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

Case No. 96,482

CITY OF HOLLYWOOD, et al., :

Petitioners, :

vs. :

ALBERT LOMBARDI, :

Respondent. :

_____ :

ANSWER BRIEF OF RESPONDENT, ALBERT LOMBARDI

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INTRODUCTION

This is the answer brief of the Respondent, Albert Lombardi, who was the claimant/employee in this workers' compensation case. The Petitioners, who are the City of Hollywood and Interrisk Concepts, will be referred to as the employer/carrier. The Respondent will be referred to as the claimant. "R" refers to the record on appeal.

The employer/carrier conceded that the claimant suffered a compensable injury and that he is permanently totally disabled. This case involves what deductions the employer/carrier can take from his benefits, in what amount, and in what order.

STATEMENT OF THE CASE

The claimant rejects the employer/carrier's Statement of the Case, as it does not fully and accurately describe the proceedings below.

As to the subrogation issue, the Judge of Compensation Claims found, as did the Circuit Judge, that the full value of damages was $250,000 and that the net recovery after attorney's fees was $62,671. This was 25% of the full value of damages reduced for comparative negligence and collectibility; that at the time of the subrogation hearing, April 5, 1995, the employer/carrier had paid $41,228.76 in the past, but was not paying any benefits at that time; that 25% of the past due benefits was $10,307.19, which the claimant paid to the employer/carrier. (R. 143-144, 200-202.) The Circuit Judge determined that the future benefits should be reduced "...by 25% as a result of the lien they retained from the time of the hearing..." (R. 144.) The Circuit Judge's Order, however, was not entered until October 7, 1995. (R. 144, 197.)

At the hearing before the Judge of Compensation Claims, the claimant

contended that the extent of the subrogation lien was 25% of the net recovery, the same percentage that the net recovery was to the full value of damages, such that the cap on the net recovery was $15,667.75, which had already been satisfied. (R. 194, 200.)

As to the pension offset issue, the claimant contended that the workers' compensation paid by the employer/carrier should be paid first. That is, that workers' compensation was primary and that any offset on account of the cap of 100% of the average monthly wage on the combination of workers' compensation and service-connected permanent total disability should go to the benefit of the pension trust fund. (R. 194.)

The employer/carrier contended that the payments from the pension trust fund were primary and that the offset should go to the benefit of the employer/ carrier to reduce the payment of workers' compensation. (R. 195.)

The Judge of Compensation Claims found that the employee's pension trust fund was employee-contributory to the extent of $113 bi-weekly by the claimant. (R. 195-196.)

There was no showing by the employer/carrier that the employer was the majority contributor of the employees' pension trust fund. (R. 78-79.)

Claim was made for penalties and interest on the payments that were made on May 12, 1995, in the amount of $8,075 and $403.75, which paid permanent total disability and the supplemental benefit for permanent total disability from December 19, 1994, through April 30, 1995. (R. 194, 197-198.)

Claim was made for the supplemental benefit for permanent total disability after it was discontinued on May 15, 1995. (R. 194, 198, 203.)

It was also contended by the claimant that there was no offset for Social Security Old-Age Retirement. (R. 194, 196, 199.)

The employer/carrier contended that there was no cap on their subrogation lien and that they were entitled to reduce all benefits by 25% until they had recouped the entire amount of the employee's net recovery of $62,671. (R. 195.)

They contended that they did not owe penalties and interest on the payments made on May 12, 1995. (R. 194.)

They contended that they were entitled to an offset for Social Security payments made. (R. 195.)

They contended that they did not owe the supplemental benefit from May 15, 1995. (R. 195.)

They also contended that they were not responsible for the claimant's attorney's fees. (R. 195.)

The Judge of Compensation Claims decided that the employer/ carrier was entitled to a subrogation lien of the entire amount of the claimant's net recovery of $62,671, such that the employer/carrier could reduce future benefits by 25% until the entire amount was recouped. (R. 200-202.) She decided that the third party lien was the first deduction to be made. (R. 202.) She decided that the receipt of Old-Age Retirement for Social Security was not an offset against workers' compensation. (R. 199.) She decided that penalties and interest were owed for the late payment of

compensation for permanent total disability and the supplemental benefit made on May 12, 1995. (R. 198-199.) She decided in regard to the pension offset, that the pension fund payments were primary and that any offset over the cap of the average monthly wage should go to the benefit of the employer/carrier to reduce their workers' compensation payments. (R. 199-200.) She decided that the claimant was entitled to the supplemental benefit for permanent total disability without offset. (R. 203.) She decided that the claimant's attorney was entitled to a reasonable attorney's fee under the 21-day rule. (R. 203-204.) She reserved jurisdiction as to the amount. (R. 204.)

The employer/carrier appealed and the claimant cross-appealed. The Florida First District Court of Appeal affirmed three of the four issues raised by the employer/carrier and declined to reach the fourth issue. The First District Court of Appeal reversed the two issues raised by the claimant on cross-appeal.

The Court affirmed the award of penalties and interest on the May, 1995, payments, as the payments were late and the subrogation lien had not yet been determined. *City of Hollywood v. Lombardi*, 24 Fla. L. Weekly D1848, at 1849 (1st DCA opinion filed August 5, 1999).

The Court affirmed the Judge of Compensation Claims' holding that the lien recovery should be calculated first and then the workers' compensation/disability pension offset should be applied. *City of Hollywood v. Lombardi*, 24 Fla. L. Weekly D1848, at 1849 (1st DCA opinion filed August 5, 1999).

The Court certified the following question to the Supreme Court of Florida as

one of great of public importance:

> WHEN AN EMPLOYER/CARRIER IS ENTITLED TO RE-DUCE A CLAIMANT'S COMPENSATION BENEFITS AS A RESULT OF A SUBROGATION LIEN UNDER SECTION 440.39, FLORIDA STATUTES, SHOULD THE EM-PLOYER/CARRIER APPLY THE LIEN REDUCTION BEFORE OR AFTER CALCULATING TOTAL BENEFITS AND APPLYING THE 100 PERCENT AVERAGE WEEKLY WAGE CAP AND RESULTANT OFFSET AUTHORIZED BY SECTION 440.20(15), FLORIDA STATUTES, AND *ESCAMBIA COUNTY SHERIFF'S DEP'T v. GRICE*, 692 SO. 2D 896 (FLA. 1997)?

City of Hollywood v. Lombardi, 24 Fla. L. Weekly D1848, at 1849 (1st DCA opinion filed August 5, 1999).

The Court affirmed the Judge of Compensation Claims' holding that offsets based on *Escambia County Sheriff's Dep't. v. Grice*, 692 So. 2d 896 (Fla. 1997) should not be taken retroactively. *City of Hollywood v. Lombardi*, 24 Fla. L. Weekly D1848, at 1849-1850 (1st DCA opinion filed August 5, 1999).

The Court declined to consider the employer/carrier's appeal of the Judge of Compensation Claims' holding that the claimant's attorney was entitled to a reasonable attorney's fee to be paid by the employer/carrier on the ground that the issue was not ripe for appeal until determination of the amount. *City of Hollywood v. Lombardi*, 24 Fla. L. Weekly D1848, at 1850 (1st DCA opinion filed August 5, 1999).

The Court reversed the Judge of Compensation Claims' interpretation of §440.39, Fla. Stat., that the employer/carrier was entitled to a subrogation lien on the entire net recovery from the third-party tortfeasor of $62,671. The Court held that the employer/carrier was only entitled to $15,667.75, which was the percentage (25%) of the net recovery that the net recovery was a percentage (25%) of the full value of

damages. *City of Hollywood v. Lombardi*, 24 Fla. L. Weekly D1848, at 1850 (1st DCA opinion filed August 5, 1999).

