

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

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| Rita Williams, |) | |
| Employee/Claimant, |) | |
| |) | Judge: Nolan S. Winn |
| vs. |) | |
| |) | OJCC Case No. 09-025908NSW |
| Gulf Coast Enterprises d/b/a Lakeview Center, |) | |
| Inc./United States Fire Insurance Company, |) | Accident date: 6/28/2009 |
| Employer/ Carrier/ Servicing Agent. |) | |
| _____ |) | |

FINAL EVIDENTIARY HEARING

THIS CAUSE came on to be heard in Pensacola, Escambia County, Florida on 08-30-10 upon E/C's Motion to Tax Costs and E/C's Motion for Reimbursement from Claimant for no-show fee for at her own independent medical examination. The Motion to Tax Costs was filed 04-19-10 and the Motion for Reimbursement on 07-15-10. The parties' Pre-Trial Stipulation was filed 06-24-10. The Final Hearing occurred one hundred thirty-three (133) days after the Motion to Tax Costs was filed and this Order was entered one (1) day thereafter. Julie Bixler, Esq. was present in Pensacola on behalf of the E/C. Donovan Whibbs, Esq. was present in Pensacola on behalf of the Claimant.

Submitted into evidence at the Final Hearing were the following documents, each accepted, identified and placed into evidence without objection except where noted, as Judge's Exhibits, Joint Exhibits, Claimant's Exhibits, or E/C Exhibits, as follows:

JUDGE'S EXHIBITS MARKED FOR THE RECORD:

- #1. The parties' Pre-Trial Stipulation filed 06-24-10.
- #2. E/C Motion to Tax Costs filed 04-19-10.
- #3. Composite of Claimant's Petitions for Benefits and Voluntary Dismissal.
- #4. E/C Motion for Reimbursement from Claimant filed 07-15-10.
- #5. Order to Show Cause issued 07-19-10.
- #6. Claimant's Response to Order to Show Cause filed 07-20-10.

JOINT EXHIBITS:

None.

CLAIMANT'S EXHIBITS:

None.

E/C's EXHIBITS:

None.

In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary to resolve this claim. I have not attempted to painstakingly summarize the substance of the parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel for the respective parties, and analyzed statutory and decisional law of Florida.

Based upon the parties' stipulations and the evidence and testimony presented, I find:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.
2. The parties' stipulations and agreements, set forth in the pretrial compliance questionnaire are accepted, adopted and made an order of the Office of the Judge of Compensation Claims.
3. Any and all issues raised by way of the Petitions for Benefits ("PFB"), but which issues were not

dismissed or tried at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the Claimant and, therefore, are Denied and Dismissed with prejudice. See, Scotty's Hardware v. Northcutt, 883 So.2d 859 (Fla. 1st DCA 2004).

4. Claimant filed two (2) Petitions for Benefits in this matter, each of which she subsequently dismissed. Ch. 440.34(3), F.S., provides that a prevailing party is entitled to recover reasonable costs expended in a proceeding. An E/C is the prevailing party when a claimant dismisses her petitions whether with or without prejudice. Palm Beach County School District v. Ferrer, 990 So.2d 13 (Fla. 1st DCA 2008) and Costco Wholesale Warehouse v. Ulett, 995 So.2d 1016 (Fla. 1st DCA 2008).

5. As prevailing party, E/C contends it is entitled to recover costs incurred of \$1,517.99. Included in such costs were \$250.00 charged for a conference by Dr. Nilsson; \$100.00 charged for a conference by Dr. Dewey; a \$50.00 non-appearance fee when Claimant failed to appear for her deposition; \$273.75 for a transcript of Claimant's deposition; and a \$750.00 cancellation fee from Dr. Nilssen when his deposition was cancelled at the last moment as a result of Claimant's dismissal.

6. Section I C of the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions sets forth the costs of expert witnesses which are properly taxable to include fees for depositions, trial testimony and preparation of any court ordered report. Conferences with expert witnesses are not set forth as a properly taxable cost. As a result, the \$250.00 charged for a conference by Dr. Nilsson and the \$100.00 charged by Dr. Dewey are not taxable.

