O/A 6-5-87

SUPREME COURT OF FLORIDA

CRITTENDEN ORANGE BLOSSOM
FRUIT, and AETNA CAS. & SUR. CO.,

Appellants,

v.

MARVIN STONE,

Appellee.

Claim No: 266-46-6123
D/A: 10/24/84
Case No: 69,476
1st District Court
of Appeal No: BI-366

# PETITIONERS' BRIEF

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## STATEMENT OF CASE

The Claimant filed Workers' Compensation claims against the Appellants and another Employer/Carrier ["E/C"] for injuries resulting from an October 24, 1984 accident. (R at 90-91, 99, 102-03). The Deputy Commissioner consolidated the claims, and held a hearing to determine which E/C was responsible. (R at Id.) The Appellants accepted the previous June 20, 1983 Workers' Compensation accident as compensable, but denied compensability for the October 24, 1984 accident. (R at Id.)

The Deputy Commissioner held a merits hearing on March 20, 1985, and in his order of August 23, 1985 found the Appellants responsible for Workers' Compensation benefits flowing from the 1984 accident and Claimant's attorneys' fees. (R at 161-66). On June 4, 1985 a hearing was held on the Claimant's entitlement to a fee from the Appellants. (R at 32-72). On August 22, 1985 a hearing was held to determine the amount of the fee. (R at 73-83).

The Appellants appealed to the First District Court of Appeal. In response, the First District issued Crittenden Orange Blossom Fruit v. Stone, 492 So.2d 1106 (Fla. 1st DCA 1986) (En Banc) and denied Appellants' motions for rehearing. The Appellants filed with this Court a timely Notice to Invoke Discretionary Jurisdiction. This Court accepted jurisdiction.

## STATEMENT OF THE FACTS

Most of the First District's majority opinion discusses the Appellants' bad faith handling of the Workers' Compensation claim, and explains why the Deputy Commissioner's finding should be upheld. Stone, 492 So.2d at 1108-1110. While the Appellants disagree with the First District's opinion on bad faith entitlement to attorneys' fees under Section 440.34 of the Florida Statutes, the appeal to this Court focuses on those facts limited to two legal issues: (1) the recovery of expert witness fees by lawyers who testify at attorneys' fee hearings on behalf of Claimant's lawyers, and (2) the time spent preparing for and prosecuting his attorneys' fee by Claimant's counsel included in an award of attorneys' fees against the E/C.

Justice Nimmons stated the facts material to this appeal:

> A 'merits' hearing was held on March 20, 1985 on certain compensation benefits. On June 4, 1985, the deputy held another hearing which was limited to the question of the claimant's **entitlement** to recover attorney's fees from the employer or carrier. Thereafter, on August 22, 1985, there was a separate hearing on the **amount** of attorney's fees. Evidence was presented at the latter hearing consisting of an affidavit of the claimant's attorney regarding the time expended on the case and testimony of two attorneys -- one called on behalf of each side. There is no indication whatsoever that the claimant's attorney sought or received any fee for that portion of the proceedings dealing with the establishment of the **amount** of the fee. It is apparent from the attorney's time affidavit that the time shown was attributable to the prosecution of the claim on the merits and on the issues regarding **entitlement** to an attorney's fee. Moreover, there was no effort to recover for

> an expert witness fee for the testimony of the attorney who was called on behalf of claimant's attorney.

Stone, 492 So.2d at 1111 (Nimmons, J. specially concurring) (emphasis in original). The parties stipulated in the appellate record that $450.00 of the Claimant's attorney's fee was for prosecuting the claim for fees. (Appellants' Initial Brief, p.5, n.1).