The Court certified the following question to the Supreme Court of Florida as one of great of public importance:

> WHEN THE EMPLOYER/CARRIER IS ENTITLED TO A SUBROGATION LIEN UNDER SECTION 440.39, FLORIDA STATUTES (1993), AND THE CLAIMANT'S NET RECOVERY IN A SETTLEMENT WITH THE THIRD-PARTY TORTFEASOR IS LESS THAN 100 PERCENT OF THE CLAIMANT'S TOTAL DAMAGES, SHOULD THE EMPLOYER/CARRIER'S LIEN BE LIMITED TO A PERCENTAGE OF THE PERCENT-AGE OF THE NET RECOVERY?

City of Hollywood v. Lombardi, 24 Fla. L. Weekly D1848, at 1850 (1st DCA opinion filed August 5, 1999).

The Court reversed the Judge of Compensation Claims' determination that there should be a "*Grice* offset" whereby the disability pension is paid first and the amount over and above the average monthly wage is a deduction in workers' compensation benefits, instead of a "*Barragan* offset" whereby the workers' compensation is paid first and the amount over and above the average monthly wage is a deduction in pension benefits. The Court held that this issue should be reversed and remanded with instructions to determine whether the City of Hollywood disability pension plan has a provision comparable to that in *Barragan* or alternatively, the amount of the claimant's pro rata contributions to the City's disability plan. *City of Hollywood v. Lombardi*, 24 Fla. L. Weekly D1848, at 1850-1851 (1st DCA opinion filed August 5, 1999).

The employer/carrier has applied to this Court for review. The Court entered

its order on September 14, 1999, postponing its decision on jurisdiction, requiring the parties to file briefs on the merits, and requiring the clerk of the First District Court of Appeal to file the original record with this Court.

STATEMENT OF THE FACTS

The claimant does not accept the Statement of the Facts given by the employer/carrier, because it includes facts which are extraneous to the questions of what is to be deducted, the amount of the deductions and when deductions are to be made. More especially, the facts are not presented in the order in which the claimant believes the facts should be presented in order to clearly show how those mathematical calculations are to be made. Therefore, the claimant will briefly state the pertinent facts in such order.

The claimant suffered an admittedly compensible accident on September 14, 1993. He reached maximum medical improvement on December 19, 1994, and he is permanently totally disabled. (R. 196.)

His average weekly wage is $783.65 with a maximum weekly compensation rate of $425. $783.65 per week times 4.3 is an average monthly wage of $3,369.69. (R. 196.)

The claimant, Al Lombardi, was born February 9, 1926. He is now 72 years of age. (R. 195.)

He became employed by the City of Hollywood as a building inspector in 1986. During the period of his employment he was paid bi-weekly and $113 bi-weekly was deducted from his payroll check toward his own pension. (R. 195-196.)

On December 19, 1994, he was awarded his service-connected permanent total disability retirement by the City of Hollywood, which amounts to $2,623.37 per month. (R. 196.)

On February 9, 1991, when he reached 65 years of age, the claimant took Old-Age Retirement under the Social Security Act. (R. 196.) His social security payments were less than the full amount through December 19, 1994, when his disability retirement began. (R. 39-41.) He presently receives $1,179 a month for Old-Age Retirement. (R. 196.)

The claimant was not paid any workers' compensation benefits following maximum medical improvement on December 19, 1994. (R. 111, 116.) He filed a claim for permanent total disability and supplemental benefits and penalties and interest from December 19, 1994. (R. 111, 116, 197. The claim was filed with the Workers' Compensation Division in Tallahassee on April 14, 1995, a copy having been received by the employer/carrier on April 11, 1995. (R. 111, 118, 123, 197.)

The employer/carrier filed a DWC-4 dated May 5, 1995, accepting permanent total disability. (R. 121, 197.) However the check for payment was not issued until May 10, 1995, and was not mailed until May 12, 1995. (R. 42-43, 125, 127, 198.) This was in the amount of $8,075 for the period December 19, 1994, to April 30, 1995. (R. 125.) With it was another check in the amount of $403.75 for the supplemental benefit for permanent total disability for the same period of time. (R. 126-127.) No penalties and interest were paid on these amounts. (R. 194, 198.)

These payments were made 28 days after the filing of the claim. (R. 42, 127,

197-198.)

Thereafter, on May 15, 1995, the employer/carrier paid the supplemental benefit in the amount of $42.50 for the period May 1, 1995, to May 15, 1995. (R. 128, 130.) But no further payments of supplemental benefits were made. (R. 198.)

The claimant was paid $425 per week from May 1, 1995, to September 17, 1995. (R. 198.) At that time, his weekly payment was reduced by $106.25 per week to $318.75 per week. (R. 198.) It has remained this amount since September 18, 1995. (R. 198.) The carrier took this deduction on account of the 25% third party lien. (R. 198.)

In regard to the subrogation lien, Circuit Judge Henning determined in her Order of October 7, 1995, the following:

> 1. I find that the total value of the damages sustained in this case, after considering that the Claimant was approximately 30% comparat
> ively negligent, and considering the policy limits of $100,000.00 to be $250,000.00.
>
> 2. I find that the total net settlement amount to the claimant amount to $62,671.00, thereby entitling the employer/carrier to a 25% recovery ratio.
>
> 3. I find that the total payout of compensation benefits made by the employer/carrier to Mr. Lombardi through December 14, 1994 to be in the amount of $41,228.76.
>
> 4. Consequently, I order the Plaintiff to pay $10, 307.19 to the employer/carrier. Furthermore, I hereby order any compensation or medical payments made after April 5, 1995 by the employer/carrier to be reduced by 25% as a result of the lien they retain from the time of the hearing on the Motion for Equitable Distribution, April 5, 1995, forward. (R. 143-144).

By mathematical calculation, 25% of $62,671 is $15,667.75; 75% of $62,671 is

$47,003.25. This divides up the net recovery of $62,671 with $47,003.25 to the claimant and $15,667.75 to the employer/carrier.

SUMMARY OF ARGUMENT

Subrogation is a creature of statute. Prior to the claimant's accident, the subrogation statute was changed by the Legislature to enlarge the circumstances for partial subrogation and to enact a formula for calculating partial subrogation. Section 440.39(3)(a), Fla. Stat. (1993), provides that when the employee does not recover full damages, the employer/carrier is not entitled to total subrogation of what they have paid, and what they will pay, in workers' compensation benefits against what the employee recovers from a third-party tortfeasor. Instead, the statute provides that the employer/carrier is only entitled to partial subrogation, in which the carrier's subrogation lien is limited to the percentage of the employee's net recovery that the net recovery (disregarding costs and attorney's fees) is the percentage of the full value of damages.

In the present case, the Circuit Judge found that the full value of damages was $250,000 and that the employee's net recovery was $62,671 and that the employer/carrier's partial subrogation lien was 25% because the employee's net recovery was 25% of the full value of damages. 25% of the employee's net recovery is $15,667.75 to the employer/carrier. The balance of 75% is $47,003.25 which would go to the claimant.

At the time of the subrogation hearing, the employer/carrier had paid $41,228.76 in benefits in the past. Thus, the Circuit Judge ordered the claimant to pay

the employer/carrier 25% of that amount from his net recovery. This was $10,307.19. The carrier was not paying benefits at that time. The Circuit Judge gave the employer/carrier a 25% reduction of future benefits to the extent of their lien.

