

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

Keisa Pickron-Rudd,
Employee/Claimant,

OJCC Case No.: 16-023812JW

vs.

Accident date: 5/10/2016

Progressive Employer Management
Co./AmTrust North America of Florida,
and Technology Insurance Company,
Employer/Carrier/Service Agent.

Judge: Jonathan Walker

ORDER AWARDING CONTESTED ATTORNEY FEE

After proper notice to all parties, this cause came on to be heard before the undersigned Judge of Compensation Claims at an evidentiary hearing in Panama City, Bay County, Florida, on November 29, 2017, regarding the Verified Petition for Attorney's Fees and Costs, filed on August 22, 2017 (DN 28). The Employer/Carrier (E/C) filed a timely Verified Response on September 8, 2017 (DN 30). Claimant's former Attorney, Maureen Proctor, Esquire, appeared by telephone. Attorney Matt Bennett, Esquire, appeared by telephone on behalf of the E/C.

Evidence in the proceeding was as follows:

JUDGE'S EXHIBITS

1. Claimant's Verified Petition for Attorney's Fees and Costs, with attached composite exhibit including time records, costs ledger, mediation report and agreement, joint stipulation, and 9/29/16 Petition for Benefits (PFB), filed August 22, 2017 (DN 28);
2. E/C Verified Response to Verified Motion for Attorney's Fees and Costs, with attached time reductions, filed September 8, 2017 (DN 30); and
3. Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire, filed October 23, 2017 (DN 35).

CLAIMANT EXHIBITS

1. None.

EMPLOYER/CARRIER EXHIBITS

1. None.

STIPULATION

Both counsel agreed to act as their own expert during the fee hearing.

In making my findings of fact and conclusions of law, I have considered and weighed all the evidence presented to me. I have observed and assessed the candor and demeanor of the Claimant, who testified in person before me, and I have resolved all of the conflicts in the testimony. I have not written a detailed summary of all the facts and evidence presented. See Section 440.25(4)(e), Fla. Stat.; Garcia v. Fence Masters, Inc., 16 So. 3d 200 (Fla. 1st DCA 2009) (holding that a compensation order need only contain findings of ultimate material fact necessary to support mandate, rather than a recitation of all evidence presented). Although I may not reference or detail each item of evidence presented by the parties, I have carefully considered all the evidence and exhibits in the context of the arguments of counsel and appropriate statutory authority and case law in making the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The undersigned Judge of Compensation Claims has jurisdiction over the parties and the subject matter in this claim.

2. In Castellanos v. Next Door Co., 192 S. 3d 431 (Fla. 2016), the Florida Supreme Court held that if a claimant shows that his attorney would receive an unreasonable fee, then the claimant’s attorney would be entitled to a fee “that deviates from the fee schedule.” A judge of compensation claims (JCC) has the authority to determine if a requested fee is reasonable. Miles v. City of Edgewater, 190 So. 3d 171, 184 (Fla. 1st DCA 2016). Once a determination is made by the JCC that deviation from the fee schedule is warranted, Castellanos instructs that, pursuant to Lee Engineering v. Fellows, 209 So. 2d 454 (Fla. 1968), the Florida Bar rules “must be considered to determine whether an attorney fee is reasonable.” 192 So. 3d at 440. (Miles also

holds that a fee must comport with the factors set forth in Lee Engineering, 190 So. 3d at 182.)

3. Further, the Castellanos Court held that the Florida Bar rules provide a “safe guide” in the award of attorney’s fees. Id. at 439. Thus, Castellanos specifically cited Rule 4-1.5(b) of the Rules Regulating the Florida Bar as a mechanism that “provides a number of factors to be considered as a guide to determining a reasonable fee.” Id. at 444. These factors include:

- (A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
- (D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
- (E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
- (F) the nature and length of the professional relationship with the client;
- (G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
- (H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client’s ability to pay rested to any significant degree on the outcome of the representation.

Rule 4-1.5(b)(1), Rules Regulating The Florida Bar.

4. Based on the above, the initial inquiry is whether the Claimant has shown that application of the statutory fee schedule would result in an unreasonable fee. Applying the law to the facts, I agree with Claimant’s counsel in her Verified Motion and sworn testimony that a statutory attorney fee of \$550.00 is not reasonable. A \$550.00 statutory fee would amount to an unreasonably low hourly rate, based on the hours expended. Therefore, I find that a departure from a guideline fee is warranted. See also Davis v. Bon Secours-Maria Manor, 892 So. 2d 516 (Fla. 1st DCA 2004) (holding that a departure from the statutory attorney fee is proper if application of the statutory fee formula is “manifestly unfair”).