Receding from City of Tampa v. Fein, 438 So.2d 442, 446 (Fla. 1st DCA 1983) and prior decisions, the First District affirmed the Deputy Commissioner's decision to award attorneys' fees based in part on time spent by Claimant's attorney in preparing for and prosecuting the claim for attorneys' fees. Stone, 492 So.2d at 1110. The Court agreed with appellee and adhered to the rulings expressed in Davis v. Keeto, Inc., 463 So.2d 368, 371 (Fla. 1st DCA 1985); pet. for rev. den., 475 So.2d 695 (Fla. 1985):

> [t]he Keeto rule is more consistent with the 1979 amendments to the workers' compensation law. The present law places primary responsibility for claimant's attorney's fees on the claimant, so that the limited instances in which the claimant may recover attorney's fees represent a substantial benefit to the claimant, whereas prior to the amendments, payment of attorney's fees to the successful claimant's attorney was assured, there usually being no issue except for the amount of the fee.

Stone, 492 So.2d at 1110.

Concerning the recovery of expert witness fees, the First District stated while it did not overlook Travieso v. Travieso, 474 So.2d 1184 (Fla. 1985) and Robert & Co. Assoc. v. Zabawczuk,

200 So.2d 802 (Fla. 1967), it distinguished them despite this Court's "continued recognition of Zabawczuk's rational for denying expert witness fees for attorneys in workers' compensation proceedings." Stone, 492 So.2d at 1110; Stone, 492 So.2d at 1110, n.1 (citing to W.A. Doss & Sons, Inc. v. Barbato, 487 So.2d 377 (Fla. 1st DCA 1986) which held Zabawczuk controlling and certified to this Court the question of expert attorneys' fees in workers' compensation proceedings, but jurisdiction failed to vest because no petition for certiorari was filed). The First District reasoned further that Zabawczuk was decided in light of the old (pre-August 1, 1979) workers' compensation law and neither it nor Travieso considered the 1979 amendments.

Because Zabawczuk was issued when the old law applied and characterized attorneys' fees as "collateral" benefits, the Court did not find Zabawczuk relevant in view of the 1979 amendments and the revitalized "self-executing" nature of the new law. The First District cites to Section 434.34, [sic] Florida Statutes (1983) and maintains the attorneys' fee statute purportedly reflects a recognition by the legislature the workers' compensation carrier pays attorneys' fee in only three circumstances, and generally the intervention of an attorney in such cases is likely to delay workers' compensation benefits to the Claimant. The majority opinion in Stone concludes,

> We are not persuaded, either by the structure of the Act itself, or our observations with respect to its operation over the past nearly seven years, that the award of attorney's

> fees to claimant's attorney under the present provisions can be realistically viewed as 'collateral' to the purposes of the Act. For these reasons, we affirm the **Keeto** rule.

Stone, 492 So.2d at 1111 (emphasis in original).

## SUMMARY OF ARGUMENT

The First District erred in allowing expert witness fees to Claimant's lawyers who testify at amount hearings. Robert & Co. Assoc. v. Zabawczuk, 200 So.2d 802 (Fla. 1967). The Stone Court exceeded its scope of appellate review because the question of expert witness fees was never presented or briefed for appellate consideration. This Court indicated in Travieso v. Travieso, 474 So.2d 1184 (Fla. 1985) that Robert & Co. Assoc. v. Zabawczuk which disallows expert witness fees is still good law.

The Travieso and Zabawczuk opinions are correct. If the legislature had intended to change Section 440.31 with the enactment of the 1979 amendments to the Workers' Compensation Act, it would have done so. There have been no substantive changes to Section 440.31 since August 1, 1979.

Allowing expert witness fees to Claimant's lawyers in Workers' Compensation proceedings will foster the growth of attorneys' fee hearings.

The Court should strictly construe Section 440.34 Florida Statutes (1985). See Whitten v. Progressive Cas. Ins. Co., 410 So.2d 501 (Fla. 1982). The rules of liberal construction should not apply to the current statute because these rules were based on the old add-on statute. Lockett v. Smith, 72 So.2d 817 (Fla. 1954). The current statute expressly limits the circumstances when the E/C pays attorneys' fees.

