

**STATE OF FLORIDA
 DIVISION OF ADMINISTRATIVE HEARINGS
 OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
 FT. MYERS DISTRICT OFFICE**

Jennifer Kauffman,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 09-19629EDS
)	
Community Inclusions)	
)	
Employer,)	Date of Accident: 7/23/2009
)	
and)	
)	
Guaranty Insurance)	
)	Judge: E. Douglas Spangler, Jr.
)	
Carrier/Servicing Agent.)	

FINAL ORDER AWARDING ATTORNEY'S FEES AND COSTS

THIS CAUSE was heard by the undersigned in Fort Myers, Lee County, Florida, on July 16, 2010 upon claimant's Verified Petition for Attorney's Fees and Costs. The Verified Petition was docketed on April 22, 2010. The employer/carrier (E/C) filed a detailed objection and response to the fee petition on May 21, 2010. An Order was entered on June 22, 2010 denying the E/C's motion to dismiss. Numerous procedural motions regarding the production of documents and the scope of testimony and evidence to be considered at the hearing were conducted resulting in the entry of intermediate Orders on June 30, 2010 and July 15, 2010. The matter proceeded to hearing on the merits of the Verified Petition on the 85th day following it being filed. Attorneys Frank Clark and Brian Sutter of the All Injuries Law Firm, Port Charlotte, Florida represented the claimant. Attorney Kelly M. Fisher of Fisher Law Group, P.A. St. Petersburg, Florida represented the employer/carrier.

Admitted into evidence at the hearing were the following documents, each accepted, identified and placed into evidence:

1. Claimant's Verified Petition for Attorney's Fees and Costs, with time record and costs statement attached.

2. Final Compensation Order rendered March 19, 2010.
3. Employer/Carrier's amended Motion to Dismiss and Response to Verified Petition, with attachments.
4. Payout record of indemnity payments.
5. Legislative History-House of Representative Staff Analysis of CS/HB 903, dated March 18, 2009.
6. Legislative History-Summary of legislation excerpt, Senate Banking and Insurance Committee, CS/HB 903.
7. Deposition of Christopher Tice completed July 15, 2010.
8. Employer/Carrier's Memorandum of Law, received as argument only.

Testimony was received during the hearing from attorney Randall Spivey of Fort Myers, Florida, attorney Michael Winer from Tampa, Florida, attorney Frank Clark of Port Charlotte, Florida, principal trial attorney for claimant during the trial on the merits of the Petition for Benefits docketed on July 30, 2009, attorney Brian Sutter of Port Charlotte, Florida, principal attorney for the claimant in the presentation of the Verified Petition for Attorney's Fees, and Kelly Fisher, the employer/carrier's attorney. Attorney Christopher Tice's testimony was received by way of deposition. Counsel for the claimant made extensive oral arguments at the conclusion of the evidence. In addition to the written memorandum filed by Ms. Fisher on behalf of the E/C, closing oral arguments were also presented by Ms. Fisher.

In making the findings of fact and conclusions of law set forth herein, the undersigned has carefully considered and weighed the evidence presented. I have resolved the conflicts in the testimony. Based on the testimony of the witnesses, stipulations, and exhibits, and after carefully considering the arguments made by counsel and legal authority submitted, I make the following findings and conclusions of law:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this matter.
2. Venue is proper in Lee County, Florida based on stipulation of the parties.
3. Any and all issues regarding attorney's fees and costs either raised in the Verified Petition and not considered at the hearing, or not raised before the hearing, are deemed resolved or abandoned, and are therefore denied and dismissed with prejudice. *Betancourt v. Sears Roebuck & C.*, 693 So.2d 680 (Fla. 1st DCA 1997).

STATEMENT OF THE CASE

4. On July 23, 2009 claimant sustained an injury to her low back while attempting to transfer a patient into a recliner chair, when she lost her balance and fell backwards onto her buttocks and back. The accident was not witnessed and the employer investigated and disputed the claim. The carrier was notified by receipt of a Notice of Injury on July 31, 2009, following which the carrier briefly and unsuccessfully attempted to investigate the circumstances of the claim. Because the carrier could not contact the employer or the employee to discuss the claim the entire claim was denied on August 5, 2009 when a Notice of Denial was issued alleging that the claimant had “willful intent to injure” herself. No benefits were provided, and no medical care offered following an initial emergency room evaluation. Consequently claimant proceeded on her own to seek medical advice on December 10, 2009 from Dr. Lian Jen, M.D. The claimant was also seen and evaluated by Dr. Steven Tucci, M.D., who made treatment recommendations based on a MRI evaluation. The trial on the merits of the petition determined that all of the E/C’s defenses were denied and that the claim was compensable, that Dr. Jen was authorized by law, that claimant was entitled to temporary partial disability benefits following her evaluation with Dr Jen, and that further medical care as recommended by Dr. Tucci was medically necessary. Claims for temporary total disability and for compensability of injuries alleged to be in claimant’s neck were denied.

