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IN THE SUPREME COURT OF FLORIDA

Orestes Ferrer,
Claimant/Petitioner,

vs.

Case No.: SC15-818
Lower Tribunal No.(s):
1D14-5178; 11-002409MAM

Truly Nolen of America, Inc., and
Broadspire Services, f/k/a/, Crawford & Company,

Employer/Servicing Agent/Respondents.

RESPONDENT'S RESPONSE TO THIS COURT'S
ORDER TO SHOW CAUSE

The Respondents, TRULY NOLEN OF AMERICA, INC., and BROADSPIRE SERVICES, f/k/a CRAWFORD & COMPANY, pursuant to this Court's order of 7/29/2016 directing it to (1) show cause why this Court should not accept jurisdiction in this case; (2) summarily quash the decision to be reviewed; (3) remand for reconsideration in light of the decision in Castellanos v. Next Door Co., 41 Fla. L. Weekly S197 (Fla. April 28, 2016); and address the issue of whether this Court should grant petitioner's motion for appellate attorney's fees for proceedings in this court but deny appellate attorney's fee that were sought and denied by the district court, if appellate attorney's fees were sought and denied at the First District court of appeal, respond as follows:

I. AS MORE FULLY OUTLINED BELOW, THE RESPONDENTS RESPECTFULLY ANSWER THIS COURT'S QUESTIONS AS FOLLOWS:

1. This Court should deny jurisdiction in this case as the issue before it was determined in Castellanos;

2. This Court should quash the decision to be reviewed from the First District Court of Appeals as it was sent for review based on Castellanos;

3. This Court should Affirm the decision of the Judge of Compensation Claims as, notwithstanding the result in Castellanos, the issue of the enhanced fee re Lee Engineering, Lee Engineering & Constr. Co v. Fellows, 209 So.2d 454 (Fla. 1968), adopted in Rule 4-1.5, Rules Regulating the Florida Bar, was fully briefed by both parties, argued before the JCC, and it was found and ordered by the JCC:

> I find that claimant's counsel has not produced competent substantial evidence of the amount of an hourly fee in this case, because it is not possible to tell who actually performed the work, and therefore it is not possible to determine what hourly rate(s) should apply. I find that the verified petition and attached time sheets are confusing and misleading, and do not constitute competent substantial evidence as required for claimant's burden of proof, even if an hourly fee were applicable to this case.
> (Appendix, Order of the JCC, Exhibit "1", p. 4, pp 4)

The JCC ordered:

> WHEREFORE it is hereby ORDERED AND ADJUDGED as follows:
>
> 1. E/C shall pay to claimant's counsel a guideline fee in the amount of $135.02.
> 2. Claimant's claim for an hourly fee is DENIED on the grounds that (a) hourly fees are not permitted under the statute applicable to this date of accident; and (b) claimant failed to present competent, substantial evidence as to the amount of an hourly fee in any event.
> 3. E/C shall reimburse claimant's counsel in the amount of $517.73 in taxable costs.
>
> (Appendix, Order of the JCC, Exhibit "1", page 5, pp 3)

and;

4. This Court should deny all appellant attorney fees as Petitioners did not prevail at any level.

II. POSTURE OF THE CASE

1. Discretionary jurisdiction was sought in this court following the First District Court of Appeals affirming of the order of the Judge of Compensation Claims based on Castellanos, id. The order stated:

> In so doing, we certify that our disposition of the instant case passes upon the same question we certified in Castellanos, id. at 394. See, Jollie v. State, 405 So.2d 418, 421 n.* (Fla. 1981).

2. This Court stayed further action prior to briefing pending a decision in Castellanos.

3. In the interim, the Respondents asked that jurisdiction be remanded back to the First DCA for the purpose of filing a motion for rehearing in that court.

4. The Motion for Rehearing was denied and jurisdiction returned to this Court, at which time, further action was stayed pending a decision in Castellanos.

III. ARGUMENT IN SUPPORT OF ANSWERS:

This case is distinguishable not only from Castellanos but also the companion cases in which an opinion was issued on the same day as Castellanos. See Diaz v. Palmetto General Hospital, et al., No.: SC14-1916 (Fla slip opinion, April 28, 2016, ("For the reasons explained in our opinion in Castellanos, we therefore quash the First District's decision in Diaz and remand for further proceedings consistent with Castellanos").; Richardson v. Aramark/Sedgewick CMS; No. SC 14-738 (Fla. slip op. April 28, 2016). ("Because our holding in Castellanos clearly resolves this issue, we quash the First District's decision and remand for further proceedings consistent with Castellanos"); Pfeffer, et al. v. Labor Ready Southeast, Inc., et al., No. SC14-1325 (Fla. slip opinion April 28, 2016), ("Because our holding in Castellanos resolves this issue, we quash the First District's

decision and remand for further proceedings consistent with Castellanos") and which were accepted by this Court based on Castellanos.

