IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CITY OF HOLLYWOOD, et al.,

Petitioners,

vs.

ALBERT LOMBARDI,

Respondent
_____/

CASE NO. 96,482

District Court of Appeal
First District - No. 98-03186

INITIAL BRIEF OF PETITIONERS ON THE MERITS

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Statutes and Other Authorities:

INTRODUCTION

This appeal is from a decision from the First District Court of Appeal.

THE CITY OF HOLLYWOOD and INTERRISK CONCEPTS, INC. will be referred to as the Employer/Servicing Agent, the Petitioners, or individually by name in this brief. The Respondent, ALBERT LOMBARDI, will be referred to as the Respondent, the employee, the Claimant, or by name in this brief.

All references to the record will appear as follows:

[Vol. __, R. __].

STATEMENT OF FONT SIZE

This Brief has been typed in Times New Roman 14.

STATEMENT OF THE CASE

Judge Henning, of the Circuit Court of the 17th Judicial Circuit, held a hearing on the City of Hollywood's Motion For an Equitable Distribution on April 5, 1995. [Vol. 1, R. 154]. Judge Henning rendered an oral ruling on April 5, 1995 setting the damages at $250,000, finding the Claimant did not recover the full value of the damages. [Vol. 1, R. 181-182]. At the same time, Counsel for Mr. Lombardi conceded a 25-percent reduction of future benefits after April 5, 1995 "up to $62,000." [Vol. 1, R. 185]. Subsequently, on October 30, 1995, Judge Henning rendered a written ruling entitling the City of Hollywood to immediate payment of $10,307.19, and a reduction of future medical and compensation payments made after April 5, 1995 (the date of the hearing) by 25 % in accordance with the lien maintained by the City of Hollywood. [Vol. 1, R. 143-144]. There was no further limitation based on the City of Hollywood's recovery pursuant to its line. [Vol. 1, R. 143-144]. The Circuit Court order was not appealed.

On July 15, 1998, Judge Powell ordered the Employer/Carrier to pay the Claimant a ten percent (10%) penalty and statutory interest of 12% per year on the $8,478.75 paid on May 12, 1995, with interest payable, as payments were due from December 19, 1994 to May 12, 1995. [Vol. 2, R. 204]. The Judge also ordered payment of supplemental benefits without any offset for service-connected permanent total disability pension or

Social Security old-age retirement from May 16, 1995 to the present and continuing, but not exceeding the current maximum weekly compensation rate in any respective year along with statutory interest of 12% per year from May 16, 1995, according to when payments were due, to the time that payment is made, but without penalty. [Vol. 2 , R. 204]. Thirdly, the Judge awarded payment of the Claimant's benefits with a twenty-five percent (25%) reduction for the third party lien recovery (as provided in the Circuit Court Judge Henning's Order of October 30, 1995) until $62,671.00 in benefits had been recouped (in accordance with a concession by counsel for the employer/SA regarding a ceiling, as none was imposed by Judge Henning [Vol. 1, R. 30, 143-144]). Judge Powell ordered the reduction to be taken prior to any Grice offset for the Claimant's pension disability benefits. [Vol. 2, R. 204-205]. Lastly, Judge Powell found entitlement to costs and attorney's fees [Vol. 2, R. 205].

A Motion for Re-Hearing was filed on August 13, 1998 indicating that as a result of the offsets allowed, there was no amount to be paid to the Claimant despite language in the decretal portion of the Order to the contrary. [Vol. 2, R.208]. The Motion further asserted that the Grice offset should apply retroactively. [R. 208]. The Motion for Rehearing was denied and an appeal and cross-appeal ensued.

On appeal, the First District Court of Appeal ruled in favor of the Claimant on practically every issue as the Court found as follows:

- The E/SA should not receive 25% of the Claimant's net tort recovery, but rather a "percentage of the percentage recovered;"
- It was proper for the Judge of Compensation Claims to compel the E/SA to take its reduction for the subrogation lien before the application of the 100 percent average weekly wage (AWW) cap authorized by section 440.20(15), Fla. Stat. (1993), and Escambia County Sheriff's Dept. v.Grice, 692 So.2d 896 (Fla. 1997);
- That the Grice offset should not apply retroactively to payments made after January 1, 1994, thereby precluding the E/SA from recoupment of any overpayments of pension disability and Workers' Compensation made in excess of the AWW;
- That the E/SA should not have been allowed by the JCC to apply the AWW cap so as to reduce workers' compensation payments rather than disability retirement pension benefits;
- That the award of penalties and interest on benefits totaling $8,478.75 that were paid on May 12, 1995 was appropriate; and
- That the Court declined to consider the issue of attorney's fees and costs based on the JCC's jurisdiction to determine amount. City of Hollywood v. Lombardi , 738 So.2d 491 (Fla. 1st DCA 1999).