At the hearing before the Judge of Compensation Claims, the claimant contended that the employer/carrier's subrogation lien was limited to $15,667.75, which had already been paid. This is 25% of the employee's net recovery, which is 25% of the full value of damages. The employer/carrier contended that they were entitled to continue to reduce the employee's future benefits by 25% until they had recovered $62,671, the entire amount of the employee's net recovery.

The Judge of Compensation Claims agreed with the employer/carrier's interpretation of the law and allowed them to continue to deduct 25% from all benefits until the employer/carrier recovers the entire amount of the employee's net recovery. The First District Court of Appeal reversed, holding that the statute in force on the date of the claimant's accident of September 14, 1993, (and still in force today) provided that the employer/carrier's subrogation lien is limited to the percentage of the net recovery (25%) that the net recovery is a percentage of the full value of damages (25%), whenever the claimant does not recover the full value of damages for any reason. As this is a case of first impression, the First District Court of Appeal certified the question to the Supreme Court of Florida as one of great public importance. There is no common law right of subrogation in workers' compensation cases. The First District Court of Appeal was correct that under the subrogation statute in the Florida Workers' Compensation Law, the employer/carrier's subrogation

lien, whenever the claimant does not recover the full value of damages, is the same percentage of what it has paid, and what it will pay, that the net recovery is a percentage of the full value of damages.

The Florida First District Court of Appeal correctly decided that the subrogation lien is to be taken first, because it is a statutory reduction. This involves the other certified question. It is also a case of first impression.

The First District Court of Appeal decided that the claimant was entitled to a combination of his service-connected disability pension and his workers' compensation for permanent total disability up to 100% of the average weekly wage, converted monthly. This would be correct under *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989). However, it may be that the cap is 100% of the average weekly wage or 100% of the average final compensation used to determine the service-connected disability pension, whichever is the greater.

The Judge of Compensation Claims incorrectly decided that the pension fund should pay first per *Escambia County Sheriff's Dep't. v. Grice*, 692 So. 2d 896 (Fla. 1997). The offset on account of the 100% cap should not go to the benefit of the City by reducing the workers' compensation payments which the City owed to the claimant for permanent total disability. The offset should go to the benefit of the pension fund. *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989). The certified question is misstated. It refers to an offset under §440.20(15), Fla. Stat. This statute does not apply to the present case or any of the offset cases like it. Section 440.20(15), Fla. Stat., provides than when an employer pays full wages during a period of disability,

in which workers' compensation benefits are being contested, and they are subsequently awarded, and or paid, the employee is not entitled to his workers' compensation disability benefits over and above his wages. Rather, the amount of the workers' compensation benefits is refundable to the employer, and any such wages paid over and above the average weekly wage at the time of the accident are considered a gratuity. Social Security benefits are not wages. Pension benefits are not wages. Workers' compensation benefits are not wages. The First District Court of Appeal was incorrect in remanding the case on this issue to determine whether the City of Hollywood disability pension plan has a provision comparable to that in *Barragan v. City of Miami*, supra, or alternatively, the amount of the claimant's pro rata contributions to the City's disability plan. The First District Court of Appeal should have held that the workers' compensation payments were primary and the pension benefits were secondary such that any offset over and above 100% of earnings (either average monthly wage or average final compensation) should go to the benefit of the pension fund.

The First District Court of Appeal correctly decided that the first payment of compensation to the claimant for permanent total disability made on May 12, 1995, with respect to a maximum medical improvement five months earlier on December 19, 1994, was a late payment for which penalties and interest were owed as provided by statute, as the subrogation lien had not been determined at this time.

The First District Court of Appeal was correct that the pension offset operated prospectively because the employer/carrier did not assert or establish a right to offset

previously. Even if *Escambia Co. Sheriff's Dept. v. Grice*, supra, is correct that disability payments from a pension fund are primary and workers' compensation payments are secondary, offsets on such account should not be taken retroactively.

ARGUMENT

POINT I

THERE IS NO BASIS IN LAW TO REVERSE AN UNAPPEALED ORDER OF THE CIRCUIT COURT JUDGE REGARDING A LIEN, OR TO LIMIT AN EMPLOYER/CARRIER'S LIEN RECOVERY TO A "PERCENTAGE OF A PERCENTAGE"

(Petitioners' Point I)

This question was certified by the Florida First District Court of Appeal:

> WHEN THE EMPLOYER/CARRIER IS ENTITLED TO A SUBROGATION LIEN UNDER SECTION 440.39, FLORIDA STATUTES (1993), AND THE CLAIMANT'S NET RECOVERY IN A SETTLEMENT WITH THE THIRD-PARTY TORTFEASOR IS LESS THAN 100 PERCENT OF THE CLAIMANT'S TOTAL DAMAGES, SHOULD THE EMPLOYER/CARRIER'S LIEN BE LIMITED TO A PERCENTAGE OF THE PERCENTAGE OF THE NET RECOVERY?

City of Hollywood v. Lombardi, 24 Fla. L. Weekly D1848 (1st DCA, opinion filed August 5, 1999).

The employer/carrier has no common law right of subrogation here.

The Florida First District Court of Appeal has held:

> Subrogation on the part of an insurance carrier in a Florida workmen's compensation case is solely that provided by statute.

Commercial Standard Insurance Company v. Miller, 274 So. 2d 588, at 589 (Fla.

1st DCA 1973).

The Florida Second District Court of Appeal has held:

> Our Supreme Court has repeatedly held that in the absence of a law or a contract specifically providing for it, insurance companies do not have the right of subrogation against the party causing such injury. Fidelity & Casualty Co. of New York v. Bedingfield, et al., Fla.1952, 60 So.2d 489-495; Arex Indemnity Co. v. Radin, et al., Fla.1954, 72 So.2d 393-395; Cushman Baking Co., et al. v. Hoberman, et al., Fla.1954, 74 So.2d 69-71.
>
> In Fidelity & Casualty Co. of New York v. Bedingfield, et al., supra, we further find this pronouncement:
>
> '* * * In this case without the Statute, the compensation insurer would have no right of subrogation. Workmen's Compensation Laws are enacted because they deal with a matter of great public interest and are enacted under the police power of the State. When compensation insurers seek or accept the benefits of subrogation as provided for by the law, they must also accept the rules, regulations, burdens and conditions which go with the right of subrogation as provided by law.'

Security Mutual Casualty Company v. Grice, 172 So. 2d 834 at 838-839 (Fla. 2nd DCA 1965).[1]

The employer/carrier's statutory right to subrogation is contained in the statute in force on the date of Lombardi's accident, September 14, 1993, for it is the statute in force on the date of accident that determines the substantive rights of the parties. *Sullivan v. Mayo,* 121 So. 2d 424 (Fla. 1960).

The subrogation statute in force on September 14, 1993, when Lombardi was injured, was §440.39, Fla. Stat. (1993), which provided:

A different "*Grice* case", not *Escambia County Sheriff's Dept. v. Grice*, infra.

440.39 Compensation for injuries when t
hird persons are liable.--

(1) If an employee, subject to the provisions of the Workers' Compensation Law, is injured or killed in the course of his employment by the negligence or wrongful act of a third-party tortfeasor, such injured employee or, in the case of his death, his dependents may accept compensation benefits under the provisions of this law, and at the same time such injured employee or his dependents or personal representatives may pursue his remedy by action at law or otherwise against such third-party tortfeasor.

(2) If the employee or his dependents accept compensation or other benefits under this law or begin proceedings therefor, the employer or, in the event the employer is insured against liability hereunder, the insurer shall be subrogated to the rights of the employee or his dependents against such third-party tortfeasor, **to the extent of the amount of compensation benefits paid or to be paid as provided by subsection (3)**.