Throughout the progress of this claim both parties vigorously and aggressively represented their respective parties’ interests. Counsel for both parties are commended for their skill and professionalism demonstrated throughout this matter. Resolution of the facts in this case involved determination of the credibility of several witnesses which could only occur as a result of the careful and skillful presentation of testimony from and cross examination of each witness. The presentation of the evidence from both sides was difficult and complex. Counsel were well prepared and focused on the issues, and conducted themselves with the highest standards of professionalism.

THE CLAIM FOR ATTORNEY’S FEES

5. The Compensation Order entered on March 19, 2010 awarded compensability of the accident, temporary total benefits from the date of December 11, 2009 to the date of the hearing, including penalties and interest, and medical treatment for claimant’s low back injury. The Verified Petition alleged the value of the temporary total award, including penalties and interest, to be

\$3417.03. The employer/carrier agrees with this amount. No values were alleged in the Verified Petition for the other benefits awarded, and claimant argued that the amounts were not ascertainable, and according to claimant's counsel even if their value were ascertainable that at most the value of these benefits would not exceed \$400-500. The E/C would not stipulate to those values, and argued that because the claimant failed to produce any evidence of value of those benefits, they could not form the basis of any calculation or determination of a fee award in this matter. The E/C further contend that because no values were placed upon the determination of compensability and the medical benefits awarded that the claimant is undervaluing the benefits awarded in the Compensation Order. However, as stated above, the E/C did not stipulate to the values suggested by the claimant, and the E/C did not present any argument or evidence as to the values of those benefits so as to quantify the degree of the undervaluation they contend the claimant is making.

6. The Compensation Order determined that the claimant's attorney is entitled to a "reasonable attorney's fee and costs in connection with the award" in the order. The claimant is arguing for a determination of the amount of a "reasonable" attorney's fee, in the context of the definition of that concept by the Supreme Court in *Murray v. Mariner Health and Ace USA*, 994 So.2d 1051 (Fla.2008). In *Murray*, the Court construed the provisions of Section 440.34 (3) (a-d), Fla. Stat. (2003), and held "based upon the plain language of the statute, that when a claimant is entitled to recover attorney's fees from a carrier or employer as provided [by that statute], the claimant is entitled to recover a 'reasonable attorney's fee'." *Id* at 1053. The Court stated that because the phrase "reasonable attorney's fee" was used in the statute, but not otherwise defined, it should be determined using the factors of Rule 4-1.5 (b), Rules Regulating the Florida Bar, and as contained in *Lee Engineering & Construction Co. v. Fellows*, 209 So.2d 454, 458 (Fla.1968).

The E/C argued that following *Murray*, the 2009 Florida Legislature passed CS/HB 903, which when enacted into law amended Sections 440.34 (1) and (3) Florida Statutes, effective July 1, 2009. They argue that the statutory amendment specifically removed any reference to "reasonable" attorney's fees in both subsections of the attorney fee statute and limits the amount of an attorney's fee which a claimant can recover from an employer or carrier pursuant to Subsection 440.34(3), Fla. Stat (2009), to an amount equal to the amount provided for in Subsection (1) or Subsection (7) of that statute. The E/C contends in this case therefore, that only a fee calculated in accordance with the provisions of Section 440.34 (1), Fla. Stat. (2009), can be awarded to the claimant in this cause.

7. There is no dispute that the approximate value of benefits alleged in the Verified Petition of \$3417.03, when applied to the formula proscribed in Section 440.34 (1), Fla. Stat. (2009), would

lead to a calculated attorney's fee of \$684.41. The E/C in this matter did not specifically dispute the time and hours submitted by claimant in the Verified Petition, and when that time is considered in relationship to the fee calculated by the statutory formula, this would yield an "hourly fee" of approximately \$6.84. Given the complexity of this matter, with difficult issues and an uncertain outcome which required experience and skill on the part of the attorney obtaining the award of benefits, a fee of \$6.84 would not be the "reasonable attorney's fee" contemplated by the undersigned when he determined the matter of entitlement to such a fee in the March 19, 2010 Order.

