

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,239

RAYMOND O. DIXON

Petitioner/Cross-Respondent,

-vs-

GAB BUSINESS SERVICES, INC.

and

BIO LAB, INC.

Respondents/Cross-Petitioners.

**ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA**

REPLY BRIEF OF RESPONDENTS/CROSS-PETITIONERS

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I hereby certify that this Brief is in proportional spacing and the font is 14 point.

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PRELIMINARY STATEMENT

In the Answer, Initial, and Reply Brief of Respondents/Cross-Petitioners, the parties will be referred to as they appeared before the Judge of Compensation Claims (JCC), the Honorable John Thurman, and as they appeared before the First District Court of Appeal. Respondent and Cross-Petitioner, Bio Lab, Inc., will be referred to as the "Employer," and Respondent and Cross-Petitioner, GAB Business Services, Inc., will be referred to as the "Carrier." Collectively, Respondents and Cross-Petitioners will be referred to as the Employer/Carrier or the "E/C." The Petitioner/Cross-Respondent will be referred to as the "Claimant." Witnesses will be referred to by their proper names. References to the record on appeal will be designated as follows: Volume and page will be represented by volume number followed by a dash, followed by the page number. For example Volume 1, page one will be 1-1.

SUMMARY OF ARGUMENT

The Claimant filed a motion for attorney's fee before the First District Court of Appeal citing section 440.34 as the basis for awarding an appellate attorney's fee. However, under section 440.34(3) a Claimant may be awarded an attorney's fee taxable against the Employer or Carrier only in four defined circumstances. The Claimant may receive an award of an attorney's fee taxed against the Employer/Carrier when (a) the Claimant successfully asserts a claim for medical benefits only when the Claimant has not filed nor is entitled to file a claim for disability; or (b) in any case in which a Carrier files a notice of denial and the Claimant retains an attorney and is successful in the prosecution of the claim; or (c) in a proceeding in which a Carrier or Employer denies that an injury occurred for which compensation benefits are payable and the Claimant prevails on the issue of compensability; or (d) in cases where the Claimant successfully prevails in proceedings filed under section 440.24 (enforcement of compensation order) or section 440.28 (modification of a compensation order).

The Claimant in this case did not prevail on appeal and, in fact, the order from the judge of compensation claim was reversed in its entirety. The Claimant attorney obtained no benefits for the Claimant on appeal and therefore did not qualify under any one of the four criteria for an award of an attorney's fee against the Employer/Carrier. There is nothing in section 440.34 that would allow the First District Court of Appeal to award an attorney's fee in favor of the Claimant against the Employer/Carrier in the absence of the Claimant obtaining any benefit.

The mere fact that a question was presented to this Court as one of great public importance and needing to be resolved is not a benefit obtained for the Claimant. The Claimant received no benefits whatsoever and in fact lost the benefits on appeal. The Employer/Carrier prevailed in its entirety on the appeal and therefore the Claimant is not entitled to an award of attorney's fees. This Honorable Court should therefore should reverse the First District Court of Appeal with respect to its award of an attorney's fee to the Claimant attorney but otherwise affirm the First District Court of Appeal on the merits pursuant to this Court's previous decision outlined in *Escambia County Sheriff's Dept. v. Grice*, 692 So. 2d. 896 (Fla. 1997).

ARGUMENT

I.

THERE IS NO BASIS IN LAW FOR THE AWARD OF ATTORNEY'S FEES TO THE CLAIMANT BY THE FIRST DISTRICT COURT OF APPEAL WHEN THE CLAIMANT IS NOT THE PREVAILING PARTY AND WHEN THE ATTORNEY SECURED NO BENEFITS FOR THE CLAIMANT.

Florida Statute §440.34(1) states as follows: “A fee, gratuity, or other consideration may not be paid for services rendered for a Claimant in connection with any proceedings arising under this chapter, unless approved as reasonable by the judge of compensation claims or court having jurisdiction over such proceedings.” In section 440.34(2), the statute states that “in awarding a reasonable Claimant’s attorney’s fee, the judge of compensation claim shall only consider only [sic] those benefits to the Claimant that the attorney is responsible for securing.... For purposes of this section, the term ‘benefit secured’ means benefits obtained as a result of the Claimant’s attorney’s legal services rendered in connection with the claim for benefits.”

Section 440.34(3) states as follows:

If the Claimant should prevail in any proceedings before a judge of compensation claims or court, there shall be taxed against the Employer the reasonable cost of such proceedings, not to include the attorney’s fees of the Claimant. The Claimant shall be responsible for the payment of his own attorney’s fees, except that a Claimant shall be entitled to recover a reasonable attorney’s fee from a Carrier or Employer:

(a) Against whom a Claimant successfully asserts a claim for medical benefits only, if the Claimant has not filed or is not entitled or is not entitled to file at such time a claim for

disability, permanent impairment, wage-loss, or death benefits, arising out of a same accident;

(b) In any case in which the Employer or Carrier files a notice of denial with the division and the injured person has employed an attorney in the successful prosecution of his claim; or

(c) In a proceeding in which a Carrier or Employer denies that an injury occurred for which compensation benefits are payable, and the Claimant prevails on the issue of compensability; or

(d) In cases where the Claimant successfully prevails in proceedings filed under s.440.24 or s.440.28.

