IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CITY OF HOLLYWOOD, Employer, and HUMANA WORKERS' COMPENSATION SERVICES, Servicing Agent,	:	CASE NO. 96,482
Petitioners,	:	District Court of Appeal First District - No. 98-03186
vs.	:	
ALBERT LOMBARDI, Claimant.	:	
Respondent.	:	

_____/

REPLY BRIEF OF PETITIONERS

SCOTT J. BROOK, ESQUIRE
Fla. Bar No. 969796
PETERS ROBERTSON DEMAHY PARSONS MOWERS PASSARO & DRAKE P.A.
Attorneys for Petitioner
506 SE 8th Street
Fort Lauderdale, FL 33316
Telephone: (954) 761-8999

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

TABLE OF CITATIONS

CASES **PAGE**

TABLE OF CITATIONS

PAGE

Statutes and Other Authorities:

INTRODUCTION

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

THE CITY OF HOLLYWOOD and HUMANA WORKERS' COMPENSATION SERVICES will be referred to as the Employer/Servicing Agent, the Petitioners, or individually by name in this brief. Although InterRisk Concepts was the Servicing Agent until approximately 10/15/99, Humana Workers' Compensation Services is the Servicing Agent currently. 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. _].

All references to the Respondent's Answer Brief will appear as follows:

[RAB, p. ____].

All references to the Petitioner's Initial Brief will appear as follows:

[PIB, p. ____].

ARGUMENT

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".

Contrary to Respondent's argument, the District Court of Appeal committed reversible error by limiting the Employer/Carrier recovery to only "a percentage of a percentage" of its lien on two grounds: Firstly, the Order contravenes §440.39, Fla. Stat. (1993) and secondly, the Order is contrary to the unappealed Circuit Court Order entitling the Employer/Carrier to a full 25% reduction of compensation payments made after April 15, 1995. [Vol. 1, R. 144]. The certified question whether §440.39 can somehow be read to limit an Employer or Carrier to some unknown percentage of a percentage of its lien should be answered in the negative thereby allowing an Employer/Carrier to whatever percentage recovery is determined by the appropriate Judge, not a Judge of Compensation Claims.

Petitioners also agree that the legislative history of this subrogation statute is connected to this Court's decision in Nikula v. Michigan Mutual Ins., 531 So. 2d 330 (Fla. 1988). Yet, Respondent cites no portion of the legislative history that indicates an intent to recede from Nikula. Rather, the statutory language provided in the 1989 changes appears to respond to the confusion of the Circuit Court Judge in Nikula and codify this

Court's findings in that case. In Nikula, the Trial Court had errantly determined that the Employer/Carrier's subrogation lien was ten percent (10%) by the virtue of the Claimant's comparable negligence of ninety percent (90%). Nikula, 531 So. 2d at 331. This Court found that §440.39(3)(a), Fla. Stat. (1983) was amended to take into consideration the workers' expenses in pursuing the third-party claim. This rule of law is consistent with the Order of Judge Henning, consistent with the language of the 1989 version of the statute and contrary to the decision of the First District Court of Appeal.

Furthermore, below and following are a few highlights of the Preamble to the legislative history behind changes to §440.01 et. seq., including §440.39, Fla. Stat. (1989):

> "WHEREAS, the Legislature finds that there is a financial crisis in the workers' compensation insurance industry, causing severe economic problems for Florida's business community and adversely impacting Florida's ability to attract new business development to the state, and ...
>
> "**WHEREAS, a report to the Joint Select Committee on Workers' Compensation of the Florida Legislature revealed that the rates for workers' compensation insurance are 54 percent higher than the nationwide average, 75 percent higher than the average of all states in the southeastern United States, and 60 percent higher than the average of those states contiguous to Florida, and**
>
> **"WHEREAS, such report also indicated that Florida has experienced one of the highest rates of increase in premiums for workers' compensation insurance anywhere in the United States during the last 5 years, and**

> "WHEREAS, such report also indicated that the present level of medical benefit payments under the Florida Workers' Compensation Law is 42 percent higher than the nationwide average level of such benefit payments, 38 percent higher than the southern United States average level of such benefit payments, and 38 percent higher than the average level of such benefit payments in states contiguous to Florida, and

[1990 Fla. Laws, Ch. 90-201].

