

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGES OF COMPENSATION CLAIMS
FORT LAUDERDALE DISTRICT OFFICE**

EMPLOYEE:

Joaquin Alcazar
2329 SW 30th Court
Hallandale, FL 33009

ATTORNEY FOR EMPLOYEE:

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Miami, FL 33129

EMPLOYER:

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Holiday, FL 34691

ATTORNEY FOR EMPLOYER/CARRIER:

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CARRIER:

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Post Office Box 1549
Tarpon Springs, FL 34688

OJCC No: 06-035571DAL

D/A: 10/13/2006

JUDGE: Daniel A. Lewis

**FINAL EVIDENTIARY ORDER ON AMOUNT OF FEES AND COSTS DUE ON
EMPLOYER/CARRIER'S MOTION FOR SANCTIONS AND
MOTION TO TAX FEES AND COSTS**

THIS CAUSE came on to be heard before the undersigned Judge of Compensation Claims on June 11, 2009 for an evidentiary hearing on the amount of attorney's fees and costs due on the employer/carrier's Motion for Sanctions and Motion to Tax Fees and Costs. The employer/carrier's Motion for Sanctions was filed on May 1, 2008 and on February 26, 2009, an Order was entered finding the employer/carrier entitled to attorney's fees and costs but reserving jurisdiction as to the amount or quantum of the fees and costs due.¹

¹ As explained in my February 26, 2009 Order, the delay in holding a hearing on the employer/carrier's Motion for Sanctions and Motion to Tax Fees and Costs was due to the fact that, on May 13, 2008, claimant filed a Notice of Appeal of my Order Dismissing All Pending Petitions for Benefits entered on

At this evidentiary hearing, live testimony was taken from counsel for the claimant and counsel for the employer/carrier, documentary exhibits were introduced into evidence, including the employer/carrier's Amended Affidavit of Time and the claimant's Verified Response thereto, and argument was presented. After careful consideration and review of the testimony, documentary evidence and argument presented, the following are my findings of ultimate facts and conclusions of law:

1. By my February 26, 2009 Final Evidentiary Order on Employer/Carrier's Motion for Sanctions and Motion to Tax Fees and Costs, I found costs to be due from the claimant pursuant to section 440.32(1), Fla. Stat., and attorney's fees to be due from claimant's counsel pursuant to Fla. Admin. Code R. 60Q-6.125(2)(b). As indicated, jurisdiction was reserved to determine the quantum of fees and costs due. At this June 11, 2009 evidentiary hearing, the parties agreed to the sum of \$44.19 as the amount of the costs due. Consequently, costs in the amount of \$44.19 are hereby assessed and awarded against the claimant, in accordance with my February 26, 2009 Final Evidentiary Order.

2. Also at issue was the amount of the attorney's fee to be assessed against claimant's counsel pursuant to Rule 60Q-6.125(2)(b). In this regard, the employer/carrier filed an Amended Affidavit of Time in support of its Motion for Sanctions. The evidence reveals that the employer/carrier paid its counsel an attorney's fee of \$4324 for time expended as a result of the filing of the January 10, 2008 petition for benefits up through February 26, 2009, the date of my Order finding entitlement to an attorney's fee payable by claimant's counsel for instituting or continuing such proceedings. The \$4324

May 5, 2008. The appeal divested me of jurisdiction to hear the employer/carrier's Motion for Sanctions until the appeal was determined. On January 5, 2009, the First District Court Appeal issued its mandate along with its opinion affirming, per curiam, my May 5, 2008 Order, and an evidentiary hearing on employer/carrier's entitlement to fees and costs pursuant to its Motion for Sanctions was held on February 24, 2009.

attorney's fee represents 31.7 hours of attorney time at \$120 per hour and 8 hours of paralegal time at \$65 per hour. The employer/carrier argued that time which its counsel expended after February 26, 2009 should also be included in order to make the employer/carrier whole, whereas claimant's counsel argued that the cut off date for fees should be May 5, 2008, when I entered my Order Dismissing All Pending Petitions for Benefits. I find February 26, 2009 to be a logical cut off date. Moreover, I would note that this evidentiary hearing was not technically an attorney's fee hearing under section 440.34, Fla. Stat. Instead, attorney's fees were awarded as a sanction against claimant's counsel pursuant to Rule 60Q-6.125. Therefore, I find I have some discretion as to the amount of the fee due, since the criteria for the imposition of a sanction under the Rule is that sanction which is "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fla. Admin. Code R. 60Q-6.125(5)(a).