***

(3)(a) In all claims or actions at law against a third-party tortfeasor, the employee, or his dependents or those entitled by law to sue in the event he is deceased, shall sue for the employee individually and for the use and benefit of the employer, if a self-insurer, or employer's insurance carrier, in the event compensation benefits are claimed or paid; and such suit may be brought in the name of the employee, or his dependents or those entitled by law to sue in the event he is deceased, as plaintiff or, at the option of such plaintiff, may be brought in the name of such plaintiff and for the use and benefit of the employer or insurance carrier, as the case may be. Upon suit being filed, the employer or the insurance carrier, as the case may be, may file in the suit a notice of payment of compensation and medical benefits to the employee or his dependents, which notice shall constitute a lien upon any judgment or settlement recovered **to the extent that the court may determine to be their prorata share for compensation and medical benefits paid or to be paid under the provisions of this law**, less their pro rata share of

all court costs expende
d by the plaintiff in the prosecution of the suit including reasonable attorney's fees for the plaintiff's attorney. In determining the employer's or carrier's pro rata share of those costs and attorney's fees, the employer or carrier shall have deducted from its recovery a percentage amount equal to the percentage of the judgment or settlement which is for costs and attorney's fees. Subject to this deduction, the employer or carrier shall recover from the judgment or settlement, after costs and attorney's fees incurred by the employee or dependent in that suit have been deducted, 100 percent of what it has paid and future benefits to be paid, **except, if the employee or dependent can demonstrate to the court that he did not recover the full value of damages sustained, the employer or carrier shall recover** from the judgment or settlement, after costs and attorney's fees incurred by the employee or dependent in that suit have been deducted, **a percentage of what it has paid and future benefits to be paid equal to the percentage that the employee's net recovery is of the full value of the employee's damages**; (Emphasis added).

This statute was enacted in 1989, effective October 1, 1989, by Ch. 89-289, §21, Laws of Fla. [Vol. I, Part Two, Laws of Florida, at 1770-1771]. It is the statute still in force today.

This Court should exercise its jurisdiction and accept the certified question for the following reasons: (1) Although this statute was enacted in 1989, this is the first case to come up to the Court involving the meaning of the subrogation formula contained in the statute. It is a case of first impression. *City of Hollywood v. Lombardi*, supra, at 1849; (2) The subrogation statute applies to the entire State of Florida, all Districts and Circuits, in all tort cases which also involve workers' compensation; and (3) The legislative history of this subrogation statute is connected to the decision of this Court in *Nikula v. Michigan Mutual Insurance*, 531 So. 2d 330 (Fla. 1988).[2]

The First District Court of Appeal stated in the decision below in *Lombardi*, at page 1850: "...but our review of the statute's history implies that the version in effect in 1993, when claimant's accident occurred, was a result of the discussion

In *Nikula*, the employee, Gustaf Thorarinsson, was the ward of Karl Nikula. Thorarinsson was struck on the head by a piece of scaffolding while he was at work. He collected workers' compensation benefits from his employer and its insurance carrier and sued the manufacturer of the hard hat that Thorarinsson was wearing at the time. The case was settled for $3,600,000 prior to trial. At the subrogation hearing, the Circuit Judge determined that the full value of damages was $15,000,000 and that Thorarinsson was comparatively negligent by 90%. The trial court determined that the employer/carrier's subrogation lien was 10% because of Thorarinsson's comparative negligence of 90%.

On appeal by the employer/carrier, the District Court reversed holding that the use of the percentage of comparative negligence to determine the amount of a partial subrogation lien was incorrect. The District Court held that the proper method to determine the amount of the employer/carrier's partial subrogation lien was the ratio of what Nikula received ($3,600,000) to the full value of damages ($15,000,000). This is a ratio of 24%.

On certified question, this Court approved of the District Court's reasoning in interpreting the 1981 subrogation statute:

> ...where settlements involving comparative negligence are concerned, the lienholder should be reimbursed in the same ratio as the injured worker.

Nikula v. Michigan Mutual Insurance, 531 So. 2d 330, at 332 (Fla. 1988).[3]

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in *Nikula*."

In the present case, the Circuit Judge determined that one of the reasons that Lombardi did not receive the full value of damages was his comparative

Michael Manfredo was employed in the construction of a shopping center. He was instructed to go through a doorway to get to his place of work. "There were no signs or other devices to alert him to the fact that the doorway opened to the exterior of the building." *Manfredo*, infra, at 1163. He opened the door, stepped through the doorway and fell twelve-and-one-half feet to the pavement below, suffering serious, permanent injuries. He collected workers' compensation benefits from the employer/carrier and sued the architect, the owner of the building and the lessee of the building. He settled his claim against the third party tortfeasors for $900,000. The employer/carrier sought a determination of its subrogation lien. By the time of the subrogation hearing, the employer/carrier had paid $440,455.05 in workers' compensation benefits in the past. The subrogation statute involved was the 1983 version (which was repealed in 1989). In the subrogation hearing, the Circuit Court Judge determined that the full value of the claim was $1,500,000 and that Manfredo was comparatively negligent to the extent of 40%. The attorney's fees and costs were $409,500. The trial Judge determined that the ratio of the fees and costs to the gross settlement was 45.5%. To this, he added the 40% comparative negligence figure for a total of 85.5%. He subtracted this from 100% in determining that the employer/carrier was entitled to subrogation amounting to 14.5% of what it had already paid ($6,447.43) and was entitled to reduce future benefits by the same percentage, 14.5%. The Third District Court of Appeal reversed, relying on this

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negligence of 30%. However, the Circuit Judge was correct under *Nikula* and the present statute in not using the 30% figure in determining the amount of the subrogation lien.

Court's decision in *Nikula*. *Employer's Casualty Insurance Co. v. Manfredo*, 542 So. 2d 1365 (Fla. 3rd DCA 1989). Although *Manfredo* involved a 1983 version of the statute and *Nikula* involved the 1981 version (both of which were repealed in 1989), both cases used the ratio of the employee's recovery to the full value of damages to determine the amount of the employer's partial subrogation lien because in both cases, the employee was guilty of comparative negligence. In both cases, the percentage of comparative negligence was not used in the formula to determine the amount of the subrogation lien. It was only important that there was comparative negligence; the percentage of how much comparative negligence was irrelevant.

In *Manfredo v. Employer's Casualty Insurance Company*, 560 So. 2d 1162 (Fla. 1990), this Court approved of the Third District Court of Appeal's decision in *Manfredo*, based on *Nikula*. The only difference between the two cases is that in *Nikula*, under the 1981 statute, the costs and attorney's fees were not a prorata deduction, whereas in *Manfredo*, under the 1983 statute, the costs and attorney's fees were divided between the employee and the employer/carrier according to the percentage that the net recovery was to the full value of damages. The employer/carrier's share of the attorney's fees and costs was then deducted from the total value of damages according to the statute.

In 1989, the workers' compensation subrogation statute was again amended in a number of ways. First, the total amount of costs and attorney's fees is to be deducted from the gross recovery regardless of whether the employee recovers the full value of damages or not. Second, the conditions which determine when there shall be partial

subrogation instead of total subrogation, were changed from comparative negligence or collectibility to whenever the employee does not recover the full value of damages for any reason. Third, the statute now contains a formula for determining the amount of partial subrogation: it is the percentage of what the employer/carrier paid in the past, and the percentage of what it will pay in the future, which is equal to the percentage of the net recovery that the net recovery is a percentage of the full value of damages.

