

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGES OF COMPENSATION CLAIMS
FORT LAUDERDALE DISTRICT OFFICE**

EMPLOYEE:
Alice Johnson
216 Lake Pointe Drive, Apt #119
Oakland Park, FL 33309

ATTORNEY FOR EMPLOYEE:
Kevin Gallagher, Esquire
707 SE 3rd Avenue, Suite #201
Fort Lauderdale, FL 33316

EMPLOYER:
West Broward Care Center/
B & W Care, LLC
20 East Robert Pitt Drive
Monsey, NY 10952

ATTORNEY FOR EMPLOYER/CARRIER:
Andrew Borah, Esquire
700 West Hillsboro Blvd., Suite #2-107
Deerfield Beach, FL 33441

CARRIER:
Normandy Insurance Company
P.O. Box 1569
Deerfield Beach, FL 33443

OJCC No: 17-021606DAL
D/A: 06/26/2017
JUDGE: Daniel A. Lewis

**FINAL ORDER ON ATTORNEY'S FEES AND COSTS
(FEE AMOUNT HEARING)**

AFTER DUE NOTICE to the parties, a Final Hearing on Attorney's Fees and Costs (Fee Amount Hearing) was conducted before the undersigned Judge of Compensation Claims (JCC) on May 31, 2018 in Lauderdale Lakes, Broward County, Florida. The claimant's Verified Petition for Attorney's Fees and Costs was filed on April 26, 2018, and the employer/carrier's Verified Response thereto was filed on May 15, 2018.

At this Fee Amount Hearing, sworn testimony was taken from counsel for the claimant and counsel for the employer/carrier; documentary exhibits, including the claimant's Verified Petition for Attorney's Fees and Costs, the employer/carrier's Verified Response thereto, the claimant's Petition for Benefits filed on September 6, 2017, the Notice of Resolution of Issues filed on November 6, 2017, the employer/carrier's Pay Log Report, claimant's counsel's

Timesheets, claimant's counsel's Affidavit of Costs, the parties' Mediation Agreement dated January 2, 2018, the Response to Petition for Benefits filed on September 18, 2017, the Response to Petition for Benefits filed on November 2, 2017, the Timesheets containing the employer/carrier's objections/notations as to the time claimed by claimant's counsel, and the Notice of Resolution of Issues filed on March 23, 2018, were admitted into evidence; and argument of counsel was presented.

After careful consideration and review of the testimony, documentary evidence and argument presented, the following are my findings of ultimate facts and conclusions of law:

1. Entitlement to attorney's fees recoverable by the claimant from the employer/carrier for the benefits listed in the Verified Petition for Attorney's Fees and Costs was not at issue. Those benefits were authorization of Dr. Aponte, the claimant's selection of one-time change of physician; authorization of Voltaren gel; and payment of temporary partial disability benefits from the date of the accident, June 26, 2017, to August 8, 2017, plus penalties and interest thereon.

2. At this Attorney's Fee Hearing, the claimant sought to amend his Verified Petition to include claims for attorney's fees from the employer/carrier for securing compensability of the claimant's right shoulder injury, securing transportation to medical appointments and obtaining a \$500 advance. The employer/carrier objected to the amendment on the basis that these claims were not recited as benefits secured in claimant's counsel's Verified Petition for Attorney's Fees and Costs. The employer/carrier asserted that it had relied on the claimant's Verified Petition in completing its Verified Response and in preparing for the instant Attorney's Fee Hearing. According to the employer/carrier, to allow claimant's counsel to amend his Verified Petition at this Fee Hearing would result in undue and unfair prejudice.

