

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
MIAMI-DADE COUNTY DISTRICT**

EMPLOYEE:
Maria Salado
633 East 30th Street
Hialeah, FL 33013

ATTORNEY FOR EMPLOYEE:
Richard E. Zaldivar, Esquire
2600 SW 3rd Ave., Ste. 300
Miami, FL 33129

EMPLOYER:
The Simplex Group, Inc
4333 Collins Ave
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ATTORNEY FOR E/C:
Andrew R. Borah, Esquire
1560 Orange Ave., Ste. 500
Winter Park, FL 32789

CARRIER:
USIS
PO Box 616648
Orlando, FL 33140

OJCC No.: 09-024667SMS
D/A: 5/3/09
JCC: Sylvia Medina-Shore

**FINAL EVIDENTIARY HEARING ORDER GRANTING EMPLOYER/CARRIER'S
MOTION TO TAX COSTS**

THIS CAUSE came before the undersigned Judge of Compensation Claims for an evidentiary hearing on 10/8/10 regarding E/C's Motion to Tax Costs filed 6/16/10.

Documentary Exhibits:

E/C-

1. E/C's Motion to Tax Costs filed 4/14/10.

Claimant-

1. Claimant's Response to E/C's Motion to Tax Costs filed 8/19/10.

Findings of Fact and Conclusions of Law:

1. The adjuster, Ms. Debra Shaffer, testified via telephone while the claimant, Ms. Maria Salado testified in person at the 10/8/10 evidentiary hearing.
2. The claimant testified that she was previously represented by Mark Touby, Esquire in

the instant matter. She provided authority to him to file the appropriate pleadings in the present case. Petitions for benefits were filed on 9/23/09 and 4/13/10 by the claimant and Mr. Touby.

3. On 9/25/09, the undersigned mailed, via U.S. Mail, a Notice of Pre-trial Conference, Notice of Final Hearing, and Pre-hearing Order to the claimant, the employer, the carrier and via e-mail to Mr. Touby. The pre-trial hearing was scheduled for 2/2/10 and the final hearing was scheduled for 4/22/10.
4. On 4/14/10, Mr. Touby filed a voluntary dismissal of the above listed PFBs on behalf of the claimant.
5. On 4/16/10, E/C filed a Notice of Cancellation of the 4/22/10 final hearing.
6. On 5/3/10, an Order closing file and dismissing pending petitions for benefits was entered.
7. On 5/17/10, a Petition for Benefits was filed by the claimant and Mr. Zaldivar.
8. On 6/16/10, E/C filed their Motion to Tax Costs.
9. On 8/19/10, Claimant filed her Response to E/C's Motion to Tax Costs. In claimant's response, she alleges that F.S. 440.30 only allows the claimant (not E/C) to recover costs such as fees for depositions. While the undersigned is cognizant of F.S. 440.30, I find that same statute section does not conflict with F.S. 440.34(3). F.S. 440.30 deals with deposition fees being recovered by the claimant either pre-suit or post suit if the claimant prevails.
10. F.S. 440.34(3) broadens the scope of costs reimbursement by indicating that "if *any party* should prevail in *any proceedings* before a JCC or court, there shall be taxed against the non-prevailing party the *reasonable costs of such proceedings*, not to

include attorney's fees.”

