

3-1-1948

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Recommended Citation

Lester Harris, *Appeals in Workmen's Compensation Cases (As Viewed by the Petitioner's Attorney)*, 2 U. Miami L. Rev. 215 (1948)
Available at: <https://repository.law.miami.edu/umlr/vol2/iss3/4>

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APPEALS IN WORKMEN'S COMPENSATION CASES

(As Viewed by the Petitioner's Attorney)

LESTER HARRIS*

WHEN A WORKMAN covered by the provisions of the Florida Workman's Compensation Law¹ suffers injury during the period of his employment, he may submit to the Industrial Commission the question whether the injury arose out of and in the course of his employment. If the findings are favorable, he is entitled to compensation whether or not the employer has been at fault, intentionally or negligently; because it is the purpose of the act to substitute insurance for common law tort liability.² To the extent that the determination of these issues depends on findings of fact, the deputy commissioner, who hears the evidence, must resolve conflicts in favor of one party or the other. In this, he is aided by certain statutory presumptions in favor of the workman.³ Both parties are protected against abuse by the deputy commissioner, first by an appeal⁴ to the Industrial Commission, and second, by an appeal⁵ to the courts of law, which is a matter of right.

If the deputy commissioner resolves a question of fact upon conflicting testimony in favor of either party, he may be reversed by the Circuit Court. The case is not remanded, but the Circuit Court substitutes its findings of fact for those of the deputy commissioner. This is surprising, because the Circuit Court does not enter upon a

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¹ Laws 1935, c. 17481; F.S. 1941, c. 440.

² See Adams J., in *Protectu Awning Shutter Co. v. Cline*, 154 Fla. 30, 16 So. 2d 342 (1944). "The purpose of the act is to shoulder on industry the expense incident to the hazards of industry."

³ F.S. 1941, § 440.26.

⁴ F.S. 1941, § 440.25.

⁵ F.S. 1941, § 440.27.

trial de novo, and must depend upon the record made before the deputy commissioner.

If the Circuit Court abuses this power, the injured party is theoretically protected by an appeal to the Supreme Court. The obstacles to a successful appeal, however, presented by certain rulings of the Supreme Court, together with the expense and delay which an appeal involves, make it virtually impossible for a workman, who has recovered before the commission on a conflict in testimony which reasonable men might resolve either way, to guard against an arbitrary reversal by the Circuit Court. These cases frequently occur in the experience of those dealing with compensation cases, and it appears advisable to examine the law and to make certain recommendations for its improvement.

Throughout this study, the purposes of the Workmen's Compensation Law must be borne in mind. Statutes of this type substitute a system of insurance for tort liability where a workman is injured in the course of a productive activity.⁶ The Industrial Revolution, in which power machinery and great factories replaced hand tools and the domestic workshop of an earlier era, produced conditions in the relationship of employer and employee not known to the common law. When a manufacturer employed one or two persons and personally supervised their work, it was unrealistic to hold the employer liable for injury unless it resulted from an intended or negligent wrong, and reasonable to hold that the employee shared in the risks of the enterprise. As power machinery exacted a higher toll in life and limb, and the factory removed the employee further from control of the place and conditions of his work, the common law defenses of assumption of risk and the fellow servant rule operated to increase the burden of the workingman. Workmen's Compensation statutes were the outgrowth of a demand that this burden be removed from the shoulders of the workman and transferred to

⁶ Wambaugh, "WORKMEN'S COMPENSATION ACTS: THEIR THEORY AND THEIR CONSTITUTIONALITY" (1911), 25 Harv. L. R. 129. New York passed the first such law in 1910 and ten other states the following year. The article cited is therefore valuable for a contemporary statement of the purposes of the act. See also note 2, *supra*.

the social order which benefited by the increased production. The risk of large scale production is therefore calculated and passed on to the consumer as part of the price.⁷

The workman and his dependents are the principal beneficiaries of the act. The Supreme Court of Florida has ruled that the act "should be constructed liberally, and all doubts resolved in the claimant's favor."⁸ Not only has the act sought to assure relief, it has sought to expedite payment. "The purpose of the Workmen's Compensation Act was to make available *promptly* medical attention, hospitalization, and compensation commensurate with the injury."⁹

