

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

Ronald Matheny,
Employee/Claimant,

OJCC Case No. 14-029102RLD

vs.

Accident date: 11/16/2014

Indian River Fire Rescue/Johns Eastern
Company, Inc.,
Employer/Carrier/Service Agent.

Judge: Robert L. Dietz

EVIDENTIARY ORDER ON MOTION TO APPROVE ATTORNEY'S FEES

THIS CAUSE was heard before the undersigned in Sebastian, Indian River County, Florida on May 11, 2015, upon the Claimant's Motion to Approve Attorney's Fees filed on March 25, 2015 (Docket Number (DN) 29). A Response was filed by the Employer/Carrier on April 1, 2015 (DN 33) and indicated they had no objection to the substance of the Motion. A Memorandum of Law in Support of His Motion for Approval of Attorney's Fee was filed March 25, 2015 (DN 30). A Response to Motion to Approve Attorney's Fee was filed by the Employer/Carrier on April 1, 2015 (DN 33). Don W. Allen, Esq. was present on behalf of the Claimant. Mark E. Hill, Esq. was present on behalf of the Employer/Carrier.

The Claimant argued in his March 25, 2015, Motion that Russ v. Brooksville Health Care Center, 109 So.3d 1266 (Fla. 1st DCA 2013) provides a claimant with the right to call witnesses and lay the appropriate record in a lower tribunal in order to preserve a constitutional challenge that must be decided in the appellate courts. The Claimant bases his motion on pursuits of claims under Section 112.18 and Section 440, Fla. Stat., claiming the need to pay Counsel an hourly fee was due to the "complexity" of handling a heart/lung or exposure case, and the difficulty in finding counsel that would competently handle those type cases. In addition, the Claimant argues that he only wants to enforce an already existing constitutional right of free speech. The Petition for Benefits (PFB) filed December 18, 2014

(DN 1), and January 8, 2015 (DN 9), identify the accident as resulting in injuries to the lungs and pulmonary system caused by exposure to mold and toxins. Based on Russ v. Brooksville Health Care Center, an Order was entered on April 29, 2015, granting an Evidentiary Hearing on the Motion (DN 44). A Voluntary Dismissal of Petition(s) for Benefits was filed on May 6, 2015 (DN 49), and an Amended Notice of Voluntary Dismissal was filed on May 6, 2015 (DN 51), dismissing the December 18, 2014, and January 8, 2015, Petitions for Benefits. The Employer/Carrier took no position regarding the Motion.

At the requested Evidentiary Hearing on May 11, 2015, Ronald Matheny (the Claimant) and John O'Connor (the President of the International Association of Fire Fighters (IAFF) Local 2201), testified on behalf of the Claimant. Beth Martin (the Employer Representative) was present, but the Employer/Carrier did not call any witnesses. The Claimant introduced into evidence a composite exhibit of five affidavits (Claimant's Exhibit #1) in support of Hourly Attorney's Fees prepared by George Cappy, Esq., John Rahaim, Esq., Dennis Smejkal, Esq., Kellye Shoemaker, Esq., and Monte Shoemaker, Esq. in a similar type toxic exposure case indicating that they were unable to take this kind of case due to its contingent nature and the huge disparity between the expense of proving an exposure case and the *de minimis* attorney's fee allowed under Section 440.34. I know each of these attorneys and recognize their expertise in the field of workers' compensation. Their testimony is not in any way surprising to the undersigned. In my experience I have found that it is much harder for a Claimant to locate competent counsel to handle Section 112.18 and Section 440 cases involving toxic exposure because of the unique nature and expense of the claims. Claimant's Exhibit #2 was the appellate brief filed in the Miles v. City of Edgewater Police Department (DCA Case No: 1DCA-15-0165) case. The Claimant is entitled to have his hearing on the constitutionality of these issues before an appellate court with jurisdiction to hear this case.

The Motion to Approve Attorney's Fee requested approval of a one thousand, five hundred dollar (\$1,500.00) attorney fee pursuant to Fla. Statute 440.105(3)(c) and Florida Administrative Code Rule 60Q-6.124(1) paid by the International Association of Fire Fighters (IAFF) Local 2201. At the

hearing, it was the Claimant's position that due to the complexity of handling a case under Section 440, Fla. Stat., commonly referred to as the "Worker's Compensation Law," and Section 112.18, Fla. Stat., commonly referred to as the "Heart/Lung Bill," Claimant's Counsel has advised the Claimant that he cannot handle the case on a contingent basis and can only continue representation if the Claimant would agree to a reasonable hourly fee of \$150.00 per hour, and a JCC would approve the payment of the fee by IAFF Local 2201. In addition, Claimant's Counsel argues that he only wants to enforce an already existing constitutional right of free speech.

Ronald Matheny, the Claimant, has been a firefighter for the Employer for thirty-one (31) years. He is alleging exposure to mold at his fire station. He sought legal representation and his Union recommended Bichler, Kelley, Oliver & Longo, PLLC, a law firm known for their expertise in first responder and exposure cases. To insure that their members get the best possible representation, the Union's Executive Board voted to pay a \$1,500.00 retainer for the first ten hours work, and \$150.00 per hour thereafter, to the Bichler Law Firm to represent the Claimant if the JCC would approve the fee. Mr. Matheny indicated that even if the law did not prohibit him from paying his lawyer, he could not afford to pay him. He has been unable to find anyone willing to accept his case without being paid. If he had to represent himself, he would have no ability to properly present his claim so that it would be found compensable.