The Petitioner, City of Hollywood/InterRisk Concepts, Inc. seeks a reversal of all issues determined adversely to it.

STATEMENT OF THE FACTS

The Claimant's accident occurred on September 14, 1993. [Vol. 1, R. 104]. The parties stipulated to a compensation rate of $425.00. [Vol. 1, R. 104].

At the time of the Pre-Trial Stipulation of January 30, 1997, the Employer/Servicing Agent was paying permanent total disability at the rate of $318.75 per week. [Vol. 1, R. 105, 107]. The Claimant's Average Weekly Wage is $783.65. [Vol. 1, R. 11]. In February of 1995, the Claimant received his first regular disability payment for his pension. [Vol. 1, R. 12].

The Claimant got his first pension disability payment on January 23, 1995 which was made for January and part of December in the amount of $3,638.81. [Vol. 1, R. 41]. The Claimant testified that on February 25, 1995, he received $2,623.37, which is the amount he has received every month since for his disability pension from the City. [Vol. 1, R. 41-42].

The Servicing Agent paid checks to the City dated May 10, 1995, for a total of $8,478.75 [Vol. 1, R. 125-126]. The Servicing Agent sent additional checks in the amount of $850.00 for permanent total benefits, and $42.50 for supplemental benefits on May 15, 1995 to the Claimant. [Vol. 1, R. 128-129]. A Notice of Denial was filed on February 10, 1997 to a Petition filed by the Claimant dated February 3, 1997 indicating

that the Claimant was already receiving $319 per week, and that the Employer/Carrier was only taking the 25% lien reduction. [Vol. 1, R. 132-136].

In Circuit Court, Judge Henning found that the Employer/Servicing Agent was entitled to a twenty-five percent (25%) recovery ratio for their lien [Vol. 1, R. 143]. The Judge also found that the total pay-out of compensation benefits made by the Employer/Servicing Agent to the Claimant through December 14, 1994 was in the amount of $41,228.76. [Vol. 1, R. 143-144]. Judge Henning ordered the Plaintiff to pay $10,307.19 to the Employer/Servicing Agent and ordered any further compensation or medical payments made after the April 5, 1995 hearing date to be reduced by twenty-five percent (25%) as a result of the lien retained from the time of the hearing on the Motion for Equitable Distribution [Vol. 1, R. 144].

POINTS ON APPEAL

POINT I

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

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 EVIDENCE OF A CONTRACT THAT PRECLUDED THE CITY OF HOLLYWOOD FROM TAKING THE GRICE OFFSET.

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.

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.

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.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal made several errors as a matter of law by failing to adhere to the Final Order of the Circuit Court Judge that permitted the Employer/Servicing Agent, the CITY OF HOLLYWOOD/INTERRISK CONCEPTS, INC. to reduce payments of workers' compensation and medical benefits after April 5, 1995 by twenty-five percent as a result of its lien on the Claimant's third party claim.

Not only did the First District Court of Appeal disregard the Circuit Court decision in rendering its ruling finding that somehow the Employer/Servicing Agent was merely entitled to only "a percentage of percentage" of its lien, but such a finding violates Section 440.39(3), Fla. Stat. (1993).

The First District Court of Appeal opined that the Employer/Carrier was somehow only entitled to twenty-five percent of its 25% lien, as opposed to a straight twenty-five percent reduction of future payments as ordered by Judge Henning. The First District Court inserted language into the statute in violation of its powers. In this case, such a ruling may detrimentally affect the City of Hollywood up to approximately $47,000.00.

Such a ruling on this novel issue, created solely by belated argument of the claimant, is truly a matter of great public importance as it may cost Employers/Carriers

tens of millions of dollars in the future by adhering to such an absurd interpretation of the statute.

The First District Court also erred as a matter of law by failing to allow the Petitioners an offset pursuant to Escambia County Sheriff's Dep't. v. Grice, 692 So.2d 896 (Fla. 1997), as the claimant's receipt of pension disability benefits from the City of Hollywood as well as workers' compensation benefits unquestionably exceeded the claimant's average weekly wage. The Grice case does not make any exceptions that would apply to this case. Furthermore, there is no legal precedent to disallow the City of Hollywood credit for overpayments made that exceeded $33,000.00 since the law has been well established that any overpayments by an Employer/Carrier since January 1, 1994 is not presumed to be a gratuity.

