

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

Barbara Kelly,	)	
	)	
Employee/Claimant,	)	
	)	
vs.	)	OJCC Case No. 10-029100PTT
	)	
Brevard County Board of Commissioners ,	)	Accident date: 6/18/2010
	)	
Employer,	)	Judge: Paul T. Terlizzese
	)	
and	)	
	)	
Preferred Governmental Claim Solutions,	)	
	)	
Carrier/Servicing Agent.	)	
_____	)	

**ORDER ON EMPLOYER/CARRIER'S EVIDENTIARY MOTION TO ENFORCE  
SETTLEMENT AGREEMENT**

THIS CAUSE came to be heard on the Employer/Carrier's Evidentiary Motion, served on May 2, 2011, and electronically filed on that same date. The initial Notice of Evidentiary Final Hearing, and Prehearing Order, was served on the parties on May 2, 2011. The parties had a conflict with the originally scheduled hearing date of June 17, 2011, and the parties called and coordinated a new date for the Evidentiary Motion Hearing to occur on June 13, 2011. An Amended Notice of Evidentiary Final Hearing was served on the parties on May 4, 2011. The Evidentiary Hearing was held and concluded on June 13, 2011. Present on behalf of the Claimant was Ms. Barbara Kelly, the Employee/Claimant, and her Counsel, Attorney Donald Van Dingenen. Present on behalf of the Employer/Carrier was Attorney Derrick Cox. No

written response was filed on behalf of the Employee/Claimant, to the Employer/Carrier's Motion.

The Employer/Carrier sought an Order to enforce an alleged settlement agreement, that was reached on or about April 14, 2011.

The following items were admitted into evidence, or marked for identification, as so noted on the record.

**Judge of Compensation Claims Exhibits:**

**Judge's Exhibit #1:** Notice of Evidentiary Final Hearing, and Prehearing Order as to the Employer/Carrier's Motion to Enforce Settlement, electronically filed on May 2, 2011, served upon the parties on May 2, 2011.

**Judge's Exhibit #2:** Amended Notice of Evidentiary Final Hearing, and Prehearing Order as to the Employer/Carrier's Motion to Enforce Settlement, electronically filed on May 2, 2011, served upon the parties on May 4, 2011.

**Claimant's Exhibits:**

None.

**Employer/Carrier's Exhibits:**

**Employer/Carrier's Exhibit #1:** Motion to Enforce Settlement, electronically filed on May 2, 2011.

**Joint Exhibits:**

None.

The live witnesses, which were sworn in and gave testimony in the hearing, included Attorney Derrick Cox, Attorney Donald Van Dingenen, and Ms. Barbara Kelly. No depositions, affidavits or other documentary exhibits were offered.

The issues presented for my determination, from the May 2, 2011 Motion to Enforce Settlement, included whether the Claimant had reached a full, final, and binding settlement agreement on or about April 14, 2011. The Claimant argued that she was misled into accepting a settlement agreement, upon the belief that her husband, who made threats against her prior authorized orthopedic physician, had a formal police report filed against him, and may face criminal charges.

The parties did not submit any written or verbal stipulations.

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all the evidence that was presented to me. I have observed the candor, credibility, and demeanor of the three (3) live witnesses, and have resolved all 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 each witness, or to state nonessential 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 having resolved any and all conflicts therein, I hereby additionally find as follows:

1. Attorney Derrick Cox, an experienced local attorney, has represented the Employer/Carrier throughout the litigation in this claim. Attorney Cox was sworn in, and gave persuasive testimony. Following a partially successful mediation on March 10, 2011, the parties prepared and submitted a Stipulation on Resolution of Average Weekly Wage and Compensation Rate Issues. The Employer/Carrier's Counsel testified that the ground work had been established toward a full, final, and binding settlement agreement. Following multiple subsequent telephone and/or email communications with Counsel for the Claimant, the

Employer/Carrier made a final offer of \$24,900.00, inclusive of all attorney's fees and costs, in exchange for a complete release of all benefits available under Chapter 440 of the Florida Statutes. On April 14, 2011, Attorney Donald Van Dingenen, representing the Claimant, accepted the offer on behalf of the Employee/Claimant, without any conditions or qualifications.