3. Fla. Admin. Code R. 60Q-6.124(3)(a)3 requires that the verified motion for attorney's fees and costs include a recitation of all benefits secured for the claimant through the attorney's efforts. I find that to allow claimant's counsel to amend his Verified Petition for Attorney's Fees and Costs at this Attorney's Fee Hearing to include claims for attorney's fees for other benefits purportedly secured which were not recited or listed in the Verified Petition would unduly prejudice the employer/carrier. Consequently, the employer/carrier's objection to the claimant's request to amend to the Verified Petition to include claims for attorney's fees from the employer/carrier for securing compensability of the claimant's right shoulder injury, securing transportation to medical appointments and obtaining a \$500 advance was sustained.¹

4. At this Attorney's Fee Hearing, the claimant also contended that, although the employer/carrier stipulated to claimant's counsel's entitlement to an attorney's fee on November 2, 2017 for obtaining the one-time change of treating physician to Dr. Aponte, this benefit was not actually provided until January 18, 2018, when the claimant attended the appointment with the doctor. Therefore, according to the claimant, attorney's fees continued to accrue after November 2, 2017 up until January 18, 2018, when the employer/carrier provided this benefit. For the following reasons, I reject the claimant's position.

5. The evidence reveals that the claimant filed her Petition for Benefits on September 6, 2017 seeking the above referenced benefits; to wit, a one-time change of physician to Dr. Aponte, authorization of Voltaren gel, and temporary partial disability benefits. In its Response to Petition for Benefits filed on November 2, 2017, the employer/carrier agreed to authorize Dr.

¹ During this Attorney's Fee Hearing, claimant's counsel withdrew his attorney's fee claim for obtaining medical transportation, as such claim was not contained in the September 6, 2017 Petition for Benefits. I also note that the Petition did not contain a claim for an advance. See section 440.34(3), Fla. Stat., which provides that "Regardless of the date benefits were initially requested, attorney's fees shall not attach under this subsection until 30 days after the date the carrier or employer, if self-insured, receives the petition." See also Jones vs. Shadow Trailers, Inc., 134 So. 3d 1136 (Fla. 1st DCA 2013) (holding the statute creates a bright-line rule for the attachment of employer/carrier paid attorney's fees under every subsection of 440.34(3)).

Aponte as the claimant selection of the one-time change of physician. In the November 2, 2017 Response, the employer/carrier also indicated it had provided the claimant with the Voltaren gel and agreed to pay the temporary partial disability benefits due and owing, plus penalties and interest thereon.² In its November 2, 2017 Response, the employer/carrier also stipulated to claimant's counsel's entitlement to an attorney's fee and costs for securing these benefits.

6. Although the claimant contends that the one-time change to Dr. Aponte was not provided until the appointment with the doctor took place, case law is to the contrary. In Jennings vs. Habana Health Care Center, 183 So. 3d 1131 (Fla. 1st DCA 2015), the First DCA held that medical benefits a physician is to provide are furnished when the employer, carrier or servicing agent communicates the name of the physician who is authorized to treat or evaluate to the claimant or to the claimant's attorney. Jennings vs. Habana Health Care Center, 183 So. 3d at 1133.

7. In the instant case, the employer/carrier communicated to the claimant the name of the physician who was authorized as the claimant's one-time change, Dr. Aponte, on November 2, 2017 in the employer/carrier's Response to Petition for Benefits.³ Consequently, this medical benefit was furnished or provided as of November 2, 2017. *See also* Dorsch, Inc. d/b/a Florida Fun Bike Super Center vs. Hunt, 15 So. 3d 836 (Fla. 1st DCA 2009) (holding that the employer/carrier's timely offer of a choice of physicians subsequent to the filing of a petition for benefits, as opposed to the scheduling of an appointment, did not represent a failure or refusal on the part of the employer/carrier to meet its statutory obligation to provide the claimant requested medical treatment pursuant to section 440.13(2)(c), Fla. Stat.) and HMSHost Corporation vs. Frederic, 102 So. 3d 668 (Fla. 1st DCA 2012) (holding the employer/carrier's informing the

² The evidence reveals the temporary partial disability benefits were also paid on November 2, 2017.