The second certified question that is before this Court concerns the order in which the Carrier's twenty-five percent lien and the Grice offset should apply. This, too, is a matter of great public importance because the ruling of the First District Court of Appeal applying the lien first would essentially disallow any lien maintained by an Employer/Carrier in similar circumstances since there would effectively be no resultant benefits to an Employer/Carrier by virtue of its lien. Whereas, an application of the Grice offset prior to the application of the twenty-five percent reduction would actually entitle an Employer/Carrier to its appropriate reduction in the payment of benefits. The First

District Court of Appeal's ruling that the lien should be applied first followed by the Grice offset amounts to another violation of the res judicata prohibition of overturning the Circuit Court's Final, un-appealed Order . Lastly, since the lien should have applied pursuant to the Circuit Court's ruling for payments after April 5, 1995, the First District Court of Appeal's affirmance of the award of penalties and interest for payments of benefits made after April 5, 1995 is also erroneous.

ARGUMENT

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

The First District Court of Appeal improperly read omitted language into its ruling of §440.39 concerning liens when it reversed the Judge of Compensation Claim order, and effectively overturned the Circuit Court order by placing a ceiling of $15,667.75 on the Employer/Servicing Agent's recovery.

Neither the First District Court of Appeal, nor the claimant should be permitted to change the final decision of the Circuit Court, which was not subject to an appeal. The Circuit Court Judge, Judge Henning, specifically ruled that "any compensation or medical payments made after April 5, 1995 by the Employer/Carrier to be reduced by twenty-five percent (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." [Vol. 1, R. 144]. The adjudication and award of compensation boards or commissions, as well as the judgment of courts, are generally held to be conclusive on the parties as to matters and issues involved within their jurisdictions. See, U.S. Fidelity and Guarantee Co. v. Odoms, 444 So.2d 78 (Fla. 5th DCA 1984). Since Judge Henning's Order was never appealed, the

doctrine of res judicata bars the Claimant/Respondent from relief from the judgment of the Circuit Court. See Id.

As this issue is one of first impression, the First District Court of Appeal certified the following question to this honorable Florida Supreme Court as one of great 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 PERCENTAGE OF THE NET TORT RECOVERY?

The First District Court of Appeal erred when it found that the ceiling that should apply to the Employer/Carrier's subrogation lien recovery to be $15,667.75. The Circuit Court Order placed no limitation on the Employer/Carrier's subrogation lien recovery [Vol. 1, R.143-144]. The lack of a ceiling on the Circuit Court's Order was never appealed by the Claimant, and it is entirely inappropriate for the First District Court of Appeal to make such a determination.

There would not be any ceiling, if not for the concession of Counsel for the Employer/Carrier that the Claimant's net tort recovery should act as a limit on the Employer/Servicing Agent's recovery. [Vol. 1, R. 30]. The Judge of Compensation

Claims' finding that the Employer/Carrier would be entitled to receive all of the Claimant's net recovery from his third-party claim is consistent with the Circuit Court order. [Vol. 1, R. 204]. Since the Claimant has not paid the full amount of $62,671, the Employer/Servicing Agent should be entitled to continue to take the 25% reduction until it recovers all of the Claimant's net recovery. See §440.39(3)(a), Fla. Stat.(1993). If not, the Claimant may receive a windfall of approximately $47,000!

The majority of the First District Court of Appeal improperly found that res judicata did not apply to this point. However, Justice Benton properly indicated in his dissent that he would affirm the Judge of Compensation Claims' deferral to the Circuit Court's decision of the amount of the third party lien. City of Hollywood v. Lombardi, 738 So.2d 491, 497 (Fla. 1st DCA 1999). Judge Benton specifically provided that. . .

> "If the employer or insurance carrier has given written notice of his rights of subrogation to the third-party tortfeasor, and, thereafter, settlement of any such claim or action at law is made, either before or after suit is filed, and the parties fail to agree on the proportion to be paid to each, the circuit court of the county in which the cause of action arose shall determine the amount to be paid to each by such third-party tortfeasor in accordance with the provisions of paragraph (a). §440.39, Fla. Stat. (1993) (emphasis supplied). The statute contemplates a decision by the circuit court which binds the judge of compensation claims. Offsets, adjustments, or 'percentage reductions' must occur, if at all, in circuit court." Lombardi, at 499.

Although the statute was amended in 1989, the legislature's amendment to the statute, only serves to exclude the ambiguous language of comparative negligence under the former version of the statute. [See below and later pages].

Under the former version of the statute, §440.39(3)(a), Fla. Stat. (1983) the Employer/Carrier would be entitled the right to recover a percentage of the employee's net recovery, subject to the deduction of attorney's fees and costs incurred, in recovering the damages from the third-party tortfeasor, by the employee. The 1983 statute as well as the 1989 statute are silent as to "a percentage of a percentage." The 1983 statute states, in pertinent part:

> Upon suit being filed, the employer or the insurance carrier, as the case by 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 judgement or settlement recovered to the extent that the court may determine to be their pro rata 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 expended by the plaintiff in the prosecution of the suit 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 which is for costs and attorney's fees. Subject to this deduction, the employer or carrier shall recover from the judgment, 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, unless the employee or dependent can demonstrate to the court that he did not recover the full value of damages sustained because

> of comparative negligence or because of limits of insurance coverage and collectibility.