Clearly, the legislative changes were meant to favor the Employer/Carrier/Servicing Agent and to reduce workers' compensation benefits. The decision rendered by the First District Court of Appeal in City of Hollywood v. Lombardi is in absolute contravention of the intent of the changes to the Statute of 1989, including the provisions of §440.39 at issue herein, as the ruling allows for substantially greater benefits to be paid to claimants.

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 Claims' Order, and effectively overturned the Circuit Court Order by placing a ceiling of $15,667.75 on the Employer/Servicing Agent's recovery. Lombardi at 495. Judge Henning never indicated that the Employer/Carrier was entitled to merely a 6.25% (25% of 25% = 6.25%) reduction in future benefits to be paid. [Vol. 1, R. 144]. Furthermore, if the Respondent truly believed that such a ceiling was placed by the Circuit Court, which ceiling would have been exceeded by the City of Hollywood, that matter should have

been pursued before the Circuit Court in a Petition for Rule Nisi. See §440.24(1), Fla. Stat. (1993).

The Respondent fails to explain why the rule that judgments of courts are generally held to be conclusive on the parties as to matters and issues involved within their jurisdictions would not apply to the case herein. See, U.S. Fidelity and Guarantee Co. v. Odoms, 444 So.2d 78 (Fla. 5th DCA 1984). See also Albrecht v. State of Florida, 444 So.2d 9, 12 (Fla. 1984). (The principal of res judicata applies to preclude relitigation of an issue already decided by a court of competent jurisdiction). Since Judge Henning's Order was never appealed, the doctrine of res judicata precludes the Claimant/Respondent from relief from the judgment of the Circuit Court. See Id.

Nothing in §440.39(3)(a), Fla. Stat. (1993) suggests that the Employer/Carrier would be limited to some vague "percentage of a percentage" of its lien. An examination of the statute in its totality reveals that the Employer/Carrier's ceiling on its recovery would be all of the Claimant's net tort recovery, as in Manfredo v. Employer's Casualty Ins. Co., 560 So.2d 1162 (Fla. 1990).

The Employer/Carrier recovery ratio is clearly 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. Therefore, the First District Court of Appeal's opinion limiting the Employer/Carrier's lien to 6.25% should be reversed.

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

Petitioners do not accept Respondent's re-statement of this point nor his attempt to overturn Escambia County Sheriff's Dept. v. Grice, 692 So.2d 896 (Fla. 1997). The First District Court of Appeal has no authority to recede from Grice and thereby disallow the City of Hollywood the offset it is entitled to by virtue of the Claimant's receipt of pension disability benefits and compensation benefits in excess of its average weekly wage. Respondent's contentions that the Grice offset requires an absence of any employee contributions to his pension disability fund is erroneous. Further, Respondent's allegation that the burden of proof rests with the Employer/Carrier to demonstrate that there is no contract that prohibits the Grice offset is also contrary to this Court's decision in Grice. Additionally, it is essential that workers' compensation be a secondary source of money for a Claimant where there are collateral sources of money

in order to be consistent with Grice and in order to appropriately honor the legislative intent behind offsets to preclude any windfall to the injured worker.

Contrary to Respondent's interpretation of Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989) and Grice as creating two exclusive offsets, an examination of the language of Barragan and Grice clearly demonstrates that this Court did not create two exclusive offsets. In Barragan this Court states that "the employer 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." Barragan, 545 So. 2d 252, 255 (Fla. 1989). Following Barragan, if there was any confusion regarding the nature of the offset, this Court removed any such doubts by further explaining Barragan in Grice. Pursuant to Grice, when an employee has received disability benefits and worker's compensation benefits as a result of an employment related accident, the employer may offset the employee's "workers' compensation benefits to the extent workers' compensation, disability retirement benefits, and Social Security Disability and other collateral sources exceed his average weekly wage." Grice, 692 So.2d at 897. By examining the two cases in conjunction, they create a single offset whereby pension disability benefits are primary to workers' compensation benefits.

Petitioners are not required to prove who provided a majority of funding as all that is required is that the employer contributed to the pension disability fund and in the case

sub judice, nowhere in the record has Respondent disputed that the City of Hollywood contributed to Lombardi's pension disability fund. [Vol. I & II, R. 1-211]. Therefore, as a matter of law the employer is permitted to offset workers' compensation benefits from pension disability benefits.

Compensation is merely that. The intent of workers' compensation is to compensate an employee for his loss of wages to a certain extent. If a claimant has allowable collateral source of money or obtains pension disability benefits in the amount of his average weekly wage, there is no compensation due to the Claimant since there is no loss of wages which requires compensation. See also Grice, supra; Brown v. S.S. Kresge Co., 305 So.2d 191 (Fla. 1974).

