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City of Hollywood vs Albert Lombardi

THE NEXT CASE ON THE COURT'S CALENDAR, THE CITY OF HOLLYWOOD VERSUS ALBERT LOMBARDI. MR. BROOKE.

GOOD MORNING. IT IS MY PLEASURE TO BE BEFORE YOU TODAY. I THANK FOR YOU THE OPPORTUNITY, FOR MYSELF AND MY CLIENTS. I AM SCOTT BROOK. I REPRESENT THE CITY OF HOLLYWOOD AND ITS SERVICING AGENT GALLAGHER BASSETT, IN THE ISSUES BEFORE YOU. I WOULD LIKE TO RESERVE THREE MINUTES FOR MY REBUTTAL. TO THE EXTENT POSSIBLE, I WILL BE DISCUSSING THE ISSUES IN THE SAME ORDER IN WHICH THEY ARE PRESENTED IN MY BRIEFS. THE FIRST PRIMARY ISSUE IS THE INTERPRETATION OF THE LANGUAGE OF SEX 440.39, AS WELL -- OF SECTION SHUN 440.39, AS WELL AS AN ORDER ON APRIL 30, 1995, WHICH SPECIFICALLY ENTITLED THE CITY OF HOLLYWOOD, BY VIRTUE OF APPLICATION OF THE FORMULA, IN ACCORDANCE WITH 440.39, A REDUCTION --

YOU ARE ARGUING THE REST JUDD CAD AN ISSUE -- THE RACE ADJUDICATA ISSUE ---RIGHT? BECAUSE THIS HAS SUCH BROAD IMPLICATIONS, LET'S TRY TO FOCUS ON THAT, WHICH IS THE ARGUMENT ESSENTIALLY IS THAT THE STATUTE, WHICH WAS PASSED IN 1989, IF YOU READ IT ON ITS FACE, WOULD SEEM TO REQUIRE THAT, IF THE CLAIMANT ONLY RECOVERS A PERCENTAGE OF THE TOTAL DAMAGES, THAT THE WORKERS COMPENSATION CARRIER SHOULD NOT RECEIVE MORE THAN A PERCENTAGE OF ITS LIEN. THAT IS THEIR ARGUMENT. CORRECT?

THAT IS THEIR POSITION.

NOW, BEFORE 189, IN AETNA V -- BEFORE 1989, IN AETNA V NORMAN, THE LAW HAS BEEN THAT THE CARRIER, ALTHOUGH THERE CAN BE A REDUCTION IN THE FUTURE BENEFITS AND THE PAST, AS FAR AS THE PERCENTAGE REDUCTION, IT IS CAPPED AT THE NET RECOVERY.

CORRECT.

SO WOULD YOUR ARGUMENT, THE BEST ARGUMENT BE, DESPITE THE FACT THAT THE STATUTE, IF YOU READ IT ON ITS FACE, MIGHT SUPPORT MR. SICKINGS'S CONSTRUCTION, THAT FOR THE LEGISLATURE, WITHOUT INDICATING ANYTHING TO HAVE MADE SUCH A DRASTIC CHANGE IN THE LAW, YOU WOULD EXPECT IT TO HAVE BEEN TOTALLY CLEAR AND UNAMBIGUOUS. IS THAT YOUR BEST ARGUMENT?

WELL, ASSUMING WHAT YOU ARE SAYING IS CORRECT, WHICH I DON'T MAKE THAT ASSUMPTION, I THINK ON ITS FACE, THE STATUTE CLEARLY DOES NOT SAY WHAT THE FIRST DISTRICT COURT OF APPEAL SAYS, AND I WILL GET TO THAT IN A MOMENT, BUT ASSUMING THAT SOMEHOW IT DOES, YES, I WOULD AGREE WITH YOUR HONOR THAT IT WOULD HAVE TO HAVE BEEN MUCH MORE EXPLICIT IN THE REVISIONS TO THE STATUTE, FROM 1983 TO 1989, SAYING WE NO LONGER EXPLICITLY STATING THAT THE NET RECOVERY WILL NOW BE LIMITED TO K OR THIS PERCENTAGE. WHAT IS INTERESTING, THE FIRST DISTRICT COURT OF APPEAL, THEY SAY THE LANGUAGE SOMEHOW SHOULD READ A PERCENTAGE OF A PERCENTAGE. ESSENTIALLY THEY ARE INSERTING LANGUAGE WHICH IS IN VIOLATION OF THEIR RIGHTS TO THE STATUTE, THAT IS NOT THERE.

I AM -- WHAT, BASICALLY, THE SCHEME IS, IS THAT A CLAIMANT CAN GO AFTER A THIRD PARTY,

RECOVER MONEY, GET ATTORNEYS' FEES AND THE COMES ARE DEDUCTED AND THEN UNDER END UP WHERE THE COMP CARRIER COMES IN AND TAKES IT ALL BACK. THAT IS ESSENTIALLY WHAT HAS HAPPENED IN THIS STATE AND CONTINUES TO HAPPEN.

WHAT HAS HAPPENED IN THE PAST, IS NOT QUITE THAT WAY. WHAT HAS HAPPENED IN THE PAST IS YOU ARE ALLOWED TO RECOVER UP UNTIL THE NET RECOVERY. THAT DOESN'T NECESSARILY MEAN THAT WILL OCCUR.

IN THIS CASE, OF COURSE, IT IS A PRETTY GRAPHIC EXAMPLE OF IT.

RIGHT. WHAT I AM SAYING IS THE INTERPRETATION BY THE FIRST DISTRICT COURT OF APPEAL, LET'S USE A COUPLE OF MATHEMATICAL FIGURES. LET'S JUST ASSUME, IT FOR ARGUMENT'S SAKE, THAT THE NET RECOVERY WAS 10,000. LET'S ASSUME, FOR PURPOSES OF THIS CASE, THAT THE RECOVERY WAS $40. AT THE TIME OF THE HEARING, THE CITY HAD PAID OUT MORE THAN 40,000, SO DOES THAT MEAN THE LIEN SHOULD NOW BE 25% OF 25% AND THE CIRCUIT COURT JUDGE WAS EVEN WRONG IN ALLOWING A $10,000-PLUS PAYMENT, JUST ASSUMING THAT YOU HAD DIFFERENT FIGURES? THAT WOULD MAKE ABSOLUTELY --

YOUR HYPOTHETICAL, THE PERSON GETS 10,000?

NETS $10,000. THE TOTAL VALUE OF THE DAMAGES IS 40,000. FOR ARGUMENT'S SAKE. AND LET'S ASSUME THE CARRIER HAS PAID OUT MORE THAN 40,000, HE HAVE OWN -- -- EVEN --

THEIR ARGUMENT WOULD BE THAT, EVEN IF YOU LIMIT IT, TO GET $2500 BACK.

