.25	[state WC benefits after offset]'
$467.10	[80% AWW]

Even factoring in the claimant's pension benefits of $725.22 per month (R:60) (excluding any cost-of-living adjustments) or $167.36 per week ($725.22 x 12 ÷ 52 = $167.36)[6], the claimant still receives more in combined benefits than he would under the federal social security offset provision:

$167.36	[weekly pension benefits]
163.85	[weekly social security benefits]
+ 252.67	[weekly WC benefits after offset][7]
$583.88	[100% AWW]

The First District also suggests that there is no ***federal*** authority which would allow an employer/carrier to cap a claimant's benefits at 100% of the average weekly wage. 20 Fla. L. Weekly at D1864. Because the question herein involves the proper

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[5] This amount includes the PT supplemental benefits since they are included within the 808 cap mandated by §440.15(9). ***State, Division of Workers'*** *Compensation v. Hooks*, 515 So.2d 294 (Fla. 1st DCA 1987).

[6] In its opinion below, the First District stated that the claimant herein receives $208.75 per week in state disability retirement benefits. 20 Fla. L. Weekly at D1863. Your amicus believes that this figure was derived by using the claimant's ***current*** state disability retirement benefit of $904.59 per month (R:61) which figure *includes* cost-of-living adjustments made since the original award ($904.59 x 12 ÷ 52 = $208.75). Your amicus is unaware of any case law addressing the issue of whether state disability retirement cost-of-living increases may be taken into account when computing the 100% cap.

[7] This amount includes the PT supplemental benefits since they are included in the 100% cap mandated by *Barragan* and §440.20(15). *City of North Bay Village v.* Cook, 617 So.2d 753 (Fla. 1st DCA 1993).

interpretation of a *state* statute, i.e., §440.20(15), your amicus agrees that there is no *federal* authority mandating a 100% cap. Nevertheless, to the extent that the First District suggests that the Social Security Administration may not take an offset against social security disability benefits on account of a claimant's receipt of state disability retirement benefits, your amicus respectfully disagrees.

The federal offset provision, 42 U.S.C. §424a, specifically provides as follows:

> **(a) Conditions for reduction; computation**
> If for any month prior to the month in which an individual attains the age of 65—
> **(1)** such individual is entitled to benefits under section 423 of this title, and
> **(2)** such individual is entitled for such month to-
> (A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State, or
> **(B)** periodic benefits on account of his or her total or partial disability (whether or not permanent) *under any other law or plan of the United States, a State, a political subdivision.* ..(emphasis added).

Amicus respectfully submits that the statutory language emphasized above is broad enough to encompass the disability retirement benefits received by the claimant in the case at bar. Also see 20 CFR §404.408(a)(2). In fact, the federal courts have held accordingly.

For example, in *Meehan* v. Sullivan, 746 F.Supp. 656 (E.D. Texas 1990), the claimant was awarded $303.50 per month in social security disability benefits. At the time of the award, he was already receiving $1,189.71 per month from the Teacher Retirement System of Texas. The Social Security Administration informed the claimant that his $303.50 social security disability benefit was completely offset by his $1,189.71 Teacher Retirement System disability benefit, and that he would thereafter receive no payment from the Social Security Adminsitration.

The claimant argued before the federal district court that had he taken a non-disability early retirement, the Teacher Retirement System would have paid him $1,084.66 per month, so his disability offset should only be $105.05 per month, the difference between non-disabled and disabled Teacher Retirement System benefits. The Secretary interpreted 42 U.S.C. §424a(a)(2), to include the *total* amount of disability benefits paid by the Teacher Retirement System of Texas, and the federal district court agreed. 746 F.Supp. at *657.*

Finally, the First District seems to suggest that capping the claimant's benefits at 100% of the average weekly wage would be inconsistent with this Court's decision in Jewel *Tea v. Florida Industrial Commission*, 235 So.2d 289 (Fla. 1970), and with its own decision in *Dept. of Highway Safety & Motor Vehicles v. McBride,* *420* So.2d 897 (Fla.1st DCA 1982). This suggestion is incorrect.

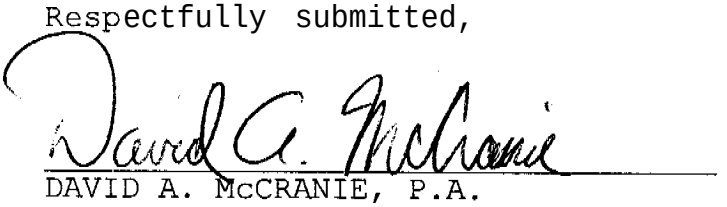
As stated earlier, there is no indication in *Jewel Tea* that the claimant's combined disability and workers' compenstaion benefits exceeded 100% of his average weekly wage. Thus, that case is to be distinguished from the case at bar. This distinction was made clear by this Court in its later decisions in Brown and *Domutz*. Moreover, to the extent that *Jewel Tea* could be read to preclude *any* form of offset when the claimant has contributed to the pension disability benefits, such a reading is inconsistent with the First District's own decision in *City of Miami v. Smith, 602* So.2d 542 (Fla.1st DCA 1992). In that case, the First District mandated a *Barragan* offset even though the claimant's pension disability benefits had largely been funded by the claimant himself.

CONCLUSION

For the foregoing reasons, your amicus curiae respectfully submits that the judge of compensation claims did not err, that the certified question should be answered in the affirmative, and that the decision of the First District Court of Appeal should be reversed.