The Petitioners rely on this Court's decision in *Manfredo v. Employer's Casualty Insurance Company*, 560 So. 2d 1162 (Fla. 1990) for the proposition that they are entitled to the percentage of what they paid in the past at the time of the subrogation hearing which is equal to the percentage that the net recovery is a percentage of the full value of damages and that they are entitled to reduce what they pay in the future after the subrogation hearing by the same percentage, until they have recovered the entire amount of the employee's net recovery. (Petitioners' Brief 17). *Manfredo* was decided under a different (and now repealed) statute, than the statute in the present case.

A comparison of *Manfredo* with the present case shows:

MANFREDO	LOMBARDI
1983 statute §440.39(3)(a) (repealed)	1993 statute §440.39(3)(a)
a) total subrogation for full value of damages	a) total subrogation for full value of damages
b) partial subrogation for	b) partial subrogation for

comparative negligence or limits of insurance and collectibility only	any reason
c) costs and attorney's fees are allocated between claimant and employer/ carrier; subrogation does not include the employer/carrier's pro rata share of costs and attorney's fees, which is equal to the percentage that the Court costs and attorney's fees are a percentage of the judgment	c) costs and attorney's fees are deducted from the gross recovery and are not included in the subrogation calculation
d) no statutory formula for partial subrogation	d) statutory formula for partial subrogation: the percentage of the net recovery of what has been paid in the past, or will be paid in the future, equal to the percentage of the net recovery that the net recovery is a percentage of the full value of damages

The formula for partial subrogation by using only the percentage of the net recovery that the net recovery is a percentage of the full value of damages first appeared in the Fourth District Court of Appeal's decision in *Michigan Mutual Insurance v. Nikula*, 509 So. 2d 334 (Fla. 4th DCA 1987). The Fourth District Court of Appeal's decision in *Nikula* was rendered May 4, 1987, with a further opinion on rehearing on July 22, 1987. This Court decided *Nikula v. Michigan Mutual Insurance*, supra, on September 22, 1988.

The Third District Court of Appeal's decision in *Employer's Casualty Insurance Company v. Manfredo*, 542 So. 2d 1365 (Fla. 3rd DCA 1989), was

rendered on May 9, 1989. Thereafter, the Legislature repealed the existing subrogation statute, §440.39(3)(a), and amended it, effective October 31, 1989. This amendment contained the formula for partial subrogation expressed by this Court in *Nikula*, supra. *Manfredo* was pending in this Court at the time, but was not decided until April 26, 1990.

What is the cap on a partial subrogation lien according to *Manfredo*? This is not so clearly answered. The 1983 statute involved in *Manfredo* contained a formula for dividing up the costs and attorney's fees between the claimant and the employer/carrier, but it did not contain a formula for dividing up the net recovery between them. This Court held that the net recovery was to be divided up between the claimant and the employer/carrier according to the formula contained in *Nikula* based on the 1981 statute: that the net recovery was to be divided between the employer/carrier and the employee such that the employer/carrier received a percentage of the net recovery that the net recovery was a percentage of the full value of damages, regardless of whether the benefits were paid before or after the subrogation hearing or both. At the end of the opinion, this Court disapproved of *Brandt v. Phillips Petroleum Co.*, 511 So. 2d 1070 (Fla. 3rd DCA 1987). The Court clearly rejected the statement in *Brandt* that the percentage of comparative negligence was a mathematical factor to be inserted into the formula for determining the amount of partial subrogation. The Court further stated:

> We note that, using the ratio of net recovery to the judicially determined full value of the third-party claim, the carrier in this case is entitled to 32.7% of the amounts previously paid

> to Manfredo, and the carrier may deduct 32.7% from future payments to Manfredo.

Manfredo v. Employer's Casualty Insurance Company, 561 So. 2d 1162 (Fla. 1990).

The Petitioners take this to mean that this Court was approving of the deduction of future payments to Manfredo by 32.7% until the entire amount of Manfredo's net recovery was in turn recovered by the employer/carrier. The Respondent, Lombardi, contends that this Court meant that the employer/carrier could deduct 32.7% from Manfredo's future benefits until they had recovered 32.7% of his net recovery.

In the present case, it is not necessary to decide whether *Manfredo* is correct or incorrect because it is based on a statute which was repealed prior to Lombardi's accident. A case such as *Manfredo*, interpreting a repealed statute, is no longer authoritative. It is obsolete. The amended statute which was enacted prior to this Court's decision in *Manfredo* does contain a formula for calculating partial subrogation, as well as a formula for reducing future workers' compensation benefits in order to amortize that partial subrogation lien when it is necessary to do so. It is the same formula. The statutory formula is this: Whenever the employee does not receive the full value of damages for any reason, the employer/carrier's subrogation lien is the percentage of what it has paid in the past, and the percentage of what it will pay in the future, in workers' compensation benefits, which is equal to the percentage of the net recovery (after costs and attorney's fees) that the net recovery is a percentage of the full value of damages. §440.39(3)(a), Fla. Stat. (1993).

The amended statute clearly refers to the employer/carrier's partial subrogation lien as being a percentage of a percentage: "...a percentage of what it has paid and future benefits to be paid equal to the percentage that the employee's net recovery is of the full value of the employee's damages...." Since a percentage of a percentage is less than 100%, the amended statute has such cap on the amount of the employer/carrier's partial subrogation lien.

Plainly, the formula for partial subrogation in the amended statute is a formula for dividing up the proceeds from the third-party tort case between the employee and the employer/carrier, whenever there is not enough money to satisfy the rights of both of them --- whenever there is not enough to go around.

In the present case, the Circuit Court Judge determined that the full value of damages, which Lombardi did not receive, was $250,000 because of comparative negligence and collectibility.

Paragraph 1 of the Circuit Court Judge's order of October 30, 1995, in the subrogation case provided:

> I find that the total value of the damages sustained in this case, after considering that the Claimant was approximately 30% comparatively negligent,[4] and considering the policy limits of $100,000.00, to be $250,000.00. (R. 143).

The Circuit Court Judge determined that Lombardi's net recovery, after attorney's fees, was $62,671, which was 25% of the full value of damages. She,

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Note: The percentage of comparative negligence does not go into the formula for determining the amount of the employer/carrier's partial subrogation lien. §440.39(3)(a), Fla. Stat. (1993).

therefore, determined that the employer/carrier's partial subrogation lien was 25%.

Paragraph 2 of the Circuit Court Judge's order of October 30, 1995, in the subrogation case provided:

> I find th
> at the total net settlement amount to the claimant amount to $62,671.00, t**hereby entitling the Employer/Carrier to a 25% recovery ratio**. (R. 143). (Emphasis added).

At the time of the subrogation hearing on April 5, 1995, the employer/carrier was not paying benefits, but it had paid $41,228.76 in the past. The Judge awarded the employer/carrier 25% of that amount, which was $10,307.19. Lombardi paid this amount to the employer/carrier from his third party recovery.

Paragraphs 3 and 4 of the Circuit Court Judge's order of October 30, 1995, in the subrogation case provided:

> I find that the total payout of compensation benefits made by the Employer/Carrier to Mr. Lombardi through December 14, 1994 to be in the amount of $41,228.76.
>
> Consequently, I order the Plaintiff to pay $10,307.19 to the Employer/Carrier. (R. 144).

The Circuit Court Judge then went on to direct in paragraph 4 of her Order that the employer/carrier could reduce future benefits by 25% "as a result of the lien they retained from the time of the hearing on the Motion for Equitable Distribution, April 5, 1995, forward." (R. 144).

Paragraph 4 of the Circuit Court Judge's order of October 30, 1995, in the subrogation case provided:

> Furthermore, I hereby order any compensation or medical

> payments made after April 5, 1995 by the Employer/Carrier to be reduced by 25% as a result of the lien they retain from the time of the hearing on the Motion for Equitable Distribution, April 5, 1995, forward. (R. 144).