AND YET THAT IS NOT EVEN WHAT THE FIRST DCA SAYS IN ITS OPINION. IN ITS OPINION, IT SAYS THAT THE AWARD OF A STRICT 25% OF WHAT HAD BEEN PAID OUT BY THE CITY WAS APPROPRIATE. I SAY THE LANGUAGE IS QUITE CLEAR. THE LANGUAGE IN THE STATUTE SAYS SPECIFICALLY THAT IT DEFINES ESSENTIALLY WHAT PERCENTAGE RECOVERY AN EMPLOYER CARRIER SHOULD HAVE, AND IF YOU WILL FOLLOW ME, AFTER DEDUCTION OF FEES AND COSTS, IT SAYS SPECIFICALLY THE EMPLOYER OR CARRIER SHALL RECOVER FROM THE JUDGMENT OR SETTLEMENT, AFTER ATTORNEYS FEES AND COSTS INCURRED BY THE EMPLOYEE OR DEPENDENT IN THAT SUIT HAVE BEEN DEDUCTED, THE FOLLOWING. A PERCENTAGE WHAT HAVE IT HAS BEEN PAID AND FUTURE BENEFITS TO BE PAID, AND THEN IT DEFINES THAT. I THINK IT HAS DEFINED THAT, BECAUSE OF THE CONFUSION, IN THE NAKULA COURT AND IN THE MANFREDO COURT AND IT HAS CODDFIED IN MAKKULLA AND NIKADO, AND IT IS ESSENTIALLY OVER THE DENOMINATOR. IT SAYS THE EMPLOYEE'S RECOVERY IS THE FULL VALUE OF THE EMPLOYEE'S DAMAGES.

WHY DOESN'T IT SAY SHOULD RECOVER THE NET RECOVERY?

BECAUSE THE NET RECOVERY DEALS WITH THE CEILING, BUT IN TERMS OF APPLICATION OF THE LIEN, YOU DON'T GET TO AUTOMATICALLY GET 100% OF WHAT YOU HAVE PAID. YOU GET A RATIO, SO THE RATIO THAT WAS DETERMINED IN MANFREDO WAS 32.7% OR SOMETHING TO THAT EFFECT. IN NAKULLA IT WAS A DIFFERENT RATIO. IN LOMBARDI --

LET ME ASK YOU THIS.

SURE.

WHY WOULD A WORKER FILE A CLAIM AGAINST A THIRD PARTY TORTFEASOR? ARE THEY REQUIRED TO?

THEY ARE NOT REQUIRED TO, AND YOU RAISE A GOOD POINT, BECAUSE THE STATUTE, IF YOU READ THE STATUTE IN ITS CONTEXT, THE CARRIER HAS A RIGHT TO SUBROW GAIT AND STAND IN FOR THE CLAIM OF THE CLAIMANT, IF THEY DO NOT MAKE A THIRD-PARTY CLAIM WITHIN THE

FIRST YEAR, SO THE EMPLOYER CARRIER CAN STAND IN, AND THEY WILL RECEIVE EVERYTHING THEY DO, EXCEPT FOR THE ATTORNEYS' FEES AND COSTS THAT THEY WOULD BE RESPONSE FOIBLE PAYING.

UNDER THIS THEORY -- RESPONSIBLE FOR PAYING.

UNDER THIS THEORY, IF THE CLAIM ONT GETS $62,000 OR SO FROM -- IF THE CLAIMANT GETS $62,000 OR SO FROM THE THIRD-PARTY TORTFEASOR AND THE CLAIMANT CAN GO AGAINST $32,000, WHY WOULD THE CLAIMANT GO AGAINST A THIRD-PARTY TORTFEASOR?

THE CLAIMANT WOULD DO IT AS THEY DID WAY BACK WHEN, BECAUSE THEY STILL GET TO HAVE THE MONEY RIGHT UP FRONT, AND THERE IS NO GUARANTEE THAT THERE WILL BE FUTURE BENEFITS PAID. AS A MATTER OF FACT A WORKERS COMPENSATION CASE CAN SETTLE AND RESOLVE THE LIEN, AND THEY WILL STILL GET THE $67,000 OR $3 MILLION, THERE IS NO GUARANTEE THAT THE CLAIMANT WILL HAVE TO PAY OUT WHAT THE CLAIMANT HAS BEEN PAID AT ANY POINT IN TIME BEYOND THE RULING.

AT THIS POINT IN TIME, THE AMOUNT OF WORKERS COMPENSATION HAD ALREADY BEEN DETERMINED, PRIOR TO THE FILING OF THE CLAIM AGAINST THE THIRD PARTY TORTFEASOR?

THE LIEN, ACCORDING TO 440.39, IS A CONTINUING LIEN. IT IS NOT SOMETHING, AND THAT IS EXACTLY WHAT THE CIRCUIT COURT ORDER INDICATED. THE LIEN IS 25% OR WHATEVER THE PERCENTAGE IS, FOR BENEFITS PAID TO THE DATE OF THE HEARING, ON THE MOTION FOR EQUITABLE DISTRIBUTION. AND THEN THE LIEN CONTINUES TO PROCEED INTO THE FUTURE. IF YOU LOOK AT THE HISTORY OF THE STATUTE, IN 1989, WHAT THE LANGUAGE OF THE STATUTE TALKS ABOUT IS ALL THE COSTS BORNE BY THE WORKERS COMPENSATION INDUSTRY, ALL OF THE COSTS BORNE BY THE CARRIER. IF THEY LOOK AT THE STATUTE AND SAY OH, NO, WHAT USED TO BE A 50% LIEN IS NOW A 25%.

WHAT THEY HAVE DONE IN THE LAST 20 YEARS HAS BENEFITED THE CARRIER?

WHY WOULD THEY CARVE OUT THIS ONE PARTICULAR SECTION, WHEN THE INTENT WAS TO REDUCE THE COST TO THE WORKERS COMPENSATION INDUSTRY.

IF YOU READ IT THE WAY YOU READ THE STATUTE, THEN THE STATUTE DOESN'T, NOW NOR EVER, HAS, REALLY, TALKED ABOUT WHERE THE LIEN IS CAPPED. DO YOU AGREE WITH THAT?

I AGREE WITH YOU. THAT'S CORRECT.

SO THAT HAS JUST BEEN SOMETHING THAT AETNA V NORMAN, ASSUMES THAT CERTAINLY YOU WOULDN'T WANT TO GET MORE THAN THE NET RECOVERY, SO WE ARE GOING TO PROP IT UP TO THE NET RECOVERY, SO YOUR CONTENTION IS THAT THE STATUTE DOESN'T EVEN DEAL WITH THE ISSUE OF THE CAP.

DEFINITELY NOT DIRECTLY. THAT'S CORRECT. IT IS OUR CONTENTION, YOUR HONORS, THAT THE STATUTE, WHEN LOOKED UPON IN ITS ENTIRE CONTEXT, IF YOU WERE TO READ IT THE WAY THE FIRST DISTRICT COURT OF APPEAL HAS READ IT, LEADS TO AN ABSURD RESULT. FOR INSTANCE, LET'S JUST SAY, FOR ARGUMENT'S SAKE, THAT THE CLAIMANT DOES RECOVER FULL VALUE OF THE DAMAGES. ACCORDING TO THEIR READING, THEN THE CARRIER RECOVERS FULL VALUE OF THE DAMAGES. THEN I AGREE WITH YOU. WHAT IS THE INCENTIVE, AND WHAT HAS HAPPENED IN THIS CASE, IN THE RULING OF THE FIRST DISTRICT COURT OF APPEAL IS IN CONTRAVENTION TO THE RULE, BECAUSE BOTH THE EMPLOYERANT CARRIER SHOULD HAVE THE -- THE EMPLOYER AND THE CARRIER SHOULD HAVE THE SAME MOTIVATION TO GET WHATEVER IS POSSIBLE FROM THE CASE, AS OPPOSED TO THE CLAIMANT TO HAVE THE DISINCENTIVE TO SAY I WAS 80% COMPARATIVELY NEGATIVE AND REDUCE THE BARGAINING NEGOTIATIONS OR REDUCE THE

AMOUNT THAT THEY COULD POSSIBLY BE REWARDED IN A MOTION FOR EQUITABLE DISTRIBUTION, BECAUSE WHAT HAPPENS IN THIS SCENARIO, THE LIST PERCENTAGE OF RECOVERY BY THE EMPLOYER, IT IS EVEN GREATER COSTS TO THE CARRIER, WITH THIS INTERPRETATION OF THE LIEN. THE STATUTE WAS AMENDED IN 1989. I AGREE.

