

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS  
SEBASTIAN/MELBOURNE DISTRICT OFFICE

John Wallace,  
Employee/Claimant,

OJCC Case No. 14-017112RLD

vs.

Accident date: 4/20/2014

Indian River County BCC-Fire  
Rescue/Johns Eastern Company,  
Inc./Indian River County BOCC,  
Employer/Carrier/Service Agent.

Judge: Robert L. Dietz

**EVIDENTIARY ORDER ON CLAIMANT'S MOTION TO APPROVE ATTORNEY'S FEE**

**THIS CAUSE** was heard before the undersigned in Sebastian, Indian River County, Florida on May 12, 2015, upon the Claimant Counsel's Motion to Approve Attorney's Fee filed on March 23, 2015 (Docket Number (DN) 33). The Employer/Carrier filed a Response to Motion to Approve Attorney's Fee on March 27, 2015, (DN 35) and indicated they had no position related to the substance of the Motion. The Claimant filed a Memorandum in Support of the Motion on March 23, 2015 (DN 34). At the requested Evidentiary Hearing on May 12, 2015, the Claimant was represented by Christine Callagy, Esq. and the Employer/Carrier was represented by Anthony Amelio, Esq. John Wallace, the Claimant, testified at the hearing. John O'Connor, President of International Association of Fire Fighters (IAFF) Local 2201, was scheduled to testify, but an emergency prevented him from being present. Claimant's Counsel was given leave to file an affidavit as to Mr. O'Connor's testimony by May 15, 2015, in lieu of a post-hearing deposition. The Affidavit was timely filed on May 14, 2015 (DN 38).

This issue was previously before the undersigned. A Motion to Approve Attorney's Fee was filed on August 18, 2014 (DN 9), and an Order Setting Requested Evidentiary Hearing dated September 23, 2014 (DN 15), was entered. An evidentiary hearing was held October 22, 2014,

and a Final Order was entered on October 27, 2014 (DN 23) finding that there was no statutory or administrative rule that permitted such an arrangement. An Order Denying Motion for Rehearing/ Motion to Vacate was entered November 19, 2014 (DN 26). No appeal was taken from that Order. The present Motion requests a finding that Section 440.34(1), Fla. Stat. (2009) and the entire Workers' Compensation Act is unconstitutional. While the request for payment of Claimant's attorney's fee is only slightly modified (as to the retainer and hourly rate), the Employer/Carrier's denial of the case November 13, 2014, the impact that action had on this claim, and the new alternative constitutional theory basis for the Motion, warrants being addressed, even though that review will need to be made by an appellate court.

The Claimant argues in the March 23, 2015, Memorandum of Law in Support of His Motion for Approval of Attorney Fees that Russ v. Brooksville Health Care Center, 109 So.3d 1266 (Fla. 1<sup>st</sup> DCA 2013) provides a claimant with the right to call witnesses and lay the appropriate record in a lower tribunal in order to preserve a constitutional challenge that must be decided in the appellate courts. Based on Russ v. Brooksville Health Care Center, an Evidentiary Hearing on the Motion was scheduled for May 12, 2015.

At the requested Evidentiary Hearing on May 12, 2015, the Claimant was represented by Christine Callagy, Esq. and the Employer/Carrier was represented by Anthony Amelio, Esq. The Claimant is entitled to have his hearing on the constitutionality of these issues before an Appellate Court with jurisdiction to hear this case if that Court so determines that review is appropriate.

The Motion to Approve Attorney's Fee requested approval of a one thousand, five hundred dollar (\$1,500.00) attorney fee retainer pursuant to Fla. Statute 440.105(3)(c) and Fla. Administrative Code Rule 60Q-6.124(1) paid by International Association of Fire Fighters (IAFF) Local 2201. At the hearing, it was the Claimant's position that due to the complexity of handling a controverted case under Section 440, Fla. Stat., Claimant's Counsel has advised the Claimant that he cannot handle the case on a contingent basis and can only continue representation if the Claimant would agree to a

reasonable hourly fee of two hundred dollars (\$200.00) per hour, and a Judge of Compensation Claims (JCC) would approve the payment of the fee.

John Wallace, the Claimant, is a member of International Association of Fire Fighters (IAFF) Local 2201. He sustained a workers' compensation accident April 23, 2014, to his neck that was accepted as compensable by the Employer/Carrier. On November 13, 2014, his case was denied for misrepresentation and he was terminated by the Employer. He still has problems with his neck and wishes to retain the law firm of Bichler, Kelley, Oliver & Longo, PLLC, a law firm known for their expertise in workers' compensation cases, to represent him. He is not interested in any other firm and, even if allowed to hire an attorney, could not afford one.

