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WORKMEN'S COMPENSATION — PROCEEDINGS TO SECURE COMPENSATION — ALLOWANCE OF ATTORNEY'S FEES TO CLAIMANTS UNSUCCESSFUL ON APPEAL—Employee claimed total permanent disability as a result of an industrial accident, but was awarded compensation for only a twenty percent permanent disability. Claimant was denied certiorari by the Florida District Court of Appeals.¹ However, claimant's request for an allowance of reasonable attorney's fees for the unsuccessful appeal was granted. Claimant's employer was then granted certiorari on its contention that the Florida workmen's compensation statute² and a past Florida Supreme Court decision³ had

¹ *Curtis v. Wick Roofing Co.*, (Fla. App. 1959) 106 S. (2d) 641.

² Fla. Stat. (1957) §440.34(1): "If the employer or carrier shall file notice of controversy as provided in §440.20, or shall decline to pay a claim on or before the twenty-first day after they have notice of same, or shall otherwise resist unsuccessfully the payment of compensation, and the injured person shall have employed an attorney at law in the successful prosecution of his claim, there shall, in addition to the award for compensation be awarded reasonable attorney's fee, to be approved by the commission which may be paid direct to the attorney for the claimant in a lump sum. If any proceedings are had for review of any claim, award or compensation order before any court, the court may allow or increase the attorney's fee, in its discretion, which fees shall be in addition to the compensation paid the claimant, and shall be paid as the court may direct."

³ *Virginian, Inc. v. Ponder*, (Fla. 1959) 72 S. (2d) 781. Claimant had been denied compensation by both the Deputy Commissioner and the full commission. The appellate court reversed these rulings, remanded the case, and awarded claimant attorney's fees for the appeal. On the employer's appeal contesting the award of attorney's fees, the Florida Supreme Court held that the award was premature, since under the statute an award of

established that attorney's fees would be allowed only when the claimant's appeal was successful. On certiorari, *held*, award of attorney's fees affirmed. The statute allows an appellate court a sound judicial discretion as to whether attorney's fees should be allowed to the attorneys for the claimant-employee, even though he is unsuccessful on appeal. However, the court should impose upon an unsuccessful claimant-appellant a heavy burden to show the justification for the allowance of additional attorney's fees under such circumstances. *Wick Roofing Co. v. Curtis*, (Fla. 1959) 110 S. (2d) 385.

The traditional common-law policy that each party to a suit pays his own attorney raises special problems when applied to workmen's compensation actions. Statutory schedules hold the amount of compensation recoverable to the bare minimum necessary for support during the disability. Since claimants more often than not are impecunious, the payment of even the most reasonable of attorney's fees out of the award would often leave the successful claimant with practically nothing, thereby subverting the basic humanitarian aims of workmen's compensation legislation. Thus, where the common-law rule persists, claimants are often forced to appear unrepresented by counsel, only to encounter skillful, highly-paid attorneys retained by the employer or its insurer. If claimant does find an attorney willing to represent him, the lawyer must either accept much less for his services than he could demand elsewhere, or prepare claimant's case only superficially.⁴ At the hearing or trial level, this problem has been dealt with in two different ways by state statutes.⁵ One method is to add to the successful claimant's award a reasonable allowance for his attorney's fees. This approach has been adopted by only five states.⁶ The second method, adopted in some form by almost all jurisdictions, retains the claimant's common-law responsibility for payment of his own counsel but subjects the fee arrangement to strict supervision by the courts or compensation commissions, or places maximum limitations on the amount of the fee paid, or both.⁷ Unfortunately, while this second approach may prevent the fee from entirely consuming the award, it also tends to make workmen's compensation cases even less attractive to practicing attorneys, and thereby

compensation is a prerequisite to an award of attorney's fees, and no such compensation award had as yet been granted to claimant.

⁴ See discussion of this problem in 2 LARSON, WORKMEN'S COMPENSATION §83.15 (1952). A case graphically illustrating both the claimant's need for counsel and the lawyer's fee problem is *Neylon v. Ford Motor Co.*, 27 N.J. Super. 511, 99 A. (2d) 664 (1953). Attorney's fees of \$2,850 were upheld as reasonable even though claimant's total award was only \$296.43. On the general subject of attorney's fees in workmen's compensation actions, see 2 LARSON, WORKMEN'S COMPENSATION §§83.10-83.20 (1952); 79 A.L.R. 678 (1932) and 159 A.L.R. 912 (1945).

⁵ For a tabulation of statutory provisions on attorney's fees at trial level in workmen's compensation cases, see 2 LARSON, WORKMEN'S COMPENSATION 560 (1952).

⁶ Ark. Stat. (1947) §81-1332; Fla. Stat. (1957) §440.34(1); Neb. Rev. Stat. (1943) §48-125; N.J. Stat. Ann. (1952; Supp. 1959) §§34:15-26 and 34:15-64; N.M. Stat. Ann. (1953; Supp. 1959) §59-10-23.

