

IN THE SUPREME COURT OF FLORIDA

David Willis,

CASE NO: SC09-1059

Petitioner,

LOWER TRIBUNAL NO: 1D08-3830

v.

Advanced Coatings, Inc.
and Liberty Mutual Group

Respondents.

RESPONDENTS' BRIEF ADDRESSING JURISDICTION

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This is the Respondents' answer brief on jurisdiction regarding a decision of the First District Court of Appeal issued May 13, 2009.

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PRELIMINARY STATEMENT

The Respondents, Advanced Coatings, Inc and Safeco Insurance Companies, will be referred to as the "employer/carrier." Petitioner, David L. Willis, will be referred to as the "claimant." The Judge of Compensation Claims will be referred to as the "JCC."

Temporary total disability benefits will be referred to as "TTD." Temporary partial disability benefits will be referred to as "TPD." Permanent total disability will be referred to as "PTD." Average weekly wage will be referred to as "AWW." Maximum medical improvement will be referred to as "MMI."

STATEMENT OF THE CASE AND FACTS

The claimant was injured in a compensable workers' compensation accident on August 22, 1978. For many years benefits were provided although disputes arose from time to time. The claimant's first attorney was Martin Jones, Esquire. It was during the representation by Mr. Jones that the claimant settled the indemnity portion of his case.

During the pendency of a dispute and petition for benefits, the parties attended a state mediation conference. The claimant was at the mediation conference and represented by Mr. Jones. The employer/carrier's adjuster attended by telephone. The employer/carrier was represented at the mediation by their attorney.

At the conclusion of the mediation the parties entered into a mediation agreement. They agreed to settle the indemnity portion of the case and leave the medical benefits open. The total settlement was for \$45,256.00, inclusive of attorney's fees and costs.

The claimant executed the mediation report. Thereafter settlement papers were prepared by the attorney for the employer/carrier. The settlement papers were forwarded to attorney Martin Jones.

Mr. Jones testified that at all times he represented the claimant's best interests. He testified that he educates his clients on the mediation process and that, although he had no specific recollection, he would have done so for the claimant as

well. Mr. Jones testified that he would not have coerced or forced the claimant to settle. Mr. Jones testified that the claimant would have agreed to settle voluntarily.

Mr. Jones testified that when he receives settlement papers he goes over them with his client. He testified that he did so in the instant case as well. Mr. Jones' protocol was to have his clients review the settlement papers and then answer any questions that the client raises. Mr. Jones testified that it would have happened in this case as well.

Mr. Jones testified that he does not allow his clients to sign any papers or affidavits without understanding them. In the instant case, Mr. Jones did not force or coerce Mr. Willis to settle. Finally, Mr. Jones testified that employer/carriers routinely draft MMI reports and have doctors sign off on them.

The claimant admitted that he signed the mediation agreement. He admitted that he signed the settlement documents. He admitted that he asked his attorney at least one question about the documents. He admitted that he read them, but claims that he read them quickly.

The claimant testified that no one instructed him not to read the papers or required him to read them quickly. His lawyer did not place any time limitations on his review. Mr. Willis admitted that Mr. Jones did answer the one question that he asked. Finally, Mr. Willis conceded that he may have had time to read the settlement papers in their entirety. He admitted that he signed the affidavit that was attached to the settlement papers.

On November 19, 1999 the JCC signed the Order for Release from Liability for Indemnity Benefits. The employer/carrier issued the settlement check which the claimant received. The claimant deposited the check and received the funds.

Dr. Douglas Weiland testified by deposition. Dr. Weiland explained that physicians are often asked by employer/carriers to address MMI. In fact, Dr. Weiland thought it was prudent for employer/carriers to ask about MMI. Dr. Weiland further explained that it is a requirement that someone be at MMI in order to assign an impairment rating.

Dr. Weiland testified that physicians often provide MMI opinions based on records alone. In the instant case, he would have reviewed his chart at the time that he signed off on the MMI report. On March 5, 1999 Sue Chaffman, the case manager, wrote Dr. Weiland a note asking him whether or not the claimant was at MMI orthopedically. Dr. Weiland signed the note and indicated that the MMI date was March 12, 1999.

Dr. Edward Chen, M.D. was deposed twice. He was deposed both before the settlement and afterward. His first deposition occurred on November 4, 1999. Under questioning by claimant's counsel, Dr. Chen opined that the claimant reached MMI. In fact, Dr. Chen opined that the claimant was at MMI prior to the initial evaluation. Dr. Chen assigned an impairment rating in his office note of May 3, 1999. On March 5, 1999 the case manager wrote Dr. Chen a letter confirming a phone conference. Dr. Chen signed a statement indicating that the claimant reached MMI on. March 11,

1999.

