

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

John O'Connor,
Employee/Claimant,

OJCC Case No. 15-003598RLD

vs.

Accident date: 1/10/2015

Indian River County BCC/Johns Eastern
Company, Inc./Indian River County
BOCC,
Employer/Carrier/Service Agent.

Judge: Robert L. Dietz

EVIDENTIARY ORDER ON EMPLOYER/CARRIER'S MOTION TO TAX COSTS

This cause was heard before the undersigned in Sebastian, Indian River County, Florida on September 28, 2015, upon the Employer/Carrier's Motion to Tax Costs filed on July 20, 2015 (Docket Number (DN) 63). A Response was filed by the Claimant on July 28, 2015 (DN 65). Kristine Callagy, Esq. appeared on behalf of the Claimant. Mark E. Hill, Esq. appeared on behalf of the Employer/Carrier.

The following documentary items were received into evidence:

Judge's Exhibits:

Exhibit #1: All documents required under Fla. R. App.P.9.180.

Joint Exhibits:

None

Claimant's Exhibits:

Exhibit #1: Response to Motion to Tax Costs filed on August 5, 2015 (DN 39)

Exhibit #2: Deposition Transcript of Shirley Chavis (Adjuster), taken on September 14, 2015, and filed September 24, 2015 (DN 55)

Exhibit #3: Exhibits to Deposition of Shirley Chavis (DN 56)

Exhibit #4: Deposition Transcript of Michael Smith (Industrial Hygienist) taken on September 15, 2015, and filed on September 25, 2015 (DN 59)

- Exhibit #5: Deposition Transcript of Beth Martin (Risk Manager) taken on September 15, 2015, and filed on September 25, 2015 (DN 60)
- Exhibit #6: Correspondence from County Attorney's Office dated June 6, 2014, filed September 28, 2015 (DN 62)
- Exhibit #7: Email Correspondence between Assistant Chief Brian Burkeen and Claimant dated September 25, 2015, and filed on September 28, 2015 (DN 63)

Employer/Carrier's Exhibits:

- Exhibit #1: Orange Legal Invoice for deposition of the Claimant dated April 30, 2015 (DN 65)
- Exhibit #2: Station 7 Cost Breakdown – AMEC Foster Wheeler (DN 66)
- Exhibit #3: Claim Payout Register as of July 24, 2015 (DN 67)
- Exhibit #4: Invoice Payments to AMEC Environment & Infrastructure, Inc. dated March 10, 2015, April 3, 2015, and April 30, 2015 (DN 68)
- Exhibit #5: Motion to Tax Costs filed on August 4, 2015 (DN 38, pp. 1-3)
- Exhibit #6: Affidavit of Costs by Shirley Chavis, Adjuster, dated July 29, 2015 (DN 38, pp. 7-8)
- Exhibit #7: Affidavit of Costs by Beth Martin, Risk Manager, dated July 28, 2015 (DN 38, pp. 9-10)

At the hearing, John O'Connor, the Claimant, and Mark E. Hill, Esq. appeared and testified before me. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the witness's testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1. The undersigned has jurisdiction over the parties and the subject matter.
2. The Employer/Carrier is the prevailing party if the Claimant dismisses its action. Palm Beach County School Dist. v. Ferrer, 990 So.2d 13 (Fla. 1st DCA 2008). In this case, the February 17, 2015, Petition for Benefits (PFB) was voluntarily

dismissed on May 14, 2015 (DN 11). As the prevailing party, the Employer/ Carrier is entitled to taxable costs pursuant to Section 440.34(3)(a), F.A.C. See Aguilar v. Kohl's Dept. Stores, Inc., 68 So.3d 356 (Fla. 1st DCA 2011).

3. The Claimant argues that until the outcome of the appeal is known, there is no way to determine the prevailing party in order to award taxable costs. In Frederick v. Monroe County School Bd., 99 So.3d 983 (Fla. 1st DCA 2012), the First DCA upheld the judge of compensation claim's (JCC's) award of taxable prevailing party costs despite the Claimant raising a constitutional question of access to the courts. The entitlement to the taxable costs was established by the dismissal of the PFB. Later entered orders may entitle the Claimant to prevailing party costs, but that cannot be determined at this time, and is the natural outcome of issues (such as workers' compensation) that are dealt with and resolved on a piecemeal basis.
4. Section 440.34(3), Fla. Stat. states: "[if] any party should prevail in any proceedings before a judge of compensation claims or court, there shall be taxed against the non-prevailing party the reasonable costs of such proceeding, not to include attorney fees."
5. The Employer/Carrier is the prevailing party and is entitled to recover their reasonable taxable costs. This includes costs associated with depositions. See Punsky v. Clay County Bd. of County Commissioners, 60 So.3d 1088 (Fla. 1st DCA 2011). The uncontroverted evidence in this case is that the adjuster's deposition transcript was \$538.20 (DN 38, pp. 7-8). This amount is found to be a taxable cost to which the Employer/Carrier is entitled to reimbursement.
6. The Employer/Carrier argues that the costs of its investigation and testing should also be taxed against the Claimant and request reimbursement of \$4,109.69 (DN 38, pp. 9-10). The Employer/Carrier has the burden of proof "to show that all

requested costs were reasonably necessary either to defend or prosecute the case at the time the action precipitating the costs was taken.” Re Amendments to Unif. Guidelines for Taxation of Costs, 915 So.2d 612 (Fla. 2005); Nealy v. Fla. Dep’t of Revenue, 171 So.3d 201 (Fla. 1st DCA 2015).

