69,476

FIRST DISTRICT COURT OF APPEAL
FIRST APPELLATE DISTRICT
TALLAHASSEE, 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
Docket No.: BI-366

PETITIONER'S JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

The Petitioners were the Defendants in trial court (before the Deputy Commissioner) and the Appellants in the First District Court of Appeal. The Respondent was the Claimant in the trial court and the Appellee in the First District Court of Appeal. In this brief, the parties will be referred to as Petitioners and Respondent.

The following symbol will be used:

"A" Appendix

STATEMENT OF THE CASE AND FACTS

The facts as found by the Appellate Court are as follows:

Respondent was involved in an industrial accident on June 20, 1983 while employed by Petitioner Crittenden Orange Blossom Fruit. The Workers' Compensation carrier for Crittenden was at the time of the accident Aetna Life & Casualty Company. (Appendix A at p. 1).

The Claimant's condition was diagnosed by an orthopedic physician (Dr. Joseph Flynn) as low back strain superimposed on degenerative disc disease.

This accident was found to be compensable by Aetna and compensation benefits and medicals were paid to or on behalf of the Respondent. (Appendix A, at p. 1).

Subsequently, Respondent returned to work with Citrus Sun Club. On October 24, 1984 Respondent, while employed with Citrus Sun Club, complained of hurting his back while lifting an ashtray at work. Respondent returned to the care of Dr. Joseph Flynn who again diagnosed his condition as low back strain superimposed on degenerative disc disease. Respondent again returned to work on December 1, 1984.

Respondent then filed a claim for benefits dated November 30, 1984 seeking TTD benefits from October 24, 1984 through December 1, 1984 as well as medical bills, costs and attorneys' fees. The Workers' Compensation carrier for Citrus Sun Club controverted the claim alleging no accident and the existence of a preexisting condition as well as "all of the Section 440

defenses that may apply". Aetna, who remained liable for Claimant's 1983 injury, did not file a notice to controvert regarding the 1984 injury but stated at Respondent's hearing that they were not responsible for the October 24, 1984 accident. (Appendix A at p. 1).

Aetna relied solely on representations made by Dr. Flynn's office to one of its adjusters, in a telephone conversation, that the 1984 accident was "a new accident and was not an aggravation of the 1983 injury." Aetna did no more to further investigate the 1984 accident. In his deposition Dr. Flynn did state that the October, 1984 injury was an aggravation of a preexisting back condition and an aggravation of the 1983 injury. The Deputy Commissioner found the Claimant entitled to temporary total benefits for the time period requested. Respondent's entitlement to these benefits was not addressed by the Appellate Court as it was not an issue. (Appendix A at p. 2).

The facts relevant to this appeal are that the Deputy Commissioner also held that the Respondent was entitled to attorneys' fees after finding that Aetna acted in "bad faith" for failing to further investigate the 1984 accident. Included in the attorneys' fee award was an award for the time Respondent's attorney spent preparing for and prosecuting his claim for attorneys' fees. (Appendix A at p. 2).

In the en banc proceedings before the First District Court of Appeal, Petitioner challenged the entire award of attorneys' fees, and the Deputy Commissioner's order allowing Claimant's

attorney to include in his fee computation the time spent preparing for and prosecuting the claim for attorneys' fees. (Appendix A at p. 2).

The First District Court of Appeal upheld the award of attorneys' fee and specifically approved the Deputy Commissioner's decision allowing time spent preparing and prosecuting attorneys' fees award. In addition, while not raised in the appeal, the First District Court of Appeal held that the awarding of expert witness fees for attorneys who testify regarding the reasonableness of an attorneys' fee in a Workers' Compensation proceeding is an appropriate taxable cost to the Employer/Carrier. (Appendix A at p. 2 and 3).

Petitioner then filed a Motion for Rehearing En Banc and for certification which was denied.

The issues on appeal are:

1. WHETHER THE FIRST DCA ERRED IN ALLOWING THE CLAIMANT (RESPONDENT) TO RECOVER EXPERT WITNESS FEES FOR AN ATTORNEY WHO TESTIFIED REGARDING THE REASONABLENESS OF AN ATTORNEYS' FEE.

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

SUMMARY OF ARGUMENT

Conflict jurisdiction exists in the case at bar because the First District Court of Appeal opinion in Crittenden Orange Blossom Fruit v. Stone, 492 So.2d 1106, 1110 (Fla. 1st DCA 1986) is in direct conflict with the Supreme Court's decision in Robert & Company Associates v. Zabawczuk, 200 So.2d 802 (Fla. 1967).

In addition the Crittenden decision conflicts with the Supreme Court's decision in Whitten v. Progressive Casualty Ins. Co., 410 So.2d 501 (Fla. 1982) and with the trend towards limiting attorneys' fees rather than expanding them, as demonstrated by this Court in The Florida Bar re: Amendment to the Code of Professional Responsibility (Contingent Fees), 11 F.L.W. 475 (Fla. Sept. 1986).

