

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

)	
Luis Sierra,)	
Employee/Claimant,)	
vs.)	
)	OJCC Case No. 12-018887MGK
Natures Flowers/Florists' Insurance)	
Company, Florists' Insurance Company,)	Accident date: 8/15/2011
and Florists' Mutual Insurance Company,)	Judge: Kerr
Employer/ Carrier/ Servicing Agent.)	

FINAL EVIDENTIARY ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims on August 27, 2013 for an evidentiary Hearing on E/C's Verified Motion to Tax Costs filed with DOAH on May 23, 2013. At the hearing, the E/C was represented by Matthew Troy Esq. The Claimant appeared live at the hearing and was represented by Yvette Gonzalez Esq. This Order ensues.

DOCUMENTARY EVIDENCE;

EMPLOYER/CARRIER:

1. E/C's Verified Motion to Tax Costs, filed on May 23, 2013, with attached affidavit and copies of the invoices incurred.
2. E/C's Response to Claimant's Motion to Strike/Reply to Motion to Tax Costs filed June 11, 2013.

CLAIMANT:

1. Deposition of Dr. Harlan Chiron filed on August 26, 2013.
2. Medical records of Dr. Gail Ballweg of June 26, 2013 filed on August 27, 2013.
3. Subpoena Duces Tecum to Michelle A. Bayhi Esq, served at Hurley, Rogner, Miller, Cox, Waranch & Wescott, P.A. on August 23, 2013 at 3:35 pm.
4. Response to Petition for Benefits filed on November 2, 2012.

JOINT:

1. Claimant's Reply to E/C's Motion to Tax Costs and to Strike E/C's Verified Motion to Tax Costs filed June 3, 2013.

JCC:

1. Petition for Benefits filed October 30, 2012 and Response filed November 2, 2012.
2. Petition for Benefits filed January 9, 2013 and response filed January 16, 2013.
3. Petition for Benefits filed February 7, 2013 and Response filed February 13, 2013.
4. Petition for Benefits filed February 19, 2013 and Response filed February 20, 2013.
5. Notice of Voluntary Dismissal of petitions for Benefits filed May 8, 2013.

LIVE WITNESSES:

1. Claimant, Luis Sierra

In making my findings of fact, I have carefully considered and weighed all the evidence presented to me. Although I may not reference each piece of evidence presented by the parties, I have carefully considered all the evidence and the exhibits in making my findings of fact. I have further taken into account the demeanor and testimony of the live witness. Based upon the evidence, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. The Judge of Compensation Claims has jurisdiction over the parties and the subject matter.
2. The Claimant filed multiple Petitions for Benefits, three of which are at issue for the instant Motion.
3. The first petition, filed on January 9, 2013, sought medical care under the supervision of Dr. Trombly and authorization of surgery, provision of a translator for medical appointments, penalties, interest, costs and attorney fees.
4. The second petition, dated February 7, 2013, sought payment of temporary total disability benefits from September 5, 2012 and continuing, authorization of surgery per Dr. Trombly, a determination that the Claimant was no longer at MMI, provision of a translator for medical appointments, penalties, interest, costs and attorney fees.
5. The third petition, filed on February 19, 2013, sought temporary partial disability

benefits from September 5, 2012 and continuing, penalties, interest, costs and attorney fees.

6. Based on a conflict of medical opinions regarding surgery and the Claimant's MMI status, an EMA physician was appointed.

7. Following receipt of the EMA opinion, the three petitions were voluntarily withdrawn by the Claimant on May 8, 2013. None of the benefits requested in the petition were provided prior to the voluntary dismissal.

8. On May 23, 2013, the E/C filed its verified Motion to Tax Costs.

9. On June 3, 2013, the Claimant filed a non-verified Reply to the Motion to Tax Costs.

10. In his response to the verified motion to Tax Costs, the Claimant raised several issues; specifically he argued that the claimant, and not the E/C was the prevailing party, that in the alternative, the E/C has the burden of establishing that each cost sought was taxable, reasonable and necessary, and finally, that FS §449.34(3) is unconstitutional as it forces counsel for the claimant to enter into a contract of representation, which if denied by the judge of compensation claims would require a declaratory action to determine counsel's right to enter into such a contract. In general terms, the Claimant also alleged that "the costs sought by the E/C are either non-taxable, unreasonable and unnecessary, and or served no purpose whatsoever to advance the E/C's position in this case."

