

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
MIAMI DISTRICT OFFICE

Engelds Zepeda,)	
Employee/Claimant,)	
)	Judge Gerardo Castiello
vs.)	
)	OJCC Case No. 11-016805GCC
La Carreta Restaurant/Zenith Insurance)	
Company,)	Accident date: 6/6/2011
Employer/ Carrier/ Servicing Agent.)	
)	

FINAL ORDER ON ATTORNEY'S FEES

(I) PROCEDURAL HISTORY:

After due notice, the above styled matter came before the undersigned Judge of Compensation Claims for attorney's fee hearing on June 5, 2013. Claimant Engelds Zepeda was represented by Salvatore Sicuso, Esquire of Salvatore J. Sicuso, P.A. Employer La Carreta Restaurant and carrier Zenith Insurance Company were represented Andrew Borah, Esquire. This Order ensues.

(II) EVIDENTIARY EXHIBITS:

Except where otherwise indicated the following exhibits were admitted into evidence:

1. Claimant's Exhibit 1- Claimant Attorney's Verified Petition for Attorney's Fees and Costs;
2. Claimant's Exhibit 2- Claimant's Attorney's Supplemental Verified Petition for Attorney's Fees and Costs;
3. Claimant's Exhibit 3- Claimant's Attorney's Second Supplemental Verified Petition for Attorney's Fees and Costs;
4. Claimant's Proffer Only Exhibit 4- Claimant's Attorney's Request for Judicial Notice;
5. Claimant's Proffer Only Exhibit 5A- Claimant's Attorney's Second Request for Judicial Notice;

6. Judge's Exhibit 5B- Order Denying Second Motion To Take Judicial Notice;
7. E/C Exhibit 6- Petition for Benefits e-filed July 22, 2011;
8. E/C Exhibit 7- Response to Petition for Benefits e-filed July 22, 2011;
9. E/C Exhibit 8- Notice of Resolution of Pending Issues;
10. E/C Proffer Only Exhibit 9- Employer/Carrier's Motion to Schedule An Attorney Fees and Costs Hearing and Set Date Certain for Claimant's Counsel's Filing of Verified Motion;
11. E/C Proffer Only Exhibit 10- Order on Employer/Carrier's Motion to Schedule An Attorney Fees and Costs Hearing and Set Date Certain for Claimant's Counsel's Filing of Verified Motion;
12. E/C Exhibit 11- Employer/Carrier's Verified Response to Verified Petition for Attorney's Fees and Costs;
13. Judge's Exhibit 12- Order Approving Pre Trial Stipulation entered on October 25, 2012;
14. E/C Exhibit 13- Amended Verified Response e-filed February 1, 2013;
15. E/C Exhibit 14- Employer/Carrier Witness and Exhibit List;
16. E/C Exhibit 15- Amended Verified Response e-filed March 20, 2013;
17. E/C Exhibit 16- Claim Payment History;
18. Judge's Exhibit 17A- Claimant's Verified Response to E/C's Motion to Vacate or Set Aside Summary Final Order;
19. Judge's Exhibit 17B- Employer/Carrier's Amended Motion to Vacate or Set Aside Summary Final Order;
20. E/C's Exhibit 17C- Order Denying Employer/Carrier's Motion to Vacate or Set Aside the Summary Order Determining Fee Entitlement;
21. E/C's Exhibit 17D- Order on Claimant's Motion for Summary Final Order;
22. E/C's Exhibit 17E- Claimant's Motion For Summary Final Order;
23. E/C's Exhibit 17F- Employer/Carrier's Response to Claimant's Motion for Summary Final Order;

24. E/C's Exhibit 18- Employer/Carrier's Second Amended Verified Response (As to Time Entries).

(III) CLAIMS AND DEFENSES:

A. Claims:

Claimant Attorney's Verified Petition for Attorney's Fees and Costs filed 8/30/12.

