

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS

Antonio Blanco,  
Employee/Claimant,

OJCC Case No. 14-022567MGK

vs.

Accident date: 8/14/2014

Mattress One, and SOS Furniture Company  
DBA Mattress One/AmTrust North  
America of Florida,  
Employer/Carrier/Servicing Agent.

Judge: Margret G. Kerr

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**EVIDENTIARY ORDER ON CLAIMANT'S VERIFIED MOTION RE ENTITLEMENT  
TO ATTORNEY FEES & COSTS RE PETITIONS FOR BENEFITS 12/24/2014 &  
3/18/2016**

**THIS MATTER** came before the undersigned Judge of Compensation Claims for an evidentiary hearing on January 19, 2017 on Claimant's Verified Motion re Entitlement to Attorney Fees and Costs re Petitions for Benefits 12/24/2014 & 3/18/2016, filed December 7, 2016. Robert Krebs Esq., appeared on behalf of the Claimant for William Souza Esq., and Andrew Borah Esq., appeared on behalf of the Employer/Carrier "E/C". This Order ensues.

**EVIDENCE PRESENTED:**

**JOINT:**

1. Deposition and attachments thereto of adjuster, Susan Mangeney, filed 1/17/2017 (ID#132, 133).
2. Transcript of 7/13/2016 Hearing on Motion to Amend Date of Accident, filed 1/6/2017 (ID#124).

**CLAIMANT:**

1. Verified Motion re Entitlement to Attorney's Fees and Costs re Petitions for Benefits 12/24/2014 & 3/18/2016, filed 12/7/2016 (ID#107).

**EMPLOYER/CARRIER:**

1. Verified Response to Motion for Attorney's Fees and Costs re Entitlement, filed 1/5/2017 (ID#122).
2. Petition for Benefits filed 8/12/2016 (ID#59).
3. Response to Petition for Benefits filed 9/9/2016 (ID#71).

**TESTIMONY:**

1. Robert Krebs Esq., counsel for Claimant - live.
2. Andrew Borah Esq., counsel for E/C - live.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

1. At the outset of the hearing, with the agreement of both parties, the undersigned took Judicial Notice of the documents contained and listed on the OJCC docket.

2. The issue is entitlement to a fee based on the claims contained in the 12/24/2014 and 3/18/2016 petitions for benefits. The 12/24/2014 petition sought authorization of pain management. The 3/18/2016 petition sought an increase in the average weekly wage and correction of past indemnity payments.

3. A verified petition is competent evidence upon which the trier of fact may rely to support an adjudication. See, *Hillsborough County Sheriff's Office v. Hilsman*, 23 So. 3d 743 (Fla. 1st DCA 2009); *Hale v. Shear Express. Inc.*, 946 So.2d 94 (Fla. 1<sup>st</sup> DCA 2006).

4. The claimant bears the burden of proving entitlement to attorney's fees. See, *Kraft Dairy Group v. Sorge*, 634 So. 2d 720 (Fla. 1st DCA 1994); See, *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." ).

**12/24/2014 Petition for Benefits**

5. On 12/24/2014, Claimant filed a petition seeking provision of treatment with a pain management physician. E/C did not file a response to the petition, but authorized and scheduled an appointment with Dr. Salamon.

6. The adjuster testified she scheduled an appointment on 1/6/2015 for Claimant with Dr. Salamon, and he was seen by the doctor on 1/23/2015, the 30<sup>th</sup> day after the petition was filed. Dr. Salamon remains authorized and the Claimant continues to treat with him. This testimony is uncontroverted.

7. E/C argues the benefit was provided in a timely manner and therefore no attorney's fees or costs are due. Claimant argues the benefit was provided on the 30<sup>th</sup> day and therefore attorney's fees and costs attach.

8. Fla. Stat 440.34(3)(b) requires the successful prosecution of the petition, but states "...attorney's fees shall not attaché under this subsection until 30 days after the date the carrier

or employer, if self insured, receives the petition.”

9. The E/C has 30 days to either provide or deny the requested benefit. 30 days is the expiration of 30 days, not the expiration of 29 days. If the legislature had intended to allow the E/C only 29 days, they would have written the section of the statute accordingly. If the petition fully succeeds before the 30 days runs, fees do not attach. *Sansone v. Crum*, 201 So.3d 1289 (Fla. 1<sup>st</sup> DCA 2016). Here, E/C scheduled the appointment for Claimant on the thirteenth day, 1/6/2015, Claimant was seen by the doctor on the thirtieth day, 1/23/2016, and the doctor remains authorized.

10. I find Dr. Salamon was authorized on the 13<sup>th</sup> day when E/C scheduled the appointment, and further find in the alternative, the attendance of Claimant at the appointment with Dr. Salamon occurred before the expiration of the 30<sup>th</sup> day and therefore the benefit was timely provided.

11. I find Claimant has failed to show entitlement to attorney’s fees or costs for a successful prosecution of the 12/24/2014 Petition for Benefits.

**3/18/2016 Petition for Benefits**

12. Claimant was injured in the course and scope of his employment on 8/14/2014

13. Claimant filed Petitions for Benefits on 9/30/2014, 12/24/2014 and 3/18/2016 all listing the date of accident as 8/18/2014.