7. In this case, the Employer contracted with AMEC Foster Wheeler to conduct testing, including air samples, and to monitor the testing being done by the Claimant. The Employer/Carrier argues that the Claimant was using a testing gauge that is not considered reliable by the industry, and that their presence was required on the same day as the Claimant’s experts examined the premises to make sure that any disagreement in results was not due to weather conditions on different days of testing.
8. The Claimant argues that the Employer/Carrier’s testing has never been proven to relate to the Claimant or the Claimant’s claim, as opposed to work the County was doing at multiple locations relating to as many as seventy (70) claims. The billing and receipts documenting the charges do not reference the Claimant, were paid by the County and not the servicing agent handling the workers’ compensation claims, and were not listed on the payout of workers’ compensation related expenses.
9. The parties were also unable to identify any case law that is applicable to the type investigation and testing that is claimed in this case. Other investigation methods have not been approved as taxable costs. See Mitchell v. Osceola Farms Co., 574 So.2d 1162 (Fla. 1st DCA 1981) (where the First District Court of Appeal held that the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions (Guidelines) make no provision for surveillance films to be taxed as costs. If the film was considered a report, it was noted that section 2B of the Guidelines provided that no charge should be made for a pretrial report submitted by one’s own expert.)

10. In the absence of authority to support a finding that investigation and testing constitutes a taxable cost, I am not willing to make the leap that an industrial hygienist's testing and investigation which was never placed into evidence is the equivalent of a physician's examination fee which was incurred in connection with a medical report placed into evidence. See Albertini v. McDonald's, 400 So.2d 160 (Fla. 1st DCA 1981). The First District Court of Appeal has indicated that expenses that are more claims costs than litigation costs are not taxable. See Marton v. Florida Hosp. Ormond Beach, 98 So.3d 754 (Fla. 1st DCA 2012) ("no-show" fees). Testing related to four locations involving seventy (70) or more claims constitutes claims costs and not litigation costs. Once on notice of the allegations of exposure, the Employer was responsible to all of its employees to undertake testing and remediation if a problem was found. To try and carve out an amount "assigned" to the Claimant in this case (based on the total number of employees that worked there, or based on the total number of anticipated claims), or to charge him for all testing done at his facility due to his unfortunate position as the first employee to have a "prevailing costs" hearing against him, are all equally problematic. Although the Employer here took the path of trying to calculate some type of *pro rata* cost assessment, I am not persuaded that the evidence supports that this Employee is the appropriate responsible party for the cost of investigation and testing for mold that must be done once an Employer is on notice of a potentially dangerous situation on its property to which an Employee, or a member of the public, could be exposed and injured. If there was a short in an electrical switch on the premises and employees or the public could be subject to being electrocuted if they came in contact with it, I don't believe the identification of the electrical problem and the repairs to fix the short would be an appropriate basis for reimbursement as a taxable cost in a prevailing party costs hearing.

11. In Board of County Commissioners, Pinellas County v. Sawyer, 620 So.2d 757 (Fla. 1993), the Florida Supreme Court held that investigative costs in a criminal case incurred by a defendant that is subsequently acquitted or discharged are not taxable costs under the plain language of the statute referencing Section 939.06, Fla. Stat. (1989). The civil cases, and in particular the workers' compensation cases, have not resulted in further interpretation from the appellate courts or direction from the Legislature to expand the definition of taxable costs. As a result, I do not find that I have authority to award the investigative costs in the absence of specific statutory or case law direction. Even if I did, the Employer/Carrier has not met their burden of establishing that these charges are related specifically to the Claimant, as opposed to dealing with environmental issues that related to all employees working at that location.
12. The Claimant has also moved for attorney fees and costs for litigating these taxable costs. In a Section 440.30 case, the 1st DCA determined that the Claimant's attorney was not entitled to a fee for obtaining fees. See Shannon v. Cheney Brothers, 98 So.3d 1228 (Fla. 1st DCA 2012). The claim for attorney fees and costs is denied.
13. Based on the evidence before me, I find that the Employer/Carrier is entitled to reimbursement of taxable costs in the amount of \$538.20 for a deposition transcript.

It is **ORDERED and ADJUDGED** that:

- 1) The Claimant shall reimburse the Employer/Carrier taxable costs in the amount of \$538.20 for a deposition transcript.
- 2) The claim for attorney fees and costs is denied.

DONE AND ELECTRONICALLY SERVED ON COUNSEL AND THE CARRIER
this 30th day of September, 2015, in Sebastian, Indian River County, Florida.



Robert L. Dietz

Judge of Compensation Claims
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