IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE FLORIDA

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JUL 281997
CLERK, SUPREME COURT
Clerk

JERRY LEE,

Petitioner,

v.

WELLS FARGO ARMORED SERVICES,
and THE TRAVELERS,

Respondents.

CLAIM NO.: 466-92-0758
D/A: 08/23/93
1DCA Case No: 96-03221
SUP. CT. Case No.: 90-455

ON APPEAL FROM THE STATE OF FLORIDA
DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY
DIVISION "A-CENTRAL"
HONORABLE C. DOUGLAS BROWN

AND

THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA
TALLAHASSEE FLORIDA

REPLY BRIEF OF PETITIONER

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PRELIMINARY STAT-NT

Petitioner, Appellee below, JERRY LEE, will be referred to in this brief by name or as the Claimant.

Respondents, Appellants, WELLS FARGO ARMORED SERVICES and THE TRAVELERS, will be referred to by name or **collectively** as the Employer/Carrier or E/C.

The Judge of Compensation Claims shall be referred to by name or as the JCC.

All references to the record on **appeal** will be made by the use of the symbol "T" followed by the appropriate page number.

All references to the appellant's brief will be made by the use of the symbol "AB" followed by the appropriate page number.

ISSUE ON APPEAL

I. "Does the Court's decision in Qualitv Enaineersd Installation, Inc., v. Wialev South. Inc., 670 So. 2d 929 (Fla. 1996) extend to permit the accrual of prejudgment interest on attorney's fees, authorized pursuant to the Workers' Compensation Law, from the date entitlement to the fee is determined, when an amount for same has not yet been established?"

ARGUMENT

I. THE DECISION OF THE FIRST DISTRICT COURT THAT THE CLAIMANT IS NOT ENTITLED TO PREJUDGEMENT INTEREST ON ATTORNEY'S FEES SHOULD BE REVERSED BECAUSE THE QUALITY ENGINEERED INSTALLATION, INC. V. HIGLEY SOUTH, INC. DECISION MANDATES THAT INTEREST BE CALCULATED FROM THE DATE THAT ENTITLEMENT IS ESTABLISHED.

The Employer/Carrier's answer brief raises several points, none meritorious, that demand rebuttal. First, is the argument that the claimant has suffered no out-of-pocket pecuniary loss. (AB:8-10) No logic graces this serpentine argument. Apparently the Employer/Carrier concludes that, because the prejudgement interest on fees is paid to the claimant's attorney rather than to the claimant, the claimant loses nothing if the interest is retained instead by the Employer/Carrier. If this is true then similar reasoning dictates that when the Employer/Carrier is required to pay the claimant's attorney's fees in the first place (without regard to interest) that the claimant reaps no benefit because the fees are paid directly to the claimant's attorney. However the substantial benefit gained for the claimant in this case is not the payment of prejudgement interest on fees; it is the payment of the claimant's attorney by the Employer/Carrier. Mr. Lee would have sustained a substantial pecuniary loss if he had been responsible for the payment of his attorney.

In addition, if the Employer/Carrier's argument that the claimant has sustained no out-of-pocket loss is valid in a prejudgement interest attorney's fee case, it should hold equally

true in a postjudgement interest attorney's fee case. And yet, this Court made it clear in Stone v. Jeffres, 208 So. 2d 827 (Fla. 1968) that "interest should run on attorney's fees from the time they are awarded by the deputies." Such postjudgement interest is paid to the claimant's attorney, not to the claimant. Likewise, prejudgement interest on fees, though paid to the claimant's attorney, is nevertheless tied to a pecuniary benefit possessed by the claimant (which is not having to pay his attorney's fees to begin with, let alone not having to pay either prejudgement or postjudgement interest on such fees).

The Employer/Carrier's brief takes the undersigned to task for noting "unabashedly" (AB:10) that payment of prejudgement interest allows the attorney to be made whole. It might as well have taken this Court to task because in Quality Engineered Installation, Inc. this Court "unabashedly" noted the unfairness of allowing the party which owes the fee to garner the interest free use of the fee "at the expense of the attorney who has earned, and is entitled to, the fee." (Emphasis added.)

Next the Employer/Carrier asserts that the Florida Supreme Court has never permitted prejudgement interest on fees in workers' compensation cases. What significance can be given such a negative assertion? This court has never been presented with a prejudgement interest on workers' compensation fees case until now. This is a case of first impression. How could the Court have ruled before on an issue never presented to it?

Still, if one looks at this Court's earlier decision on a

similar issue, it set forth explicit policy reasons for allowing both postjudgement (Stone) and prejudgement (Quality Engineered Installation, Inc.) interest on attorney's fees. These policy considerations include fairness, deterrence and delay. They apply with equal force to prejudgement interest on fees in workers' compensation cases.

The Employer/Carrier's argument that the 1994 workers' compensation statute was passed because of a legislatively perceived financial crisis in the industry is a specious request that this Court engage in speculation as to the current state of the industry. Whether or not a real crisis existed in 1994, there is no record of evidence that such a crisis currently exists. This Court should ignore the Employer/Carrier's request that it jump on the legislative bandwagon and instead evaluate whether the same policy considerations that justify the payment of postjudgement interest on fees apply to the payment of prejudgement interest on fees.

Next the Employer/Carrier nearly breaks its arm pointing the finger of blame at the claimant's attorney for delays in providing the Employer/Carrier with a verified petition. (AB:18-21) First, although a verified petition is required by statute, the Employer/Carrier is not completely in the dark until it receives that petition. A review of its own attorney's hours can be instructive. Moreover, in this case nothing happened once the verified petition was provided to the Employer/Carrier. A fee hearing still took place. An appeal followed.

The $26,825 fee awarded by Judge Brown was reasonable. The First District Court agreed it was reasonable by affirming that amount on appeal. The fee exceeds by leaps and bounds the testimony offered by the Employer/Carrier's expert as to a reasonable fee. That is why this case dragged on, and continues to do so. The fee amount was not resolved sooner in this case because the Employer/Carrier grossly undercalculated a reasonable fee (even after it was provided with the verified petition). The implication that, but for the claimant's attorney's delay in forwarding the verified petition, that less prejudgement interest would have been payable is undermined by the Employer/Carrier's failure to settle the fee issue once it received the verified petition, and its appeal of the fee awarded by Judge Brown.

To say that the burden of delay in paying a statutorily mandated fee should rest on the Employer/Carrier is proper. To acknowledge that the claimant benefits where fees and interest are payable by the Employer/Carrier is proper. To say that the recipient of that interest is the claimant's attorney is proper. The Employer/Carrier is not being punished; it is simply being required to turn over the interest earned while it held in trust the claimant's attorney's money.

CONCLUSION

The First District Court of Appeal's decision dated April 28, 1997, should be reversed as to its denial of prejudgement interest and an Order should be entered reinstating the JCC's Order.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Ms. Susan S. Foltz, Esquire, at P.O. Box 14129, Tallahassee, Florida 32217, this 28th day of July, 1997.

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