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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CITY OF CLEARWATER,

Petitioner,

CASE NO. 93,800

v.

JUDITH ACKER,

Respondent.

_____/

BRIEF OF AMICUS CURIAE
FLORIDA WORKERS' ADVOCATES
FILED ON BEHALF OF RESPONDENT, JUDITH ACKER

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INTRODUCTION

This Brief is filed on behalf of the Florida Workers' Advocates, Inc., Amicus Curiae for Respondent, ACKER, pursuant to the October 12, 1998 Order of the Court granting leave to file same.

Florida Workers' Advocates, Inc. is a non-profit corporation dedicated to preserving and enhancing the rights of those unfortunate enough to be injured while covered by Florida Workers' Compensation Act, Chapter 440 F.S.

Chapter 440 provides the exclusive remedy for redress of loss caused by injury arising out of and in the course and scope of employment.

All emphasis added will be that of Amicus, unless designated otherwise.

STATEMENT OF THE CASE AND OF THE FACTS

Amicus does not dispute the Statement of the Case or of the Facts presented by the Petitioner.

SUMMARY OF THE ARGUMENT

JURISDICTION OF THE COURT

Amicus will show that the Court has jurisdiction over the specific issues raised in the certified question as well as jurisdiction to consider related questions presented in the case on appeal which are not specifically covered by the certified question but which are relevant to the subject matter of the appeal.

LEGISLATIVE HISTORY

This appeal concerns both "offsets" from workers' compensation benefits paid for permanent total disability (PTD) and any "caps" on weekly compensation benefits applicable to this classification of benefit. As a general rule, 100% of the average weekly wage (AWW) has been considered the maximum amount ("cap") that an injured worker may receive from all employer sources (including the supplemental benefit paid in addition to permanent total disability benefits pursuant to 440.15(1)e Fla. Stat.(1993).

Amicus will review the history of Florida's current formula for determining AWW and thus the compensation rate (66 2/3% of AWW capped only by the statewide average weekly wage, 440.12(2) Fla. Stat.(1985)). The "statewide average weekly wage", we will show, is the product of Federal legislation and State legislation based on Federal and State definitions of "wages" that include the value of non cash payments. We will also review the method used to determine AWW in Florida at or about the time in the early 1970's when significant decisions such as **Vesta Mae Brown vs. S.S.Kresge**, 305 So.2d 191 (Fla. 1974) (**Kresge**) were published. That particular

decision held that 100% of the AWW is the "cap" on combined employer provided benefits for disability. When **Vesta Mae Brown** was injured on December 24, 1970 there was no such thing as the statewide average weekly wage. There was also no supplement to PTD. The **Kresge** case didn't even consider PTD benefits, just Temporary Total Disability benefits.

We will review both the National as well as the State political environment leading up to the enactment of the supplemental benefits for those who are deemed permanently and totally disabled. This provision was enacted as part of a sweeping set of reforms known in Florida as the "Papy" package which became effective October 1, 1974. We will analyze the legislative intent for statutory provisions relating to "offsets" and "caps" on workers' compensation benefits to show that clear expressions of intent as well as the Federal forces which prompted change in Florida, have been misinterpreted by this court, assuming prior litigants fully briefed the court on these issues.

JUDICIAL HISTORY

Amicus will trace the history of judicial decisions specifically comparing those which decided benefit issues in claims for accidents occurring prior to October 1, 1974 and those concerning benefits issues for accidents occurring subsequent to October 1, 1974. The "PAPY" package of substantial changes to Chapter 440 became effective October 1, 1974 (Laws of 1974). The "Papy" reforms were enacted in response to threats of Federal legislation establishing minimum standards for state worker's

compensation programs. The Williams-Javits Bill (S. 2008 "National Workers' Compensation Standards Bill of 1973)(Appendix A) and the issuance of the report of The National Commission on State Workmen's Compensation Laws (Appendix B) were the "stick" held over the states' head to force state reform. The United States was contending that State worker's compensation benefits and delivery systems were inadequate.

AVERAGE WEEKLY WAGE

Amicus will attempt to assist the Court in determining the meaning of average weekly wage (AWW) by referring the court to its own prior decisions as well as those from other jurisdictions. We will also raise the question and provide authority for the proposition that the current method of assessing the average weekly wage could very well be unconstitutional in that it fails to provide equal protection of the laws without any rational basis for distinction between employees paid solely wages versus those who have substantial fringe benefit packages which are currently excluded from the AWW calculation. Amicus will show that those employees whose remuneration from work activities is paid by their employer in wages receive greater workers' compensation weekly indemnity benefits than those employees whose remuneration consists of wages plus fringe benefits such as pension contributions; since the value of the fringe benefits for the latter group are no longer included in the AWW calculation, but the disability pension benefit bought by those contributions is used to offset their workers' compensation benefits.

KRESGE, BARRAGAN, GRICE,[1] ET AL. -
TO RECEDE OR NOT TO RECEDE, THAT IS THE QUESTION.

