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IN THE SUPREME COURT OF FLORIDA

SC Case No.: S15-818
DCA Case No.: 1D14-5178

OJCC Case No. 11-002409MAM

Orestes J. Ferrer,

Claimant/Petitioner,

vs.

Truly Nolen of America, Inc., and
Crawford and Company,

Employer/Carrier/Respondents.
_____/

PETITIONER'S REPLY TO THE RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE DATED JULY 14, 2016

Comes now the Petitioner, Orestes J. Ferrer, and files this Reply to the Respondents' Response to the Order to Show Cause issued by this Court on June 29, 2016 and states as follows:

1. The Respondents contend in their July 13, 2016, response to the order to show cause that this court should deny jurisdiction and attorney's fees in this case. However, Petitioner contends that the argument in support of Respondents position has no merit at this stage of the litigation as will be discussed further infra. As such, Petitioner asserts that this court should in

fact summarily quash the decision being reviewed, and remand for reconsideration in light its decision in *Castellanos v. Next Door Co*., 41 Fla. L. Weekly S197 (Fla. Apr. 28, 2016).

2. The Respondents' reasoning is that the JCC found:

> [c]laimant's counsel has not produced competent substantial evidence of the amount of the hourly fee in this case, because it is not possible to tell who actually performed the work, and therefor 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.

However, the Petitioner challenged this finding in the initial brief on the merits filed in the District Court and it was not addressed in the opinion. Rather, the District Court's opinion provided as follows: "Based on *Castellanos v. Next Door Co.*, 124 So. 3d 392 (Fla. 1st DCA 2013), we AFFIRM. 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)."

3. The Respondents challenged the certification made in the District Court's opinion by filing a motion for rehearing and arguing essentially the same thing that they are arguing now. The District Court denied the motion for rehearing evincing that it did not think there was any merit to the

Respondents' "failure of proof" argument, which in essence is really a preservation or error argument. Presumably, the District Court felt that the Petitioner did whatever was necessary to preserve the constitutionality issue for appellate review; otherwise the case would not be in its current procedural posture. Surely, if the District Court believed their was a failure of proof or a preservation of error issue, it would not have certified that the issue was the same issue certified in *Castellanos* after being informed of the purported failure of proof in the initial brief, answer brief, reply brief, E/C's motion for rehearing and the response to the motion for rehearing. Moreover, the District Court would have had no cause or reason to address the constitutionality issue, if there was another valid basis upon which to affirm the decision of the JCC.

4. Based on the state of the law when this case was decided, the JCC had no authority and was, in fact, statutorily bound to award a guideline fee no matter the circumstance. Nevertheless, the JCC specifically found that an ***upward departure from the fee was justified and that 32.8 hours were reasonable in this case***. Beyond that there was certainly no requirement that the Claimant prove a certain hourly rate or that the JCC make a finding that a certain hourly rate was appropriate. Any finding as to a reasonable hourly rate would be superfluous in any case because the rate could not be awarded

under any circumstance. The only finding necessary to preserve the constitutional issue for appellate review was made by the JCC when he found that 32.8 hours were reasonably expended, but not compensable because the statute mandated that the statutory guideline fee be awarded. The hourly amount can be set on remand.

5. The District Court's stance is not surprising given that the Respondents conceded before the JCC that most of the hours claimed by Petitioner's counsel were reasonable and, as noted above, the JCC found that Claimant's counsel reasonably expended 32.8 hours of time securing benefits. (R. 15). This means the fee awarded was $4.12 per hour ($135.02 divided by 32.8). Certainly this is an unreasonable hourly rate governed by any standard. Although the Respondents are correct in asserting that the JCC found that it was not possible to determine what hourly rate(s) should apply because all of the time was under one attorneys name, they ignore the fact that it was entirely possible based on the unrefuted evidence presented for the JCC to make an hourly rate finding. The JCC could have selected any hourly rate in the unrefuted range of hourly rates attested to by the Petitioner's counsel, even if he chose to apply the lowest hourly rate to all of the reasonable attorney time, which would have resulted in a fee of $275.00

per hour for all of the hours claimed for a total of $9,020.00 instead of $135.02.