The 1993 statute no longer contains the ambiguous language directly above regarding comparative negligence in the amended statute. See, Fla. Stat. §440.39(3)(a)(1993).

In Manfredo v. Employer's Casualty Ins. Co., 560 So.2d 1162 (Fla. 1990), this Court interpreted the statute as asserting that the Employer/Carrier would be able to recover the percentage of the employee's net recovery without a cap until the Employer/Carrier recovers the entire amount of the employee's net recovery. Id.

In interpreting the revised statute in Manfredo, the Supreme Court of Florida explained that it sought to avoid the unfair practice that would be derived from a settlement of a workers' compensation claim. Id. at 1164. As the earlier version of the statute was written, the Court stated that "an employee's comparative negligence could totally eliminate any equitable distribution that the worker's compensation carrier would receive..." Id. Therefore, the Court interpreted §440.39(3)(a), Fla. Stat. (1983) as providing the workers' compensation carrier the right to collect all net funds received from the third-party tortfeasor in order to avoid a windfall to the employee.

Furthermore, the plain meaning of the revised version of §440.39(3)(a), Fla. Stat. (1993), should be interpreted as affording the workers' compensation carrier the ability to recover all the damages received by an employee from a third-party tortfeasor as there

is no added language in the 1993 version that limits the Employer or Carrier's recovery to a "percentage of a percentage".

It is the court's obligation to construe the various parts of the Act together to achieve a consistent whole. Roberson v. Winn Dixie Stores, Inc., 669 So.2d 294, 296 (Fla. 1st DCA, 1996). In doing so, the court must construe related statutory provisions in harmony with one another. Id. at 297.

Nothing in §440.39(3)(a), Fla. Stat. (1993) suggests that the Employer/Carrier would only be limited to a partial subrogation of a Claimant's recovery from a third-party tortfeasor. On the contrary, the statute in its totality reveals that the Employer/Carrier would be entitled to all of the Claimant's net tort recovery, as in Manfredo.

Florida Statute §440.39(3)(a)(1993) provides that:

> Subject to this deduction, [attorney's fees and costs] 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 supplied).

In conjunction with the above referenced provision of §440.39(3)(a) Fla. Stat., the statute provides that in all claims or actions at law against a third party tortfeasor, "the

employee shall sue **for the use and benefit** of the employer or insurance carrier." Fla. Stat. §440.39(3)(a) (1993). The statute elaborates that such suit "**may be brought in the name of the plaintiff and for the use and benefit of the Employer/Carrier**." Id. (emphasis supplied).

The referenced provision dictates that the employee will be acting on behalf of the employer/carrier to recover the amount paid, or to be paid, in benefits up to that amount that the employer/carrier incurred in the workers' compensation claim. If the entire amount is not recovered, the Employer/Carrier would be entitled to a percentage of what it has paid and future benefits to be paid, which is defined in the statute as "**equal to** the percentage that the employee's net recovery is of the full value of the employee's damages" Id. (emphasis supplied). Here, the term "equal to" in the statute, when taken in context of the entire statute, unequivocally means that the Employer/Carrier would be entitled to the same percentage amount that the Claimant's net recovery is of the entire settlement[1]. (emphasis supplied). It does not mean the Employer is entitled to a "percentage of a percentage," as found by the First District Court of Appeal.

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[1] A] Employer/Carrier recovery ratio = $\frac{\text{Employee's net recovery}}{\text{Full value of Damage}}$

B] 25% = $\frac{\$\ 62,671}{\$250,000}$

The First District Court of Appeal appears to base its unexplainable interpretation of §440.39(3), Fla. Stat. (1993) on its assertion that "to conclude otherwise with entitle the Employer/Servicing Agent" to recover all that Lombardi received in the civil action, which was necessarily include damages for paining and suffering and loss of contortion. Those are damages claimant obtained in his action over and above economic and medical damages towards the Employer/Servicing Agent is entitled." Lombardi, at supra. However, this finding is also in conflict with findings of other District Courts of Appeal as well as in violation of a holding made by this Supreme Court in 1985. See Aetna Insurance Co. v. Norman, 468 So. 2d 226(Fla. 1985), Fountainbleau Hotel v. Willcox, 570 So. 2d 1083 (Fla. 3rd DCA 1990); American State Ins. v. See-WAI, 472 So. 2d 838 (Fla. 5th DCA 1985).

Punitive damages make up part of the "full value of damages sustained" by a worker under §440.39(3)(a), Fla. Stat. 1983, and should be factored in when calculating the pro rata percentage for the carrier. Fountainbleau Hotel v. Wilcox, 570 So.2d 1083, 1084 (Fla. 3d DCA 1990).