In Brown, this Honorable Court provided 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." Id. at 194. (Cited by Grice, 692 So.2d at 898). An employee cannot waive his right to "compensation" to which he is not entitled. Therefore, the Grice offset should apply for all City of Hollywood payments made prior to the time of the JCC Order as well as into the future.

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.

Despite Respondent's unsupported contention to the contrary, it was reversible error for the Judge of Compensation Claims and the First District Court of Appeal to compel the Employer/Carrier to apply its lien reduction before applying the 100% average weekly wage cap pursuant to Grice. The Respondent erroneously states that the Employer/Carrier argument of this Point is because it is financially better for them in this case." [RAB. p. 45]. However, Petitioners can not find any mathematical examples to support Respondent's erroneous contentions that there may be a different result depending on the facts.

If this Court were to accept Respondent's argument that a lien reduction would always have to be applied prior to application of the Grice offset, then the resulting amount of workers' compensation that would be required to be paid to reach the 100% average weekly wage cap would always be increased by the same amount of the supposed reduction that the Employer/Carrier would be entitled to by virtue of its lien. In other words, to whatever extent the lien might be applied, that is the same extent that the Grice offset would be reduced. According to the figures of our particular matter, the amount of workers' compensation required to be paid to bring the Claimant to his pre-injury wages totals $178.26. (This is exactly $44.56 more than the Carrier would have to pay by applying the lien after application of the Grice offset). [See PIB, pp. 26-27]. This

$44.56 is the exact amount that the City of Hollywood would be entitled to reduce its workers' compensation payments by virtue of the lien. Thus, there is no effective lien.

Any which way it is sliced, application of the lien prior to application of the 100% average weekly cap contravenes §440.39, Fla. Stat. (1993) as it effectively diminishes any lien to which an Employer/Carrier may be entitled, who is simultaneously entitled to a Grice offset.

Contrary to the reasoning of the First District, the total sum to be paid by the Employer can not be determined until after the Grice offset is applied. Cf. Grice, supra. Thus, it was entirely unreasonable for the JCC to determine that the lien reduction should be allowed before the AWW cap and resultant offset.

Furthermore, the most favorable remedy rule as cited by the Respondent should not apply to the case herein as there is no ambiguity to the placement of the subrogation deduction pursuant to §440.39(3)(a), Fla. Stat. (1993). Specifically, the Statute provides that

> "... the Employer or Carrier shall recover from the Judgment or settlement... 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." Id.

The language of this Statute is clear that the Employer/Carrier shall recover pursuant to its subrogation claim. There is no provision that an Employer or Carrier may not recover from a third party judgment or settlement depending upon how other offsets may be applied. Id.

Even if somehow there were figures that could be utilized that would not reduce the Claimant's lien by application of the offset and subrogation claim in accordance with the First District Court of Appeal ruling, the facts of this particular case should not lead this Court to a liberal interpretation in favor of the injured worker and in opposition to the Circuit Court Order. See §440.015, Fla. Stat. (1994). Lastly, the CITY OF HOLLYWOOD was properly awarded a 25% reduction in future benefits to be paid after the hearing in the Circuit Court. The Claimant's attempt to obtain a reversal through the Judge of Compensation Claims and the First District Court of Appeal is in complete violation of the res judicata prohibition, despite the opinion held by the majority of the First District Court of Appeal.

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.

Respondent provides no supporting case law for his contention that the Employer/Carrier should not take an offset retroactively until it meets its burden to establish the amount that it is entitled to take.[RAB, p. 47]. On the contrary, it is well established that "the Workers' Compensation Act remains a presumptively self-executing, but fundamentally employer/carrier monitored, system." Barnes v. PCH Walter T. Parker, 464 So.2d 1298, 1299 (Fla. 1st DCA 1985). Consequently, since the Workers' Compensation Act is essentially self-executing, the employer/carrier may take a unilateral offset, without first establishing the amount that it is entitled to take, and without prior approval from the Workers' Compensation court, as was recognized by the Supreme Court of Florida in Dept. of Public Health, Division of Risk Management v. Wilcox, 543 So.2d 1253 (Fla. 1989).

