IN THE SUPREME COURT OF FLORIDA
ON CERTIFIED QUESTION FROM
THE FLORIDA FIRST DISTRICT COURT OF APPEAL

Case No. 93,800

CITY OF CLEARWATER, :

Petitioner, :

v. :

JUDI ACKER, :

Respondent. :

BRIEF OF AMICUS CURIAE, CLEARWATER FIRE FIGHTERS ASSOCIATION, INC., LOCAL 1158, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AND FLORIDA PROFESSIONAL FIREFIGHTERS, INC., INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO

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Statement of the Case and Facts

The Amicus Curiae, Clearwater Fire Fighters Association, Inc., Local 1158, International Association of Fire Fighters, AFL-CIO, and Florida Professional Firefighters, Inc., International Association of Fire Fighters, AFL-CIO, accepts the Statement of the Case and Facts given by the Petitioner.

Summary of Argument

In coordinating the payment of workers' compensation benefits with service-connected disability pension benefits for the same injury, the cap on the combination of benefits should be 100% of the workers' compensation average weekly wage converted monthly, or the pension average final compensation calculated monthly, whichever is the greater.

In coordinating the payment of workers' compensation benefits with service-connected disability pension benefits for the same injury, workers' compensation is primary and should be paid first. Any offset on account of the 100% cap should go to the benefit of the employee's pension trust fund.

In coordinating the payment of workers' compensation benefits with service-connected disability pension benefits for the same injury, supplemental benefits and cost of living adjustments, whether they are related to the workers' compensation benefit or the pension benefit, should not be included in the offset calculation.

Argument

Point I

AN EMPLOYER WHO TAKES A WORKERS' COMPENSATION OFFSET UNDER SECTION 440.20(15), FLORIDA STATUTES (1985), AND INITIALLY INCLUDES SUPPLEMENTAL BENEFITS PAID UNDER SECTION 440.15(1)(e)(1), FLORIDA STATUTES (1985), IS ENTITLED TO RECALCULATE THE OFFSET BASED ON THE YEARLY 5% INCREASE IN SUPPLEMENTAL BENEFITS

(Petitioner's Point I)

The Petitioner, City of Clearwater, seeks permission from this Court to be relieved of its responsibility to pay the supplemental benefit for permanent total disability to the Respondent, Judi Acker, even though the payment of that benefit is mandated by the Florida Legislature in §440.15(1)(e)1, Fla. Stat. (1985). This was the statute in force on the date of the Respondent's accidents. It is now denominated as §440.15(1)(f)1, Fla. Stat. It provides:

> In case of permanent total disability...the injured employee shall receive additional weekly compensation benefits equal to 5 percent of his weekly compensation rate, as established pursuant to the law in effect on the date of his injury, multiplied by the number of calendar years since the date of injury. The weekly compensation payable and the additional benefits payable pursuant to this paragraph, when combined, shall not exceed the maximum weekly compensation rate in effect at the time of payment as determined pursuant to s. 440.12(2).

The statute then goes on to refer to these benefits as "supplemental benefits."

The reason the Petitioner argues that it should be relieved of the obligation of complying with this statute, is this Court's decision in *Escambia Co. Sheriff's Dept. v. Grice*, 692 So. 2d 896 (Fla. 1997). (Petitioner's Brief 7-8.)

Compensation for permanent total disability became a lifetime benefit June 30, 1955, at which time the maximum weekly compensation rate was $35.00 per week. §440.12(2), Fla. Stat. (1955).

Since that time, the maximum weekly compensation rate pursuant to §440.12(2), Fla. Stat., has increased in increments over the years to $494 per week in 1998.

MAXIMUM WEEKLY COMPENSATION
ALLOWED FOR ACCIDENTS AFTER:

June 30, 1959	$ 42.00	(60% AWW)
December 21, 1967	49.00	"
June 30, 1970	56.00	"
June 30, 1972	66.00	"
July 1, 1973	80.00	"
January 1, 1975	105.00	"
January 1, 1976	112.00	"
January 1, 1977	119.00	"
January 1, 1978	126.00	"
January 1, 1979	130.00	"
July 1, 1979	130.00	(66 2/3% AWW)
August 1, 1979	195.00	"
January 1, 1980	211.00	"
January 1, 1981	228.00	"
January 1, 1982	253.00	"
January 1, 1983	271.00	"
January 1, 1984	288.00	"
January 1, 1985	307.00	"
January 1, 1986	315.00	"
January 1, 1987	330.00	"
January 1, 1988	344.00	"
January 1, 1989	362.00	"
January 1, 1990	382.00	"
January 1, 1991	392.00	"
January 1, 1992	409.00	"
January 1, 1993	425.00	"
January 1, 1994	444.00	"
January 1, 1995	453.00	"
January 1, 1996	465.00	"
January 1, 1997	479.00	"
January 1, 1998	494.00	"

"Florida Workers' Compensation Reference Manual", at 657 (FWCI 1998).

