

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

Kelly Duby,	)	
	)	
Employee/Claimant,	)	
	)	
vs.	)	OJCC Case No. 09-030483PTT
	)	
Wuestoff Health Systems,	)	Accident date: 3/19/2008
	)	
Employer,	)	Judge: Paul T. Terlizzese
	)	
and	)	
	)	
United Self Insured Services,	)	
	)	
Carrier/Servicing Agent.	)	

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**ORDER ON EMPLOYER/CARRIER'S VERIFIED MOTION TO TAX COSTS**

THIS CAUSE came to be heard on the Employer/Carrier's Verified Motion to Tax Costs, served on May 27, 2011, and electronically filed on May 27, 2011. The Evidentiary Hearing was held and concluded on July 19, 2011. Attorney Derrick Cox appeared on behalf of the Employer/Carrier. The Employee/Claimant was represented by Attorney Salim Punjani, at the July 19, 2011 proceedings.

The Employer/Carrier filed a Verified Motion to Tax Costs, seeking reimbursement of \$4,771.49, in taxable costs. The Employee/Claimant filed a Verified Response to the Employer/Carrier's Motion, electronically filed on June 9, 2011.

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 Verified Motion to Tax Costs, electronically filed on May 27, 2011. The Notice was served on Counsel for the parties on May 27, 2011.

**Employer/Carrier's Exhibits:**

**Employer/Carrier's Exhibit #1:** Employer/Carrier's Verified Motion to Tax Costs, filed May 27, 2011. The Motion was accompanied by documentary exhibits which included: Affidavit in Support of Verified Motion to Tax Costs, executed on May 27, 2011; Invoice from Dr. Anthony Ware; Invoice from First-Choice Reporting Services (Deposition of Claimant/Ms. Kelly Duby); Invoice from ICU, Inc.; Invoice from First-Choice Reporting Services (Deposition of Dr. Anthony Ware); Invoice from Orlando Orthopaedic Center; Invoice from First-Choice Reporting Services (Deposition of Ms. Lesley MacDougall, Adjustor); Invoice from Florida Reporting Specialists, Inc (Deposition of Ms. Debbie Henshaw, Employer Representative).; Invoice from First-Choice Reporting Services (Deposition of Dr. Joseph Funk); Invoice from Orlando Orthopaedic Center; and Invoices from Tomattco Investigations, Inc.

**Claimant's Exhibits:**

**Claimant's Exhibit #1:** Claimant's Verified Response to Employer/Carrier's Motion to Tax Costs, electronically filed on June 9, 2011, executed by Counsel on June 9, 2011.

**Claimant's Exhibit #2:** Claimant's Exhibit List, which included the following: Petition for Benefits filed on November 23, 2010; IME Report of Dr. Funk; Tomattco Investigations, Inc., video surveillance report; Invoice for Employer/Carrier's telephone conference with Dr. Anthony Ware for April 21, 2010; Notice of Denial, prepared on June 11, 2010; and the first page, of each trial exhibit from the April 6, 2011 Final Merit Hearing.

**Joint Exhibits:**

None.

The Employer/Carrier argued that the evidence established that the Employer/Carrier became the prevailing party due to the April 13, 2011 Final Merit Order, which barred the Claimant's receipt of any further worker's compensation or medical benefits. The Employer/Carrier also becoming a prevailing party due to the January 18, 2010 Voluntary Dismissal, of the November 30, 2009 Petition for Benefits. The Employee/Claimant, through Counsel, argued that the evidence would not support an award of IME, physician conference, or surveillance charges that were incurred prior to the filing of the November 23, 2010 Petition for Benefits. The Employee/Claimant's Counsel also argued that the deposition of the human resources representative for the employer, the investigator, and adjuster should not be taxed, as those depositions were not admitted into evidence at the April 6, 2011 Final Merit Hearing.

In addition to the exhibits, live and sworn testimony was provided by two (2) witnesses. The witnesses that were sworn in, and gave testimony at the July 19, 2011 Evidentiary Hearing, were Attorney Derrick Cox, attorney for the Employer/Carrier, and Attorney Salim Punjani, Counsel for the Employee/Claimant. Attorney Cox appeared live at the Evidentiary Hearing, and Attorney Punjani attended by telephone, and was sworn in by a Notary Public in his presence. The Claimant, Ms. Kelly Duby did not attend the Evidentiary Hearing.