³ As the employer/carrier notes, Dr. Aponte was the claimant's selection or choice of one-time change of treating physician.

claimant of a particular doctor's name satisfied section 440.13(2)(f), even though the employer/carrier did not contact the doctor).⁴

8. I find that claimant's counsel is not entitled to attorney's fee from the employer/carrier for legal services performed subsequent to November 2, 2017, as such services would not be in relation to the benefits secured herein. As of that date, the employer/carrier provided or furnished the subject benefits and stipulated to claimant's counsel's entitlement to attorney's fees and costs thereon. Claimant's counsel would have to reestablish entitlement to a fee for time expended after November 2, 2017. *See Wiseman vs. AT&T Technologies, Inc.*, 569 So. 2d 508 (Fla. 1st DCA 1990) (citing *Crittenden Orange Blossom Fruit vs. Stone*, 514 So. 2d 351 (Fla. 1987) and noting that while the fee amount should include an attorney's services rendered to prove entitlement to a fee, the holding in *Crittenden* did not extend to cover time spent by the attorney in establishing the amount of the fee). *See also Spiker's All American Custom Accessories vs. Spiker*, 647 So. 2d 201 (Fla. 1st DCA 1994).

9. Consequently, I consider only that time expended by claimant's counsel up through November 2, 2017, when entitlement was stipulated to by the employer/carrier for securing the subject benefits; namely, the one-time change of physician to Dr. Aponte, authorization of the Voltaren gel, and temporary partial disability benefits plus penalties and interest.⁵ As such, I turn to the applicable factors to be considered in awarding an attorney's fee pursuant to *Lee Engineering & Construction Co. vs. Fellows*, 209 So. 2d 454 (Fla. 1968) and R. Regulating Fla. Bar 4-1.5(b)(1). *Castellanos vs. Next Door Company*, 192 So. 3d 431, 449 (Fla. 2016), *Murray*

⁴ The claimant contends that the *Dorsch* case is inapplicable because it involved the employer/carrier's provision of a one-time change of treating physician under section 440.13(2)(f), Fla. Stat. I find that case to be applicable since it construed the timeliness of the employer/carrier's provision of benefits. Moreover, the *Jennings, supra*, case did not involve a one-time change but instead whether the employer/carrier had timely furnished an orthopedic evaluation.

⁵ The employer/carrier agreed that time spent through November 6, 2017 should be included, since the time expended on that date involved establishing that the benefits had, in fact, been paid or provided.

vs. Mariner Health, 994 So. 2d 1051, 1061-1062 (Fla. 2008), Escambia County School District vs. Vickery-Orso, 109 So. 3d 1242 (Fla. 1st DCA 2013). Those factors are as follows:

10. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly:

Claimant's counsel claims a time expenditure of some 43.8 hours plus 2.4 hours of paralegal time in securing authorization of Dr. Aponte, the claimant's one-time change of physician; authorization of the Voltaren gel; and payment of temporary partial disability benefits from June 26, 2017 to August 8, 2017, plus penalties and interest thereon. While the employer/carrier agreed that an hourly fee would be appropriate here as opposed to the statutory formula fee, the employer/carrier objected to many of the time entries in claimant's counsel's Timesheets as excessive, clerical or administrative in nature, and unrelated to the benefits secured.

I have carefully reviewed each time entry, and I find the following time to be reasonable, related to the benefits secured, and awardable. To save space, I have abbreviated the description of the service performed which was listed on the Timesheets. I have only listed below those time entries where the employer/carrier has contested or objected to the time expended, as reflected on the Timesheets attached to the employer/carrier's Verified Response to Verified Petition for Attorney's Fees and Costs.

Date	Description	Time
July 5, 2017	Merged, labeled and filed	0.0 ⁶
August 14, 2017	Receipt and review appt. letter	.2

⁶ Under the case law, paralegal time and labor is only compensable where the paralegal has contributed nonclerical meaningful legal support to the matter involved. Dayco Products vs. McLane, 690 So. 2d 654 (Fla. 1st DCA 1997), Demedrano vs. Labor Finders of the Treasure Coast, 8 So. 3d 498, 500 (Fla. 1st DCA 2009). I find the time expended for this service does not constitute nonclerical meaningful legal support but instead is merely administrative or clerical in nature.