WHEN WAS THE LANGUAGE PUT IN TO THE STATUTE THAT SAYS FULL VALUE OF THE EMPLOYEE'S DAMAGES? I MEAN MY MEMORY OF THIS HISTORY OF THIS IS THAT, WHEN THAT CHANGE WAS MADE, WAS A SORT OF DEPARTING FROM THE OLD WORKING OUT THE COMP LIEN ON WHAT THE BASIS OF ESTIMATE OF COMPARATIVE NEGLIGENCE WAS.

WHERE THEY GOT RID OF THE COMPARATIVE NEGLIGENCE WAS BETWEEN -- I AM JUST CHECKING HERE. ESSENTIALLY I UNDERSTAND YOUR QUESTION. COMPARATIVE NEGLIGENCE STILL SHOWS UP IN THE 1983 STATUTE. IT IS OUR POSITION THAT THE CHANGE TO THE 1989 STATUTE DIDN'T DEAL WITH, NOW, PROVIDING SOME KIND OF CEILING. DIDN'T DEAL WITH GIVING A PERCENTAGE AFTER PERCENTAGE. BUT DEALT WITH CLARIFYING THE CONFUSION REGARDING THE COMPARATIVE NEGLIGENCE. THAT IS WHAT HAD OCCURRED IN THE CASE OF MAN FRED-AND IN THE CASE OF NAKULLA. MATTER OF FACT, THIS COURT INDICATED THAT IF YOU HAD SO MUCH COMPARATIVE NEGLIGENCE, THE CARRIER WOULD NOT BE AWARDED ANYTHING, AND THAT WOULD BE ABSURD.

DIDN'T COMPARATIVE LANGUAGE COME OUT IN THE FULL FULL VALUE OF NET RECOVERY COME IN, INCLUDING THE ADDITION WILL SETTLEMENT AND JUDGMENT LANGUAGE IN THE 1989 CHANGES?

INCLUDING THE FULL VALUE? I THINK, EVEN IN 1983, IT SAYS, IN TERMS OF THE COMPARATIVE NEGLIGENCE, THAT IS NOW OUT IN THE 1989 STATUTE.

RIGHT.

IT INCLUDES VARIOUS FACTORS, INCLUDING COMPARATIVE NEGLIGENCE.

THAT IS WHEN COMPARATIVE NEGLIGENCE CAME OUT. THE QUESTION IS DID THAT CHANGE THINGS?

RIGHT. AND YET THAT DOESN'T NAME THE NUMERATOR. COMPARATIVE NEGLIGENCE IS ALWAYS CONSIDERED IN THE NUMERAT ON OR, AS IS IN THIS ONE. ANOTHER MATTER OF GREAT IMPORTANCE, BECAUSE IT TALKS ABOUT THE PRIORITY OF WHETHER TO APPLY THE GRICE OFFSET BEFORE THE LIEN OR THE LIEN BEFORE GRICE.

JUST QUICKLY, BEFORE WE GET TO THE OFFSET, BARRAGAN AND GRICE, IF THE WORKERS COMP COMES OFF FIRST, WHICH IS EASY IN THIS CASE, BECAUSE YOU START OFF WITH 318, ASSUMING THE 25% REDUCTION, YOU DON'T WORRY ABOUT BEFORE AND AFTER. I WANT TO UNDERSTAND YOUR POSITION ON THE ENTER PLAY BETWEEN BARRAGAN AND GRICE. IN THIS CASE THE JUDGE OF THE COMPENSATION COURT FOUND THAT THIS WAS AN EMPLOYEE CONTRIBUTE OTHER PLAN. THEREFORE, UNDER BARRAGAN, WOULDN'T IT BE A PROHIBITION FOR THERE TO BE AN OFFSET OR A BENEFIT TO THE WORKERS COMPENSATION BENEFITS AND SHOULDN'T, IN THIS CASE, THE BENEFITS BE PAID, FIRST, AS THE FIRST DISTRICT ORDER? AND THEN YOU DON'T HAVE TO WORRY, ABOUT, IN THIS CASE, AT LEAST THE BEFORE AND AFTER QUESTION.

MY ANSWER IS NO.

WHAT IS THE VITALITY, THEN, OF BARRAGAN, AFTER GRICE, IN YOUR OPINION?

THE VITALITY OF BARRAGAN STILL APPLIES IN SITUATIONS SIMILAR TO BARRAGAN, WHERE YOU ARE DEALING WITH A CONTRACT AND A PENSION, AND THE OFFSET IS APPLICABLE TO THE OFFSET

OF PENSION BENEFITS BY VIRTUE OF A CONTRACT.

HOW -- ISN'T THIS, IF WE WERE TO ALLOW THE WORKERS COMP TO GET THE BENEFIT OF A DISABILITY PAYMENT THAT WAS EMPLOYEE CONTRIBUTE OTHER, WHETHER THAT VIOLATES 440.21?

NO. AND IT DOESN'T VIOLATE 440.21, BECAUSE A CLAIMANT HAS NO RIGHT TO RECEIVE COMPENSATION BEYOND THE AVERAGE WEEKLY WAGE. THIS COURT STATED JUST SO IN GRICE. THIS COURT STATED JUST SO IN BARRAGAN. MATTER OF FACT IT GOES BACK TO 1974, IN THE KRESKY CASE.

IN THIS CASE, THE PENSION PLAN WOULD GET THE BENEFIT OF THE OFFSET. WE STILL WOULDN'T HAVE -- I DIDN'T READ THE -- LOCAL BARRY'S POSITION TO BE -- LOMBARDI'S POSITION TO BE THAT HE SHOULD GET IN EXCESS OF THE WEEKLY WAGE, ALTHOUGH I ASSUME THAT HE WOULD LIKE TO SEE GRICE TO SEE IT FROM, BUT IN THIS CASE TO PUT COMP FIRST AND THEN GO TO THE PENSION PLAN AND LET THEM GET THE BEN SFIT?

I CAN SEE -- THE BENEFIT?

I CAN SEE HOW YOU CAN REIT THAT WAY, AND I THINK BAR A -- YOU CAN READ IT THAT WAY, AND I THINK BARRAGAN CAN BE READ THAT WAY, AS PERTAINS TO THE OFFSETS IN BARRAGAN AND THE CITY OF MIAMI AND BARRAGAN, BUT BARRAGAN SPECIFICALLY STATED THE FOLLOWING, THE WORKER MAY NOT OFFSET COMPENSATION BENEFITS TO COMPENSATION PAYMENTS, TO THE RECEIVING OF THE MONTHLY WAGE, SO I WOULD SAY THAT THE CONTRARY OF THAT, SPECIFICALLY IN BARRAGAN, IS THAT YOU CAN OFFSET WORKERS COMPENSATION PAYMENTS WHEN YOU CONCEDE THAT.

YOU CONCEDE BARRAGAN AND GRICE AS BEING THE SAME THING.

I DON'T SEE GRICE AS REVERSING BARRAGAN.

BUT YOU DON'T SEE BARRAGAN AS REQUIRING THE COMP BENEFITS TO BE PAID FIRST?