3. In deciding the amount of the fee due under the sanctions Rule, I have also considered the employer/carrier's argument that it is entitled to attorney's fees for time its counsel expended relating to claimant's unsuccessful appeals of my May 5, 2008 Order Dismissing All Pending Petitions for Benefits and of my February 26, 2009 Final Evidentiary Order finding the employer/carrier entitled to attorney's fees and costs. I find I have no jurisdiction to award an appellate attorney's fee. Moreover, at this evidentiary hearing, I found the proffered evidence establishing the time expended for the appeal to be inadmissible hearsay. Again, I believe I have some discretion in this regard, since the fees were awarded under the sanctions provision of the rules.

4. In determining the amount of the attorney's fee due from claimant's counsel, I have also considered the following cases cited by the employer/carrier as reflecting similar conduct by claimant's counsel:

In his Final Order Granting Travelers' Verified Petition for Attorney's Fees and Costs entered on April 4, 2005 in the case of Murillo vs. Tri-State Employment Services, OJCC# 03-046880AMK, date of accident March 18, 2003, Judge of Compensation Claims Alan Kuker found that proceedings had been maintained and continued frivolously by attorney Richard Zaldivar, claimant's counsel herein, against Travelers Insurance Company despite claimant's counsel having been furnished information reflecting that Travelers did not provide workers' compensation insurance coverage for that accident. Judge Kuker ordered Richard E. Zaldivar, P.A. to pay to Travelers the sum of \$4292 for attorney's fees incurred by it during such proceedings, pursuant to section 440.32(2), Fla. Stat. By opinion dated March 3, 2006, Judge Kuker's Order was affirmed on appeal in Murillo vs. Tri-State Employment Services, Inc., 925 So.2d 376 (Fla. 1st DCA 2006).

Similarly, in his Final Evidentiary Order on Sanctions entered on November 6, 2008 in the case of Nzinga vs. Kimmins Recycling Corp., OJCC# 98-012068CMH, date of accident May 15, 1998, Judge of Compensation Claims Charles Hill found that Richard E. Zaldivar, P.A., claimant's counsel herein, had attempted to relitigate identical issues which had previously been adjudicated in Judge Hill's Final Compensation Order. Judge Hill did not impose a monetary sanction, but instead imposed the limited sanction of striking claimant's petitions for benefits.

Also cited by the employer/carrier for my consideration was the Order Granting Employer/Carrier's Motion for Sanctions Pursuant to F.S. 440.32(2) entered by Judge of Compensation Claims Sylvia Medina-Shore on May 29, 2008 in the case of Ortega vs. Ameristaff, Inc., OJCC# 03-042188SMS, date of accident October 6, 2003. In that case, Judge Medina-Shore assessed sanctions in the form of reasonable defense attorney's fees and costs against the law firm of Richard Zaldivar, claimant's counsel herein, for "maintaining and continuing the proceedings... without any supporting existing law or non-frivolous argument of the existing law or establishment of a new law," in violation of section 440.32(2), Fla. Stat. In that case, claimant's counsel failed to execute a joint stipulation and failed to comply with an Order of the JCC compelling execution of same. According to Judge Medina-Shore, this conduct evidenced a "common delay tactic of the law firm of Richard Zaldivar" and caused "needless increase in the costs of litigation." In her Order, Judge Medina-Shore reserved jurisdiction to determine the amount of the fees and costs due to the employer/carrier from claimant's counsel's law firm.

5. Based on the evidence and argument presented, I find a reasonable and appropriate quantum of attorney's fees in this case to be in the amount of \$4324. Consequently, attorney's fees in the amount of \$4324 are hereby assessed and awarded against claimant's counsel, Richard E. Zaldivar, P.A., in accordance with my February 26, 2009 Final Evidentiary Order imposing fees as a sanction against claimant's counsel.

DONE AND ORDERED at Lauderdale Lakes, Broward County, Florida this

15th day of June, 2009.



Honorable Daniel A. Lewis
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Final Evidentiary Order on Amount of Fees and Costs Due on Employer/Carrier's Motion for Sanctions and Motion to Tax Fees and Costs was furnished by U.S. mail this 15th day of June, 2009, to the aforementioned parties and their counsel of record.

Secretary to Judge of Compensation Claims