In the action sounding in tort which the statute replaces, the employee was required to prove fault on the part of the employer and to negative the defenses of contributory negligence, assumption of risk, and negligence of a fellow servant.¹⁰ In the procedure under the Workmen's Compensation Law, fault of the employer is not an issue,¹¹ and fault of the employee is an issue only to the extent that injury may result primarily from the intoxication of the employee, his willful intent to injure or to kill himself, or his refusal to follow safety rules or to employ safety appliances.¹² There are statutory presumptions in favor of the claimant on each of these issues.¹³ The questions of fact to be determined relate principally to the extent of

⁷ "This is only partly true. In every instance the employee bears part of the loss . . . so that no employee shall lose one of the primary incentives to avoid accidental injuries." Carl B. Smith, Chairman, Florida Industrial Commission, in preface to official publication, "The Workmen's Compensation Act, as Amended, with Annotations," 1947.

⁸ *Fidelity & Casualty Co. of New York v. Moore*, 143 Fla. 103, 196 So. 495 (1940). See also: *S. H. Kress Co. et al. v. Burkes*, 153 Fla. 868, 16 So. 2d 106 (1944), *McCall v. Motor Fuel Carriers*, 155 Fla. 854, 22 So. 2d 153 (1945), *Leon County v. Sauls*, 151 Fla. 171, 9 So. 2d 461 (1942), *C.F. Wheeler Co. v. Pullins*, 152 Fla. 96, 11 So. 2d 303 (1942).

⁹ *Weathers v. Gauthen*, 152 Fla. 420, 12 So. 2d 294 (1943).

¹⁰ These defenses are preserved if the employee elects not to operate under the law. F.S. 1941, § 440.07.

¹¹ "The act removes all question of negligence, assumption of risk or wrong-doing on the part of the employer." *Adams, J., in Protective Awning Shutter Co. v. Cline*, 154 Fla. 30, 16 So. 2d 342 (1944).

¹² F.S. 1941, § 440.09 (c).

¹³ F.S. 1941, § 440.26.

the injuries and to whether they were incurred in and arose out of the course of the employment.

The administrative procedure by which claims are handled by the Industrial Commission, is prompt and efficient, and gives full support to the purposes of the act. The claim is placed before a deputy commissioner, who takes action immediately.¹⁴ An appeal lies to the full commission, which is required to act promptly.¹⁵ In the hearing before the deputy commission, strict rules of pleading and evidence are avoided, and the injured workman is not bound by technical requirements of proof.¹⁶ On appeal to the full board, the findings of fact made by the deputy commissioner are presumably accorded the weight given a jury verdict or the findings of a chancellor if supported by competent evidence.

When an appellate body accords conclusiveness to the findings of a trier of fact, full recognition is given to the principle that appearance and demeanor of witnesses are factors from which credibility is determined. In Workmen's Compensation cases, the visible condition of the claimant is to be weighed with the professional opinion of physicians in determining the extent of disability. An appellate body cannot evaluate these elements from the record. Any danger of abuse of power by the trier of fact is offset by the requirement that his findings must be supported by substantial and competent evidence.

When an appeal is taken from the Florida Industrial Commission to the Circuit Court, it might be expected that the appellate tribunal would review only questions of law and would treat as conclusive the findings of fact made by the commission, if supported by competent evidence. The language of the statute¹⁷ and the opinions of the Su-

¹⁴ The claim may be filed at any time after the first seven days of disability or after death. Notice is given the employer within ten days. A hearing follows ten days' notice, and the deputy commissioner must determine the dispute within 20 days. A hearing is had on application of an interested party; otherwise the case is investigated by the deputy. F.S. 1941, §§ 440.25 (1) (2) and (3).

¹⁵ F.S. 1941, § 440.25 (4).

¹⁶ F.S. 1941, § 440.29.

