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

Martha Guzman,
Employee/Claimant,

vs.

Infante Zumpano, et al/Guarantee Insurance Company,
Employer/Carrier/Servicing Agent.

/

OJCC Case No. 13-012669RJH

Accident date: 7/23/2011

Judge: Ralph J. Humphries

ORDER DENYING VERIFIED PETITION FOR ATTORNEY'S FEES

THIS CAUSE came before me for hearing on June 27, 2014. Barry A. Pemsler, Esquire, appeared for the claimant. Andrew R. Borah, Esquire, appeared for the employer/carrier.

Admitted into evidence as Judge's Exhibit 1 is the Verified Petition for Attorney's Fees filed on August 19, 2013. Admitted as Judge's Exhibit 2 is the Employer/Carrier's Verified Response to Claimant's Verified Motion for Attorney's Fees filed on September 13, 2013.

Admitted into evidence as a joint exhibit is page 5 of the deposition of the claimant taken on August 9, 2013.

Admitted into evidence as employer/carrier Exhibit 1 is the petition for benefits filed on June 4, 2013. Admitted as employer/carrier Exhibit 2 is the Notice of Resolution filed by the claimant on September 25, 2013.

Claimant's counsel contends he is entitled to an attorney's fee for his preparation for and attendance at the deposition of his client taken on August 9, 2013 pursuant to Section 440.30, Florida Statutes. The gist of that statute is to allow the taking of depositions by the parties either before or after filing a claim and to provide for fees in a certain instance. It reads, in pertinent part: "If no claim has been filed, then the carrier or employer taking the deposition shall pay the claimant's attorney a reasonable attorney's fee for attending said deposition."

While it is true a claim, the petition for benefits filed on June 4, 2013, had been filed prior to the deposition, claimant argues that petition had been, in effect, dismissed or withdrawn when the deposition took place and that a fee is therefore due.

As recorded on page 5 of the claimant's deposition, the following exchange took place:

Mr. Pemsler: Before we go forward I just want to put on the record I had spoken to the attorney and the partner her firm and indicated that the issues for which the petition has been filed, I've learned, have been resolved, that is the carrier has supplied that, so it's my position there are no – there are no outstanding issues, and at this point, other than possibly fees and costs, I haven't seen one that they have – they have acknowledged it, so I will be contending that fees are due under 440.30. So I just wanted to State that for the record, you know.

Ms. Albin: Okay. And, also, just for the record, you have not yet dismissed your petition, correct?

Mr. Pemsler: That's right, because I just found out this morning –

Ms. Albin: Okay.

Mr. Pemsler: – some of these resolved issues I have not file [sic] a voluntary dismissal as of yet.

Ms. Albin: Okay.

The focus of the dispute between the parties is whether a claim related to the petition of June 4, 2013 remains outstanding. The employer/carrier argues that since the petition contained claims for attorney's fees and costs and those issues remained outstanding at the time of the deposition, the petition remains outstanding. The claimant argues that because only attorney's fees and costs remain outstanding, and the substantive claims seeking benefits for the claimant were reportedly resolved, Section 440.30 dictates a fee is due.

It is my determination, however, I need not decide whether attorney's fees are due when a petition for benefits is dismissed with the exception of attorney's fees and costs and the deposition of a claimant goes forward. As was conceded by counsel for the claimant during the deposition, he had not yet dismissed the petition for benefits as of the time of the taking of the deposition. It is my conclusion that the statements made by Mr. Pemsler, as quoted above, are not tantamount to a dismissal of the pending claims. In reaching this conclusion, I have considered whether the exchange between the attorneys amounts to a contract between the parties sufficient that, if necessary, the employer/carrier could have sought enforcement of a dismissal of the June 4, 2013 petition for benefits and have concluded any such efforts would have been denied. It is basic to Florida contract law that the acceptance of an offer that results in an enforceable agreement must be: absolute and unconditional; identical with the terms of the offer; and in the mode, at the place, and within the time expressly and impliedly stated within the

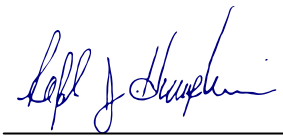
offer. *Nichols v. Hartford Ins. Co. of the Midwest*, 834 So.2d 217 (Fla. 1st DCA 2002). An acceptance must contain an assent or meeting of the minds to the essential terms contained in the offer. *Cheverie v. Geisser*, 783 So.2d 1115 (Fla. 4th DCA 2001). To be enforceable, an agreement must be sufficiently specific and reflect assent by the parties to all essential terms. *Williams v. Ingram*, 605 So.2d 890 (Fla. 1st DCA 1992). The definition of "essential term" varies widely according to the nature and complexity of each transaction and is evaluated on a case by case basis. *Dimase v. Aquamar 176*, 835 So.2d 1150 (Fla. 3rd DCA 2002). To enforce an agreement, it must be established there was a meeting of the minds or mutual reciprocal assent to a certain and definite proposition. *Williams v. Ingram*, 605 So.2d 890 (Fla. 1st DCA 1992)

In evaluating the statements made by claimant's counsel at the time of the deposition, I find he is suggesting the issues are resolved but has not committed to their resolution. Counsel for the E/C makes no commitment to any proposition in response. Had claimant's attorney then decided not to dismiss the claims, I conclude the E/C would not have been able to enforce any agreement to do so because there *was* no such agreement. Resultantly, I find the petition for benefits filed June 4, 2013 was not dismissed until the Notice of Resolution, E/C Exhibit 2, was filed on September 25, 2013. Since the petition was still viable at the time of the deposition, Section 440.30 is inapplicable and no fee is due.

I have considered the case of *Bednarik v. Ebasco Services, 527 So.2d 251 (Fla. 1st DCA 1988)* cited by claimant and conclude the circumstances therein are distinguishable. In that case, the parties filed a stipulation for the purpose of cancelling a hearing "inasmuch as the matters scheduled to be heard at that time have been resolved by the parties." That agreement, executed by both parties, shows a meeting of the minds as to the essential terms reached between the parties. On the other hand, the language offered here is ambiguous. The E/C did not confirm or stipulate the issues were resolved. There was no statement by the claimant's attorney he was dismissing or withdrawing the claims. While *Bednarik* establishes no certain language is required to operate as a dismissal, there must be something more than that offered in this case to establish the petition was in fact dismissed or withdrawn at the outset of the deposition.

Accordingly the Verified Petition for Attorney's Fees filed August 19, 2013 is hereby denied.

DONE AND ORDERED this 10th day of July, 2014, in Jacksonville, Duval County, Florida.



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