IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ESCAMBIA COUNTY SCHOOL DISTRICT/ BOARD,

Appellants,

v.

TINA VICKERY-ORSO,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-4813

Opinion filed April 3, 2013.

An appeal from an order of the Judge of Compensation Claims.
Nolan S. Winn, Judge.

Date of Accident: February 26, 2008.

Joseph L. Hammons of the Hammons Law Firm, Pensacola, for Appellants.

Jeremiah J. Talbott of the Law Office of Jeremiah J. Talbott, P.A., Pensacola, for Appellee.

PER CURIAM.

In this workers' compensation appeal, the Employer seeks review of an order of the Judge of Compensation Claims (JCC) to the extent it awards Claimant an upward adjustment in the compensation rate, and penalties, interest, costs, and

attorney's fees associated with that adjustment. For the reasons stated herein, we find error and reverse this award.

On February 26, 2008, Claimant suffered multiple injuries in a compensable motor vehicle accident. On August 22, 2011, the Employer administratively accepted her as permanently and totally disabled. Claimant sought permanent total disability (PTD) benefits from December 17, 2010, to April 25, 2011, and adjustment of her average weekly wage (AWW) based on her wages together with includable fringe benefits under section 440.02(28), Florida Statutes. Subsequent litigation resulted in a final order which, in part, denied the requested PTD benefits. We do not disturb that ruling on appeal.

The final order also included the JCC's findings regarding the appropriate AWW amounts both before and after Claimant's resignation, which affected the inclusion (vel non) of fringe benefits in AWW. The JCC agreed with the Employer's calculations of AWW amounts, but disagreed with the Employer's calculations of the appropriate compensation rates.

Section 440.15(1)(a), Florida Statutes (2007), states that the compensation rate for PTD benefits is "66 2/3 percent of the average weekly wages." The JCC calculated the appropriate compensation rate by multiplying the AWW by .6667. The Employer had calculated the compensation rate by multiplying the AWW by .66667. The different multipliers led to different results – the focus of the dispute

here. Yet both results are greater than the result dictated by strict application of the statute, which states the compensation rate is not .6667 or .66667 of the AWW, but "66 2/3 percent." See generally Fla. Dep't of Educ. v. Cooper, 858 So.2d 394, 396 (Fla. 1st DCA 2003) ("First, the court must look to the plain language of the statute. Where the language is clear and unambiguous, it must be given its plain and ordinary meaning."). An illustration of the proper calculation method follows.

Begin with the appropriate AWW for the period before Claimant's resignation: $794.21. Using the most strict reading of the statute: sixty-six percent of 794.21 is 524.1786. One percent of 794.21 is 7.9421. Two-thirds of one percent of 794.21 – that is, two-thirds of 7.9421 – is $5.2947\overline{3}$. The fraction is determined by multiplying by two and then dividing the result by three. Adding 524.1786 and $5.2947\overline{3}$ together produces a result of $529.4733\overline{3}$. Rounding to cents gives us the appropriate compensation rate, $529.47.

Notably, the mathematical equivalent of the statutory definition of the compensation rate is still a fractional amount: two-thirds of the AWW. In this example, one would multiply 794.21 by two to get 1,588.42, and then divide 1,588.42 by three to get $529.47\overline{3}$; rounded to cents, this again is $529.47. Using the Employer's multiplier – a decimal number – gives a different, less accurate, result: 794.21 times .66667 is 529.4759807, which, rounded to cents, is $529.48. And using the JCC's multiplier gives yet a third result: 794.21 times .6667 is

529.499807, which, rounded to cents, is $529.50. These differences of two or three cents become significant when repeated over multiple payments, and are even more significant when they form the basis of awards of penalties, interest, costs, and attorney's fees.

Because the Employer did not pay less than the compensation rate required by statute, the JCC erred in ordering the Employer to pay more. The JCC consequently erred in awarding associated penalties, interest, costs, and fees.

AFFIRMED in part and REVERSED in part.

RAY and SWANSON, JJ., CONCUR; WOLF, J. CON CURRING IN PART AND DISSENTING IN PART.

WOLF, J., Concurring in part and Dissenting in part.

I reluctantly agree to reverse because I can find no precedent which would allow us to affirm a miscalculation of the compensation rate simply because the amount involved is *de minimis*. I would, however, exercise our discretion and award Claimant attorney's fees for defending this appeal pursuant to section 440.34(5), Florida Statutes (2007), because it is my belief that this appeal should not have been taken for the reasons stated within this opinion.

The crux of this appeal is an alleged miscalculation of the compensation rate. The disputed amount at most is 3¢ per week. Claimant states in her brief that the total maximum difference in total benefits that would be paid out is insignificant. The Employer does not dispute this amount but asserts that "without requiring the Employer to pay the Claimant an attorney's fee and costs [for benefits obtained in front of the JCC], it is unlikely this appeal would have resulted."[1]

The Employer, however, does not specifically argue that the JCC erred in granting an attorney's fee based on the insignificant amount involved in this case,

[1] Another arguable reason for taking this appeal is the effect of the JCC's decision as to the systematic extra benefits which would have to be paid rather than just the amount involved in this case. I reject this as a reason not to grant Claimant appellate fees for a number of reasons: (1) the Employer did not raise the issue; (2) there is nothing in the record or the briefs to support the idea that the extra systematic costs would be significant; and (3) the JCC's decision had no precedential value.

nor is there an argument presented that the amount of fees awarded below was excessive based on benefits obtained. In fact, it is not clear that the amount of fees had even been determined at the time this appeal was taken.

It is also unclear to me that the potential size of the trial attorney's fees in this case justifies an appeal.

The injury in this case took place prior to July 1, 2009; thus, in determining the appropriate trial fee to be awarded, the court would be governed by the test of reasonableness and the factors enumerated in Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454 (Fla. 1968), as codified in section 440.34(1), Florida Statutes (1977). See Murray v. Mariner Health, 994 So. 2d 1051 (Fla. 2008). Two very important factors in this calculation are: (1) the amount involved in the controversy and the benefits resulting to Claimant, and (2) the time and labor required in relation to the controversy at issue. In the instant case, both factors would be minimal. As previously noted, the amount in controversy below was insignificant. The issue in dispute was simple and involved presentation to the JCC of a mathematical calculation formula – hardly a time-consuming effort. If more than a small fee is awarded to Claimant for her attorney's work before the JCC, the Employer may have an issue worthy of appeal. At the present time, there is no significant dispute justifying the time and expense of this appeal. I would thus award Claimant an appellate attorney's fee.