

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

Dean Bienes,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 10-022447PTT
)	
Brevard County Parks and Recreation,)	Accident date: 3/21/2010
)	
Employer,)	Judge: Paul T. Terlizzese
)	
and)	
)	
PGCS,)	
)	
Carrier/Servicing Agent.)	
_____)	

ORDER ON EMPLOYER/CARRIER'S MOTION TO TAX COSTS

THIS CAUSE came to be heard on the Employer/Carrier's Motion to Tax Costs, served on April 27, 2011, and electronically filed on April 28, 2011. The Evidentiary Hearing was held and concluded on June 16, 2011. Attorney John Fielding appeared on behalf of the Employee/Claimant. The Employer/Carrier was represented by Attorney Derrick Cox at the June 16, 2011 proceedings.

The Employer/Carrier filed a Motion to Tax Costs, seeking reimbursement of \$5,573.03 in costs. The Employee/Claimant did not file a written response to the Motion. The following items were admitted into evidence:

Judge of Compensation Claims Exhibits:

Judge's Exhibit #1: Notice of Evidentiary Final Hearing, and Pre-Hearing Order as to Employer/Carrier's Motion to Tax Costs, served on April 28, 2011.

Claimant's Exhibits:

None.

Joint Exhibits:

None.

Employer/Carrier's Exhibits:

Employer/Carrier's Exhibit #1: Employer/Carrier's Motion to Tax Costs filed April 28, 2011. The Motion was accompanied by documentary exhibits which included: Affidavit in Support of Motion to Tax Costs, (sworn and verified), dated April 28, 2011; invoices from Tomattco Investigations, Inc.; payout ledger; invoices from Esquire Court Reporting; invoices from Florida Reporting Specialists, Inc.; invoices from Spine, Orthopedic and Rehabilitation; invoices from Medical Records Southeast, LLC; invoices from Alliance Process, Inc.; invoices from Dr. Thomas J. Lapine; invoices from IOD Incorporated, on records from Wuesthoff Pain Management Center; invoices from Health First Occupational Medicine; and invoices from Federal Express.

In addition to the exhibits, live and sworn testimony was provided by a single witness. The witness that was sworn in, and gave testimony at the June 16, 2011 Evidentiary Hearing, was Attorney Derrick Cox, attorney for the Employer/Carrier. No other depositions, affidavits, or other documentary exhibits were offered, beyond those listed herein above. The issues presented for my determination from the April 28, 2011 Employer/Carrier's Motion to Tax Costs, were whether the Employee/Claimant owed the Employer/Carrier the sum of \$5,573.03, due to the Notice of Voluntary Dismissal filed on April 8, 2011. The Claimant, by and through Counsel, argued that the dismissal was without prejudice, and thus the Employer/Carrier should not be considered the prevailing party, or be entitled to recovery of taxable costs.

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the evidence that was presented to me. I have carefully considered the candor, credibility, and demeanor of the live witness, and have resolved all of the conflicts in the live testimony and evidence. In writing this Order, I have attempted to distill the salient issues to get to the findings and conclusions necessary to a resolution. Even though I have not attempted to fully summarize the testimony of the witness, nor to state non-essential facts, this does not mean that I have failed to consider all of the evidence. After careful consideration of all of the evidence presented, and after resolving any and all conflicts therein, I hereby additionally find as follows:

1. The Employee/Claimant allegedly suffered an injury arising out of and in the course and scope of employment on March 21, 2010. The Claimant subsequently retained the services of Attorney John Fielding, and a Petition for Benefits was filed on September 24, 2010. The matter proceeded to a Mandatory State Mediation, which was held, concluded, and resulted in an impasse, on December 20, 2010. A Final Merit Hearing had originally been scheduled for January 27, 2011, but that was coordinated and rescheduled with the parties to occur on April 11, 2011.

The sole Petition for Benefits filed in this claim sought a variety of benefits, which would include claims for: temporary total disability benefits from August 19, 2010, and continuing; temporary partial disability benefits from August 19, 2010, and continuing; authorization for treatment and ongoing care with Dr. Homi Cooper, as recommended by authorized treating physician Paul Keller, M.D.; authorization for cervical MRI, as recommended by authorized treating physician Dr. Homi Cooper; payment of past medical bills for Brevard County EMS Transport; penalties; interest; costs; and attorney's fees. On April 8, 2011, the

Employee/Claimant filed a Notice of Voluntary Dismissal of the September 24, 2010 Petition for Benefits. As a result, an Order was entered on April 8, 2011, accepting the Claimant's Voluntary Dismissal, and cancelling the April 11, 2011 Final Merit Hearing. In other words, the Final Merit Hearing, or workers' compensation trial, was cancelled on a Friday, just prior to the next Monday's Trial.