Amicus will advise the Court that the legislature intended the "cap" on weekly indemnity benefits be 100% of the statewide average weekly wage effective on the date benefits are paid (rather than 100% of the recipients AWW determined as of the date of the accident/injury). We will further show that even this "cap" may be exceeded if the amount being offset by combining workers' compensation benefits, social security disability benefits and in-line of duty disability retirement benefits is greater than that which would have been offset under the Federal formula. **Grice** failed to account for the formula contained in 42 U.S.C 424a. 42 U.S.C.424a was adopted by the Florida Legislature as the maximum offset to be applied to any combination of benefits in which social security disability benefits and disability pension benefits are included in the mix, 440.15(10)(a),(b) Fla. Stat.(1993).

Amicus will urge the Court to issue a comprehensive opinion. One which questions the constitutionality of the definition of wages contained in 440.02(24) Fla.Stat.(1993), and one which declares wrongful the use of a workers' compensation recipient's AWW as the maximum weekly benefit that the individual can receive -- taking into account social security disability benefits, disability pension benefits and workers' compensation benefits

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[1].Brown v. S.S. Kresge Co., 305 So.2d 252 (Fla. 1974) **(Kresge)**, Barragan v. City of Miami, 545 So.2d 191 (Fla. 1989) **(Barragan)**, Escambia County Sheriffs Dept. v. Grice, 692 So.2d 896 (Fla. 1997) **(Grice)**.

including supplements (the so called "cap"). We will urge the Court to adopt, as the "cap" on weekly benefits, 100% of the statewide average weekly wage or the amount obtained by following the formula in 42 U.S.C.424a, whichever is greater.

CERTIFIED QUESTION

"Where an employer 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 the employer entitled to recalculate the offset based on the yearly 5% increase in supplemental benefits?"[2]

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[2] The annual supplement is not always 5% of the compensation rate. Supplements are "capped" in any year by maximum weekly compensation rate in effect at the time of payment as determined pursuant to s. 440.12(2). The maximum weekly compensation rate is otherwise known as the statewide average weekly wage.

ARGUMENT

I. JURISDICTION OF THE COURT

The First District concluded that supplemental payments ostensibly provided to account for cost of living increases for those, and only those, receiving PTD benefits could be included in calculating a Section 440.20(15), Florida Statutes (1985) offset, but reasoned that once the employer/carrier asserted the offset any additional supplemental benefits credited for future years' cost of living increases could not be included in offset calculations . Acker v. City of Clearwater ,23 Fla. L. Weekly D1970 (Fla. 1st. DCA, August 17, 1998) ("**Acker**")[3]. The Court may exercise jurisdiction over the certified question should the Court choose to do so Rule 9.030 (a)(2)(B)(i) Fla. R. App.P..

The Court may also exercise jurisdiction over issues raised in the underlying case, but which are not within the four corners of the question certified by the District Court of Appeal. In City of Miami v. Bell, 634 So.2d 163 (Fla. 1st DCA 1992)(**Bell**), the First District certified as a question of great public importance the application of the penalty provisions in Florida Statute 440.20(7)(1985). In answering the certified question, the Supreme Court determined that its decision in **Barragan** should not be given retroactive effect prior to the date of that decision. The issue of retroactive application of **Barragan** was not within the four corners

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[3] It appears from the opinion that the petitioner conceded that supplemental benefits which were being paid at the time the offset was asserted could be included in the offset calculation. Amicus makes no such concession.

of the certified question in **Bell**.

The case at bar deals not only with whether or not the employer/carrier may recalculate offsets yearly to account for increases in supplemental benefits paid with permanent total disability benefits, but also concerns whether or not the decision of the Court in **Grice** dealt with supplemental benefits at all. **Acker** affirms that the "cap" on weekly benefits is 100% of the totally disabled worker's AWW calculated at the time of the injury. **Acker** also deals with 440.20(15)(1985) which provides:

> "When an employee is injured and the employer pays his full wages or any part thereof during the period of disability, or pays medical expenses for such employee, and the case is contested by the carrier or the carrier and employer and thereafter the carrier, either voluntarily or pursuant to an award, makes a payment of compensation or medical benefits, the employer shall be entitled to reimbursement to the extent of the compensation paid or awarded, plus medical benefits, if any, out of the first proceeds paid by the carrier in compliance with such voluntary payment or award, provided the employer furnishes satisfactory proof to the judge of such payment of compensation and medical benefits. Any payment by the employer over and above compensation paid or awarded and medical benefits, pursuant to §(14) shall be considered a gratuity."[4]

The Court therefore may exercise jurisdiction to consider issues regarding "offsets" from compensation, "caps" on weekly compensation, determination of the average weekly wage and whether or not 440.20(15) Fla. Stat. has been correctly interpreted to place a "cap" on weekly indemnity benefits from all sources at 100% of the injured workers average weekly wage at the time of the

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[4]. Amicus on behalf of Brevard County Board of County Commissioners mentions 440.20(15). We provide the full text to show that it was never intended to be interpreted as a "cap" on all employer provided benefits.

injury.[5]

II. LEGISLATIVE HISTORY.

Prior to the opinion of the Supreme Court in **Kresge** the rule of law was that the average weekly wage of an injured worker included not only actual wages paid but the fair market value of all fringe benefits provided (called "similar advantage" by the legislature). The term fringe benefits included, but was not limited to, the value of uniforms, Torres v. Eden Roc Hotel, 238 So.2d 639(641)(Fla 1970); and room and board, New Fort Pierce Hotel Co, v. Gorley, 137 Fla. 345, 188 So.2d 340 (1939), (which established the basic underlying principles pertinent to cases of in-kind compensation). In **Kresge**, the Court also included tips and the fair market value of meals when calculating the AWW. The First District Court of Appeal has opined that the value of group medical and life insurance benefits received from the employer should also be included in the average weekly wage. In a 1980 decision the First District quoted from 440.02(12) Fla. Stat.(1979) as follows:

> "'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, ..."
>
> The First District said:
>
> "We realize that fringe benefits which employees receive from an employment contract often have significant value and may be included as "similar advantage" in a Deputy Commissioner's determination of average weekly wage."