B. Defenses:

1. Per Verified Response dated 09/21/12.
2. The e/c timely paid the medical bills from Sheridan Emergency Physicians and Kendall Regional Medical Center upon receipt of said bills on proper form per Fla. Stat. 440.20(2)(b). The bill from Sheridan was received on 08/01/11 on proper form and paid on 08/05/11. The bill from Kendall Regional was received on 09/06/11 on proper form and paid 09/14/11. No attorney's fees and costs are due and owing.
3. Attorney's fees and costs for proving entitlement to attorney's fees and costs are not awardable per *Shannon v. Cheney Bros, Inc.*, Case No. 1D12-1140(Fla. 1st DCA 10/02/12).

(IV) FINDINGS OF FACT:

(1) The heart of the issue presented is whether claimant's counsel can obtain an hourly rate based fee for time spent in prosecuting entitlement to attorneys fees.

(2) Claimant's initial verified motion for attorneys fees and costs claimed attorneys fees of \$1500.00 in the form of a Section 440.34(7) "medicals only" fee; \$39.50 in costs and \$6,037.50 in attorneys fees for proving entitlement to the "medicals only" fee. (Exhibit 1) Via a "Supplemental Verified Petition for Attorneys Fees and Costs," claimant amended his initial Motion by increasing the claim for costs to \$141.33 and increasing the claim for attorneys fees for proving entitlement to the medical only fee up to \$30,600.00.

(3) The claimant filed a "medicals only" petition for benefits on July 22, 2011. (Exhibit 6); (Exhibit 17D). It sought payment of two specific medical bills: (a) a \$460.00 bill from Sheridan Emergency Physicians and (b) a \$2,239.00 bill from Kendal

Medical Center. (Exhibit 17D)

(4) The employer/carrier's August 3, 2011 "Response to Petition for Benefits" filed August 3, 2011 neither accepted nor denied the medical benefits requested, but it expressly denied claimant's claims for attorneys fees and costs.

(5) On August 5, 2011, the employer/carrier made payment to Sheridan.
(Exhibit 17D)

~~(6) On August 11, 2011, a conversation took place between claimant's counsel and the adjuster. An non-specific agreement of some type was reached.~~

(7) Claimant's counsel filed a Notice of Resolution on September 6, 2011.
(Exhibit 8); (Exhibit 17D)

(8) It was not until September 14, 2011 that the employer/carrier actually paid the bill from Kendall Medical Center. (Exhibit 17D)

(9) The value of benefits secured is \$1,634.47.

(10) It is well established that it is claimant's burden to prove entitlement to and the quantum of attorneys fees. See, *Kraft Dairy Group v. Sorge*, 634 So. 2d 720 (Fla. 1st DCA 1994); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rate.)

(11) Where a contingency fee arrangement is provided for by statute, such fee arrangements are presumed reasonable. In the matter presented, claimant seeks to circumvent the limitations of the statutorily imposed fee schedule by two means. First, claimant alleges that time spent on proving entitlement should be remunerated separate and apart. Second, claimant asserts that the employer/carrier's conduct in this matter was so egregious as to warrant imposition of hourly based fees as a sanction.

(12) The claimant has presented no case on point addressing the first issue. The undersigned acknowledges *Crittenden v. Orange Blossom Fruit*, 514 So. 2d 351 (Fla. 1987) for the proposition that an attorneys who successful overcomes a carrier's challenge to entitlement is entitled to paid for his time spent prosecuting against that challenge. The flaw in this argument is that the statutory scheme in effect at the time of the *Crittenden* decision allowed for hourly fees. The current scheme does not. Similarly, the claimant has not presented and the undersigned is not aware of any analogous

precedents: an area of law where contingency fees are provided for by statute but hourly fees can also be obtained for proving entitlement.

(13) Claimant next attempts to open the door to hourly fees by asserting that the employer/carrier's conduct is sanctionable under Section 57.105 et. Seq.

