

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

Mary Hektner,
Employee/Claimant,

OJCC Case No. 13-014654RLD

vs.

Accident date: 4/20/1995

School Board of Brevard County/
Sedgwick CMS,
Employer/Carrier/Servicing Agent.

Judge: Robert L. Dietz

ORDER ON VERIFIED MOTION FOR ATTORNEY'S FEES AND COSTS

This matter came before the undersigned in Sebastian, Indian River County, Florida on August 4, 2017, pursuant to a Verified Petition for Attorney's Fees and Costs filed March 31, 2017 (Docket Number (DN 228)). The Employer/Carrier filed a Verified Response to Claimant's Attorney's Verified Petition for Attorney's Fee and Costs on April 20, 2017 (DN 229). Additional documents filed and admitted into evidence include Employer/Carrier's Witness List and Exhibit List filed April 21, 2017 (DN 230), Employer/Carrier's Composite Exhibit for Fee Hearing filed on July 20, 2017 (DN 237) and Claimant's Witness and Exhibit List for Fee Hearing filed July 27, 2017 (DN 239). The Claimant is represented by Toni Lynne Villaverde, Esq. The Employer/Carrier is represented by William H. Rogner, Esq.

The following preliminary motions were heard prior to the Hearing: 1) The Claimant's Motion to Compel Response to Request to Produce filed on June 28, 2017 (Docket Number (DN) 233) (the Employer/Carrier's Response to Motion to Compel Response to Request to Produce was filed June 30, 2017 (DN 234)); 2) The Claimant's Motion to Compel Better Responses to Request to Produce dated December 12, 2016, filed on June 30, 2017 (DN) 235)

(the Employer/Carrier's Response to Motion to Compel Better Responses to Request to Produce dated December 12, 2016, was filed July 13, 2017 (DN 236)). At the end of the preliminary hearing, the Claimant's attorney withdrew both Motions in order to proceed with the attorney's fee hearing.

Prior to the taking of evidence, Ms. Villaverde indicated she planned to call an expert witness, James Walker, Esq., after her staff confirmed to Mr. Rogner that she was in agreement not to call experts at the attorney's fee hearing and that just the two attorneys currently involved in the case would testify. Mr. Rogner's basis for objection is confirmed by e-mails dated May 3, 2017, and May 4, 2017 (DN 249) sent to Ms. Villaverde and answered by her assistant. Ms. Villaverde's argument that her staff's responses and representation to opposing counsel of her position on issues related to this hearing as not being binding on her is perplexing. The Employer/Carrier filed their Witness List and Exhibit List on April 21, 2017 (DN 230) (including an expert witness), the day after filing their Verified Response (DN 229), and then e-mailed Ms. Villaverde on May 3, 2017, to determine if experts would be necessary. Ms. Villaverde's office's representations of agreement ("per Toni") that no experts would be called was dated May 4, 2017 (DN 249). Ms. Villaverde did not file her Witness and Exhibit List until July 27, 2017 (DN 239). The issue is whether a subsequently unilaterally filed Witness and Exhibit List negates or changes the stipulations previously reached by the parties, or if such a change would require approval by the judge of compensation claims. Ms. Villaverde at the hearing claimed no knowledge of the staff person's indication as to her position regarding the use of an expert witness. It was not addressed in the Witness and Exhibit List. Relying on Ms.

Villaverde's office's representations, by not bringing an expert witness, Mr. Rogner reserved on whether he wished to call his own expert until after hearing Mr. Walker's testimony.

If a party wishes to rescind a stipulation, there are proper ways to do so in the litigation context, but in the absence of agreement from the opposing party, it requires a judge's approval. Claiming surprise at the hearing that you have made a stipulation is not a proper way to rescind a stipulation. Claiming that you don't know what your staff has done is not a proper way to rescind a stipulation. The Employer/Carrier's objection to the testimony of James Walker, Esq. is sustained.

Even if Mr. Walker's testimony was admissible (as proffered), it does not impact the ruling in this case. He testified consistently with Ms. Villaverde that Miami District hourly fees should be used, that he had no knowledge of the hourly fees customarily awarded in Sebastian District, and agreed with Ms. Villaverde's requested hourly rate of \$350.00. He has handled either zero or one case in Sebastian District, but could not recall for sure.