5. Because I find that a statutory attorney fee would not be reasonable under Castellanos and Miles, application of the Rule 4-1.5(b) factors is warranted. (Factors supporting an upward departure are noted as positive factors. Factors supporting a downward departure are

noted as negative. Factors that support neither a downward or upward deviation are described as neutral.)

A) The time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly:

Time and labor required: In addressing the hours claimed, Ms. Proctor withdrew the following entries at trial, as not related to the benefits obtained:

9/21/16 (.25); 9/29/16 (.85); 10/11/16 (.9); 10/12/16 (.25); 2/16/17 (.95); 3/1/17 (1.1); 3/17/17 (.4); 3/20/17 (.15); 3/20/17 (.2)

Thus, the total time amount withdrawn at the hearing was **5.05 hours**.

I find several entries amounted to administrative or secretarial tasks for which an E/C paid attorney fee should not be awarded. These entries are as follows:

10/20/16 (.2); 11/1/16 (.2); 11/4/16 (.15); 11/8/16 (.1); 11/9/16 (.15); 11/17/16 (.25); 12/9/16 (.1); 12/12/16 (.1)

Therefore, the total amount disallowed for administrative or secretarial tasks is **1.25 hours**.

Regarding duplicative entries, I find that the entry of 1/30/17 is duplicative of an earlier, similar entry of 1/25/17. Thus, I have disallowed the 1/30/17 entry amounting to **.35 hours**, as duplicative.

I found a couple of entries that were not related to the benefit obtained. In this regard, I reviewed the parties' February 2, 2017 Joint Stipulation Resolving Petition for Benefits, dated 9/29/16 (DN 21). (This Tribunal subsequently issued an Order Approving Stipulation (DN 22) on February 3, 2017.) Within the Joint Stipulation, the parties agreed to the payment of \$2,750 in back indemnity benefits. The Stipulation specifically references the September 29, 2016 Petition for Benefits (DN 2), which only requested temporary benefits. The Stipulation is silent

regarding any issue of surgery. Moreover, the pending Verified Petition for Attorney's Fees and Costs candidly states that, "surgery was timely authorized..." Thus, time entries dealing with surgery cannot be considered in an award of attorney's fees. Here, the time entry for 10/3/16 claims 2.6 hours for "[r]esearch on causation of shoulder surgery *and* obtaining records for indemnity purposes." (Emphasis added.) Because I am disallowing any time associated with surgery, I find that awarding half of this entry, or 1.3 hours, to be proper. While part of the entry references efforts concerning the surgery, the other part mentions seeking records to support the indemnity claim. It is the latter part of the entry that appears related, and should support an attorney fee award. The Verified Petition also seeks 1.35 hours for a 10/6/16 entry that pertains to attorney efforts to "[p]repare PFB, request for shoulder surgery w/ 2pgs of exhibits." I find this entire entry to be related to the surgical issue so this entry is disallowed. Taken together, I have excluded **2.65** hours as not related to the benefit obtained.

Turning to excessive entries, I have reduced a 10/13/16 entry from .2 to .1 because the activity at issue only involved reviewing an order granting a motion to correct an employer. Further, a 1/20/17 entry was reduced from .5 to .3 because the matter at issue simply involved preparing a notice of telephonic appearance at mediation. The larger aspect of excessive entries addresses entries dealing with research, reviewing discovery responses, or preparing for mediation. I accept Ms. Proctor's testimony that early legal research was required to explore strategies to counter an E/C affirmative defense involving the Claimant's voluntary limitation of income/refusal of suitable employment. In this regard, Claimant's counsel also had to develop a trial strategy, which included research as to the usefulness of certain witnesses at a potential final hearing. In all, Ms. Proctor expended 10.3 hours before the pretrial stipulation in these efforts.¹ While I find that these early efforts were required based on Ms. Proctor's testimony, I accept E/C counsel's arguments that later entries for the preparation of a 1/10/17 pretrial stipulation (2.7 hours), and 1/23/17 mediation preparation (2.65 hours), are excessive. The groundwork for the pretrial stipulation and mediation should have been prepared by the time these last two litigation events occurred. Thus, I accept the E/C's contention that these two entries are disproportionate, and so reduce each entry to the amount suggested by the E/C, i.e., 1.5 hours for the 1/10/17

¹ As noted earlier, I have allowed only 50% of the 10/3/16 entry, or 1.3 hours, because part of this entry pertained to a surgery, which is not a benefit obtained for purposes of a fee award in the instant matter.

pretrial stipulation (a 1.2 hour reduction), and 1.0 hours for the 1/23/17 mediation preparation (a 1.65 hour reduction). In sum, I have reduced the time sought by **3.15 hours** for excessive entries.

