SUPREME COURT OF FLORIDA

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

Appellants,

v.

MARVIN STONE,

Appellee.

_____/

Claim No. : 266 46 6123
D/Acc. : 10/24/84
Case No. : 69,476
First District Court
of Appeal No: BI-366

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF CASE AND FACTS

Pursuant to Rule 9.210(c) of the Rules of Appellate Procedure, the Appellee accepts the Appellant's Statement of Case and Facts.

SUMMARY OF ARGUMENT

The First District did not err in allowing expert witness fees to Claimant's lawyers who testify at amount hearings. Since 1979, the First District Court has handled the majority of appeals based upon the new law. The First District Court of Appeal has ruled that the awarding of an expert witness fee for attorneys who testify regarding the reasonableness of an attorney's fee in a worker's compensation proceeding is an appropriate taxable cost to the Employer/Carrier. Crittenden Orange Blossom Fruit v. Stone, 492 So. 2d 1106 (Fla. 1st DCA 1986).

In an En Banc Opinion, and after close examination of this Honorable Court's decision in Traviesco v Traviesco, 474 So.2d 1184 (Fla. 1985), the First District Court observed that in Traviesco this Honorable Court was not called upon to consider the viability of Robert & Company Associates v. Zabawczuk, 200 So.2d 802 (Fla. 1967) in light of the present day worker's compensation statute.

In Stone the First District Court determined that time spent in connection with preparing for and securing an award of attorney's fees should be considered, in light of the 1979 amendments to the Worker's Compensation Act, in determining the amount of a fee. This decision followed Davis v. Keeto, Inc., 463 So.2d 368 (Fla. 1st DCA 1985), and the First District Court of Appeals receded from the contrary decision on the same issue in City of Tampa v.

Fein, 438 So.2d 442 (Fla. 1st DCA 1983).

It is clear that the present attorney's fee provisions found in Section 440.34, Florida Statutes (1983), reflect a recognition by the legislature that in specific circumstances (those covered under 440.34 (3) (a)(b)(c)), without the intervention or potential intervention of an attorney acting for the claimant, medical or compensation benefits due the claimant are likely to be delayed or denied to the claimant. See Sam Rogers Enterprises v. Williams, 401 So.2d 1388 (Fla. 1st DCA 1981).

Under the present provisions the award of attorney's fees to a claimant's attorney cannot be realistically viewed as "collateral" to the purposes of the Act. In addition, the instant decision does not expand the circumstances under which an attorney fee can be awarded in a Worker's Compensation case, as argued by the Employer/Carrier, but only delineates the manner in which the amount of the fee is to be determined.

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 ATTORNEY'S FEE.

The Appellants argue that in Robert & Co. Assoc. v. Zabawczuk, 200 So.2d 802 (Fla. 1967), this court addressed Section 440.31 of the Florida Statutes and that the Crittenden Orange Blossom Fruit v. Stone opinion only discusses the award of expert witness fees for attorney's in light of Section 440.34, Florida Statutes, 1983.

The Zabawczuk decision involved Supreme Court review of an Industrial Relations Commission decision issued in 1967. This decision was entered prior to the drastic limitation of the scope of review for this Court as enacted by Constitutional Amendment by the electorate of the State of Florida on March 11, 1980. At that time Article V, Section 3 (b), Florida Constitution, was amended to specifically take the Supreme Court out of the business of re-reviewing decisions of the District Court of Appeal and the expressed intent of that Constitutional Amendment was to make the District Courts of Appeal the court of last resort for the vast majority of litigants under the amended Article V.

A recent Supreme Court decision, Travieso v Travieso, 474 So.2d 1184 (Fla. 1985), approved recovery, as costs, of an expert witness fee in a civil case for a lawyer who testifies as to reason-

able attorney's fees. The Travieso court was not called upon to consider the viability of Zabawczuk in the light of present day worker's compensation litigation, but only to affirm, as did the Fourth District Court in Murphy v. Tallardy, 422 So.2d 1098 (Fla. 4th DCA 1982). The narrow construction of the worker's compensation statute at the time Zabawczuk was decided did not require the same construction of the expert fee statute, section 92.231, Florida Statutes (1983). The Zabawczuk case relied upon the pre-1979 attorney features of the Worker's Compensation Act as providing "collateral" benefits, and in light of the 1979 amendments is not relevant to the issue addressed here by the Employer/Carrier.