In applying the factors set forth in subsection (1) to cases arising under paragraphs (a), (b), (c), and (d), the judge of compensation claims must only consider only such benefits and the time reasonably spent in obtaining them as were secured for the Claimant within the scope of paragraphs (a), (b), (c), and (d).

Rule 9.180(i) of the Florida Rules of Appellate Procedure states that appellate cost shall be taxed as provided by law, and if the court determines that an appellate fee is due, the lower tribunal shall have jurisdiction to conduct hearings and consider evidence regarding the amount of the attorney's fee and cost due at any time after the mandate is issued. Under rule 9.400(b), a motion for appellate attorney's fees may be filed no later than time for the service of the reply brief and shall state the grounds on which recovery is sought.

The motion which the Claimant/Appellee filed for attorney's fees in the First District Court of Appeal stated in its entirety as follows:

COMES NOW the Appellee, Brian, through his undersigned attorneys, and respectfully petitions the First District Court of Appeal to grant his attorneys a reasonable fee for

representation before this Honorable Court. *Statutory authority for this award is section 440.34, Florida Statutes.* (emphasis added) (See Appendix, Exhibit “A”).

The only statutory basis upon which the Claimant filed a motion for attorney’s fees is section 440.34 of the Florida Statutes. As outlined above, nowhere in section 440.34 does the statute allow an award of attorney’s fees to a Claimant when the Claimant does not prevail against the Employer/Carrier. The only basis for an award of attorney’s fees against the Employer/Carrier is found in section 440.34(3). The only grounds for an award for an attorney’s fee includes the following: (a) when a Claimant successfully asserts a claim for medical benefits only when the Claimant has not filed for and is not entitled to file for any claim for disability at the time the medical benefits are claimed; (b) in any case in which the Employer or Carrier files a notice of denial with the division and the injured person has employed an attorney in the successful prosecution of his claim; or (c) in a proceeding in which a Carrier or Employer denies that an injury occurred for which compensation benefits are payable and the Claimant prevails on the issue of compensability; or (d) when a Claimant successfully prevails in proceedings filed under section 440.24 (enforcing a compensation order) or section 440.28 (modification of a compensation order).

The Claimant is not entitled to an attorney’s fee under section 440.34 because the claim before the First District Court of Appeal, which is now before this Court, did not claim any medical benefits and consequently was not a medical benefits claim. The claim did not involve one where the Employer or Carrier filed a notice of denial and the Claimant was successful in the prosecution. Indeed, the First District

Court of Appeal reversed the judge's order and ruled in favor of the Employer/Carrier and against the Claimant. The Claimant did not obtain any benefits. Additionally, the Carrier or Employer did not deny compensability of this claim. Finally, this claim does not involve enforcement of the compensation order or the modification of such an order. Therefore, there is absolutely no statutory basis upon which to award an attorney's fee to the Claimant. Moreover, the cases of *Wick Roofing Co. v. Curtis*, 110 So. 2d 385 (Fla. 1959) and *Florida Juice Co., Inc. v. Yeates*, 111 So. 2d 433 (Fla. 1959), do not support the Claimant's position. These cases did not address section 440.34 and the four criteria outlined in the statute under which the Claimant alleges entitlement to an attorney's fee.

In previous cases, the First District Court of Appeals has stressed that an attorney may not receive a fee for benefits that were not secured. See *TransWorld Tire Co. v. Hagness*, 651 So. 2d 124 (Fla. 1st DCA 1995); *Fumigation Dept. v. Pearson*, 559 So. 2d 587 (Fla. 1st DCA 1989). The First District Court of Appeal also stated in *Wiseman v. AT&T Technologies, Inc.*, 569 So. 2d 508 (Fla. 1st DCA 1990), that when awarding attorney's fees, a judge shall only consider those benefits to the Claimant that the attorney is responsible for securing. Moreover, in *Barr v. Pantry Pride*, 518 So. 2d 1309 (Fla. 1st DCA 1987), the First District Court of Appeal construed the statutory provision to mean that an attorney's fee should be determined on the basis of the total benefits secured as a result of the attorney's intervention.

The Claimant's attorney has not secured any benefits. The Claimant's brief before this Court has not argued for the securing of any benefits other than that

a questions was certified before this Court. That is not securing benefits for the Claimant.

This Court should therefore reverse the First District Court of Appeal decision awarding attorney's fees despite the fact that the Claimant did not prevail on appeal and despite the fact that the First District Court of Appeal ruled against the Claimant on appeal. However, this Court should affirm the First District Court of Appeal on the merits pursuant to this Court's decision in *Escambia County Sheriff's Dept. v. Grice*, 692 So. 2d 896 (Fla. 1997).

CONCLUSION

Section 440.34 the Florida Statutes is the only basis upon which a Claimant attorney may claim entitlement to an attorney's fee. The Claimant cited section 440.34 as the basis of his attorney fee award, yet there is no provision under section 440.34 that would award an attorney's fee to a Claimant attorney who has not prevailed on any matter and who has secured no benefits for the Claimant. Therefore, the award of an attorney's fee in this case is improper and should be reversed because the Claimant attorney secured no benefits for the Claimant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondents and Cross-Petitioners has been furnished by U.S. Mail this ____ day of January, 2000, to: Monte R. Shoemaker, Esq., P.O. Box 151057, Altamonte Springs, FL 32715-1057; and Paul McCaskill, Esq., 545 Delaney Avenue, Orlando, Florida, 32801.

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