Workers' Compensation proceedings are impressed by a public trust. Encouraging more litigation and attorneys' fees violates

this trust. Attorneys are members of a noble profession who should voluntarily testify for fellow attorneys at no cost as a professional courtesy absent exceptional circumstances. Travieso v. Travieso, 474 So.2d 1184, 1185 (Fla. 1985). Including preparation time in awards of attorneys' fees and allowing expert witness fees for lawyers who testify at amount hearings will denigrate the noble profession and the Workers' Compensation system.

The Court in Crittenden Orange Blossom Fruit v. Stone allowed expert witness fees to Claimants' lawyers and the preparation time lawyers spend proving their entitlement and amount of attorneys' fees in the award of fees because (1) the present statute limits the circumstances in which the E/C pays the fee unlike the old add-on attorneys' fee statute and (2) the result is more consistent with the 1979 amendments which have destroyed the collateral versus substantive distinction. The Stone Court is wrong.

The 1979 amendments have reduced neither attorney involvement nor litigation. The current attorneys' fee statute has been loosely interpreted by the First District. Unlike the express language of the statute or the intention of the 1979 legislature, in practice the instances when E/C's pay attorneys' fees is not the exception to the rule. For example, the proliferation of average weekly wage claims are a fertile area for attorney involvement and fees. The wage loss concept, equitable in concept, has promoted litigation. The Stone Court

based its decision not on the reality of todays Workers' Compensation practice, but on the antiquated, albeit praiseworthy, legislative intent behind the 1979 amendments. Moreover, attorneys' fees are still considered collateral to the employee's medical, rehabilitation and compensation benefits, and procedurally attorneys' fee hearings are conducted after the hearing on the merits.

The Stone opinion is a step out of the time as demonstrated by the limitations placed on contingent fees by this Court and the spirit of the 1986 Tort Reform Act. This is a time when lawyers are under close observation by the public. Increasing attorneys' fees and promoting litigation will do little to increase the publics' confidence in the bar or the Workers' Compensation system.

## ARGUMENT

### ISSUE I

**WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRED IN ALLOWING THE CLAIMANT TO RECOVER EXPERT WITNESS FEES FOR AN ATTORNEY WHO TESTIFIED REGARDING THE REASONABLENESS AND AMOUNT OF AN ATTORNEYS' FEE.**

In Robert & Co. Assoc. v. Zabawczuk, 200 So.2d 802 (Fla. 1967) this Court addressed Section 440.31 of the Florida Statutes. The Crittenden Orange Blossom Fruit v. Stone opinion discusses the award of expert witness fees for attorneys in light of Section 440.34, Florida Statutes (1983), but makes no reference to Section 440.31.

The Stone Court fails to point out that the 1979 amendments to the Florida Workers' Compensation Act made no substantive changes to Section 440.31. The only changes were cosmetic. Under the "new law," Section 440.31, Florida Statutes (1979), "judge of industrial claims" was replaced by "deputy commissioner," "workmen's" was replaced with the more neutral "workers," and the Section 90.231 reference was replaced with renumbered Section 92.231.

If the legislature intended to substantively change the old law version of Section 440.31, it would have done so in the 1979 amendments. The statutory history of Section 440.31 has not materially changed since Zabawczuk.

This Court in Travieso v. Travieso, 474 So.2d 1184 (Fla. 1985) neither overruled nor disapproved of Zabawczuk. This Court stated that even under Section 92.231 (in non-workers'

compensation proceedings) expert witness fees may be taxed as costs for a lawyer who testifies as an expert as to reasonable attorneys' fees. Travieso, 474 So.2d at 1186. This Court cautioned, however,

> We do not hold that such expert witness fees must be awarded in all cases. Generally, lawyers are willing to testify gratuitously for other lawyers on the issue of reasonable attorney's fees. This traditionally has been a matter of professional courtesy. An attorney is an officer of the court and should be willing to give the expert testimony necessary to ensure that the trial court has the requisite competent evidence to determine reasonable fees. Only in the exceptional case where the time required for preparation and testifying is burdensome, should the attorney expect compensation.

Id.