¹⁷ "If not in accordance with law, the compensation order or award

preme Court¹⁸ favor such an interpretation. However, when an appeal is taken from the Circuit Court to the Supreme Court, the argument that the Circuit Court did not accord proper weight to the findings of the commission, is not available to the appellant. Instead, it is held that the findings of the Circuit Court will not be reversed if there is evidence to support them.¹⁹

. . . may be appealed." Similar language in the Federal Longshoremen's and Harbor Workers' Act is construed to limit appeals to questions of law. *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L. Ed. 598 (1938). For cases from this district holding the deputy commissioner's findings conclusive in maritime cases, see *Southern Shipping Co. v. Lawson*, 5 F. Supp. 321 (S.D. Fla. 1933), *Suwanee Fruit & S.S. Co. v. Lawson*, 63 F. Supp. 112 (S.D. Fla. 1945). Compare the wording of the federal statute: "If not in accordance with law, a compensation order may be suspended or set aside—through injunction proceeding—instituted in the federal district court."

¹⁸ For cases holding that on appeal from the order of the Industrial Commission, the Circuit Court should give the findings of the Commission the same weight which a chancellor would properly give to findings of law and fact by a Special Master appointed by the court, see *Cone Bros. Contracting Co. v. Massey*, 145 Fla. 56, 198 So. 802 (1940), *Firestone Auto Supply Service Stores v. Bullard*, 141 Fla. 282, 192 So. 865 (1940). See also *Dixie Laundry v. Wantzell*, 145 Fla. 569, 200 So. 860 (1941), *Moorer v. Putnam Lumber Co.*, 152 Fla. 520, 12 So. 2d 370 (1943), *City of St. Petersburg v. Mosedale*, 146 Fla. 784, 1 So. 2d 878 (1941); *Florida Forest and Park Service v. Strickland*, 154 Fla. 472, 18 So. 2d 251 (1944); *Haller Bros. Packing Co. v. Lewis*, 155 Fla. 430, 20 So. 2d 385 (1945).

¹⁹ "The Circuit Judge shall give to the findings of the commission about the same weight and consideration which the chancellor should give to the findings of law and fact by a Special Master appointed by the court for that purpose. When, however, appeal is taken from the order of the Circuit Court to the Supreme Court, the Supreme Court shall give to the findings of fact by the Circuit Judge that degree of consideration, force and effect which the Supreme Court gives to the findings of a chancellor in an ordinary Chancery suit, which means that if the Circuit Court has acted upon the record made before the Commission, great weight will be given findings of the Circuit Court. It follows that the burden in cases appealed to this court is upon the appellant to show clearly that the Circuit Court has arrived at an erroneous or unwarranted conclusion." *Buford, J.*, in *Firestone Auto Supply Service Stores et. al. v. Bullard*, 141 Fla. 282, 192 So. 865 (1940). See also *Cone Bros. Contracting Co. v. Massey*, 145 Fla. 56, 198 So. 802 (1940); *Cone Bros. Contracting Co. v. Allrook*, 153 Fla. 829, 16 So. 2d 61 (1943), *Keller Bros. Packing Co. v. Kendricks*, 155 Fla. 430, 20 So. 2d 38 (1945); *Florida Forest & Park Service v. Strickland*, 154 Fla.

For example, if there is a conflict in the testimony ad-duced before the master as to whether the claimant's admitted disability is the result of an industrial accident or a disease contracted elsewhere, and a reasonable man might believe the professional opinion of the claimant's physicians as readily as that of the employer's, the court should not overrule the deputy commissioner.²⁰ A chancellor reviewing the findings of a master should not reverse under those circumstances. If the Circuit Court does reverse, however, the propriety of the action cannot be re-viewed in the Supreme Court because, from the hypothesis, there is evidence to support the Circuit Court's substituted finding.

This paradox appears to be the result of an historical accident in the development of the law. When the Workmen's Compensation Law was originally adopted, an appeal to the Circuit Court was followed by a trial de novo.²¹ This procedure was in accord with that followed in many other states, and it resulted no doubt from the view formerly held, that to permit an administrative commission to adjudicate a case or controversy between parties was in violation of the constitutional allocation of judicial power to the courts. This view yielded in time to the necessity of relieving courts of the burden of much minor litigation, such as the establishment of the controverted facts in compensation cases, and was supplanted by a view that constitutional requirements could be satisfied if an appeal lay to the courts to correct errors of law.²²

472, 18 So. 2d 251 (1944); *Orange Homes Co. v. Burnette*, 29 So. 2d 449 (Fla. 1947); *Intercontinental Aircraft Corp. v. Pickton*, 154 Fla. 8, 16 So. 2d 292 (1944); *DuVal Engineering & Contracting Co. v. Johnson*, 154 Fla. 9, 16 So. 2d 290 (1944).