NOT NECESSARILY. I THINK IN THAT PARTICULAR CASE, THAT WAS WHAT OCCURRED, BECAUSE OF THE CONTRACT. AGAIN, HERE IN THIS CASE --

BECAUSE OF THE CONTRACT IT SAID WHAT? THE CONTRACT SAID WE ARE GOING TO REDUCE YOUR?

PENSION BENEFITS BY VIRTUE OF THE WORKERS COMPENSATION PAYMENTS. THAT IS WHAT THE CONTRACT SAID IN BARRAGAN. THERE WAS NO EVIDENCE OF ANY SUCH CONTRACT IN GRICE OR IN THIS CASE OF THE CITY OF HOLLYWOOD VERSUS LOMBARDI.

SO THAT IN BARRAGAN, THEN, WHAT WAS HAPPENING? YOU PAID THE COMP FIRST AND THEN THE -- AND THEN WHAT HAPPENED?

IN BARRAGAN, THEY -- THE CITY ATTEMPTED TO REDUCE ITS PENSION PAYMENTS, BECAUSE OF THE WORKERS COMPENSATION BENEFITS THAT WAS BEING PAID. I AM BEING VERY BRIEF WITH THAT, AND IT DID SO, EVEN IT REDPUSED THE TOTAL PAYMENTS TO THE CLAIMANT IN THAT CASE, BENEATH THE AVERAGE MONTHLY WAGE, REALLY, AVERAGE WEEKLY WAGE.

AND SO YOU SAID THAT, THEN, WHAT WAS HAPPENING AFTER BARRAGAN WAS THAT HE GOT HIS FULL PENSION BENEFITS BUT LESS WORKERS COMP? IS THAT WHAT YOU ARE SAY SOMETHING.

IN BARRAGAN? THAT HE RECEIVED HIS FULL PENSION BENEFITS.

BUT NOT TO --

I THINK IN BARRAGAN IT WOUND UP BEING THAT THE PENSION OFFSET CAME -- THE PENSION OFFSET WAS WHAT WAS ALLOWED AND WORKERS COMPENSATION, AS MR. SICKING INDICATED, WAS PRIMARY.

BUT WHY SHOULDN'T THAT BE THE RESULT HERE, WHERE IT IS AN EMPLOYEE CONTRIBUTE OTHER PLAN? ISN'T THAT THE SAME? DOESN'T THAT DO THE SAME THING THAT 440.21 PROHIBITS?

NO. BECAUSE, AND IF I MAY JUST ANSWER THAT, THE CITY OF HOLLYWOOD, SIMILAR TO THE -- SIMILAR TO THE GRICE CASE, IN GRICE, THIS COURT MENTIONED SECTION 440.21. IT MENTIONED SECTION 440.2015, REGARDING THE OVERPAYMENT, AND IT INDICATED THAT THERE WAS NO RIGHT. THE CLAIMANT HAS NO RIGHT TO RECEIVE PAYMENTS FROM THE EMPLOYER AND OTHER COLLATERAL SOURCES, WHETHER IT BE WORKERS COMPENSATION, PENSION DISABILITY, WINDS UP NOT BEING SOCIAL SECURITY, RETIREMENT AND OTHERS, BUT HAS NO RIGHT TO PAYMENTS BEYOND THAT. SO THAT IS WHERE WORKERS COMPENSATION, AND I SAY HAS ALWAYS BEEN A PRIMARY -- I AM SORRY. PENSION WAS PRIMARY IN THE -- IN THIS CASE, BECAUSE OF THE FACTS OF THE CASE. I DON'T -- I DO NOT SEE BARRAGAN AND GRICE BEING EXCLUSIVE OF ONE ANOTHER. IT JUST HAPPENS TO BE THE FACTS OF THAT CASE.

I DON'T KNOW WHETHER YOU HAVE ANY TIME LEFT, BUT IF YOU WISH TO SAVE SOME, YOU MAY.

I HAVE VERY LITTLE TIME LEFT. I WILL BE RELEASING MY REBUTTAL. THAT IS THE MAIN ISSUE BEFORE THIS COURT IS CONCERNING THE LIEN. ANOTHER PRIMARY ISSUE IS CONCERNING THE GRICE OFFSET. WE BELIEVE THE GRICE OFFSET SHOULD HAVE APPLIED AND THE CREDITS SHOULD BE APPLICABLE, ALL THE WAY BACK TO DECEMBER OF 1994, BECAUSE IT DID NOT CHANGE ANY SUBSTANTIVE RIGHTS OF THE CLAIMANT. THE CLAIMANT HAS NEVER HAD ANY RIGHTS TO BENEFITS BEYOND THE AVERAGE WEEKLY WAGE, SO THE CREDIT SHOULD BE APPLIED. THE GRICE OFFSET SHOULD BE ALLOWED. THE PENALTIES AND INTEREST SHOULD BE CONSIDERED TO HAVE BEEN DEEMED PAID BY VIRTUE OF THE $2,000 OVERPAYMENT MADE IN MAY OF 1995, AND WE RESPECTFULLY REQUEST THIS COURT TO REVERSE THE FIRST DCA OPINION. THANK YOU VERY MUCH.

THANK YOU. MR. SICKING.

YOUR HONORS, MAY IT PLEASE THE COURT. I AM RICHARD SICKING FROM CORAL GABLES, FOR THE RESPONDENT AL LOMBARDI. THE CAP IN THIS CASE IS THE AVERAGE WEEKLY WAGE, CONVERTED MONTHLY, THE AVERAGE MONTHLY WAGE. THE QUESTIONS ARE WHO PAYS FIRST, THE EMPLOYER OR THE PENSION FUND, AND WHERE DOES THE 25% REDUCTION FOR THE SUBJUGATION RIGHTS GO? BEFORE OR AFTER THAT CALCULATION?

NOW, I SAY THAT THE 25% OFF, THE SUBJUGATION DEDUCTION, COMES FIRST. AND THEN COST OFFSET ON ACCOUNT OF ANY OVERAGE ABOVE THE AVERAGE MONTHLY WAGE ON ACCOUNT OF THE COMBINATION OF THE WORKERS COMPENSATION AND THE DISABILITY SERVICE-CONNECTED PENSION, EXCLUDING COST OF LIVING ADJUSTMENTS. THEY SAY JUST OPPOSITE.

JUST TO MAKE SURE, SO THE SUBJUGATION WOULD BE THAT YOU START WITH 318 IN THIS CASE.

YES.

BECAUSE THAT IS 25% LESS THAN 25. WHAT IS THE NEXT STEP THAT COMES IN?

THE NEXT STEP IS TO TAKE THAT AMOUNT AND ADD TO THE PENSION AS IT STANDS, SOME 2600, AND SEE WHETHER IT GOES ABOVE 336970, WHICH IS THE AVERAGE MONTHLY WAGE. THE AMOUNT OVER 336970 WOULD, THEN, BE A DEDUCTION TO THE PENSION FUND. THE PENSION FUND

WOULD GO DOWN, BUT THE WORKERS COMPENSATION THAT IS PAID BY THE EMPLOYER, BY STATUTE, IN EXCHANGE FROM THE IMMUNITY FROM SUIT, IS FIXED BY LAW.

WHY IS THAT -- WHY IS IT THAT -- WOULD YOU AGREE THAT, IN GRICE, WE SAID THAT WORKERS COMPENSATION GOT THE BENEFIT OF THE OFFSET?

YES.

NOW, YOU ARE TRYING TO URGE US TO CONCEDE FROM GRICE. ASSUMING THAT WE DON'T, WHAT IS YOUR ARGUMENT IN THIS CASE AS TO WHY THE WORKERS COMPENSATION BENEFITS SHOULD NOT BE OFFSET AND THAT THE PENSION PLAN SHOULD GET THE BENEFIT OF IT?