In Travieso v. Travieso, 474 So.2d 1184, 1185 (Fla. 1985) this Court stated the Fourth District in Murphy v. Tallardy, 422 So.2d 1098 (Fla. 4th DCA 1982) properly determined the construction of Section 440.31 in Robert & Co. Assoc. v. Zabawczuk, 200 So.2d 802 (Fla. 1967) to effectuate the purpose of the Workers' Compensation Act. The Travieso Court cited to Lee Engineering & Const. Co. v. Fellows, 209 So.2d 454, 456 (Fla. 1968) in explaining the construction given Section 440.31 by the Zabawczuk Court. Travieso, 474 So.2d at 1186. Under the new law, awards under Section 440.34 are interpreted by the First District in light of Lee Engineering & Const. Co. v. Fellows. See e.g. AT&T Technologies, Inc. v. Jackson, 478 So.2d 488 (Fla. 1st DCA 1985); Central Truck Lines, Inc. v. Coleman, 458 So.2d 1145 (Fla. 1st DCA 1984).

## ARGUMENT

## ISSUE II

**WHETHER THE DEPUTY COMMISSIONER ERRED IN ALLOWING CLAIMANT'S ATTORNEY TO RECOVER AN ATTORNEYS' FEE FOR THE TIME HE SPENT PROSECUTING THE CLAIM FOR ATTORNEYS' FEES.**

The First District has held Workers' Compensation attorney's fees statutes should be liberally construed, e.g., Crittenden Orange Blossom Fruit v. Stone, 492 So.2d 1106 (Fla. 1st DCA 1986), and has held they should be strictly construed. Dump All, Inc. v. Grossman, 475 So.2d 976, 980 (Fla. 1st DCA 1985).

Generally, attorneys' fees statutes are in derogation of the common law and must be strictly construed. Whitten v. Progressive Cas. Ins. Co., 410 So.2d 501 (Fla. 1982). Costs usually do not include attorneys' fees in the absence of a specific statute. State ex rel. Hartford Accident and Indemnity Co. v. Johnson, 118 So.2d 223 (Fla. 1960); State ex rel. Royal Ins. Co. v. Barrs, 87 Fla. 168, 99 So. 668 (1924).

Under the old law, this Court first applied the liberal construction rule to the old add-on attorneys' fees statute in Lockett v. Smith, 72 So.2d 817 (Fla. 1954). In Lockett, this Court held the 20% late payment penalty under Section 440.20(6) was "compensation" entitling the attorney to a fee under Section 440.34(1). The Lockett Court stated, "The salutory purpose of Section 440.34(1), which is one of the few provisions of its kind in the United States, should not be nullified by restrictive interpretation." Id. at 819; accord City of Miami Beach v. Schiffman, 144 So.2d 799 (Fla. 1962). The liberal construction

rule in Lockett and Schiffman should not apply to Section 440.34, Florida Statute (1985). The current statute, expressly limits the circumstances when the E/C pays attorneys' fee, and it is more restrictive than the old add-on statute.

The Stone Court maintains that attorneys' fees cannot "be realistically viewed as 'collateral' to the purposes of the Act." 492 So.2d at 1111. The Stone Court is in error. Under Travieso v. Travieso, 474 So.2d 1184 (Fla. 1985), this Court held Zabawczuk v. Zabawczuk, 200 So.2d 802 (Fla. 1967), is still good law. Accord Crittenden Orange Blossom Fruit v. Stone, 492 So.2d 1106, 1112 (Fla. 1st DCA 1986)(Nimmons, J. specially concurring). In Zabawczuk, attorneys' fee hearings for the determination of the amount of the fee were deemed a collateral matter. 200 So.2d at 804.

Under the new law attorneys' fee proceedings continue to be collateral to the Claimant's claim for compensation, medical or rehabilitation benefits. Procedurally, under current practice, the question of attorneys fees is reserved until after the hearing on the merits. The case at bar is an example. The hearing on the merits (to determine entitlement to compensation and medical benefits) was on March 20, 1985. The hearing on entitlement to an attorneys' fee was on June 4, 1985. The hearing on the amount of the fee was on August 22, 1985. The Appellants appealed the attorneys' fees award, but did not appeal the award of compensation benefits to the employee.