A failure to do so would be contrary to this Court's holdings in *Brown*, *Domutz*, and *Barragan*, as well as with §440.20(15), Fla.Stat.(1985). Further, it would be inconsistent with the underlying purpose of our Workers' Compensation Act: to shift a *portion* of the cost of industrial injuries onto industry and its consumers, while simultaneously providing an incentive to employees for accident avoidance and for a rapid post-accident return to work.

Respectfully submitted,



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Counsel for Amicus Curiae, State of Florida, Department of Insurance, Division of Risk Management

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Michael J. Valen, Esquire, 317 South Baylen Street, Suite 500, Pensacola, Florida, 32501, and to James F. McKenzie, Esquire, 905 East Hatton Street, Pensacola, Florida, 32503, this 28th day of September, 1995.

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Counsel for Amicus Curiae, State of Florida, Department of Insurance, Division of Risk Management

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 13, 1995

ESCAMBIA COUNTY SHERIFF'S DEPARTMENT, ET AL.,

Petitioners,

v.

THOMAS GRICE,

Respondent.

CASE NO. 86,327

* * * * * * * * * * * * * * * * *

The Motion for Leave to File Brief as Amicus Curiae filed by the Department Of Insurance Division of Risk Management is hereby granted and they are allowed to file brief only.

Please send to the Court, either in word Perfect format or ASCII text format, a 3-1/2" diskette of the brief filed in this case. This procedure is voluntary. PLEASE LABEL ENVELOPE TO AVOID ERASURE.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

BDM
cc: David A. McCranie, P.A.
Mr. Michael J. Valen
Mr. James F. McKenzie
Mr. Edward A. Dion

IN THE SUPREME COURT OF FLORIDA

ESCAMBIA COUNTY SHERIFF'S DEPARTMENT, ET. AL.,

Petitioners,

VS.

THOMAS GRICE,

Respondent.

CASE NO.: 86,327

District Court of Appeal,
1st District - No. 94-1950

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

COMES NOW the undersigned attorney on behalf of State of Florida, Department of Insurance Division of Risk Management, and respectfully requests this honorable Court to grant leave for their filing of a Brief Amicus Curiae in support of the Petitioners herein and as grounds therefore would show:

1. The State of Florida is a public employer which employs thousands of workers in this state.

2. The State's vital interests will be affected by the Court's decision herein.

3. Movant was allowed to appear as an Amicus Curiae on behalf of Petitioners in the District Court of Appeal.

4. Counsel for both the Petitioners and Respondent have been contacted, and they have no objection to the filing of an Amicus Brief herein,

WHEREFORE, the State of Florida, Department of Insurance, Division of Risk Management respectfully requests the Court for leave to file a Brief Amicus Curiae in support of the Petitioners herein.

Respectfully submitted,

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Attorney for Amicus Curiae

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Michael J. Valen, Esquire, Post Office Box 13570, Pensacola, Florida 32591-3570, Attorney for Petitioners; and to James F. McKenzie, Esquire, 905 East Hatton Street, Pensacola, Florida 32503, by U.S. Mail delivery, this 6th day of September, 1995,

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Attorney for Amicus Curiae

IN THE SUPREME COURT OF FLORIDA

ESCAMBIA COUNTY SHERIFF'S DEPARTMENT, ET. AL.,

Petitioners,

vs.

THOMAS GRICE,

Respondent.

CASE NO.: 86,327

District Court of Appeal,
1st District - No. 94-1950

Hunt No objection

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

COMES NOW the undersigned attorney on behalf of the BAY COUNTY BOARD OF COUNTY COMMISSIONERS, and respectfully requests this honorable Court to grant leave for their filing of a Brief Amicus Curiae in support of the Petitioners herein and as grounds therefore would show:

1. The Bay County Board of County Commissioners is a large public employer in this State whose employees are members of the Florida Retirement System.

2. The Board's vital interests will be affected by the Court's decision herein inasmuch as many of the Board's employees could potentially be awarded a combination of workers' compensation, pension disability, and Social Security disability benefits which exceed 100% of the employee's average weekly wage, resulting in a windfall to the employee at great cost to the Board.

3. The undersigned has been allowed to appear in this cause as counsel for Amicus Curiae State of Florida, Department of Insurance, Division of Risk Management, by this Court's order dated September 13, 1995.

4. The undersigned does not intend to submit an additional brief, but would rely on the brief amicus curiae prevously submitted on behalf of the State of Florida, Department of Insurance, Division of Risk Management on or about September 28, 1995.

5. Counsel for both the Petitioners and Respondent have been contacted, and they have no objection to the appearance of the Bay County Board of County Commissioners as Amicus Curiae herein.

WHEREFORE, the Bay County Board of County Commissioners respectfully requests the Court for leave to appear as Amicus Curiae in support of the Petitioners herein.

Respectfully submitted,

David A. McCranie

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Attorney for Amicus Curiae Bay County Board of County Commissioners

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Michael J. Valen, Esquire, Post Office Box 13570, Pensacola, Florida 32591-3570, Attorney for Petitioners; and to James F. McKenzie, Esquire, 905 East Hatton Street, Pensacola, Florida 32503, by U.S. Mail delivery, this 24th day of October, 1995.

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Attorney for Amicus Curiae Bay County Board of County Commissioners