The First District addressed this matter and stated the following:

> "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.
>
> We have not overlooked the Florida Supreme Court's recent decision in Traviesco v. Traviesco, 474 So.2d 1184 (Fla. 1985), approving recovery, as costs, of an expert witness fee in a civil case for a lawyer who testifies as to reasonable attorney's fees. The court's refeences to Robert & Company Associates v. Zabawczuk, 200 So.2d 802 (Fla. 1967), do seem to indicate continued recognition of Zabawczuk's rationale for denying expert witness fees for attorney's in workers' compensation proceedings. However, upon close examination, we observe that the Travieso court was not called upon to consider the viability of Zabawczuk in the light of present day workers' compensation litigation, but only to affirm, as did the Fourth District

> in Murphy v. Tallardy, 422 So.2d 1098 (Fla. 4th DCA 1982), that the narrow construction of the workers' compensation statute at the time Zabawczuk was decided did not require the same construction of the expert witness fee statute, Section 92.231, Florida Statutes (1983). Upon our own independent examination, we are now of the view that Zabawczuk, relying as it did upon the court's characterization of the pre-1979 attorney's fees features of the Workers' Compensation Act as providing "collateral" benefits, is not relevant to the specific issue before us, in the light of the changes wrought by the 1979 amendments. Today's workers' compensation law retains and even places renewed emphasis upon the pre-1979 self-executing concept. Florida Erection Service, Inc. v. McDonald, 395 So.2d 203 (Fla. 1st DCA 1981).

It is respectfully submitted that this Honorable Court should recede from its prior decision in light of the nature of litigation in workers compensation cases as it exists under the present workers compensation law, and follow the well-reasoned decision of the First District Court of Appeals.

ARGUMENT

ISSUE II

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

In the instant case, a merits hearing was held on March 20, 1985. On June 4, 1985, a separate bad faith hearing was held and on August 20, 1985, an amount hearing was held. The claimant was successful at these hearings, and the issue presented to the First District Court was whether the time spent in preparing for, prosecuting and attending a bad faith hearing should be included in determining a reasonable attorney's fee. The claimant would point out that at no time was there any offer to pay even a guidelines attorneys' fee.

In Davis v. Keeto, Inc., 463 So.2d 368 (Fla. 1st DCA 1985), the First District Court determined that time spent in connection with preparing for and securing an award of attorney's fees should be considered. In The Polote Corp v. Meredith, 482 So.2d 515 (Fla. 1st DCA 1985) the Court followed Keeto.

Prior to the 1979 amendments to the Worker's Compensation Act, the issue at attorney's fee hearings was, normally, only the amount of the fee, and it was uniformally held that time expended in proving amounts, which time was normally minimal, was not to be included. However, under current law, the claimant must, after proving entitlement to benefits, prove entitlement to an attorney's fee, said fee to be paid by the Employer/Carrier. Considerable time and effort will normally be spent in attempting to obtain this additional benefit for the claimant, and this portion of the litigation

process will often be more hotly contested and can also be more time consuming than the merits hearing. If this additional time is not to be included in determining an appropriate fee, then claimants' attorneys will not be fully and adequately compensated for time spent, and the impetus for pursuing the bad faith claim against the Employer/Carrier will be removed. If claimants' attorneys don't pursue a bad faith claim, but instead collect their fee from the claimant, then Employer/Carriers will be allowed to pursue any course of action they deem appropriate, regardless of the consequences to the claimant, with impunity. Such cannot be allowed.

If this Honorable Court were to accept the Employer/Carrrier's reasoning, it would be impossible for a claimant to pursue his obviously legitimate claim because he would be unable to obtain the services of an attorney as there would not, in a case like this, be any funds from which to pay an attorney, and the stated purpose of this section of the statute would be thwarted. This issue was clearly addressed in Great Dane Trailers and Jones, Hill & Mercer v. Langene FLIS, 435 So.2d 931 (Fla. 1st DCA 1983). A portion of that case reads as follows:

> "The words of the statute impose an attorney's fee obligation on the carrier if it "denies that an injury ocurred for which compensation benefits are payable, and the claimant prevails on the issue of compensability. Nothing in this language compels a construction that would limit the term injury to the accident-event itself. The statute does not limit fee awards to "a proceeding where a carrier or employer denies that (any) injury ocurred for which compensation benefits are payable. Though revisions to chapter 440 by the 1979 Legislature are said to have been intended to deter attorney involvement on the part of the claimants, that deterrance is to be accomplished by enhancing the

> self-executing character of the Act, placing the initiative with the employer and carrier, and so dispensing with the need for claimants' attorneys in the scheme for securing just compensation to injured workers. Since we may be sure that the fact of compensability would never have been demonstrated without the intervention of an attorney in the claimant's behalf, the purpose of securing claimant deserved benefits under chapter 440 compels our choice of the more liberal, rather than the more restrictive, interpretation of section 440.34(3)(c)."