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[5]. Amicus for The Department of Labor and Employment Security desire for the Court to add to the certified question the issue of Social Security Disability and Retirement benefits as well as the prospective and retrospective application of **Acker**.

As a result the First District included, as part of the AWW, $20.00 worth of child care per week plus free lunches for the claimant and her child, Jess Parrish Memorial Hospital v. Ansell, 390 So.2d 1201 (Fla. 1st DCA 1980). This is not to say that everything received from the employer is included in the AWW. Clearly "make whole reimbursements" do not provide a real and reasonably definite gain to the employee and therefore are not included in the AWW, Sears Commercial Sales v. Davis, 559 So.2d 237, 239, 240 (Fla. 1st DCA 1990).

The "statewide average weekly wage" is determined based on a formula which uses the Florida Unemployment Compensation Law (ch.443 et. seq.). To arrive at that figure "wages" need to be determined. The definition of wages in 443.036 Fla. Stat. is:

> (33) **Wages-**
> (a)"Wages" means **all** remuneration for employment, including commissions, bonuses, back pay awards, **and the cash value of all remuneration paid in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the division..."**

The Federal Unemployment Tax Act defines "wages" as:

"**Wages**--For purposes of this chapter, the term "wages" means **all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash...** 26 U.S.C.3306(b)

The Florida legislature amended the definition of wages in 1987 to read:

> " 'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, together with the reasonable value of board, rent, housing, lodging; employer contributions for uniforms or cleaning allowances; employer contributions for life,health,accident, or disability insurance for the

> employee or dependents, excluding social security benefits; contributions to pension plans to the extent that the employee's rights have vested; any other consideration received from the employer that is considered income under the Internal Revenue Code in effect on January 1st, 1987; and gratuities received in the course of employment from others than the employer, only when such gratuities are received with the knowledge of the employer. In employment in which an employee receives consideration other than cash as a portion of this compensation, the reasonable value of such compensation shall be the **actual cost to the employer**." 440.02 (21) ch. 87-330 Laws of 1987.

Prior to the 1987 amendments the reasonable value of all such compensation was the **fair market value**.

After the effective date of the 1987 amendments to Florida Statute 440.02(21), injured workers were required to accept the actual cost to the employer of various fringe benefits; all of which were still included in the AWW but surely could not be replaced by the injured worker with only the receipt of 66 2/3% of the employers cost as compensation for their loss. Airline employees were entitled to have the actual cost to the employer of free or reduced rate transportation provided to themselves and their immediate family included, Eastern Airlines, Inc. v. Michaelis, 619 So.2d 383 (Fla. 1st DCA 1993). See also Live Oak Manor v. Miller, 625 So.2d 898 (Fla. 1st DCA 1993).

Effective July 1, 1990 the definition of wages was amended again to read:

> " 'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury and includes only the wages earned on the job where he is injured and does not include wages from outside or concurrent employment except in the case of a volunteer firefighter, together with the reasonable value of housing furnished to the employee by the employer which is the permanent year-

> round residence of the employee, and gratuities to the extent reported to the employer in writing as taxable income received in the course of employment from others than the employer and employer contributions for health insurance for the employee or the employee's dependents. However, housing furnished to migrant farmworkers shall be included in wages unless provided after the time of injury. In employment in which an employee receives consideration for housing, the reasonable value of such housing compensation shall be the actual cost to the employer or based upon the fair market rent survey promulgated pursuant to Section 8 of the Housing and Urban Development Act of 1974, whichever is less. However, if employer contributions for housing or health insurance are continued after the time of injury, the contributions are not "wages" for the purpose of calculating an employee's average weekly wage". 440.02(24) ch. 90-201 Laws of 1990.

The language connecting AWW to income tax laws of the United States was not without its problems. In University of Florida v. Bowens, 667 So.2d 942 (Fla. 1st 1996), the District Court was called upon to determine what income is subject to Federal Income Tax Legislation. The First District found that whether income is taxable or not is not the issue, but instead whether the benefit provided constitutes wages earned for purposes of calculating average weekly wage.

The part of the 1990 wage definition which sought to exclude "concurrent" earnings from AWW was deftly interpreted by the 1st DCA not to have that effect, Vegas v. Globe Security, 627 So.2d 76 (Fla. 1 DCA 1993) cert. den. 637 So.2d 234 (Fla. 1994). The District Court would not go so far as to say the wage definition provision was unconstitutional. The court did acknowledge that AWW was intended to reflect wage earning capacity.[6] That part of the

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[6]. This en-banc opinion is worth reading as a synopsis of the evolution of AWW from the 1st. DCA prospective.

definition of "wages" that excluded "concurrent" earnings in the 1990 statute was amended by the 1993 legislature to once again include concurrent covered earnings in the AWW, 440.02(24) ch.93-415 Laws of 1993.

