IN THE SUPREME COURT OF FLORIDA
CASE NUMBER: 92,030

FILED
SID J. WHITE
FEB 2 1998
CLERK, SUPREME COURT
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ROOSEVELT U. PAULK,
Petitioner,

v.

PALM BEACH COUNTY SCHOOL BOARD
and **CRAWFORD & COMPANY,**
Respondents.
_______________________________/

PETITIONER'S REPLY BRIEF ON THE MERITS

RICHARD A. KUPFER, P.A.
The Forum - Tower C - Suite 810
1655 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
(561) 684-8600
Counsel for Petitioner

-and-

JASON GOLDSTONE, ESQ.
GOODMARK, GOODMARK & GOLDSTONE, P.A.
West Palm Beach, Florida
Co-counsel for Petitioner

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CERTIFIED QUESTION

DOES THE COURT'S DECISION IN QUALITY ENGINEERED INSTALLATION, INC. V. HIGLEY SOUTH, INC., 670 So2d 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?

REPLY ARGUMENT

The Petitioner would respectfully reply to a few of the comments made in Respondent's Answer Brief.

Respondents assert, at Page 7 of their brief, that the First District Court of Appeal "has never awarded prejudgment interest on fees" in workers' compensation cases. That is incorrect. In Metropolitan Dade County v. Rolle, 21 FLW D1365 (Fla. 1st DCA, June 11, 1996), the First District Court noted that this court's reasoning in the Quality Engineered Installation case is apparently applicable to workers' compensation cases. That was the opinion of the First District Court when it initially considered this issue soon after the Quality Engineered Installation case was decided by this court. However, that opinion

was subsequently withdrawn by the First District Court and a new opinion was entered which was silent on this subject. See Metropolitan Dade County v. Rolle, 678 So2d 904 (Fla. 1st DCA 1996). Later, of course, the First DCA changed its opinion and held in the Wells Fargo v. Lee case that this court's decision in Quality Engineered Installation does not apply to workers' compensation cases. Accordingly, while it would be correct to say that this is the opinion of the First District Court currently, it was not the opinion of the First District Court when it initially addressed this issue. We would respectfully submit that the First District Court was right the first time.

The Respondents argue that there is a statutory prohibition under Section 440.34 (6), Florida Statutes, which prohibits an Employer/Carrier from tendering an attorney's fee prior to approval by the Judge of Compensation Claims, which in turn justifies treating workers' compensation cases differently than all other cases for purposes of prejudgment interest on attorney's fees. We respectfully disagree with the Respondents' assertion that the reasoning underlying this court's decision in Quality Engineered Installation does not apply to workers' compensation cases.

This court properly noted in the Quality Engineered case that the accrual of interest on unpaid attorney's fees can be tolled by tendering payment of that portion of the fee which the party acknowledges is due. This is every bit as true in a workers' compensation case as it is in a civil litigation. There is no

language to be found in Section 440.34 that prevents an Employer/Carrier from seeking approval of the Judge of Compensation Claims to tender payment of an attorney's fee which is acknowledged to be owed to the Claimant's attorney. The Employer/Carrier can, at any time, file a motion with the Judge of Compensation Claims to tender attorney's fees to the Claimant's attorney in order to toll the running of interest on the amount tendered. Although it might be slightly less convenient than in civil cases, this can be done in workers' compensation cases just as it can be done in civil cases. We do not believe the Judge of Compensation Claims would have to find the tender to be "reasonable" in order to approve the tender, but rather would only have to find that the tender is being made in good faith in order to toll the accrual of interest on the minimum amount which the Employer/Carrier acknowledges is owed to Claimant's attorney.

