

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

Alfredo Brandariz Garcia,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 11-012863GCC
Cargo Force, Inc./Frank Winston Crum)	
Insurance,)	Accident date: 11/27/2009
Employer/ Carrier/Servicing Agent.)	
_____)	

FINAL ORDER ON ATTORNEYS FEES

(I) PROCEDURAL HISTORY:

After due notice, the above styled matter came before the undersigned Judge of Compensation Claims for attorney's fee hearing on February 21, 2013. The Claimant was represented by William Haro, Esquire of the Law Offices of Richard Zaldivar, PA. Cargo Force, Inc. employer and Frank Winston Crum Insurance carrier (collectively hereinafter: "E/C") were represented by Sandra D. Wilkerson, Esquire of the Law Offices Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A. This Order follows.

(II) EVIDENTIARY EXHIBITS:

The following exhibits were introduced into evidence at the attorney's fee hearing and considered by the undersigned Judge of Compensation Claims:

(a) Documentary Evidence:

The following exhibits were admitted into evidence.

1. Verified Motion for Attorney's Fees and Costs dated October 22, 2012;
2. Uniform Pretrial Stipulation & Pretrial Compliance Questionnaire for Attorney Fee Hearing and Order entered January 23, 2013;
3. Claimant's Trial Memorandum dated February 18, 2013 (ID ONLY);
4. Employer/Carrier's Verified Response to Claimant's Verified Motion for Attorney's Fees & Costs dated November 20, 2012 (PROFFER);
5. Employer/Carrier's Verified Response to Time Records dated November 20, 2012 (PROFFER);

6. Attorney's e/mails dated June 5, 2012 and June 6, 2012;
- 7a. Employer/Carrier's Amendment to Pretrial Stipulation dated January 22, 2013;
- 7b. Claimant's Notice of Objections to Pretrial Amendment dated January 22, 2013;
- 7c. Order Striking Improper Amendment to Pretrial Stipulation dated January 24, 2013;
8. Claimant's Notice of Voluntary Dismissal dated May 22, 2012 (PROFFER);
9. Employer/Carrier's Trial Memorandum of Law dated February 18, 2013 (ID ONLY);
- 10a. Abbreviated Final Order On Attorneys Fees dated January 25, 2011 (PROFFER);
- 10b. Abbreviated Final Order on Attorney's Fees Following Evidentiary Hearing dated June 22, 2011 (PROFFER);
- 10c. Final Order on Attorney's Fees dated August 31, 2013 (PROFFER);
11. John A. White, MD Patients Detailed History & Physical dated July 23, 2012.

(III) CLAIMS AND DEFENSES:

(a) Claims:

1. Payment of attorney's fees and costs for medical care secured to date. As well as the present value of future medical care, as well as a medical only fee per 440.34(3)(7).

(b) Defenses:

1. A fee pursuant to §440.34(7) is not applicable to this case. Claimant not entitled to both guideline fee on medical benefits obtained and an hourly fee of up to \$1,500.00. The fee in this matter is strictly limited to guideline fee. No evidence that any future care warranted or value of future care.

(IV) LAW AND RELEVANT FACTS

(1) It is well settled that it is the Claimant's obligation to prove entitlement to fees and the quantum of same. See, *Kraft Dairy Group v. Sorge*, 634 So. 2d 720 (Fla. 1st DCA 1994). See also, *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed 2nd 40 (1983)

(2) Claimant filed a Petition for Benefits in this cause on June 2, 2011 in which he claimed “temporary total/partial disability benefits...from the date of accident and continuing,” an upward adjustment in his AAW to \$560.00 a week, an IME with an orthopedist, authorization of an orthopedic surgeon, compensability and penalties and interest. (See Exhibit 1 @ A).

(3) On June 17, 2011, the employer/carrier filed a Form DWC-12, Notice of Denial wherein they denied all benefits claimed. (See Exhibit 1 @ B)

(4) On June 21, 2011, the employer/carrier issued a Response to Petition for Benefits. It details an itemized response denying each benefit claimed by the claimant – including compensability – in the June 2, 2011 Petition for Benefits. (See Exhibit 1 @ C)

(5) On August 4, 2011, claimant filed a Petition for Benefits which – with the exception of some of the language in 3 thereto – was essentially a carbon copy of the June 2, 2011 Petition. Substantively, it is one. (Exhibit 1 @D).

