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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MARVIN CASTELLANOS,

Petitioner,

vs.

NEXT DOOR COMPANY and AMERISURE INSURANCE CO.,

Respondents. /

CASE NO.: SC13-2082

Lwr. Tribunal: 1D12-3639;
OJCC No. 09-027890GCC

REPLY BRIEF OF PETITIONER, MARVIN CASTELLANOS, ON THE MERITS

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INTRODUCTION

Throughout this reply brief, the factors for the determination of reasonable attorney's fees contained in Rule 4-1.5(b), Rules Regulating The Florida Bar, and also in the *Lee Engineering* case and *Murray v. Mariner Health Care, Inc.*, are referred to as the "*Lee Engineering* factors".

REPLY TO THE EMPLOYER/CARRIERS' ANSWER BRIEF

This reply highlights some of the points made by the employer/carrier.

The argument of the employer/carrier is simple, but nonetheless incorrect. They start with the premise that only the Legislature can pass a prevailing party attorney's fee statute and therefore, only the Legislature can determine the amount of a prevailing party attorney's fee. (Respondents' Brief, 10-16). The first part is correct, the second is not. According to them, the judicial branch has no role in determining the amount of claimants' attorney's fees in workers' compensation cases. (Respondents' Brief, 10-16). [The Florida Chamber of Commerce makes the same argument on pages 17-19 of their brief]. This cannot be. As the court observed in *Olive II* (page 203), it may have been the Legislature's intent to limit the attorney's fee above [or below] the schedule, but that being so, the statute would be unconstitutional.

To be precise, a prevailing party attorney fee statute goes both ways:

the loser pays the winner's attorney's fees. Section 440.34, Fla. Stat., is a transfer of responsibility statute (a fee-shifting statute) whereby the employee's obligation to pay his attorney is transferred to the employer/carrier under limited circumstances. If the employer/carrier provides the benefits within the 30-days grace period following the filing of the petition for benefits, then the employer/carrier would owe no claimant's attorney's fees at all. §440.34(3), Fla. Stat., which provides:

> Regardless of the date benefits were initially requested, attorney's fees shall not attach under this subsection until 30 days after the date the carrier or employer, if self-insured, receives the petition.

The schedule of the amount of the fee based only the benefits secured applies to both employee paid attorney's fees and employer/carrier paid attorney's fees. §440.34(1) and (3), Fla. Stat. Regardless of who pays the attorney's fee under the 2009 amendment, the Judge of Compensation Claims can only approve of a fee which is determined exclusively by the schedule. §440.34(1) and (3), Fla. Stat. Otherwise, it is a crime. §440.105(3)(c), Fla. Stat.

On pages 8-9 of their brief, the employer/carrier erroneously state that the claimant could augment the scheduled fee paid by the employer/carrier. According to them, he can waive the schedule. (Respondents' brief, 8-9). This is completely wrong because parties cannot agree not to be bound by a

criminal statute. They cannot waive a criminal statute.

Somehow, the employer/carrier never argue that the claimant's attorney's fee of $164.54, which is $1.53 per hour, is adequate.

Nor do they explain how the schedule does not violate due process of law when it cannot distinguish between an inadequate fee, an adequate fee, or an excessive fee.

The employer/carrier argue that Castellanos and his lawyer agreed to the statutory schedule in the retainer agreement. (Respondents' Brief, 2-3, 8, 18-19).

Wrong!

The retainer agreement specifically provided:

> I agree to pay to my attorney a reasonable attorney's fee for such services rendered with respect to my workers' compensation claim.

(A. 22).

The retainer agreement then went on to provide that in the event benefits were provided, the scheduled amounts could be withheld in trust as a retainer towards the attorney's fee. It then provided:

> ...although my attorney's fee may be greater or less than the sums retained in trust, depending on the amount of time my attorney expends in the prosecution of my claim, the difficulty, novelty or complexity of my case and the amount ultimately paid or awarded.

THE JUDGE OF COMPENSATION CLAIMS WILL MAKE THE FINAL DETERMINATION AS TO THE AMOUNT OF/AND MY ATTORNEY'S ENTITLEMENT TO AN ATTORNEY'S FEE.

(A. 22).

The employer/carrier argue that the *Makemson, Olive I, Olive II,* cases do not apply because they are Sixth Amendment right to counsel cases. (Respondents' Brief, 18-19). They concede that *Scruggs* is not. (Respondents' Brief, 18). They miss the point. There is a separate, second part of this line of cases, which is that a statutory cap on attorney's fees is unconstitutional as applied whenever it is inadequate to compensate for the services rendered. An Article V judge can conduct a due process hearing and when he determines that the statutory fee cap is inadequate, it is then treated as unconstitutional as applied, such that a reasonable attorney's fee is then awarded. Interestingly, the attorney's fee statutes involved in these cases did not contain the words "reasonable attorney's fee". There was no ambiguity a la *Murray v. Mariner Health Care, Inc.*, 994 So. 2d 1051 (Fla. 2008). The same reasoning was used in *Public Defender, etc. v. State*, 115 S. 3d 261, at 272-273 (Fla. 2013).