7. The Respondents have also failed to assert a valid basis for the denial of appellate attorney's fees. Petitioner disagrees with Respondents' reasoning as to why appellate attorney's fees should not be awarded in relation to this case. The Respondents assert that the Petitioner has not prevailed at any at any level of the proceedings. Section 440.34(5), Florida Statue, is a discretionary fee provision, as opposed to a prevailing party fee provision. In most circumstances appellate fees are awarded when the injured worker is the prevailing party in connection with a workers' compensation appeal. Therefore, if this Court agrees with the District Court's determination that the disposition of this case passes upon the same question that was certified in *Castellanos*, then the Petitioner will have prevailed by virtue of the outcome in *Castellanos*.

8. Not only that, but it would be unjust and inequitable to deny appellate attorney's fees, assuming this Court agrees that the District Court's decision should be quashed and remanded, especially where the Respondents forced the issue and filed a motion to compel the injured worker's trial counsel to file a verified petition for attorney's fees, despite the pendency of *Castellanos*. This motion was granted by the JCC.

Thereafter, the fee hearing took place and the guideline fee was awarded. The only way to preserve the right to a "reasonable fee" was to file an appeal and await the outcome of *Castellanos*. But for the appellate counsel's filings first in the District Court and then in this Court, the injured worker (and the beneficiary of the award, her trial counsel) would not now be entitled to a "reasonable fee" for his efforts, assuming the District Court's decision is quashed and remanded.

9. As such, Petitioner contends that this Court should award appellate attorney's fees for the proceedings in this Court and remand to the JCC for a determination of the amount. If this Court is not inclined to reverse the District Court's denial of appellate attorney's fees, it should leave the decision to the District Court as to whether it will rescind its prior order denying appellate attorney's fees on remand as it has done in *Castellanos* and *Diaz v. Palmetto Gen. Hosp.*, No. SC14-1916, slip op. at 1-2 (Fla. Apr. 28, 2016) [41 Fla. L. Weekly S208b] (See attached exhibit #1). The District Court has yet to decide whether appellate attorney's fees are owed in *Richardson v. Aramark/Sedgwick CMS*, No. SC14-738, slip op. at 2-3 (Fla. Apr. 28, 2016) [41 Fla. L. Weekly S207a] and *Pfeffer v. Labor Ready Se. Inc.*, No. SC14-1325, slip op. at 1-2 (Fla. Apr. 28, 2016) [41 Fla. L. Weekly S208a].

WHEREFORE, it is respectfully asserted that this court should accept jurisdiction in this case, summarily quash the decision being reviewed, and remand for reconsideration in light of the concession that *Castellanos controls* the outcome of this case. As to appellate attorney's fees, this Court should award appellate attorney's fees relating to the proceedings in this court and, if it is not inclined to reverse the District Court's order denying attorney's fees, leave it to the District Court as to whether it will award fees in its sound discretion, once it enters its order on remand in accordance with this court's mandate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was sent via electronic mail on this 24th day of July 2016 to: Paul Rosenberg, Esquire, Attorney for the Employee/Claimant, 2501 Hollywood Blvd Ste 110, Hollywood FL 33020-6631 prosenberg@rrpalaw.com; Janet M. Greene, Attorney for the Employer/Carrier, 3225 S Macdill Ave Ste 129-308, Tampa FL 33629-8171 jg3910@msn.com.

/s/_____

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June 23, 2016

CASE NO.: **1D14-1676**
L.T. No.: 11-002425GCC

Henry Diaz	v.	Palmetto General Hospital Sedgwick CMS
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

The court's opinion of September 19, 2014, having been quashed by the Supreme Court of Florida, the court hereby rescinds its September 19, 2014, order denying Appellant's motion for appellate attorney's fees and costs, filed July 14, 2014, and hereby GRANTS the motion and REMANDS to the Judge of Compensation Claims to determine the amount.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Martha D. Fornaris
Russell H. Young
Hon. Margret G. Kerr
Kimberly A. Hill
Vanessa De Rosa Lipsky
Cindy R. Galen

jm

JON S. WHEELER, CLERK