IN THIS CASE FACTUALLY IT IS DIFFERENT FROM GRICE, BECAUSE THIS PLAN, LIKE THE PLAN IN MIAMI, WAS EMPLOYEE DISTRIBUTETORY, AND THE STATUTE, 440.21, COMES TO PLAY, AND IT DOESN'T SAY ANYTHING ABOUT HOW MUCH HE PAID. THAT IS WHY THE REMAND IS UNNECESSARY. IT IS JUST WHETHER HE PAID ANYTHING AND WE KNOW THAT HE PAID A LOT, AND SINCE HE PAID, THEY CAN'T GET A DEDUCTION FROM WHAT THEY WOULD OTHERWISE OWE BY LAW ON ACCOUNT AFTER PAYMENT BY A FUND TO WHICH HE CONTRIBUTED. THAT IS THE HOLDING OF THE BARRAGAN CASE, IF HE VIOLATED THAT STATUTE, SO IF YOU DIDN'T CONCEDE FROM GRICE, IF YOU SIMPLY SAID THAT FACTUALLY THE CASES, BARRAGAN AND GRICE, ARE DIFFERENT, BECAUSE OF THAT STATUTE AND ITS APPLICABILITY, THAT WOULD CERTAINLY BE CORRECT, AND THE DISTRICT COURT WOULD BE CORRECT AS TO ITS HOLDING, BUT THE REMAND TO DETERMINE THE AMOUNT WOULD BE UNNECESSARY. THE PROBLEM THAT WE HAVE IS THAT THE DIVISION OF RETIREMENT OF THE STATE OF FLORIDA, THE EXECUTIVE BRANCH IN ITS AMICUS CURREA BRIEF, ONE OF THE PLEADINGS IN THIS CASE TAKES THE POSITION THAT DPRIS IS WRONG, EVEN IN REGARD TO NONCONTRIBUTE OTHER PLANS, AND I AGREE, AND I HAVE SET FORTH FIVE DIFFERENT CASES, AND I AGREE, MY CONTENTION IS THAT EVEN IF THE CASE IS NONEMPLOYEE, WORKERS COMPENSATION SHOULD STILL BE PAID FIRST.

THIS IS WHAT YOU ARGUED IN THE ACKER CASE, ALSO?

I MIGHT HAVE. ACKER SPECIFICALLY DEALS WITH COST OF LIVING ADJUSTMENTS.

I REMEMBER YOU SAYING THAT.

I DIDN'T WANT TO GO BACK TO ACKER, BECAUSE THEY DON'T CONTEST ABOUT THE SUPPLEMENTAL.

I UNDERSTAND THAT. BUT AREN'T WE, THEN, BECAUSE IN THIS CASE, WE DON'T HAVE THE DIVISION OF RETIREMENT, AND THOSE ISSUES. IN TERMS OF USING THIS CASE AS RELATES TO GRICE, AT THE VERY LEAST WHAT YOU WOULD WANT THE LOAD HOLDING TO BE IS -- WHAT YOU WOULD WANT THE HOLDING TO BE IS THAT, AN EMPLOYEE CONTRIBUTE OTHER PENSION FUND, IN ORDER TO HE EFFECT WAIT THE POLICY OF -- INORITYER TO EFFECT WAIT THE POLICY OF 440.11, IN ORDER TO DO SO.

CLEARLY IT IS A BARRAGAN NOT GRICE CASE IN THAT REGARD. THE CASE IS REALLY ONE OF JUDICIAL ECONOMY. YOU REALLY SHOULDN'T DO MORE THAN YOU NEED TO DO, BUT WHAT DO YOU NEED TO DO, AND I THINK YOU NEED NOT DO SOMETHING THAT PEOPLE WILL MISS UNDERSTAND AND DO IT ALL WRONG, AND THE QUESTION IS IF THEY DO IT ALL WRONG, THAT ENCOURAGES LITIGATION. WE HAVE BEEN AT THIS FOR FIVE YEARS, AND WE DON'T HAVE AN ANSWER FROM ANY OF THE CASES, INCLUDING GRICE, WHICH SPECIFICALLY SAYS WORKERS COMPENSATION PAYS FIRST.

YOU DON'T THINK THAT GRICE SAYS ALL OF IT?

I DON'T THINK IT IS A COINCIDENCE THAT ALL OF THE EMPLOYEES IN THIS IS GOVERNMENT. THAT IS THE RETIREMENT INCOME SECURITY ACT. THE FEDERAL ACT, I BELIEVE, WOULD ABSOLUTELY PROHIBIT THAT, BECAUSE TITLE 29 OF THE UNITED STATES CODE, SEX 1103 -- SECTION 1103, SAYS THE MOST MANDATORY LANGUAGE I HAVE SEEN. IT SAYS THE APPLICATION OF AN EMPLOYEE PENSION TRUST WILL NEVER ENURE TO THE BENEFIT OF THE EMPLOYER, SO THAT MEANS THAT THE EMPLOYER MAY NOT USE THE PENSION TRUST TO PAY OBLIGATIONS TO ANYONE, INCLUDING HIS OWNV' NOT FOR WITHHOLDING TAXES, NOT FOR BENEFITS, NOTHING.

WHAT IS GOING TO START TO HAPPEN IS THAT THE PENSION PLANS, WHICH ARE FUNDED AND ACTUARIALLY BASED, YOU ARE SAYING THIS IS NOT FOR NORMAL RETIREMENT, JUST FOR DISABILITY.

NORMAL RETIREMENT WOULD STILL APPLY.

THAT IS A FAR-REACHING ISSUE, THEN, OF THEM GETTING THE BENEFIT OF THE OFFSET VERSUS THE WORKERS COMP FUND GETTING THE OFFSET. THAT IS A VERY SIGNIFICANT QUESTION. YOU ARE SAYING IT IS NOT ADDRESSED DIRECTLY IN GRICE?

WITH REGARD TO GOVERNMENT BUT NOT WITH REGARD TO PRIVATE INDUSTRY, BUT IT ISN'T ACTUALLY MUCH OF A CHANGE, AND I WILL TELL YOU WHY. AFTER BARRAGAN, THAT IS WHAT BERP -- WHAT WE WERE ALL DOING, ANYWAY. THAT IS WHAT WE HAVE ALWAYS COUNTRY.

AFTER BARRAGAN, IT WAS -- THAT IS WHAT WE HAVE ALWAYS DONE.

AFTER BARRAGAN, IT WAS ALWAYS DONE. IN THE PRIVATE INDUSTRY THEY ALSO HAVE, BECAUSE THAT IS A RISSO.

THAT IS WHY THIS EMPLOYER, FROM 1994, ON, DID NOT ---.