(6) On September 2, 2011, the employer/carrier filed a response in which it accepted compensability of the accident. (Exhibit 1 @E)

(7) However, the September 2, 2011 Response to Petition for Benefits still generally adhered to the employer/carrier's other previously stated denials. While the employer/carrier agreed to provide the claimant with an orthopedic evaluation, they denied any claims for TTD/TPD; denied penalties, interest, costs and attorneys fees; and maintained that their position relative to AAW was correct. (Exhibit 1 @ E)

(8) Despite the indication in the September 2, 2011 response, the employer/carrier did not set up an orthopedic evaluation. (Exhibit 1) However, at a mediation conference held September 30, 2011, the parties entered into an agreement whereby the employer/carrier agreed to authorize an orthopedic specialist for evaluation and treatment. (Exhibit 1 @F). In that same agreement, it was expressly indicated that the claims for temporary indemnity benefits and “PICA” remained outstanding. (Exhibit 1 @F)

(9) A claimant is entitled to recover his reasonable attorneys fees from the employer carrier in instances where he has prevailed: (a) in a medical only claim (See, Section 440.34(3)); (b) in a claim where the employer/carrier initially filed a response denying a requested benefit (See, Section 440.34(3)(b) and in a successful challenge to a denial of compensability (See, Section 440.34(3)(c).

(10) The claimant's success in securing the employer/carrier's acceptance of compensability – a benefit previously denied – established the claimant's right to an employer/carrier paid fee for having secured this benefit. See Section 440.34(3)(c), Fla. Stat. (2008) Unfortunately, it was not until October 19, 2011, that the employer/carrier actually provided the claimant with the name of the doctor, the doctor's contact information and an actual appointment date. (Exhibit 1 @ G)

(11) Because the authorization secured at the September 30, 2011 mediation had been requested by the claimant in the original June 2, 2011 Petition for Benefits and had been denied

in a formal response, the claimant was entitled to an employer/carrier paid fee for having secured same. See Section 440.34(3)(b), Fla. Stat. (2008)

(12) The claimant subsequently filed a Petition for Benefits dated May 15, 2012 in which he sought authorization of an alternative physician to Dr. Mehalik, the physician authorized in October of 2011. (Exhibit 1 @G, H) Via correspondence dated May 23, 2012, the employer/carrier timely advised the claimant that it had authorized Dr. Jerry Sher and that the claimant had an appointment with him on June 11, 2012. (Exhibit I) The employer/carrier's May 23, 2012 authorization in response to the May 15, 2012 Petition was timely.

(13) Nevertheless, the claimant complained because he was living in Cape Coral on the Florida west coast while Dr. Sher practiced on Miami Beach. (Exhibit 1 @I) The aforementioned problem and the resulting delay is squarely the claimant's fault. The May 15, 2012 Petition for Benefits clearly indicates that the claimant resided at that time at 3064 SE 1st Drive, #2, Homestead, FL 33033, an address in the greater Miami-Dade County area. (Exhibit H) The employer/carrier timely – within eight (8) days of the date on the Petition for Benefits - authorized a doctor in Miami-Dade County.

(14) The authorization of Dr. Sher was not withdrawn. With the authorization pending, the claimant approached the employer/carrier about obtaining an alternative to Dr. Sher. The employer/carrier was under no obligation under these circumstances to authorize an alternative to the alternative. Nevertheless, Dr. John White was subsequently authorized formally via correspondence dated July 19, 2012. (Exhibit 1 @K)

(15) The May 15, 2012 petition on its face is of the “medicals only” nature. However, for purposes of evaluating attorneys fee liability related to same, it does not qualify for a “medicals only” fee under Section 440.34(7) because there were outstanding indemnity claims pending at the time the petition was filed. See, *Gunn's Quality Glass & Mirrors v. Strode*, 425 So. 2d 73 (Fla. 1st DCA 1982). See also, *Westinghouse Electric v. Widlan*, 623 So. 2d 511, 514 (Fla. 1st DCA 1993); *Sunland Center v. Campbell*, 451 So. 2d 939 (Fla. 1st DCA 1984)

(16) Specifically, there is no indication that the indemnity claims acknowledged by the parties at the September 30, 2011 mediation and left open at that time had been closed by the time of the filing of the May 15, 2012 Petition for Benefits or by the time of the employer/carrier's May 23, 2012 authorization of Dr. Sher.