If the argument of the Petitioner were accepted, then employees who were injured years ago and are receiving a disability pension and who are permanently totally disabled, would have their supplemental benefits cut off at their own average weekly wage. For example, anyone injured between 1959 and 1967 could be capped off at $70 a week (60% of $70 is $42).

The Petitioner's argument that disability pensions are wages under §440.20(15), Fla. Stat., is contrary to *Coleman v. City of Hialeah*, 525 So. 2d 435 (Fla. 3rd DCA 1988); rev. denied, 536 So. 2d 243 (Fla. 1988). Wages are pay for services performed. §440.02(21), Fla. Stat. (1985). Disability pensions are not wages but an entitlement for inability to work. *Coleman*, supra at 437.

Following the 1972 "Report of the National Commission on State Workers' Compensation Laws", the Florida Legislature enacted a number of recommended changes in 1974. The maximum weekly compensation rate was changed to 100% of the state average weekly wage for the previous year. §440.12(2)(b), Fla. Stat. (1974). The supplemental benefit for permanent total disability was created at that same time. §440.15(1)(e), Fla. Stat. (1974). Under the 1974 amendment, the supplemental benefit was paid to those persons who were permanently totally disabled by the Workers' Compensation Trust Fund beginning October 1, 1974. Ibid. Today, this trust fund is maintained by the Florida Department of Labor and Employment Security, Division of Workers' Compensation. The 1974 language did not specifically refer to the cap on payments being the maximum weekly compensation rate in force at the time that payment was made. Rather, it simply referred to the cap as the maximum weekly compensation rate in §440.12(2), Fla. Stat.

In the original decision in *The Polote Corp. v. Meredith*, 10 FLW 2340 (1st DCA, October 10, 1985), the First District Court of Appeal held that the

5% supplemental benefit was not payable to the claimant, Bradley Meredith, because: "Claimant was already entitled to the maximum weekly benefit under the Act at the time of injury and would not receive any supplemental benefits." "1984-1985 Fla. Workers' Compensation Cases", at 396.

The Department of Labor and Employment Security, Division of Workers' Compensation, filed a motion for rehearing and rehearing was granted. The earlier opinion was withdrawn. *The Polote Corp. v. Meredith*, 482 So. 2d 515 (Fla. 1st DCA 1986).

In that case, the Court pointed out that the Division of Workers' Compensation had a longstanding policy by which it had interpreted the 1974 statute to mean that an employee who was permanently totally disabled was entitled to the 5% supplemental benefit, not capped at the maximum rate at the time of his own accident, but up to the maximum rate in force at the time the payment is made. Id. at 517. The Court further noted that Chapter 84-267, Laws of Florida, added the language that "...the supplemental benefit is limited by the maximum weekly compensation rate in effect at the time of payment as determined pursuant to s. 440.12(2)." *The Polote Corp. v. Meredith*, supra at 517.

Plainly, the Florida Department of Labor and Employment Security, Division of Workers' Compensation, told the First District Court of Appeal in 1986 of its longstanding policy that those who were permanently totally disabled were entitled to the supplemental benefit up to the maximum compensation rate in force in the year in which payment is made. *The Polote Corp. v. Meredith*, supra at 517.

The statute was further changed by the Legislature in 1984 to provide that for accidents that occurred after July 1, 1984, resulting in permanent total disability, the employer/carrier and not the workers' compensation

administrative trust fund would pay the supplemental benefit for permanent total disability. Clearly, then, the Legislature has mandated the City of Clearwater to pay the supplemental benefit for permanent total disability to Judi Acker up to the maximum weekly compensation rate in force in the year of payment. An employee who is permanently totally disabled due to an accident in the past has no hope of any further wages or earnings from work. A worker that seriously disabled is entitled to this cost of living adjustment, but it is limited to the maximum amount that could be paid to a person who became disabled in the year in which the payment is made.

The lifetime permanent total disability benefit that has been available since 1955 is not the only benefit that has existed in the workers' compensation law that could be subject to the long term effects of inflation.

When the Legislature created the wage loss benefit for a disability that was permanent in duration but partial in quality, the Legislature provided that in the 25th month following maximum medical improvement, post-recovery wages would be discounted 5% per year, or the rate of inflation using the National Consumer Price Index, published by the United States Department of Labor, whichever is less. §440.15(3)(b)5c, Fla. Stat. (1979).

In this regard, the Division of Workers' Compensation was given a mandate by the Legislature:

> The Division shall keep such records and conduct such investigations as are necessary to determine the feasibility of providing additional protection from inflation for workers entitled to wage-loss benefits and shall report its findings to the Legislature not later than March 1, 1981.