John O'Connor, President of Local 2201, testified by affidavit that the Executive Board of IAFF Local 2201 met and unanimously agreed to pay a retainer of one thousand, five hundred dollars (\$1,500.00), from the Union treasury to pay legal fees on behalf of the Claimant, who is a member in good standing of the IAFF Local. It is further represented that the IAFF Local also wishes to pay two hundred dollars (\$200.00) per hour for all work performed. The Claimant and IAFF Local 2201 have been advised by Claimant's Counsel that if an Order is entered approving this fee, the Claimant's Counsel will continue his involvement in the case through the date of the merit hearing. If the fee is not approved, the Claimant's Counsel indicates that he will be forced to withdraw from the case.

In the absence of any supporting case law related to workers' compensation cases, the Claimant takes the position that Jacobson v. Southeast Personnel, 1113 So.2d 1042 (Fla. 1<sup>st</sup> DCA 2013) stands for the general proposition that a claimant has a constitutional right to pay his own counsel. Jacobson involved a claim where costs were sought against the Claimant by an Employer/Carrier that was the prevailing party in their litigation, and the Claimant was unable to obtain counsel to represent him because he could not pay them a fee under sections 440.34 and 440.105(3)(c), Fla. Stat. The Court held that, to the extent that these statutes prohibited the Claimant from retaining counsel to defend a motion to tax costs against him, they were unconstitutional, and remanded to

the JCC to determine whether a proposed fee was reasonable. The undersigned does not find that Jacobson provides any basis for the action requested in this case.

Here, the Claimant has requested that a hearing be conducted on the constitutionality of Section 440.34, Fla. Stat. The only hoped-for-outcome for the Claimant is the removal of the contingency nature of workers' compensation cases created by the legislature, and the conversion to a non-contingent arrangement in those cases where the Claimant has access to parties willing to provide economic resources to their cause. Unfortunately, a JCC does not have the authority to make such a change. Justice Wetherell, in a concurring opinion in Jacobson, limited the application of the case noting:

“This does not mean that these statutes are unconstitutional in other circumstances, nor in my view should the majority opinion be construed or applied to reach such a conclusion. Indeed, this Court has consistently rejected constitutional challenges to the statutory limitations on the amount of fees the JCC can award (or approve) under section 440.34 based on the benefits secured for the claimant by the attorney. See, e.g., Kauffman v. Community Inclusions, Inc., 57 So.3d 919, 920-21 (Fla. 1<sup>st</sup> DCA) (citing cases), rev. denied, 68 So.3d 234 (Fla. 2011). I do not read the majority opinion to undermine the continued viability of those decisions or to call into doubt the validity of the statutory limitations on claimant-paid fees generally because the compelling governmental interests that were absent here (see majority opin. at 10-12) are directly implicated in cases where the attorney's fee is paid by the claimant out of the benefits awarded, or by the E/C.”

Jacobson at 1052-1053.

For the following reasons, the Claimant's Motion to Approve Attorney Fee is denied. First, a JCC is prohibited by statute from approving retainer agreements between an injured employee and his counsel that are in excess of the amount allowed under Section 440.34(1),

Fla. Stat. An hourly rate of two hundred dollars (\$200.00) an hour could exceed guideline attorney fees for cases that do not involve significant “benefits obtained.” Second, Section 440.34, Fla. Stat. prohibits approving or permitting an attorney to be paid an hourly fee by an injured employee for representation in a workers’ compensation matter for this date of accident. Third, the Claimant’s counsel is not barred from receiving any fee by filing a PFB on behalf of the Claimant and litigating benefits due him, in which case he may become eligible for payment of a fee by either the carrier or his client. Finally, there is no statutory or case law precedent for allowing a third party not involved in the case to pay attorney fees to the Claimant’s attorney.

Fees due to the claimants’ attorney in workers’ compensation cases are contingent in nature, just as they are in personal injury cases. An attorney who litigates a workers’ compensation case and is unable to secure any benefits for his client cannot receive a fee from either his client or the carrier, just as a personal injury attorney representing a plaintiff is not paid a fee by anyone if the jury awards her/his client nothing. If an attorney agrees to represent an injured employee, then that attorney has to risk not receiving a fee. To do as Claimant’s Counsel suggests would rewrite Chapter 440 to remove the contingency factor. This is a matter for the legislature and not for a JCC, particularly as it relates to third party payers of an hourly fee. The constitutionality issues are for the appellate court to address.

**It is therefore DONE AND ORDERED that:**

The Motion for Approval of Attorney Fees is denied.

DONE AND ELECTRONICALLY SERVED ON COUNSEL AND CARRIER this 14th day of May, 2015, in Sebastian, Indian River County, Florida.



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Judge of Compensation Claims  
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