

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

JOHN WALLACE,
Employee/Claimant,

OJCC Case No. 14-017112RLD

vs.

Accident date: 4/20/2014

Indian River County BCC-Fire Rescue/Johns
Eastern Company, Inc./Indian River County
BOCC,
Employer/Carrier/Servicing Agent.

Judge: Robert L. Dietz

**FINAL EVIDENTIARY ORDER DENYING CLAIMANT COUNSEL'S MOTION TO APPROVE
ATTORNEY FEE**

THIS CAUSE was heard before the undersigned in Sebastian, Indian River County, Florida on October 22, 2014, upon the Claimant Counsel's August 18, 2014, Motion to Approve Attorney's Fee (Docket Number (DN) 9). The Employer/Carrier filed a Response to Motion to Approve Attorney's Fee on August 22, 2014, (DN 10) and indicated they had no objection to the substance of the Motion. The undersigned entered an Order Requiring Clarification of Claimant's Motion to Approve Attorney's Fee on September 2, 2014, (DN 11), requesting copies of any case law or any orders entered by a Judge of Compensation Claims (JCC) approving payment of attorney fees in a Florida workers' compensation case by an interested third party that is not a party in the case. The Claimant filed a Response to Order Requiring Clarification on September 5, 2014, (DN 12). The Claimant's Counsel was aware of only one other case where it had been requested, and the merits of the motion were never reached due to resolution of the case.

The Claimant argued in their August 18, 2014, 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. Originally in this case, it did not appear to the undersigned that a predicate has been established to raise a constitutional challenge relating to the issue referenced in the motion. The Claimant initially based his motion on pursuit of a claim under Section 112.18, Fla. Stat.,

claiming the need to pay Counsel an hourly fee was due to the “complexity” of handling a heart/lung case, and the difficulty in finding counsel that would competently handle that type of case. The Petition for Benefits (PFB) filed July 28, 2014, identifies the accident as resulting in injuries to the neck. This would not involve Section 112.18, Fla. Stat., but rather Section 440, Fla. Stat. As a result, I did not believe a justiciable issue existed on the alleged constitutional challenge. Nevertheless, based on Russ v. Brooksville Health Care Center, an Order was entered on September 23, 2014, granting an evidentiary hearing on the Motion.

At the requested evidentiary hearing on October 22, 2014, the Claimant was represented by Paolo Longo, Esq. and the Employer/Carrier was represented by Paul Westcott, Esq. The Claimant’s Counsel clarified his request, conceded that this was an orthopedic injury under Section 440, and included Section 440 cases in his claim. Although, in my experience I have found that it is harder for a Claimant to locate competent counsel to handle Section 112.18 cases than Section 440 cases because of the unique nature of heart/lung presumption claims, I believe 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 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 one hundred and fifty dollars (\$150.00) per hour, and a JCC would approve the payment of the fee.

John O’Connor, President of Local 2201, testified that the Executive Board of IAFF Local 2201 met and unanimously agreed to pay One thousand, five hundred dollars (\$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 one thousand, five hundred dollar (\$1,500.00) payment is for all work done through the date of the Motion (August 18, 2014). It is further represented that the IAFF Local also wishes to pay one hundred and fifty dollars (\$150.00) per hour for all work performed after May 27, 2014. The Claimant introduced into evidence a time sheet outlining an additional 12.3 hours of legal work done on behalf of the Claimant between September 22, 2014, and October 21, 2014, (Claimant's Exhibit #1). I find that the work documented on the time affidavits to be reasonable and appropriate for this type case if entitlement to an attorney fee had been established. 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 alleges that he will be forced to withdraw from the case.

In the absence of any supporting 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.

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, I am 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 one hundred and fifty dollars \$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 incorrect that he will have no means of obtaining a fee if he is not permitted to charge his client by the hour. He 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 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.

It is therefore DONE AND ORDERED that:

The Motion for Approval of Attorney Fees is denied.

DONE AND ELECTRONICALLY SERVED ON COUNSEL AND CARRIER this 27th day of October, 2014, in Sebastian, Indian River County, Florida.



Robert L. Dietz
Judge of Compensation Claims
Sebastian/Melbourne District Office
1627 US-1, Suite 115
Sebastian, Florida 32958
(772)581-6800

COPIES FURNISHED:

Johns Eastern Company, Inc./Indian River County BOCC
wcfax@johnseastern.com

Paolo Longo, Jr., Esquire
paolo@bichlerlaw.com,josette@bichlerlaw.com

Paul L. Westcott, Esquire
pwestcott@hrmcw.com,gfinnegan@hrmcw.com