²⁰ "Sec. 26 (440.26) of the act declares what presumptions should obtain in proceedings for the enforcement of claim under the act and does not include the presumption of correctness of the Commissioner's findings." Buford, J., in *Firestone Auto Supply & Service Stores v. Bullard*, 141 Fla. 282, 192 So. 865 (1940). Note that in this case the decision favored the workman.

²¹ For history, see note, F.S.A. § 440.27, and also, *South Atlantic Steamship Co. of Delaware v. Tutson*, 139 Fla. 405, 190 So. 675 (1939).

²² "Some governmental functions that are not essentially legislative or judicial powers may by statute be conferred upon administrative

The Florida statute was amended in 1937 in keeping with this trend. It provided for an appeal from the order or award of the full commission "if not in accordance with law", and that the appeal "shall be heard upon the record". Obviously the trial de novo was eliminated; but it was argued that if this were an appeal, and a review only of the law, then the act violated a specific provision of the Florida Constitution which made final all appeals to the Circuit Court from inferior tribunals. In what must be admitted to be a praiseworthy attitude, the court construed the act liberally to sustain it, and ruled that a claim for workmen's compensation becomes a lawsuit for the first time when it reaches the Circuit Court.²³

The Supreme Court proceeded to elaborate its ruling by showing how the appeal might be regarded as an original proceeding without a trial de novo. It likened the hearing in the Circuit Court to the action of a chancellor in equity taking action on the report of a master. Traditionally, the hearing by a master is extra-judicial, and the analogy is helpful. Equity practice requires that the chancellor accord to the findings of the master that respect which the fact that the master has seen and heard the witnesses demands. Neither the master nor the Commission should be reversed unless clearly wrong. Formulation of the rule that on appeal the Circuit Court should not be reversed for failure to accord such respect to the findings of fact by the Industrial Commission, but only if there is no evidence to support the substituted findings

officers, boards or commissioners, to be exercised within appropriate statutory limitations . . . such a state policy . . . is becoming more and more essential to efficient government, since the processes of the legislative and judicial departments are not designed to perform the constant and expeditious functions necessary to expanding business, commercial, industrial, and social relations." Whitfield, J., in *South Atlantic S.S. Co. of Delaware v. Tutson*, 139 Fla. 405, 190 So. 675 (1939). See also *Crowell v. Benson*, 285 U. S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1938).

²³ *South Atlantic S.S. Co. of Delaware v. Tutson*, 139 Fla. 405, 190 So. 675 (1939). "Such proceedings may not appear in the judicial department of the State Government as a judicial 'case' until they are brought to the Circuit Court by appeals; therefore the 'case' may fairly be regarded as 'originating' in the circuit court through a statutory appeal . . . as it would . . . by injunction, certiorari, or other original writ." Whitfield, J.

of the Circuit Court, the Supreme Court apparently overlooked an important distinction. When it reviews the findings of a chancellor who has heard the evidence himself, the court treats his findings as conclusive if supported by legally sufficient evidence; but when it reviews the findings of a chancellor who has acted upon the report of a master, the question is whether the chancellor erred in finding the master's findings clearly against the weight of the evidence.²⁴

The rule is subject to criticism on another score. If the Circuit Court acts adversely to the claimant, the latter may be deprived of benefits expressly conferred by the statute. As to the procedure on appeal, the Supreme Court has said that "the burden is on appellant to show clearly that the Circuit Court has arrived at an erroneous conclusion".²⁵ If that is the case, the policy of liberal construction formulated by the Supreme Court, and the statutory presumptions which favor the claimant on the principal issues, are lost.²⁶

It must be noted in fairness that none of the reported cases involve a situation where the Circuit Court has reversed findings of fact which were resolved favorably to the claimant by the Industrial Commission.²⁷ The reported cases are either appeals by the employer or appeals by a claimant whose award was reversed on a point of law. It may confidently be expected that the Supreme Court, if such a situation were presented, would examine the issues

²⁴ *Groom v. Ocala Plumbing & Electric Co.*, 62 Fla. 460, 57 So. 243 (1911), *Kent v. Knowles*, 101 Fla. 1375, 133 So. 315 (1937). *McAdow v. Smith*, 127 Fla. 29, 172 So. 448 (1937); and see *Kooman*, "Florida Chancery Pleading & Practice" (1939), 303, 453.

