

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

Angela Shaw,  
Employee/Claimant,

OJCC Case No.: 11-023251JW

vs.

Accident date: 7/14/2011

Broward Institute for Long Term  
Care/Gallagher Bassett Services, Inc.,  
Employer/Carrier/Service Agent.

Judge: Jonathan E. Walker

**ORDER DENYING CONTESTED ATTORNEY FEE**

After proper notice to all parties, this cause came on to be heard before the undersigned Judge of Compensation Claims at a fee entitlement hearing in Panama City, Bay County, Florida, on December 21, 2017, regarding the Amended Verified Petition for Attorney's Fees and Costs, filed on September 29, 2017 (DN 76). The Employer/Carrier (E/C) timely filed an Amended Response to Claimant's Verified Petition for Attorney's Fees on October 6, 2017 (DN 79). Attorney Kevin Gallagher, Esquire, appeared by telephone on behalf of the Claimant. Attorney Scott Miller, 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 Fees, filed September 28, 2017 (DN 74); (no attachments)
2. Claimant's Amended Verified Petition for Attorney's Fees and Costs, with attachments, filed September 29, 2017 (DN 76);
3. Employer/Carrier's Response to Verified Petition for Attorney's Fees, with attachments, filed October 2, 2017 (DN 77);
4. Employer/Carrier's Amended Response to Verified Petition for Attorney Fees, filed October 6, 2017 (DN 79) (no attachments); and
5. Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire, filed November 14, 2017 (DN 84).

### CLAIMANT EXHIBITS

1. Composite exhibit comprising October 6, 2011 Petition for Benefits (DN 1,2), February 7, 2014 Petition for Benefits (DN 24), July 16, 2015 Petition for Benefits (DN 42), and April 4, 2017 Petitions for Benefits (DN 61);
2. Composite exhibit comprising October 17, 2011 Employer/Carrier (E/C) Response (DN 8) and May 2, 2017 Employer/Carrier (E/C) Response (DN 65);
3. December 21, 2011 Notice of Resolution (DN 15);
4. April 30, 2014 Mediation Agreement (DN 30);
5. Concentra medical records (DN 85).

### EMPLOYER/CARRIER EXHIBITS

1. August 7, 2014 Order Granting Motion to Dismiss Attorney's Fees and Costs (DN 35);
2. November 4, 2016 Order Granting Motion to Dismiss for Lack of Prosecution (DN 60);
3. August 5, 2015 E/C Response to PFB (DN 53).

### OBJECTION

The E/C objects to Claimant's Exhibit 5— Concentra medical records—that were filed on the morning of the December 21, 2017 fee entitlement hearing. A review of the parties' Pretrial Stipulation (DN 84), filed November 13, 2017, shows that the Claimant sought to move into evidence, "Medical records of all Auth. Dr's (sic)..." The E/C objected on the basis of hearsay. I find that the E/C's October 17, 2011 Response states that Concentra is an authorized provider (DN 8). Because the proffered records were from an authorized clinic, such records are not hearsay, and are generally admissible pursuant to Section 440.29, F.S. Again, the Claimant listed the records of authorized doctors on the Pretrial Stipulation, so the E/C's objection is overruled. See also Boyle v. J.A. Cummings, Inc., 212 So. 3d 1060 (Fla. 1<sup>st</sup> DCA 2017), ("The undergirding principle [is] that relevant evidence should be considered by the factfinder and the intent of the Workers' Compensation Law [is] that cases should be decided on their merits."); Walters v. Keebler Co., 652 So. 2d 976 (Fla. 1<sup>st</sup> DCA 1995) (holding that the exclusion of even an unlisted witness' testimony was a "drastic remedy which should pertain in only the most compelling circumstances..."); Cedar Hammock Fire Dept. v. Bonami, 672 So. 2d 892 (Fla. 1<sup>st</sup> DCA 1996) (holding that that the exclusion of evidence "may be *unduly harsh* even when there has been a deliberate violation of local rules.") [Emphasis added.]