It should be noted that there is a difference between an exclusive attorney's fee schedule that sets the amount of the fee exactly and a statutory cap on attorney's fees at the top. An exclusive attorney's fee schedule, such

as the statute in the present case, that sets the amount of the fee exactly does not comport with due process of law (a fair and meaningful hearing) because it cannot distinguish between an inadequate fee, an adequate fee and an excessive fee. Even someone who received an award of an appropriate fee by accident was prohibited from telling the Judge the relevant information that would identify an appropriate fee, per the *Lee Engineering* factors. In the case of a statutory cap, if the cap is high enough, a judge can determine at a due process hearing whether the fee requested is inadequate, adequate or excessive. When the cap is not high enough, he can do the same and apply the rule of unconstitutional as applied and award a reasonable attorney's fee. The judge of compensation claims, however, does not have the power to do unconstitutional as applied. *Castellanos v. Next Door Co.*, 124 So. 3d 392, at 393-394 (Fla. 1st DCA 2013). Every disputed attorney's fee case would have to be appealed to the First District Court of Appeal in order for an Article V Court to determine whether the claimant's attorney's fee was inadequate, adequate or excessive, by applying the *Lee Engineering* factors. This would clog the docket of the First DCA and interfere with the administration of justice. E.g., *Public Defender, etc. v. State*, supra, at 279. Therefore, the JCC should make this determination in the first instance, by making careful findings of fact on the *Lee Engineering* factors and awarding

reasonable and necessary attorney's fees. *Murray*, at 1062.

Indeed, in *Murray*, at 1061, this Court pointed out that the use of a schedule exclusively would produce an absurd result in all cases, inadequate in some and excessive in others.

REPLY TO AIF'S AMICUS BRIEF

This reply highlights some of the arguments made by AIF.

AIF cites *Ingraham v. Dade County School Board,* 450 So. 2d 847 (Fla. 1984) (AIF Brief, 4). In this case, the Supreme Court of Florida held that the 25% limitation on attorney's fees applied to the statutory waiver of sovereign immunity amount and any additional amount of insurance and that this was constitutional. Bernadette Ingraham suffered a quadraplegic injury. The School Board, self-insured to $100,000, had purchased excess insurance to $1,000,000. The total was tendered on a structured settlement. The trial court held that the 25% limit on attorney's fees applied only to the first $50,000. The Third District Court of Appeal reversed and held that the limitation applied to the entire amount. The Supreme Court affirmed and held the 25% limitation was constitutional. In that case, the cap was Two Hundred Fifty Thousand Dollars ($250,000.00). Under present law, the cap on attorney's fees on the waiver of the sovereign immunity amount alone is Fifty Thousand Dollars ($50,000.00). §768.28(5) and (8), Fla. Stat. Neither

of these is any comparison to the One Hundred Sixty-Four Dollars ($164.54) required by the mandatory attorney's fee schedule in the present case.

AIF cites Section 73.092(1)(c), Fla. Stat., as an example of a sliding scale cap on attorney's fees to be found elsewhere in the Florida Statutes. (AIF Brief, 4-5). In this eminent domain statute, the cap on attorney's fees is 33 1/3% up to $250,000; 25% for $250,000 to $1,000,000; and 20% for over $1,000,000. Furthermore, the statute contains modifying factors like the *Lee Engineering* factors. §73.092(2)(a) through (g), Fla. Stat. Certainly, there is no comparison between this sliding scale statute and the mandatory schedule in the present case.

AIF relies on an Arkansas case, *Smith v. McKee Foods*, ___ S.W. 3d____, 2000 WL 177602 (Ark. App. Feb. 9, 2000). (AIF Brief, 8). They say that an Arkansas appellate court held that a fee of $16.20 was affirmed. They purport to quote the opinion, but the quotation does not show that it was a constitutional challenge. (IAF Brief, 8). First of all, this case has never appeared in the Southwestern Third Reporter and never will. It does appear in Arkansas Appellate Reports published by the State of Arkansas. 69 Arkansas Appellate Reports, page xxiv. It is included in the section entitled "Opinions Not Designated for Publication". 69 Arkansas Appellate Reports, page xxvi. So this case is an unpublished opinion which is not even

precedent in Arkansas. It does appear in the Westlaw service. Arkansas Supreme Court Rule 5-2(c) provides that cases of this kind are not to be cited, quoted, or referred to by any court or in any argument, brief or other materials presented to any court... (Appendix to Petitioner's Motion to Strike Brief of AIF, pages 3-4).

