

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
WEST PALM BEACH DISTRICT OFFICE

Anibal Mojica ,
Employee/Claimant,

OJCC Case No. 13-011608MAD

vs.

Accident date: 11/8/2012

A-Lighting Maintenance Corp./Amerisure
Insurance,
Employer/Carrier/Service Agent.

Judge: Mary A. D'Ambrosio

FINAL EVIDENTIARY ORDER ON EMPLOYER/CARRIER'S MOTION FOR SANCTIONS

THIS CAUSE came before me on May 13, 2016 for an Evidentiary Hearing on the Employer/Carrier's Motion for Sanctions filed on March 9, 2016. Present for the hearing were Lee Amento, Esquire counsel for the Claimant and Kate Albin, Esquire counsel for the Employer/Carrier.

EXHIBITS

1. March 10, 2016 email between counsel – Employer/Carrier's Exhibit #1;
2. Petition for Benefits August 26, 2015 (DE 35) – Employer/Carrier's Exhibit #2;
3. Notice of Voluntary Dismissal of Petition for Benefits filed 3/8/16 (DE 50) – Employer/Carrier's Exhibit #3;
4. Amended Notice of Voluntary Dismissal filed April 1, 2016 (DE 58)- Employer/Carrier's Exhibit #5.
5. Notice of filing billing records (DE 61) – Employer/Carrier's Exhibit #5.

The Motion for Sanctions, the Claimant's Response and the Reply were considered as argument. The Employer/Carrier withdrew its request for Sanctions under Section 440.32(2), Florida Statutes. The Employer/Carrier proceeded with its request for Sanctions under Sections 440.32(1) and (3), F.S.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On August 26, 2015, the Claimant's attorney filed a Petition for Benefits on behalf of the Claimant, requesting authorization and scheduling of a return visit to Dr. Wachsman.

2. The Employer/Carrier did not authorize a return visit with Dr. Wachsman. They argue no benefit was secured by Claimant's Counsel. This was not disputed by the Claimant.

3. On March 8, 2016 Attorney Amento filed a Notice of Voluntary Dismissal of the August 26, 2015 Petition with a reservation as to entitlement to attorney's fees and costs.

4. On March 8, 2016 at 5:26 p.m. Counsel for the Employer/Carrier sent an email to Claimant's Counsel advising of their position that the reservation as to attorney's fees and costs was "frivolous and sanctionable" and requested a dismissal of the fee claim. Mr. Amento responded on March 10, 2016 at 2:34 p.m. "OK, will do." Mr. Amento filed an Amended Notice of Voluntary Dismissal to include attorney's fees and costs on April 1, 2016.

5. On March 9, 2016, the Employer/Carrier filed its Motion for Sanctions pursuant to F.S. 440.32(1),(2) and (3) (later withdrawing claim under 440.32(2) at time of hearing).

6. The Claimant argues the Motion is procedurally deficient for failure to comply with Rule 60Q-6.125(4)(a) which requires that any motion for sanctions shall be served but shall not be filed unless the challenged claim is not withdrawn or appropriately corrected within 21 days after service of the motion. The Employer/Carrier argue the 21 day "safe harbor" provision in the Rule is inapplicable to F.S. 440.32. Additionally, they argue the Amended Notice of Voluntary Dismissal was filed 23 days after the Motion for Sanctions was filed.

7. The Employer/Carrier seeks attorney's fees from Claimant's counsel representing 5.1 hours spent on the issue of pursuing the voluntary dismissal and Motion for Sanctions. For the reasons discussed below, I find that Claimant's counsel shall personally pay a monetary

sanction of \$375.00 pursuant to 440.32(1) for continuing a proceeding without reasonable grounds and under section 440.32(3). Attorney Amento has not shown that at the time he signed the Notice of Voluntary Dismissal on March 8, 2016, he knew or should have known after reasonable inquiry that the pleading was well grounded in fact, warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. Mr. Amento presented no evidence as to the reasons for his reservation of the claim for attorney fees and costs at the time he filed the Notice of Voluntary Dismissal on March 8, 2016. He presented no competent reason for his failure to dismiss the attorney fee and cost claim on March 10, 2016 when he agreed to do so in an email. The billing records show defense counsel called claimant's counsel eight days later, on March 18, 2016 to inquire whether he was dismissing the attorney fee and cost claim (as claimant's counsel agreed to do in the March 10, 2016 email). The billing records indicate the defense counsel made a good faith attempt to resolve a proposed Motion to Compel filing of a Verified Motion for attorney fees. Mr. Amento presented no competent reason for his failure to dismiss the attorney fee and cost claim until April 1, 2016, well after the Order Setting Evidentiary Hearing on the Motion for Sanctions was issued.

8. I find that Rule 60Q-6.125(4)(a) specifically references 60Q-6.125(2), which deals with representations to the judge. The rule does not reference Florida Statute 440.32. There is no 21 day "safe harbor" provision in Florida Statute 440.32 (1) (2) or (3). If the Legislature wanted it to be there, they would have specifically stated it.

9. I find that the Employer/Carrier has shown that the continuation of the attorney fee and cost claim after March 8, 2016 was done without reasonable grounds. I have reviewed the Employer/Carrier's billing sheets and find that some of the time billed was duplicative. I award 2.5 hours at the rate of \$150.00 per hour which I find to be reasonable to compensate the

Employer/Carrier for their time and costs incurred for pursuing the dismissal and sufficient to deter future conduct.

WHEREFORE, it is

ORDERED AND ADJUDGED:

1. The Employer/Carrier's Motion for Sanctions is granted.
2. Attorney Lee Amento shall pay to the Employer/Carrier the sum of \$375.00

within 30 days as a sanction under sections 440.32(1) and (3), Florida Statutes.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 19 day of May, 2016.



Mary A. D'Ambrosio
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Final Evidentiary Order was entered on the 19 day of May, 2016, and that a copy thereof was electronically served on counsel.



Secretary to Judge of Compensation Claims

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