

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

James Quesada,
Employee/Claimant,

vs.

OJCC Case No. 09-032344GCC

Miami Dade Ambulance Service/Frank
Winston Crum Insurance, Inc., and Broadspire,
Employer/ Carrier/Servicing Agent.

Accident date: 10/21/2009

ORDER DISMISSING PETITION FOR BENEFITS FOR LACK OF PROSECUTION

This matter came before the undersigned Judge of Compensation Claims for evidentiary hearing on the July 23, 2013 "Employer/Carrier's Motion to Dismiss for Lack of Prosecution". Claimant James Quesada was represented by David Goehl, Esquire. Employer Frank Crum, carrier Frank Winston Crum and servicing agent Broadspire were represented by Kate Albin, Esquire. This Order follows.

- (1) The DOAH docket indicates and the parties agree that Petitions for Benefits were filed in this cause on December 21, 2009; February 22, 2010; and July 22, 2010 respectively.
- (2) The December 21, 2009 Petition for Benefits was voluntarily dismissed on January 29, 2010.
- (3) The February 22, 2010 Petition for Benefits was voluntarily dismissed on June 1, 2010.
- (4) The July 22, 2010 Petition for Benefits was voluntarily dismissed on October 18, 2010.
- (5) Claimant filed another Petition for Benefits on October 18, 2011. A Voluntary Dismissal was taken on same on December 9, 2011.
- (6) Section 440.25(4)(i), Fla. Stat. (2008) provides for dismissal of claims for lack of prosecution where there has been a one year period of inactivity. No hearing is required to effectuate same.

- (7) On July 23, 2013, the employer/carrier filed a Motion to Dismiss for Lack of Prosecution. Their motion insists that there was no record activity in this file from July 22, 2010 until July 23, 2013.
- (8) The initial facts alleged in the employer/carrier's motion raised a prima facie case for relief. However, recognizing that "good cause" may excuse record inactivity, the matter was set by the undersigned for evidentiary hearing.
- (9) The evidentiary hearing was held August 29, 2013. At the hearing, both counselors accepted the facts pled in (1) of the employer/carrier's motion as true. Same constitute findings (1) - (4).
- (10) This file was reviewed for record activity on August 29, 2013, the day of the evidentiary hearing.
- (11) Prior to the July 23, 2013 filing of the motion addressed by this Order, the last record activity that took place on this file was the Order on Employer/Carrier's Motion to Compel Filing of Verified Motion for Attorneys Fees and Costs. Same was entered on July 3, 2012.
- (12) In the one year period prior to the July 23, 2013 Motion to Dismiss, no record activity took place.
- (13) The claimant bears the burden of moving his case forward. The claimant has failed to meet his obligation to prosecute this action.
- (14) The claimant notes that each of the three voluntary dismissals noted herein contained a reservation of jurisdiction over the issue of attorney's fees. The claimant interprets these reservations as perpetually tolling the running of the statute of limitations. See, *Vassallo v. Goldwire*, 18 So. 3d 670 (Fla. 1st DCA 2009)
- (15) Prior to *Vassallo*, caselaw recognized that attorney's fee claims – like all other claims – are subject to dismissal for lack of prosecution. See, *Sherertz v. Key West Oceanside Marina*, 477 So. 2d 70 (Fla. 1st DCA 1985); *Florida Power & Light v. Callahan*, 470 So. 2d 819 (Fla. 1st DCA 1985); *Jerry Chapman, Inc., v. Ivey*, 448 So. 2d 11 (Fla. 1st DCA 1984).
- (16) *Vassallo* distinguishes *Callahan* and *Regal Wood Products v. Mendez*, 432 So. 2d 141 (Fla. 1st DCA 1983) pointing out that the former is based on an interpretation of Section 440.24(4)(i) while the latter two cases are based on interpretations of

the former Rule 11(b), which subsequently became Fla. R. Work. Comp. P. 4.110(b). The statute allows for dismissal of petitions. The language in the rule was broader expanding applicability to "(a)ny claim or petition to modify."

- (17) In *Vassallo*, Section 440.25(4)(i) was found inapplicable "because less than one year passed between the time Appellant filed his fee petition and the time a hearing was held to address it." The facts present here are materially different. More than a year ran between July 3, 2012 and July 23, 2013.
- (18) Secondly, the claims for attorney's fees which claimant relies upon to defeat dismissal for lack of prosecution were raised via Petitions for Benefits. They remain pending as a function of the respective Petitions.
- (19) Any benefit claimed via a Petition for Benefits must meet specificity requirements. Section 440.192(2)(j) expressly requires:

"Specific explanation of any other disputed issue that a judge of compensation claims will be called to rule upon".