The "lien they retain" was the lien provided for in paragraph 2 of the Order. This was 25% of Lombardi's net recovery. (R. 143.) 25% of Lombardi's net recovery of $62,671 is $15,667.75, which goes to the employer/carrier. This leaves $47,003.25 to Lombardi.

The words "as a result of the lien they retain" was a limitation on the employer/carrier's authority under the Circuit Court Judge's order to reduce future compensation or medical benefits by 25%. They could only reduce future workers' compensation benefits by 25% "as a result of the lien they retain". How much was that? The answer was provided for in paragraph 2 of the Circuit Court Judge's order:

> I find that the total net settlement amount to the Claimant amount to $62,671.00, thereby entitling the Employer/Carrier to 25% recovery ratio. (R. 143).

The majority of the First District Court of Appeal understood the Circuit Court Judge's order to mean that "the lien they retain" to be 25% of $62,671.00 as provided in paragraph 2 of the Circuit Court Judge's order. They did not think that the Circuit Court Judge's order was ambiguous in this regard. After all, it is a simple mathematical calculation: 25% of $62,671.00 is $15,667.75. The majority of the First District Court of Appeal further felt that even if it could be argued that the words "the lien they retain" were ambiguous, then the ambiguity would have to be resolved in favor of a correct interpretation of the statute, §440.39(3)(a): whenever the employee recovers less than the full value of damages (as the Circuit Court Judge

found) the employer/carrier's subrogation lien amounts to the percentage of what they have paid in the past and what they will pay in the future which is equal to the percentage of the net recovery that the net recovery is the percentage of the full value of damages. (The Circuit Court Judge found that was 25%.) The dissenting Judge in the First District Court of Appeal did not say that the majority was incorrect in its interpretation of §440.39(3)(a), Fla. Stat. Rather, what he said was, that he thought the Circuit Court Judge had found that the employer/carrier was entitled to $62,671.00 and that there was no ambiguity. Of all of the interpretations that could be made of the Circuit Court Judge's order, that is not one of them. Under that interpretation, the plaintiff's lawyer gets paid in full, the employer/carrier gets the employee/claimant's complete net recovery and the employee/claimant gets nothing. He gets nothing for his pain and suffering. He gets nothing for his lost wages over and above what workers' compensation pays. He gets nothing for loss of consortium or any of the other common law damages, such as loss of earning capacity.

Yet, §440.39(1), Fla. Stat., (1993) provides that the employee may collect both workers' compensation and collect damages from a third-party tortfeasor, subject to subrogation under §440.39(3)(a), Fla. Stat. If the argument of the Petitioners were correct that the employer/carrier gets Lombardi's total net recovery, then §440.39(1), Fla. Stat., has no meaning. What they argue for is not subrogation. They claim they are entitled to take everything from Lombardi that he received, his entire net recovery.

As a matter of law, both under the statute, §440.39(3)(a), Fla. Stat., and paragraphs 2 and 4 of the Circuit Judge's Order, the employer/carrier is only entitled

to a subrogation lien of $15,667.75. Since Lombardi had already paid them $10,307.19, they had exactly $5,360.56 to be burned off at a 25% reduction in future benefits. This amount has long since been burned off. However the employer/carrier continues to take the 25% reduction because it was their contention before the Judge of Compensation Claims, before the First District Court of Appeal, and before this Court, that the meaning of the Circuit Judge's Order was that they could reduce future benefits by 25% until they had recovered the entire amount of the claimant's net recovery of $62,671. (R. 195.) (Petitioner's Brief 17).

This is not a percentage of a percentage as the statute provides. It is everything that the employee recovered. Under the employer/carrier's argument, the claimant's attorney is paid his attorney's fee, the employer/carrier gets the employee's entire net recovery and the employee gets nothing.

The Circuit Judge's Order does not provide that the employer/carrier is entitled to the entire amount of the employee's net recovery. It provides in paragraph 4 that future benefits could be reduced by 25% as a result of the lien they retained from April 5, 1995, forward. The lien retained was provided for in paragraph 2 of the Order as being 25% of the net recovery. By mathematics, 25% of the net recovery is $15,667.75, to the employer/carrier and the balance of $47,003.25 to Lombardi.

The Petitioners' reference to the argument of counsel at the subrogation hearing at page 2, lines 5-7, page 14, lines 21-23 and page 15, lines 1-3 of their initial brief is outside the record. When the transcript was offered by the employer/carrier, the claimant objected as it was incomplete, the parties had already rested and it was only

the argument of counsel anyway. (R. 57-60.) The Judge of Compensation Claims sustained the objection. (R. 60.) The transcript is contained at page 153, et seq., only as a proffer. This argument of the Petitioners should be stricken. Fla. R. App. P. 9.180(h)(3).

The certified question should be answered in the affirmative and this portion of the First District Court of Appeal's decision should be affirmed.

POINT II

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS CONTRARY TO FLORIDA LAW BECAUSE IT IMPROPERLY REVERSED THE JUDGE OF COMPENSATION CLAIMS' FINDING THAT THE EMPLOYER/SERVICING AGENT IS ENTITLED TO A GRICE OFFSET, AS THERE IS NO RECORD OF A CONTRACT THAT PRECLUDED THE CITY OF HOLLYWOOD FROM TAKING THE GRICE OFFSET.

(Petitioner's Point II)

The Respondent would state Petitioners' Point II a different way:

> THE JUDGE OF COMPENSATION CLAIMS WAS INCORRECT IN HOLDING THAT IN COORDINATING WORKERS' COMPENSATION WITH A SERVICE-CONNECTED DISABILITY FOR THE SAME INJURY OVER THE CAP OF 100% OF THE AVERAGE MONTHLY WAGE, THE OFFSET GOES TO THE BENEFIT OF THE EMPLOYER/CARRIER TO REDUCE WORKERS' COMPENSATION TO THE DETRIMENT OF THE PENSION TRUST FUND WHEN:

A. THE PENSION TRUST FUND WAS EMPLOYEE-CONTRIBUTORY;

B.REQUIRING THAT PENSION TRUST FUND PAYMENTS BE PRIMARY IS UNLAWFUL.

A precise way of putting this question is whether this is a *Barragan*[5] *offset or whether it is a Grice*[6] *offset. Under Barragan*, workers' compensation was primary and the pension payment was secondary. Under *Grice*, it is just the opposite. The pension fund payment is primary and the workers' compensation payment is secondary. *Grice* cites *Barragan* with approval. It does not overrule it. What, then, is the difference between the two cases? In *Barragan*, there was a city involved and the city's system was employee contributory. In *Barragan*, the Supreme Court held that §440.21, Fla. Stat., then comes into play which forbids any scheme by which the employer requires the employee to contribute to a fund from which his own benefits are paid. Thus, if the pension fund were primary and workers' compensation were reduced in any way on account of such payments, it would violate the criminal aspects of that statute and, therefore, cannot be done.

In *Grice*, the pension fund was operated by the Florida Retirement System (FRS), not by the employer, which was a county and a compulsory of FRS. The Florida Retirement System is employee non-contributory. §121.071, Fla. Stat. Therefore, in such instance, §440.21, Fla. Stat., would not come into play.

In the present case, the employer is the City of Hollywood and the employees'

Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989)

Escambia County Sheriff's Dep't v. Grice, 672 So. 2d 896 (Fla. 1997)

pension trust fund was employee contributory and the Judge of Compensation Claims so found. (R. 196.)

On that basis, as a matter of law, this was a *Barragan* offset and not a *Grice* offset. The pension fund was primary and workers' compensation was secondary. Under *Barragan*, workers' compensation was primary and the pension fund was secondary.

