SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ROBERT FLAMILY,

Petitioner,

vs. CASE NO.: SC06-847

CITY OF ORLANDO and CITY OF ORLANDO RISK MANAGEMENT,

Respondents.
_____/

BRIEF OF AMICUS CURIAE, FLORIDA PROFESSIONAL FIREFIGHTERS, INC., INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, ON BEHALF OF PETITIONER'S POSITION

RICHARD A. SICKING, ESQ.
Attorney for Amicus Curiae,
Florida Professional Firefighters, Inc.,
International Association of
Firefighters, AFL-CIO
1313 Ponce de Leon Blvd., #300
Coral Gables, Florida 33134
Telephone (305) 446-3700
Florida Bar No. 073747

TABLE OF CONTENTS

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 2

STANDARD OF REVIEW 2

POINT INVOLVED

THE FIRST DISTRICT'S POSITION THAT THE 2001 AMENDMENT TO §440.20(11)(c), FLA. STAT. DEPRIVES JCC'S OF JURISDICTION TO SET ASIDE WORKERS' COMPENSATION SETTLEMENT AGREEMENTS OF CLAIMANTS REPRESENTED BY COUNSEL WAS ERROR AS A MATTER OF LAW

A. THE FIRST DCA'S REASONING FOR ITS DECISION IS CONTRARY TO LONG-STANDING PRECEDENT.

B. THE FIRST DCA INCORRECTLY INTERPRETED THE PURPOSE OF THE 2001 AMENDMENT TO §440.20(11)(c).

(Petitioner's Point I)

ARGUMENT

POINT ONE 2-11

CONCLUSION 11

CERTIFICATE OF FONT SIZE AND STYLE

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

Cases

Amendments to the Florida Rules of Workers' Compensation Procedure, 891 So. 2d 474 (Fla. 2004) 6

Dunscombe v. Smith, 139 Fla. 497, 190 So. 796 9

Smith v. Smith, 90 Fla. 824, 107 So. 257 9

Steele v. A.D.H. Building Contractors, Inc., 174 So. 2d 16 (Fla. 1965) 7-9, 11

Sullivan v. Mayo, 121 So. 2d 424 (Fla. 1960) 4

Constitution

Art. I, §21, Fla. Const. 10

Statutes

§440.015, Fla. Stat. 11

§440.20(10), Fla. Stat. 9

§440.20(10), Fla. Stat. (1955) 3

§440.20(10), Fla. Stat. (1959) 3-4

§440.20(11)(a), Fla. Stat. (2001) 5

§440.20(11)(b), Fla. Stat. (2001) 5

§440.20(11)(c), Fla. Stat. (2001) 2, 5

§440.20(11)(e), Fla. Stat. (2001) 5

§440.20(12)(a), Fla. Stat. (1979) 4

§440.20(12)(b), Fla. Stat. (1979) 4

§440.20(12)(b), Fla. Stat. (1994) 4

§440.20(12)(c), Fla. Stat. (1994) 4

§440.22, Fla. Stat. 7

§440.28, Fla. Stat. 7

Ch. 93-415, §29, Laws of Fla. 4

Rules

F.I.C. Rule 1 (1947) 5

Fla. R. Work. Comp. P. 4.142 6

Fla. R. Work. Comp. P. 4.143 6

Miscellaneous

1 Larson, "Workers' Compensation Law"
Ch. 1, 2 (2000) 3

The Report of the The National Commission
on State Workmen's Compensation Laws,
p.p. 21, 80, 109-110 (1972) 2-3

STATEMENT OF THE CASE AND FACTS

The amicus curiae, Florida Professional Firefighters, Inc., International Association of Fire Fighters, AFL-CIO, adopts the statement of the case and facts by the petitioner as provided in Fla. R. App. P. 9.370.

SUMMARY OF ARGUMENT

The Florida First District Court of Appeal was incorrect that a 2001 amendment to the Florida Workers' Compensation Law providing that a settlement agreement by an employee represented by counsel need not be approved by the Judge of Compensation Claims, has the legal effect of depriving the Judge of Compensation Claims of jurisdiction to set aside settlement agreements on the ground of fraud, overreaching, misrepresentation or withholding facts by the adversary and that the 2001 amendment has a retroactive effect. This holding is contrary to long-standing legal precedent adopted by the Supreme Court of Florida and is contrary to expressed legislative intent that all workers' compensation controversies are to be decided by the Judge of Compensation Claims.

