

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

Dale Steedly,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 04-017887TGP
)	
Volusia County School Board,)	Accident date: 4/27/2004
)	
Employer,)	
)	
and)	
)	
United Self Insured Services,)	
)	
Carrier/Servicing Agent.)	
)	

ORDER ON APPELLATE FEE AMOUNT AND COSTS

This cause came to be heard before the undersigned Judge of Compensation Claims in Daytona Beach, Volusia County, Florida on October 23, 2009. The Verified Petitions for Appellate Attorney Fees and Costs at issue were filed on April 15, 2009, and April 27, 2009. The Claimant, Dale Steedly, was represented by Attorney Mark Zimmerman and Attorney Mark Zientz. Attorney Mark Zimmerman appeared live at Hearing and Attorney Mark Zientz appeared via video teleconference. The Employer/Servicing Agent, Volusia County School Board/USIS, was represented by Attorney Clay Meek who appeared live at the Hearing.

Issues and Defenses

The issues as set forth by the Claimant in the initial Pretrial Questionnaire included; “appellate attorney’s fees (amount only) per order of the 1st DCA”. The Claimant also filed a Motion to Tax Appellate Costs on April 16, 2009, to be heard at the October 23, 2009, Evidentiary Hearing.

The Employer/Servicing Agent defended these claims at the initial Pretrial Questionnaire on the grounds that; “only reasonable appellate attorney’s fees are due as set forth in the May 6, 2009, Verified Response”. The Employer/Servicing Agent raised various objections to the Verified Petitions for Appellate Attorney Fees and to the Motion to Tax Appellate Costs in the contents of the Employer/Servicing Agent’s Verified Response.

Statement of the Case

This case involved an appeal taken by the Employer/Servicing Agent from an Order Awarding Permanent Total Disability Benefits. On appeal, the Employer/Servicing Agent raised various arguments including that the Judge of Compensation Claims erred in accepting the opinion of one expert over another and that the Claimant was not permanently totally disabled. It was also argued that the JCC’s determination that no Expert Medical Advisor should be appointed in this case was legal error.

The First District Court of Appeal affirmed the Order of the JCC and, by Order dated April 1, 2009, awarded an attorney’s fee for services performed before the District Court of Appeal in this case. Thereafter, Attorney Mark Zimmerman filed “Supplemental Motion and Verified Petition for Appellate Attorney’s Fees and Costs” on April 15, 2009, and Attorney Mark Zientz filed “Motion and Verified Petition for Appellate Attorney Fees” on April 27, 2009. On May 6, 2009, the

Employer/Servicing Agent filed “Verified Response to Motion and Verified Petition for Appellate Attorney Fees of Mr. Zientz, Supplemental Motion and Verified Petition for Appellate Attorney’s Fees and Costs of Mr. Zimmerman and Motion to Tax Appellate Costs of Mr. Zimmerman”.

Documentary Evidence

At the Attorney Fee Evidentiary Hearing in this case, the following documentary evidence was admitted:

- | | |
|-----------------------|---|
| JCC’s Exhibit #1 | Pretrial Questionnaire and Order by the undersigned dated May 11, 2009. |
| JCC’s Exhibit #2 | Order Granting Claimant’s Motion to Allow Testimony via Video Teleconference Equipment, dated July 27, 2009, and accompanying Motion to Allow Testimony via Video Teleconference Equipment. |
| JCC’s Exhibit #3 | Order of First District Court of Appeal relinquishing jurisdiction to the lower tribunal until October 30, 2009. |
| JCC’s Exhibit #4 | Order on Employer/Servicing Agent’s Emergency Motion for Continuance dated July 29, 2009, and accompanying Motion for Continuance. |
| JCC’s Exhibit #5 | Order of the 1 st DCA dated November 13, 2009, extending jurisdiction to the lower court to November 30, 2009, admitted post-hearing. |
| Claimant’s Exhibit #1 | Motion and Verified Petition for Appellate Attorney’s Fees filed by Mr. Zientz on April 27, 2009 with attachments A through D. |
| Claimant’s Exhibit #2 | Supplemental Motion and Verified Petition for Appellate Attorney’s Fees and Costs filed by Attorney Mark Zimmerman on April 15, 2009. |
| Claimant’s Exhibit #3 | Motion to Tax Appellate Costs filed April 16, 2009, by Attorney Mark Zimmerman. |

Claimant's Exhibit #4	Deposition of Attorney L. Barry Keyfetz, taken July 15, 2009, with attachments.
Employer/Servicing Agent's Exhibit #1	Verified Response to Motion and Verified Petition for Appellate Attorney Fees of Mr. Zientz and Mr. Zimmerman filed May 6, 2009, with attachments.
Employer/Servicing Agent's Exhibit #2	Deposition of Attorney William H. Rogner, taken October 9, 2009, with attachments, admitted over objections.