The Court should also know that the correctness of *Grice* is being revisited in a case that was certified to the Supreme Court, *City of Clearwater v. Acker*, Fla. Sup. Ct. Case No. 93,800, in which the briefs of the parties have been filed and the case was argued April 7, 1999. The decision is long awaited.

Depending on whether the Supreme Court decides in *Acker* to revisit *Grice* completely, or only deal with the payment of the supplemental benefit, which the Petitioners in the present case concede, is yet to be determined.

In discussing whether there really is a difference between a *Barragan* offset and a *Grice* offset, the First District Court of Appeal in the decision in *Lombardi* below stated:

> We are not convinced that the Florida Supreme Court intended to create two different types of offsets, allowing employer/carriers to reduce different benefits based on the contributors to the particular funds.

City of Hollywood v. Lombardi, 24 Fla. L. Weekly D1849, at 1850 (opinion filed August 5, 1999).

Nonetheless, the First District Court of Appeal remanded the cause to the Judge of Compensation Claims to determine whether Lombardi's employment

contract was like the employment in *Barragan* and if it was, that workers' compensation should be primary and the pension payment secondary. Alternatively, the First District Court of Appeal remanded the cause to determine if there were no such contract, then to determine how much of Lombardi's contribution to the pension fund produced how much of his disability benefit.

The Respondent submits that the remand was unnecessary because workers' compensation is primary regardless of whether the employee is required to contribute to the pension fund or not.

It is noteworthy that one of the reasons why *Grice* may be incorrect, is that the Legislative has waived sovereign immunity for governmental employment completely. §440.02(15)(b)1, Fla. Stat. (1993).

Thus, private employment and governmental employment are treated the same.

The Employee Retirement Security Act of 1974 only applies to private employment. It should be clear under 29 U.S.C. §§1001, 1103(c)(1), that it would be unlawful under ERISA for a private employer to make payment from an employee pension trust fund to satisfy his own obligations to pay workers' compensation. Thus, it should appear that the judicial branch of the Florida government not only should not, but cannot, "legislate" a different rule for governmental employment in Florida, since governmental employment is treated the same as private employment insofar as the Florida Workers' Compensation Law is concerned.

In *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989), this Court held that a municipal ordinance, which provided for the reduction of workers' compensation

benefits on account of the receipt of disability pension benefits for the same injury, was invalid.

After the repeal of §440.09(4), Fla. Stat., by the Florida Legislature in 1974, 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. This 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 Municipal 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.

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. In both *Barragan* and *Grice* the cap is stated to be 100% of the average monthly wage, which

is the workers' compensation way of calculating salary or earnings. Since the purpose of the salary cap is to restrict the employee from receiving disability benefits from two different sources, both of which are provided by his employer, it does not make sense to say that the cap is only the workers' compensation average weekly wage method of calculating or earnings. Rather, in coordinating both of these benefits, the cap should be either the workers' compensation average weekly wage method of calculating earnings or the pension trust fund method of calculating earnings as used to determine the disability pension benefit, whichever of the two is the greater.

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.

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

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 benefits were 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 when 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).

In *Grice*, the employer was Escambia County and the employee, Thomas

Grice, was a deputy sheriff. Counties are compulsory members of the Florida Retirement System (FRS) provided for in Chapter 121. The Florida Retirement System under Chapter 121 is not employee-contributory. §121.071, Fla. Stat. 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. Stat., 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 an exactly 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.[7]

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

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[7] The Court should note that in the present case, the Petitioner, City of Hollywood, does not contend that the supplemental benefit for permanent total disability should be included in the offset calculation.

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. 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 the Court in *City of Clearwater v. Acker*, Fla. Sup. Ct. Case No. 93,800. 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.

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(15)(b)1, Fla. Stat. (1993). Sovereign immunity is completely waived as the Legislature specifically provided that the government and private employers are to be treated the same. §440.02(15)(b)1, Fla. Stat. (1993).

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.[8] 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,

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E.g., City of Miami Beach

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' 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.

Professor Prosser well states the theory of workers' compensation, that the industry which produced the injury bears the cost of workers' compensation benefits for such injury, as an item of overhead:

> The theory underlying the workmen's compensation acts never has been stated better than in the old campaign slogan, "the cost of the product should bear the blood of the workman." The human accident losses of modern industry are to be treated as a cost of production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the consumer. In this he is aided and controlled by a system of compulsory liability insurance, which equalizes the burden over the entire industry. Through such insurance both the master and the servant are protected at the expense of the ultimate consumer.
>
> Prosser, "The Law of Torts", §80, pp. 530-531 (4th ed. 1971).

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, Fla. Stat., 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 employee's lifetime. 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 so that future taxpayers do not pay for his benefit. §112.61, Fla. Stat. Workers' compensation does not require that extensive a degree of funding. As far as the taxpayer is concerned, a *Grice* offset is the most expensive way of doing it. A *Barragan* offset is cheaper for the taxpayer.

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 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.

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. (1993). 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. (1993), 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? The problem actually becomes even more complicated when as in the present case, there is a recovery from a third-party tortfeasor and accompanying subrogation. A similar problem could arise if there were 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.

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. While Lombardi's accident did occur during the window of the existence of this statute, it should be

noted that §440.15(12), Fla. Stat., (1993) was not really an offset statute providing for a deduction when benefits from workers' compensation and a disability pension were to be coordinated. Rather, it provides that the combination of these two benefits shall not total less than 100 percent 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 employee's injury. Under the statute, this would only be applicable if the employer provided the majority of funding. §440.15(12), Fla. Stat. (1993).

In the present case, the Petitioners did not even attempt to prove that the City of Hollywood provided the majority of funding. Indeed, in most governmental pension plans, that would never be true because the majority of funding comes from the fund itself, by interest earned on investments and the proceeds from the profitable sale of investments.

The remand by the First District Court of Appeal to determine whether Lombardi's contract was like the contract in the *Barragan* case or alternatively, how much his contributions account for his benefit, violates this statute as well as §440.21, Fla. Stat. No inquiry can be made as to whether the employee fully paid for his own benefit or overpaid for it or underpaid for it. If he paid anything at all to the pension fund, the benefits paid by the pension fund cannot be primary. The workers' compensation benefits must be primary. *Barragan v. City of Miami*, supra.

In reality, the remand imposes a burden on the employee which is impossible to prove. It is not possible to determine how much of the pension fund's corpus was provided for by Mr. Lombardi's contributions to the pension fund from his bi-weekly

payroll deductions. Did the pension fund purchase only its most profitable investments or did the pension fund purchase only its worst losses with his money?

The decision of the First District Court of Appeal should be modified. Workers' compensation is primary and a disability pension for the same injury is secondary, regardless of whether the pension plan was employee-contributory or not.

POINT III

IT WAS ERROR FOR THE FIRST DISTRICT COURT OF APPEAL TO COMPEL THE EMPLOYER/SERVICING AGENT TO TAKE ITS TWENTY-FIVE PERCENT (25%) REDUCTION FOR THE SUBROGATION LIEN PRIOR TO APPLICATION OF THE GRICE OFFSET IN VIOLATION OF THE INTENT OF SECTION 440.39

(Petitioners' Point III)

This point involves the District Court of Appeal's other certified question. It, too, is a novel question:

> WHEN AN EMPLOYER/CARRIER IS ENTITLED TO REDUCE A CLAIMANT'S COMPENSATION BENEFITS AS A RESULT OF A SUBROGATION LIEN UNDER SECTION 440.39, FLORIDA STATUTES, SHOULD THE EMPLOYER/CARRIER APPLY THE LIEN REDUCTION BEFORE OR AFTER CALCULATING TOTAL BENEFITS AND APPLYING THE 100 PERCENT AVERAGE WEEKLY WAGE CAP AND RESULTANT OFFSET AUTHORIZED BY SECTION 440.20(15), FLORIDA STATUTES, AND *ESCAMBIA COUNTY SHERIFF'S DEP'T v. GRICE*, 692 SO. 2D 896 (FLA. 1997)?