2. Attorney Derrick Cox, Counsel for the Employer/Carrier, provided live sworn testimony, in supplementation of the sworn affidavit that was already admitted into evidence. Attorney Cox persuasively argued that he undertook reasonable discovery efforts on behalf of the Employer/Carrier, in preparation of the fast approaching workers' compensation trial, or Final Merit Hearing. Attorney Cox established through his testimony, and the written affidavit, that each of the expenses had been incurred, and paid for. The testimony of Attorney Cox also established that each of the records, depositions, expert charges, court reporter charges, and other pieces of evidence were filed, and were to have been offered for admission at the April 11, 2011 Final Merit Hearing. I take judicial notice of the file of the Division of Administrative Hearings, and there is corroboration for the testimony from Attorney Cox, that indeed the surveillance evidence, medical and lay depositions, and medical records had indeed been tendered for admission and consideration at the April 11, 2011 Final Merit Hearing.

3. Florida Statutes Section 440.34(3)(2009), indicates that, "If any party should prevail in any proceedings before a judge of compensation claims or court, there shall be taxed against the nonprevailing party the reasonable costs of such proceedings, not to include attorney's fees." By preparing for the Final Merit Hearing and defending against claims of medical and indemnity benefits, in the September 24, 2010 Petition for Benefits, the Employer/Carrier clearly incurred reasonable and taxable costs. The Employer/Carrier became the prevailing party upon the filing

by the Claimant of the Notice of the Voluntary Dismissal. Under current case law or decisional authority, it does not matter from a legal analysis standpoint, that this was the first voluntary dismissal filed by the Claimant of those classifications of benefits.

4. The taxation of costs against the Claimant, and in favor of the Employer/Carrier as the prevailing party, has been frequent in appellate cases of late. A number of cases were considered in reaching these ultimate conclusions of law, and findings of fact. Some of those cases considered are: Palm Beach County School District v. Ferrer, 990 So. 2d 13(Fla. 1st DCA 2008); F.A. Richard and Associates v. Fernandez, 975 So. 2d 1224(Fla. 1st DCA 2008); Guckenberger v. Seminole County, 979 So. 2d 407(Fla. 1st DCA 2008); Morris v. Dollar Tree, 869 So. 2d 704(Fla. 1st DCA 2004); Hillsborough County Sherriff's Office v. Hilsman, 23 So. 3d 743(Fla. 1st DCA 2009); and Costco Wholesale Corporation v. Ulett, 995 So. 2d 1016(Fla. 1st DCA 2008).

5. I find the uncontradicted sworn record evidence establishes the Employer/Carrier is the prevailing party. Further, the Employer/Carrier, based on the uncontested record evidence, is entitled to reimbursement of incurred, related, taxable, and awarded costs in the amount or \$5,573.03.

WHEREFORE, it is hereby ORDERED and ADJUDGED as follows:

1. The Employer/Carrier has been rendered the prevailing party, pursuant to Florida Statutes Section 440.34(3), due to the April 8, 2011 Notice of Voluntary Dismissal.

2. The Employer/Carrier incurred the reasonable and related costs of \$5,573.03, in properly defending against the claims raised in the September 24, 2010 Petition for Benefits, and in preparation for the April 11, 2011 Final Merit Hearing.

3. The Claimant shall pay the Employer/Carrier's taxable costs in the amount of \$5,573.03, within 30 days from the date of this Order. In the event that the Claimant fails to satisfy payment of the above costs within 30 days, the prevailing and statutory interest rate, as established by the Florida Legislature, shall attach, accrue, and shall be appropriate for assessment.

4. The Employee/Claimant's full payment of the \$5,573.03 in taxable costs to the Employer/Carrier shall act as a condition precedent to the Claimant filing any future Petitions for Benefits, unless an Order on indigency or insolvency is entered.

DONE AND ELECTRONICALLY MAILED to Counsel and served via US Mail to the Claimant this 21st day of June, 2011, in Melbourne, Brevard County, Florida.



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