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IN THE SUPREME COURT OF FLORIDA

FILED

OCT 20 1984

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

Petitioners,

vs.

MARVIN STONE,

Respondent.

Claim No : 266 46 6123
D/Acc : 10/24/84
First DCA
Docket No : BI-366

Clerk of the Court

Deputy Clerk

RESPONDENT'S BRIEF OF JURISDICTION

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PRELIMINARY STATEMENT

In this jurisdictional brief of Respondent, the Petitioners will be referred to as the Employer/Carrier, with the Respondent, Marvin Stone, being referred to as the Claimant.

All references to the record on appeal will be designated by the letter "A" followed by the appropriate appendix notation.

STATEMENT OF CASE AND FACTS

Pursuant to Rule 9.210(c) of the Rules of Appellate Procedure, the Respondent accepts the Petitioner's Statement of Case and Facts as set forth by the Employer/Carrier.

SUMMARY OF ARGUMENT

No conflict jurisdiction exists in the case at bar as the opinion in Crittenden Orange Blossom Fruit v Stone, 492 So.2d 1106 (Fla 1st DCA 1986) does not conflict with the Supreme Court's decision in Robert & Company Associates v Zabawczuk, 200 So.2d 802 (Fla. 1967).

No conflict exists in the Crittenden decision with the Supreme Court's decision in Whitten v Progressive Casualty Ins. Co., 410 So.2d 501 (Fla. 1982). There is no conflict as the First District Court of Appeals considered this case en banc for the purpose of resolving an intradistrict conflict on the issue, which decision does not conflict with Whitten.

ARGUMENT

THIS HONORABLE COURT DOES NOT HAVE
JURISDICTION TO REVIEW THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL
AND THE DECISION DOES NOT CONFLICT
WITH OPINIONS OF THE SUPREME COURT

The first question raised by the Employer/Carrier is whether the decision of the First District Court of Appeal in the instant case expressly and directly conflicts with Robert & Company Associates v Zabawczuk, 200 So.2d 802 (Fla. 1967) in that 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.

The Employer/Carrier alleges discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), alleging conflict with an earlier Supreme Court case of Robert & Company Associates v Zabawczuk, 200 So.2d 802 (Fla. 1967). The case cited by the Employer/Carrier involves a Supreme Court review of an Industrial Relations Commission decision issued in 1967 in the area of worker's compensation. This decision was entered prior to the drastic limitation of the scope of review for this Honorable 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 remove the Supreme Court from 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 reasonable 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 that 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 attorney's fee provisions under the present Worker's Compensation Act can no longer be considered collateral benefits, as the fee must be paid by the claimant from the claimant's funds if the claimant's attorney is not successful in the prosecution of the claim for fees. Prior to the 1979 Amendments, the Employer/Carrier was responsible of the fee. Therefore, there is no conflict between the instant case and Robert & Company Associates v Zabawczuk, 200 So.2d 802 (Fla. 1967). Thus no conflict jurisdiction exists.

The second issue presented by the Employer/Carrier is whether the decision of the First District Court of Appeal in the instant case expressly and directly conflicts with Whitten v Progressive Casualty Ins.Co., 410 So.2d 501 (Fla. 1982) in that the First District Court of Appeal has ruled that claimant's attorneys can

recover an attorney's fee for the time spent prosecuting the claim for attorney's fees.

Prior to the 1979 amendments to the Worker's Compensation Act, the issue at attorney' fee hearings was, normally, only the amount of fee, and it was uniformly 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, and then the amount of the fee, which fee is to be paid by the Employer/Carrier.

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 light of the 1979 amendments to the Worker's Compensation Act, in determining the amount of a fee. This decision was upheld 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). Here, by majority vote, the First District Court of Appeals decided to consider this case en banc for the purpose of resolving an intradistrict conflict on the issue of whether an award of attorney's fees to a claimant's attorney should include time spent in preparing for and prosecuting the claim for attorney's fees.

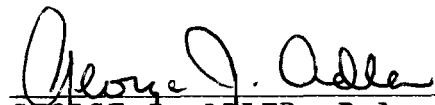
The First District Court of Appeals affirmed the deputy's decision to award attorney's fees and stated that they were not persuaded, either by the structure of the Act itself, or their observations with respect to its operation over the past seven years, that the award of attorney's fees to a claimant's attorney

under the present provisions can be realistically viewed as "collateral" to the purposes of the Act. Thus, any conflict that existed was resolved and there is no basis for jurisdictional review and there is no conflict with the Supreme Court decision in Whitten v Progressive Casualty Ins. Co., 410 So.2d 501 (Fla. 1982)

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to DANIEL DeCICCIO, ESQUIRE, 20 North Orange Avenue #807, Orlando, Florida 32801, on this the 27th day of October, 1986.



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