

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

Frank Benniefield,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 11-018956MES
City of Lakeland/RetailFirst Insurance)	
Company,)	Accident date: 4/9/2008
Employer/ Carrier/Servicing Agent.)	
_____)	

EVIDENTIARY ORDER AWARDING CONTESTED APPELLATE ATTORNEY FEES

A hearing was held in this matter on June 13, 2013 in Lakeland, Polk County, Florida on the Claimant/Appellant’s Verified Petition for Attorney Fees. Present on behalf of the Claimant/Appellant was attorney Wendy Loquasto and present on behalf of the Employer/Carrier/Appellee was attorney, Bettina Carrier. The following exhibits were marked and received into evidence.

Claimant:

1. Verified Petition for Attorney Fees and Costs with exhibits filed May 8, 2013.
2. Exhibits A-G to Verified Petition filed May 8, 2013.
3. Cost check filed June 6, 2013.

EC:

1. EC’s response to Verified Petition with exhibits filed May 28, 2013.
2. EC’s amended response to Verified Petition filed June 3, 2013.
3. Deposition of W. Rogers Turner taken June 4, 2013 and filed June 10, 2013.

Findings of Fact and Conclusions of Law:

1. A final compensation order was entered in this matter on April 9, 2012 finding that Benniefield was not at MMI and thus the request for PTD benefits was premature.
2. An appeal was taken from this order and on April 9, 2013 an order was entered by the First District Court of Appeal reversing the finding of the undersigned. In a separate order the appellate court awarded attorney’s fees to the claimant. The order of the appellate court requires the claimant to file, among other things, a detailed chronological listing of all time devoted to the appeal, the usual hourly rate of the attorney or attorneys performing the services and any special circumstances “relevant under any of the factors

set forth in Section 440.34, Florida Statutes (2011).¹ The order requires the EC to file a response and states that if the time alleged is in dispute the EC shall produce a detailed chronological listing of the time devoted to the appeal by the disputing party on each entry on which there is a dispute.

3. Counsel agreed that the issue on appeal in this matter was whether the claimant had reached maximum medical improvement or whether a subsequent injury had placed the claimant back in a temporary disability status. The appeal of this matter did include oral argument. The claimant has indicated that 111.45 hours was required to prepare and file the briefs and to attend oral argument. I have reviewed the time and the EC's objections to the same and my rulings are reflected on the attached Exhibit "A". Claimant argued that the EC's objections could not be considered as the EC did not file a listing of any time corresponding to the time in dispute as required by the First DCA. I sustain the claimant's objection where the EC has objected to time and conducted similar activities. I overrule this objection as to events that would not necessarily be similar, for example correspondence to clients or other counsel. I also overrule the objection as to time that is in dispute where the dispute involves the nature of the time as opposed to the amount of the time. Clerical or secretarial activities are not properly included in an attorney's fee award. *Youngblood v. Youngblood*, 91 So.3d 190 (Fla. 2nd DCA 2012); *Dayco Products v. McClane*, 690 So.2d 654 (Fla. 1st DCA 1997). The time entries are not separately delineated but are bundled together to include all activities conducted on each date. Thus where the objections are sustained the entire entry is disallowed as I cannot ascertain how much time was allotted to each of the individual activities.
4. In determining the amount of attorney's fee due in an appellate matter the starting point is reasonable number of hours expended on the appeal multiplied by an appropriate hourly rate. *Metric Constructors v. Boyles*, 633 So.2d 1167 (Fla. 1st DCA 1994). In making that determination I considered the following factors:

- a. Time and labor required and the novelty and difficulty of the questions involved:

I find that while the issue of MMI is one involved in many workers' compensation cases and appeals, this issue was made somewhat more complex by the question of the subsequent intervening fall experienced by the claimant.

The case was well defended both at the trial and appellate levels and the record

¹ There are no factors listed in Section 440.34, Florida Statutes (2011) and the parties agreed that the appropriate factors to consider are the factors set forth in *Lee Engineering & Constr. Co. v. Fellows*, 209 So.2d 454 (Fla. 1968).

on appeal was fairly substantial, although the issue turned almost exclusively on the testimony of one physician, Dr. Amann. I find that the attorney time expended on this appeal totaled 73.25 hours and the clerk time expended on this appeal totaled 30 hours.

b. The fee customarily charged in this locality for similar legal services.

I have considered the testimony of Ms. Loquasto, her expert witness attorney Michael Winer, Ms. Carrier and her expert witness attorney W. Rogers Turner. I reject Mr. Winer's argument that the locality is the entire state of Florida. I note that while he maintained that the locality was the entire state, he offered mostly testimony regarding the customary rates in South Florida and did not offer any testimony regarding the customary rates in the northern portion of the state. He acknowledged that the rates in South Florida were in general higher than the rates throughout the rest of the state. Mr. Turner testified that the customary rate for an appeal in this locality for an attorney is \$275 per hour and for a clerk is \$60-\$70 per hour. Ms. Loquasto indicated that the customary rate for an attorney was \$300-\$450 per hour and for a law clerk \$100 per hour. Many of the fees to which she cited were stipulated fees rather than contested fees. Ms. Loquasto acknowledged in her testimony that she has received as low as \$250 per hour for her appellate work in contested matters. She also took into consideration the attorney fees paid statewide for appellate work in reaching her conclusions. Ms. Carrier testified that a reasonable fee for appellate work in this locality is \$250 to \$300 per hour for an attorney and \$55.00 per hour for a clerk. I give greater weight to the testimony of Ms. Carrier and Mr. Turner as they limited their opinions to fees awarded in the central portion of the state. I find that the appropriate hourly rate to be awarded is \$275 per hour for Ms. Loquasto as a board certified appellate attorney and \$55.00 per hour for her law clerk.

c. The experience, reputation and ability of the lawyers performing the legal services:

Ms. Loquasto is an experienced board certified appellate attorney who was employed by the First District Court of Appeal and is very familiar with the appellate process.

d. The contingency or certainty of the fee:

This is a contingent fee and a positive factor.

e. The time limitation imposed by the claimant or the circumstances.

Testimony was given that extensions of time are generally not given in workers' compensation appellate matters. However, the docket, attached as an exhibit, clearly reflects that the appellant's motion to extend time was granted. As such there does not appear to have been any significant time limitations imposed by the claimant or the circumstances of this matter.

5. Based upon my review of the above factors I find that the appropriate fee to be awarded in this matter is \$21,793.75. This is based upon 73.25 attorney hours at \$275.00 per hour and 30 clerk hours at \$55.00 per hour. I see no reason to depart either up or down from this base fee. There were a significant number of hours involved in this matter and some of this was due to preparation for and attendance at oral argument. However an experienced attorney should be able to prepare for and conduct an appeal in less time than required by an inexperienced attorney. This is one reason the courts award higher hourly rates to experienced attorneys and lower rates to less experienced attorneys.
6. The appellant incurred \$300.00 in costs and the EC has not objected to this cost.

Wherefore it is ordered and adjudged as follows:

1. The EC/Appellee shall pay an appellate attorney's fee of \$21,793.75 and costs of \$300.00.
- DONE AND MAILED this 25th day of June, 2013, in Lakeland, Polk County, Florida.



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