§440.15(3)(b)6, Fla. Stat. (1979).

It may well be that this report was never prepared. This language was subsequently deleted by statutory revision after the expiration date. Nonetheless, this, too, demonstrates that the Legislature was aware that long-term workers' compensation payments require some cost of living adjustment (COLA).

The 5% supplemental benefit for permanent total disability is a Legislative determination of what is an appropriate one. Rather than deal with the specific variations that exist from place to place or from time to time, the Legislature determined that 5% of the employee's compensation rate per year was an appropriate amount, keeping in mind that it is always capped at the maximum rate for the year of payment, the maximum that any person could possibly receive in that same year. There are Consumer Price Indexes for various locations in the United States which recognize the differences from place to place. There is no index for differences within the State of Florida, for example, Boca Raton vs. Sopchoppy. All indexes take into account differences in the real value of a dollar from one period of time to another.

Pensions

State workers' compensation laws were examined by the Federal government in the early 1970's. This produced considerable reform, not only in Florida, but also in other states as well. At the same time, Congress was also examining employee pensions, which ultimately produced the Employee Retirement Income Security Act of 1974 (ERISA). Among the evils remedied by that Act, was the removal of the temptation by an employer to pay his own obligations from the employees' pension trust fund. 29 U.S.C. §1001, 1103(c)(1).

ERISA applies to private industry. It does not apply to local government. At the time it was under consideration, there was an amendment to apply it to local government (PERISA), but local government urged Congress to stay its hand. Pension reform for local government was left to the states. In Florida, this occurred in a number of different ways. One was the repeal by §2, Chapter 73-127, Laws of Florida, of §440.09(4), Fla. Stat. It had provided since 1935 that public employees could not receive both their workers' compensation and their pensions at the same time. The now repealed statute had provided that pensions were reduced by workers' compensation received.

The Florida Retirement System (FRS) was created in 1970, which is compulsory for the state and the counties and voluntary for those cities who cared to join. §121.051, Fla. Stat. It was originally contributory by employees, but in 1974 it was made non-contributory by employees. Ch. 74-302, §4, Laws of Fla. In 1978, there was further pension reform. The Legislature created Part VII of Chapter 112 of the Florida Statutes which has the short title "Florida Protection of Public Employee Retirement Benefits Act." §112.60, Fla. Stat. Again, it should be noted this statute applies to government employment. It does not apply to private industry.

Section 112.65, Fla. Stat. (1985), provides:

> (1) The normal retirement benefit or pension payable to a retiree who becomes a member of any retirement system or plan and who has not previously participated in such plan, on or after January 1, 1980, shall be limited in the following manner:
> (a) If such member does not receive social security benefits, his pension benefit shall not exceed 100 percent of his average final compensation.
> (b) If such member receives social security benefits, the sum of the member's pension benefit and the primary social security benefit the member receives shall not

> exceed 100 percent of the member's average final compensation.
>
> (c) Nothing contained in this section shall apply to supplemental retirement benefits or to pension increases attributable to cost-of-living increases or adjustments.

The current statute is shorter and does not mention social security. The words "or pension payable" could be interpreted to include benefits other than normal retirement, such as a disability retirement.

Again, the Legislature has recognized that there are supplemental retirement benefits and cost of living increases or adjustments. It was the Legislature's determination that these amounts were not included in the cap on benefits of 100% of average final compensation.

The Respondent was a police officer employed by the Petitioner, City of Clearwater.[1]

There is a specific act entitled the Municipal Police Officers' Retirement Trust Funds Act contained in Chapter 185 of the Florida Statutes. It has a companion for fire fighters employed by municipalities entitled the Municipal Firefighters Pension Trust Funds Act contained in Chapter 175 of the Florida Statutes. These acts impose a tax on casualty insurance for city police officers and fire insurance for city fire fighters respectively, which is paid on insurance premiums and sent by the insurance carriers to the state treasurer/insurance commissioner/fire marshal. §185.07-08, Fla. Stat.; §175.091-101, Fla. Stat. At one time, if his office and now the Division of Retirement, determines that a city has a pension plan that meets the minimum standards of state law, then the State of Florida sends this money to the city for the purpose of providing pension benefits to police officers and fire fighters respectively. Section

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[1] The City's pension plan was employee contributory and it had no cost-of-living adjustment.

185.35, Fla. Stat., sets the minimum standards for the pension funds for police officers in order for the city to receive the tax monies established by Chapter 185. Section 185.35(2), Fla. Stat., provides that a municipality must place the income from the insurance premium tax into its existing pension fund "...for the sole and exclusive use of its police officers (or for firefighters and police officers where included), where it shall become an integral part of that fund, or may use the income to pay extra benefits to the police officers included in the fund." There is a mirror image of this provision in Chapter 175 for firefighters. §175.351(13), Fla. Stat.