John O'Connor, President of Local 2201, testified that the Executive Board of IAFF Local 2201 met and unanimously agreed to pay \$1,500.00, from the Union treasury to pay legal fees on behalf of the Claimant, who is a member in good standing of the IAFF Local. This \$1,500.00 payment is for all work done through the date of the Motion (March 25, 2015). It is further represented that the IAFF Local also wishes to pay \$150.00 per hour for all work performed after March 25, 2014. The Claimant and IAFF Local 2201 have been advised by Claimant's Counsel that if an Order is entered approving this fee, the Claimant's Counsel will continue his involvement in the case through the date of the merit hearing. If the fee is not approved, the Claimant's Counsel indicates that he will be forced to withdraw from the case.

In the absence of any supporting worker's compensation case law, the Claimant takes the position that Jacobson v. Southeast Personnel, 1113 So.2d 1042 (Fla. 1st DCA 2013) stands for the general proposition that a claimant has a constitutional right to pay his own counsel. Jacobson involved a claim where costs were sought against the Claimant by an Employer/Carrier that was the prevailing party in their litigation, and the Claimant was unable to obtain counsel to represent him because he could not pay them a fee under sections 440.34 and 440.105(3)(c), Fla. Stat. The Court held that, to the extent that these statutes prohibited the Claimant from retaining counsel to defend a motion to tax costs against him, they were unconstitutional, and remanded to the JCC to determine whether a proposed fee was reasonable. The undersigned does not find that Jacobson provides any basis for the action requested in this case. The Claimant argues that the United States Supreme Court cases cited make clear the action that should be taken here. Again, for the same reason, this is an issue best addressed by the appellate court.

Here, the Claimant has requested that a hearing be conducted on the constitutionality of Section 440.34, Fla. Stat. The only hoped-for-outcome for the Claimant is the removal of the contingency nature of workers' compensation cases created by the legislature, and the conversion to a non-contingent arrangement in those cases where the Claimant has access to parties willing to provide economic resources to their cause. Unfortunately, a JCC does not have the authority to make such a change. Justice Wetherell in a concurring opinion in Jacobson limited the application of the case noting:

“This does not mean that these statutes are unconstitutional in other circumstances, nor in my view should the majority opinion be construed or applied to reach such a conclusion. Indeed, this Court has consistently rejected constitutional challenges to the statutory limitations on the amount of fees the JCC can award (or approve) under section 440.34 based on the benefits secured for the claimant by the attorney. See, e.g., Kauffman v. Community Inclusions, Inc., 57 So.3d 919, 920-21 (Fla. 1st DCA) (citing cases), rev. denied, 68 So.3d

234 (Fla. 2011). I do not read the majority opinion to undermine the continued viability of those decisions or to call into doubt the validity of the statutory limitations on claimant-paid fees generally because the compelling governmental interests that were absent here (see majority opin. at 10-12) are directly implicated in cases where the attorney's fee is paid by the claimant out of the benefits awarded, or by the E/C."

Jacobson at 1052-1053.

For the following reasons, the Claimant's Motion to Approve Attorney Fee is denied. First, the JCC is prohibited by statute from approving retainer agreements between an injured employee and his counsel that are in excess of the amount allowed under Section 440.34(1), Fla. Stat. An hourly rate of \$150.00 an hour could exceed guideline attorney fees for cases that do not involve significant "benefits obtained." Second, Section 440.34, Fla. Stat. prohibits approving or permitting an attorney to be paid an hourly fee by an injured employee for representation in a workers' compensation matter for this date of accident. Third, the Claimant's counsel is not barred from receiving any fee. The Claimant's counsel has the opportunity to file a PFB on behalf of the Claimant and litigate benefits due him, in which case he may become eligible for payment of a fee by either the carrier or his client. Finally, there is no workers' compensation statutory or case law precedent for allowing a third party not involved in the case to pay attorney fees to the Claimant's attorney.

Fees due to the claimants' attorney in workers' compensation cases are contingent in nature, just as they are in personal injury cases. An attorney who litigates a workers' compensation case and is unable to secure any benefits for his client cannot receive a fee from either his client or the carrier, just as a personal injury attorney representing a plaintiff is not paid a fee by anyone if the jury awards her/ his client nothing. If an attorney agrees to represent an injured employee, then that attorney has to risk not receiving a fee. To do as Claimant's Counsel suggests would rewrite Chapter 440 to remove the contingency factor. This is a matter for the legislature and not for a JCC, particularly as it relates

to third party payers of an hourly fee. The Claimant also raises fundamental fairness, right to contract and freedom of speech issues since the Employer/Carrier has the ability to hire and pay any attorney it wants, while the Claimant does not. All of these are issues that will be considered by the appellate court in addressing the constitutional issues. Finally, if the Motion for Approval of Attorney Fees is denied, the undersigned is requested to grant Claimant's Motion to Withdraw as Attorney of Record. No contingent Motion to Withdraw as Attorney of Record had been filed at the time of the May 11, 2014, hearing, however, since the undersigned understood that this was the planned course of action as stated in the original Motion, the undersigned will enter the requested Order allowing Claimant's Counsel to withdraw from the case by separate Order when the Motion is appropriately filed.

It is DONE AND ORDERED that:

The Motion for Approval of Attorney Fees is denied.

DONE AND ELECTRONICALLY SERVED ON COUNSEL AND CARRIER this 12th day of May, 2015, in Sebastian, Indian River County, Florida.



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