11. I reject the Claimant's argument that there can only be one prevailing party, and that if the claimant has prevailed on even one issue, the E/C is therefore estopped from being the prevailing party. See *Hillsborough Cty. Sch. Bd. v. Kubik*, 110 So.3d 928 (Fla. 1st DCA 2013).

12. I reject the Claimant's argument that even if the E/C is the prevailing party, the E/C still carries the burden of proving that the taxable costs claimed are reasonable and necessary. See Rule 60Q-6.124(3)(b).

13. Lastly, the Claimant challenges the constitutionality of FS §440.34(3), as he argues that by filing the motion to tax costs, the E/C became the claimant in the matter, and is therefore barred from paying normal and customary defense costs for this procedure.

14. A judge of compensation claims lacks jurisdiction to address constitutional issues, but it is well settled that a party wishing to challenge the constitutionality of an issue is entitled to build a record to support his constitutional challenge with a court of competent jurisdiction.

15. The Claimant's Reply to the Motion to Tax Costs was not verified, as required by

Rule 60Q-6.124(3)(b), and as such is an unsworn response, such that the undersigned need not rely upon it when determining costs or fees. The response was placed into evidence however, as a joint exhibit, without objection regarding the verification.

16. The E/C did however, object to the content of Claimant's response, arguing that it was facially deficient as it did not include a detailed recitation of all disputed matters as required by rule 60Q-6.124(3)(b), and that as a result the allegations in the Verified Motion for Costs are accepted as true.

17. The Claimant failed to show good cause why he did not allege with specificity which costs he was challenging in his response in violation of 60Q-6.124(3)(b) and therefore, the allegations in the E/C's Motion to Tax Costs are accepted as true, and the costs as outlined accepted as reasonable and necessary.

18. At the evidentiary hearing, for the first time, the claimant challenged the reasonableness of specific costs. As stated above, the failure to challenge the costs with specificity in the response results in acceptance of the allegations in the motion as true, but I further find that on the merits, each of the costs as listed by the E/C was reasonable in accordance with the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions.

19. The Statewide Uniform Guidelines for Taxation of Costs in Civil Actions outlines those items which should be taxed including deposition costs, costs of copies obtained in discovery, even if the copies were not used at trial, reasonable fees for deposition and/or trial testimony, subpoena costs, and witness fees.

20. The costs submitted for taxation by the E/C are for the costs of copies of medical records and MRI films, expert witness deposition fees, court reporter costs, interpreter costs, and a physician office conference.

21. The Claimant went on to challenge the \$500.00 fee charged by Dr. Pagan as excessive, and the E/C conceded that the most the doctor could charge per statute if \$200.00 and therefore reduced the claim for this item to \$400.00. I accept the \$200.00 per hour cap, see *Marton v. Fla. Hospital Ormond Bch*, 98 So.3d 754 (Fla. 1st DCA 2012).

22. The claimant also challenged the \$100.00 conference fee charged by Dr. Ibars as improper; and the fees for the medical records of Baptist Outpatient Services, South Miami Hospital and Kendall Regional Medical Center as improper as they were not paid for until after the EMA with Dr. Chiron. I reject this argument. See *Hernandez v. Manatee Cty*.

Govt./Commercial Risk Mgt., 50 So.3d 57 (Fla. 1st DCA 2010).

23. The cost of depositions, experts and IMEs, even if taken prior to the filing of the petition are taxable. *Hernandez v. Manatee Cty. Govt./Commercial Risk Mgt.*, 50 So.3d 57 (Fla. 1st DCA 2010). Specific costs need only to be in aid of litigation to be reasonable. *Punsky v. Clay Cty. Bd. of Cty. Commissioners*, 60 So.3d 1088 (Fla. 1st DCA 2011).