Evidentiary Objections

At the Evidentiary Hearing, the Claimant objected to the deposition of Attorney William H. Rogner, offered by the Employer/Servicing Agent. This Court reserved jurisdiction to determine the admissibility of Attorney William H. Rogner's deposition and allowed the parties to submit post-hearing authority and argument on this issue. After reviewing the post-hearing submissions of both parties, the undersigned hereby overrules the Claimant's objection to Attorney William Rogner's deposition and allows the deposition in evidence as Employer/Servicing Agent's Exhibit #2. The testimony and opinions contained within the deposition are given appropriate weight as described herein.

In making this finding, I have reviewed the authority submitted by Claimant's counsel including the case of W. A. Doss v. Barbato, 47 So. 2nd 377 (Fla. 1st DCA 1986), Robert and Company v. Zabawczuk, 200 So. 2nd 802 (Fla. 1967), and City of Riviera Beach v. Napier, 791 So. 2nd 1160 (Fla. 1st DCA 2001). I reject the Claimant's argument that these cases stand for the proposition that Attorney William H. Rogner's deposition testimony is not admissible on the grounds that he was paid an expert attorney's fee by the Employer/Servicing Agent for time spent testifying

on the appellate fee issue in this case. I find that a plain reading of the case law authority identified by the Claimant does not support a determination that Attorney William H. Rogner's opinion should be stricken from the Record.

Findings of Fact and Conclusions of Law

In making my findings of fact and conclusions of law in this matter, I have carefully considered and weighed all the testimony and evidence presented to me including all the live testimony as well as the documentary exhibits and I have resolved any and all conflicts therein. After having carefully considered the arguments of the parties and all evidence presented in this case, I make the following findings of fact and conclusions of law:

1. The stipulations of the parties as listed above and as identified in the Pretrial Questionnaire are approved and adopted by me.

2. This Court has jurisdiction over the subject matter and over the parties. This Court notes the order of the First DCA dated November 13, 2009, relinquishing jurisdiction to the undersigned Judge of Compensation Claims until November 30, 2009, admitted into evidence post-hearing as JCC's Exhibit #5.

3. In making the determinations set forth below, I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary for the resolution of this claim. I have not attempted to painstakingly summarize the substance of all the documentary evidence or the testimony of the witness nor have I attempted to state nonessential facts. Because I have not done so does not mean I have failed to consider all the evidence.

4. In determining the amount of the appellate attorney's fee in this case, the undersigned has considered various factors raised by the parties. These factors reflect the criteria addressed by the Florida Supreme Court in Lee Engineering & Construction C. v. Fellows, 209 S. 2d 454 (Fla. 1968). The factors considered by the undersigned in this case include: the time and labor required; the difficulty of the legal questions involved and the skills necessary to perform the service properly; the fee customarily charged in the locality; the amount involved in the controversy and benefits to the Claimant; the experience, reputation, and ability of the lawyers performing the services; the contingency or certainty of a fee; and the time limitations imposed by the Claimant. The attorney fee amounts determined in the contents of this Order are based upon this Court's application of the various fee criteria to the facts of this case, as argued by the parties, and based on the totality of evidence.

5. I note that not all of the above fee criteria or factors are in dispute in this case, as shown in the pre-trial pleadings filed by the Employer/Servicing Agent. As such, I will focus this Order on the issues which are disputed by the parties. However, that does not mean that the undersigned has not considered all factors as argued by the parties in this case. Moreover, to the extent that the undersigned does not identify a specific objection raised by the Employer/Servicing Agent in the contents of this Order, that objection is considered overruled.

Attorney Mark Zientz Fee Petition/Time Spent

6. After reviewing the Motion and Verified Petition for Appellate Attorney's Fees filed by Attorney Mark Zientz, and after noting each objection raised by the Employer/Servicing Agent in the contents of the response to said motion and at the Evidentiary Hearing, the undersigned finds that

Attorney Mark Zientz has spent a total of 85.6 hours in appellate representation on Dale Steedly necessary to respond to the Employer/Servicing Agent's Appeal. I find that 85.6 hours of time is reasonable and directly related to Workers' Compensation benefits secured pursuant to the Order of the Appellate Court in this case.