LEGAL ARGUMENT REGARDING THE APPLICABILITY OF THE STATUTE

8. The claimant argued that the statute as amended effective in July 2009, must be construed in such a way as to prevent the result outlined above from occurring, because otherwise the statute may be unconstitutional. Attorney Michael Winer, testifying as an expert for the claimant, noted that in amending the statute the Legislature retained the language in Section 440.34 (1) that "any fee **approved** by the judge of compensation claims must" be calculated in accordance with the formula, and that Subsection (1) is limited to fees approved by stipulations or lump sum settlements. Mr. Winer further testified that Section 440.34 (2) contemplates a fee that is **awarded** by the judge after consideration of the benefits secured by the attorney. The argument advanced by the claimant in this regard is that in making an award, the judge engages in a process rather than simply approving a proposal. Black's Law Dictionary, 8th Edition, contains two references to "award". As a noun, an award is a final judgment or decree. As a verb, award means to grant by formal process or judicial decree; to determine after careful consideration; to give by judicial decree as to assign a value to damages. In this context the undersigned notes that the concepts of award and approve are also juxtaposed in Section 440.20 (11)(c), Fla. Stat., wherein a fee approved as part of a settlement is not to be considered an award, and is not subject to modification.

However, the distinctions, such as they are, between "award" and "approval" may be distinctions without any real substance because of the language in Section 440.34(3), which states... "that a claimant is entitled to recover an attorney's fee in an amount equal to the amount provided for in Subsection (1)...from the employer or carrier: ..." in the four instances set out in paragraphs (a) through (d). In considering the claimant's invitation to interpret the statute, the undersigned is mindful of the admonition that he must look first to the plain meaning of the terms used in the statute. If the language used and meaning of the terms are clear, then the ordinary

meaning of the terms used must be applied, and resort to extrinsic aids to statutory construction are not necessary. *Closet Maid v. Sykes*, 763 So. 2d 377 (Fla. 1st DCA 2000).

The undersigned notes that the Legislature specifically removed the word “reasonable” from Subsections (1) and (3) of Section 440.34, Fla. Stat. When these changes were made, the concept of reasonable attorney’s fees was allowed by the Legislature to remain in Sections 440.30, 440.32 (2) and 440.34 (5) of the statute. Because the term “reasonable fee” is not defined in those statutes, presumably the holding in *Murray* as to the method of determination of those fees applies to those statutes. Thus, it is only in the context of fees being paid on behalf of a claimant under the authority of Sections 440.34 (1), 440.34 (3) and 440.34 (7), Fla. Stat. (2009), that the Legislature has made a specific effort to define and restrict the quantum of attorney’s fees payable by the employer or carrier by eliminating the concept of “reasonable attorney’s fees” from consideration. Indeed, the crux of these restrictions and limitations is directed to fees which would be payable to the claimant in cases wherein the claimant has successfully asserted a claim for medical benefits only; where benefits are not being timely provided; where the claimant has successfully prosecuted a petition for benefits which have been denied; and where the compensability of the accident is denied. The restrictions on “reasonable fees” also apply in situations where the claimant is required to seek enforcement of an order awarding benefits in Circuit Court pursuant to Section 440.24 (1), Fla. Stat.; and, in defense of petitions to modify a previous award of benefits pursuant to Section 440.28, Fla. Stat. Therefore, the intent of the Legislature is obvious and clear, and the plain language in the statute as now amended must be applied to the instant case, which falls under Section 440.34 (3)(b) and (c), Fla. Stat.¹

9. Therefore, the undersigned accepts the arguments of the E/C that the statute as amended effective July 1, 2009 applies to this case and limits the quantum of the fee which the claimant can obtain from the E/C to the amount of the fee generated by application of the formula specified in Section 440.34 (1), Fla. Stat. (2009) . As previously indicated that fee amount is \$684.41.²

¹ While the undersigned is constrained to follow the legislatively mandated scheme, I cannot help but question whether this scheme is consistent with the otherwise stated legislative intent in enacting the worker’s compensation statute to “ensure a prompt delivery of benefits to the injured worker” by creating an effective self-executing, employer/carrier administered system, and to create a system which imputes the majority portion of costs of worker based injuries on industry rather than society. See *Morris v. Dollar Tree Store*, 869 So.2d 704 (Fla. 1st DCA 2004) .

