

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

**RUBEN ANTONIO LUNA-
MARTINEZ**

Employee

Mr. William Haro
ATTORNEY FOR EMPLOYEE

FRANKCRUM

Employer

Mr. Andrew R. Borah
ATTORNEY FOR
EMPLOYER/CARRIER

**FRANK WINSTON CRUM
INSURANCE**

SERVICED BY: BROADSPIRE

Carrier

OJCC CASE NO.:
09-027615HHH
D/A: 7/27/2009

Judge: Henry H. Harnage

FINAL COMPENSATION ORDER ON ATTORNEY'S FEES AND COSTS

THIS CAUSE came before me in Miami-Dade County, Florida, on December 20, 2012 and continued on January 18, 2013 for a final merits hearing on the contested amount of attorney's fees and.

The claimant was represented by attorney William Haro of the Law Office of Richard Zaldivar, PA, while the Employer/Carrier was represented by attorney Andrew Borah of Hurley, Rogner, Miller, Cox, Waranch, & Westcott, P.A. Each testified as both fact and expert witnesses for their respective clients.

This Final Compensation Order follows.

INTRODUCTION

At issue for the Final Hearing was a *Verified Petition for Attorney's Fees and Costs*, filed on July 31, 2012. The Employer/Carrier filed its Verified Response to Claimant's Verified Motion on August 28, 2012, and amended such response on September 26, 2012. Entitlement has never been an issue. The only issue has been the amount of the claimant's attorney's fee. In the Amended Response, the Employer/Carrier stipulated to the claimant's attorney's claimed guideline fee of \$3,029.00 for past benefits obtained, and also stipulated to the claimed taxable costs of \$2,727.80. However, the Employer/Carrier dispute the amount of the claimant's attorney's fee in regard to future medical benefits and dispute the claimant's attorney's entitlement to a \$1,500.00 fee pursuant to Fla. Stat. §440.34(7).

After hearing the testimony of the party's attorneys and having reviewed all of the evidence¹, I find for the Employer/Carrier as to the issues in dispute. I find that the \$1,500.00 medical only fee requested by claimant's counsel pursuant to Fla. Stat. 440.34(7) is not awardable. I also note that the fee on future medical benefits would be \$173.45, which is supported by Fla. Stat. 440.34, and relevant case law as outlined below. As such, I award an attorney's fee of \$3,202.45 for benefits secured, and \$2,727.80 for costs.

1 The documentary evidence is set forth in the ATTACHMENT to this Final Compensation Order.

BACKGROUND

1. As a result of past benefits, the claimant's attorney alleged a reasonable fee of \$3,029.00 based on \$22,794.91 in medical and indemnity benefits in the past. The Employer/Carrier stipulated to this fee of \$3,029.00, therefore, the subject of fees on past benefits was not at issue at this hearing.

2. The claimant's attorney also claimed a \$1,500.00 medical only fee pursuant to Fla. Stat. 440.34(7) for obtaining a medical only benefit pursuant to the Petition for Benefits filed on November 19, 2010 where the claimant requested an MRI of the right ankle and EMGs of the claimant's lower extremities. The Employer/Carrier disputed the right to this fee, asserting that the \$1,500.00 medical only fee was an alternative to a guideline fee, and is not awardable since there was a pending claim for indemnity at the time of the November 19, 2010 Petition for Benefits.

3. Finally, the claimant's attorney alleged entitlement to a statutory fee on the reasonable value of future medical care for the five years after the petition was filed. The claimant's attorney requested a fee for future medical benefits in the amount of \$15,750.00. At the time of hearing, this proposed fee was reduced to between \$10,000.00 to \$12,500.00 based on the testimony of Dr. Randall Blinn at deposition. The value of future benefits were not stipulated to by the

Employer/Carrier, who alleged that the appropriate fee amount based on future medical benefits should be \$173.45.

FINDINGS

4. After reviewing the evidence, as well as testimony offered by Mr. Haro and Mr. Borah, I find that the parties stipulated to a fee on past benefits obtained in the amount of \$3,029.00. This number is appropriate and is not at issue. I also find that the parties have stipulated to taxable costs of \$2,727.80, and therefore this is not at issue as well.

5. I have carefully considered both parties' testimony regarding the \$1,500.00 medical only fee. Pursuant to Fl. Stat. 440.34(7), "If an attorney's fee is owed under paragraph (3)(a), the judge of compensation claims may approve an *alternative* attorney's fee not to exceed \$1,500 only once per accident..." (emphasis supplied). Paragraph (3)(a) asserts that a medical only fee can be taxed "against whom she or he successfully asserts a petition for medical benefits only, if the claimant has not filed or is not entitled to file at such time a claim for disability, permanent impairment, wage-loss, or death benefits, arising out of the same accident." I find that at the time that claimant's counsel prevailed on the medical benefits set forth in the November 19, 2010 petition, there was also a pending petition for indemnity benefits which was filed on June 15, 2010. I find that the claim for indemnity benefits prevents the claimant's attorney from seeking a

\$1,500.00 fee pursuant to Fla. Stat. 440.34(7). Specifically, this is supported by Westinghouse Electric v Widlan, 623 So.2d 511, 514 (Fla. 1st DCA 1993).