The Claimant, by and through her Counsel, argued that the undersigned should employ a strict interpretation of the Uniform Guidelines for Taxation of Costs in Civil Proceedings, and that no other costs should be taxable or reimbursable for the Employer/Carrier.

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 witnesses, 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 witnesses, 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 19, 2008. The Claimant subsequently retained the services of the Coye Law Firm, and various Petitions for Benefits had been filed. The Petition for Benefits filed on November 30, 2009 sought payment of Temporary Total Disability Benefits, and Temporary Partial Disability Benefits, from March 19, 2008 and continuing, as well as penalties, interest, costs, and Attorney's Fees. The First Petition had been scheduled for a February 2, 2010, Expedited Final Hearing. Shortly before the scheduled Expedited Final Hearing, the Claimant filed a Voluntary Dismissal on January 18, 2010, and an Order was entered on January 19, 2010 accepting the Voluntary Dismissal, and cancelling the scheduled Expedited Final Hearing, or workers' compensation trial. Thereafter, a second Petition was filed on December 31, 2009. That Petition, when reviewed and docketed by the undersigned, was not compliant with Florida Statutes Section 440.192 or 440.02(40), and was thus judicially dismissed. On November 23, 2010, the Claimant filed a third Petition for Benefits seeking a

wide variety of benefits. That third Petition sought: payment of Temporary Total Disability Benefits, and/or Temporary Partial Disability Benefits from June 7, 2010 and continuing; authorization of Dr. Ware; authorization of a CT Scan of the Claimant's lower extremity; and payment of penalties, interest, costs, and Attorney's Fees. The last Petition was Mediated on February 7, 2011, and proceeded to a Final Merit Hearing on April 6, 2011. The Employer/Carrier raised a number of defenses to the claims within the November 23, 2010 Petition for Benefits. The Employer/Carrier asserted a major contributing cause defense, apportionment defense, that the Claimant was not making appropriate progress under the care of Dr. Ware, and Dr. Ware should be deauthorized. The Employer/Carrier also asserted that the Claimant had not completed, nor submitted, any DWC-19 or Employee Earnings Report forms, that the Claimant's loss of wages were not due to the industrial accident, and affirmatively asserted that the Claimant had made false, misleading, and fraudulent statements in violation of Florida Statutes Section 440.105, and as a result the Claimant's claims should be barred forever, by action of Florida Statutes Section 440.09.

2. Attorney Derrick Cox, Counsel for the Employer/Carrier, was sworn in and gave convincing and credible testimony. Attorney Cox supplemented his sworn and notarized positions within his Motion and Affidavit to Tax Costs, by indicating that the Employer/Carrier was required to retain Dr. Funk for an Independent Medical Evaluation, in response to the Claimant's ongoing receipt of medical care from Dr. Ware, and Dr Ware's renewed requests for surgical intervention. Counsel for the Employer/Carrier testified that the April, 2010 IME, and March 16, 2011 deposition, of Dr. Funk were necessary and relevant on the Claimant's need for treatment, the Employer/Carrier's request for deauthorization of Dr. Ware, the Claimant's

restrictions, abilities, and the impact of the surveillance. Attorney Cox also testified that the Claimant's deposition formed the predicate and foundation for the defense against fraudulent and false statements. The conference results, and deposition of Dr. Ware were relevant, and admitted at the subsequent Final Merit Hearing as well. Attorney Cox persuasively testified that the depositions of Ms. Henshaw, Ms. MacDougal, Investigator Flack, and Dr. Ware were all scheduled and noticed by the Claimant's Counsel and as a result counsel for the Employer/Carrier was forced to attend those depositions to protect the interests of their client. Due to the wide variety of indemnity and medical claims brought forth by the Claimant, and the necessity of bringing multiple defenses and affirmative defenses, Attorney Cox testified in a clear, logical, and convincing manner as to the reasonableness and relevancy of each requested cost. In a display of great candor, Attorney Cox conceded that there were many costs incurred by his law firm, and on behalf of the Employer/Carrier, for which Attorney Cox did not seek reimbursement from the Claimant. Specifically, testimony was given on the Morris V. Dollar Tree case, found at 869 So. 2d 704(Fla. 1st DCA 2004). Attorney Cox indicated that the additional mileage, long distance, photocopy and postage type charges, that may have been recoverable, had not been sought by the Employer/Carrier, and were recognized as waived. The testimony explaining that mere copies of depositions taken by the Claimant's Counsel were incurred as costs was believable and credible. Further, Attorney Cox's testimony on the circumstances of Ms. Henshaw and Investigator Flack having been scheduled consecutively, one after the other, and the inability of counsel to complete both of those depositions was also accepted.