² This is contrasted with the fee the E/C is obligated to pay its own counsel. E/C counsel testified that she had a contract with the carrier to pay her \$115/hour and billed 128 hours to the carrier for defending the petition for benefits. This would yield a fee paid by the carrier to its counsel of \$14,720.

CLAIMANT'S CONSTITUTIONAL ARGUMENT

10. Claimant argued several potential constitutional theories, not summarized in this order, as to why the present amended fee statute is unconstitutional and requested an opportunity to present facts which she contended would illustrate those constitutional problems. Despite the fact that Judges of Compensation Claims do not have any authority to address the constitutional issues, the claimant has every right to build her record for the constitutional challenge in this proceeding, and an expanded concept of relevance was enforced during this hearing to permit the development of such evidence. *Anderson Columbia v. Brown*, 902 so.2d 838, 841 (Fla.1st DCA 2005).

11. In this regard, the claimant presented the testimony of attorney Randy Spivey of Fort Myers relating to hourly rates of attorney's fees customarily received by attorneys in the 20th Judicial Circuit for representing plaintiffs in other legal matters, such as litigated personal injury protection claims, an area of the law reasonably analogous to workers compensation law. He was not offered as an expert in the matters involving applicable rates received by attorneys in workers compensation matters. According to Mr. Spivey, the attorney fee rates allowed in 20th Circuit courts of record in these matters frequently range from \$350 to \$450 per billable hour. He also noted that a rate of \$200 per billable hour is a rate commonly awarded in the local courts of record as a minimum when non-contingent matters are resolved.

12. Attorney Michael Winer testified for the claimant as her expert on attorneys fees in workers compensation proceedings. Mr. Winer is very qualified to render the opinions he did regarding the applicability of the time alleged to have been spent by claimant's counsel in the trial of the petition for benefits, and the matters of hourly rate. Mr. Winer also advanced his own personal observations on the construction of the statute so as to prevent a constitutional issue which was discussed above. Regarding the time and rate, Mr. Winer testified that attorney fee rates in Southwest Florida in litigated workers compensation matters range from \$200 per billable hour to \$350 per billable hour. After reviewing the scope of the matters litigated in this particular case, in the context of the factors outlined in Rule 4-1.5(b), Rules Regulating The Florida Bar, he determined that all factors in the Rule would tend toward an enhancement of the fee, and that most would be highly favorable for enhancement in consideration of the complexity, contingency and the nature of the litigation itself. He noted that the E/C in this matter had not specifically challenged any of the time entries posted by the claimant's attorney in the verified petition as not

being appropriate but that the challenge was more toward attempting to limit the relevant time for consideration to only the time attributable to the benefits actually awarded in the order. He stated that because the seminal issue tried in the case was compensability, all time spent by claimant's counsel had to be considered because the order determined the claim was compensable. In a similar vein, he testified that all costs contained in claimant's Verified Petition should be awarded, although he did admit he had not specifically analyzed those costs in the context as to what might be attributable to the actual benefits secured. However, in his opinion, because the very compensability of the accident itself was in issue, he believed all of the costs should be considered as necessary and taxable to the E/C.³

13. Attorneys Frank Clark, the claimant's trial counsel, and Brian Sutter, the principal in All Injuries Law Firm, who also participated in pretrial work in the trial phase of the case, and acted as lead counsel in the prosecution of the Verified Petition, testified as to the hours contained in the time affidavit and the matter of the reasonableness and necessity of the costs contained in the costs statement attached to the Verified Petition. Mr. Clark recorded in his testimony his reflections about the nature of the litigation, being vigorously and aggressively defended, the contingency and complexity of the matter, and the requirement that claimant have effective counsel representing her in order to acquire a judicial determination of compensability of the claim and an award, if only partial, of some of the benefits claimant was seeking. These observations were affirmed by the testimony of Mr. Sutter. Both counsel argued that all of the posted time was entered by the attorneys and the costs were reasonable and necessary to accomplish the task and obtain the order entered on March 19, 2010.