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. 1<sup>st</sup> 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. Regarding the October 6, 2011 and February 7, 2014 Petitions for Benefits (PFB), the Claimant's former attorney seeks fee entitlement based upon the failure of the E/C to provide benefits claimed within these 2 PFBs on a timely basis. In response, the E/C argues that there is no fee entitlement associated with these PFBs because entitlement was previously denied by an earlier order of this Tribunal. The E/C's argument is well-taken for the following reasons.

3. Taking judicial notice of the OJCC docket, on June 6, 2014, the E/C filed a Motion to Compel Filing of Verified Motion for Attorney's Fees and Costs, for any attorney's fees and costs associated with October 6, 2011 and February 7, 2014 Petitions for Benefits (DN 32).<sup>1</sup> Subsequently, Judge Laura Roesch (now retired) entered a June 24, 2014 Order Granting the E/C's Motion to Compel (DN 33), which gave the Claimant 15 days to file a verified petition for attorney's fees and costs. After 15 days expired, the E/C filed a July 22, 2014 Motion to

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<sup>1</sup> See Section 90.202(6), F.S., "A court may take judicial notice of... [r]ecords of any court of this state..." Professor Ehrhardt commented on this provision by stating, "Section 90.202(6) provides that a court may take judicial notice of its own records in a pending case as well as the court records in other cases..." *Ehrhardt's Florida Evidence* (2010 edition) at Section 202.6. Further, the First District Court of Appeal, in Shannon v. Cheney Brothers, Inc., 157 So. 3d 397 (Fla. 1<sup>st</sup> DCA 2015), also has held that it could take judicial notice, pursuant to Section 90.202(6), of a motion to dismiss that was part of the court's records.

Dismiss (DN 34) that sought dismissal of all outstanding attorney's fees and costs due to the Claimant's non-compliance with the previous order. After over 15 days passed without a response from the Claimant (as in allowable pursuant to Rule 60Q-6.115(4), F.A.C.), Judge Roesch entered an August 7, 2014 Order Granting Motion to Dismiss Attorney's Fees and Costs (DN 35), finding that the Claimant was non-compliant with the June 24, 2014 Order. On August 18, 2014, the Claimant filed a Motion to Set Aside the June 24, 2014 and August 7, 2014 Orders (DN 39). Following an E/C Response, Judge Roesch entered an August 27, 2014 Order denying the Motion to Set Aside the earlier orders based on untimeliness (DN 41). Following the August 27, 2014 Order, there was no record activity on the docket for almost one year.

4. Orders of the Judges of Compensation Claims become final 30 days after rendition. See Section 440.25(5)(a), Florida Statutes; Dubreil's *Workers Compensation Handbook* (2016) at Section 22.09. The issue of when a JCC's order becomes final generally comes up regarding the timeliness of appeals. In Ake v. U.S. Sugar Corp., 112 So. 3d 171, 173 (Fla. 1<sup>st</sup> DCA 2013), the Court held that a notice of appeal, filed more than 30 days after the rendition of a final order, is untimely. The Ake Court also referenced Florida Rule of Appellate Procedure 9.180, which governs workers' compensation appeals. Specifically, Appellate Rule 9.180(b)(3), holds that jurisdiction of the District Court of Appeal is only invoked if a party files a "notice of appeal with the lower tribunal within 30 days of the date the lower tribunal sends to the parties the order to be reviewed either by mail or by electronic means..., which shall be the date of rendition."

5. Applying the law to the facts, I find that I am without jurisdiction to order attorney fee and cost entitlement on the October 6, 2011 and February 7, 2014 PFBs because all attorney's fees and costs were previously dismissed per Judge Roesch's August 7, 2014 and August 27, 2014 orders. As neither of the 2014 orders were appealed, they are final. See also Herrera-Munoz v. JR Plastics Corp., OJCC Case No. 14-12762 (Judge Humphries held similarly that he did not have jurisdiction when a previous PFB had been dismissed without a reservation of jurisdiction to determine entitlement to attorney's fees or costs). In short, because the August 7, 2014 Order Granting Motion to Dismiss Attorney's Fees and Costs is final, entitlement to attorney's fees and costs must be denied for the October 6, 2011 and February 7, 2014 Petitions for Benefits.