⁷ E.g., Mich. Comp. Laws (1948) §413.10.

increases the difficulties experienced by claimants in engaging counsel. At the appeal level, considerably more progress has been made toward keeping fees from cutting into benefits. In many states a commission whose award is appealed becomes a party to the appeal, defending the award.⁸ If the award is favorable to the claimant, he is in effect represented by the commission, and need not retain counsel at all. In addition, over one-fourth of the states have passed some sort of statutory authorization for assessing, from sources other than the claimant himself, payment for claimant's attorney's services on appeal. Some statutes provide for payment of the fees from the general administrative expense fund of the commission.⁹ Some assess them from the employer's insurer, if it is the appealing party.¹⁰ Most tax the employer himself.¹¹ Georgia and New York require all costs, including counsel fees, to be paid by any party taking an appeal without reasonable grounds.¹² However, an almost universal requirement is that to qualify for an award of attorney's fees the claimant must "prevail" or be "successful" on the appeal. This statutory requirement has been interpreted as meaning that claimant must already have been awarded some compensation at a lower level in the proceedings,¹³ and that the award cannot have been reduced on appeal.¹⁴ Likewise, where the claimant appeals in an attempt to have the amount of the award increased, he is not successful in the appeal if the award is merely affirmed.¹⁵ Except for one Florida decision,¹⁶ no authority prior to the principal case has been found allowing attorney's fees to a claimant-appellant who is unsuccessful in obtaining an increase in an award given at a lower level. The principal case must therefore be viewed as a guarded attempt to ease further the attorney's fee problem.¹⁷ Given its opportunity by the wording of the statute in

⁸ *Rathjen v. Industrial Commission*, 233 Wis. 452, 289 N.W. 618 (1940); 64 N.Y. Consol. Laws (McKinney, 1940) §23.

⁹ E.g., Ore. Rev. Stat. (1953) §§656.292 and 656.588.

¹⁰ E.g., N.C. Gen. Stat. (1958) §97-88.

¹¹ E.g., Neb. Rev. Stat. (1943) §48-125; N.J. Court Rules (1958), rule 5:2-5 (f).

¹² Ga. Code Ann. (1956) §114-712; 64 N.Y. Consol. Laws (McKinney, 1940) §24.

¹³ *Magee v. Albuquerque Gravel Products Co.*, 65 N.M. 314, 336 P. (2d) 1066 (1959); *Yeager v. Brown Bros.*, 131 N.J.L. 463, 37 A. (2d) 287 (1944).

¹⁴ *Sporic v. Swift & Co.*, 149 Neb. 489, 31 N.W. (2d) 404 (1948).

¹⁵ *Rowland v. Reynolds Electrical Co.*, 55 N.M. 287, 232 P. (2d) 689 (1951) (fact situation similar to that in principal case).

¹⁶ *Roberts v. Wofford Beach Hotel*, (Fla. 1953) 67 S. (2d) 670, cited in the principal case at 387. It seems hardly distinguishable. Claimant had been awarded an increase in compensation, but had been denied permanent partial disability benefits. On appeal by claimant, the supreme court affirmed, but awarded without comment additional attorney's fees for the appeal.

¹⁷ Since the court in the principal case insisted, at 386, that it was not overruling *Virginian, Inc. v. Ponder*, note 3 *supra*, it must be assumed that a prior award of compensation by the commission continues to be a prerequisite in Florida for award of attorney's fees on appeal. But query, has the prerequisite been met when claimant has received an award before the commission, but the award has been reversed on the employer's appeal?

question, the Florida court has changed the basis for awarding attorney's fees from the mechanical and somewhat arbitrary test of "success" on appeal to the more flexible exercise of the appellate court's "sound judicial discretion." The exercise of this discretion undoubtedly should be guided by such considerations as the reasonableness of the grounds for appeal, the extent and quality of the professional services rendered by counsel, and, above all, the ultimate effectuation of the broad social policies of the compensation legislation. Such bases seem decidedly more germane and equitable than determinations by reference solely to the uncertain fortunes of the appealing party.¹⁸

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¹⁸ The principal case has already been followed once in Florida in *Florida Juice Co. v. Yeates*, (Fla. 1959) 111 S. (2d) 433. A subsequent Maine decision has reached the same result under a somewhat different statute. Me. Rev. Stat. (1954) c. 31, §41 provides: "In all cases of appeal the law court may order a reasonable allowance to be paid to the employee by the employer for expenses incurred in the proceedings of the appeal including the record, not however to include the expenses incurred in other proceedings in the case." In *Pelchat v. Portland Box Co.*, (Me. 1959) 153 A. (2d) 615, employer filed a petition for review of a previous compensation award, claiming that employee's disability had declined to a level of fifty percent. From an adverse finding the employee appealed, but the decision was affirmed. Upon further appeal to the Supreme Judicial Court of Maine, the decision was again affirmed, but employee was nonetheless allowed \$250 costs and counsel fees. The court seemed to experience no difficulty whatsoever in including attorney's fees under the term "expenses" in the statute.