²⁵ See *Buford, J., in Firestone Auto Supply Service Stores et al. v. Bullard*, 141 Fla. 282, 192 So. 865 (1940), and cases cited in note 19 above.

²⁶ "Section 26 (F.S. 1941, § 440.26) of the act . . . does not include the presumption of correctness of the commission's findings." *Buford, J., in Firestone Auto Supply Service Stores et al. v. Bullard*, *supra*, note 25.

²⁷ Since on appeal to the Florida Supreme Court, the case is restyled, a cursory glance at the cases cited in the notes show that the employer is usually the appellant. In each case cited where that does not appear, either claimant failed to establish his claim before the deputy commissioner, or the reversal was on a question of law.

in the light of its liberal attitude and the purposes of the statute, and would be more critical than heretofore of the action of the Circuit Court. The absence of such cases must not be construed, however, as an assurance that the problem never arises. Rather it is a fact to which the author testifies, that the risk and expense of an appeal make it impossible for the claimant to obtain relief, and that many cases of this type are dropped when the Circuit Court has ruled adversely.

For one thing, an appeal takes time and money. The attorney represents a client who, as a general rule, can pay him only in the event of final victory. He runs the risk of spending a year in litigation, making two trips to Tallahassee to argue the case, and expending his own monies in railroad fares, hotel bills, stenographic costs, and meals away from home, all on a mere contingency. In addition, the claimant's attorney faces the possibility of being required to pay heavy medical bills, because physicians are loathe to spend time and work on indigent patients unless the attorney guarantees the costs.

Even if the case is won in the Supreme Court, the attorney's fees must be approved by the Commission or the Court.²³ Claimant's recovery is limited by the terms of the act to a portion of his wages, and that being a mere pittance, the Commission or the Court, as the case may be, will be disposed to protect it even against an attorney whose devotion to the case is the sole basis of recovery. It is a misdemeanor to circumvent this provision of the statute.

Nor do the burdens of an appeal rest equally on both parties. While there may be exceptions, the employer or his insurance carrier can pay an attorney and the costs of litigation, win or lose. Usually, the carrier's attorney is on retainer; but we would not risk violation of professional courtesy to suggest that the only way to hold a good retainer is to show a record of constant litigation successfully handled, even at the expense of the poor devil of a workman.

Extended review of cases of this nature shifts unnecessarily to the courts the burden of a task which is much

²³ F.S. 1941, § 440.34.

more efficiently performed by the Industrial Commission. Assuming proper selection, training and retention of deputy commissioners, the claims will be processed by experts with a close knowledge of the aims and requirements of the law and the conditions of employment within the state.²⁹ Compensation cases are sociological, economic and medical in their implications, and not legal. Therefore, in this and similar instances, the Judiciary should defer to administrative experience.³⁰ "It was in 1877 that Justice Holmes predicted that for the rational study of the law, the man of the future would be the man of statistics and the master of economics, rather than the black letter man."³¹

There are three solutions to the problem which the writer deems to be deserving of consideration. The first would be to amend the statute so as to make the deputy commissioner's findings of fact conclusive if supported by legal evidence. Another would be to eliminate one or more of the present three appeals which seem superfluous. A third would be to provide counsel at public expense for a workman who has won the initial approval of the commission. These three measures would be effective, whether adopted singly or in combination.

The first remedy suggested would be to limit appeals to questions of law. The findings of fact of the deputy commissioner would thus become final unless it can be said, as a matter of law, that there is insufficient evidence to support them. This would accord no more and no less finality to the deputy Commissioner's findings than are

²⁹ See Whitfield, J., in *South Atlantic S.S. Co. of Delaware v. Tutson*, 139 Fla. 405, 190 So. 675 (1939), as set forth in note 23, *supra*.