AIF cites *United States Dept. of Labor v. Triplett*, 494 U.S. 715, 110A S. Ct. 1428, 108 L. Ed. 2d 701 (1990). (AIF Brief, 9-11). The Chamber did not follow up their argument based on *Walters* with *Triplett*. *Triplett* has very little to do with the present case because it does not deal with the amount of claimant's attorney's fees specifically. AIF's reliance on *Triplett*, is misplaced.

Triplett was based on the Black Lung Benefits Act of 1972 (BLBA). 30 U.S.C. §932(a) incorporates the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. §928(c) and (e), provide that claimant's attorney's fees must be approved by the deputy commissioner, etc. Otherwise, it is a crime. Approved fees are to be "'reasonably commensurate' with the necessary work done" considering other relevant information. 20 C.F.R. §725.366(b).

Triplett, a West Virginia lawyer, entered into contingent fee contracts with workers that he represented in BLBA claims and he received

unapproved fees. He was charged with unethical conduct by the West Virginia Bar. On review, the West Virginia Supreme Court held that the restrictions on fees were unconstitutional because they effectively denied claimants' access to counsel. The U.S. Supreme Court reversed, holding that any inability to obtain counsel was anecdotal. Furthermore, the Federal Government operated within its powers to limit claimant's attorney's fees in Black Lung Disease Act cases to those which were "'reasonably commensurate' with the necessary work done" together with "other information which may be relevant to the amount of fee requested". Id., at 1430.

In other words, approval of reasonable attorney's fees was constitutionally valid. Unapproved contingent fee contracts were not.

REPLY TO INSURANCE AMICUS BRIEF

This reply highlights some of the points made by the Insurance Amicus Brief.

The amicus brief of Insurance is all about costs. First of all, the cost of complying with the Constitution is not a legal consideration.

They say that the 2003 Amendment to Section 440.34, Fla. Stat., repealing the *Lee Engineering* factors and mandating the strict fee schedule reduced costs. (Insurance Brief, 11, 13-15).

They say that this Court's decision in *Murray v. Mariner Health Care, Inc.*, that there was an ambiguity between the strict schedule and the words "reasonable attorney's fees" and resolving the ambiguity against the schedule increased costs. (Insurance Brief, 16-17).

They say that the Legislature's 2009 repeal of the words referring to a reasonable attorney's fee in Section 440.34, Fla. Stat., was intended to reduce costs. (Insurance Brief, 17). They call this the "*Murray* Fix". (Insurance Brief, 17).

They say that the Court should not hold that the 2009 Amendment is unconstitutional because it would increase costs. (Insurance Brief, 17-19).

The Staff Analysis accompanying the 2009 Amendment states: "The bill should have no more than a minimal fiscal impact on State and Local government". (Emphasis added). (Appendix to Petitioner's Initial Brief, page 1).

Inappropriately, they quote a series of "Whereas" clauses that were unadopted in 2009. (Insurance Brief, 18-19). Laws that are not passed, are not laws.

The Staff Analysis that accompanied the 2009 Amendment involved here stated that between 2003 and 2009, workers' compensation costs were down over 60 % for all the changes made in 2003. (Appendix to Petitioner's

Initial Brief, p. 3).

During about the same period of time, the Department of Insurance report stated that costs were down 56 % for all the changes made in 2003. *Westphal v. City of St. Petersburg*, 38 Fla. L. Weekly D504 (Fla. 1st DCA Feb. 28, 2013); footnote 8, 2013 Fla. App. LEXIS 3203*27.

What is disturbing however, is that the Florida Office of the Insurance, Consumer Advocate, reported that during this same period of time, premium dollars that went to benefit employees (disability, death benefits, hospital, medical and pharmacy benefits, etc.), account for only 43.7% of premium in Florida compared to 61.8% throughout the United States. (A. 4). Thus, the administrative load accounts for more than half the costs. This is the overhead, salaries and profits of those who run the program.

In 2012, the Legislature repealed the excess profits limitation on workers' compensation insurance carriers so that now insurance carriers can keep excess profits, instead of rebating them to employers. Ch. 2012-2013, §7, at 2913. Laws of Fla.

Insurance agents' commissions routinely are 11% of the premium for writing an insurance policy that the employer has to purchase annually. (A. 19). This is more than the total of all claimants' attorneys' fees. According

to the Deputy Chief Commissioner's report of 2007-2008 at the time of the 2009 Amendment, claimants' attorneys' fees amounted to $188,701,256[1] of a $3.3 billion program. (Appendix to Petitioner's Initial Brief, pages 33-34, 189). This is less than 5% of the cost of the program. Employer/carrier fees were $82 million more, $270,501,574. (Appendix to Petitioner's Initial Brief, p. 34).