A good example of the complications that can arise if claimants' attorneys are not allowed to include time preparing for, prosecuting and attending these hearings is demonstrated in Keeto. There, the Deputy Commissioner found the employer/carrier to be guilty of bad faith. The claimant received impairment benefits in the amount of $1,150. The claimant's attorney spent 28.5 hours in his attempt to secure those benefits. The guidelines fee on that amount is $333.00. Obviously, if the claimant's attorney is required to accept this amount as his fee, to be paid by the claimant, in all likelihood there would never have been a case and the claimant would not have received her benefits. Based on those figures, the fee would amount to $13 an hour. The claimant's attorney, not willing to accept a fee in that amount, to be paid by the claimant, is then required to attend several hearing on entitlement and amount of fee. In Keeto, the claimant's attorney spent an additional 12.5 hours prosecuting the claim for attorney's fees. Based upon the Appellant's theory, in Keeto, the claimant's attorney would receive a meager $8 an hour. The First District Court addressed this issue and stated the following:

> "The same could be said of the claimant in the instant case, who suffered the loss of an eye, an injury for which minimal benefits were afforded at the time of the injury, and thereafter was required to endure prolonged litigation in order to recover the $1,150 in impairment benefits. The employer/carrier resisted payment at every step of the way, and this resistance was found not justified by the deputy, who determined the employer/carrier guilty of bad faith. Without the assistance of competent counsel, claimant would similarly have been 'helpless as a turtle on its back,' Neylon v. Ford Motor Company, supra, and could very well have not recovered her impairment benefits. The deputy also erred in refusing to consider time spent in connection with preparing for and securing award of attorney's fees."

The Employer/Carrier sets forth on page sixteen of the Petitioners' brief how claimants' attorneys will use the Stone decision as leverage in an attempt to inflate the settlement value of attorneys' fees and thus these attorneys will become unjustly enriched. The claimant would point out that at no time in the Stone case was there any offer to pay any attorney's fee. The claimant was awarded payment of certain benefits at the merits hearing. The claimant's attorney then pursued a fee based on bad faith under Florida Statute 440.34 (3) and that hearing was held on June 4, 1985. On August 22, 1985 a hearing was held to determine the amount of fee and during this time period there was no offer to pay a fee. If there had been, in all likelihood, there would have been no need for the claimant's attorney to spend additional hours in an attempt to recover a fee for the claimant, which is the subject of this appeal. The vast majority of the time expended on the issue of attorney's fees is spent on the bad faith issue regarding entitlement, with only a minimal amount of time spent on the appropriate dollar

figure. Further, if this Court accepts the appellants' position, it is conceivable, even inevitable, that in negotiating attorney's fees, Employer/Carriers will offer $500.00 as a fee in the scenario set forth on page sixteen of the appellants brief, knowing that the claimant's attorney will not be compensated for any additional hearings attended.

The First District has held that Worker's Compensation attorney's fee statute should be liberally construed, e.g., Stone. This is not in conflict with Dump All, Inc. v. Grossman, 475 So.2d 976 (Fla. 1st DCA 1985), as the Employer/Carrier contend. In Grossman, there was no finding pursuant to an award. The First District held that the statute upon which Grossman relied (Florida Statute 440.34 (3), (5)), revealed that an attorney's fee may be awarded only to a claimant, injured worker or injured employee. Dr. Grossman made no claim under any of those terms and thus, in that situation, Florida Statute 440.34 had to be strictly construed.

Under the current Workers' Compensation law, the provisions relating to attorney's fees cannot be considered "collateral" to the purposes of the Act, as the claimant must pay the fee from his benefits if there is no finding of bad faith at the bad faith hearing. Thus, the award of fees to be paid by the Employer/Carrier is actually a benefit awarded to the client, as the amount which he receives will not be reduced to pay fees. This is a substantive benefit to the claimant.

Every provision of the Worker's Compensation Act should be construed in keeping with the remedial purpose of the Act as a

whole and an employee should receive the benefits to which he is entitled with reasonable promptness. See Sam Rogers Enterprises v. Williams, 401 So.2d 1388 (Fla. 1st DCA 1981), and Tampa Electric v. Bradshaw, 477 So.2d 624 (Fla. 1st DCA 1985). As previously stated, under current law, the claimant must, after proving entitlement to benefits, prove entitlement to an attorney's fee. If the time preparing for and prosecuting is not allowed to be considered in determining a fee the claimant becomes, to quote, as helpless as a turtle on his back as Employer/Carrier's would make little or no attempt to see that each employee receives the benefits to which they are entitled in a timely matter.

CONCLUSION

For all the reasons set forth herein taken together with the appellate pleadings directed to the First District, this Court should AFFIRM the Crittenden Orange Blossom Fruit v. Stone, 492 So.2d 1106 (Fla. 1st DCA 1986). The Stone decision does not conflict with the Traviesco v Traviesco, 474 So.2d 1184 (Fla. 1985), and Robert & Company Associates v Zabawczuk, 200 So.2d 802 (Fla. 1967) in light of the present day worker's compensation statute.

There was no error in the Stone decision by the First District Court in finding that time spent in connection with preparing for and securing an award of attorney's fees should be considered, in light of the 1979 amendments to the Worker's Compensation Act, in determining the amount of a fee. This was not an expansive interpretation, but merely delineates the manner in which the amount of the fee is to be determined.

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