6. I now turn to the Claimant's request for entitlement to attorney's fees and costs for the July 16, 2015 PFB. Again taking judicial notice of the docket, the E/C previously filed a September 28, 2016 Motion to Dismiss for Lack of Prosecution (DN 57). The grounds for the motion were that there had not been any record activity since a September 10, 2015 Notice of Resolution of Issues had reserved on the issue of attorney's fees and costs. Because over 12 months had elapsed since the issues resolved, with the exception of attorney fee and cost entitlement, the E/C filed its motion, pursuant to Section 440.25(4)(i). This Tribunal issued a November 3, 2016 Order to Show Cause (DN 58), wherein I requested Claimant's former counsel to show good cause why the motion to dismiss should not be granted. In response, the Claimant's former attorney responded, and stated, "The undersigned has no objection to the Motion to Dismiss." (DN 59). Thereafter, I issued a November 4, 2016 Order Granting Motion to Dismiss for Lack of Prosecution (DN 60). Within the order, I specifically held that, "Any and all pending claims for attorney's fees and costs in a July 16, 2015 Petition for Benefits... are hereby dismissed for lack of prosecution."

7. Now, attorney's fees and costs associated with a July 16, 2015 PFB are back before me for consideration. I find that I am again without jurisdiction to adjudicate fee and cost entitlement for this 2015 PFB because all such claims were previously dismissed by the November 4, 2016 Order.

8. Even if I had jurisdiction on the 2015 PFB, I find, alternatively, that the E/C timely responded to the July 16, 2015 PFB pursuant to an August 5, 2015 Response (DN 53). Within the response, the E/C adjuster stated that a return office visit with Concentra was "approved." Furthermore, the adjuster even scheduled a return appointment for August 13, 2015, and noted the follow up visit in the response.

9. Section 440.34(3)(d) states that "attorney's fees shall not attach... until 30 days after the date the carrier or employer, if self-insured, receives the petition." In Sansone v. Frank Crum, 201 So. 3d 1289 (Fla. 1<sup>st</sup> DCA 2016), the Court referred to this 30 day timeframe as a "grace period," and further opined that a petition "succeeds" if an E/C accepts responsibility for a medical bill—even if a medical bill was not paid until later. For this reason, attorney fee liability was not found. The Court has also held that medical benefits are furnished when the E/C provides the name of a doctor who is authorized to treat. Jennings v. Habana Health Care Center,

183 So. 3d 1131 (Fla. 1<sup>st</sup> DCA 2015). Similarly, in Dorsch, Inc. v. Hunt, 15 So. 3d 836 (Fla. 1<sup>st</sup> DCA 2009), the Court held that an E/C met its statutory obligations when it informed a claimant that medical treatment would be authorized—even if the actual appointment did not occur within statutory time limits.

10. In the instant case, the adjuster, in her August 5, 2015 Response, actually went beyond what was required—especially under the Sansone holding. She apprised the Claimant of the actual follow up office visit date of August 13, 2015. In short, I find, as an alternative holding, that the adjuster responded to the July 16, 2015 PFB on a timely basis, under Section 440.34(3)(d), so that fee and costs entitlement is not present.

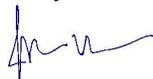
11. Lastly, the Claimant seeks a determination of fee and costs entitlement pertaining to her April 4, 2017 Petition for Benefits, which requested an update appointment with Dr. Steinlauf. I find, as argued by the E/C, that the adjuster filed a timely May 2, 2017 Response (DN 65). Here, again, she both approved the requested medical treatment, and actually noted the new appointment date in her response. Based on these findings, and pursuant to the holdings in Sansone, Jennings, and Hunt, *ante*, I hold that there is no attorney fee or costs entitlement, under Section 440.34, for the April 4, 2017 PFB.

Therefore, based upon the above, it is

ORDERED AND ADJUDGED that:

1. Claims for entitlement to attorney's fees and costs for October 6, 2011, February 7, 2014, July 16, 2015 and April 4, 2017 Petitions for Benefits are DENIED WITH PREJUDICE.

DONE AND SERVED this 17<sup>th</sup> day of January 2018, in Panama City, Bay County, Florida.



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