I DON'T THINK THERE SHOULD BE A DIFFERENT RULE FOR LOCAL GOVERNMENT AS OPPOSED TO PRIVATE INDUSTRY. THE PRIVATE EMPLOYMENT WAIVES COMPLETELY, SO WE SHOULDN'T HAVE A DIFFERENT RULE FOR GOVERNMENT EMPLOYMENT AS OPPOSED TO PRIVATE EMPLOYMENT, AND IF A WORKER CAN HIDE ITS EXPERIENCE IN A PRIVATE PENSION FUND, IT MAKES IT APPEAR AS A SMALL LOSS, BECAUSE IT WORKS TO THE DETRIMENT OF OTHERS IN THE INDUSTRY WHO DON'T HAVE A SAME BENEFIT, BECAUSE THE WHOLE THEORY OF WORKERS COMPENSATION IS DESTROYED. IT HAS ALL SORTS OF ADVERSE CONSEQUENCES, WHICH BOTH THE DEPARTMENT OF THE DIVISION OF RETIREMENT, AND I HAVE POINTED OUT AS A PRACTICAL MATTER, THE LEGISLATURE HAS GIVEN US A PRICE, WHICH IS IN EXCHANGE FOR IMMUNITY FROM SUIT. IT IS THIS PRICE IN THIS STATUTE, AND ALLOWING THE EMPLOYER TO PAY LESS FOR THAT RIGHT, THE IMMUNITY FROM SUIT, BECAUSE PAYMENTS MADE FROM SOME OTHER SYSTEM IS WRONG, IT DOESN'T PLEEN MEAN THE EMPLOYEE -- IT DOESN'T MEAN THE EMPLOYEE GETS MORE. IT IS STILL CAPPED OFF AT THE WAGES.

IN THIS CASE THERE WAS NO QUESTION WHETHER THERE WAS A CONTRACT AND THE AGREEMENT WAS THAT HE WOULD GET MORE THAN HIS AVERAGE WITHHOLDING.

ABSOLUTELY. THAT IS RATHER RARE, ABSOLUTELY.

YOUR ARGUMENT IS THAT WORKERS COMP SHOULD ALWAYS BE THE PRIMARY SOURCE AND WORKERS COMP NEVER TAKES THE OFFSET.

RIGHT. THAT IS, BY THE WAY, NOT INVENT, EITHER, BECAUSE THE DIVISION ALREADY HAS A FORM WHICH IT IS AUTHORIZED TO SEND OUT BY STATUTE TO THE RECIPIENTS OF WORKERS COMP, IN WHICH THEY HAVE TO REPORT THEIR SOCIAL SECURITY, ANY PENSION BENEFITS OR OTHER PAYMENTS, AND UNDER THREAT OF HAVING THEIR BENEFITS SUSPENDED IF THEY DON'T,

SO WE HAVE IN PLACE THE MECHANISM FOR DOING THAT.

YOU ARE SAYING UP UNTIL GRICE, EVERYONE ASSUMED THAT IS THE WAY IT WOULD GO. SINCE GRICE, IT HAS BEEN ASSUMED IT IS THE OTHER WAY. ISN'T IT? WE HAVE TO BE ON --

IT IS A MESS.

WE HAVE TO BE CLEAR, HERE, WHERE IF THE ISSUE IS YOU SAY WE DON'T NEED TO RECEDE FROM GRICE TO DO THIS OR WE HAVE TO EXPRESSLY RECEDE FROM GRICE, IN ORDER TO DO THIS?

TO DO IT RIGHT, YOU HAVE TO RECEDE FROM GRICE, AND SINCE, IF THE EXECUTIVE BRANCH OF THE GOVERNMENT SAYS THAT GRICE IS WRONG, I THINK IT AT LEAST DESERVES YOUR CONSIDERATION, AND CONSIDER IT WITH REGARD TO THE SUPPLEMENTAL BENEFITS, AS ALREADY MENTIONED IN GRICE. YOU HAVE ALREADY RECEDED FROM THAT. IF WE SAY THAT THE WORKERS COMP IS PAID FIRST, THEN IT IS MUCH EASIER TO DEAL WITH THAT AS TO SAY THAT THEY PAY IT FIRST, AND THE PENSION FUND GETS THE OFFSET, THEN IT IS MUCH EASIER TO DEAL WITH THE 25% SUBJUGATION. -- SUBROGATION. ONE OF THE REASONS I POINT THAT OUT, AGAIN, IS THE SAME PROBLEM. THE WORKERS COMPENSATION IS NOT SUPPOSED TO COME FROM THE PENSION PAYMENTS, SO IF YOU DO THE OFFSET, THEY ASK IN A SENSE, THE EMPLOYEE WHO HAS FUNDED THIS, IS SUBSIDIZING THAT. IT IS SUPPOSED TO COME OFF THE WORKERS COMP, NOT THE COMBINATION OF WORKERS COMP AND THE PENSION. I DON'T THINK YOU HAVE TO DEAL WITH CASES LIKE NORMAN AND MANFREDO OR ANY CASE THAT DEALS WITH A REPEALED STATUTE. WE ONLY HAVE TO DEAL WITH THE 1989 STATUTE, WHICH IS THE STATUTE IN THIS CASE, THE CURRENT LAW.

YOU ARE TALKING ABOUT THE CAP OF 25%. THIS IS MY PROBLEM, FRANKLY. YOU HAVE GOT A PRINCIPLE IN AETNA V NORMAN. I DON'T REMEMBER IT TALKING ABOUT WHERE IT IS CAPPED OFF. IT IS NOT A QUESTION OF STATUTORY CONSTRUCTION. IT WAS STATED AND ALWAYS ASSUMED THAT THEY COULDN'T -- ONCE YOU PAID OUT THE UP TO THE NET RECOVERY, THEN THEY COULD START GETTING GETTING THEIR 100 --

BE -- WOULD BE PAYING 100% OF THE BENEFITS. IN MANFREDO AND NICOLLA DON'T DEAL WITH THE CAPS. SO WHAT YOU WOULD BE SAYING IS, IN THIS STATUTE IN 1989, THE LEGISLATURE DECIDEDED THAT THEY WERE GOING TO DRAMATICALLY CHANGE THE RIGHTS THAT THE EMPLOYER HAD TO RECEIVE PAYMENT ON ITS LIEN.

I THINK SO. THAT IS WHAT CHANGES IN STATUTES DO. IF YOU LOOK AT THE EARLIER CASES, THEY -- BASED ON EARLIER STATUTES, THE STATUTES DIDN'T CONTAIN A FORMULA FOR PARTIAL SUBROGATION. NOW IT DOES.

WHEN YOU I PARTIAL SUBROGATION, THAT IS WHERE THE KEY IS, IS THAT THEY SAY IT IS, FOR THE FIRST TIME, EXPLAINS THE DILEMMA THAT WAS EXPLAINED AND THEN DISCUSSED IN NAKULLA, WHICH WAS IF YOUR COMPARATIVE NEGLIGENCE IS THIS, YOU RECOVER -- WHAT IS THE PERCENTAGE, AND NAKULLA EXPLAINED IT, AND THEN THIS STATUTE, NOW, HAS CODDFIED THAT, AND THAT IS WHAT IS ALLEGED TO BE THE PURPOSE OF THAT CHANGE, WHICH, FRANKLY, SEEMS THE MOST LOGICAL CONSTRUCTION OF WHAT THE LEGISLATURE WAS TRYING TO DO. AS OPPOSED TO SAYING YOU KNOW WHAT? PEOPLE REALIZE CLAIMANTS, IT IS NOT FAIR FOR THEM TO HAVE TO PAY BACK ALL OF THEIR NET RECOVERY, SO INSTEAD OF GIVING -- GIVING THEM THE CARRIER 60-PLUS-THOUSAND DOLLARS IN IT CASE, WE ARE ONLY GOING TO GIVE THEM BACK 15,000. WOULD YOU AGREE IT IS A DRAMATIC CHANGE?

IT IS A DRAMATIC CHANGE, BUT YOU CAN'T GET ISOLATE ODD A GIVE ENCASE, TO SEE WHERE THE MONEY IS.

