

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS  
FT. LAUDERDALE DISTRICT OFFICE

Pedro Munoz,  
Employee/Claimant,

OJCC Case No. 16-025968GBH

vs.

Accident date: 7/21/2016

MH 2 G, Concepts & Designs Studio, Inc.  
DBA Modern Homes to Go/AmTrust  
North America of Florida, and Associated  
Industries Insurance Company,  
Employer/Carrier/Servicing Agent.

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Judge: Geraldine B. Hogan

**ORDER DENYING CONTESTED ATTORNEY'S FEE AND COSTS**

This matter came before the undersigned Judge of Compensation Claims on a Verified Motion for Attorney's Fees and Costs filed on January 2, 2018. Claimant's prior attorney requested prevailing party costs and an attorney's fee for securing those costs. For reasons set forth below, I find that Claimant's prior attorney was not a prevailing party and therefore, is not entitled to an E/C paid fee.

1. Attorneys at the Law Office of Richard E. Zaldivar represented the Claimant from October 5, 2016 until on, or about, December 14, 2016. Attorney Robert M. Rivera filed the Verified Motion and Attorney Monica Cooper appeared on behalf of the law firm at a May 1, 2018 hearing.
2. On October 25, 2016, an Attorney from the Law Office of Richard E. Zaldivar filed a PFB requesting the following benefits:
  - Temporary total disability benefits from 7/21/2016 to date and continuing;
  - Temporary partial disability benefits from 7/21/2016 to date and continuing;
  - Provision of orthopedist for evaluation and treatment;
  - Compensability of the back condition; and
  - Penalties, interest, costs, and attorney's fees.
3. In the Response to Petition for Benefits, prepared on November 1, 2016, the adjuster asserted that:
  - TTD was not due or owing because [the Claimant] was never placed on an out of work status.

- TPD was not due and owing because [the Claimant] continues to work. He has only missed 2 days since accident. 8/19/16 was a sick day and 8/24/16 was a vacation day.
  - Claimant treated with Dr. Garcia on 10/20/16 who is an orthopedic doctor;
  - E/C has and continues to authorize medical care for low back condition.
  - Compensability has always been accepted; and
  - PICA was not due or owing.
4. According to paragraph #5 of the Verified Petition Claimant had not received indemnity benefits, in spite of being placed on restrictions and the Employer had not provided light-duty work. The Verified Petition further noted that on **November 2, 2016**, Attorney Cooper emailed the adjuster requesting payment of TPD benefits because on **November 1, 2016**, the employer advised the Claimant that it did not have light duty work available for him. The Verified Petition also asserted that after the November 2, 2016 correspondence, the adjuster initiated payment of indemnity benefits.
  5. Attorney Cooper asserted that she is entitled to prevailing party costs for the successful prosecution of the October 25, 2016 PFB, pursuant to sec. 440.34(3) Fla. Stat. (2013) and *Jennings v. Habana Health Care Center*, 183 So. 3d 1131 (Fla. 1st DCA 2015). Attorney Cooper argued entitlement to an E/C paid fee for securing the reimbursement of costs associated with the PFB filed on October 25, 2016. To support this assertion, Attorney Cooper cited *Poyntz v. William Adeimy, Inc.* (190 So. 2d Fla. 745).
  6. In *Jennings* the First District held that the Claimant was the prevailing party, entitling her to prevailing party costs pursuant to sec. 440.34(3) Fla. Stat., even though the benefits requested in the PFB were provided less than 30 days after the claimant filed the PFB. *Jennings v. Habana Health Care Center* 183 So. 3d at 1132.
  7. In *Poyntz* the Court found that the Deputy Commissioner did not err in awarding an E/C paid fee because claimant's attorney secured payment of expert witness fees. The Court agreed with the Deputy Commissioner, who reasoned that in the event the E/C was not obligated to pay the reasonable charges of expert witness fees or other costs of the hearing, the claimant would be required to do so since said charges are initially incurred by the claimant in his attendance of witnesses by subpoena and his promise to pay a reasonable fee for the expert witnesses.
  8. In *Jennings* the claimant filed a PFB requesting an orthopedic evaluation. The claims adjuster received a petition for benefits on September 11, 2014 and the evaluation requested in the PFB was furnished on September 12, 2014. The court noted that the PFB included the required language of 440.192(4) Fla. Stat., that the claimant, or her attorney, had made a good faith effort to resolve the dispute over benefits with the carrier, but was unable to do so. The court further noted that this certification was not challenged. *Jennings*, 183 So. 3d at 1132.