STANDARD OF REVIEW

The standard of review is de novo.

ARGUMENT

POINT I

THE FIRST DISTRICT'S POSITION THAT THE 2001 AMENDMENT TO §440.20(11)(c), FLA. STAT. DEPRIVES JCC'S OF JURISDICTION TO SET ASIDE WORKERS' COMPENSATION SETTLEMENT AGREEMENTS OF CLAIMANTS REPRESENTED BY COUNSEL WAS ERROR AS A MATTER OF LAW

A. THE FIRST DCA'S REASONING FOR ITS DECISION IS CONTRARY TO LONG-STANDING PRECEDENT.

B. THE FIRST DCA INCORRECTLY INTERPRETED THE PURPOSE OF THE 2001 AMENDMENT TO §440.20(11)(c).

(Petitioner's Point I)

The parties entered into a so-called "washout" settlement which was approved by Judge of Compensation Claims Joe E. Willis on December 13, 1996. This was a settlement for a date of accident of October 6, 1995, involving a heart condition. Judge of Compensation Claims David W. Langham subsequently determined in an order dated April 16, 2004, that the washout of December 13, 1996, should be set aside because there were numerous irregularities, failure to comply with statutory provisions, and the withholding of information. The employer appealed this decision and the Florida First District Court of Appeal held that Judge Langham did not have jurisdiction to set aside the washout approved by Judge Willis because a 2001 amendment to §440.20(11)(c) of the Florida Workers'

Compensation Law provided that when an employee is represented by counsel, the Judge of Compensation Claims need not approve of the settlement agreement. The District Court of Appeal further held that this statutory change was procedural and therefore retroactive in application.

Workers' compensation laws in the United States are legislative enactments of the states which substitute a no-fault system of medical and indemnity benefits provided by the employer on a regular basis and secured by insurance as a substitute for common law damages based on fault.

Historically, these enactments were a reaction to the Triangle Shirt Waist Company fire in 1911 and by 1920, most of the states had workers' compensation laws. Florida was second to last in 1935.[1] That law did not provide for a release of claims. In 1955, the statute was amended by the legislature to provide for the complete release of workers' compensation claims for indemnity in exchange for a lump sum of money. §440.20(10), Fla. Stat. (1955). The settlement was subject to approval by the State of Florida, by the then Deputy Commissioner of the Florida Industrial Commission (now the Judge of Compensation Claims.) In 1959, the statute was amended to allow washouts of compensation and medical

[1] 1 Larson, "Workers' Compensation Law" Ch. 1, 2 (2000).

benefits. §440.20(10), Fla. Stat. (1959). In *Sullivan v. Mayo,* 121 So. 2d 424 (Fla. 1960), the Supreme Court of Florida decided that these were substantive changes such that accidents which occurred after these respective enactments would be governed by the statute in force on the date of accident. Amendments to the statute authorizing washouts which were subsequent to the date of accident would not apply.

In the 1970s, the federal government recommended to the states that the right of the employee to receive future medical care should not be subject to release.[2] Consequently, in 1979, the Florida legislature amended the statute to prohibit the release of claims for future medical care, but continuing to allow the release of claims for indemnity by the payment of a lump sum, but still subject to approval by the Deputy Commissioner. §440.20(12)(a) and (b), Fla. Stat. (1979).

In 1993, the Florida legislature amended the statute to re-authorize a washout which releases future medical care as well as indemnity. Ch. 93-415, §26, Laws of Fla. This statutory enactment was stated to have a retroactive effect, i.e. that it applied to accidents that occurred prior to the effective date of Jan. 1, 1994. §440.20(12)(b) and (c), Fla. Stat. (1994). The constitutional validity of the retroactive application of this statute has

[2] The Report of the The National Commission on State Workmen's Compensation Laws, p.p. 21, 80, 109-110 (1972).

never been challenged.