Thus the current (for accidents after January 1, 1994) definition of wages reads:

> " 'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury and includes only the wages earned and reported for Federal Income Tax purposes on the job where the employee is injured and any other concurrent employment where he is also subject to workers' compensation coverage and benefits together with the reasonable value of housing furnished to the employee by the employer which is the permanent year-round residence of the employee, and gratuities to the extent reported to the employer in writing as taxable income received in the course of employment from others than the employer and employer contributions for health insurance for the employee or the employee's dependents. However, housing furnished to migrant workers shall be included in wages unless provided after the time of injury. In employment in which an employee receives consideration for housing, the reasonable value of such housing compensation shall be the actual cost to the employer or based upon the fair market rent survey promulgated pursuant to Section 8 of the Housing and Urban Development Act of 1974, whichever is less. However, if employer contributions for housing or health insurance are continued after the time of the injury, the contributions are not "wages" for the purpose of calculating an employee's average weekly wage." 440.02(24) (1993) ch. 93-415 Laws of 1993.

Permanent total disability benefits in their current form have been in the Florida compensation law since 1955. Before that, compensation for total disability permanent in nature was limited to a maximum of 700 weeks. Effective October 1, 1974, the Florida Legislature enacted Florida Statute 440.15(1)(e). That section provided:

> "In case of permanent total disability resulting from injuries which occurred subsequent to June 30, 1955, and for which the liability of the employer for compensation has not been discharged under the provisions of Section 440.20(1), the injured employee shall receive from the Division additional weekly compensation benefits equal to 5% of the injured employee's 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 and subject to the maximum weekly compensation rate set forth in 440.12(2), such additional benefits shall be paid out of the Workmen's (now Workers') Compensation Administrative Trust Fund[7]. This applies to payments due after October 1, 1974".

Section 440.12(2) also contained new provisions effective October 1, 1974. That section defined the maximum amount of weekly compensation which could be paid to an employee regardless of how high his average weekly wage. That maximum was determined as 66 2/3% of the average weekly wages paid by employers subject to the Florida Unemployment Compensation Law as reported to the Department for the four calendar quarters ending each June 30th.

In the report, study and recommendations for changes in the Florida Workers' Compensation Act prepared by Representative Charles C. Papy, Jr., Chairman of the Select Committee on Workmens' Compensation, Florida House of Representatives, 1974, (Appendix C), the committee explained the changes in 440.12(2) as follows:

> "This proposed bill would link the maximum weekly compensation rate to 66 2/3% of the average weekly wage paid in the State. It will avoid the necessity of

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[7]. Florida Statute 440.50 established the Administration Trust Fund. 440.51 provided that the fund shall include only sums paid into it by insurance companies and self insurers for the purpose of paying benefits due pursuant to 440.15(1)(e) (the supplement to PTD) as well as the total expenses of administration by state employees. Any representation that the State pays the supplemental benefits is misleading.

> readjusting the maximum weekly compensation at each session of the legislature. It is in accord with the recommendations of the Bureau of Workers Compensation of Florida, the Williams-Javits Bill and the National Commission Report."

In fact, the Williams-Javits bill (Appendix A) and the National Commission Report (Appendix B) suggested substantially higher percentages. The Williams-Javits Bill provided that the maximum payment be not less than 100% of the State average weekly wage of 1975, 133% of the State average weekly wage of 1976, 166 2/3% by 1977 and after January 1, 1978, 200%. The National Commission report of 1972 recommended that weekly compensation rates be immediately set at 66 2/3% of the statewide average weekly wage, 100 percent of State average weekly wage as of July 1, 1975, 133 1/2% of State average weekly wage as of July 1, 1977, 166 2/3% of State average weekly wage as of July 1, 1979 and 200% of State average weekly wage of July 1, 1981.

As a further consequence of the Federal threat, the Florida legislature amended 440.12 effective August 1, 1979 to bring the maximum compensation rate up to 100% of the Statewide average weekly wage (from the 66 2/3% figure in 1974), determined as provided for the year in which the injury occurred. The increase in the maximum compensation rate formula from 66 2/3% of the Statewide average weekly wage to 100% of the statewide average weekly wage applied only to injuries occurring on or after January 1, 1979. (Chapter 79-40 Section 21 Florida Statutes). Florida has never increased the percentage of statewide average weekly wage that would set the maximum compensation rate after the 1979

increase to 100%.

The Select Committee on Workers' Compensation, in its report, also commented upon the supplemental benefit package it was suggesting:

> "Presently, we have permanent total disability cases in Florida which are receiving as low $35.00 per week and yet are prohibited because of physical injury on the job from being engaged in any other type of gainful employment. Inflation has reduced the amount of their compensation from a purchasing power standpoint that these people are having to be placed on our welfare roles. Our proposal is to bring all permanent total cases still pending up to date by starting after the act to raise their future workmen's compensation payments **to the present rate, if in the event they had been injured today**. This should relieve a number of people from relying upon our welfare roles and would be a total cost in premiums of .0025%.