The Judge of Compensation Claims determined that the subrogation offset should be taken first because it is a statutory deduction and that the pension offset

should be taken thereafter because it is a common-law offset. The District Court of Appeal affirmed. The employer/carrier have not demonstrated that this is reversible error. On the contrary, it makes more sense because it has a reasonable basis in law. They argue that it should be the other way because that is financially better for them in this case. However, that would not always be so, depending upon which was the greater of the two. This could vary from case to case. Sometimes, the pension offset would be more than the subrogation deduction. Sometimes, it would be vice versa. It could even be the same, by happenchance.

The certified question, however, is misstated. There is no "...resultant offset authorized by Section 440.20(15), Florida Statutes..." as stated in the certified question. Section 440.20(15), Fla. Stat., provides that when an employer pays full wages during a period of disability, in which workers' compensation benefits are being contested, and they are subsequently awarded, or paid, the employee is not entitled to his workers' compensation disability benefits over and above his wages. The workers' compensation benefits are thereby refundable to the employer, and any wages paid over and above the average weekly wage at the time of the accident are considered a gratuity. Workers' compensation benefits are not wages. §440.02(24), Fla. Stat., (1993). Pension benefits are not wages. *Coleman v. City of Hialeah*, 525 So. 2d 435 (Fla. 3rd DCA 1988); rev. denied, 536 So. 2d 243 (Fla. 1988). Social Security benefits are not wages. §440.02(24), Fla. Stat., (1993). Plainly, wages are pay for work performed; whereas, workers' compensation, disability pensions and Social Security disability benefits are entitlements for the inability to work. The

reference to §440.20(15), Fla. Stat., by the District Court of Appeal is totally inappropriate.

The Judge of Compensation Claims was correct in calculating the statutory subrogation deduction before the common-law pension offset, according to the provisions of §440.39(3)(a), Fla. Stat.

Alternatively, if this Court believes that §440.39(3)(a), Fla. Stat., is ambiguous as to the placement of the subrogation deduction, then it should be placed after the workers' compensation calculation, or the Social Security offset, or the pension offset in each particular case depending upon which calculation gives the employee the greatest benefit, according to the most favorable remedy rule. *Kerce v. Coca-Cola Company-Foods Division*, 389 So. 2d 1177 (Fla. 1980).

POINT IV

THE FIRST DISTRICT COURT OF APPEAL FAILED TO FOLLOW PRECEDENT BY FAILING TO ALLOW THE EMPLOYER/CARRIER CREDIT FOR OVERPAYMENTS MADE BY VIRTUE OF THE GRICE OFFSET FOR PERIODS AFTER DECEMBER 19, 1994

(Petitioners' Point IV)

The First District Court of Appeal was correct in affirming the Judge of Compensation Claims' decision in directing that such offsets as the employer/carrier were entitled to take were to be taken prospectively from the date of the order.

The employer/carrier complain of this part of the Judge's decision but it has very little, if any, meaning. The employer/carrier was already taking the deduction of the 25% toward the entire amount of the employee's net recovery. The employer/carrier conceded that there is no pension or Social Security offset for the supplemental benefit and no Social Security offset for the permanent total disability. (Employer/carrier's Initial 1st DCA brief, 17.)

The only offset that could have any significance, therefore, is the pension offset. Obviously, if the final decision is that the pension fund payments are secondary, then this issue is moot. As workers' compensation benefits are primary, then they would need to be paid in full. It would be for the pension trust fund to take the offset.

Furthermore, the employer/carrier should not take an offset retroactively until it meets its burden to establish the amount that it is entitled to take. Here, the employer/carrier had never done that and therefore, the Judge would be correct in granting the offset prospectively. See *City of Miami v. Bell,* 634 So. 2d 163 (Fla. 1994). The present case has a peculiar problem. As the accident happened in 1993, it falls within the window of §440.15(12), Fla. Stat., (1993), which is a statutory post-*Barragan* offset provision. It was repealed by the Legislature in 1994. In the present case, the employer/carrier failed to show, as required by that statute, that the employer was the majority funder of the pension plan. The record only shows that the employee contributed and does not show whether the employer contributed or how much, or whether any employer payments constituted the majority of funding.

Having not complied with that statute, the employer/carrier cannot complain that the Judge did not grant them an offset that was retroactive.

The offset given to this employer, in this case, under these circumstances, was to be prospective from the date of the order, is correct.

POINT V

IT WAS ERROR FOR THE FIRST DISTRICT COURT TO AFFIRM THE AWARD OF PAYMENT OF PENALTIES AND INTEREST ON THE $8,478.75 THAT WAS PAID ON MAY 12, 1995 AS THE AWARD VIOLATES THE TWENTY-FIVE PERCENT (25%) REDUCTION PERMITTED BY VIRTUE OF THE EMPLOYER/SERVICING AGENT'S LIEN IN ACCORDANCE WITH THE CIRCUIT COURT'S ORDER

(Petitioners' Point V)

The Judge of Compensation Claims was correct in awarding penalties and interest on the payments that were made on May 12, 1995, from December 14, 1994, because they were paid late. The claimant did not have the use of that money during that period of time. The employer/carrier did not file a Notice of Denial and did not show that the failure to pay during the time that the payments were due, was due to any circumstance beyond their control as allowed by statute to excuse penalties. §440.20(7), Fla. Stat., (1993). Interest would be payable in any event. §440.20(9), Fla. Stat. (1993). As the subrogation hearing was in April when the employer/carrier was not paying benefits, their claim for past benefits for subrogation purposes does not include the payment of

permanent total disability or the supplemental benefit. The subrogation Order was not entered by the Circuit Judge until October 10, 1995, Therefore, the employer/carrier could not invoke the subrogation deduction that the Circuit Judge gave until October of 1995. Their claim is: that if the Circuit Judge's Order had been entered before May, they could have taken a 25% reduction in the principal amount. Therefore, they could have offset that against the penalties and interest which were owed. Even if that were true, they would still have to calculate the amount of the penalties and interest that were owed, because that would reduce the credit that they got for the "25% overpayment." Thus, even under the terms of their own argument, they have shorted the claimant that much and they still argue that they ought to be able to do so.

The award of penalties and interest on this late payment was correct.

CONCLUSION

The First District Court of Appeal's decision on Point I should be affirmed; on Point II, it should be modified: (1) the cap on coordination of workers' compensation and disability pension benefits for the same injury, is the workers' compensation average weekly wage or the average final compensation used to calculate the pension benefit, whichever is greater; (2) the workers' compensation payment is primary; the pension payment is secondary, regardless of whether the pension plan is employee-contributory or not, but most certainly, if it is employee-contributory; and (3) a Social Security disability offset should be determined in accordance with state and federal statutory law; and on Point III, Point IV and Point V, it should be affirmed.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE AND STYLE

I certify that this brief has been typed in 14 point proportionately spaced Times Roman.

Richard A. Sicking

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Scott J. Brook, Esquire, Peters, Robertson, Parsons, Welcher, Mowers & Passaro, attorney for Petitioners, 506 S.E. 8th Street, Ft. Lauderdale, Florida 33316, by mail this _____ day of November, 1999.

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Richard A. Sicking