In the present case, the employer is the City of Clearwater, which has a basic pension plan for its employees together with supplemental plans for its police officers and firefighters under Chapter 175 and 185. Code of the City of Clearwater, Florida, Sec. 2.391 et seq.

At the time of Acker's injury, the City of Clearwater had a provision in its pension ordinance for the offset of pension benefits by the receipt of workers' compensation, which was similar to that of the City of Miami. Such an ordinance was declared invalid in the case of *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989).

After the repeal of §440.09(4), Fla. Stat., by the Florida Legislature, the City of Miami continued to offset workers' compensation against disability retirement, under authority of its own City Ordinance. However, the manner in which it did this was reprehensible. The manner of this is described in *Barragan* and its companion cases, *City of Miami v. Gates,* 393 So. 2d. 586 (Fla. 3rd DCA 1981) [Gates II], *City of Miami v. Gates,* 592 So. 2d 749 (Fla. 3rd DCA 1992) [Gates III].

In the case of employees who were permanently totally disabled, the City of Miami paid workers' compensation, but then deducted the amount of

workers' compensation paid by the City from the monthly disability pension checks. However, at the end of the year, the City, which was also the administrator of the pension trust, then wrote a check from the pension trust to the City to reimburse the City for the workers' compensation that was paid. This check was equal in the aggregate to the amount that had already been deducted from the employees' pensions. Thus, when all of these Byzantine transactions had been completed, the employees received nothing more than what the amount of their disability pensions would have been without any workers' compensation payments and the City paid no workers' compensation at all. The Third District Court of Appeal clearly stated that the City had misused its employees' pension trust fund to pay the City's statutory obligations to pay workers' compensation benefits. *Gates II* at 587-588.

The Third District Court of Appeal in *Gates II*, condemned the City's conduct.

In *Barragan v. City of Miami*, supra, this Court declared the City's actions unlawful because the employees of the City had to contribute to their own disability pension trust from their weekly payroll checks. The Court concluded that the City of Miami's arrangement violated the criminal provisions of §440.21 of the Florida Statutes, which prohibit an employer from requiring an employee to contribute to his own workers' compensation benefits. This Court held in *Barragan* that under the Home Rule Powers Act, the City did not have the authority to enact an ordinance that conflicted with state law. The Florida statute authorizing an offset had been repealed. It did not matter which way the offset went. *Barragan v. City of Miami*, supra, at 254. The result was the same: an illegal offset. Ibid. The decision became final July 14, 1989. In a subsequent decision, *City of Miami v. Bell,*

634 So. 2d 163 (Fla. 1994), this Court held that the *Barragan* decision operated prospectively, at least in regard to the City of Miami.[2] In the present case, the City of Clearwater, recognizing the impact of the *Barragan* decision upon its own ordinance, paid the claimant her workers' compensation and her disability pension in accordance with that decision from July 15, 1989, following *Barragan*. (Petitioner's Brief 3.)

Barragan stands for essentially two ideas.

The first is that in coordinating benefits between workers' compensation and disability retirement, there is a cap which is the average monthly wage. The Court did not define average monthly wage and this phrase is found no where else in the law. However, it is generally thought that it means the workers' compensation average weekly wage multiplied by 4.3, converting it to a month, since the pension benefits were paid on a monthly basis.

The Court never explained what was the basis for establishing the cap.

The second is that in coordinating workers' compensation with a disability pension for the same injury, in a pension system in which the employee is a contributor, the workers' compensation payments are primary because of §440.21, Fla. Stat., provisions with respect to employee contributions. The pension fund payments would then be secondary.

The dissenting judge in *Barragan* said that the decision was equitable, but that the Court was legislating.

Wherever the cap came from, it was technically flawed in one respect. If we combine workers' compensation payments for injury with

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2 It has not been decided whether the prospective application of *Barragan* under *Bell* applies to any city other than the City of Miami. It may not.

pension payments for the same injury and say that they must be capped at 100%, why did the Court conclude that it was the workers' compensation "average weekly wage" and not the pension "average final compensation"? The Court never discussed this, nor even indicated that it considered that it should be the one or the other. Obviously, in any given case, in some instances the average weekly wage would be higher than the pension average final compensation, but in other cases, it would be just the reverse and in some instances, by chance, they might be the same. That the Court picked one base calculation to the exclusion of the other, seems to have been overlooked. Both calculations are statutory attempts to define a base amount of what were the employee's earnings, that a disability payment is designed to replace. In the present case, average final compensation is defined in §185.02(2), Fla. Stat., as being 1/12th of the average annual compensation of the 5 best years of the last 10 years of creditable service prior to retirement. Whereas, average weekly wage is defined in §440.14, Fla. Stat., as being 1/13th of the earnings in the 13 weeks prior to the industrial accident.

