

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS  
PORT ST. LUCIE DISTRICT OFFICE

Tony E. Doran,	)	
Employee/Claimant,	)	
	)	
vs.	)	
	)	OJCC Case No. 12-005297RDM
Florida Power & Light/Broadspire,	)	
Employer/ Carrier/ Servicing Agent.	)	Accident date: 11/16/2005
_____	)	

FINAL EVIDENTIARY ORDER ON MOTION TO TAX COSTS

At the onset of a prior merits hearing, claimant withdrew several claims which had been pursued until that time. At the merits hearing itself the employer/carrier (E/C) prevailed on all remaining issues. As a result, I find E/C may recover costs incurred in the amount of \$1680.72 from claimant. This finding is explained below.

JURISDICTION AND NOTICE

The parties agree, and I find, the Judge of Compensation Claims (JCC) has jurisdiction over the parties and subject matter. The parties were properly notified of the evidentiary hearing.

BACKGROUND

This case went to a final hearing on November 1, 2012. The claims being considered were raised in the four pending Petitions for Benefits (PFB). At the onset of the November hearing several claims were withdrawn, primarily a claim for permanent total disability and a claim for the payment of a medical bill.

By virtue of withdrawing these claims, claimant is barred from proceeding against E/C on these issues – – at least for the time period involved – – in accordance with the doctrine of res judicata. *Betancourt v. Sears Roebuck and Co.*, 693 So.2d 680,683 (Fla. 1st DCA 1997)(en

*banc*).

This action by claimant becomes the practical equivalent of a voluntary dismissal. Hence, E/C may recover the costs incurred in defending these issues. *Palm Beach County School District v. Ferrer*, 990 So. 2d 13 (Fla. 1st DCA 2008).

Subsequently an "Order on the Merits"(Final Order) was entered finding for E/C on all pending issues including claims for additional temporary disability benefits, medical care with a specific pain management physician, and low back surgery with a particular neurosurgeon.

Since E/C also prevailed on the issues that went to trial, they may recover the taxable costs incurred in presenting a defense. Sec. 440.34 (3) Fla. Stat. (2005); *Punsky v. Clay County Bd. of County Comm.*, 60 So. 3d 1088 (Fla. 1<sup>st</sup> DCA 2011).

#### PLEADINGS

This matter is presently before me pursuant to "Employer/Carrier's Motion to Tax Costs" filed February 1, 2013, along with a supporting affidavit together with claimant's "Response to Employer/Carrier's Motion to Tax Costs" filed February 19, 2013.

#### PROCEDURAL AND EVIDENTIARY ISSUES

Only the attorneys for the respective parties were present at the hearing on taxable costs. Claimant objected to E/C attending by telephone but offers no substantial basis for his objection particular to this hearing.

Claimant also asserts that an affidavit is an insufficient evidentiary vehicle to for making a determination of taxable costs. But at my inquiry claimant does not point to any particular charge that is in and of itself questionable.

This argument is rejected. Initially, claimant makes no objection to E/C presenting affidavit evidence as to taxable costs in his response filed February 19, 2013.

Furthermore, absent a question as to the underlying reasonableness of a particular charge, it is appropriate for E/C's counsel to testify as to the reasonableness and necessity of deposition and discovery costs through the vehicle of an affidavit. See eg *Winter Park Imports Inc. v. JM Family Enterprises Inc.*, 77 So. 3d 227 (Fla. 5<sup>th</sup> DCA 2011) ("While appellees' lead counsel could properly testify as to the reasonableness and necessity of deposition transcript costs, as well as the necessity of obtaining expert witnesses, he was not qualified to testify as to the reasonable value of expert witnesses' services.")

E/C complied with Florida Administrative Code Rule 60Q – 6.124(3)(a)6 as well as adding copies of the actual bills. Given the specifics of claimant's response, I "... cannot imagine what additional information the E/C could have been expected to produce at the hearing in this situation..." *Hillsboro County Sheriff's Office v. Hilsman*, 23 So. 3d 743 (Fla. 1st DCA 2009).

#### BURDEN OF PROOF

E/C has the burden of demonstrating a particular cost should be taxed regardless of the nature of claimant's objections. *Hillsborough County Sheriff's Office v. Hilsman*. By rule the JCC must consider the *Statewide Uniform Guidelines for Taxation of Costs and Civil Actions (Guidelines)* in determining the type of costs that should or should not be awarded to the prevailing party. *Fla. Admin Code Rule 60 Q – 6.124 (3)(e)*. The *Guidelines* are advisory by their express terms. *In Re Guidelines for Taxation of Costs*, 915 So. 2d 612 (Fla. 2005.) A given cost must be shown to have been reasonably necessary to defend the case at the time that cost is incurred. *Guidelines*.