3. Attorney Salim Punjani, Counsel for the Claimant, also testified in supplement to his Verified Response to the Employer/Carrier's Motion to Tax Costs. Attorney Punjani disregarded, or failed to adequately address, the legal impact of the Claimant's prior Voluntary Dismissal of the November 30, 2009 Petition for Benefits. The January 18, 2010 Voluntary Dismissal, and the January 19, 2010 Order Accepting Voluntary Dismissal, rendered the Employer/Carrier the prevailing party through that stage of the litigation as well. Further, Attorney Punjani did not persuasively rebut the showing of evidence by the Employer/Carrier, in recognizing that the Employer/Carrier had no independent right to file a Petition for Benefits, nor to file a Motion for Determination of Fraud, during any time period in which the Claimant did not have a pending Petition for Benefits. The Employer/Carrier's testimony, evidence, and arguments are much more consistent with the line of cases, culminating in the most recent decision of Florida Department of Transportation & York Claims Services, Inc. v. Ellison-Rippy, 1D10-5781(Fla. 1st DCA July 18, 2011).

4. Florida Statutes Section 440.34(3), recognizes the Employer/Carrier as the prevailing party on the voluntarily dismissed November 30, 2009 Petition for Benefits, on the April 13, 2011 Final Order stemming from the November 23, 2010 Petition, and on the Employer/Carrier's affirmative defenses that permanently severed the Claimant's right to receive any further benefits under the Workers' Compensation Act. The Employer/Carrier adequately and convincingly submitted largely uncontradicted evidence, that the Employer/Carrier was forced to zealously and responsively defend against the claims from the November 30, 2009 and November 23, 2010 Petitions. Each of the depositions and discovery efforts were necessitated by

the Claimant's filing of the claims, the nature of the defenses, and the participation in the April 6, 2011 Final Merit Hearing, upon which the Employer/Carrier prevailed in every aspect.

5. Florida Statutes Section 440.34(3), 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 responsibly preparing for the initial February 2, 2010 Expedited Final Hearing, and the later April 6, 2011 Final Hearing, and defending against claims for a wide variety of additional medical and indemnity benefits in the respective Petition for Benefits, the Employer/Carrier clearly incurred and expended reasonable and taxable costs. The Employer/Carrier became the prevailing party upon the filing of the earlier Notice of Voluntary Dismissal, and upon issuance of the April 13, 2011 Final Merit Order. Under current case law, or decisional authority, it does not matter from a legal analysis standpoint, that the Voluntary Dismissal was a first Voluntary Dismissal, or a Voluntary Dismissal without Prejudice.

6. The taxation of costs against a Claimant, and in favor of an Employer/Carrier as the prevailing party, has been frequently addressed in recent appellate cases. 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); Costco Wholesale Corporation v. Ulett, 995 So. 2d 1016(Fla. 1st DCA 2008); Punsky v. Clay County Board of County Commissioners & Scibal Associates, 1D-10-

3269(Fla. 1st DCA March 31, 2011); and Florida Department of Transportation & York Claims Services, Inc. v. Ellison-Rippy, 1D10-5781(Fla. 1st DCA July 18, 2011).

7. I find the accepted, persuasive, and sworn record evidence establishes that the Employer/Carrier is the prevailing party. Further, the Employer/Carrier, based on the accepted record evidence, is entitled to reimbursement of incurred, related, taxable, and awarded costs in the amount of \$4,771.49, as reflected in the Employer/Carrier's Verified Motion and Affidavit to Tax Costs.

WHEREFORE, it is hereby ORDERED and ADJUDGED as follows:

1. The Employer/Carrier has been established as the prevailing party, pursuant to Florida Statutes Section 440.34(3), due to the January 18, 2010 Notice of Voluntary Dismissal, and the April 13, 2011 Final Merit Order.

2. The Employer/Carrier incurred the reasonable and related costs of \$4,771.49, in properly defending against the claims raised in the November 30, 2009 and November 23, 2010 Petitions for Benefits, and in preparation of the February 2, 2010, Expedited Final Hearing, and April 6, 2011 Final Merit Hearing.

3. The Claimant shall pay the Employer/Carrier's taxable costs in the amount of \$4,771.49, 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.

DONE AND ELECTRONICALLY MAILED to Counsel and served via U.S. mail to the  
Claimant this 21st day of July, 2011, in Melbourne, Brevard County, Florida.



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