Then, in 2001, the legislature further amended the statute. This is the enactment involved in the present case. It provides that when the employee is represented by counsel, the agreement, settlement, washout, common law release, whatever it be called, need no longer be approved by the Judge of Compensation Claims. §440.20(11)(c), Fla. Stat. (2001). Only in the case when the employee is unrepresented, would a washout have to be approved by the Judge of Compensation Claims, who was to make inquiry as to whether it was in the best interest of the employee to settle completely. §440.20(11)(a) and (b), Fla. Stat. (2001).

It is this statute which the District Court below held has a retroactive application. §440.20(11)(e), Fla. Stat. (2001).[3] Thus, according to the First District court of Appeal below, the washout settlement approved by Judge Willis "retroactively" need not have been approved by Judge Willis. Therefore, Judge Langham could not have had jurisdiction to set it aside for irregularities, failure to comply with the statute, or overreaching or withholding of information.

From 1947 on, under rules of the Florida Industrial Commission[4]

[3] This is a carry-over enacted in 1993.
[4] F.I.C. Rule 1 (1947).

and later by rules of the Supreme Court of Florida,[5] all agreements had to be approved by the Deputy Commissioner/Judge of Industrial Claims/Judge of Compensation Claims. In other words, the employee and the employer/carrier and the State of Florida were parties to any settlement agreement.

In the rules' case, *Amendments to the Florida Rules of Workers' Compensation Procedure*, 891 So. 2d 474 (Fla. 2004), the Supreme Court of Florida decided that the workers' compensation rules enacted by the Supreme Court were without constitutional authority, but in holding that the rules were invalid, the Court held that it did do so prospectively from December 2, 2004.

The DOAH rules have no equivalent. The DOAH rules track the statutory enactment, which provides that washouts do not have to be approved by the Judge of Compensation Claims when the employee is represented by counsel. Only that portion of the agreement providing for the payment of attorney's fees and the withholding or not of monies for child support is subject to approval by the Judge.

From the time of its inception in 1935, Florida workers' compensation cases were sometimes settled by what was called a "straight

[5] Fla. R. Work. Comp. P. 4.142 and 4.143.

stipulation". It was always possible for the employee to reach an agreement with the employer/carrier as to medical benefits or indemnity, which was not a washout. It was simply an agreement about the providing of medical care or the periodic indemnity benefits. In the trade, this was called a "straight stip". It was really an agreed-to order. The parties would agree to certain things, to what would be done and what would not be done. This would be reduced to writing and co-signed by the Judge of Compensation Claims as an order approving the straight stipulation. It had to be approved by the Judge of Compensation Claims as an agreed-to order, otherwise the agreement would violate §440.22, Fla. Stat., which prohibits releases except as provided in the chapter.

Unlike washout settlements, straight stipulations could be subject to modification under §440.28, Fla. Stat., on the ground of a mistake in determination of fact or change in condition. The Workers' Compensation Law had always contained the modification provision since its inception in 1935. In the leading case of *Steele v. A.D.H. Building Contractors, Inc.*, 174 So. 2d 16 (Fla. 1965), the parties had entered into a straight stipulation which was approved by the Deputy Commissioner for the payment of a 50% permanent partial disability. Subsequently, the employer/carrier filed a petition for modification under §440.28, Fla. Stat. The Deputy

Commissioner denied the petition for modification and the employer/carrier appealed to the full Commission, which reversed and remanded. The employee sought workers' compensation certiorari in the Supreme Court which held that a straight stipulation was the same as a washout stipulation insofar as finality is concerned. It could not be modified on the ground of a mistake in determination of fact since the mistake must be a mistake of the Deputy Commissioner, not of the parties. Straight stips could only be modified for a change of condition. However, the Court did hold in this leading case that settlement agreements in workers' compensation could be set aside for fraud, overreaching, misrepresentation or withholding facts by the adversary. The Supreme Court of Florida held:

> One entering a stipulation relative to present facts should be sure of his ground before he executes the agreement and subsequently reaps benefits from it. If he is unsure, he should consult counsel at his elbow or should simply decline and rely on the determination of the deputy and the Full Commission. **Such an agreement should neither be ignored nor set aside in the absence of fraud, overreaching, misrepresentation or withholding facts by the adversary or some such element as would render the agreement void.**
>
> The execution of a stipulation is, of course, strictly within the control of the parties undertaking to settle a controversy and in making it binding, once signed, bears a close analogy to the situation created

> when the provisions of F.S.A. Sec. 440.20(10) of the Workmen's Compensation Law are effectuated. The section deals with lump sum settlement and provides that when a settlement is made on the joint petition of all parties the order putting it into effect 'shall not be subject to modification or review under 440.28.' **To our minds there is no difference in principle between insulating a stipulated lump sum settlement from modification and holding a stipulation of facts precluded from modification under the statute.**
>
> To repeat, there is no indication of any fraud, overreaching, misrepresentation or concealment on the part of the claimant which would have vitiated the stipulation. Smith v. Smith, 90 Fla. 824, 107 So. 257.
>
> Stipulations have long been approved and encouraged as means of expediting the resolution of controversies. Dunscombe v. Smith, 139 Fla. 497, 190 So. 796. And there is as much reason to utilize them in cases arising under Workmen's Compensation Law as in other disputes, if not more, inasmuch as they affect directly the wages of the working man and delay consequently deprives him and his family immediately of the meat and bread to sustain them. (Emphasis added.)

Steele v. A.D.H. Building Contractors, Inc., supra at 19.

Until the decision of the District Court in the proceedings below, this is what everyone in the field of workers' compensation believed.

It is impossible to understand why the District Court in the proceedings below decided that the change in the statute to provide that if the employee was represented by counsel, washouts would no longer be approved by the Judge of Compensation Claims, somehow means that

settlement agreements could no longer be set aside on the grounds of fraud, overreaching, misrepresentation or withholding facts by the adversary. It is even more difficult to understand how the District Court could have reached the conclusion that this enactment would apply retroactively so that prior washout settlements which were approved by the Judge of Compensation Claims could not be set aside by the Judge of Compensation Claims for fraud, overreaching, misrepresentation or withholding facts by the adversary.

The only remaining question is, prompted by the maxim, for every wrong there is a remedy, which is an implementation of the access to Court's provision of the Florida Constitution, Article I, Section 21. The District Court's decision is that settlement agreements, when the worker is represented by counsel, cannot be set aside for fraud, overreaching, misrepresentation or withholding facts by the adversary. Surely, this cannot be the case. The question then would remain: what governmental adjudicator has jurisdiction to consider that issue? The choices are the Judge of Compensation Claims, on the one hand, or the Circuit Court Judge, on the other, if the amount in controversy is sufficient, or a lesser court, and so on. Judicial economy dictates that it should be the Judge of Compensation Claims, rather than have the same case in front of two

different adjudicators. Furthermore, there is a statement of intent by the legislature in §440.015, Fla. Stat., that all workers' compensation controversies should be decided by the Judge of Compensation Claims located in the Division of Administration Hearings (DOAH).

CONCLUSION

The Court should reaffirm its holding in *Steele v. A.D.H. Building Contractors, Inc.*, 174 So. 2d 16 (Fla. 1965), that settlement agreements may be set aside by the Judge of Compensation Claims for fraud, overreaching, misrepresentation or withholding facts by the adversary.

Respectfully submitted,

RICHARD A. SICKING, ESQ.
Attorney for Amicus Curiae,
Florida Professional Firefighters, Inc.,
International Association of
Firefighters, AFL-CIO
1313 Ponce de Leon Blvd., #300
Coral Gables, Florida 33134
Telephone (305) 446-3700
Florida Bar No. 073747

_____
Richard A. Sicking

CERTIFICATE OF FONT SIZE AND STYLE

I certify that this brief has been typed in 14 point proportionately spaced Times New Roman.

_____

Richard A. Sicking

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this 1st day of February, 2007 to: Todd J. Sanders, Esq., counsel for petitioner, 807 West Morse Blvd., #201, Winter Park, Florida 32789 and Barbara A. Eagan, Esq., counsel for the respondents, 445 West Colonial Dr., Orlando, Florida 32804.

_____

Richard A. Sicking