August 16, 2017	Receipt and review R/P	.2
August 16, 2017	Telephone conference claimant	.5
August 17, 2017	Prepared letter claimant	.2
September 6, 2017	Sent certified mail	0.0 ⁷
September 6, 2017	Receipt and review email	.1
September 6, 2017	Receipt and review email	.4
September 18, 2017	Receipt and review Response	.2
September 19, 2018	Imported the Certified RR	0.0 ⁸
September 26, 2017	Telephone conference claimant	0.0 ⁹
September 27, 2017	Receipt and review email	.2
October 9, 2017	Receipt and review MTC	.4
October 10, 2017	Communicate with claimant	0.0 ¹⁰
October 10, 2017	Emailed opposing counsel	0.0 ¹¹
October 10, 2017	Mailed employee earnings reports	0.0 ¹²
October 10, 2017	E-filed Motion for Advance	0.0 ¹³
October 12, 2017	Prepared Notice of Compliance	.2
October 12, 2017	Prepared and emailed OC	0.0 ¹⁴
October 16, 2017	Receipt/review Notice of Mediation	.2
October 16, 2017	Receipt letter re: adj. telephone	.1

⁷ See fn. 6

⁸ See fn. 6

⁹ Time unrelated to benefits secured.

¹⁰ See fn. 9

¹¹ See fn. 6

¹² See fn. 6

¹³ See fn. 9

¹⁴ Objection as to vague time entry sustained.

October 17, 2017	Receipt notice evidentiary hearing	0.0 ¹⁵
October 23, 2017	Receipt employee earnings reports	.3
October 23, 2017	Sent earnings reports to OC	0.0 ¹⁶
October 24, 2017	Receipt/review subpoena	.2
October 24, 2017	Prepared letter re: copies subpoena	.2
October 24, 2017	Emailed letter to OC	0.0 ¹⁷
October 24, 2017	Receipt Notice claimant deposition	.2
November 6, 2017	Communication with OC	0.0 ¹⁸
November 6, 2017	Prepared Notice of Resolution	1.0
October 10, 2017	Receipt of various documents	0.0 ¹⁹
October 11, 2017	Prepared letter re: releases	.2
November 6, 2017	Review of file re: advance	0.0 ²⁰
Subtotal of contested time (from above)		5.0
<u>Subtotal of uncontested time (from Timesheets)</u>		<u>14.7</u>
Total awardable time		19.7 hours

I find that a reasonable time expenditure for securing the benefits obtained is in the amount of 19.7 hours. I further find that the issues involved were neither novel nor complex, although they required the services of an experienced workers' compensation attorney. I note that no depositions or trials were required to obtain the benefits secured and that the services

¹⁵ See fn. 9

¹⁶ See fn. 6

¹⁷ See fn. 6

¹⁸ This is a duplicate of another November 6, 2017 entry. Claimant's counsel's Timesheets have duplicate entries and are not always in chronological order. I have included the 3.0 hours for the other November 6, 2017 time entry in the uncontested time.

¹⁹ This time entry was withdrawn by claimant's counsel at this Attorney's Fee Hearing.

²⁰ See fn. 9

were essentially routine in nature . I find the skill requisite to perform the legal services properly were those of an experienced workers' compensation attorney.

11. The fee customarily charged in the locality for similar legal services:

Claimant's counsel seeks an hourly rate of \$325 for performing the legal services rendered. The employer/carrier asserts that a reasonable combined hourly rate for the services of all claimant's counsel who worked on this case is in the amount of \$300. The majority of the legal services were performed by other attorneys in claimant's counsel's law firm. I find that a reasonable hourly rate is in the amount of \$300.

12. The amount involved in the controversy and the benefits resulting to the claimant:

The value of the benefits secured herein, the one-time change of physician to Dr. Aponte, authorization of Voltaren gel, and temporary partial disability benefits plus penalties and interest, were in the amount of approximately \$1500. As indicated, the employer/carrier stipulated that a fee based on hours reasonably expended would be appropriate as opposed to the statutory formula fee on the value of the benefits secured.