In American State Ins., 472 So.2d at 838, and 468 So.2d at 227 (Fla. 1985) pain and suffering, and loss of consortium recoveries were not separated from the equitable distribution formula to reduce the carrier's pro rata recovery on the worker's judgment. The 1993 version of §440.39(3) does not alter these rulings in any way.

Federal courts also have refused to place a worker's third-party recovery for pain and suffering outside the reach of the employer's lien, even when the entire recovery was only for pain and suffering. See United States v. Lorenzetti, 104 S. Ct. 2284 (1984).

In Reibach v. Burdine's, 417 So.2d 284 (Fla. 1st DCA 1982) it was stated that:

> "usually, the courts in construing a statute may not insert words or phrases in the statute or supply an omission that to all appearances was not in the minds of the legislators when the law was enacted. Armstrong v. Edgewater, 157 So.2d 422 (Fla. 1963). When there is doubt as to the legislative intent, the doubt should be resolved against the power of the court to supply missing words. In. Re: Estate of Jeffcott, 186 So.2d 80 (Fla. 2d DCA 1966)."

To construe the statute as espoused by the Claimant and the First District Court of Appeal and add the words, "percentage of a percentage" is not within the power of the First District Court of Appeal would create an interpretation that would lead to an absurd result. The court has an obligation to avoid interpreting any part of the statute in such a manner as would lead to an absurd result. Carawan v. State, 515 So.2d 161, 167 (Fla. 1987).

Section 440.39 precludes Mr. Lombardi, and any other injured worker who receive wages and medical benefits from the employer while receiving the same from the third party tortfeasor from being unjustly enriched. The First District Court of Appeal's holding to the contrary could unfairly cost the Employers/Carriers tens of millions of dollars in the future while providing claimants with untold windfalls.

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

The First District Court of Appeal opines that a Barragan offset may apply instead of a Grice offset. The basis of the First District Court of Appeal's decision is that the Employee's pension trust fund was Employee - contributory. However, contrary to the Claimant's argument, and the First District Court of Appeal decision, this Supreme Court held, in Escambia County Sheriff's Dept. vs. Grice, 692 So.2d 896 (Fla. 1997), that an Employer may offset the employee's "Workers' Compensation benefits to the extent that the employee's Workers' Compensation, disability retirement benefits, and Social Security Disability exceed his Average Weekly Wage." Id. at 897. (emphasis supplied). That is what the Petitioner refer to as the Grice offset.

In conformity with the ruling in Grice, the Judge of Compensation Claims correctly held that the Employer/Servicing Agent was entitled to the Grice offset of the Claimant workers' compensation and pension disability funds.

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

> "The Employer/Carrier may not offset Workers' Compensation payments against an employee's pension benefits except to the extent that the total of the two exceeds the employee's average monthly wage." Id. at 254. (emphasis supplied).

The converse is the Employer/Carrier can offset workers' compensation payments to the extent that the total of the two exceeds the employee's Average Weekly Wage. See id. Thus, the Petitioners disagree that the Barragan offset is exclusive from a Grice offset.

The Grice case did not approve this Barragan statement, but instead modified it. Grice, citing Barragan, stated that "this court observed that §440.21 precludes offsets for collateral benefits until an injured worker has received 100% of his average weekly wage in combined benefits, **regardless of whether the collateral benefits were from the employer alone or in part by employee's contribution**." Grice, at 897. (emphasis supplied). Consequently, since the Employer undisputedly to the claimant's pension disability benefits and since the claimant is receiving pension disability benefits and workers' compensation benefits in excess of 100 percent of his AWW, the Grice offset applies herein.

The First District Court of Appeal erred in reversing the Judge of Compensation Claims' finding that the Employer/Servicing Agent was allowed to take the Grice offset.

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.

The First District Court of Appeal essentially disallowed the E/SA its right to a reduction in accordance with its 25% lien. The First District Court of Appeal's directive violates the intent of § 440.39, Fla. Stat. (1993) as well as the unappealed ruling of the Circuit Court Judge. As this issue is one of first impression, the First District Court of Appeal certified the following question to this honorable Florida Supreme Court as one of great public importance:

> 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 APPLY 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)? Lombardi, at 494.

The Petitioner/Employer/Servicing Agent asserts that the Grice offset should apply prior to the twenty-five percent (25%) reduction in order for the Circuit Court Order to maintain its effect and in order to properly allow the E/SA its recovery pursuant to § 440.39(3), Fla. Stat. (1993).

Once again § 440.39(3), Fla. Stat. (1993) provides that the Employer or Carrier shall recover from the third party judgment:

> 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.