However, even if I disregard the pending indemnity claim at the time of the medical only petition, I accept Mr. Borah's testimony that a \$1,500.00 medical only fee is an alternative fee pursuant to Fla. Stat. 440.34(7) and cannot be claimed in this instance addition to the guideline fee.

6. As for future medical benefits, I find that pursuant to Greene v Maharaja of India, 558 So. 2d 461 (Fla. 1st DCA 1990) and Department of Health v Lucas, 466 So.2d 1269 (Fla. 1st DCA 1985), the value of future medical benefits must be reduced to fee schedule. Furthermore, claimant's counsel has agreed that past medical benefits should be reduced to fee schedule as evidenced in his Verified Petition for Attorney's Fees and Costs, and I find no evidence that past and future medical benefits should be treated any differently for reduction to fee schedule.

7. I reviewed in its totality the deposition transcript from Dr. Blinn, the claimant's IME, as well as the transcripts of the adjuster, Ruby Arias, and Dr. Warren Windram, the authorized treating podiatrist. Dr. Blinn saw the claimant on only one occasion, November 16, 2010. More than two years after evaluating the claimant, on November 29, 2012, Dr. Blinn opined that the claimant would need \$100,000.00 to \$120,000.00 in future medical treatment over the next couple years.

I find that Dr. Blinn's testimony is reconstructed after the fact, and is too speculative as to what treatment the claimant will need in the future particularly as compared to the more recent treating doctor, Dr. Windram, who has seen the claimant on numerous occasions, more recent in time, and whose area of expertise in podiatry is more relevant and focused towards the claimant's ankle injury. I find that pursuant to Greene, evidence of future medical expenses as provided by Dr. Blinn is not helpful, as no attempt was made to reduce Dr. Blinn's anticipated future medical costs to the fee schedule. I find that Dr. Windram's testimony that the claimant would only require Voltaren gel, office visits as needed, and a CT scan of the right foot/ankle as being specific and based on competent and substantial evidence from the claimant's seven office visits with Dr. Windram.

8. I find the adjuster, Ruby Arias, to be knowledgeable and competent. I find that she has significant experience adjusting claims, and has knowledge of the cost of medical treatment pursuant to fee schedule as paid out in both this claim and other similar claims. I find that the cost of the medical treatment as recommended by Dr. Windram pursuant to fee schedule is supported within the record by the adjuster's testimony.

9. Based on Dr. Windram's opinions on future medical treatment necessary in conjunction with the adjuster's testimony on the cost of such

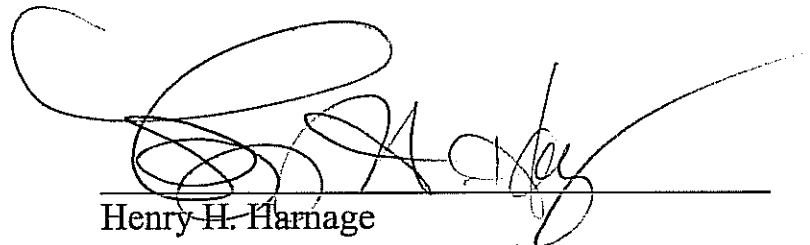
treatment pursuant to fee schedule, I find that the guideline fee on future medical benefits obtained is \$173.45.

WHEREFORE it is **ORDERED** and **ADJUDGED** that:

A. The Employer/Carrier to pay to the Law Office of Richard Zaldivar, P.A., an attorney's fee in the amount of \$3,202.45 for past and future benefits secured; and

B. The Employer/Carrier to pay costs to the Law Office of Richard Zaldivar, P.A., as stipulated in the amount of \$2,727.80.

ORDERED in chambers in Miami, Miami-Dade County this 13th day of February, 2013.



Henry H. Harnage
Judge of Compensation Claims

ATTACHMENT

Claimant:

1. Verified Motion for Fees and Costs
2. Deposition transcript of Dr. Blinn

Joint Exhibits:

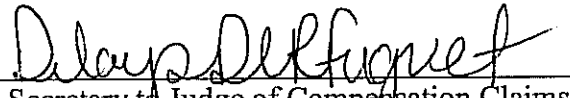
1. Adjuster deposition transcript of Ruby Arias

Employer/Carrier/Servicing Agent:

- A. Deposition transcript of Dr. Windram
- B. Amended Verified Response to the claimant's verified motion for attorney's fees and costs.
 - 1A. Present value calculations for future benefits

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been E-SERVED to the attorneys of record and furnished by U.S. Mail to all parties this 13th day of February, 2013.


Secretary to Judge of Compensation Claims

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