Since the *Barragan* cap rule required the placement of a cap on the combination of payments from two difference sources, it would have made more sense to have said that the cap was 100% of what was the base that was used to calculate either one or the other of the two payments, whichever was the higher. On that basis, the *Barragan* cap should have been 100% of the workers' compensation average monthly wage or 100% of the pension average final compensation, whichever of the two was the greater. The Court should note that in the case of workers' compensation, it is the law in force on the date of accident that controls entitlement. *Sullivan v. Mayo,* 121 So. 2d 424 (Fla. 1960). In the case of a work-connected disability

retirement, the occurrence of the accident does not give rise to any entitlement. Rather, the benefit is payable when the service-connected disability becomes permanent and total, which ordinarily would be at a much later date. See *Nuce v. Board of Trustees for the City Pension Fund for Firemen and Policemen in the City of Miami Beach,* 246 So. 2d 610 (Fla. 3d DCA 1971).

In any event, the workers' compensation average weekly wage and the pension average final compensation will be calculated differently. In coordinating the two benefits derived from those two calculations, either one should be usable. The greater of the two would establish the correct cap.

The second part of the *Barragan* decision was eminently clear that the workers' compensation payment was primary and that whenever the cap was reached, the workers' compensation was paid in full and any offset went to the benefit of the pension fund.

Workers' compensation benefits are a vested property right. *Florida Forest and Park Service v. Strickland,* 18 So. 2d 251 (Fla. 1944).

Pension benefits are also a vested property right upon retirement. *Florida Sheriffs Association v. Dept. of Administration,* 408 So. 2d 1033 (Fla. 1981).

In deciding how to coordinate these two vested property rights whenever the combination of the two of them exceeds 100% of either the average weekly wage or the average final compensation, the Court would have to balance those two property rights to produce the most reasonable result, but always keeping in mind the applicability of statutes. Thus, §440.21, Fla. Stat., in the *Barragan* case dictated that workers' compensation would be primary where the employee contributes to his own pension. After *Barragan*, the workers' compensation system knew what it was supposed to

do in coordinating workers' compensation with service-connected disability pensions for the same injury. Then, however, came *Escambia County Sheriff's Dept. v. Grice*, 692 So. 2d 896 (Fla. 1997).

Grice has given real life meaning to the sign in the office of the Secretary of the Department of Labor of the United States government in Washington, D.C.: "Every solution to a problem creates a new problem that is harder to solve."

In *Grice*, the employer was Escambia County and the employee, Grice, was a deputy sheriff. Counties are not members of Chapter 185 plans. Instead, they are compulsory members of the Florida Retirement System (FRS) provided for in Chapter 121. Unlike the Chapter 185 plans for municipalities which are employee-contributory, the Florida Retirement System under Chapter 121 is not employee-contributory. Therefore, §440.21, Fla. Stat., relied upon by the Court in *Barragan* would not apply. In *Grice* this Court reaffirmed its holding in *Barragan* that the cap is 100% of the average monthly wage. Again, it was not argued, and the Court seems not to have considered, that the cap should have been either the "average final compensation" as defined in the Florida Retirement System, §121.24, Fla. Stat., or the average weekly wage as defined in §440.14, Fla. Sta., whichever is the higher.

Grice is nothing new as to the first issue. It is the same as *Barragan*. It is to the second issue that there is a difference with *Barragan*. *Grice* cites *Barragan* with approval, but then as to the second issue: which is primary, the workers' compensation payment or the pension payment; *Grice* reaches the exact opposite conclusion. The Court does not explain why. In *Grice*, the Court held that the pension payment is paid first and if the combination with workers' compensation reaches the cap of the average monthly wage,

then the workers' compensation is reduced accordingly. It is this holding that the Petitioner relies on in the present case to argue that the supplemental benefit, a cost of living adjustment, should not be paid to the Respondent.

The first thing to notice about *Grice* is that the pension trust in the *Grice* case was not under the auspices of the employer, Escambia County. Instead, it was under the auspices of the State of Florida. This differed from the *Barragan* case in which the Court commented upon the City's objection that when the City was before the Court in its workers' compensation role, it was not before the Court in its pension role. The Court rejected that argument in *Barragan*, saying there was only one City of Miami. Therefore, the City of Miami was before the Court in both roles, workers' compensation and pension. In *Grice*, that was not true. The employer, Escambia County, was before the Court, but the pension trust was not. The State of Florida, Division of Retirement (FRS) was not a party to the case. It was not even an amicus curiae. Yet, the Court held that the local government, Escambia County, won the case and the State of Florida, Division of Retirement (FRS) lost, even though the State of Florida, Division of Retirement (FRS) was not a party to the case and was never given an opportunity to express its views. The State of Florida, Division of Retirement (FRS) lost money in *Grice* itself, and also lost money in any similar case because the *Grice* decision held that the pension had to be paid first and that the employer would get the benefit of any overage by deducting its workers' compensation payments accordingly. Thus, this Court adjudicated the rights of the State of Florida, Division of Retirement (FRS), without affording the State of Florida, Division of Retirement (FRS), an opportunity to be heard. This Court decided a dispute between state government and

