

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

Deanna K. Lichauco,
Employee/Claimant,

Judge: Neal P. Pitts

vs.

OJCC Case No. 12-022891NPP

Cornerstone Hospice/Amerisure Insurance,
Employer/ Carrier/Servicing Agent.

Accident date: 10/18/2010

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FINAL EVIDENTIARY ORDER

This cause came on for an evidentiary hearing before the undersigned Judge of Compensation claims on July 26, 2013 in Orlando, Orange County, Florida, upon the E/C's Verified Motion to Tax Costs, filed with DOAH on June 20, 2013, to which the claimant filed a written response and objections thereto with DOAH on July 23, 2013. The claimant was represented at the hearing by Bradley Guy Smith, Esq., who appeared by VTC from Lakeland, Polk County, Florida. The employer was represented by William H. Rogner, Esq. No live testimony was received during the hearing.

The claim for determination at the hearing was:

1. Taxation of reasonable costs against the claimant in favor of the E/C as the prevailing party pursuant to section 440.34(3), Fla. Stat.

The following documents were admitted into evidence:

Employer's Exhibit:

1. Employer/Carrier's Verified Motion To Tax Costs, filed with DOAH on June 20, 2013, with attachments. Each of the attachments is considered as evidence as if they were separately marked.

Claimant's Exhibit:

1. Claimant's Response To E/C's Verified Motion To Tax Costs, filed with DOAH on July 23, 2013.

SUMMARY OF THE RECORD AND/OR UNDISPUTED EVIDENCE:

1. The claimant sustained a compensable accident and injury on October 18, 2010. According to the pay ledger, the E/C has paid out approximately \$300,000.00 in medical benefits on this claim, not including the expenses associated with the recent surgery. Based upon this figure, it is clear that the claimant has sustained serious injuries in this accident and the E/C has been providing significant medical care.
2. The claimant initiated the matter in dispute when she filed a claim against the E/C via a Petition For Benefits filed with DOAH on October 16, 2012. This petition sought TTD/TPD benefits for the period of October 18, 2010 and continuing, and correction of the AWW from October 18, 2010 and continuing.

3. The parties reached an impasse after a state mediation conference held on February 14, 2013 and a merits' hearing was scheduled for May 14, 2013. Subsequently, on May 13, 2013, claimant voluntarily dismissed on without prejudice the October 16, 2012 petition for benefits. On May 16, 2013, the claimant filed a new petition for benefits with DOAH which sought TTD/TPD benefits for the period of October 18, 2010 and continuing, and correction of the AWW; issues which were raised and dismissed in the October 16, 2012 petition.
4. The claimant did not attend the hearing on the motion to tax cost. According to claimant's attorney, the claimant was hospitalized at that time. It appears that the claimant has been hospitalized since mid June, 2013. No written request for a continuance had been filed by the claimant prior to the hearing.
5. In its verified motion, the E/C asserted that it was the prevailing party as to the October 16, 2012 petition for benefits which had been voluntarily dismissed by the claimant. It further asserted that it had incurred taxable costs defending the claim in the form of witness fees and deposition transcripts for the deposition of the

treating physician, Dr. Childers, and Michael Metcalf, the adjuster.

6. In her written response filed with DOAH to the E/C's motion to tax costs, the claimant did not challenge the E/C's assertion that the itemized costs had not been incurred in defense of the claim that had been voluntarily dismissed by her.

In making my findings of fact, I have carefully considered and weighed all of the evidence presented to me. Although I may not reference each piece of evidence presented by the parties, I have carefully considered all the evidence and the exhibits in making my findings of fact. I have resolved all conflicts in the evidence, both live testimony and by deposition, where they existed. Based upon the evidence, I make the following findings of fact:

1. I have jurisdiction of the parties and the subject matter of these claims.
2. The claimant filed an untimely response to the Verified Motion To Tax Costs. As such, pursuant to Rule 60Q6-124(3)(b), the failure to file a timely and specific response to a motion for attorney's fees and costs, detailing matters which are disputed, shall in the

absence of good cause, result in acceptance of the allegations in the motion as true.

3. No explanation was provided by claimant as to why the written response was untimely filed. Based upon the evidence in the record, I find that the E/C is a prevailing party with regards to the October 16, 2012 petition for benefits which had been voluntarily dismissed by the claimant, and therefore, is entitled to an award of taxable costs. See *Palm Beach County Sch. Bd.*, 990 So.2d 13 (Fla. 1st DCA 2008) (a defendant generally becomes the prevailing party when a claimant dismisses its action, whether the dismissal was with or without prejudice). See also *Costco Wholesale Corp. v. Ulett*, 995 So.2d 1016 (Fla. 1st DCA 2008) (the E/C becomes the prevailing party when the claimant withdrew all pending petitions for benefits and thus JCC erred in denying E/C's motion to tax costs).