14. Attorney Christopher Tice of Jacksonville, Florida testified by deposition as the E/C's expert. Even though now practicing in Jacksonville, Mr. Tice began his workers' compensation career in the Fort Myers District. He now represents employers and carriers in a practice that has statewide coverage. He expressed sufficient knowledge to be capable of rendering opinions on an appropriate hourly rate to be considered in the Fort Myers district, which he ranged in this case to be from \$175 per billable hour to perhaps \$300 per billable hour. However, he testified that the appropriate rate, based on this particular case should be \$200 per billable hour, which rate he believed was representative of similar rates awarded to other counsel around the state in similar matters. Mr. Tice found the application of the factors enumerated in Rule 4-1.5(b) to yield essentially a neutral result not requiring any enhancement of value. In rendering this testimony he

³ Based on the testimony presented by the claimant the undersigned would find a reasonable fee in this matter to be a factor of the stated hours, 100.3 hours and an appropriate billable rate for this particular matter of \$250 per hour, totaling \$25,075.

emphasized that based on the present state of the law however, the fee must be limited to the fee generated by the statutory formula. Because of that position, a specific refutation of actual time entries contained in the Verified Petition was not part of his testimony. Rather he noted that the specific time keepers were not listed in the affidavit, and opined that approximately 25 of the total hours were “paralegal” type hours, to which he assigned an hourly rate of \$75.00. He focused his analysis on the temporary indemnity benefits awarded in the Order and opined that only 20 hours were reasonable for attaining that benefit. His rationale for that limitation was that the only benefits for which any monetary value had been alleged in the Verified Petition were the temporary total benefits awarded, and the fees must be based only on the securing of those benefits. Similarly, in his analysis of the costs he allocated only \$1210.83 as costs directly attributable to the award of the temporary total benefits in the compensation order, and \$3, 422.91 toward the entire scope of the benefits awarded.

COSTS

15. Claimant is the prevailing party in this matter and is entitled to prevailing party costs, and reasonable costs of the proceedings should be taxed against the E/C. Section 440.34 (3), Fla. Stat. (2009). The undersigned accepts the testimony and opinions of Michael Winer, Brian Sutter, and Frank Clark and finds that all costs alleged in the Verified Petition are taxable. In making this determination, the undersigned notes that the testimony of Mr. Tice, which expressed a lower value of taxable costs of the proceedings, was non-specific in his reasons, and his opinions were expressed in terms of generalities. In other words, while he did reduce the costs to a specific amount he believed were reasonable, the exact items of the costs he would not include and why those costs were not includable, was not part of his testimony. In conclusion therefore, the undersigned can find no reason why the claimant should have to bear any of her own costs in this matter which involved a complete denial of the compensability of her claim, in the face of an inadequate investigation by the E/C at the outset. See *Morris v. Dollar Tree Store*, 869 So.2d 704 (Fla. 1st DCA 2004) and *Sanchez v. Woerner Management, Inc., etc.*, 867 So.2d 1173, (Fla. 1st DCA 2004). Claimant’s demand for \$5,216.55 costs is approved.

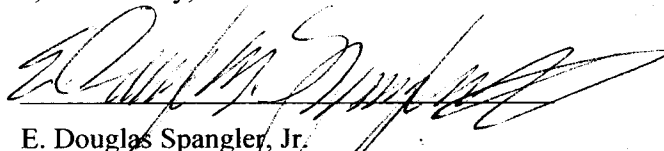
Wherefore, on the basis of the foregoing it is Ordered and Adjudged:

1. Claimant is awarded attorney’s fees from the employer/carrier in the amount of \$648.41 in accordance with the mandate of Section 440.34(3), Fla. Stat. (2009), which amount shall be paid

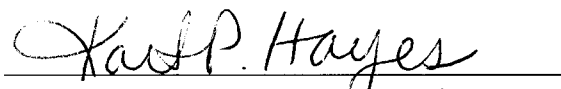
by the employer/carrier to the claimant as provided by law.

2. Claimant is entitled to prevailing party costs from the employer/carrier pursuant to Section 440.34 (3), Fla. Stat. (2009), in the amount of \$5216.55, which amount shall be paid by the employer/carrier to the claimant as provided by law.

DONE AND ENTERED in chambers, Fort Myers, Lee County, Florida.


E. Douglas Spangler, Jr.
Judge of Compensation Claims

I certify that a true copy of the foregoing Order was served by mail on all parties and counsel of record this 23 day of July, 2010.


Karl P. Hayes
District Deputy Clerk