7. In determining that Attorney Mark Zientz spent 85.6 hours of reimbursable attorney time in this case, I sustain the objection raised by the Employer/Servicing Agent to time entries identified by Attorney Mark Zientz on July 23, 2008, and September 29, 2008. I accept the Employer/Servicing Agent's position that the time reflected by Attorney Mark Zientz on the time sheet for these dates is unreasonable based upon the totality of circumstances in this case. I find the Employer/Servicing Agent's position on this issue is logical and reasonable. I accept the Employer/Servicing Agent's position that the total amount of time for these two entries should be 0.4 hours.

8. I also sustain the objection raised by the Employer/Servicing Agent to Attorney Mark Zientz's time entry appearing on the time sheet for April 1, 2009. I accept the Employer/Servicing Agent's position that this time entry is not reasonable. I find the Employer/Servicing Agent's position on this issue is logical and reasonable based upon the totality of circumstances in this case. I accept the Employer/Servicing Agent's argument that 0.2 hours of time is reasonable for time spent on April 1, 2009.

9. I accept the argument of the Claimant that, although the cross-appeal was not filed in this case, that time spent in preparing for a cross-appeal is reimbursable, reasonable, and related to time spent responding to the Employer/Servicing Agent's appeal in this case. I find that time spent

in preparation for a cross-appeal, even though not filed, is directly related to the securing of benefits in this case.

10. I overrule all additional objections raised by the Employer/Servicing Agent to the time sheet provided by Attorney Mark Zientz. I accept Attorney Mark Zientz's argument that the remaining time entries, totally 85.6 hours, are reasonable and related to securing permanent total disability benefits pursuant to the order of the Appellate Court.

11. I accept Attorney Mark Zientz's argument that a significant amount of attorney time was dedicated to reviewing and analyzing the 2,128 page Record on appeal. Mr. Zientz's argument that a detailed review of the Record was mandated and a comprehensive understanding of the evidence was critical to preserve the Judge's ruling is logical and reasonable under these circumstances. I also accept Mr. Zientz's argument that extensive research was required in this appeal. I accept Mr. Zientz's argument that the strenuous defense raised by the Employer/Servicing Agent in this case required Mr. Zientz to respond to the Employer/Servicing Agent's three points raised on appeal, resulting in additional time spent by Attorney Mark Zientz necessary to respond to Employer/Servicing Agent's appeal.

Attorney Mark Zimmerman Fee Petition/Time Spent

12. After reviewing the pleadings in this case, including Mr. Zimmerman's Supplemental Motion and Verified Petition for Appellate Attorney's Fees and Costs as well as the response of the Employer/Servicing Agent, I find that a reasonable amount of time spent by Mr. Zimmerman in order to respond to the Employer/Servicing Agent's appeal in this case is 4.65 hours.

13. In making this finding, the undersigned has considered that Mr. Zimmerman did represent Dale Steedly on appeal and was sole counsel for the Claimant up until approximately October 20, 2008. However, I note that Attorney Mark Zientz, following October 20, 2008, handled the appeal in this case, resulting in the undersigned's determination herein that 85.6 hours were spent in that regard. I accept the logical and reasonable argument of the Employer/Servicing Agent that Mr. Zientz is a fully capable appellate attorney and did not require any assistance or time spent by Mr. Zimmerman to properly represent the Claimant on appeal following October 20, 2008. As such, I have sustained the objections raised by the Employer/Servicing Agent to time spent by Mr. Zimmerman in this matter subsequent to October 20, 2008, as duplicative attorney time, not necessary to respond to the Employer/Servicing Agent's appeal in this case. I find that each of the time entries following October 20, 2008, identified by Attorney Mark Zimmerman in his Supplemental Motion and Verified Petition, are for time duplicated by Attorney Mark Zientz or for time spent for receipt and review of the work prepared by Mr. Zientz. I find that all entries by Attorney Mark Zimmerman subsequent to October 20, 2008, were not necessary, not reasonable, and not reimbursable attorney time.

14. Additionally, I accept the argument of the Employer/Servicing Agent that certain time entries identified by Attorney Mark Zimmerman prior to October 20, 2008, are requests for reimbursement of secretary work. I sustain the objection raised by the Employer/Servicing Agent to various time entries where Attorney Mark Zimmerman requested reimbursement for preparation of fax cover sheets. I find these entries are not reimbursable attorney time. These entries appear on the following dates: 7/11/08; 7/15/08; 7/18/08; 7/18/08; and 7/31/08.