local government in favor of local government without affording the state government an opportunity to be heard. While it would be unusual to revisit a case so soon after it is decided, nonetheless, it is appropriate to do so in the present case because the views of the State of Florida, Division of Retirement (FRS), and others were never considered by the Court in the *Grice* case. The State of Florida, Division of Retirement (FRS), had it been given the opportunity to be heard, could have made the argument that the giving of the offset to Escambia County was unjustified.

In the First District Court of Appeal case of *H.R.S. District II v. Picard* (Fla. 1st DCA Case No. 98-01097), the State of Florida, Division of Retirement (FRS) has filed a brief as amicus curiae in which it sets forth its position on the same issues that are now before this Court in the present case. The State of Florida, Division of Retirement (FRS), contends that workers' compensation should be paid first and that the pension fund should get the benefit of any offset. It also states its position that the supplemental benefit for permanent total disability should be paid apart from any cap on the combination of workers' compensation and pension benefits. The brief of the State of Florida, Division of Retirement, in that case is attached to this brief as an appendix so that this Court may have the benefit of the views of the State of Florida, Division of Retirement, on these issues. Obviously, it would be helpful to this Court in deciding the present case, to now have the views of the Division of Retirement.

Policy Reasons Why Workers' Compensation Should be Paid First

There are a number of reasons why workers' compensation should be paid first and the offset should go to the benefit of the pension fund and not the other way around as was done in *Grice*.

Workers' compensation is an item of overhead which is borne by the industry served and passed on to the consumer by the price of goods or services, albeit in the case of government, in the form of taxes. See *Florida Game & Fresh Water Fish Comm. v. Driggers*. 65 So. 2d 723 (Fla. 1953); 1 Larson, "The Law of Workmen's Compensation", §2.20, at 1-6; §2.70 at 13; §3.20 at 1-15, 1-16 (1993 revision).

Government is treated under the Florida Workers' Compensation Law no different than private industry. §440.02(12), Fla. Stat. (1985). Sovereign immunity is completely waived as the Legislature specifically provided that the government and private employers are to be treated the same. §440.02(12), Fla. Stat. (1985).

Where the pension fund is primary and the offset goes to the benefit of workers' compensation, thus reducing workers' compensation costs, the aggregate amount paid may be the same, but the workers' compensation experience is now distorted and distorted falsely. The experience would be shown to be small when, in fact, it was large. For example, the employer has a service-connected disability program that pays 85% of average final compensation for a permanent total disability.[3] If workers' compensation is paid first, then the experience is the same as an employer who has no pension plan at all or who has one that has small benefits. If the process, however, is reversed as required by the *Grice* case, then the pension fund pays most of the money and it appears that only a small percentage, all things being equal, say 15% of the salary, was paid for workers' compensation. This distorts the experience of the industry involved and adversely affects those employers who have no pension plans at all or who have pension plans of lesser benefits. Premiums for workers'

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[3] E.g., City of Miami Beach

compensation are based on payroll times a rate for the industry taken as a whole. Larson, op. cit., supra. To artificially and falsely distort that formula by paying benefits from a pension fund destroys not only the theory of workers' compensation, but adversely affects the payments to be made by various employers within the industry, depending upon whether they have a pension fund or not, and how much it pays.

In the case of government, it is actually worse than that, because making the pension fund primary per *Grice* is the most expensive way to make the payments, at least as far as the taxpayer is concerned. The reason for this is that Part VII of Chapter 112 requires that pension benefits, whether they are for regular retirement or whether they are for disability, be funded on a sound actuarial basis. This has a foundation in the constitutional requirements of Article 10, Section 14 of the Florida Constitution.