The committee commented that this is something that is greatly needed by the individuals involved and should certainly be passed from a humanitarian standpoint, as well as to transfer the responsibility onto industry rather than upon the taxpayers of this State through welfare. See Appendix "C".

The "Papy" bill of 1974 ordered payment beginning on October 1, 1974 to individuals injured as far back as July 1, 1955, who had not yet settled their claims. The legislature mandated an immediate 95% increase in compensation, 5% per year for 19 years and more than enough to put most recipients well above their AWW at the time of their injury. This is what we believe to be the clear legislative intent: to "cap" compensation benefits, and only compensation benefits, at the maximum rate in effect statewide in the date benefits accrue rather than 100% of the AWW of the recipient calculated as of the date of injury.

Even before the 1974 reforms, the 1973 legislature had repealed Section 440.09(4) (Section 2, Chapter 73-127). That section had provided (since 1957) that any workers' compensation benefits payable to injured public employees should be reduced by the amount of pension benefits which were also payable, **Barragan**. It was the legislatures intent to deny public employers any reduction of workers' compensation benefits because public employees received disability pensions for the same injury. The Florida Retirement System (FRS) has no provision for offsetting other benefits received by a disability pensioner according to **Grice**.

Following the 1989 decision in **Barragan**, the legislature passed Florida Statute 440.15(12) ch.90-201, which again allowed a reduction in pension benefits (not compensation benefits), if compensation and pensions (not including social security benefits)[8] exceeded 100% of the money rate at which the service rendered by the employee was recompensed, excluding overtime, under the contract of hiring in force at the time of the employees injury. That new offset section was then repealed by the 1993 legislature. Legislative intent was reaffirmed: neither compensation benefits nor pension benefits should be coordinated for the purpose of reducing either.

Chapter 440 contains at least three provisions relating to the amount of compensation an injured employee can receive in any week.

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[8]. The City of Miami is not subject to The Social Security Act.

Section 440.12 "caps" weekly benefits at 100% of the current statewide average weekly wage (for 1998 this figure is $494.00). Section 440.15(10) coordinates weekly compensation benefits and/or disability pension benefits paid by state governmental agencies with social security disability benefits to "cap" benefits at 80% of the AWW or 80% of the average current earnings (ACE), whichever is a more favorable calculation to the employee. This offset is controlled by 42 U.S.C. Section 424a. Since the Social Security Administration can never reduce social security disability benefits to any amount greater than the initial primary insurance amount (PIA) (or below zero) that too would be the limit of Florida's offset. 42 U.S.C. Section 424a provides:

> "(a) Conditions for reduction; calculation
> If for any month prior to the month in which the 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...."**

Subsection (B) concerns the State disability pension benefit that figured in the **Grice** and **Acker** decisions.

It is respectfully suggested that the court has misinterpreted 42 U.S.C. 424a in **Grice** because the court did not recognize that both workers' compensation benefits and disability pension benefits are included by the Social Security Administration to calculate their offsets and that Florida may not offset benefits to a greater

extent than the Social Security Administration.

The Social Security Administration offset formula takes into consideration State and Federal government provided in-line of duty disability pension benefits as well as state workers' compensation benefits when calculating the social security offset. For this reason and because the legislature has expressed a specific intent not to take an offset in Florida greater than that to which the Federal Government would be entitled, the decision in **Grice** must be receded from or at the very least clarified to limit offsets in cases where the injured worker obtains state disability pension benefits and/or social security disability benefits in addition to workers' compensation benefits for permanent total disability. The limit of the offset is the amount the Social Security Administration would take in the same circumstances. [9]

The last Florida chapter 440 section which deals with maximums is rather narrow and not in issue here. It is mentioned only to show the Court that the legislature never intended that compensation be limited to 100% of average weekly wage. Indeed, Florida Statute 440.54 provides that an injured minor, may in the discretion of the Judge of Compensation Claims, receive up to double the amount of compensation otherwise payable.

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[9].Absurd results occur when Petitioner and their Amicus' arguments are tested in real situations. Teresita Pasqual found out the it was to her distinct disadvantage to accept an FRS in-line of duty disability pension and also get PTD workers compensation. Her compensation was reduced per the State's interpretation of **Grice** by an amount which was greater than her whole pension. The JCC couldn't accept that result. Teresita Pasqual v. HRS State of Florida and Alexis ,Order of JCC Judith Nelson District K, October 20, 1998 (Appendix D)

III. JUDICIAL HISTORY.

The Florida Supreme Court in **Kresge**. (a case which reflects a December 24th, 1970 date of accident), interpreted I.R.C. Rule 9 to "cap" the temporary total disability benefits payable under workers' compensation at 100% of the individuals AWW on the date of the injury. I.R.C. Rule 9 is virtually identical to the current statute being followed by the First District Court of Appeals in "**Acker**", 440.20(15)(1985).