15. I sustain the objection raised by the Employer/Servicing Agent to certain time entries by Attorney Mark Zimmerman prior to October 20, 2008, requesting reimbursement for time spent communicating with Attorney Mark Zientz. I note this objection was raised in regard to email correspondence between Mr. Zimmerman and Mr. Zientz. I accept the Employer/Servicing Agent's argument that these entries are vague, nonspecific, represent duplicative attorney time, and are not reimbursable attorney time. I note these entries appear on Mr. Zimmerman's time sheet for: 7/23/08; 7/23/08; 9/25/08; 9/29/08; 9/29/08; 10/2/08; 10/2/08; 10/16/08; 10/16/08; and 10/16/08.

16. Additionally, I accept the argument of the Employer/Servicing Agent that receipt and review of the Record of Appeal from the Judge of Compensation Claims, identified as 5.0 hours worth of attorney time by Attorney Mark Zimmerman, should be stricken as duplicative with the time spent by Attorney Mark Zientz in this case.

17. In making these findings, I accept the argument of the Claimant that, although the cross-appeal was not filed in this case, that time spent in preparing for a cross-appeal is reimbursable, reasonable, and related to time spent responding to the Employer/Servicing Agent's appeal in this case. Again, I find that time spent in preparation for a cross-appeal, even though not filed, is directly related to the securing of benefits in this case.

Hourly Rate

18. I accept Attorney William Rogner's opinion with regard to the hourly rate deserving or both Attorney Mark Zientz and Attorney Mark Zimmerman in this case over any contradictory opinion, including the opinion of Attorney Barry Keyfetz. In making this decision, I find that Attorney William Rogner is most familiar with the appropriate hourly rate in this "locality", whether

this “locality” is considered the Daytona Beach District, the Central Florida area, or the entire State of Florida. I find that Attorney William Rogner’s testimony is most consistent with the totality of circumstances in this case and was most logical and reasonable. When rejecting Attorney Barry Keyfetz’s opinion on hourly rates, I note Attorney Barry Keyfetz’s testimony that in the last ten years he has not handled any Workers' Compensation matters north of a rough line between Naples and Port St. Lucie (Deposition Barry Keyfetz, page 21). On the other hand, the deposition testimony of Attorney William Rogner reveals that he is far more knowledgeable with the locality of this particular case and the entire State of Florida. I note that Attorney William Rogner researched a much larger geographical area than Attorney Barry Keyfetz prior to rendering an opinion on the appropriate hourly rates in this case. As such, I find that Attorney William Rogner’s opinions on hourly rates are more logical, more reasonable, and most consistent with fees customarily charged in this locality. Again, I make this finding whether or not it is determined that the locality of this particular case is the Daytona Beach District, the Central Florida area, or the entire State of Florida.

Attorney Mark Zientz Fee Petition/Hourly Rate

19. I note that Attorney William Rogner testified in behalf of Employer/Service Agent in this case and opined that the appropriate rate in this particular locality would be within the range of \$210.00 to \$285.00 and that Mr. Zientz should be compensated at a rate of \$275.00, based upon Mr. Zientz’s experience. I accept Mr. Rogner’s testimony and find that Mr. Zientz should be compensated at a rate of \$275.00 per hour. Again, I find that Mr. Rogner’s opinions and testimony on the hourly rate issue are most logical and most reasonable under these circumstances. I accept Mr. Rogner’s testimony as consistent with this Court’s own application of the various fee criteria to

the totality of circumstances of this case.

20. Although I accept Mr. Zientz's argument that the size of the Record in this case supports a determination that additional number of hours was spent in order to respond to the Employer/Servicing Agent's appeal, I do not accept Mr. Zientz's argument that the size of the Record supports a determination of an hourly rate higher than set forth by Attorney William Rogner. Although I find the size of the Record on Appeal to be well above average for a workers' compensation case, I cannot find that Mr. Zientz was forced to call upon the extent of his expertise to successfully respond to the Employer/Servicing Agent's appeal in this case.

21. I particularly reject Mr. Zientz's argument and Attorney Barry Keyfetz's testimony that an hourly rate awarded to Mr. Zientz should be \$300.00 to \$500.00 per hour. I reject Mr. Zientz's argument that since he maintains his office and does business in the Miami-Dade area, that Mr. Zientz should be reimbursed at an hourly rate customarily charged in the Miami-Dade area. I find this argument is not logical and not reasonable under the circumstances of this case. Based on the evidence presented in this case, I find that Mr. Zientz routinely performs statewide work and that the venue of this particular case is in the Daytona Beach District. Again, I find that Attorney William Rogner's testimony, that Mr. Zientz should be compensated at an hourly rate of \$275.00, is reasonable under these particular circumstances, whether it is determined that the locality of this particular case is the Daytona Beach District, the Central Florida area, or the entire State of Florida.

