

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 86,327

Petitioner,

vs.

THOMAS GRICE,

Respondent.

BRIEF OF **AMICUS CURIAE**,
SCHOOL BOARD OF HILLSBOROUGH COUNTY

ELLEN LORENZEN, ESQUIRE
JOHN R. DIXON, ESQUIRE
Barr, Murman, Tonelli, Herzfeld & Rubin
Post Office Box 172118
Tampa, FL 33672-0118
(813)223-3951
Florida Bar No. 260843
Florida Bar No. 930512

Counsel for Amicus Curiae,
School Board Of Hillsborough County

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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, 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 has requested leave by this Court to file this brief in support of Petitioners' position.

SUMMARY OF ARGUMENT

The Workers' Compensation Act is designed to both shift a portion of the costs of industrial injuries onto industry and its consumers and to encourage a prompt return to work following an employee's accident. Accordingly, the Courts 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. Obviously, an injured worker has a financial incentive 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. 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."

The issue herein is not whether the claimant's workers' compensation benefits and pension benefits must be included within the 100% cap. 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%.

Therefore, when an injured worker receives Social Security disability benefits following an industrial accident, the employer continues to provide his "**full wages** or any part thereof during the period of disability." 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 of whether the employer has paid the employee's "**full wages** or any part thereof during the period of disability."

ARGUMENT

SECTION 440.20(15), FLA. STAT. (1985), BARS A
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 enacted the workers' compensation act. Chapter 17481, Laws of Florida (1935). In considering the purpose of this legislation, this Court early on noted in Duffv 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).

Thus, 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. 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 66 2/3% 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 from those wages from the Claimant's compensation checks. [§440.20(15), Fla. Stat. (1985)]. When there has been an overpayment of compensation by the carrier to an injured worker, the carrier is entitled to recoup the overpayment under certain circumstances. Belam Florida Corsoration v. Dardy, 397 So. 2d 756 (Fla. 1st DCA 1981). Finally, 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)].

Limiting an employee to 100% of his losses has also been applied in those cases where an injured worker receives workers' compensation benefits, as well as sick pay, private disability, and pension disability benefits. From this line of cases, one overriding principle has become clear: 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. Such an exception is contrary to Florida Supreme Court authority and inconsistent with **§440.20(15)**, Fla. Stat. (1985).

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. Under Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989), these two classes of employees are now treated identically. Nevertheless, in analyzing the issue at bar, it will be helpful to trace separately the history of these two lines of cases.

A. A BRIEF HISTORY OF 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 Comsanv, 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 5440.21:

Regardless of whether you say the workmen's compensation benefits reduce the group insurance benefits of 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]. 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 exceeded 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, 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 exceeded the claimant's average weekly wage, an offset against the claimant's workers' compensation benefits would not violate 5440.21. 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 interpretation of the I.R.C. Rule 9 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.

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

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

305 So.2d at 193.

Although this I.R.C. rule no longer appears in our Workers' Compensation Rules of Procedure, 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 wages or any part thereof during the period of disability . . . the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded . . . (Emphasis added).

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 the Court in Dept. of Highway Safety & Motor Vehicles v. McBride, 420 So. 2d 897 (Fla.1st DCA 1982), "[t]he rulings in Hoagey, [Jewel Tea] and Brown effectively synthesize the interplay between Sec.440.21 and **Sec.440.20(15)**. . . ." Thus, the First District appears to have overlooked **§440.20(15)** when it recently stated that "there is no statutory provision in chapter 440 authorizing the limitation directed in the Barrasan opinion." City 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). See also, 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).'

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 average weekly wage.

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

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 average weekly wage. (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

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.

disability, pension or other like benefits, whether paid or furnished in whole or in part by the employer, or contributed to by the employee, 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, to the extent that the combined benefits exceed the average weekly wage, the fact that the claimant may have partially funded the collateral disability benefits is irrelevant in determining whether there should be an offset.

B. A BRIEF HISTORY OF OFFSETS FOR PUBLIC EMPLOYEES

Initially, Jewel Tea and Brown 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. Barragan v. City of Miami, 545 So. 2d 252, 254 (Fla.1989).

In 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

Chapter 28236, Section 1, Laws of Florida (1953).

The interpretation of this statute was at issue in City 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.

138 So.2d at 754.

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 the courts 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." City 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. City 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).

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 employee. (Emphasis added).

238 So.2d at 754.

Thus, unlike 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 were payable. See, Barracran v. City of Miami, 545 So. 2d 252, 254 (Fla. 1989).

In 1973, the legislature repealed §440.09(4). 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." Barragan 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 wa 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. Knisht, 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. Barrasan, 517 so. 2d 99 (Fla. 1st DCA 1988).

In Barrasan v. Citv 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 Knisht. 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.