The new Act taken as a whole supports the substantive versus

collateral distinction. The thrust of the Act is to secure appropriate compensation, §440.14 and §440.15, Florida Statutes (1985), medical benefits, §440.13, Florida Statutes (1985), and rehabilitation, §440.49 Florida Statutes (1985), to the injured worker. These substantive Workers' Compensation benefits cannot be considered in the same context as recompense to an attorney. Workers' Compensation benefits are the essence of the Act; attorneys' fees in Workers' Compensation are payments for legal services. The question of attorneys' fees is essentially a collateral matter, and procedurally the question of attorneys' fees follows the merits hearing.

The Appellants are in agreement with Justice Nimmons that, "the [Stone] Court has decided more than the record in this case would legitimately permit." Stone, 492 So.2d 1111 (Nimmons, J. specially concurring). As Justice Nimmons points out, there was no effort by the Claimant's attorney to recover an expert witness fee for the testimony of a fellow attorney who testified as to the amount of a reasonable fee. Id. Moreover, the lawyers in the instant case will agree no fees were expected or charged by the fellow attorneys who testified at the amount hearing. It was "a matter of professional courtesy" as it should have been. Travieso v. Travieso, 474 So.2d 1184, 1186 (Fla. 1985).

Under Section 440.34, Florida Statute (1985), Workers' Compensation litigation continues to thrive due, in part, to the liberal construction given the attorneys' fee statute by the First District. In contrast, the trend by this Court is not to

expand fees by liberal interpretations of attorneys' fee statutes, but to place the interest of the bar first by promoting appropriate fees. See The Fla. Bar Re: Amendment to the Code of Professional Responsibility, (Contingent Fees) 494 So.2d 960 (Fla. 1986); see also The Florida Bar Re: Rules Regulating The Florida Bar, 494 So.2d 977 (Fla. 1986). The limitation of contingent fees by this Court was evidence of its sensitivity to the public's perception of lawyers and their fees. The legislature's enactment of the Tort Reform Act of 1986 (Chapter 768, Florida Statutes) expressed the public's mandate that there must be some degree of control over the civil justice system including limits on damage awards. It appears then from the actions of this Court and the legislature the public is wary of lawyers and the amount of fees they receive. If the law should mirror the times and attitudes of the people it serves, then restraint is indicated here. This Court should prevent the institutional growth of attorneys' fees and strictly construe Section 440.34, Florida Statute (1985) which will promote public confidence in the bar and in the Workers' Compensation system.

Lawyers are not merely businessmen. Justice Terrell, later Chief Justice, said in State v. Murell, 74 So.2d 221, 226 (Fla. 1954), "it is a profession, a noble one, with standards in certain respects different from those applicable to business, which standards it is the duty of the bar to uphold." For professionalism in the law to survive, it should not be stripped to a barren commercial enterprise. See The Florida Bar v.

Schreiber, 420 So.2d 599 (Fla. 1982). As officers of the Court lawyers should volunteer their testimony as a professional courtesy to insure the Deputy Commissioner has competent evidence to determine reasonable fees. See Travieso, 474 So.2d at 1186. It is only the exceptionally burdensome case in which lawyers should expect compensation. Travieso, 474 So.2d at 1186; Travieso, 474 So.2d at 1188 (Overton, J. dissenting); see Baruch v. Giblin, 122 Fla. 59, 164 So. 831 (1935). In most Workers' Compensation cases, lawyers who testify at amount hearings spend minutes, not hours, just before the hearing preparing for their testimony. They should testify as a professional courtesy.

Lawyers as officers of the Court are subject to high ethical standards as demonstrated by the Code of Professional Responsibility. Lawyers in Florida are subject to the scrutiny of a vigilant bar. They are the beneficiaries of a High Court which dispenses penalties to delinquent bar members. As evidence, one need only peruse a current edition of the Florida Bar News.