11. I find that F.S. 440.34(3) allows for the prevailing party--either the E/C or the claimant—to recover reasonable costs. Accordingly, E/C is correct in seeking costs pursuant to F.S. 440.34(3). Further, I find that F.S. 440.34(3) does not limit a prevailing party to solely recover non-deposition fee costs. F.S. 440.34(3) specifically indicates that “reasonable costs” shall be taxed against the prevailing party.
12. As to claimant's testimony regarding the voluntary dismissal, I find that same grounds were not encompassed in claimant's response to the motion to tax costs. Claimant's testimony that she did not provide Mr. Touby with authority to file the voluntary dismissal was first brought forth at the time of the evidentiary hearing. The timing of claimant's assertions substantiates “trial by ambush” tactics. Nonetheless, I will address claimant's allegation.
13. Claimant testified that she never received notice of the mediation, pre-trial, or final hearing. The only reason she attended the mediation was because Mr. Touby's secretary informed her of same via telephone. She never saw or discussed the voluntary dismissal with Mr. Touby. She did not provide Mr. Touby with authority to file same. She became aware of the 4/14/10 Notice of Voluntary Dismissal on 10/8/10.
14. I find claimant not credible and reject her testimony. The docket of the instant case, which I take judicial notice of, reflects that claimant was mailed the Notice of Pre-Trial and Final Hearing on 9/25/09. The address on the notice is the correct address of the claimant. Accordingly, I find that claimant was provided with notice of the

pre-trial and final hearing contrary to her evidentiary hearing testimony.

15. No one appeared for the 4/22/10 final hearing. Thus, I find that claimant had to have knowledge that same final hearing was cancelled. I find her testimony that she was not aware of the voluntary dismissal to be dubious.
16. Moreover, a voluntary dismissal is a pleading. See, 6Q-6.102(10). Pursuant to 60Q-6.103(1)(c), all documents under pleadings filed with the OJCC or with the judge shall: . . . (c) contain the signature, or the electronic equivalent of the signature if filed electronically, of the party in interest or, if represented, the party's attorney of record;”
17. In the present case, the Notice of Voluntary Dismissal has the signature of claimant's prior attorney, Mr. Mark Touby. Accordingly, I find that Mr. Touby had apparent authority to file the 4/14/10 voluntary dismissal and did so complying with the 60Q rules.
18. I find that pursuant to Fla. Stat. §440.34(3) and the case of *Palm Beach School District v. Ferrer 990 So.2d 13 (Fla. 1st DCA 2008)*, the E/C is entitled to reimbursement of its costs as the prevailing party. The adjuster testified that the total costs paid to third party providers were \$2,046.90. She confirmed that the costs related to reimbursement for fees for the depositions of claimant (\$866.10), herself (\$165.50), Dr. Brumer (\$176.20), Dr. Droblas (\$784.10) and \$55.00 in process server fees for serving Jorge Quero.
19. A party seeking costs wherein a response has been filed should delineate which witness or transcript the charge was for. Doing so assists the JCC in determining which of the costs were associated with evidence used in support of the defense. *See,*

Hillsborough County's Sheriff's Office v. Hilsman, 23 So.3d 743 (Fla. 3rd DCA 2009). In the present case, claimant questions whether the entirety of the \$866.10 and \$784.10 costs are taxable. Unfortunately, the adjuster did not have the invoices available to delineate the breakdown of costs. However, based on her testimony, I find that \$498.60 is taxable costs (deposition and transcript of the claimant) out of the \$866.10. It is not clear what the remaining amount of costs relate to. I further find that the entire \$784.10 amount is taxable as the adjuster testified she had one statement for the costs of Dr. Roblas deposition. I therefore find that the total reasonable costs expended by E/C in the defense of the instant case are \$1,679.40.

WHEREFORE, IT IS ORDERED:

1. E/C's Motion to Tax Costs against the Claimant is granted.
2. The claimant shall pay the insurance carrier \$1,679.40 as reimbursement for costs expended in defending the voluntarily dismissed PFBs.



Sylvia Medina-Shore
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I hereby certify that the instant Final Evidentiary Hearing Order Granting E/C's Motion to Tax Costs was mailed, via U.S. mail, to the parties at: Maria Salado, 633 East 30th Street, Hialeah, FL 33013; The Simplex Group, Inc., 4333 Collins Ave., Miami Beach, FL 33140; USIS, PO Box 616648, Orlando, FL 33140, and via e-mail to the attorneys of record at: Zaldivarpa@gmail.com

and zzevallos@hrmcw.com; sfounier@hrmcw.com this 12th day of October of 2010.

Letecia Espina

Secretary to JCC