The Claimant's attorney untimely filed additional documentary evidence on the day of the hearing, including the payout ledger (DN 244) and e-mails related to the preliminary motions that were withdrawn (DN 248). The Employer/Carrier objected to the untimely filed evidence (DN 246). The Claimant also submitted as evidence a composite exhibit of Docket Numbers 233, 234, 235, 236 and 247 related to the withdrawn motions. The Employer/Carrier objected that they were not relevant to this hearing since the motions had been withdrawn. The objections are sustained.

Toni Villaverde, Esq. and James Walker, Esq. (as proffered) testified on behalf of the Claimant. William Rogner, Esq. testified on behalf of the Employer/Carrier. Mr. Rogner

objected to Ms. Villaverde's testimony as to entitlement indicating that she was only qualified to give testimony on the issue of amount. The objection is sustained. The attorneys can argue whether the admissible evidence constitutes proof of entitlement, as was done based on the stipulated exhibits of the PFBs and Responses to PFBs. Testimony on amount, for which attorneys are experts, does not include creating proof of entitlement based on an attorney's interpretation of the facts. Those facts must be established by submission of evidence.

Having reviewed the Verified Petition for Attorney's Fees and Costs, the Verified Response, and being otherwise fully advised in the premises, I make the following findings:

- 1) The undersigned has jurisdiction over the parties and the subject matter.
- 2) The Employer/Carrier stipulates to the Claimant's entitlement to attorney's fees and costs for the Petitions for Benefits dated January 28, 2014 (#2), February 19, 2015 (#6), and January 12, 2016 (#11).
- 3) The Claimant agrees that no attorney's fee is due regarding the Petitions for Benefits dated July 14, 2014 (#5), May 27, 2016 (#12), and December 7, 2016 (#14).
- 4) The Employer/Carrier is contesting the entitlement to attorney fees for the Petitions for Benefits dated June 26, 2013 (#1), June 9, 2014 (#3), June 24, 2014 (#4), May 14, 2015 (#7), July 22, 2015 (#8), July 23, 2015 (#9), September 18, 2015 (#10), January 12, 2016 (#11), September 8, 2016 (#13), and December 7, 2016 (#14). The Employer/Carrier argues that the only admissible evidence as to lack of entitlement is based on the stipulated PFBs and Responses. The Verified Response points to the defenses to each PFB to which stipulation to entitlement has not been given. No admissible evidence has been presented to establish that the factual basis of any of the

Responses were incorrect or to prove entitlement pursuant to Section 440. As a result, I do not find that there is entitlement to an attorney's fee regarding Petitions for Benefits #1, #3, #4, #7, #8, #10, #11, #13, and #14.

- 5) The Claimant's attorney is claiming a fee in excess of a guideline attorney fee and filed a Verified Petition claiming 308.3 hours and \$3,556.09 in taxable costs based on all 13 PFBs. Ms. Villaverde argues that the described tasks in her Verified Petitions actually include much more work than described and questioned on cross-examination Mr. Rogner's reduction of the time listed if he "understood" all that went into the time entry. This is, of course, revisionist history. Ms. Villaverde had every opportunity to identify the specific tasks she undertook in representation of her client. Because Mr. Rogner has appropriately objected to her descriptions as being inadequate for numerous reasons, she attempts to spin why inadequate descriptions of services allegedly provided for her client in support of the PFBs are actually something else that would be worthy of recompense. This is not rehabilitating an inadequate Verified Petition, just prolonging a hearing hours longer than it should take.
- 6) The Employer/Carrier filed a Response to the Verified Petition and an audit of the Claimant's time records claiming 68.3 hours is reasonable and agreeing with taxable costs of \$3,550.09. (The only objectionable costs was \$6.00 in postage and unspecified copies.)
- 7) In Castellanos v. Next Door Co., 192 So.3d 431 (Fla. 2016), the Florida Supreme Court directed that a reasonable fee would be decided based on the factors codified

under Section 440.34(1) (a-h), Fla. Stat. and the rules regulating The Florida Bar 4-1.5(b)(1), and explained by Lee Engineering & Constr. Co. v. Fellows, 209 So.2d 454 (Fla. 1968). These factors and their application to this case along with whether the factor supports a deviation upward (positive or plus) or downward (negative or minus) from the guideline attorney fee (neutral) are as follows:

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

Time and Labor Required:

Ms. Villaverde has submitted a Verified Petition listing 308.3 hours of time spent on this case. The Employer/Carrier lists objections to 240 hours based on categories of vague, administrative/secretarial time, form pleading prepared by staff, no fee entitlement for this task, duplication of task, no relation to benefits secured by counsel, form letter prepared by staff, excessive time entry, Claimant did not prevail on this issue, and time related to appeal for which counsel for the claimant has already been compensated rather than legal tasks reasonably related to benefits obtained. I have deducted 228.3 hours for time not related to benefits secured based on PFBs #2, #6, and #11 and for the other objections raised. Since the Claimant's attorney has not established entitlement to any contested PFB, there is no basis for awarding attorney's fees related to preparing for or attending this hearing. There is no entitlement to an attorney's fee for determining the amount of the attorney's fee. Crittenden Orange Blossom Fruit v. Stone, 514 So.2d 351 (Fla. 1987). Reasonable attorney's fees in a workers' compensation case does not include hours expended by

attorney in preparation for and attendance at hearing on amount of attorney's fees. Barr v. Pantry Pride, 518 So.2d 1309 (Fla. 1st DCA 1987). The attorney's fee hearings on August 4, 2017, lasted just under four hours. In Sebastian District, these type proceedings usually take less than one hour, and on rare occasions stretching to two hours. Efficiently prosecuted claims remove many of the Employer/Carrier's arguments in making objections to the number of hours claimed in attorney's fee hearings being excessive. I find that the reasonable total hours spent on behalf of the Claimant in securing the benefits in PFBs #2, #6, and #11 is 80 hours.

Novelty and Difficulty of the Questions Involved:

Obtaining medical benefits and authorization of out-of-state medical providers are routine issues to an experienced workers' compensation practitioner. Ms. Villaverde successfully performed this task with the skill necessary to obtain the benefit for her client.

Skill Requisite to Perform the Legal Services Properly:

Ms. Villaverde has demonstrated the requisite skills to perform the legal services necessary to secure benefits for her client, and has been successful in securing \$94.95 (PFB #2), approximately \$2,700.00 (PFB #6), and \$170.00 (PFB #11) in benefits for the Claimant. The case was defended by H.A. Rigdon, Esq., who is known as an experienced litigator in workers' compensation matters. The appeal (not at issue here) and the case, including attorney's fee issues, since the appeal were defended by William Rogner, Esq., a Florida Bar Board Certified Workers' Compensation and Appellate Lawyer, and senior partner of a statewide defense firm.

This is a plus factor.

B) The likelihood that the acceptance of the particular employment will preclude employment of the lawyer or cause antagonisms with other clients.

Ms. Villaverde's representation dates back to 2013. The benefits obtained for the Claimant evidence that the Claimant's attorney could not adequately represent this Claimant without setting aside appropriate time, perhaps to the disadvantage of other clients. However, there was no evidence presented on such conflicts, so this is a neutral to plus factor.

C) The fee customarily charged in the locality for similar legal services.

Ms. Villaverde asserts that the range in the locality is \$300.00 to \$400.00 per hour, and requests \$350.00 per hour based on her experience and qualifications. Ms. Villaverde (and the Claimant's proffered expert, Mr. Walker) assert that this range and requested hourly rate are based on the range in Miami District and that the "locality" should be defined as statewide for attorney's fees based on the location of the Claimant's attorney (Miami District), and not the locality of the case (Sebastian District). I reject this argument.

While there has historically been little litigation over the fee customarily charged in the locality for similar legal services except in the context of self-serving (for both sides) testimony of those involved in the case or their hand-picked "experts," the appellate courts have recognized that there is a difference in legal markets and have left the determination of reasonable attorney fees to the judges of compensation claims in the various districts around the state. Attorneys may choose

the claimants they wish to represent which brings with the decision of representation the jurisdiction of the case. The Employer/Carrier's attorney asserts that the range for attorney's fees is \$150.00 to \$250.00 in Sebastian District and that based on the Claimant's attorney's experience and qualifications, the range would be \$200.00 to \$250.00 per hour. The Claimant's attorney is not Board Certified by The Florida Bar in Workers' Compensation Law, so there is no reason to consider a premium being assigned. I find that an appropriate hourly rate in this case based on the experience and qualifications of the claimant's attorney is \$225.00 per hour. I accept the Employer/Carrier's attorney's testimony as to the appropriate range of the hourly rate in Sebastian District.