Florida Workers' Advocates believes that reliance upon 440.20(15) to "cap" an injured worker's benefits from all employer provided sources (including social security disability for which the employee pays almost 50% of the premium) is misplaced and inappropriate. To the contrary, that section alludes to employer payment of wages and benefits in excess of 100% of the average weekly wage and does not find those payments repugnant in the least. The First District has also held that the employer and the employee may contract for a workers' compensation/disability pension system that is free of offsets and caps, City of Pensacola v. Winchester, 560 So.2d 1273 (Fla. 1st DCA 1990). The only thing the legislature intended to accomplish by passage of 440.20(15) now (14) is to limit the responsibility of the carrier for reimbursing an employer any amount greater than the compensation benefits and medical benefits owed by the carrier to the injured worker. This section does not, was not, and is not intended to "cap" the injured worker's compensation benefits from all employer sources at 100% of the AWW. It is only intended to "cap" the carrier's responsibility

at the amount provided by law (i.e.: 66 2/3% of the AWW up to the statewide average weekly wage in effect on the date payment is made). Section 440.20 (14) is nothing more than an employer reimbursement section. It allows an employer to continue to pay wages and benefits in lieu of compensation while an injured employee litigates the compensability of his injury with a reluctant to pay carrier. It in no way limits the total benefit package to an employee.

The opinion in **Brown**, goes to great lengths to point out that the general theory in the United States, as espoused by Professor Larson on workers' compensation law, is that; as to private pensions or health and accident insurance, whether provided by the employer, union, or by the individual's own purchase, there is ordinarily no occasion for reduction of compensation benefits. The **Brown**, Court cited cases standing for the proposition that sick leave provisions for employees are often one of the fringe benefits to include (sic induce) initial employment or retention of employees.

It is respectfully contended that the Supreme Court went awry in its 4 to 3 decision in Brown when it said:

> "However, it is reasonable to conclude that workmens' compensation benefits when combined with sick leave insurance benefits provided by the employer should not exceed claimant's average weekly wage because under a logical interpretation of I.R.C. Rule 9 (now 440.20(14)) when an injured employee receives the equivalent of his full wages from whatever employer source, that should be limit of compensation to which he is entitled".

As pointed out herein, AWW under current law is as far from "full wages" as one can imagine. "Full wages" at the time of Vesta

Mae Brown's accident included wages plus the fair market value of all "similar advantage" (a fancy term for fringe benefits and perks), which is a substantially more favorable definition of wages than exists today. As pointed out above, both the Federal and State unemployment schemes use a definition of wages that includes the cash value of fringe benefits. Florida uses these figures in calculating the statewide average weekly wage but not the individuals AWW. However, using "full wages" as a "cap" is still not a "logical interpretation" of I.R.C. Rule 9.

Thomas Jefferson said "Laws and institutions must go hand in hand with the progress of the human mind.... we might as well require a man to wear the coat that fitted him as a boy, as a civilized society to remain ever under the regime of their ancestors."

The judicial history of decisions rendered concerning accidents that occurred after October 1, 1974 (in other words, after supplemental benefits became payable with permanent total disability benefits) conclude that supplemental benefits are "compensation" and subject to offset when combined with Federal social security disability benefits under 440.15 (10) Fla. Stat.(1993).

Florida Workers' Advocates believes that including supplemental benefits paid as a cost of living adjustment in any formula used to reduce benefits is adverse to the intent of the 1973 legislature as documented by The Report, Study and recommendations for Changes in the Florida Workmens' Compensation

Act, (Appendix C).

The Social Security Administration, in calculating offsets under 42 U.S.C. 424a in states that do not take the offset themselves, does not include in the offset calculations Federal annual cost of living increases applicable to Social Security Disability benefits. Because of the problems encountered by the First District Court of Appeals in Hunt v. D.M. Stratton Builders, 677 So.2d 64 (Fla. 1st DCA 1996) and Cruse Construction v. St. Remy, 704 So.2d 1100 (Fla. 1st DCA 1997), cases which involved offsets and caps, the Court found it necessary to certify the instant question as one of great public importance. Unfortunately, in the case at bar, Respondent's counsel stipulated that those supplemental benefits calculated and paid to the injured worker until the Petitioner first asserted it's 100% of AWW cap/offset could be included in the offset formula but none calculated and paid thereafter. In **Acker**, the First District tacitly approved that method of calculation. The District Court ignored its own finding that the purpose of supplemental benefits are to protect recipients of periodic payments from the long term effects of inflation that reduce the value of fixed benefits. The District Court of Appeal also ignored the fact that when the legislature created the supplemental benefit it provided for an immediate payment of supplemental benefits from 1955 to 1974, a 95% increase in compensation that was capped only by the new statewide average weekly wage. The district court in **Acker** failed to explain why supplemental benefits up to the point where the employer asserts

the right to take an offset or enforce a "cap" are in any way different than the supplemental benefits paid the following year. Those benefits, the Court concluded, should not be included in calculating the offset/cap. The result defies logic. The supplemental benefits are either a cost of living adjustment, or they are not.

IV. WHAT IS THE AVERAGE WEEKLY WAGE ANYWAY?

The average weekly wage is determined by a formula set out in Florida Statute 440.14(1) which has essentially remained unchanged since 1935. A thorough reading of the first four subdivisions of 440.14(1) should leave the reader with the impression that the legislative intent was to fairly but accurately determine the wage earning capacity of the injured worker. Professor Larson describes the function of the average weekly wage as follows:

> "The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable **future earning capacity**. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable **future earnings**, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis." 2 Larson, The law of Workmen's Compensation, sec. 60.11(d)(1986).