This means that when a permanent total disability retirement is awarded, the pension fund must have available the actuarial funding for permanent total disability payments for the remainder of the employee's life. Where there is also a survivorship benefit, then this is not only for the employee's life, but for the beneficiary's life as well. Workers' compensation does not require such extensive funding of benefits. Rather, reserves can be established and rotated over a 3-year basis, for example, without any difficulty. To put it simply, the law requires that the pension plan be funded by the taxpayers prior to the employee's retirement and that future taxpayers not pay for his benefit. §112.61, Fla. Stat. Workers' compensation does not require that extensive a degree of funding. The Court might then wonder why the State of Florida, Division of Risk Management, has filed a brief as amicus curiae urging the position that the

pensions should be paid first and that the benefit of the offset should go to the employer. As far as the taxpayer is concerned, that is the most expensive way of doing it. The reason for it, however, has more to do with the non-legal maxim "Show me the money."[4] The point is: whichever budget or fund has cash available to make the payment, is not a legal consideration. It may be a consideration for a risk manager as a practical matter, but his judgment is clouded. One employer may have a risk management fund that is short of money and a pension fund that is flush with cash. Such an employer would prefer that the benefits be paid from the pension trust first. Another employer might prefer the opposite and either one might prefer something else in a different year. A rationale that says let whomever has the most money, make the payments, does not work. Indeed, although the State of Florida, Division of Risk Management, urges that the pension payments be made first and that workers' compensation have the benefit of the offset, the State of Florida, Division of Retirement (FRS), urges just the opposite position, that workers' compensation be paid first and that the pension trust fund get the benefit of any offset. Thus, is realized Judge Hugh Taylor's worst nightmare, that someday there would be a case in which two different departments of the State government would urge directly opposite positions upon the Court on behalf of the State of Florida: "Now we will hear from the State." Which one?

There is another, hopefully, unintended consequence of requiring the pension fund to pay first by giving the offset to the employer paying workers' compensation as decided in *Grice*.

The State of Florida, Division of Workers' Compensation, is not paid for by tax dollars. §440.51, Fla. Stat. Rather, there is an assessment on

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4 From the motion picture "Jerry Maguire"

workers' compensation insurance premiums collected by insurance companies and a like amount as though there had been insurance upon self-insured employers, to pay for the cost of the Division of Workers' Compensation. §440.51, Fla. Stat.

It is the Division of Workers' Compensation that pays the supplemental benefit to the people who are permanently totally disabled and were injured before 1984. §440.15(1)(f)1, Fla. Stat. (1998) It also pays for the rehabilitation, education and retraining of injured workers under §440.49, §440.491(6), 440.50, Fla. Stat. (1998). It pays for the adjudicatory processes, and also the enforcement to require employers to comply with the law and provide insurance coverage and other functions.

As the Court decided in *Grice*, that the payments should be made by the pension trust fund first, thereby reducing the workers' compensation payments that were paid for the injury, the assessment on workers' compensation premiums would decline based on workers' compensation experience. This would reduce the revenue source for the Division of Workers' Compensation. When the payments from the pension trust fund are primary as decided in *Grice*, then the Division of Workers' Compensation gets shortchanged.

There is, of course, another reason, not so much legal, but more in the way of moral, why workers' compensation should be primary and pension payments secondary. An employer should not be permitted to pay his own obligation for workers' compensation from an employee pension trust. The pension trust is largely for normal retirement for years of service, disability retirements being an adjunct. It is the idea of the employer raiding the employees' pension trust to pay his own obligations which the Federal government sought to remedy, among other things, in

enacting ERISA. Insofar as the maxim is concerned that no one was careful until the law made it too expensive not to be careful, the payment of workers' compensation benefits gives employers an economic incentive to seek and foster industrial safety. Paying workers' compensation from a pension trust designed to provide normal years-of-service retirement, defeats that purpose.

It is unfortunate that in *Grice* the Court also mentioned that Social Security went into the mix of the *Grice* offset because this mention was superficial. The whole matter of Social Security offsets is the subject of Federal regulation and State regulation. 29 U.S.C. §424a(a) and §440.15(9), Fla. Stat. (1985). If Social Security were to be mentioned at all, it should have been qualified by the Court. In *Grice*, it should have been qualified with the words that it was to be considered for offsetting, but only in the manner and in the amount provided for, as allowed by Federal law. Anyone who would look at the mention of Social Security in the *Grice* decision as somehow being a new Social Security offset not provided for by Federal or State statute is misdirected. Florida is a reverse-offset state, §440.15(9), Fla. Stat. (1985), by which the Social Security offset goes to the benefit of employers who pay workers' compensation. That is to say, Social Security is primary and the workers' compensation is deducted to the 80% level, not exceeding the average weekly wage or average current earnings as provided for by Social Security. However, it should be understood that such an offset of workers' compensation is, at the present time, under Federal law, illegal. Florida is only allowed to continue to do this by a grandfather clause that was adopted at the time that the statute which had authorized reverse offsets was repealed. Pub. L. No. 97-35 (1981) amending 42 U.S.C. §424a(a). As a consequence, it is not possible for Florida to enlarge upon the Social Security

offset, thus grandfathered. To do so would be a forfeiture whereby the reverse offset would be undone. All of it would then go to the benefit of the Social Security system such that workers' compensation would then have to be paid first and any offset to the 80% level would go to the benefit of the Social Security Administration. Thus, any enlargement upon the Social Security reverse offset could result in all of the employers of Florida losing the benefit of the offset for Social Security that they now enjoy. This would be an unthinkable disaster. Social Security should be left alone. It has its own offsets. Indeed, the *Grice* decision left unanswered the question when there was a source of more than two payments, pension, workers' compensation and Social Security, which is primary, which is secondary and which is tertiary? Just so that the Court would know that the problem is actually more complicated than can be imagined, there are at least two other sources of payments: one, a third party recovery with its attendant subrogation and, at least in the former cases, a reimbursement from the Special Disability Fund.