Following the offer, and the acceptance by the attorney acting with full authority and agency on behalf of the Claimant, the Employer/Carrier prepared all necessary documents for execution and filing, to bring about judicial approval of any potential child support arrearages and attorney's fee/cost allocations. By April 21, 2011, the Claimant's Attorney called Attorney Cox, and informed the Employer/Carrier's Counsel that the Claimant's husband disagreed with the settlement, and indicated that he would not allow his wife, the Employee/Claimant to sign any settlement paperwork. The Claimant's Counsel was informed that a Motion to Enforce would be filed.

I found the sworn testimony of Attorney Derrick Cox to be very persuasive, forthright, and truthful. I fully accept the live testimony of Attorney Cox, that the parties, by and through their Counsel, undertook negotiations on a good faith basis. I also accept the testimony of Attorney Cox as establishing that the parties intended to enter a full, final, and binding settlement agreement, in exchange for valuable consideration. The testimony does not establish that there were any contingencies placed upon the settlement, nor were there any conditions precedent or subsequent attached to the settlement agreement. There was also no right of refusal, negotiated by and between the parties.

2. The Claimant's Counsel, Attorney Donald Van Dingenen provided unequivocal sworn testimony in the Hearing, which occurred on June 13, 2011. Attorney Van Dingenen is also an extremely experienced local Workers' Compensation practitioner, with an equally highly

regarded reputation. Attorney Van Dingenen testified very consistently with Attorney Cox, and to the extent that his testimony is consistent with the Employer/Carrier's Counsel, his testimony is accepted.

The Claimant's Counsel agreed that the parties undertook a good faith mediation on March 10, 2011, and were successful in resolving some of the underlying issues. Subsequently, the parties voluntarily participated in a stipulation, which led to an Order approving the areas of agreement on the Average Weekly Wage and Compensation Rate. Shortly after the mediation, communications came to the attention of the Employee/Claimant's Counsel, that the Claimant's husband had made some type of threats to the staff and/or physicians at Atlantic Orthopedic Clinic, where the Claimant was previously treated on an authorized basis. Attorney Van Dingenen took all the information from his staff, and had follow up communications with Ms. Barbara Kelly herself, as well as follow up communications with Attorney Cox. Attorney Van Dingenen expressed that he was very concerned over how the Claimant's husband's threats, and unpleasant communications, would impact her future ability to obtain authorized medical care, and how his actions may impact whether the Employee/Carrier would leave their prior settlement offers "on the table".

Attorney Van Dingenen went into great detail on the frequency and content of communications with his client, after confirming that the Employer/Carrier was standing behind their \$24,900.00 inclusive offer of settlement. Attorney Van Dingenen explained that the Claimant was aware that her husband was agitated and had psychiatric type issues, and that she was concerned over whether formal police reports had been filed, and whether criminal charges could be forthcoming. The Claimant was informed by her Counsel of the settlement money remaining as a viable offer, and he explained to his client the difficulties in obtaining physicians

willing to treat the Claimant in the future, given her husband's documented behavior. The settlement amount, as well as breakdowns of all attorney's fees and costs, were explained in detail to the Claimant, and the Claimant apparently acknowledged her complete agreement with receiving a net of \$19,600.00 in exchange for a complete and total release of all future Workers' Compensation benefits under the Florida Statutes.

After confirming that he had the full authority and agency from his client to accept a settlement, Attorney Van Dingenen contacted Attorney Cox, Counsel for the Employer/Carrier, and accepted the Employer/Carrier's highest offer for settlement. The attorneys discussed the exchange of routine and statutorily required documentation to effectuate the settlement.

Approximately one week later, a law clerk or intern at the Van Dingenen law firm had communications with the Claimant's husband, where the Claimant's husband indicated that he would not allow the settlement to move forward, would not allow his wife to sign the settlement documents, and that he would have his wife committed to an institution if necessary to derail the settlement. After receiving that information, the Claimant's Attorney immediately informed the Employer/Carrier's Attorney of the husband's attempted interference, with the previously negotiated settlement.