It is the average weekly wage which is used to determine the amount of weekly indemnity benefits to which an injured worker is entitled.

The amounts included in the formula contained in 440.14(1) are

determined by the definition of "wages" contained in Florida Statute 440.02(24). As indicated earlier, section 440.02(24) has evolved from a definition which included all wages earned plus the fair market value of all similar advantage (fringe benefits), to all wages earned plus the cost to the employer of all fringe benefits, to all wages earned plus the cost of the employer of only health insurance and under certain circumstances the value of lodging. Under the present system, gratuities received by the employee are subject to strict scrutiny regardless of whether or not the employer encourages or discourages employees from reporting their actual tips.

Since 1987, the legislature has used the definition of wages as a tool to cut weekly benefits to injured workers and thereby cut the cost of workers' compensation insurance to industry.

It is the position of the Florida Workers' Advocates that in Florida Statute 440.02(24), the definition of "wages" in its current form is unconstitutional as violative of the equal protection clause of the United States Constitution. We suggest that an employee that receives his entire remuneration as money wages with no fringe benefits whatsoever would receive as indemnity benefits 66 2/3% of those wages limited only by the statewide average weekly wage. The employee whose employer chooses to provide, or contracts to provide fringe benefits in the nature of vested contributions to: pension plans; life insurance and disability insurance with vested benefits; uniforms; meals; temporary lodging; free or reduced rate products or services of the

employer; airline frequent flyer miles; parking; company car; vested sick leave and/or annual leave; and any other form of non-cash benefit, will only receive indemnity benefits based upon 66 2/3% of the actual wages earned regardless of the value of the fringe benefit package. In some union contracts the fringe benefit package amounts to as much as 46% of wages provided in addition to wages, City of Miami v. Rantanen, 645 So.2d 4 (Fla. 1st DCA 1994). The City of Miami provides a substantial benefits package to account, in part, for the fact that it does not contribute to an employees Social Security account. See fn.8.

Employers may, but are not required, to continue the entire fringe benefit package during periods of disability.

It is possible that two injured workers doing the same job for the same employer at the same cost to the employer, one with a fringe benefit package and one with only wages (even though the wages might account for or be in lieu of the fringe benefits package), would receive vastly different compensation benefits if injured in the same accident.

To determine whether or not a statutory scheme violates the equal protection clause of the Florida or United States Constitutions, certain legal tests must be applied depending upon the circumstances.

The Florida Constitution requires equal protection of the law. Article I Section 2 of the Florida Constitution provides:

> "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and

protect property..."

The 14th Amendment to the United States Constitution provides:

> "No State may deny to any person within its jurisdiction the equal protection of the law".

States may, however, treat different classes of persons in different ways so long as such classifications are reasonably related to a legitimate state interest, Stahl v. State, 577 2nd 257 (Fla. 1990). We contend that the Legislature, by defining wages to exclude most fringe benefits and other similar advantage, has classified injured workers who happen to receive remuneration in the form of wages different from those who receive remuneration in the form of wages plus valuable fringe benefits to the detriment of the latter class. Both workers receive value for their services at a cost to their employers, but receive under the Florida definition of wages, different amounts of workers' compensation indemnity. This disparity occurs partly because neither State nor Federal laws require employers to continue providing the same level of fringe benefits after an injury on the job and partly because the reasonable value of those fringe benefits are not used to calculate the level of compensation.

We suggest that the more stringent rational basis test is the appropriate standard to determine a violation of the Equal Protection of the law, Ciancio v. North Dunedin Baptist Church, 616 So.2d 61 (Fla. 1 DCA 1993) (treating Firefighters better than other employees has a justifiable public purpose). Thus the question presented is whether the government has chosen a rational classification to further a legitimate end by providing a higher

level of compensation to workers who receive only wages compared to those who have the same earning capacity but reflected in the value of fringe benefits rather than equivalent wages.

The State has a legitimate interest in providing for reasonable compensation to workers following an injury on the job. There is no reasonable or rational basis for requiring the payment of different levels of compensation benefits to employees whose employers have chosen to provide remuneration of equal value but in different form. An employee who is given a choice between accepting the use of a company car valued at $100.00 a week or receiving the $100.00 as wages should not under the reasonableness test receive less in compensation benefits because he chooses the car versus the cash and when he is injured and is required to give up the use of the car but not be compensated for its loss. In Florida the rational basis test was satisfied and 440.16(7) Fla. Stat. 1983 found unconstitutional as a denial of equal protection, DeAyala v. Florida Farm Bureau Casualty Ins. Co., 543 So.2d 204 (Fla. 1989)(statute which provided reduced compensation benefits for Florida workers with nonresident alien dependents living in Mexico was unconstitutional using the rational basis test).