IF THIS IS NOT PLAIN AND AMBIGUOUS, WOULDN'T YOU AT LEAST THINK THAT, IN THE

LEGISLATIVE HISTORY, THERE MIGHT BE SOME MENTION OF WHAT COULD HAVE SOME VERY SIGNIFICANT EFFECTS ON THE WORKERS COMPENSATION INDUSTRY, WHICH IS A SIGNIFICANT REDUCTION IN THEIR ABILITY TO GET, YOU KNOW, THEIR LIEN BACK?

WELL, I DON'T THINK IT REALLY WORKS THAT WAY. LET ME EXPLAIN. FIRST OF ALL, AS YOU KNOW IN THIS CASE, AND TO ME THE SIGNIFICANT CHANGE IN THE '89 STATUTE WAS REDUCED FOR ANY REASON, NOT JUST COMPARATIVE NEGLIGENCE. IN THIS CASE IT HAPPENED TO BE COLLECTIBILITY, BECAUSE THERE WAS $100,000, AND THAT IS ALL THERE WAS TO GO AROUND. THE FIRST ONE, WHICH IS TOTAL SUBROGATION IN THE STATUTE, IS WHENEVER THE EMPLOYEE GETS THE FULL VALUE OF DAMAGES, THEN WHAT THEY PAID IN THE PAST AND WHAT THEY GET IN THE FUTURE, THEY HAVE PAID EVERYTHING BACK, BECAUSE THERE IS MORE MONEY TO DO THAT, BECAUSE --

LESS ATTORNEYS' FEES AND COSTS.

BUT EXCEPT WHEN THE EMPLOYEE DOESN'T GET THE FULL VALUE OF FULL DAMAGES FOR ANY REASONS, THAT IS NEW, THEN THEY GET SOMETHING ELSE, AND THIS IS NEW. THE FORMULA. IT WAS NEVER THERE BEFORE. THE FORMULA ATTRACTS YOUR DECISION IN NAKULLA, AND WHAT IT SAYS, REALLY, IS WHEN THERE ISN'T ENOUGH MONEY FROM THE THIRD PARTY TORTFEASOR, IF THERE ISN'T ENOUGH, WHETHER BY JURY VERDICT OR BY SETTLEMENT TO SATISFY THE RIGHTS OF THE EMPLOYEE AND EMPLOYER, THEN THE LEGISLATURE HAS GIVEN US A FORMULA TO DIFUP AND SATISFY THE RIGHTS OF BOTH OF THESE PARTIES, NEITHER OF WHICH IS GOING TO BE ENOUGH FOR BOTH OF THEM. IN THIS PARTICULAR CASE, THE $62,000 WOULD BE DIVIDED UP $47,000 TO THE CLAIMANT AND $15,000 TO THEM, WHY? BECAUSE THE STATUTE SAYS WHENEVER HE DOESN'T GET THE FULL VALUE OF DAMAGES, THEN THEIR SUBROGATION RIGHT IS THE PERCENTAGE OF THE NET RECOVERY, THAT THE NET RECOVERY IS A PERCENTAGE OF THE FULL VALUE OF DAMAGES, AND TO ME THAT IS AS CLEAR AS CRYSTAL THAT, IT IS A CAP ON -- OTHERWISE WHAT DOES IT DO? IT DOESN'T DO ANYTHING.

IT SAYS IT CLARIFIES AND CODIFIES NAKULLA. IT SAYS THAT YOU GET BACK 25% OF WHAT HAS BEEN PAID IN THE PAST, AND YOU GET BACK 25% OF ALL FUTURE PAYMENTS, AND NEITHER, AND THIS IS THE OTHER WAY TO LOOK AT IT, NEITHER THIS STATUTE OR THE PRIOR STATUTE EVER TALKED ABOUT UP TO WHAT. AND THAT IS -- I -- IF IT WASN'T FOR AETNA V NORMAN AND THE LAW BEING WHAT IT WAS, AS I READ THE STATUTE, FIRST READ, I THINK THAT IS A LOGICAL READING OF IT, BUT I, ALSO, SEE THE OTHER READING OF IT, AND THAT MAKES IT POTENTIALLY AMBIGUOUS, AND THEN AREN'T WE TO BE GUIDED BY WHAT THE LAW HAS BEEN, AND THAT, AGAIN, IF THE LEGISLATURE WAS TO MAKE A DRAMATIC DEPARTURE, WE WOULD EXPECT SOME INDICATION AND SOME CLEARER STATEMENT OF THAT DRAMATIC DEPARTURE?

I DON'T THINK YOU CAN HAVE MORE OF A STATEMENT OF DRAMATIC DEPARTURE THAN THE STATUTE, ITSELF. IT CHANGED THE REASON FOR GETTING PARTIAL SUBROGATION, AND IT GAVE A FORMULA THAT DIDN'T EXIST BEFORE. THE POINT OF THE FORMULA IS NOT HOW YOU TAKE IT DOWN, BECAUSE WHAT REALLY SHOWS THAT UP IS WHAT IF EVERYTHING THEY HAD PAID WAS IN THE PAST? SEE. THERE IS TWO THINGS OPERATING. 25% OFF IN ORDER TO PAY BACK FUTURE BENEFITS BUT IT IS, ALSO, 25% OFF ON THE TOTAL AMOUNT. BECAUSE THE 25% OFF OF FUTURE BENEFITS ISN'T NORMAN. ISN'T MANKULLA. MANKULLA ISN'T SOMETHING ELSE. IT JUST A PROCEDURE. THE CASE IS, WHAT WAS THE SIGNIFICANT THING WAS WHAT WAS THE CAP, NOT HOW DO YOU IT, WHETHER THE BENEFITS WERE PAID IN THE PAST OR IN THE FUTURE.

NAKULLA WAS THE CAP? I DON'T HAVE NAKULLA AS ADDRESSING THAT.

NO, BUT THAT IS HOW IT HAPPENS TO COME OUT. I QUITE AGREE WITH YOU, BUT I THINK THAT IS WHY THE LEGISLATURE ADDRESSED IT THAT WAY, BY YIING THE STATUTE THAT -- BY WRITING THE STATUTE THAT WAY. OTHERWISE IT DOESN'T ACCOMPLISH ANYTHING. IT SAYS THE WAY YOU

TAKE OFF FUTURE BENEFITS, BUT IT SAYS RIGHT IN IT FOR THE PAST AND THE FUTURE. SO YOU CAN'T TAKE OFF THE PAST IN THIS STAUMENT, REDUCING WORKERS COMP, IF IT SAYS WHAT THEY WILL PAY IN THE PAST AND WHAT THEY WILL PAY IN THE FUTURE, THEN IT IS THE CAP, BECAUSE WHAT HAS BEEN PAID IN THE PAST IS FIX THE. THERE IS NO WAY TO TAKE OFF WHAT YOU WILL PAY IN THE FUTURE. THE DIFFERENCE BETWEEN WHAT THEY WILL PAY IN THE PAST AND THE FUTURE IS THE CAP, NOT THE PROCEDURAL WAY OF DEDUCTING AMOUNTS OFF OF FUTURE BENEFITS.

ISN'T THE CALCULATION, THOUGH, THAT THE STATUTE ADDED HERE, AT THAT POINT IN TIME, WHAT THE PERCENTAGE IS TO BE IN THE PERCENTAGE IS GOING TO BE THE NET RECOVERY VERSUS THE TOTAL AMOUNT OF THE DAMAGES.

YES.