³⁰ For a discussion of the weight properly given to administrative experience, see *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 67 S. Ct. 1575 (1947). See also Learned Hand, J., in *Parke-Davis Co. v. Mulford Co.*, 189 Fed. 95, 115 (1911), who, after settling a patent controversy involving discoveries in the field of applied chemistry, a science of which he disclaimed knowledge, said: "How long shall we continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons, not conventionalized by provincial legal habits of mind, ought, I should think, unite to effect some advance."

³¹ "Case and Comment", Oct. 1947, pp. 18-21.

now given to the findings of a jury or chancellor. This is the approved procedure in cases arising under the Federal Longshoremen's and Harbor Workers' Act, the constitutionality of which has been upheld by the Supreme Court of the United States.³² It is interesting to note that the language of the Federal statute is identical with that of the Florida act, and it has already been pointed out that the Florida Supreme Court chose an alternative construction to avoid conflict with a peculiar provision of the Florida constitution.³³ To avoid attack along the same line, it would be desirable to vest final appellate jurisdiction in the Circuit Court, as recommended below for other reasons.

The second remedy would be to reduce the number of appeals. Coupled with this, the courts having appellate jurisdiction should be brought closer to the place of employment. Under present procedure, two trips to Tallahassee are necessary: one to appear before the commission, and one before the Supreme Court. There are a total of three appeals: first, to the Industrial Commission; second, to the Circuit Court; and third, to the Supreme Court. The appeal to the Supreme Court should be omitted. This would give the Circuit Court final jurisdiction such as it now exercises over inferior courts. A direct appeal to the Supreme Court would be burdensome and incommensurate with the small amounts usually involved. Making the Circuit Court the final appellate court would not preclude the Supreme Court from issuing certiorari to correct special situations,³⁴ such as a diversity of opinion between several circuits, or a claim of constitutional privilege.

The appeal to the full board should also be eliminated. In federal practice under the Longshoremen's and Harbor Workers' Act, appeals go directly to the district court

³² See note 17, *supra*.

³³ *Atlantic S.S. Co. of Delaware v. Tutson*, 139 Fla. 405, 190 So. 675 (1939). See note 23, *supra*.

³⁴ Certiorari lies to review "final" appellate decisions of the Circuit Court in special cases. *Florio v. Colquitt Hardware Co., Inc.*, 33 So. 2d 722 (Fla. 1948). This point is discussed in *South Atlantic S.S. Co. v. Tutson*, note 23, *supra*.

from the deputy commissioner.³⁵ Instead of reviewing cases, the full commission by promulgating rules for the guidance of deputy commissioners could supply the uniformity in administration which the present review is designed to accomplish. If the Industrial Commission were to promulgate arbitrary rules, or to exceed its authority, the Circuit Court on appeal would so hold and disregard the rules.³⁶ In this way, a proper judicial control would be assured.

The third recommendation is that the act be amended to provide counsel or counsel fees for a claimant who has won initial approval before the deputy commissioner. The present statute requires the Industrial Commission to be made a party to all appeals,³⁷ but it does not appear by counsel and participate.³⁸ It should also be suggested, that since the costs of administration are now charged to employers and their insurers,³⁹ a nice appreciation of the standards of fair play which define "due process" might make it desirable that funds for this purpose be supplied by the state.

Admittedly an injured workman is a public liability and the proper object of a program of aid and rehabilitation. Streamlining procedure to make relief prompt and effective will advance the program already undertaken. Since the profession has not found it economical to handle appeals, it may well ask whether it would not be better in this field to furnish public counsel.

³⁵ Sec. 21, Act Mar. 4, 1927, 44 Stat. 1436; 33 U.S.C.A. § 921. See cases cited, note 17, *supra*.

³⁶ See *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575 (1947); compare sec. 10, Federal Administrative Procedure Act of June 11, 1946; 60 Stat. 243; 5 U.S.C.A. § 1009.

³⁷ F.S. 1941, § 440.27 (2).

³⁸ Cases under the Federal Longshoremen's and Harbor Workers' Act are reviewed by injunction proceedings. § 21; 44 Stat. 1436, 33 U.S.C.A. § 921. The deputy commissioner, represented by the Federal district attorney, who appears to take an active part in the defense of the award, is thus the actual appellee.

³⁹ F.S. 1941, § 440.51.