3. The Employee/Claimant, Ms. Barbara Kelly testified under oath in the Hearing. Ms. Kelly seemed somewhat hesitant and reluctant to engage in the proceedings, however she did appear to make an effort to give truthful testimony. She disclosed and acknowledged that she and Attorney Van Dingenen had established an attorney/client relationship, and had spoken on several occasions. Her conversations with Attorney Van Dingenen in the March and April of 2011 timeframes included discussions on settlement, the treats by her husband, the mental health issues of her husband, the difficulty in obtaining future authorized medical care given her

husband's behavior, the "possibility" of a police report or criminal charges flowing from his behaviors, and that the \$24,900.00 inclusive offer was "still on the table".

After a fully informed discussion with her attorney about settlement, the Employee/Claimant authorized her attorney to accept the Employer/Carrier's highest offer, and she fully understood that she would net the sum of \$19,600.00 out of the \$24,900.00, after attorney's fees and costs.

Subsequent to her full and voluntary acceptance of the settlement offer, the Claimant's husband checked on whether there was record of a formal police report having been filed, and on whether formal criminal charges may be forthcoming. Because the Claimant's husband could not confirm that a formal police report had indeed been filed, and because he had not yet been criminally charged for the threats made to the Atlantic Orthopedic Clinic, which no witness denied, the Claimant felt that she had been misled, and decided to change her mind on settlement. The Claimant indicated that she wanted to see another physician, and although she had received proposed settlement documents, she did not want to sign and execute those documents.

4. I find that the Employer/Carrier has effectively carried their burden of proof in establishing all of the necessary elements to prove that a settlement agreement had been reached. The evidence establishes that an offer was made, and a valid and binding acceptance was communicated. The agreement was not subject to any contingencies or conditions. The agreement was not voidable, and there is a complete absence of any evidence of fraud, duress, or overreaching. At most, the evidence establishes that the Employee/Claimant, and her husband who is not a party, reached a unilateral conclusion or mistake of fact. There is not a scintilla of evidence that the Employer/Carrier, or any of their representatives, made any false, misleading,

or inaccurate statements, upon which the Employee/Claimant detrimentally relied in accepting their good faith offer. From a totality of the evidence, I cannot conclude that the Claimant was misled on whether a formal police report had been filed or not, and whether any formal criminal charges would flow from the husband's uncontradicted behavior. At best, from the evidence that was admitted, I can find that there was a misunderstanding on the Claimant's part only.

5. I find that a full, final, and binding settlement agreement for \$24,900.00 inclusive was reached by and on behalf of the parties, on or about April 14, 2011. The guideline attorney's fee, under Florida Statutes Section 440.34 would equal \$3,240.00. No evidence of detailed taxable costs, or any other attorney's fee entitlements have been filed to date, thus I am unable to conclude whether the remaining \$2,060.00 would be eligible for approval. In other words, out of the \$24,900.00, after consideration of the guideline fee of \$3,240.00, and with the Claimant's clear and unequivocal testimony that she had agreed to net \$19,600.00, there is still \$2,060.00 remaining, which to date has not been established as going towards other attorney's fees and/or costs.

WHEREFORE it is hereby ORDERED and ADJUDGED as follows:

1. The Employer/Carrier's Motion to Enforce Settlement agreement is hereby granted.
2. The Employer/Carrier shall initiate the required documentation, to include the Motion for Approval of Attorney's Fees and Child Support Arrearages, Attorney's Fee Data Sheet, Cost Reimbursement Forms, Child Support forms, and any other statutorily required documentation, and shall provide the same to the Claimant's Counsel within 14 days of this Order.
3. The Employee/Claimant shall sign and execute the provided documentation, and shall return the same to Counsel for the Employer/Carrier within 14 days of receipt of those documents.

4. Should the Claimant refuse to acknowledge, sign, and execute the documentation reflecting the \$24,900.00 settlement, inclusive of a guideline attorney's fee of \$3,240.00, and properly reimbursable taxable costs, the undersigned will retain jurisdiction to consider a future Motion to approve the attorney's fees, costs, and child support arrearages, without the Claimant's signature.

DONE AND ELECTRONICALLY MAILED to Counsel and served via US Mail to the Claimant this 15th day of June, 2011, in Melbourne, Brevard County, Florida.



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