While all four cases involved the claimant's attorneys' being granted the statutorily mandated percentage of benefits obtained fee, it was only in this one, Ferrer, that the JCC awarded the statutory fee, but also found that, even if the enhanced fee had been allowed, the Claimant did not meet his evidentiary burden and the enhanced fee would have been denied.

In this case, the amount of the benefits obtained was $675.12, giving a statutory fee of $135.02. Here, although the JCC awarded the statutory fee which was the law at the time, he also ruled on whether there would have been entitlement to an enhanced fee and found that the Petitioners did not meet their burden of proof as they did not present competent substantial evidence upon which the JCC could rule. (Order of the JCC, p.5, pp 3)

> The Claimant bears the burden of proving (1) entitlement to an attorney fee and (2) the quantum of same. Kraft Diary Group v. Sorge, 634 So.2d 720 (Fla. 1st DCA 1994); See, Hensely v. Eckhart, 461 U.S. 424, 437 (1983) ("the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates").

In their verified petition for attorneys' fees and costs, Petitioners attached the attorney time sheet as support for their claim. (Appendix, Verified Petition of Petitioners, Exhibit '2", pgs 11-14) In its response, the Respondents pointed out that it was impossible to determine the validity of the time sheet as all hours were attributed to the senior attorney, Paul Rosenberg, who did not perform all time attributed to him. (Appendix, Verified Petition of Petitioners, Exhibit "3" pg. 6, pp e). Also in its response, in an exercise of caution, the Respondents responded to all the criteria in Lee Engineering, Id. which would have been part of the decision had they been allowed. (Appendix, Response to Verified Petition, Exhibit "3", pg. 3, pp. 8).

Even after the discrepancy was noted in the response, Petitioners' did not correct it nor file an amended Verified Petition nor did they present evidence at hearing to clarify the omission.

The Lee Engineering criteria came into play because the Petitioners asked the Court for leave to "make a record" in the event the Castellanos opinion found the statutorily mandated fees unconstitutional.

The Petitioners had ample time to correct their Verified Petition to conform to the required burden of proof as the Respondent

pointed out the problem in its response to the Verified Petition and the Petitioners did nothing. If this case is remanded to the JCC, he has already ruled that the burden of proof was not met and Petitioners should not be allowed another "bite of the apple".

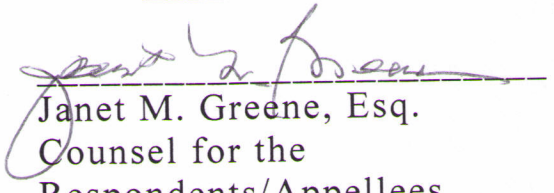
Regardless of the ruling in Castellanos, the initial review of the request for attorneys fees is still the percentage of benefits obtained. Castellanos, id at p. 38 ("We emphasize, however, that the fee schedule remains the starting point and that the revival of the predecessor statute does not mean that claimant's attorneys will receive a windfall.") It is only after the statutory fee is determined to be insufficient that the Lee Engineering factors are brought into play. Here, the Lee Engineering factors were fully argued in the Verified Petition and the Response to the Verified Petition and in the hearing on the issue before the JCC and found to be insufficient not to meet the criteria of competent substantial evidence.

IV. CONCLUSION

In Answer to this Court's Order to Show Cause, the Respondents respectfully ask this Court to (1) deny jurisdiction; (2) summarily quash the decision being reviewed; (3) affirm the order of the Judge of Compensation Claims as res judicata; and (4) deny appellate

attorney's fees as Petitioners did not prevail at any level.

Respectfully submitted this 13th day of July, 2016.



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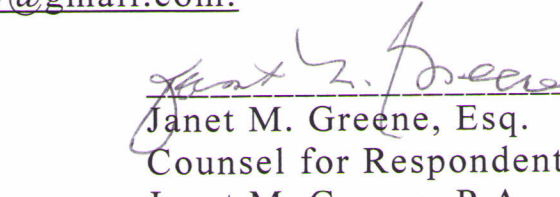
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that the foregoing was sent, via electronic mail on this 13th day of July, 2016 to: Paul Rosenberg, Attorney for the Petitioner/Employee/Claimant, 2501 Hollywood Blvd., Ste. 110, Hollywood, Fl 33020-6631, prosenberg@rrpalaw.com, Kimberly A. Hill, Co-Counsel for the Petitioner/Employee/Claimant, 821 S.E. 7th Street, Ft. Lauderdale, FL 33301, kimberlyhillappellatelaw@gmail.com.



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CERTIFICATE OF COMPLIANCE

Respondents hereby certify that the above Response to this Court's Order to Show Case complies with the font requirements of Florida Rules of Appellate Procedure 9.100(h) and (l) and is submitted in Times New Roman 14-point font.

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