Then, there is the "Sponsorship Fee". It is not illegal. It is not legal either because apparently nobody thought they would do it. Premium dollars are taken out of a trade association's workers' compensation self-insurance fund and sent to the sponsoring trade association to pay for lobbying and any other expenses of the trade association. Because it is unregulated, nobody knows how much it is, but if it were only 1% of the premium, it would amount to at least $10 million dollars a year, year after year after year. (Appendix to Petitioner's Initial Brief, p. 189).

Saving costs is a good motive, but not at the expense of violating the Constitution. If it were otherwise, then we would have to accept the Legislature's abolishing the right of people to have a hearing to dispute a parking ticket, on the ground that this would save costs. After all, parking tickets are not criminal. Could not the Legislature just deny people the right

[1] This includes employee paid fees as well as employer/carrier paid fees.

to dispute a parking ticket in order to save costs? The answer, of course, is no, because of the Constitution. Why, they could even bring back hanging, which is cheaper than lethal injections, in order to save costs, except for the Constitution.

REPLY TO FLA. CHAMBER OF COMMERCE AMICUS BRIEF

This reply highlights some of the points made by the Florida Chamber of Commerce/Florida Justice Reform Institute.

The Florida Chamber of Commerce argues that deciding that the 2009 Amendment to Section 440.34, Fla. Stat., is unconstitutional would cost $360 million dollars. (Chamber Brief, 11). Consider: If the employer/ carrier paid what was owed within the 30-days grace period following the filing of a petition for benefits by the claimant's attorney, they would owe no claimant's attorney's fees at all. §440.34(3), Fla. Stat. By these statements, they must expect that they are either wrongfully going to deny benefits in an enormous number of cases, or else they are greatly exaggerating; mother and father said that exaggerating is lying.

The Chamber mentions the Ombudsman Office as though this were a realistic solution to enable injured workers to handle their own claims. (Chamber Brief, 10). They forgot to mention that there are only 8 ombudsmen for the 19 million people of Florida. One is the supervisor in

Tallahassee and they are not authorized to provide legal advice or services.

The Florida Chamber of Commerce cites *Walters v. National Association of Radiation Survivors*, 473 U.S. 305; 105A S. Ct. 3180; 87 L.Ed. 2d 220 (1985). (Chamber Brief, 6-8). In *Walters*, a federal statute passed in 1862, limited attorney's fees in veterans' disability applications to $10.00 to be paid by the Veterans' Administration. *Walters*, at 3189. The U.S. Supreme Court pointed out a number of things about these claims. There was no judicial review available of the VA's decision regarding benefits. It was not an adversarial proceeding. There was no statute of limitations and there was no res judicata effect. Further, the VA was directed by regulation to resolve all reasonable doubts in favor of the claimant. Non-lawyers, including service organizations like the American Legion, may represent veterans in such claims. As the claims were not legal proceedings as such, the U.S. Supreme Court held that the ancient fee limitation was not unconstitutional. Later, in *United States Department of Labor v. Triplett*, 494 U.S. 715, 110A S. Ct. 1428, 108 L. Ed. 2d 701 (1990), the U.S. Supreme Court stated that lawyers were not necessary in the VA claims. *Triplett*, at 1433.

Now, for the rest of the story: The very next year, in 1991, Congress repealed the $10.00 limitation on attorney's fees and moved the statute to 38

USC §5904 to provide for a reasonable attorney's fee, not to exceed 20% of the past due benefit. 38 USC §5904(c)(3) and (d)(1). Thus, *Walters v. National Association of Radiation Survivors*, supra, was in effect legislatively overruled.

The Chamber argued about the availability of lawyers to represent claimants. (Chamber Brief, 14-15). AIF made the same argument. (AIF Brief, 11-15). This is an answer for which there was no question. The petitioner did not argue in the initial brief about unavailability of counsel.

CONCLUSION

The 2009 Amendment to Section 440.34, Fla. Stat., deleting the reference to reasonable attorney's fees should be declared invalid, the certified question answered in the negative and the case remanded to the Judge of Compensation Claims to award a reasonable attorney's fee.

Respectfully submitted,

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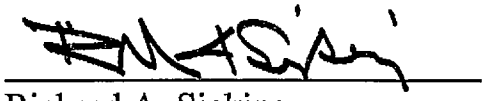

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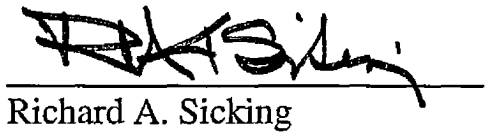

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