Lawyers who practice workers' compensation law occupy a different position than do divorce lawyers or criminal lawyers. Professor Alpert states,

> [i]t is my view that workers' compensation is impressed by a public trust. Workers' compensation is a system designed to distribute the cost of industrial accidents. In such a system, is it ever appropriate for an attorney to 'hit the jack pot?'

Alpert, J. L., Attorneys' Fees -- The Defense Attorney Perspective, Section II(b), p. 2.3-2.4, Workers' Compensation:

Case Management Seminar (May 22, 1986 - June 13, 1986). Allowing expert witness fees to lawyers in Workers' Compensation proceedings will cast a cloud over the members of a noble profession who will appear to be profiting in a system impressed by a public trust, and "foster [the] institutional growth of attorneys' fees hearings." Crittenden Orange Blossom Fruit v. Stone, 492 So.2d 1106, 1112 (Fla. 1st DCA 1986) (Nimmons, J. specially concurring).

As the appellate record demonstrates, the Stone decision had an immediate deleterious impact. (See Supplement to Motion for Rehearing En Banc with attached letter served August 18, 1986). In some cases, Claimants' attorneys may use as leverage the anticipated time and expense of litigating their attorneys' fee to inflate the settlement value of attorneys' fees. For example, assume it is undisputed a reasonable fee is $1,000 considering Section 440.34 and Lee Engineering & Const. Co. v. Fellows, 209 So.2d 454 (Fla. 1968). Some Claimants' lawyers may demand $1,500 because of the additional time necessary for preparing for and prosecuting the fee if the matter were to proceed to hearing. Payment of a fee in excess of $1,000 unjustly enriches the lawyer at the expense of the insurance company and the Workers' Compensation system with no resulting benefit to the injured worker.

The attorneys' fee statute under the new law was an attempt by the legislature to curtail attorney involvement in the claims process. A. Larson, Workmen's Compensation for Occupational

Injuries and Death §83.15, at 15-674. This action was prompted by a 1978 report by the National Commission on State Workmen's Compensation laws "which seemed to indicate an inverse relationship between attorney involvement and speedy resolution of claims." Larson, §83.15 at 16-675. The Florida experience of add-on fees (the old law in Florida where a lawyer-obtained benefit resulted in a fee) may actually encourage litigation. Larson, §83.15 at 15-680. A study by the National Council of Compensation Insurance showed the level of litigation in Florida is higher than in other states. Sadowski, Herzog, Butler & Gokel, The 1979 Florida Workers' Compensation Reform: Back to Basics, 7 Fla. St. U.L. Rev. 641, 650 (1979) (hereinafter "Back to Basics"). The legislative goal of the 1979 amendments included the implementation of a self-executing act to reduce litigation, and avoid doctor-shopping for impairment ratings. Back to Basics, 7 Fla. St. U. L. Rev. 641, 650, 670-71, (1979). The wage loss system, viewed as a more equitable form of compensation than the scheduled injuries approach, was aimed at reducing attorney involvement and litigation. Back to Basics, 7 Fla. St. U.L. Rev. 641, 652, 670-71, (1979).

In practice, a large percentage of the claims heard before the Deputy Commissioners are wage loss cases. Claimants continue to doctor shop to obtain impairment ratings (only 1% is required) to meet the threshold requirement for entitlement to wage loss benefits. Under Section 440.15(3)(a), wage loss benefits can continue for 525 weeks. Each month of wage loss is considered a

new benefit period requiring the worker to conduct a good faith monthly job search and prove the claimed wage loss is the result of the compensable injury. See §440.15(3)(a), Florida Statute (1985). Theoretically each wage loss case has the potential of 122.09 hearings (525 weeks divided by 4.3 equals 122.09) which does not include hearings on medical or rehabilitation benefits. This scheme does not reduce litigation. Appellate activity on wage loss issues, such as, job search, voluntary limitation of employment, deemed earnings, and the injury as the "cause" of the alleged wage loss, has been extensive.