THAT, REALLY, THAT WAS A DEPARTURE FROM WHAT HAD TRADITIONALLY BEEN GOING ON IN THE FIELD, IN THAT, REALLY, WHAT WAS TRADITIONALLY GOING ON IN THE FIELD WAS THEY TAKE INTO THE CIRCUIT JUDGE, A DETERMINATION OF IN THIS KIND OF SETTLEMENT, WHAT WAS THE TOTAL -- WHAT FACTOR IN THE TOTAL RECOVERY WAS COMPARATIVE NEGLIGENCE.

NOW IT IS MECHANICAL. YOU JUST DO THE MATHEMATICS.

RIGHT. AND THAT BUT YOU HAD TO ARRIVE AT A PERCENTAGE AMOUNT IN THE SETTLEMENT CONTEXT, AND SO THAT IS WHAT YOU ALWAYS GOT INTO IN THE DEBATE.

THIS HAS ELIMINATED THE DEBATE.

SO THE INTENT OF THAT STATUTE WAS TO ELIMINATE THE DEBATE AND TO GIVE YOU A METHOD BY WHICH YOU FIGURED DAMAGES ON THE BASIS OF WHAT NET AFTER ATTORNEYS FEES AND COSTS THE CLAIMANT GOT, VERSUS WHAT THE CLAIMANT'S TOTAL DAMAGE IS OR ESTIMATED TO BE. ISN'T THAT IT?

YES.

THE WAY IT WORKED.

I BELIEVE SO.

AND SO, THEN, WE ARE LEFT WITH THIS DEBATE AS TO WHETHER, IN THE FINAL ANALYSIS, YOU ONLY GET THAT PERCENTAGE AGAINST WHAT IS ALREADY PAID, OR YOU CAN DEDUCT IT, UP UNTIL THE TIME YOU ARE OUT OF WHAT THE COMP CARRIER TOTALLY EVER PACE PAYS.

BUT TO ME -- EVER PAYS.

BUT TO ME WHAT THE STATUTE SAYS, WHAT THEY PAID IN THE PAST AND WHAT THEY WILL PAY IN THE FUTURE, IT IS BOTH, AND IF IT IS BOTH, IT CAN'T BE ANYTHING ELSE WITH YOU THE -- ANYTHING ELSE BUT THE CAP. THE FUTURE CAN HAVE NO MEANING TO REFERENCE OF WHAT WAS PAID IN THE PAST, BECAUSE THEY ARE SIMPLY DONE UP THAT WAY.

I AM HAVING TROUBLE WITH THE ARGUMENT YOU ARE MAKING, THE LAST ARGUMENT ABOUT THE SIGNIFICANCE OF THE PAST AND THE FUTURE. IF ALL THAT THIS CARRIER HAD PAID OR THE CITY HAD PAID OUT WAS WHAT IT PAID OUT IN THE PAST.

YES.

I THINK, IF I CAN HAVE A SECOND FOR REBUTTAL, THAT THEY WOULD AGREE THAT THEY WOULD

ONLY GET THE PERCENTAGE OF WHAT THEY PAID IN THE PAST.

YES.

SO THAT IS NOT IN DISPUTE, AND IF THAT IS ALL THAT THEY PAID, THEN YOUR CLIENT WOULD GET -- WOULD PAY THAT BACK AND WOULD HAVE -- WOULDN'T --

IT WOULD BE OVER.

THAT WOULD BE IT.

IT WOULD BE OVER.

BUT THIS SAYS, THEN THERE, IS A FORMULA, ALSO, FOR THE FUTURE, WHICH IS THE SAME FORMULA, WHICH IS 20 -- WHICH IS REDUCED BY 25% OF THE FUTURE OR, I AM SORRY. YEAH. 25% OF THE FUTURE. BUT WHERE YOU READ AND WHY DOES THE FACT THAT IT MENTIONS THE FUTURE, IN YOUR OPINION, CLEARLY MEAN THAT THEY MUST BE TALKING ABOUT A CAP, WHICH, OF COURSE, ISN'T EXPRESSLY MENTIONED IN THE STATUTE, WHICH --

THEY DON'T HAVE TO SAY IT THREE TYPES OVER, BECAUSE THE COURT HAS ALWAYS HAD THE POWER TO DIVVY UP WHAT WAS EQUITABLE DISTRIBUTION BETWEEN THEM. THIS TAKES AWAY THE EQUITABLE DISTRIBUTION BETWEEN THEM AND GIVES WAS MECHANICAL FORMULA. THERE IS NO POINT IN HAVING NO CAP, BECAUSE THEN YOU REACH THIS CONCLUSION THAT THE LAWYER GETS PAID. THE PLAINTIFF'S LAWYER GETS PAID. THE INSURANCE CARRIER GETS ALL THE MONEY AND THE EMPLOYEE GETS NOTHING. IF IT WAS ALL PAID IN THE PAST, HE ISN'T GOING TO GET ANY LUMP SUM. IT ALL GOES TO THEM. THAT SEEMS TO IN FLAME ABOUT HOW COULD THE LEGISLATURE TAKE AWAY ALL DAMAGES FOR THE EMPLOYEE?

IF YOU AGREE WITH THE PAST, IS THAT HOW NORMAL INTERPRETED IT JUST SO WE UNDERSTAND THE CONTEXT, THIS HAS BEEN THE WAY THE PLAINTIFFS AND THE COMP INDUSTRY HAS FUNCTIONED, UNTIL THE PRESENT TIME, THAT USUALLY WHAT HAPPENED HAPPEN IS, WHEN YOU -- WHAT WOULD HAPPEN IS, WHEN YOU GO TO SETTLE YOUR THIRD PARTY, YOU WORK SOMETHING OUT WITH THE COMP CARRIER, WHICH IS PROBABLY WHY THERE IS NOT AS MUCH LITIGATION, BECAUSE YOU WORK IT ALL OUT. THAT IS WHAT HAPPENS IN THE REAL WORLD.

I DISAGREE WITH YOU THAT, BECAUSE THEY WORKED IT ALL OUT, THAT IT WAS ALWAYS DONE THAT WAY. THERE WERE PEOPLE WHO THOUGHT NORMAN WAS STRANGE.

DRACONIAN?

AND PEOPLE WOULDN'T AGREE TO THAT, SO IF IT WASN'T WORKED OUT, IT IS ONE CASE. ONE CASE DOES NOT MAKE AN EMPIRE.

ONE CASE FROM THIS COURT WHICH HAS NEVER BEEN OVERRULED.

BASED ON A REPEALED STATUTE? SO WHAT DID THE LEGISLATURE THINK OF IT? APPARENTLY NOT VERY MUCH. NOW, WHAT I WOULD LIKE TO SAY IS THAT THE SECOND QUESTION SHOULD BE AFFIRMED, THE CASE SHOULD BE AFFIRMED AND THE QUESTION ANSWERED IN THE AFFIRMATIVE. THE FIRST QUESTION, IT CANNOT BE ANSWERED IN THE AFFIRMATIVE OR NEGATIVE, BECAUSE IT ISN'T THIS OR THERE, AND WHAT I SAY TO THAT IS THAT THE SUBROGATION DEDUCTION SHOULD COME FIRST AND THEN THE PENSION OFFSET, TO THE BENEFIT OF THE PENSION FUND. THE EMPLOYER PAYS IN FULL TO THE CAP OF THE WEEKLY WAGE. THANK YOUR HONORS FOR YOUR TIME.

DO YOU HAVE ANY TIME LEFT?

TWO TENTHS OF A MINUTE.

DO YOU WANT TO TAKE THEM? THANK YOU VERY MUCH. WE APPRECIATE YOUR ASSISTANCE. THE MARSHAL: PLEASE RISE.

WE WILL BE IN RECESS.