7. As regards the deposition costs incurred by E/C, while the legislature in enacting Ch. 440.34(3), F.S., may have intended taxable costs incurred in taking a deposition to be recoverable by either party, the legislature also enacted Ch. 440.30, F.S. specifically addressing depositions and taxation of costs incurred in the taking thereof in workers' compensation proceedings. Ch. 440.30, F.S. clearly states fees incurred in connection with the taking of depositions in workers' compensation may be taxed as costs and recovered "by the claimant." Courts have generally recognized the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another. See, Jackson Nat'l Life Ins. Co. v. Lovallo, 8 So.3d 1242 (Fla. 1st DCA 2009)(footnote 2). Whether intended by the legislature or not, Ch. 440.30, F.S. allows only claimant's to recover costs incurred in the taking of deposition in workers' compensation proceedings. As a result, the \$273.75 E/C incurred for the taking of Claimant's deposition is not taxable.

8. The \$50.00 charged by the court reporter as a result of Claimant's failure to appear for her scheduled deposition is not a fee for the taking of Claimant's deposition, but rather a charge levied and paid as a result of Claimant's failure to attend her deposition. It is a charge that was incurred solely as a result of Claimant's own actions or in-actions and as such should be taxed in favor of the E/C.

9. Similarly, the \$750.00 charged by Dr. Nilssen for the late cancellation of his deposition following Claimant's dismissal of her claims, is not a fee charged for the doctor's deposition, but rather for late cancellation thereof. It is therefore a charge incurred solely as a result of Claimant's action in dismissing her claims, is not a charge for a deposition and as such should be taxed in favor of the E/C. However, Ch. 440.13(10), F.S. limits a treating physician to charging no more than \$200.00 per hour should his deposition actually be taken. Review of the Invoice for Deposition indicates the cancellation fee was based upon a "1 hour" charge. This being the case, E/C's recovery should be limited to \$200.00.

10. Regarding the second matter at issue, E/C seeks to recover one-half of the \$1,000.00 paid Dr. Gilmore due to Claimant's failure to appear for her own scheduled IME appointment on 05-04-10. Ch. 440.13(5)(d), F.S., provides that an employee failing to appear for a properly noticed IME appointment without good cause and who fails to advise the physician 24 hours in advance that she cannot appear shall reimburse the E/C 50% of any no-show fee assessed.

7. Claimant requested an IME on 02-24-10 and on 04-13-10 E/C wrote Claimant advising of the scheduled 05-04-10 IME appointment. Claimant did not appear for the IME as, unknown to her attorney or E/C, she had been incarcerated since either February or March, 2010. Claimant contends E/C is not entitled to recover 50% of the \$1,000.00 no show fee as (1) her incarceration is good cause for not attending the appointment and (2) E/C's mere mailing of a letter advising of such appointment was not sufficient notice as the same should have been by certified mail. With regards to the latter, there is no requirement that E/C's notify claimant's of medical appointments by certified mail. Insofar as E/C timely notified Claimant and her attorney of the scheduled IME appointment, unless there is good cause for her failure to attend and her failure to notify the physician 24 hours in advance that she would be unable to attend, Claimant should be held responsible for 50% of the no-show fee.

8. As Claimant was incarcerated at the time the E/C wrote advising of the appointment and Claimant, for

purposes hereof is assumed to have never received such letter, Claimant has shown good cause for not attending the appointment. The question becomes then whether Claimant has shown good cause for failing to notify the doctor she would not be attending and thus request that he cancel the appointment. There are certainly circumstances under which her incarceration could be considered good cause so as to excuse her failure to call and cancel the appointment. Had her incarceration began a week or so before the scheduled appointment, it would be reasonable to find she had other, more pressing matters on her mind so as to excuse her failure to call her workers' compensation attorney and advise him of her situation. In this instance however, her incarceration commenced 2 to 3 months prior to the IME appointment yet at no time during such period did she call her attorney and tell him of her incarceration. While Claimant had dismissed her petitions, she was, or should have been, well aware of the fact she had requested an IME appointment. In other words she had an ongoing workers' compensation claim for which she had retained an attorney to represent her and had requested benefits from the E/C. When she was incarcerated, she was obligated, within a reasonable period of time, to advise her attorney of such fact. When she failed to do so during the ensuing 2 to 3 month period, E/C incurred the unnecessary expense of an IME no-show fee. As a result, I find no good cause has been shown to excuse her payment of 50% of such fee.

It is therefore,

ORDERED AND ADJUDGED that:

1. E/C's Motion to Tax Costs is **GRANTED** and E/C shall have and recover from Claimant, the sum of \$344.24, for all of which let execution issue.
2. E/C's Motion for Reimbursement from Claimant for IME no-show fee is **GRANTED**. E/C shall have and recover from Claimant, the sum of \$500.00, for all of which let execution issue.

DONE AND ELECTRONICALLY MAILED this 1st day of September, 2010, in Pensacola, Escambia County, Florida.



Nolan S. Winn

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