The Workers' Compensation experience since August 1, 1979 does not square with the underlying legislative purpose for the passage of the 1979 amendments. The First District is incorrect in concluding the time spent preparing for and prosecuting fees should be included in an award of attorneys' fees because it "is more consistent with the 1979 amendments to the Workers' Compensation law." Stone, 492 So.2d at 1110. While the First District's opinion may reflect the well-intentioned goal of the legislature in 1979, it does not reflect the reality in 1987 or the Florida experience since August 1, 1979.[1]

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[1]Based on the author's research under the time constraints imposed, meaningful statistical information does not appear to be available comparing litigation expenses and awards of attorneys' fees before and after the new law. The Division of Workers' Compensation published the following statistical reports: 1977-1978 Cases, Causes, Costs; 1981 Workers' Compensation Injuries--A Statistical Report; 1982 & 1983 Workers' Compensation Injuries -- A Statistical Report; and, 1984 Workers' Compensation Injuries -- A Statistical Report. These reports do not seem to make any analytical comparisons or draw any conclusions regarding the effect of the 1979 amendments and the operation of the wage loss system.

Under §440.34 of the old law, if the Claimant's attorney obtained a benefit, he was due a fee. Entitlement to a fee was conditioned upon prompt payment within 21 days. Under §440.34 of the new law, the general rule is the Claimant pays his own attorneys' fee. Fees are payable by the E/C under three circumstances: (1) when the carrier denies compensability for an injury or accident and the Claimant prevails on compensability, (2) when the Claimant prevails on a medical-only claim or (3) when the carrier has acted in bad faith. If the Claimant cannot prove one of these three circumstances, then the Claimant pays his attorney a "guideline" fee set forth in Section 440.34 (25% of the first $5,000 in benefits, 20% of the next $5,000 and 15% over $10,000).

Judicial interpretation and current practice has expanded the three circumstances when the E/C pays attorneys' fees. The concept of when the E/C denies an injury or accident and when the Claimant prevails has been extended. E.g. Hillsborough County School Board v. Hilburn, 472 So.2d 1309 (Fla. 1st DCA 1985). A medical-only claim means even a successful change-of-physician claim. E.g. State of Florida/Sunland Ctr. v. Campbell, 451 So.2d 939 (Fla. 1st DCA 1984). The concept "bad faith" has been loosley interpreted. E.g., Crittenden Orange Blossom Fruit v. Stone, 492 So.2d 1106 (Fla. 1st DCA 1986); Hubbert v. Abco Const., 488 So.2d 889 (Fla. 1st DCA 1986); Celtics Mobile Home Mfg. Co. v. Butler, 460 So.2d 846 (Fla. 1st DCA 1984); Florida Erection Serv., Inc. v. McDonald, 395 So.2d 203 (Fla. 1st DCA

1981).

While the statute reflects the general rule the Claimant pays his own attorneys' fees, in practice, Claimants' lawyers oftentimes recover fees against the E/C. For example, a fertile ground for fees based on bad faith is with average weekly wage claims. In general, when the E/C miscalculates the average weekly wage and makes a late adjustment to the average weekly wage, it amounts to bad faith. E.g. King Motor Co. v. Parisi, 445 So.2d 1074 (Fla. 1st DCA 1984).

The First District has held that health insurance premiums are to be included in the average weekly wage as a fringe benefit at the cost to the employee in the open market. Martinez v. Inland Container, 490 So.2d 1058 (Fla. 1st DCA 1986); Mobley v. Winter Park Mem. Hosp., 471 So.2d 591 (Fla. 1st DCA 1985). If the worker is employed by a large employer and is provided with group health coverage, he usually gets the benefit of superior health insurance coverage at a low group rate. When the worker reports the claim, the E/C rarely has sufficient time to determine the market cost of the health insurance coverage because the procuring broker needs to be contacted, policies need to be compared and the market value needs to be ascertained very quickly or the E/C gets slammed with bad faith. The market value cost can exceed employee cost from 100% to 1000%. If the worker is young, his average weekly wage high and the injuries serious, the amount of the fee can be high because of the valuation of future benefits over the worker's life expectancy. Many claims