4. In the written response, the claimant contends that the E/C's motion to tax cost is premature because she has re-filed another petition seeking the same benefits. This petition is set for mediation on August 12, 2013 and a merits' hearing on October 18, 2013. I am compelled to deny this argument because cost awards to a prevailing

party are mandatory, *Punsky v. Clay County Bd. Of County Comm'rs*, 60 So.3d 1088 (Fla. 1st DCA 2011) and because the law appears to require serial awards of costs in favor of a prevailing party without any offset for a competing cost award in favor of the other party. See *Hillsborough County Sch. Bd. v. Kubik*, 110 So.3d 928 (Fla. 1st DCA 2013); *Aguilar v. Kohl's Dept. Stores, Inc.*, 68 So.3d 356 (Fla. 1st DCA 2011). Thus, the fact that the claimant may ultimately prevail on her May 16, 2013 petition for benefits involving the same issues and maybe the same evidence does not prevent the award of taxable costs in favor of the E/C when she dismissed her October 16, 2012 petition for benefits.

5. Additionally, the claimant contends that the costs of the depositions are recoverable only by the claimant and not by the E/C under §440.30, Fla. Stat. I deny this argument based upon *Marton v. Fla. Hosp. Ormond Beach/Adventist Health Systems*, 98 So.3d 754 (Fla. 1st DCA 2012) (allowing the taxation under the uniform guides for the original and one copy of the deposition and the court reporter's per diem for all depositions).
6. At the hearing, the claimant also requested an ore tenus continuance of the hearing. No written motion was filed.

The basis for the request was to allow the claimant to attend the hearing and attempt to explain why she believed that she had filed her petition in good faith. The E/C objected to this request and argued that it was irrelevant to the determination of its entitlement to prevailing party costs.

7. I am troubled by the failure of the claimant to have filed, prior to the hearing, a motion for continuance of the hearing setting forth her grounds for same; especially since the claimant has been admitted in the hospital for an extended period of time. Thus, this was not an emergency or last minute hospitalization over which the claimant had no notice or control. The E/C argued this was a tactic to delay the hearing and the award of the costs.
8. Based upon *Frederick v. Monroe County Sch. Bd.*, 99 So.3d 983 (Fla. 1st DCA 2012) (costs must be taxed against the claimant even though she had filed her petition in good faith), I conclude that the claimant's desire to attend the hearing to provide testimony in an attempt to explain why she had filed the motions in good faith would be irrelevant. Therefore, I denied the ore tenus motion to continue the hearing.

9. Based upon the foregoing law, I am compelled to conclude that the E/C is the prevailing party as a matter of law because of the claimant's voluntary dismissal of her October 16, 2012 petition for benefits, and therefore, is entitled as a matter of law to its costs being taxed against the claimant; even assuming that the claimant would have provided prima facie evidence that she had filed such petition in good faith. Furthermore, this is true even if the claimant were to be the prevailing party on the same issues in the future; at which time she would be entitled to her own costs.

10. Based upon the greater weight of the evidence, I find the sum of One Thousand Three One Hundred Four Dollars and thirty cents (\$1,304.30) to be the amount of reasonable costs taxable against the claimant.

WHEREFORE, based upon the foregoing, it is CONSIDERED, ORDERED, AND ADJUDGED that the claimant shall pay to the Employer/Carrier the sum of One Thousand Three One Hundred Four Dollars and thirty cents (\$1,304.30) for reasonable and taxable costs incurred by the Employer in defending the October 16, 2012 petition for benefits.

DONE AND ORDERED in Chambers at Orange County, County, Florida, this 31st day of July, 2013.

Neal P. Pitts



Neal P. Pitts
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Orlando District Office
400 West Robinson Street, Suite 608-North
Orlando, Florida 32801-1701
(407)245-0844
www.jcc.state.fl.us

Bradley G. Smith, Esquire
Smith, Feddeler & Smith, P.A.
P.O. Drawer 1089
Lakeland, Florida 33801
bsmith@sfsmlaw.com, jccmail@sfsmlaw.com

William H. Rogner, Esquire
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1560 Orange Avenue, Suite 500
Winter Park, Florida 32789
wrogner@hrmcw.com, atierney@hrmcw.com