While we rely in our argument on the stringent rational basis test for determining whether there has been a violation of the equal protection of the laws, we do not thereby eliminate from the Court's consideration the question of whether or not injured workers who have had their fundamental constitutional right to sue at common law taken away in favor of a statutory scheme of workers'

compensation, have also had their fundamental rights interfered with. Compensation benefits for injured workers replaced fundamental rights. What could be more fundamental than the right to trial by jury[10]. The strict scrutiny test applies, Massachusetts Board of Retirement v. Murgia, 49 L.Ed 2d 520, 427 U.S. 307, 96 S. Ct. 2562 (1976)(a "suspect class" requiring application of the strict scrutiny standard of equal protection analysis is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process).

An injured employee's right to receive worker's compensation benefits qualifies as a property right, Rucker v. City of Ocala, 684 So. 2d 836, 840 (Fla. 1st DCA 1996). Eliminating from the definition of wages the value attributable to a multitude of fringe benefits has caused the varying treatment of different persons. Because it is so unrelated to the achievement of any combination of legitimate purposes under the workers' compensation act, the Court should and must conclude that the legislature's actions were irrational.

As evidence of the irrational nature of the legislature's act redefining wages, we point to the fact that **Grice's** compensation benefits were reduced in part because he received a pension paid for by his government employer. Yet, under the definition of wages,

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[10]. The right of all citizens to trial by jury to redress civil wrongs is guaranteed by Art. I, Sec. 22 of the Florida Constitution.

the employer's contributions to that same pension plan are not included in his average weekly wage. **Grice** suffered what amounts to a double dip by the employer. **Grice** started with an AWW which did not reflect his true earning capacity and that same low AWW was used to "cap" the benefits to which he is entitled.

The strict scrutiny test could be used to determine if the Florida definition of wages is unconstitutional because injured workers are a suspect class. A suspect class is any group that has been the traditional target of an irrational, unfair and unlawful discrimination, DeAyala v. Florida Farm Bureau Casualty Insurance Co., supra.

Since AWW is in issue in **Acker**, it is respectfully suggested that the Court request additional briefing and consider declaring 440.02(24) Fla. Stat 1993, the definition of "wages", unconstitutional as a violation of the equal protection of the Florida and United States Constitutions.

IV. KRESGE, BARRAGAN AND GRICE: TO RECEDE OR NOT TO RECEDE, THAT IS THE QUESTION?

The judicially legislated "cap" of 100% of the AWW applied to workers' compensation benefits combined with all other employer provided benefits including pensions and social security (for which the employee pays almost half the premium) is based upon a convoluted interpretation of 440.20(14)Fla. Stat 1993. This

interpretation is erroneous and should not be allowed to remain.

The decisions of the Court which predate the adoption of the "PAPY" package of amendments effective October 1, 1974 may have been appropriate 25 or more years ago, but are no longer valid today. The legislature has expressed on numerous occasions its intent that the "cap" on workers' compensation benefits, when combined with other remuneration, should not exceed the statewide average weekly wage. "Offsets" from benefit packages which include disability pensions, social security disability benefits and workers' compensation benefits may never exceed the amount offset by the Social Security Administration under similar circumstances. In this regard the Federal government has preempted the state, and the Florida legislature has recognized that preemption by enacting 440.15(10)(1993). The current Court should recognize that the actions of the **Kresge** Court, the **Barragan** Court and the **Grice** Court amount to the judicial department of government taking over the legislative powers. The Court should be just as diligent, indeed, more so, to safeguard the powers vested in the legislature from encroachment by the judicial branch of the government. The Court in **Kresge**, **Barragan** and **Grice** has clearly intruded upon the jurisdiction of the legislature in placing a "cap" of 100% of AWW as the full extent to which compensation, social security disability and disability retirement can be paid notwithstanding express legislative intent and statutory language to the contrary. Pepper v. Pepper, 66 So.2d 280 (Fla. 1953). By using the language of 440.20(15), the codification of I.R.C. Rule 9, to "cap" all

employer provided benefits at 100% of the AWW is not interpretation, it is legislation.

We urge the Court to recede from all prior decisions which conflict with the proposition that a combination of disability benefits which includes workers' compensation should be limited by the statewide average weekly wage in effect on the date the benefit accrues or by the Social Security formula in 42 U.S.C. 424a, whichever provides the greater benefit to the totally disabled worker.

CONCLUSION

FLORIDA WORKERS' ADVOCATES respectfully requests that the Supreme Court of Florida take jurisdiction over all issues presented in **City of Clearwater v. Acker**, including but not limited to those posed in the certified question.

FLORIDA WORKERS' ADVOCATES respectfully asks that the certified question be reworded so that its import is directed at whether or not supplemental benefits should be included in any "cap" or "offset" formula. They should not be.

FLORIDA WORKERS' ADVOCATES respectfully requests that the Court require briefing on the issue of whether Florida Statute 440.02(24), the definition of "wages", is unconstitutional as violative of the Equal Protection clause of the Florida and United States Constitutions.

FLORIDA WORKERS' ADVOCATES respectfully requests that the Court recede from its opinions in **Kresge**, **Barragan**, and **Grice** to the extent that those opinions mandate a "100% of the AWW at the time of the injury cap" on any combination of workers' compensation, social security disability, disability retirement and other employer provided benefit. The "cap" should be the statewide average weekly wage. The maximum "offset" should be determined by 42 U.S.C. 424a. The permanently and totally disabled worker should receive the greater benefit.

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CERTIFICATE OF SERVICE

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