(14) Section 57.105(1), (3) allows for hourly fees where meritless positions are advanced *Wendy's N.E. Florida, Inc., v. Van Der Griff*, 895 So. 2d 520 (Fla. 1st DCA 2004); ~~*Davis v. Bill Williams Air-Conditioning and Hearing, Inc.*, 765 So.2d 114 (Fla. 1st DCA 2000)~~ Sanctions can even be imposed for continued prosecution of a claim which had merit when initiated but which later proved meritless but was maintained. See, *Weathersby Associates, Inc., v. Ballack*, 783 So. 2d 1138, 1142 (Fla. 4th DCA 2001)

(15) 57.105 et. Seq. is not intended to impede legitimate advocacy. See, *Boca Burger, Inc., v. Forum*, 912 So. 2d 561 (Fla, 2005) It is intended to discourage baseless claims, stonewall defenses and sham appeals. See, *City of Largo v. La Grade*, 650 So. 2d 178 (Fla. 2nd DCA 1995) .

(16) Though they did not prevail in their defense of the medicals only matter or in the corresponding litigation related to fees for claimant having secured same, the employer/carrier were well within their rights to mount what they believed in good faith to be a legitimate defenses. There is no basis for imposition of hourly fees or any other sanction under Section 57.105(1), Fla. Stat. (2010) or Section 57.105(3), Fla. Stat. (2010).

(V) DECREE:

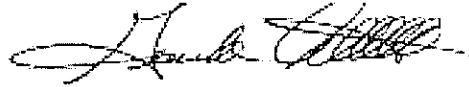
Accordingly, it is hereby Ordered that:

(1) the employer/carrier shall pay to Salvatore Sicuso, Esquire the sum of \$1,500.00 in attorney's fees for successful prosecution of a "medical only" claim pursuant to Section 440.34(7), Fla. Stat. (2010);

(2) the employer/carrier shall pay to Salvatore Sicuso, Esquire the sum of \$141.33 in taxable costs related to said successful prosecution;

(3) the claim for attorneys fees for prosecuting the issue of entitlement to attorneys fees is DENIED.

Done and Ordered in chambers in Miami, Dade County, Florida this 5th day of July, 2013.



Gerardo Castiello
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copies of the foregoing Final Order on Attorney's Fees have been mailed to each of the parties listed below via U.S. mail this 5th day of July, 2013.

Engelds Zepeda
12226 SW 16 Lane
Miami, Florida 33175

La Carreta Restaurant
10633 Northwest 12th Street
Miami, Florida 33172

I HEREBY CERTIFY that a true and correct copies of the foregoing Final Order on Attorney's Fees have been mailed to each of the parties listed below via E/mail this 5th day of July, 2013.

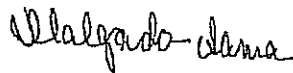
Zenith Insurance Company
PO Box 1558
Sarasota, Florida 34230
EDS_Forward@thezenith.com

Kenneth B. Schwartz
Kenneth B. Schwartz, P.A.
kbs@FlaLaw.com
flalaw99@gmail.com

Salvatore J. Sicuso
Salvatore J. Sicuso, P.A.
Sal@sicusolaw.com
ivana@sicusolaw.com

Andrew R. Borah
Hurley, Rogner, Miller, Cox, Waranch
& Westcott, P.A.
sfournier@hrmcw.com
sdela@hrmcw.com

William H. Rogner
Hurley, Rogner, Miller, Cox, Waranch &
Westcott, P.A.
wrogner@hrmcw.com
atierney@hrmcw.com



Assistant to the Judge of Compensation Claims

Final Hearing Statistics Worksheet

Please complete this form at the time of Order upload for any of the following:

Evidentiary Motion Hearing

Expedited Final Hearing

Fee Amount Hearing

Fee Entitlement Hearing

Final Hearing

Fund Hearing

Remand Hearing

Appellate Fee Hearing

OJCC Number(s) 11-016805GCC

Date Order Mailed/Emailed: 7/5/13

Trial/Hearing dates opened: 6/5/13; concluded: 6/5/13

For Final Hearing or Expedited Final Hearing:

Dates of all pending petitions heard _____

OR

For Evidentiary Motion Hearing:

Type of Motion: _____

Filing Date of Motion Heard: _____

OR

For Fee Amount Hearing or Fee Entitlement Hearing

Date motion or verified petition filed 8/30/12

OR

For Appellate Fee or Remand Hearing

Date of Mandate _____

AND

If abbreviated final/fee order was issued and later vacated:

Date Abbreviated Order Entered: _____

Date Abbreviated Order Vacated: _____