No exception is made for attorney's fees. The generic, non-specific claims presented herein by the claimant for attorney's fees do not survive specificity scrutiny required for pleading any benefit claimed. However, because specificity was not challenged within thirty (30) days, the employer/carrier waived the right to seek dismissal for lack of specificity.

- (20) Third, under Section 440.192(9), "(a) petition for benefits must contain claims for all benefits that are ripe, due and owing on the date that the petition is filed." Attorney's fees are a benefit to the claimant. The decision to prosecute them via Petition for Benefits was wholly the claimant's. The claimant cannot now turn around and assert that the benefit he himself chose to prosecute via petition is not ripe, due and owing.
- (21) Fourth, *Vassallo* case relied upon by claimant involved a joint stipulation entered into between the parties wherein jurisdiction over the attorneys fee claim was reserved by agreement. This difference is material and significant.
- (22) A historical look at dismissal for lack of prosecution in workers' compensation highlights how guidance from Fla. R. Civ. P. 1.420(e) impacts this analysis. That

rule calls for dismissal where "it appears upon the face of the record that no activity by filing of pleadings, order of court or otherwise has occurred for a period of one year". The rule specifically disallows dismissal for lack of prosecution where the parties have entered a stipulation reserving on attorneys fees. See, *Gilman v. South Florida Water Management District*, 584 So. 2d 591 (Fla. 1st DCA 1991); *John Ringling Towers v. Security Insurance Group*, 573 So. 2d 154 (Fla. 1st DCA 1991) *Sherertz v. Key West Oceanside Marina*, 477 So. 2d 70 (Fla. 1st DCA 1985) went so far as to find Fla. R. Civ. P. 1.420(e) analogous to then Fla. R. Work. Comp. P. 11(b).

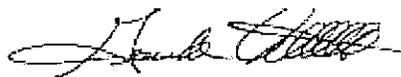
- (23) In *Jerry Chapman, Inc., v. Ivey*, 448 So. 2d 11 (Fla. 1st DCA 1984), a claim for attorneys fees stood dormant for two years. The JCC erred in not dismissing same. Similarly, in *Florida Power & Light Co. v. Callahan*, 470 So. 2d 819 (Fla. 1st DCA 1985), the claimant's failure to have prosecuted his attorneys fee claim between April 16, 1981 and February 8, 1984 resulted in dismissal of his attorneys fee claim for lack of prosecution.
- (24) There being no stipulation reserving on jurisdiction over attorneys fees and costs, the undersigned finds that the attorneys fees claims raised via Petitions for Benefits are dismissed without prejudice for lack of prosecution.

(II) DECREE

It is hereby Ordered that:

- (1) the attorneys fee claims raised in the Petitions for Benefits filed December 21, 2009; February 22, 2010 and July 22, 2010, respectively are hereby dismissed for lack of prosecution.
- (2) Judicial notice is taken of the OJCC docket.

Done and Ordered in chambers in Miami, Miami-Dade County, Florida this 27th day of September, 2013.



Gerardo Castiello
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order have been mailed to each of the parties listed below via U.S. mail this 27th day of September, 2013.

James Quesada
6141 East 4th Avenue
Hialeah, Florida 33013

Miami Dade Ambulance Service
2766 Northwest 62nd Street
Miami, Florida 33147

I HEREBY CERTIFY that a true and correct copy of the foregoing Order have been mailed to each of the parties listed below via E-mail this 27th day of September, 2013.

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Assistant to the Judge of Compensation Claims

Final Hearing Statistics Worksheet

Please complete this form at the time of Order upload for any of the following:

***** Evidentiary Motion Hearing *****

Expedited Final Hearing
Fee Amount Hearing
Fee Entitlement Hearing
Final Hearing
Fund Hearing
Remand Hearing
Appellate Fee Hearing

OJCC Number(s) 09-032344GCC

Date Order Mailed/Emailed 09/27/2013

Trial/Hearing dates opened 08/29/2013, concluded 08/29/2013

For Final Hearing or Expedited Final Hearing:

Dates of all pending petitions heard _____

OR

For Evidentiary Motion Hearing:

Type of Motion Employer/Carrier's Motion to Dismiss for Lack of Prosecution.

Filing Date of Motion Heard July 23, 2013

OR

For Fee Amount Hearing or Fee Entitlement Hearing

Date motion or verified petition filed _____

OR

For Appellate Fee or Remand Hearing

Date of Mandate _____

AND

If abbreviated final/fee order was issued and later vacated:

Date Abbreviated Order Entered: _____

Date Abbreviated Order Vacated: _____