The venue in this case is Indian River County. The Claimant's attorney testified that she has been awarded \$350.00 per hour in St. Petersburg District. She has previously been awarded appellate fees of \$250.00 per hour in this case (DN 194), but does not reference any other cases she has handled in Indian River County. The Employer/Carrier's attorney, having tried many cases in Sebastian District, and having researched attorney fee awards statewide, testified that the fee customarily charged in the locality (Indian River County is in the Sebastian/Melbourne District) for similar legal services is \$200.00-\$250.00 per hour. The First District Court of Appeal has held that the award must be predicated upon expert testimony regarding the reasonableness of the hourly rate. See Smith v. U.S. Sugar Corp., 624 So.2d 315, 319 (Fla. 1st DCA 1993); G&A Bldg. Maint. v. Makuski, 510 So.2d 1074 (Fla. 1st DCA 1987). The Florida Supreme Court in Castellanos directed the judges of

compensation claims to determine a reasonable attorney's fee after considering the Lee Engineering criteria being applied here. This would appear to require the consistent application of the fee customarily charged in the locality for similar legal services, and not be dependent on ranges generated by the attorneys from other districts or that have a vested interest in the outcome. It is impossible to arrive at a reasonable attorney's fee if the judge of compensation claims must accept, regardless of how unreasonable, the opinions of one of the attorneys involved in the case, high or low (as the "least unreasonable").

There are many reasons why an attorney may receive an hourly rate greater than the fee customarily charged in the locality for similar legal services. Stipulations reached between parties for employer/carrier paid fees may or may not necessarily reflect the fee customarily charged in the locality for similar legal services. Approved fees are based on a stipulation between the parties that unless deemed unreasonable is approved by the JCC. Approved fees do not create a district range because it is not determined by the JCCs but by the parties. "Approved" fees are very different than "awarded" fees. The fee customarily charged in the locality for similar legal services and justified by an Evidentiary Order based on evidence presented on the attorney's fee issue in a case is the "awarded" fee and can be a wide range depending on the criteria discussed herein. It is typically between \$150.00 - \$250.00 in Sebastian/Melbourne District for non-board certified attorneys. After considering the numerous variables that impact the hourly rate in this case, I find that \$225.00 per hour is appropriate in this case. This is a plus factor.

D) The amount involved in controversy and the benefits resulting to the claimant.

The Claimant secured total benefits of \$2,964.00 in PFBs #2, #6, and #11. This is a plus factor.

E) The time limitation imposed by the claimant or the circumstances.

There were no unreasonable time limitations imposed in this case other than the needs of the Claimant who had not received appropriate medical care. This is a plus factor.

F) The nature and length of the professional relationship with the claimant.

The Claimant's attorney has been handling this case since 2013 (the first PFB was filed June 26, 2013). This is a plus factor.

G) The experience, reputation, and ability of the lawyer or lawyers performing the services.

Ms. Villaverde graduated from law school in 1987 and has been in practice for 29 years. She has a reputation in the workers' compensation field for being a difficult adversary and providing competent representation to her clients. Two other attorneys in her office, Matthew Ferran, Esq. and Dennis Martens, Esq., apparently performed work on this file, but no information has been provided as to their qualifications or experience. There is no way to tell from the Verified Petition who performed what work. The Employer/Carrier suggests that a blended rate of \$200.00 per hour would be appropriate. This is a neutral factor.

H) The contingency or certainty of a fee.

Although no attorney takes a case and accepts a new client expecting to lose, there is no certainty of a fee in a workers' compensation case. This matter was handled on a contingency basis, the contingency being that counsel for the Claimant would only be entitled to any attorney's fee if, and only if, she was to succeed in establishing entitlement to the benefits claimed. The contingency fee versus the fee certain is a plus consideration in the determination of a reasonable attorney fee.

- 8) Based on the above findings, and the application of the statute and case law, I find that the Claimant is entitled to an upward deviation from the guideline attorney fee and the Employer/Carrier shall pay to the Claimant's attorney a fee based on 80 hours at \$225.00 per hour.
- 9) The documentation of taxable costs was reviewed and \$3,550.69 are taxable costs related to obtaining the benefits claimed herein. Expenses related to office overhead such as postage and unspecified copies are not taxable. See Re Amendments to Unif. Guidelines for Taxation of Costs, 915 So.2d 612 (Fla 2005).

It is **ORDERED and ADJUDGED** that:

The Employer/Carrier shall pay to the Claimant's attorney a fee in the amount of \$18,000.00 and taxable costs in the amount of \$3,550.69.

Done and electronically served on Counsel and the Carrier this 29th day of August, 2017, in Sebastian, Indian River County, Florida.



Robert L. Dietz
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