As broken down earlier in this brief, this sub§ entitles the CITY OF HOLLYWOOD to a particular percentage recovery of the amount already paid by the CITY OF HOLLYWOOD at the time of the ruling by Judge Henning of the Circuit Court and to the same percentage recovery of benefits paid by the CITY OF HOLLYWOOD thereafter. Judge Henning properly found the CITY's percentage was 25% (twenty-five percent), which is "equal to the percentage that the employee's net recovery is of the full value of the employee's damages," as indicated specifically in the statute. [Vol 1, R. 143-144]. The percentage was accurately determined by dividing the employee's net recovery ($62,671) by the full value of the damages, as determined by Judge Henning ($250,000). [Vol. 1, R. 143-144].

Consequently, the CITY OF HOLLYWOOD was properly awarded a 25% reduction in <u>future benefits to be paid</u> after the hearing in the Circuit Court. Since this order was never appealed, it was too late for the Claimant to try to obtain a reversal through the Judge of Compensation Claims. It was also in complete violation of the <u>res</u>

judicata prohibition, contrary to the opinion held by the majority of the First District Court of Appeal.

However, even assuming res judicata does not apply, the decision by the First District violates § 440.39 as it essentially precludes the E/SA from reducing any future payments so long as the Grice offset applies.

Following this line of reasoning, if we were to apply the twenty-five percent (25%) reduction prior to application of the Grice offset to this particular matter this would be how it would look for one week of benefits:

A. **Application of 25% lien after application of Grice offset**

AWW	$783.65
Less:	
Weekly pension disability:	$605.39
Amount of workers' compensation to be paid to bring claimant to pre-injury wages	$178.26
Application of 25% reduction pursuant to lien: [$178.26 x .75]	**$133.70**
Resulting amount of workers' compensation to be paid:	$133.70

AMOUNT OF REDUCTION PURSUANT TO LIEN: $44.56

B. **Application of 25% lien before Grice offset** (as held by First DCA):

Weekly compensation rate	$425.00
Application of 25% lien: [$425.00 x .75]	$318.75
AWW	$783.65
Less: Weekly pension disability:	$605.39
Amount of workers' compensation to be paid to bring claimant to pre-injury wages	$178.26
Resulting amount of workers' compensation to be paid:	**$178.26**

ULTIMATE AMOUNT OF REDUCTION PURSUANT TO LIEN: -$0-

Consequently, by application of the lien prior to the Grice offset, there is no effective recovery by the Employer on its Motion for Equitable Distribution. Thus, under the First District's ruling, the Employer no longer has a 25% reduction applicable to the compensation benefits to be paid, in violation of the Circuit Court ruling to the contrary and in opposition to § 440.39, Fla. Stat. (1993). This is yet another absurd result wrought by the opinion of the First District Court of Appeal, which violates the rule of Carawan, 515 So.2d at 167.

This Court's decision in Grice is effectively repudiated once again by the First District Court of Appeal's opinion. The Grice holding is consistent with Petitioner's argument. In Grice, this Court specifically stated that the Claimant is not entitled to

receive any combination of workers' compensation, "state disability retirement, city retirement and/or pension disability retirement benefits or any other collateral source, in combination that exceeds 100% of the Claimant's average weekly wage," unless a contract prohibits such an offset. (emphasis supplied). There is no record evidence of any such contract. The intent behind such a ruling is obvious as it precludes a Claimant from receiving any windfall beyond his pre-injury wages. However, if the First District Court of Appeal opinion stands, the additional $47,000 or so that the Employer/Servicing Agent is entitled to recover could not be accomplished by reduced payment of compensation benefits.

This court cited the case of Brown v. S. S. Kresge Co., 305 So.2d 191 (Fla. 1974), where the Supreme Court of Florida earlier stated that when an injured Employee receives the equivalent of his full wages from whatever employer source, that should be the limit of compensation to which he is entitled.' Grice, 692 So.2d at 898 (citing Brown, 305 So.2d at 194). This statement also demonstrates that conversely, an employer should not have to endure payments of compensation to the claimant in excess of the full wages paid by the employer prior to the claimant's accident.

The reasoning behind the allowance for reduction of benefits pursuant to a third party lien held by the Employer is similar. § 440.39 precludes a claimant from receiving a windfall as a result of his industrial accident as it allows the Employer/Carrier to offset

workers' compensation and medical benefits paid and to be paid by virtue of the appropriate percentage recovery.

Thus, under the First District Court of Appeal's ruling, the Employer no longer has an offset applicable to the compensation benefits to be paid and already paid, in violation of the Circuit Court ruling to the contrary.