ARGUMENT

THIS HONORABLE COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL AND THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH OPINIONS OF THE FLORIDA SUPREME COURT.

The primary purpose of Florida Rule of Appellate Procedure 9.030(a)(2) (A) (iv) is to avoid confusion and to maintain uniformity in the case law of this state and to avoid any uncertainty that might derive from situations where conflicting decisions develop in the district court's of appeal. Blake v. Blake, 103 So.2d 639 (Fla. 1958), overruled on other grounds, Foley v. Weaver Drags, Inc., 177 So.2d 221 (Fla. 1965). This Court has identified two forms of decisional conflict which "trigger the exercise" of its jurisdiction. City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So.2d 632 (Fla. 1976). The conflict may exist either:

> (1) Where an announced rule of law conflicts with other appellate expressions of law, or
>
> (2) Where a rule of law is applied to produce a different result in a case which involves 'substantially the same controlling facts as a prior case'.

City of Jacksonville, at 633.

The announced rule of law in the First District Court of Appeal's en banc opinion regarding awarding expert witness fees for an attorney who testifies regarding attorneys' fees, conflicts with the rule of law announced by this Court in Robert & Company Associates v. Zabawczuk, 200 So.2d 802 (Fla. 1967).

The First District Court of Appeal recognized this conflict,

as the Zabawczuk case was cited by the Court. The Court attempted to distinguish Zabawczuk from the case at bar based on the fact that the Zabawczuk opinion was rendered in 1967 prior to the 1979 amendment to the Workers' Compensation Act. However, Petitioner respectfully submits that this distinction is inconsequential.

The pre-1979 statute regarding witness fees in the Workers' Compensation Act (Fla. Stat. 440.31) is identical to the present statute (Fla. Stat. 440.31 (1985)). In Zabawczuk, this court specifically held that Fla. Stat. 440.31 did not permit an award of fees to witnesses appearing on behalf of Claimant's attorneys who are claiming entitlement to attorneys' fees under the Act:

> It is our view, in accord with that of the commission, that the statutory provision F.S. A § 440.31, for the award of expert fees authorizes only the payment of fees to experts testifying in the case with reference to the claimant and that the statute was never intended to cover the award of fees to witnesses appearing on behalf of attorneys who claim counsel fees payable under our act.

Zabawczuk, at 804 (emphasis added).

The First District Court of Appeal departed from this ruling in the case at bar and so states in its opinion:

> 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 light of the changes wrought by the 1979 amendments.

Crittenden Orange Blossom Fruit v. Stone, 492 So.2d 1106, 1110 (Fla. 1st DCA 1986).

In addition, the Crittenden court acknowledges in footnote #3 of its opinion that the reason for their previously contrary holding on this same issue in W.A. Doss & Sons, Inc. v. Barbato, 11 F.L.W. 935 (Fla. 1st DCA April 22, 1986) was "deference to precedent from our highest court." Crittenden at 1110. Petitioners argue that this same deference should apply in the case at bar.

In view of the departure by the First District Court of Appeal from this Court's ruling in Zabawczuk, Petitioner urges this Court to exercise its jurisdiction and resolve the conflicts that arise from the First District Court of Appeal's ruling in Crittenden as to the proper construction of Fla. Stat. 440.31.

Conflict jurisdiction also exists due to the fact that the First District Court of Appeal's opinion conflicts with decision of this Court in Whitten v. Progressive Casualty Ins. Co., 410 So.2d 501 (Fla. 1982).

In Whitten the Supreme Court ruled that because statutes awarding attorneys' fees are in derogation of the common law, they must be strictly construed. Whitten at 505.

The First District Court of Appeal has expanded the Workers' Compensation attorneys' fee statute (Fla. Stat. 440.34 (1985)) by permitting respondent to recover attorneys' fees for the time his attorney expended in prosecuting the claim for attorneys' fees. Fla. Stat. 440.34 specifically outlines the three circumstances under which an attorneys' fee will be awarded in Workers' Compensation cases. Nowhere does the statute indicate that fees

shall be awarded when an attorney must prosecute a claim for attorneys' fees.

Finally, Petitioner submits that the First District Court of Appeal's decision conflicts with The Florida Bar re: Amendment to the Code of Professional Responsibility (Contingent Fees), 11 F.L.W. 475 (Fla. Sept. 1986) wherein this Court demonstrated a trend towards limiting contingency fees in tort cases, rather than expanding them. The First District Court of Appeal's decision, however, displays a trend of expanding the legislature's proclamation regarding attorneys' fees in the field of Workers' Compensation.

There is no rationale for an expansive reading of the attorneys' fee statute in the field of Workers' Compensation, in view of the atmosphere of restraint displayed by the Supreme Court regarding contingency fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 21st day of October, 1986 to George J. Adler, Esquire, 135 E. Marks Street, Orlando, Florida, 32801.

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