The settlement papers indicated that Dr. Chen and Dr. Weiland opined that the claimant reached MMI prior to April 1, 1999. The parties stipulated that the claimant reached MMI from all conditions prior to April 1, 1999. A letter from Dr. Weiland dated April 1, 1999 addressing MMI was attached to the settlement papers.

The claimant signed a sworn affidavit when he executed the settlement papers. In the affidavit, the claimant represented that he both read and understood the settlement papers. He represented that he understood that the receipt of the settlement money completely discharged the employer/carrier from additional indemnity benefits.

The claimant affirmed that he understood that he was giving up his rights to litigate his entitlement to additional benefits. The claimant represented that he understood that once approved, the settlement order was not subject to modification, review, or appeal.

The claimant represented that all of the factual stipulations in the settlement papers were correct. He affirmed that he was not under undue influence or coercion to settle. He attested that he was settling of his own free will. He made all of these representations under oath.

This case was presented to the Judge of Compensation Claims following the claimant's petition to set aside the settlement agreement. It was the claimant's position that the settlement was

induced fraudulently or through overreaching, misrepresentation, or by withholding of facts by the employer/carrier. After extensive discovery the matter was presented to the Judge of Compensation Claims at a merits hearing. The JCC ruled in favor of the employer/carrier.

The Judge of Compensation Claims concluded that the settlement agreement was not induced by fraud, overreaching, misrepresentation, or withholding of facts by the employer/carrier. The claimant's petition to set aside the settlement was denied. That order was appealed to the First District Court of Appeal. The First District affirmed the JCC's order without opinion.

SUMMARY OF ARGUMENT

Discretionary jurisdiction of this Court is governed by Article V, Section 3 of the Florida Constitution. The decision of the First District Court of Appeal was a *per curiam* affirmance without written opinion. It may not serve as a basis to invoke the discretionary jurisdiction of this Court. Thus, the notice to invoke the discretionary jurisdiction of this Court must be denied.

ARGUMENT

PETITIONER HAS NOT DEMONSTRATED A VALID BASIS TO INVOKE THE DISCRETIONARY JURISDICTION OF THE SUPREME COURT OF FLORIDA.

The discretionary jurisdiction of this Honorable Court is governed by Article V, Section 3 of the Florida Constitution. This Court may review a decision of a District Court of Appeal that expressly declares state statute to be valid; expressly construes a provision of the state or federal Constitution; expressly affects a class of constitutional or state officer; or that expressly and directly conflicts with the decision of another District Court of Appeal or of the Supreme Court on the same question of law. Finally, this Court may review any decision of a District Court of Appeal certified to be of great public importance.

The decision of the First District Court of Appeal in the instant case is a *per curiam* affirmance. It does not expressly or directly state, rule upon, construe, or determine anything at all. As a *per curiam* affirmance, the decision of the First District Court of Appeal cannot serve to invoke the discretionary jurisdiction of this Court. Thus, the petitioner's notice to invoke the Court's discretionary jurisdiction is flawed and must be denied.

By definition, the term "expressly" requires some written representation or expression of the legal grounds supporting the decision under review. See *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). "Express" means "to represent in words" or "to give

expression to." *Id.* A decision of a District Court of Appeal is not reviewable on the ground that an examination of the record would show that it is in conflict with other decisions. Rather, it is only reviewable if the conflict can be demonstrated from the District Court of Appeal's written opinion. See *Ford Motor Co. v. Kikis*, 401 So. 2d 1341 (Fla. 1981).

A per curiam affirmance without an opinion is unreviewable under Article V, Section 3(b) (3), because it does not *expressly* conflict with another appellate decision. See *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *Beaty v. State*, 701 So. 2d 856 (Fla. 1997); *Tippins v. State*, 897 So. 2d 1278 (Fla. 2005).

While the Petitioner asserts that the issue presented in this case is one of "great public importance" the First District Court of Appeal did not certify the case as one of great public importance. Petitioner's belief or opinion that the case is one of great public importance is legally irrelevant. The notice to invoke the discretionary jurisdiction of this Court must be denied.

CONCLUSION

The Respondent respectfully requests this Court to deny the notice to invoke discretionary jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to David Willis, P. O. Box 506, Fort McCoy, FL 32134, on this_____ day of June, 2009.

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CERTIFICATION

I HEREBY CERTIFY that the foregoing Brief complies with the font type and size requirements designated in Rule of Appellate Procedure 9.210 on this _____ day of June, 2009.

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