13. The nature and length of the professional relationship with the claimant, the time limitation imposed by the claimant or the circumstances, and the likelihood that the acceptance of the particular employment will preclude employment of the lawyer by others or cause antagonisms with other clients:

Claimant's counsel has been representing the claimant herein since July, 2017. No evidence was adduced that any particular time limitations were imposed by the claimant or by the circumstances. No evidence was presented that, by spending time on this case, claimant's

counsel was precluded from accepting other cases. Nor was any evidence presented that this representation caused antagonisms with any other clients.

14. The experience, reputation, and ability of the lawyer or lawyers performing the services:

Claimant's counsel testified that he has been practicing law for some 20 years. The other attorneys in claimant's counsel's law firm who also worked on this case have varying degrees of legal experience. I find that claimant's counsel is an experienced and qualified workers' compensation attorney.

15. The contingency or certainty of the fee:

This case was handled on a contingency basis with no certainty or guarantee of a fee.

16. I have carefully considered all of the applicable statutory and case law factors. I find a reasonable hourly rate in this case to be in the amount of \$300. I find a reasonable attorney's fee award in this cause to be in the amount of \$5910, which represents 19.7 hours times \$300 per hour. Consequently, I am hereby awarding to claimant's counsel, as and for a reasonable attorney's fee, the sum of \$5910.

17. There remains the issue of taxable costs due. The claimant seeks taxable costs in the amount of \$226.25. Fla. Admin. Code R. 60Q-6.124(3)(e) provides that the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions shall be considered by the JCC in determining the reasonableness of an award of cost reimbursement. The Statewide Uniform Guidelines provide that it is the burden of the moving party to show that all requested costs were reasonably necessary either to defend or prosecute the case at the time the action precipitating the cost was taken.

18. I find that the court reporter's charge in the amount of \$157 for the deposition of the carrier's adjuster, which deposition was taken on March 14, 2018, was not reasonably necessary to prosecute the case at the time the deposition was taken. This discovery was neither related to the benefits secured nor was it necessary to establish entitlement to an attorney's fee. The deposition was taken after the subject benefits had been provided/furnished on November 2, 2017 and after the employer/carrier stipulated to claimant's counsel's entitlement to a fee. Consequently, I find this cost is not taxable against the employer/carrier.

19. The claimant also seeks photocopy costs in the amount of \$62.50 representing 55 pages at \$.50 per page as well as mailing expenses in the amount of \$6.75. The employer/carrier does not dispute the \$6.75. The Statewide Uniform Guidelines provide that the costs of copies of documents filed with the court and the costs of copies obtained in discovery, even if the copies were not used at trial, are taxable. Although the employer/carrier asserts that it is unclear when these photocopy costs were incurred, the Timesheets reflect that, within the applicable time period, petitions and pleadings were filed and copies of documents received in response to subpoenas were requested. Consequently, I will allow this expense as reasonable litigation costs. However, 55 pages at \$.50 per page only amounts to \$27.50. I am therefore awarding to claimant's counsel, as and for taxable costs incurred, the sum of \$34.25 (\$6.75 plus \$27.50).

DONE AND ORDERED at Lauderdale Lakes, Broward County, Florida this

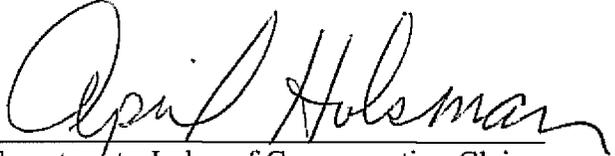
5th day of June, 2018.



Honorable Daniel A. Lewis
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Final Order on Attorney's Fees and Costs (Fee Amount Hearing) was furnished this 5th day of June, 2018 by electronic transmission to the parties' counsel of record and by U.S. mail to the parties.


Secretary to Judge of Compensation Claims