9. The matter before me is distinguishable from *Jennings* because in this case E/C challenged the “good faith effort” asserted in the October 25, 2016 PFB. (E/C’s Exhibit #3: Motion for Sanctions).
10. Ashley Conway, the adjuster, testified that compensability was never questioned and prior to the October 25, 2016 PFB, medical care for the Claimant’s low back injury was authorized. The adjuster testified that she filed a Response to the Petition for Benefits on November 1, 2016. At that time the Claimant had never been placed out of work. According to her testimony, when Claimant filed the PFB on October 25, 2016 he was working for the employer earning at least 80 percent of his AWW.
11. According to the adjuster’s testimony, an employer representative met with the Claimant on November 1, 2016, and informed him that they could no longer accommodate his work restrictions. An employer representative sent an email to the adjuster on November 2, 2016, advising the carrier that the employer could no longer accommodate the Claimant’s restrictions.
12. When the adjuster received an email from Claimant’s prior attorney advising that the employer no longer had work available, she advised Claimant’s prior attorney that she was aware of the Claimant’s work status. She further advised that she would initiate payment of indemnity benefits after the waiting period was met. On November 11, 2016 the adjuster issued a payment of TPD benefits that covered November 2, 2016 to November 15, 2016.
13. The adjuster did not pay any temporary partial disability benefits for any date prior to **November 2, 2016**. According to the adjuster’s testimony none of the benefits requested in the October 25, 2016 PFB were ripe due and owing on the date Claimant filed it.
14. Ms. Cooper testified that she was not seeking a fee for obtaining indemnity benefits. According to her testimony, she was seeking a fee for securing E/C paid costs.
15. E/C argued that Claimant’s prior counsel is not entitled to an E/C paid fee pursuant to the October 25, 2016 PFB because benefits were timely provided. E/C further contended that there was no fee entitlement for obtaining prevailing party costs because Claimant failed to make a good faith effort to resolve the matter prior to filing the October 25, 2016 PFB.
16. E/C also contended, among other assertions, that the costs incurred were not taxable pursuant to the *Statewide Uniform Guidelines for Taxation of Costs in Civil Actions*. According to the Itemized Costs, Claimant’s prior attorney incurred costs for letters and copies of letters to the Claimant for a mediation and a deposition. According to the *Statewide Uniform Guidelines for Taxation of Costs in Civil Actions*, costs incurred in connection with any matter which was not reasonably calculated to lead to the discovery of admissible evidence should not be taxed. Pursuant to Fla. Admin. Code Rule 60Q-6.124(3)(e) the *Statewide Uniform Guidelines for Taxation of Costs*

in Civil Actions shall be considered by the judge in determining the reasonableness of an award of cost reimbursement. Pursuant to the *Statewide Uniform Guidelines for Taxation of Costs in Civil Actions* the costs listed in the Verified Petition should not be taxed.

17. The evidence supports a finding that the benefits requested in the October 25, 2016 PFB were either provided prior to the date Claimant's prior attorney filed the PFB, or the benefits requested were not ripe, due and owing on October 25, 2016. Additionally, the costs incurred are not taxable pursuant to Statewide Uniform Guidelines for Taxation of Costs in Civil Actions.

WHEREFORE, it is ORDERED and ADJUDGED that,

1. The claim for prevailing party costs is DENIED.
2. The claim for attorney fee entitlement is DENIED.

DONE AND SERVED this 8<sup>th</sup> day of June, 2018, in Lauderdale Lakes, Broward County, Florida.



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## Appendix

### Claimant's Prior Counsel's Exhibit:

1. Verified Motion for Attorney's Fees and Costs
2. Claimant's Former Attorney's Response to Employer/Carrier's Motion for Sanctions

### Employer/Carrier's Exhibits:

1. Employer/Carrier's Verified Response to Verified Motion for Attorney's Fees and Costs
2. 04/25/2018 Deposition Transcript of Ashley Conway
3. Employer/Carrier's Motion for Sanctions

### Witnesses:

Monica Cooper, Esquire  
Andrew R. Borah, Esquire