This Court is bound by that determination by the principal of res judicata. "The law is well settled that when a fact, an issue, or a cause of action has been decided by a Court of competent jurisdiction, neither of the parties involved shall be allowed to call and to question or re-litigate the thing decided, so long as the Judgment or a Decree stands unreversed." A.G.B. Oil Co. v. Crystal Exploration and Production Co., 406 So.2d 1165, 1167 (Fla. 3rd DCA 1981). This principal applies when the elements of res judicata are presented and the doctrine is properly applied. Albrecht v. State of Florida, 444 So.2d 9, 12 (Fla. 1984). That is, the first judgment is conclusive as to all matters which were or could have been determined, as should have been the case with Judge Henning's ruling.

In this matter, The First District Court of Appeal has effectively reversed a portion of the Circuit Court ruling by precluding the CITY OF HOLLYWOOD and INTERRISK CONCEPTS from taking a reduction for compensation paid, while simultaneously violating § 440.39, Fla. Stat. (1993). Moreover, the opinion below appears to recede

from this Court's holding in Grice. Consequently, this finding should be reversed and the certified question answered in the negative.

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.

Utilizing the previous figures, the Employer/Servicing Agent assert that the weekly payments made for permanent total disability should only be $133.70 going all the way back to December 19, 1994. There is no basis in law or fact for the Judge's ruling nor the First District Court of Appeal's affirmance that "any previous offsets which the Employer/Carrier could have administratively taken are waived." This finding is contrary to Brown v. L.P. Sanitation, 689 So.2d 332, 322 (Fla. 1st DCA 1997) which allows for the Employer/Carrier for credit of any overpayment made after January 1, 1994.

Furthermore, the finding of the First District Court of Appeal finding no abuse of discretion on the part of the Judge for finding a waiver of any previous offset is in violation of § 440.15(13), Fla. Stat. (Supp. 1994). As admitted by the First District, this statute renders an employee liable for overpayments of indemnity benefits and allows the Employer/Carrier to recover the overpayments by reducing compensation payments by twenty percent (20%). Lombardi, 738 So.2d at 494-495. Contrary to the opinion rendered

by the First District Court of Appeal, the application of the Grice offset retroactively in this or any other manner does not serve to effectively reduce the claimant's benefits as he is still receiving money from the City of Hollywood no less than his pre-injury wages. There is no "compensation" when there is no loss of earnings, from whatever source.

The ruling of the First District Court of Appeal is inconsistent with the intent of Grice, the intent of §440.15 (13), and the intent of § 440.39, which laws are geared to preclude an Employee/Claimant from obtaining a windfall as a result of an industrial accident.

The only case law cited by First District Court of Appeal to support its position is City of Miami v. Bell, 634 So. 2d 163 (Fla. 1994). The First District Court of Appeal indicated a comparison of Bell, where this Honorable Court refused to apply the ruling of Barragan, supra. to retroactively to require the City of Miami to repay offsets (improperly taken from the claimant's pensions). This is regarding the Bell case. This Court explained that it would not apply the Barragan ruling retroactively because it involved contractual rights established in the records.

Specifically, this Court indicated "when contractual rights are adversely affected in such a manner, we are reluctant to apply a decision retroactively." Bell, 634 So.2d at 164. There is no such record evidence in this matter that any of Lombardi's contractual rights would be adversely affected by applying the Grice offset retroactively. The

claimant does not have any contractual rights nor statutory right to any overpayments from the City of Hollywood, let alone an overpayment in excess of $33,000.00. Consequently, since all of his payments occurred after January 1, 1994, the City should be entitled to a substantial credit to be taken in according with §440.20(15), Fla. Stat. (1994).

Examining the permanent total disability benefits that were actually paid with the permanent total disability benefits and supplemental benefits that should have been paid in accordance with Grice and the twenty-five percent (25%) lien, the math below reveals that the Employer/Carrier would be entitled to a credit of over $33,000 for payments made through the date of the hearing before Judge Powell.

Overpayment Period	Overpayment Amount
1] 12/16/94 - 5/15/95:	$6,603.00
2] 5/16/95 - 9/17/95: [18 weeks x $269.55]	$4,851.90
3] 9/18/95 - 12/31/95: [15 weeks x $163.30]	$2,449.50
4] 1996: [52 x $154.30]	$8,023.60
5] 1997: [52 x $143.80]	$7,477.60
6] January 1, 1998 - July 15, 1998 [Order date] [28 x $132.55]	$3,711.40

GRAND TOTAL: $33,117.00

Consequently, the First District Court of Appeal erred as a matter of law in failing to reverse the Judge of Compensation Claim's opinion disallowing a credit for the overpayments made by the Petitioner.

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.

While the written ruling by the Circuit Court Judge was made on October 30, 1998, the Oral Ruling was rendered at the time of the Motion for Equitable Distribution. It was on April 5, 1995 that the Court found the total value of the damages amounted to $250,000.00, thereby entitling the City of Hollywood to a 25 percent lien for benefits paid after April 5, 1995. [Vol. 1, R. 181-187]. Even Counsel for the Claimant in the third party case admitted that such payments into the future would not exceed the $62,000.00 netted by the claimant and the Third Party. [Vol. 1, R. 185].

