

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

Andrew Stancil,
Employee/Claimant,

OJCC Case No. 09-010898MAM

vs.

Accident date: 4/18/2009

Right Hand Man/ESIS WC Claims,
Employer/Carrier/Service Agent.

Judge: Mark A. Massey

_____ /

FINAL COMPENSATION ORDER

This cause came for hearing before the undersigned Judge of Compensation Claims on 05/24/16. Claimant was represented by Michael Winer, Esquire. E/C was represented by Derrick Cox, Esquire. The hearing was held to address and adjudicate the petition for benefits filed 09/23/15.

CLAIMS

1. Payment of guardianship attorney's fees and costs in the amount of \$1357.50 for services performed by guardianship's attorney between 11/21/14 and 09/09/15.
2. Costs and attorney's fees.

DEFENSES

1. Guardianship attorney's fees of \$1357.50 are not due.
2. The activities listed by the guardianship's attorney were not incurred in handling the claimant's rights, duties and responsibilities under the workers' compensation act.

EXHIBITS

The petition for benefits filed 09/23/15, along with the attachment thereto (docket #102,

103), was marked into evidence as an exhibit for the claimant. The pre-trial stipulation (docket #114) was marked into evidence as a judge's exhibit. Claimant's trial summary (docket #134) and E/C's trial summary (docket # 131) were marked into evidence as judge's exhibits for argument purposes only. There were no additional exhibits.

FINDINGS OF FACT

Claimant, Andrew Stancil, was catastrophically injured in a compensable industrial accident on 04/18/09. Due to his incapacity as a result of the accident, claimant's sister, Lenora Green, was appointed as plenary guardian of claimant's person and property.

Under Chapter 744 of the Florida Statutes, the guardian is required to file in the probate court an annual report. Further, the law requires that the guardian have an attorney, who is responsible for, among other things, preparing and filing the annual report.

Claimant's guardian retained the law firm of Genders Alvarez Diecidue. The primary attorney assigned to the case was Derek Alvarez, Esquire, who testified live at the hearing. Claimant seeks payment, by the carrier, of fees for services rendered by the guardian's attorney between 11/21/14 and 09/09/15. Those services included, among other things, the preparation and filing of the required annual report. E/C deny that the carrier is responsible for payment of the fees in question.

ANALYSIS

I reject E/C's argument that the attorney's fees in question cannot be awarded because attorney Alvarez never filed a notice of appearance in the workers' compensation claim, never filed a petition for workers' compensation benefits, and never obtained or secured a benefit

under Chapter 440. E/C argue that under these circumstances, attorney's fees cannot be awarded under section 440.34, F.S., under which fees are payable only based on benefits secured. However, this is not a claim for attorney's fees under section 440.34. Rather, this is a claim for reimbursement of attorney's fees incurred by claimant's guardian. Therefore, section 440.34 does not come into play. Instead, we must look to section 440.17, F.S. and the case law interpreting same.

The case law on whether and to what extent guardianship fees and expenses, when the guardianship is necessitated by an industrial accident, are payable by the workers' compensation carrier, is very limited. In fact, both sides cite the same two cases in support of their respective positions.¹ Both cases will be discussed below.

In *Southeast Concrete Floor v Charlton*, 584 So. 2d 574 (Fla. 1st DCA 1991), the court held that guardianship fees and expenses:

are awardable only to the extent that they are incurred in and about the handling of the claimant/ward's rights, duties, and responsibilities under Chapter 440, including but not limited to such activities as the collection of benefits under Chapter 440, obtaining medical services for the claimant, and representation of the claimant in proceedings before the JCC.

I find that there is insufficient evidence to demonstrate that the services performed by Mr. Alvarez and his firm were incurred in and about either their handling, or the guardian's handling, of the claimant's rights, duties, and responsibilities under Chapter 440. Most of the time entries are too vague and non-specific to determine what they relate to. For example, "Telephone conference with Lenora Green; memorandum to file," or "Correspondence to Lenora Green."

¹ E/C cited a JCC order which was per curiam affirmed on appeal. I agree with claimant, however, that a PCA has no precedential value, and therefore the case cited by E/C will not be relied on here.

Although Mr. Alvarez testified at the hearing, he was unable to provide more specific information as to what the time entries related to, and candidly admitted that at least some of them were *not* related in any way to the workers' compensation case, or to the receipt, pursuit, or handling of any workers' compensation benefits. For example, he was asked about the time entries on 07/01/15 and 07/14/15. His recollection was that those entries related to collection activities concerning a ticket previously incurred by the claimant, which had nothing to do with workers' compensation. He also recalled that one or more of the entries had to do with dealing with a bond company, which also had nothing to do with workers' compensation. As to the remainder of the entries, with one exception noted below, Mr. Alvarez was simply unable to recall or identify the substance of what they related to. For the time entries spanning 11/21/14 to 09/03/15, and 09/08/15 to 09/09/15, I find that there is no competent substantial evidence that any of those services were incurred in and about the handling of claimant's rights, duties, and responsibilities under Chapter 440.