In abstract, based upon the sworn pleadings, witness testimony, and the parties' time records; I find that the reasonable total time expended on the claim amounted to **34.5 hours**.²

Novelty, complexity and difficulty of the questions involved: The Verified Petition states that the case involved "difficult questions of law," including compensability and causation matters. By contrast, Mr. Bennett counters in his Response that the issues were "straight forward and routine." I find that back indemnity benefits were at issue. While effort was required to prosecute the claim, I do find any unusual aspects in the present matter. Therefore, I find that this factor is neutral.

Skill requisite to perform the legal services properly: The Claimant's attorney had the requisite skills to perform all needed legal activities in order to secure \$2,750 in back indemnity benefits. Mr. Bennett defended the claim, and is an experienced litigator. Based on these considerations, I find this to be a positive factor.

(B) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer:

There was limited testimony regarding this matter so this is a neutral factor in deviating from the statutory fee.

(C) The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature:

Ms. Proctor requests that I award a rate of \$275.00 per hour. Mr. Bennett suggests an hourly rate of \$250.00 per hour, based upon a range for this type of litigation, in this District, of \$200.00 - \$300.00 per attorney hour. Here, I find that the parties are relatively close in regards to recommended hourly rates. Importantly, I find that I cannot average the rates testified to by the attorneys to reach a rate of \$262.50, for example. See Morris v. Dollar Tree Stores, 869 So. 2d 704 (Fla. 1st DCA 2004); Minerd v. Walgreens, 962 So. 2d 955 (Fla. 1st DCA 2007) (rejecting

² This time calculation occurred by subtracting the total reductions of 12.45 hours from the 46.95 hours claimed.

the JCC's conclusion that \$200.00 was a reasonable hourly rate when the only record evidence was testimony regarding rates of \$225.00 per hour or \$265.00 per hour).

Ms. Proctor has been board certified in workers' compensation by The Florida Bar since 1998. She possesses over 25 years' experience as a workers' compensation attorney, with over 24 years related to the representation of injured workers. Particularly involving an attorney's board certifications, other Districts have awarded enhanced hourly rates based upon this designation. For example, Judge of Compensation Claims Robert Dietz, covering a recent fee case from the Lakeland District, increased the customary hourly rate in Lakeland for an experienced attorney with board certification. See *Condra v. Bernie Little Distributors, Inc.*, OJCC Case No. 15-17061 (October 17, 2017). In short, I find that the higher attorney hourly rate of \$275.00 is more appropriate in this case based upon Ms. Proctor's board certification and level of experience.

(D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

I find this is a negative factor because the benefit secured was only \$2,750.

(E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

As limited testimony occurred regarding this matter, I find that this is a neutral factor.

(F) the nature and length of the professional relationship with the client;

As limited testimony occurred regarding this matter, I find that this is a neutral factor.

(G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services;

As addressed earlier, Ms. Proctor's 25 years of legal experience, in addition to almost 20 years as a board certified workers' compensation lawyer, supports a finding that this is a positive factor supporting an upward deviation from a statutory fee.

(H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

Like most workers' compensation cases, Ms. Proctor took this claim on a contingent fee basis. This is a positive consideration in the award of an enhanced statutory attorney fee.

COSTS

Ms. Proctor seeks \$206.35 in taxable costs. Generally, the Statewide Uniform Guidelines for Taxation of Costs ("Guidelines") support taxation of costs for depositions, transcripts, witness fees, court reporting costs and discovery records. In the instant case, reimbursement for copy charges, postage and certified mail is sought. Based upon the case expense summary, I cannot determine if the copy charges were related to discovery. Because further explanation of the copy charges incurred is not available, I cannot award such charges as litigation costs that should be taxable. Further, postage and mailing expenses are related to office management, and are not specifically referenced in the Guidelines as items that should be taxable. Therefore, for the reasons above, I hold that awarding any of the requested costs would be improper.

CONCLUSION

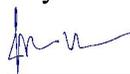
In consideration of the factors outlined above, and finding that an award of a statutory attorney fee to be manifestly unfair in light of Castellanos and Miles, I find a reasonable fee to be **\$9,487.50**. This finding is based upon a reasonable attorney hourly rate of **\$275.00**, and reasonable time expenditures of **34.5** hours. Costs are not awarded.

Therefore, it is,

ORDERED and **ADJUDGED** that:

1. Claimant's Verified Petition for Attorney Fees is **GRANTED**. The E/C shall pay former Claimant's attorney, Maureen Proctor, Esquire, the sum of **\$9,487.50** as a reasonable attorney's fee.
2. Claimant's Verified Petition for Costs is **DENIED**. Taxable costs are not awarded.

DONE AND SERVED this 1st day of December, 2017, in Panama City, Bay County, Florida.



Jonathan E. Walker
Judge of Compensation Claims
Division of Administrative Hearings

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