It is undisputed that $8,478.75 was paid to the Claimant on May 10, 1995 and that an additional $892.50 was paid on May 15, 1995, after the April 5, 1995 Oral Ruling. [R. 125-129]. It is also undisputed that the Claimant's compensation rate is $425.00 per week. [R. 104]. The Judge of Compensation Claims' Order states that these payments were supposed to have been made from December 19 to May 12, 1995. [R. 204]. However, this portion of the Order fails to take into account that such payments were actually made after April 5, 1995, when the Employer/Carrier was entitled to a twenty-five (25%) reduction for the payments made after April 5, 1995 despite the length of time entailed before Judge Henning executed the Circuit Court Order.

The calculation of which is as follows:

Days within period of December 19, 1994 - May 12, 1995	145 days x
Daily compensation rate: [$425 ÷ 7, rounded up]	$60.72
TOTAL AMOUNT THAT SHOULD HAVE BEEN PAID FOR PTD [excl/lien and Grice offset] [145 x $60.72]	$8,804.00
Subtract: 25% lien	$2,201.00
Amount that should have been paid including 25% lien: [$8,804 - $2,201]	$6,603.00

Thus, the amount of permanent total disability benefits that should have been paid between December 19, 1994 and May 12, 1995 - without any offsets or payments of interest or penalties - amounts to $6603.00. The payments of $8,478.75 plus $892.50 included an overpayment of $2,768.25. This amount exceeds the $880.40 for penalties [10% x $8804] and the statutory interest of 12% per year of no more than $396 by a total of approximately $1,491.85 [see calculations below]. That amount even assumes that the Order of interest and penalties for the last two weeks paid on May 12, 1995 is appropriate.

Additionally, it is the Petitioner's assertion that no penalties nor interest should be awarded for those last two weeks as those last two weeks were paid timely. See § 440.20(6), Fla. Stat. (1995); Willette v. Air Products, 700 So.2d 397 (Fla. 1st DCA 1998). § 440.20(6) awards penalties if compensation is not paid within seven (7) days of the date it is due.

Consequently, the payments made for the weeks ending May 5 and May 12 were certainly paid within seven (7) days of the due date and neither penalties nor interest should have been awarded thereon.

There should not have been any interest awarded either because the maximum compensation rates for the years 1995, 1996, 1997 and 1998 are respectively as follows: $453, $465, $479 and $494. By subtracting the maximum compensation rate of $425 for

this date of accident, the Employer/Servicing Agent agree that the amount of supplemental benefits that should be paid weekly, without any twenty-five percent (25%) deduction [the Grice offset does not apply] should be $29, $41, $55 and $70 weekly for the years 1995, 1996, 1997 and 1998, respectively. Utilizing the twenty-five percent (25%) reduction for the third party lien, those amounts drop down to $21.75, $30.75, $41.25, and $52.50 for the years 1995 through 1998 respectively. The Employer/Servicing Agent maintain its contention that these amounts have already been paid by virtue of the $318.75 amount paid weekly from September 18, 1995 to the present and by virtue of the $425 weekly payments between May 16 and September 17, 1995. [R. 16-17, 147-152]. These weekly payments certainly include what should have been paid in accordance with the Grice case as that amounts to only $133.70 weekly (when the reduction for the lien is made after the Grice offset). Thus, for those weeks that the Carrier paid $318.75, there is an overpayment of $185.05 which exceeds the amount of supplemental benefits that should have been paid [after the twenty-five percent (25%) lien] of $163.30 per week in 1995, $154.30 per week in 1996, $143.80 in 1997 and $132.55 in 1998. For those weeks in May through September, 1995 when $425 was paid, the overpayment amounts to $291.30 weekly. [Once again, please see earlier calculations].

As all the supplemental benefits were certainly paid within the weekly amounts paid by the City of Hollywood and its Servicing Agent, there of course would be no entitlement to interest for dates after May 16, 1995 as each payment was made timely. [R. 16, 17, 147-152].

CONCLUSION

Based upon the law and argument contained herein, the Petitioners, City of Hollywood and its Servicing Agent respectfully request that this Honorable Court reverse the order of the First District Court of Appeal awarding actual payment of any benefits to the Claimant as well as the opinion that the twenty-five percent (25%) lien should apply prior to application of the Grice offset and reverse the denial of any credit due to the City of Hollywood.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent by Federal Express to: Richard Sicking, Esq., Attorney for Respondent, 1313 Ponce de Leon, Coral Gables, FL 33134 this _____ day of October, 2000.

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