This lesser offset was mandated by §440.20(15),
Fla.Stat. (1985):

Under 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. OFFSETS TODAY

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. Section 440.21, Fla.Stat. precludes any such offset until a claimant has received a combination of benefits which equals his pre-injury wage, regardless of whether the collateral benefits were funded by the employer or by the employee. Furthermore, whenever the employer pays the claimant's "full wages or any part thereof," §440.20(15), Fla.Stat. (1985) mandates that the total benefits be reduced so that they do not exceed the employee's average weekly wage.

Therefore, the issue before the Court is not whether the combination of pension benefits and workers' compensation benefits should be allowed to exceed the average weekly wage. Indeed, this issue was resolved by Barragan. Instead, the issue is whether the claimant's Social Security disability benefits should be included in the 100% cap. Although there appears to be no case law

specifically addressing this issue, i.e., whether the three-way combination of Social Security disability, workers' compensation, and pension benefits should not exceed the average weekly wage, 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). 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)]. Thus, Social Security disability benefits are analogous to benefits received from a private disability policy whose premiums are 50% funded by the employer. Just as the employer in Brown funded the Aetna disability policy, every 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 Norty 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 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, §440.51, Fla. Stat. (1985), the Court implicitly recognized that the employer did pay a "part thereof" of the employee's wages.

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 City 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 pension, 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 Barrasan 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). Nevertheless, 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 contractual 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 the present case, the First District recognized that the claimant's interpretation of Barracran was incorrect:

As for the claimant's interpretation of the Barrasan 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 Winchester was 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 Barragan and **\$440.20(15)** was inappropriate. The Court's reluctance

to include these benefits was 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 80% of the ACE, whichever is treater. 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 \times 662/3\% = \389.25).³ Eighty percent (80%) of the

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 **662/3%** 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

Claimant's Aww is \$467.10 ($\$583.88 \times .80 = \467.10). Eighty percent (80%) of the claimant's ACE is \$1,514.40 per month (R. 46, 51), or \$349.48 per week ($\$1,514.40 \times 12 \div 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)⁴ is \$710.00 per month (R. 46-47, 51), or \$163.85 per week ($\$710.00 \times 12 \div 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)]. See 20 CFR §404.408(c)(2); Robert E. Francis, Social Security Disability Claims, §2.15, Example 4.

\$583.88

per week. ($\$583.88 \times 662/3\%$) + [$\$583.88 \times 662/3\%$] 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. Eaues v. Best Knit Textile Corporation, 382 So.2d 738 (Fla. 1st DCA 1980).

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

\$163.85 [weekly SS benefits]
+ 303.25 [state WC benefits after offset]⁵
\$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 \times 12 \div 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. >. Weekly at

⁵ This amount includes the PT supplemental benefits since they are included within the 80% 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. This figure appears to have been derived by using the claimant's current state disability retirement benefit of \$904.59 per monthly (R. 61) which figure includes cost-of-living adjustments made since the original award ($\$904.59 \times 12 \div 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 Barrasan and §440.20(15). City of North Bay Village v. Cook, 617 So.2d 753 (Fla. 1st DCA 1993).

D1864. Because the question herein involves the proper 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-
 - (8) 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 anv other law or plan of the United States, a State, a political subdivision...(emphasis added).

The statutory language emphasized above is broad enough to encompass the disability retirement benefits received by the claimant in the case at bar. See also, 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 Administration.

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 Dent. of Highway Safety & Motor Vehicles v. McBride, 420 So. 2d 897 (Fla. 1st DCA 1982). This is not the case.

As stated earlier, there is no indication in Jewel Tea that the claimant's combined disability and workers' compensation benefits exceeded 100% of his average weekly wage. Thus, that case is to be distinguished for the case at bar. This distinction was

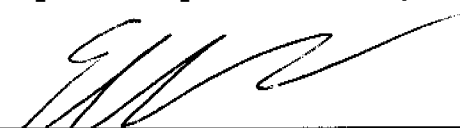
made clear by this Court in its later decisions in Brown and Domutz. Moreover, to the extent that Jewel Tea could be read to preclude any form of offset when the claimant has contributed to the pension disability benefits, such a reading is inconsistent with the First District's own decision in City of Miami v. Smith, 602 So.2d 542 (Fla.1st DCA 1992). In that case, the First District mandated a Barrasan 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,



Ellen Lorenzen, Esquire
Florida Bar Number 260843
John R. Dixon, Esquire
Florida Bar Number 930512
Barr, Murman, Tonelli,
Herzfeld & Rubin
Post Office Box 172118
Tampa, FL 33672-0118
(813) 223-3951

CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of October, 1995, , I mailed a true and correct copy of the foregoing Brief of Amicus Cruiae by placing a copy thereof in the United States mail, postage prepaid, addressed to the following:

Michael J. Valen, Esq.
317 South Baylen Street
Suite 500
Pensacola, Florida 32503

James F. McKenzie, Esq.
905 East Hatton Street
Pensacola, Florida 32503