At this, the Court should be at least suspicious that the whole matter of offsets and the whole matter of the coordination of benefits is fact intensive. Private industry is governed by ERISA, government is not. Some plans are defined benefits, others are defined contributions. Some plans are employee contributory, some are not. There are even differing tax consequences. Workers' compensation is exempt from taxation under §104 of the Internal Revenue Code. Payment for total disability which is work connected under any state statute or local governmental ordinance is also considered to be workers' compensation-like and is tax exempt so long as the amount that is paid is in no way determined by the employee's years of service or age. Private industry pensions do not enjoy this same treatment.

They are taxable. Governmental pensions may be taxable too, at least in part, where they fail that criteria. For example, the Florida Retirement System has a minimum benefit of 42% for service-connected disability, but an employee who has worked long enough or who is in one of the higher service credit categories, such as judges and police officers and fire fighters, whose normal retirement would be at greater than 42%, would be entitled to the higher benefit. In such case, the first 42% would be tax exempt, but the amount over that would not be. If we were to follow *Grice* in such a case, then part of the pension benefits would be taxable and part would not. As they are then offset against workers' compensation benefits which are totally tax free, by doing a *Grice* offset in such a case, the employee's tax free dollars would be replaced by taxable dollars. This means that a *Grice* offset is not one of equal dollars, but one in which the employee can lose money, at taxable rates. If the workers' compensation is paid first, this does not occur. Other problems that are fact intensive are whether the disability pension was for the same injury as the workers' compensation injury or for an unrelated condition or partly for the same injury. There is also the problem of whether the pension payments were for normal retirement or an early retirement for years of service unconnected with the disability at all.

It is interesting to note that following the *Barragan* decision, the Legislature enacted §440.15(12), Fla. Stat. (1990), which was a provision for coordination of benefits for government service-connected disability pensions and workers' compensation. However, this statute was repealed in 1994. Ch. 93-415 §20, Laws of Fla. If the Court believes that the manner of the coordination of benefits is better left to the Legislature, then the fact that the Legislature has provided for the coordination of benefits between

workers' compensation and Social Security, but has twice repealed the provisions dealing with coordination of workers' compensation and public employee pensions, is significant.

Conclusion

What, then, can be recommended? First of all, the cap for any coordination of benefits scheme should be the base from which each benefit was calculated and which is being coordinated; in the case of workers' compensation, the average weekly wage; in the case of pensions, the average final compensation; and in the case of social security, average weekly wage or average current earnings, whichever is the greater.

The cap should be 100% of the workers' compensation average weekly wage converted monthly or the pension average current earnings considered monthly, whichever be the greater.

As to the matter of whether workers' compensation or the pension payment should be primary, that should be a no-brainer. Workers' compensation should be paid first and if the combination of the benefits exceed the cap, then the offset should go to the benefit of the pension trust.

That being so, in the present case, we are confronted with the clear mandate of §440.15(1)(e), Fla. Stat., that the supplemental benefit is to be paid to those who are permanently totally disabled like the Respondent, Judi Acker. Following the statement of Legislative intent contained in §112.65(1), Fla. Stat., that cost of living increases or supplemental benefits are not to be included in any 100% cap, the conclusion should be reached that the employee was entitled to workers' compensation together with the supplemental benefit for permanent total disability. It is not included in any offset calculation for coordination of benefits.

The decision of the District Court should be modified accordingly.

Respectfully submitted,

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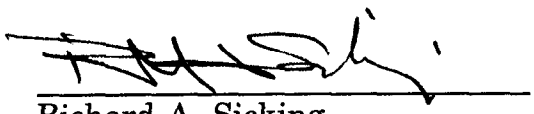

Richard A. Sicking

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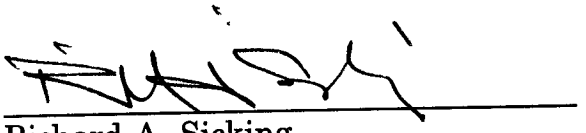

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Certificate of Service

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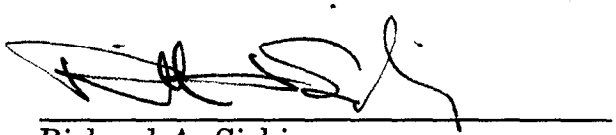

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