have an average weekly wage issue which, in many cases, expose the E/C to a fee. This gives lawyers incentive to file claims and attempt to obtain a fee from the E/C. See Workers' Compensation: Case Management Seminar (May 22, 1986 - June 13, 1986), The Florida Bar Continuing Legal Education and the Workers' Compensation Section, "Attorney's Fees - A Claimant's Attorney's Perspective" by R. Cory Schnepper, Esquire and Renee Ruska Relzman, Esquire; Section I(3) ("Looking for the right kind of cases: Almost 'guaranteed fees' from the employer/carrier") and Section III(A)(c) (regarding practical/technical considerations when to request an attorneys' fee hearing -- "Let the benefits 'pile up' after the Order").

Even under the new law it is more profitable for the Claimant's lawyer to recover a fee from the E/C. This Court was aware of this reality in Lee Engineering & Const. v. Fellows, 209 So.2d 454, 457 (Fla. 1968). The Court stated:

> The tendency to award fees in excess of those contemplated by the Act or even by the fee schedule adopted by the Florida Industrial Commission, may be attributed, in part, to the fact that in Florida the employer or carrier pays the claimant's award... We recognize that inequitable abuse of any benefit often results in destroying the source of such benefits, Tampa Aluminum Products Company v. Watts, (1961), Fla., 132 So.2d 414, but it is obvious that fees should not be so low that capable attorneys will not be attracted, nor so high as to impair the compensation program. Larson, Workmen's Compensation Law, Volume 2, Section 83.

Id. at 457 (emphasis added). Section 440.34 limits the fee the lawyer can obtain from his client. There is no similar guideline

limitation for the fee a lawyer can obtain from an E/C save Lee Engineering & Const. Co. v. Fellows, 209 So.2d 454 (Fla. 1968) and its progeny.

Assume the Claimant proves entitlement to a fee. The benefits obtained for Claimant by his lawyer total $250. The hours total 15. Since the First District has held in such cases the hours and actual work are the primary considerations, the Deputy Commissioner is safe to award a fee based on straight time multiplied by the hourly rate. E.g. Bacon v. Broward Employment & Training Admin., 12 F.L.W. 395 (Fla. 1st DCA Ja. 29, 1987); Rivers v. SCA Serv of Fla., Inc., 488 So.2d 873 (Fla. 1st DCA 1986). In Orlando, the average hourly rate awarded to Claimant's attorneys average from $100 to $150 per hour and a $1875 fee (15 x $125) would be a representative fee based on these facts. In contrast, a guideline fee is $62.50 (25% x $250). On the other hand, if the hours are low but the valuation of future benefits is substantial resulting in a high attorneys' fee using the guideline approach, it is error for the Deputy Commissioner to deviate from the guideline absent compelling circumstances. Chesnick v. City of Delray Beach, 492 So.2d 762 (Fla. 1st DCA 1986). In this climate, the new law does not discourage litigation and lawyer intervention.

## CONCLUSION

For all the reasons set forth herein taken together with the appellate pleadings directed to the First District, this Court should REVERSE the Crittenden Orange Blossom Fruit v. Stone, 492 So.2d 1106 (Fla. 1st DCA 1986). The Stone decision expressly and directly conflicts with Travieso v. Travieso, 474 So.2d 11 84 (Fla. 1985) and Robert & Co. Assoc. v. Zabawczuk, 200 So.2d 802 (Fla. 1967) in allowing expert witness fees to Claimants' lawyers who testify at amount hearings. The Stone Court erred further in its expansive interpretation of the current attorneys' fee statute, Section 440.34 Florida Statutes (1985), in allowing an award of attorneys' fees to include the time spent by the Claimant's attorney in preparing for and prosecuting the attorneys' fee claim. Attorneys' fee statutes are in derogation of the common law and should be strictly construed. See Whitten v. Progressive Cas. Ins. Co., 410 So.2d 501 (Fla. 1982).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 13th day of March, 1987 to George J. Adler, Esquire, 135 E. Marks Street, Orlando, Florida, 32801.

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