#### ANALYSIS

##### **Taxable Items**

In response to the claim that care be provided with Dr. Levine, a physician with whom

claimant initially treated, E/C raised the defense claimant did not follow managed medical care procedures and that Dr. Levine was no longer a healthcare provider in the managed medical care network. To support this position, E/C took the deposition of Sandra Solano, a witness with the carrier knowledgeable about the managed medical care arrangement. When the underlying claim was withdrawn, E/C did not place Ms. Solano's deposition transcript in evidence. I find the deposition the cost of \$194.40 was reasonably incurred in defending this particular claim which was dropped at the onset of the November final hearing.

I find the costs of the following depositions placed in evidence at trial were reasonably incurred in preparing and presenting a defense at trial: Dr. Grabel, \$228; claims adjuster, \$276; Dr. Levine, \$101.

I find the court reporter charges of \$627.95 incurred taking and preparing a transcript of claimant's deposition were reasonably incurred by E/C in the defense of this case.

Claimant's argument that deposition charges may never be taxed by E/C against a claimant was addressed and rejected in *Punsky v. Clay County Bd. of County Comm.*, 60 So. 3d 1088, 1093 (Fla. 1st DCA 2011).

Certain medical records not placed in evidence nevertheless figured prominently in the trial of this case. Claimant began treating with a number of doctors outside the workers' compensation system and related that care to a nonindustrial cause. In addition to being reviewed by authorized treating physicians on the subjects of causation and maximum medical improvement, their use in cross-examining claimant figured prominently in assessing claimant's credibility. These records which I find taxable are as follows: Jensen Beach Walk-In, \$11; Premier Wellness Center, \$31.70; Florida Pain Management, \$42; Healthport, \$49.99; Surgery Center at Jensen Beach, \$48.50.

Claimant concedes, and I find, the following records are taxable: Express Copy (Dr. Grabel), \$48.68; Treasure Coast Orthopedic (Dr. Stolzer ), \$29.50.

### **Nontaxable Items**

I find the following items are not taxable: Social Security Records, \$115; Martin Memorial Hospital Records, \$54.32; Family Care Associates, \$69.33. These items were not placed in evidence. There is no showing they figured prominently in presenting a defense to the claims dropped at the onset of the trial or addressed at trial or in the Final Order. Hence, I conclude these items reflect nontaxable investigative expenses.

I determine another investigative expense is the \$250 cost for a conference with Marc Rubinstein M.D. The deposition of Dr. Rubinstein was not taken either at the time the conference was conducted or later. This physician did not testify at trial. E/C cites *Brascom v. Hillsborough County Sheriff's Office* 65 So.3d 619 (Fla. 1st DCA 2011) in support of this charge being taxable.

But in *Brascom* the district court describes the expense as being for a "pre-deposition conference." See also *Winter Park Imports Inc. v. JM Family Enterprises Inc.*, 77 So.3d 227,231 (Fla. 5th DCA 2011) (Citing *Brascom* the court observes, "However, given the broad discretion granted to the trial court, we conclude that a court is not precluded from considering the time and expert expended in preparing for deposition, including the time recently and necessarily spent when conferring with counsel and in formulating his or her expert opinion through examination, investigation, testing, and/or research.)

### **RESERVATION OF JURISDICTION**

Claimant maintains that by E/C withdrawing its cost claim for a canceled deposition and that for any charges rejected by this order that he is entitled to an attorney's fee on proper motion.

Jurisdiction is retained to determine all issues pertaining to this assertion.

### CONCLUSION

Based on the foregoing findings of fact and conclusions of law, I make the following determinations:

a) The Employer/Carrier SHALL RECOVER from claimant its costs expended in the amount of \$1,680.72 as explained in the text of this order.

b) Those costs totaling \$488.65 expended by the Employer/Carrier, as explained in the text of this order, are not taxable. Hence the claim for recovery of same is DENIED.

c) Jurisdiction is RESERVED to determine all issues pertaining to attorney's fees payable in conjunction with this order.

DONE AND ORDERED this 3rd day of June, 2013, in Port St. Lucie, St. Lucie County, Florida.



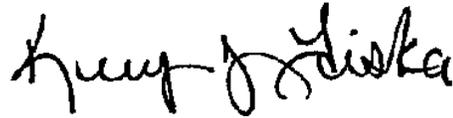
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I HEREBY certify that a true and correct copy of the foregoing has been e-mailed to Counsel on June 3rd, 2013.

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A handwritten signature in black ink, appearing to read "Hung J. Lioka". The signature is written in a cursive, flowing style.

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Assistant to Robert D. McAliley