

IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,343

ROY MILLINGER,

Petitioner,

vs.

BROWARD COUNTY MENTAL
HEALTH DIVISION, et al.

Respondent.

0-7
FILED

SID J. WHITE

JUL 31 1995

CLERK, SUPREME COURT

By

Chief Deputy Clerk

ON PETITION FOR REVIEW OF A
DECISION OF THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, ON THE GROUNDS
OF EXPRESS AND DIRECT CONFLICT OF DECISION

PETITIONER'S REPLY BRIEF

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BROWARD COUNTY MENTAL
HEALTH DIVISION and
RISK MANAGEMENT,

Respondents.

I

Respondents' Statement of the Facts

Respondent has chosen not to address the facts relating to the underlying merits order which involves the compensability *vel non* of Claimant's injuries. Respondents indicate that the determination of whether the JCC's order on the merits is supported by competent substantial evidence is for the District Court of Appeal, First District (Answer Brief at 4). The First District did not address this issue because it vacated the order and dismissed the appeal due to lack of jurisdiction. However, this Court has held that once jurisdiction has been properly invoked, this Court has jurisdiction to entertain the entire cause. See: *Williston Highlands Development Corporation v. Hogue*, 277 So.2d 260 (Fla. 1973). Therefore, this Court cannot only consider the jurisdictional issue but can also consider the compensability of the injury.

II

Jurisdictional Point

Broward County maintains that there does not exist an express

and direct conflict of decision. Broward contends that because *New Washington Heights Community Development Conference v. Department of Community Affairs*, 515 So.2d 328 (Fla. 3DCA 1987), is an administrative appeal and the instant cause is a worker's compensation appeal, there is no express and direct conflict of decision. However, the distinction drawn by Broward County is insignificant. Both decisions are substantially identical from a factual standpoint and both cases involve a state official advising of a course of conduct which resulted in an appeal being filed late. There is no legal difference between an administrative proceeding and a worker's compensation proceeding with regard to the procedures with which the instant cause is concerned. The rule of finality of orders applies to both. Compare: *Austin Tupler Trucking, Inc. v. Hawkins*, 377 So.2d 679 (Fla. 1979), with *Farrell v. Amica Mutual Insurance Company*, 361 So.2d 438 (Fla. 1978). There is an express decision on the same point of law: Whether state actions can vest an administrative tribunal with jurisdiction to set aside and re-enter an order to preserve appellate rights. On the same facts, the Third District in *New Washington* held yes and the First District in the instant cause held no. There is an express and direct conflict of decision.

III
Argument on the Merits

Before this Court, BROWARD COUNTY argues that the JCC's finding that the late filing of the MILLINGER's appeal was a direct result of misrepresentation of a state functionary is erroneous (brief at 11). Instead, BROWARD COUNTY argues that negligence on

the part of MILLINGER's attorney caused the untimely filing of the appeal. This argument overlooks the affidavit of the secretary which was admitted without objection establishing the underlying facts concerning the statement by the Clerk of the First District Court of Appeal (R. 92-93, 443-444). BROWARD COUNTY essentially argues proximate cause which is generally considered a question of fact for the fact finder. In this cause, that fact finder, the Judge of Compensation Claims, found that the misrepresentation was the cause of the late filing of the appeal. As this finding is supported by competent substantial evidence in the form of the affidavit of the secretary admitted without objection, this finding of the Judge should be affirmed.

BROWARD COUNTY argues that the decision of the District Court in *Morgan Yacht Corp v. Edwards*, 386 So.2d 883 (Fla. 1DCA 1980) is to be distinguished because it involves orders procured by fraud. We do not disagree that the case is factually distinguishable. MILLINGER's problem with *Morgan Yacht* is that if as *Farrell v. Amica Mutual Insurance Company* holds an order is final thirty days after rendition, then *Morgan Yacht Corporation* represents a judicially created exception to the finality. If fraud is an acceptable exception to the rules of finality, then the instant cause as recognized by the Third District in *New Washington* also presents a proper factual situation for an exception to the rule of finality. In the instant cause, as found by the JCC and supported by competent evidence, the late filing of the appeal was caused by the representation of an individual in the Clerk's office at the

District Court of Appeal, First District, which was relied upon by MILLINGER's trial attorney's secretary in sending the notice. As a result the notice of appeal was timely mailed but not received by the Court within the thirty days to file an appeal. In short, there is a sufficient basis to conclude that the instant cause should constitute an exception to the rule of finality as found by the District Court of Appeal, Third District in *New Washington Heights*.

In all other respects, MILLINGER relies on the argument contained in his Initial Brief filed in this cause.

IV
Conclusion

Based upon the foregoing cases, statutes, arguments and other authorities, Petitioner, ROY MILLINGER, respectfully requests that this Court reverse the decision of the Judge of Compensation Claims and remand this cause with instruction that the Petitioner's eye disease be held compensable and the Judge of Compensation Claims award appropriate temporary and permanent benefits to MILLINGER.

V
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to BARBARA WAGNER, ESQUIRE, Attorney for

Respondent, 21512 Hillsboro Blvd, Suite 301, Deerfield Beach,
Florida 33442, this 27th day of July, 1995.

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