(17) The total value of benefits secured on behalf of the claimant is \$728.38. (Exhibit 1 @L) No evidence has been offered by either side as to the future value of benefits secured. The statutory fee on same is \$145.68.

(18) Claimant's counsel has expended 34.4 hours in the successful prosecution of claims for acceptance of compensability and authorization of an orthopedic surgeon. The conflicting figure of 39.9 hours is rejected. These hours are modest and do not represent so disproportionately a time commitment as to take away from other matters. However, the substantive rights and liabilities of the parties with respect to attorneys fees are controlled by the statute in effect on the date of accident. See, *Ship Shape v. Taylor*, 397 So. 2d 1199 (Fla. 1st

DCA 1981) Given the version of Section 440.34 et. seq. applicable to this date of accident, the considerations noted herein above are ostensibly not relevant.

(19) Based on the total hours found reasonable and the value of benefits secured to date, claimant's counsel's effective hourly rate under the obligatory statutory fee guidelines is \$4.23 an hour. Claimant asserts that same clearly would not provide counsel with adequate and equitable remuneration for his efforts. Given the ultimate net effect of these hours relative to the benefits secured, this would become a positive factor, and an hourly-rate-based fee would be appropriate under the law in effect for prior dates of accident. See, *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008) However, there is no such option available for attorneys fees awarded for cases involving the post July 1, 2009 date of accident at issue.

(20) The issues presented in this litigation were neither novel nor unique, but typical in workers' compensation litigation and of very average complexity.

(21) The undisputed range at which attorney services of the type called for here is remunerated is from \$250.00 to \$350.00 an hour. (Exhibit 1, p. 6) The undersigned finds \$275.00 an hour would be appropriate if hourly rate fees were appropriate for this date of accident.

(22) The total costs incurred by claimant's counsel is \$132.00.

(V) DECREE

It is hereby Ordered that the employer/carrier shall pay to William Haro, Esquire:

(1) the sum of \$145.68 in full and complete satisfaction of any and all attorneys fee obligations incurred to date;

(2) the sum of \$132.00 in full and complete satisfaction of any and all cost obligations incurred to date.

Done and Ordered in chambers in Miami, Miami-Dade County, Florida this 5th day of March, 2013.



Gerardo Castiello
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I hereby certify that each of the above listed parties was served via U.S. mail this 5th day of March, 2013 with a true and correct copy of this Final Order on Attorneys Fees.

Alfredo Brandariz Garcia
3064 SE 1st Drive, #2
Homestead, Florida 33033

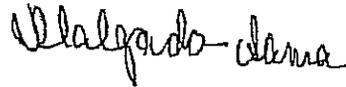
Frank Winston Crum Insurance
100 S. Missouri Avenue
Clearwater, Florida 33756

Cargo Force, Inc.
2461 NW 67th Ave, Bldg 700, Ste 202
Miami, Florida 33122

I hereby certify that each of the above listed parties was served via E/mail this 5th day of March, 2013 with a true and correct copy of this Final Order on Attorneys Fees.

William Haro
The Law Offices of Richard E. Zaldivar, P.A.
williamharo@hotmail.com
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Sandra D. Wilkerson, Esquire
Hurley, Rogner, Miller, Cox,
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Assistant to the Judge of Compensation Claims

Final Hearing Statistics Worksheet

Please complete this form at the time of Order upload for any of the following:

Evidentiary Motion Hearing

Expedited Final Hearing

Fee Amount Hearing

Fee Entitlement Hearing

Final Hearing

Fund Hearing

Remand Hearing

Appellate Fee Hearing

OJCC Number(s) 11-012863GCC

Date Order Mailed/Emailed: 3/5/13

Trial/Hearing dates opened: 2/21/13; concluded: 2-21-13

For Final Hearing or Expedited Final Hearing:

Dates of all pending petitions heard _____

OR

For Evidentiary Motion Hearing:

Type of Motion: _____

Filing Date of Motion Heard: _____

OR

For Fee Amount Hearing or Fee Entitlement Hearing

Date motion or verified petition filed 10-22-12

OR

For Appellate Fee or Remand Hearing

Date of Mandate _____

AND

If abbreviated final/fee order was issued and later vacated:

Date Abbreviated Order Entered: _____

Date Abbreviated Order Vacated: _____