The only other exception is two time entries on 09/07/15. Those entries relate to the preparation and filing of the annual report. Claimant argues that this expense should be the responsibility of the carrier, because the filing of the annual report is required in order to keep the guardianship in existence, and keeping the guardianship in existence is what *enables* or *allows* the guardian to handle claimant's rights, duties and responsibilities under the workers' compensation act. Claimant's argument is respectfully rejected.

The underlying premise of claimant's argument is that the workplace injury is what necessitated the guardianship, and therefore requiring the claimant "to pay for the guardianship services occasioned by his work injury [would be] directly repugnant to the express intent of the

workers' compensation law," which is to "remove from the workman himself the burden of his own injury and disability and place it on the industry which he served." (Claimant's Trial Summary, citations omitted) This type of argument was expressly rejected in *Fla. Cypress Gardens v Lavoy*, 932 So. 2d 542 (Fla. 1st DCA 2006). In that case, the claimant argued that "the fees and expenses of the guardianship should be assessed against the employer and carrier, because the need for the appointment of a guardian came about solely as a result of the accident." The court rejected that argument and reiterated that claimant was entitled to reimbursement of only those fees and expenses incurred in and about the handling or pursuit of workers' compensation benefits or other matters pertaining to claimant's rights, duties, and responsibilities under Chapter 440. The court noted that "Perhaps it would be more equitable to make an employer pay for all of the expenses of a guardianship necessitated by a workplace injury, but the issue is not directly addressed in the Workers' Compensation Law, and we are bound by our own decisions on the subject," (citing *Charlton*). *Lavoy* was decided ten years ago, and no changes have been made to section 440.17 since then.

I find that establishing or maintaining the guardianship serves many purposes in addition to *enabling* or *allowing* the handling of claimant's rights, duties, and responsibilities under Chapter 440. I further find that *enabling* or *allowing* the handling of claimant's rights, duties, and responsibilities under Chapter 440, is not the equivalent of the *actual* handling of claimant's rights, duties, and responsibilities under Chapter 440. Further, the guardian, and the guardian's attorney, perform many functions on behalf of the claimant that are wholly unrelated to Chapter 440 (as evidenced by the attorney's time records and testimony at trial). I find that the reimbursement sought by claimant here is prohibited by the controlling case law of *Charlton* and

Lavoy, as it has not been demonstrated that the services were performed in or about the handling of claimant's rights, duties, or responsibilities under Chapter 440.

Claimant argues in the alternative that the carrier is estopped from denying payment of the fees in question, because they have paid similar legal expenses on a regular basis over the past seven years. Claimant specifically argues promissory estoppel (and laches). I find that promissory estoppel does not apply here. There is no evidence that E/C made any affirmative promise, at any time, to pay the guardian's legal bills, which promise would reasonably be expected to induce action or forbearance of definite and substantial character on the part of the guardian or the guardian's attorney. *Cf. Criterion Leasing Group v Guld Coast Plastering & Drywall*, 582 So. 2d 799 (Fla. 1st DCA 1991). Even if it were to be shown that E/C paid some or even all of the guardian's legal bills in the past, it would not preclude E/C from challenging or disputing liability for payment of any future bills. Further, there is no competent substantial evidence that E/C did pay the past bills. Mr. Alvarez' testimony on this point was ambiguous and uncertain, and was not supported by any corroborating documentation.

Finally, I also find that none of the elements of laches have been demonstrated here. There is no evidence of a lack of diligence on the part of E/C, nor is there any evidence of prejudice to the claimant by E/C's assertion of its rights under the law, by way of denying payment of the bill once it was received.

WHEREFORE it is hereby ORDERED AND ADJUDGED:

1. The claim for payment of the guardian's attorney's fees and costs for the period 11/21/14 to 09/09/15 is denied and dismissed.

2. The claim for attorney's fees and costs is denied and dismissed.

DONE AND ORDERED this 2nd day of June, 2016, in Tampa, Hillsborough County, Florida.



A blue ink handwritten signature of Mark A. Massey, which is a stylized, cursive representation of his name.

Mark A. Massey
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Tampa District Office
6302 E. Dr. Martin Luther King Jr. Blvd., Suite 460
Tampa, Florida 33619
(813)664-4000
www.fljcc.org

COPIES FURNISHED:

ESIS WC Claims
PO Box 6560
Scranton, PA 18505
TamWCClientFNOL@esis.com

Michael J. Winer, Esq.
Law Office of Michael J. Winer, P.A.
110 N. 11th St., 2nd Floor
Tampa, FL 33602
lauri@mikewinerlaw.com,danielle@mikewinerlaw.com

Derrick E. Cox
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1560 Orange Avenue, Suite 500
Winter Park, FL 32789
dcox@hrmcw.com,canderson@hrmcw.com

I HEREBY CERTIFY that the foregoing
Order was posted to the DOAH website.
www.jcc.state.fl.us

6-2-2016

A handwritten signature in blue ink, appearing to read "A. Ferlita".
Digitally signed by
Ana Ferlita
Date: 2016.06.02
11:37:08 -04'00'