24. The claimant argued that despite the fact that he withdrew the three petitions for benefits following receipt of Dr. Chiron's EMA report, the Motion to tax Costs is premature as it is possible that he will need surgery at some point in the future.

25. The Claimant argued that as his claims were brought in good faith, he should not be taxed for prevailing party costs. The Claimant testified live at the hearing. I observed the demeanor and candor of the Claimant and I found him to be a credible witness, but am constrained to reject this argument. See *Frederick v. Monroe Cty Sch. Bd.*, 99 So.3d 983 (Fla. 1st DCA 2012).

26. The claimant further argued that since he was accepted for state vocational rehabilitation in June 2013, and the carrier is paying temporary total disability benefits, the E/C cannot be the prevailing party on the issue of indemnity benefits. I find that the E/C timely provided these benefits when they became due, which was after the petition was dismissed.

27. The Claimant went on to argue that since Dr. Ballweg has recently stated that the Claimant is not at MMI and out of work, it is the claimant who should have brought a motion to tax costs. The Claimant takes the position that as the prevailing party on any issue, even if not all issues, the claimant is entitled to prevailing party costs. I find no merit in this argument. On the three petitions for benefits which are the basis for the Motion to Tax Costs, there is no evidence whatsoever that the Claimant prevailed on any issues contained in the petitions.

28. I find that the costs incurred by the E/C in this case were reasonable and necessary to defend the issues raised in the three petitions for benefits.

29. The party challenging the constitutionality must create that record according to the Florida Rules of Civil Procedure and The Rules of Procedure for Workers' Compensation Proceedings.

30. Counsel for the Claimant served a subpoena duces tecum on Michelle A. Bayhi Esq, served at Hurley, Rogner, Miller, Cox. Waranch & Wescott, P.A., "Hurley, Rogner", the firm representing the E/C, on August 23, 2013 at 3:35 pm.

31. Attorney Bayhi is no longer employed at the law firm of Hurley, Rogner and the E/C therefore immediately filed a Motion for Protective Order against Ms. Bayhi appearing and/or producing a file she does not control.

32. Counsel for the E/C further objected to the subpoena for the attorney file, as it contained attorney client privilege, work product, and billing information.

33. The Motion for Protective Order was heard immediately prior to the Verified Motion to tax Costs.

34. Based on the fact that the subpoena was improperly served, the Motion for Protective Order was granted.

35. I find that the unsworn response to the verified motion to tax costs does not address with specificity the reasonableness or necessity of the disputed costs and therefore the allegations in the Verified Motion to tax Costs are accepted as true according to Rule 60Q-6.124(3)(b).

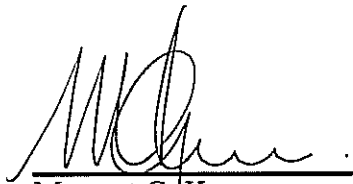
36. I find that the E/C became the prevailing party on the three petitions for benefits filed on January 9, 2013, February 7, 2013 and February 19, 2013 when the Claimant withdrew his petitions for benefits without any of the requested benefits having been provided by the E/C. *Frederick v. Monroe Cty. Sch. Bd.*, 99 So.3d 983 (Fla. 1st DCA 2012), *Palm Bch. Cty. Sch. Dist. v. Ferrer*, 990 So.2d 13 (Fla. 1st DCA 2008).

37. I further find that the costs outlined in the Motion to Tax Costs were reasonable and necessary taxable costs, with the exception of the \$100.00 conceded by the E/C relating to the deposition of Dr. Pagan.

ORDERED AND ADJUDGED that:

1. E/C's Motion for Prevailing Party Costs is hereby GRANTED.
2. The Claimant is ordered to pay taxable costs to the Employer/Carrier in the amount of \$1,458.92.

DONE AND MAILED this 5th day of September, 2013, in Miami, Dade County, Florida.



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