Respondent cites City of Miami v. Bell, 634 So. 2d 163 (Fla. 1994) for the proposition that if the employer/carrier did not first establish the amount it is entitled to offset, then the JCC properly granted the offset prospectively. [RAB, p. 47]. However, in Bell, it was essentially determined that substantive rights of the City would have been impaired through holding the City liable for past offsets prior to the effective date of Barragan. Here, no substantive rights are impaired because the claimant's right to compensation benefits up to the Average Weekly Wage has not been reduced. See Grice, supra.

Substantive rights were explained by this Court in American Bankers Ins. Co. v. Little, 393 So.2d 1063, (Fla. 1980), where this Court established that the offset is retroactive, unless the claimant proves that a substantive right would be impaired by a retroactive application. Nowhere does Little establish that the employer/carrier must first prove the amount of the offset it will take, otherwise the offset must be applied prospectively only. See Id.

Respondent next contends that under §440.15(12), Fla. Stat., (1993), the employer/carrier must show that the employer was the majority funder of the pension plan. [RAB, p. 47]. However, Respondent failed at the trial level to raise the issue of §440.15(12), Fla. Stat., (1993), requiring the employer/carrier to show that the employer was the majority funder of the pension plan. [Vol. 1-2, R. 1-200]. Therefore, the issue was not preserved for appeal, and it is too late for Respondent to assert this objection at this time. See Area Electric Service, Inc. v. Cunningham, 538 So.2d 471, (Fla. 1st DCA, 1989).

Therefore, 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.

Respondent contends that since 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. [RAB, p. 47]. Respondent further contends that the employer/carrier could not invoke the subrogation deduction of the Circuit Judge until October, 1995, the date the subrogation Order was entered by the Circuit Judge. [RAB, p. 47]

Respondent is incorrect in both assertions because the Circuit Court Judge orally ruled on April 5, 1995 that the damages were set at $250,000, with a 25% reduction of workers' compensation benefits. [Vol. I, R. 181 - 183].

In Florida, a Judge's oral pronouncements are effective immediately, and do not have to be committed to writing before they take effect. See Burton v. State of Florida, 596 So.2d 733 (Fla. 2nd DCA 1992). Therefore, Circuit Court Judge Patti Henning's oral pronouncements at the hearing of April 5, 1995, immediately authorized the employer/carrier to invoke its subrogation deduction from any payments made to the Claimant after April 5, 1995.

Additionally, Circuit Court Judge Patti Henning's Order, executed on October 30, 1995 expressly authorizes the employer/carrier to invoke its subrogation deduction from any payments after April 5, 1995, by the express language of the Order. [Vol. I, R. 144].

The employer/carrier concedes that the payment made on May 12, 1995 was late, but assert that the payment made on May 12, 1995 included an overpayment by virtue of Circuit Court Judge Henning's oral ruling on April 5, 1995, [Vol. I, R. 181 - 187], and subsequent Order executed on October 30, 1995, [Vol. I, R. 144], entitling the employer/carrier to a 25% reduction of any indemnity payments after April 5, 1995. [PIB, p. 35-37]. Since the payment made on May 12, 1995 failed to reduce the claimant's indemnity payment by 25% as ordered, an overpayment occurred. Rather than requiring that the overpayment be disgorged from the claimant, and a separate check be issued by the employer/carrier for penalties and interest, the overpayment should be deemed a payment, by the employer/carrier, of the penalties and interest which were owed because of the late payment of the December 14, 1994 indemnity benefits. The authority to so deem the payment of penalties and interest comes from §440.15(13), Fla. Stat. (Supp. 1994) which requires the injured worker to repay any overpayment of indemnity benefits of any category.

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,

PETERS ROBERTSON, et al.
Attorneys for the Petitioners
506 S.E. 8th Street
Fort Lauderdale. Lauderdale, FL 33316
(954) 761-8999 - Telephone
(954) 761-8990 - Facsimile

By:_____

Scott J. Brook, Esquire
Fla. Bar No. 969796

CERTIFICATE OF FONT SIZE AND STYLE

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

_____

SCOTT J. BROOK, ESQ.

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.

PETERS ROBERTSON DEMAHY PARSONS
MOWERS PASSARO & DRAKE P.A.
Attorneys for the City of Hollywood
and INTERRISK CONCEPTS, INC.
506 S.E. 8th Street
Fort Lauderdale. Lauderdale, FL 33316
(954) 761-8999 - Telephone
(954) 761-8990 - Facsimile

By:_____
SCOTT J. BROOK, ESQUIRE
Fla. Bar No. 969796