Attorney Mark Zimmerman Fee Petition/Hourly Rate

22. I accept the testimony of Attorney William Rogner that Attorney Mark Zimmerman should be reimbursed in this case at an hourly rate at \$250.00 per hour. At deposition, Attorney

William Rogner explained that, although Attorney Mark Zimmerman is a good trial lawyer, he is not as well known or experienced in appellate work as Attorney Mark Zientz. I accept this testimony as logical and reasonable under these circumstances. I find that \$250.00 per hour is within the hourly rate awardable in this locality and is reasonable under these particular circumstances.

Amount of Appellate Fees

23. With regard to Attorney Mark Zientz, this Court's calculation of 85.6 hours multiplied at \$275.00 per hour gives rise to a reasonable attorney's fee in the amount of \$23,540.00. With regard to Attorney Mark Zimmerman, this Court's calculation of 4.65 hours multiplied at \$250.00 per hour gives rise to a reasonable attorney's fee in the amount of \$1,162.50. This Court recognizes that it has the discretion to raise or lower these amounts based upon the further application of various circumstances of this case and fee criteria as argued by the parties. However, after consideration of all the fee criteria and evidence, as argued by the parties in this particular case, this Court finds that the amount of \$23,540.00 to Attorney Mark Zientz and \$1,162.50 to Attorney Mark Zimmerman is the most reasonable attorney's fee under these circumstances.

Motion for Appellate Costs

24. I sustain the objections raised by the Employer/Servicing Agent to each of the costs asserted by Attorney Mark Zimmerman in this case totaling \$263.49. I find that the costs asserted by Attorney Mark Zimmerman are improperly vague in that these costs are not itemized as to when they occurred, how the costs were incurred, or whether the costs are necessary for prosecution of the appeal. I note that Mr. Zimmerman did not file any briefs in behalf of the Claimant and I find there is insufficient evidence in the Record to suggest that Mr. Zimmerman filed or served any document

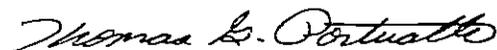
that would require a Federal Express charge. Additionally, as this Court has sustained the Employer/Servicing Agent's objection to the duplication of attorney's time in this case, the undersigned cannot determine whether or not the costs asserted by Attorney Mark Zimmerman were incurred in response to the appeal in this case or whether these costs were incurred as the result of mere communications with Attorney Zientz. As such, I strike each of the costs on the grounds they are non-specific, vague, and unreasonable under the totality of circumstances in this case.

WHEREFORE, it is ORDERED and ADJUDGED as follows:

1. That the Employer/Servicing Agent shall pay Attorney Mark Zientz an appellate attorney's fee of \$23,540.00.
2. That the Employer/Servicing Agent shall pay Attorney Mark Zimmerman an appellate attorney's fee of \$1,162.50.
3. That Attorney Mark Zimmerman's Motion for Payment of Taxable Costs is

DENIED.

DONE AND ORDERED this 16th day of November, 2009, in Daytona Beach, Volusia County, Florida.



Thomas G. Portuallo
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Daytona Beach District Office
444 Seabreeze Boulevard, Suite 450
Daytona Beach, Florida 32118
(386)254-3734
www.jcc.state.fl.us

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order has been electronically transmitted via email to the attorneys of Record and sent by U.S. Mail to the parties as listed below on the 16th day of November, 2009:

Debra Smith

Executive Secretary to the Judge of
Compensation Claims

Dale Steedly
508 East Lansdowne Avenue
Orange City, Florida 32763

Volusia County School Board
200 North Clara Avenue
Deland, Florida 32720

United Self Insured Services
Post Office Box 616648
Orlando, Florida 32861

Mark L. Zientz, Esquire
9130 South Dadeland Boulevard, Suite 1619
Miami, Florida 33156
mark.zientz@mzlaw.com

Mark Zimmerman
James & Zimmerman
P.O. Box 208
Deland, Florida 32721
zimmerman@jz-law.com;hdulong@jz-law.com

Clay L. Meek, Esquire
Smith, Hood, Perkins, Loucks, Stout & Orfinger, P.A.
Post Office Box 15200
Daytona Beach, Florida 32115
cmeek@daytonalaw.com