14. The 3/18/2016 petition requested an increase in the average weekly wage, still claiming a date of accident of 8/18/2014.

15. The adjuster responded within 30 days of the 3/18/2016 petition, increasing the AWW based on payroll records for the 13 weeks before the listed August 18, 2014 date of accident. The adjuster also issued back due indemnity based on this increase in the AWW, including penalties and interest

16. On June 16, 2016, claimant's counsel filed a Motion to Amend the Date of Accident from 8/18/14 to 8/14/14. The Employer/Carrier objected and argued Claimant should dismiss his petitions and re-file using the correct date as allowing an amendment more than 30 days after a petition for benefit was filed changed the claims and could result in attorney fee entitlement since the Employer/Carrier would then have to amend the AWW based on the new date of accident.

17. At the 7/13/2016 hearing on Claimant’s Motion to Amend, the undersigned

addressed the two year time delay, with counsel for Claimant:

*Q: I'm just asking, in two years you never investigated the date of accident, the correct date of accident?*

*A: I wouldn't say I never - I never investigated it until we went to a mediation — his deposition was taken when we filed this AWW petition in April of this year, after the petition, and he talked about this Thursday versus Tuesday.*

7/13/2016 Hearing on Motion to Amend date of Accident, p. 17, 1. 6-14

18. Claimant's counsel acknowledged:

*A: At that point, that date, March 29, 2016 when my office, myself and Mr. Souza, finalized the petition, yes, perhaps we should have thought, hey, wait a minute, are we sure that it's that date of accident. But it — it didn't seem like it was going to be a big deal,*

7/13/2016 Hearing on Motion to Amend date of Accident, p. 18,1.21-25, p. 19, 1. 1-2

19. The undersigned held at the July 13, 2016 hearing on the claimant's Motion to Amend:

*Q: All right, I find merit to the Claimant's argument on its face. Prejudice to the Employer/Carrier as to whether or not there would or would not be an attorney's fee due is not necessarily sufficient grounds for refusing to correct something that has been admitted by the parties to be incorrect, So I'm going to grant the motion to amend the date of accident. However, that does not waive any rights of the Employer/Carrier to defend an issue of attorney's fees and costs based on whether the fees generated were, in fact, the responsibility of the Claimant, or the attorney at that time.*

7/13/2016 Hearing on Motion to Amend date of Accident, p. 22,1.7-21

20. On 7/15/2016, I entered the Order granting Claimant's Motion to Amend the Date of Accident.

21. On 8/9/2016 the Employer/Carrier recalculated the claimant's AWW based on the 13 weeks before 8/14/2014, and issued back due indemnity, plus penalties and interest. I accept E/C's testimony that there was no additional time period covered by this payment that the Employer/Carrier previously paid, but it was an additional payment due to the claimant's AWW being increased following the amendment to the 8/14/2014 date of accident. The parties then filed a stipulation on August 5, resolving the AWW and indemnity claims in the 3/18/2016 petition.

22. The E/C concedes when they first opened their file, they used a 8/14/2014 date of

accident. The Employer/Carrier then justifiably relied on Claimant's claims contained in his petitions for benefits that the correct date of accident was 8/18/14. For litigation purposes, the Employer/Carrier deferred to the claimant's pleadings and the Court records.

23. The Employer/Carrier provided all benefits that were due and owing within 30 days of 3/18/2016 petition for Benefits based on the date of accident contained in that petition. They then timely provided an additional increase within 30 days of the 7/15/2016 Order that amended the date of accident to 8/14/2014. As a result, I find no attorney's fee entitlement pursuant to §440.34(3).

24. Claimant's own lack of diligence caused the confusion over the date of accident. For almost 2 years, Claimant maintained the date of accident was 8/18/2014 and actively litigated the case using that date of accident. Within 30 days of the Order granting Claimant's motion to amend the date of accident, the E/C provided the benefits based on the corrected date.

25. Claimant argues the E/C has the responsibility to "properly administer the file" and failed to do so. I find this argument and his prior statement he felt the change was "no big deal", to be disingenuous. Claimant has the obligation to ensure accuracy in his claims against his employer and their carrier. The E/C ignores claims made by Claimant at their peril. Had the E/C paid benefits calculated on the 8/14/2014 date in disregard of Claimant's petitions and the date was later determined to be correct, they would no doubt have owed attorney's fees and costs. Instead, Claimant maintained for almost two years a claim for an adjustment of the average weekly wage based on a date of accident he knew, or should have known was incorrect. I find no basis to award attorney's fees and costs to Claimant for a retroactive correction of his own error, particularly as it was based on information readily available to Claimant.

26. The burden remains with the Claimant to prove entitlement to a fee for obtaining an adjustment in the average weekly wage. I find Claimant has failed to carry his burden to show entitlement to attorney fees and costs for an adjustment in the average weekly wage.

Based on the foregoing, it is hereby:

**ORDERED AND ADJUDGED THAT:**

1. Claim for entitlement to attorney's fees and costs for the 12/24/2014 and 3/18/2016 Petitions for Benefits is DENIED.

Done and Ordered in chambers in Miami, Miami-Dade County, Florida this 26th day of January, 2017.



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