Either party has the ability to bring the issue of the amount of the fee to a hearing before the Judge of Compensation Claims. There is nothing in the Workers' Compensation Act which makes this the exclusive responsibility of the Claimant. As a practical matter, there may be very good reasons for the parties to wait for a period of time after entitlement to the fee has been determined, before coming back to ask the Judge of Compensation Claims to quantify what would be a reasonable amount for the fee. The most obvious example is when the Claimant prevails on the issue of compensability of his injuries before the Claimant has reached the point of maximum medical improvement from his injuries. This

is because the amount of the attorney's fee is dependent upon a calculation of all the benefits reasonably flowing from the attorney's intervention in the case on behalf of the Claimant. This includes reasonably predictable future benefits. See Prestressed Systems v. Goff, 486 So2d 1378 (Fla. 1st DCA 1986); Polote Corp. v. Meredith, 482 So2d 515 (Fla. 1st DCA 1986); Putnal Groves v. Butler, 525 So2d 1003 (Fla. 1st DCA 1988); Ward v. Leon County School Board, 538 So2d 1307 (Fla. 1st DCA 1989).

Until a Claimant has reached the point of maximum medical improvement from his injuries, it is usually not possible to know exactly when that point will be reached, nor the degree of permanent impairment that the Claimant will be left with, and it is therefore very difficult to quantify the amount of future benefits flowing from the original finding of compensability, and therefore very difficult to assess the amount of a reasonable attorney's fee. In the present case, the Respondents admit in their brief (at Page 1) that they did not accept the Claimant as being permanently and totally disabled until several years after the 1991 order finding Claimant to be entitled to an attorney's fee. In the present case the Claimant had not yet reached maximum medical improvement at the time of the 1991 order. (See R. 9)

In this regard, the Respondents' suggestion in their brief that this court should unilaterally enact a new rule of workers' compensation procedure requiring Claimant's counsel to request a fee assessment hearing within thirty days after the order awarding entitlement, is a very unwise suggestion. The

Respondents' comparison to the offer of judgment statute in civil cases is a poor analogy because the thirty days does not begin running under the offer of judgment statute until the entire case is finished. That is quite often not the situation in a workers' compensation case where the Judge of Compensation Claims awards entitlement to an attorney's fee long before the amount of benefits flowing to the Claimant are ripe for adjudication. Certainly, if this court was even remotely inclined to consider enacting such a thirty day rule, it would be far more beneficial to refer that question to the Florida Bar's Workers' Compensation Rules Committee so that its merits and demerits can be thoroughly debated by the various judges and practitioners on that committee, with the results of that committee's findings then being provided to this court.

In all other respects, we would continue to rely upon our Initial Brief on the Merits, as well as the briefs of the Petitioners in Lee v. Wells Fargo Armored Services, presently pending before this court as Case Number 90,455.[1]

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1. We have filed a separate response to the Respondents' motion for consolidation, indicating that we have no objection to the Respondents' request to consolidate this case with the Lee v. Wells Fargo Armored Services case before this court.

CONCLUSION

This court should answer the certified question in this case in the same way it will be answered in the Lee v. Wells Fargo Armored Services case.

Respectfully submitted,

RICHARD A. KUPFER, P.A.
The Forum - Tower C - Suite 810
1655 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
(561) 684-8600
Counsel for Petitioner

By:
Richard A. Kupfer
Florida Bar No.: 238600

-and-

Goodmark, Goodmark & Goldstone, P.A.
Co-counsel for Petitioner

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing document has been furnished, this 30th day of January, 1998 to: **JASON J. GOLDSTONE, ESQ.**, Goodmark, Goodmark & Goldstone, P.A., 400 Executive Center Drive, Suite 110, West Palm Beach, Florida 33401, co-counsel for Petitioner; **RICHARD H. GAUNT, ESQ.** and **KARA ROCKENBACH, ESQ.**, Gaunt, Pratt, Radford & Methe, P.A., 1401 Forum Way, Suite 500, West Palm Beach, Florida 33401, counsel for Respondent.

RICHARD A. KUPFER, P.A.
The Forum - Tower C - Suite 810
1655 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
(561) 684-8600
Counsel for Petitioner

By:
Richard A. Kupfer
Florida Bar No.: 238600