

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

EMPLOYEE:

Anna Redding
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Apt # 6204
Orlando, FL 32811

ATTORNEY FOR EMPLOYEE:

Douglas W. Bond, Esquire
Douglas W. Bond, P.A.
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EMPLOYER:

Healthcenter of Windermere
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ATTORNEY FOR EMPLOYER/CARRIER:

W. Rogers Turner, Jr., Esquire
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CARRIER:

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OJCC CASE NO: 07-023267WJC
D/A: 05/23/2007

Judge W. James Condry, II

ORDER ON ATTORNEY FEES

After proper notice to all parties, an attorney fee amount hearing was held and concluded on the above claim on the afternoon of Friday, November 5, 2010 in Orlando, Orange County, Florida.

The following items were considered by me in the resolution of the issues:

- a. The 09/08/10 amended motion, verified petition and affidavit for attorney's fees and attachments marked as exhibit #1.
- b. The 10/06/10 employer/carrier's response to claimant's amended motion for attorney's fees and attachments marked as exhibit #2.
- c. The 09/09/10 expert affidavit of Attorney Jason Gumula marked as exhibit #3.

- d. The 10/08/10 employer/carrier's expert affidavit for attorney fees of Attorney Philip R. Augustine marked as exhibit #4.

Additionally, live testimony was received under oath from Attorneys Douglas W. Bond and W. Rogers Turner, Jr.

OVERVIEW

This claim involves a certified nursing assistant who sustained a compensable injury to her right foot when a patient while being transferred to a bed stepped on it. A dispute later arose over what ongoing treatment if any was required. The benefits secured in this case involve the authorization of a podiatrist for continuing care and the authorization of foot surgery as recommended by Dr. Eugene Pascarella. The claimant seeks \$2,577.20 in costs and \$46,365.00 in attorney fees for successfully securing the above referenced benefits.

Both attorneys acknowledge that the monetary value of the benefits secured approximates \$5,000.00. Application of a statutory guideline would result in a fee of \$1,000.00. The claimant maintains that given the totality of the circumstances an award of a statutory fee would prove manifestly unfair. I agree.

ANAYLSIS

In determining a reasonable fee amount I find it appropriate based on the applicable date of loss in this case to consider the standards as set forth under the cases of Lee Engineering & Construction Co. v Fellows, 209 So.2d 454 (Fla. 1968) and Murray v Mariner Health, 994 So.2d 1051 (Fla. 2008). In so doing, I have considered the following factors:

- a. The time and labor required the novelty and difficulty of the questions

involved, and the skill requisite to perform the legal service properly:

Based on my review of the time affidavits submitted and the sworn testimony of the litigants, the time expended on this claim was moderate. I do not find that the litigated issues were overly complex. However the benefits were aggressively contested resulting in my concluding that the hours I ultimately find were properly expended were necessary to secure for Ms. Redding the benefits for which she was entitled.

The employer/carrier, hereinafter referred to as the E/C, challenged Ms. Redding's continuing entitlement to medical care with a podiatrist taking the position that care in that area of specialty was not required. The E/C also challenged whether the major contributing cause of any need for the recommended surgery was the industrial accident having relied upon other physicians' opinions suggesting full recovery from the accident had been achieved. The nature of the issues were such that the skill requisite to perform the legal services appropriately ideally required the expertise of an attorney experienced in the handling of workers' compensation matters. This I conclude was a positive factor in evaluating a reasonable fee in this case.

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

I accept from the evidence produced at trial that attorney fees customarily charged for similar legal services in workers' compensation matters in the Orlando District which covers Orange, Seminole, Osceola and Lake Counties range from \$175 to \$275 per hour.

c. The amount involved in the controversy and the benefits resulting to the claimant:

The total monetary value of the medical benefits secured as a result of Attorney Bond's intervention was agreed by the parties to approximate \$5,000.00. I find no reason to reject this finding based on the evidence produced.

d. The time limitation imposed by the claimant or the circumstances:

There was no evidence presented suggesting the likelihood that Ms. Redding's counsel's acceptance of the case would

preclude his employment by others or cause antagonisms with other clients. In short I do not find there to be any special limitation imposed by Ms. Redding as a result of the attorney accepting the representation of her as a client. I conclude this was a neutral factor and not a significant one in determining a proper fee amount.

e. The experience, reputation, and ability of the lawyer or lawyers performing services:

Both attorneys have very well deserved reputations as talented and highly professional counsel. Their zealous and responsible representation of their respective clients support the amount of time I have found to be reasonable in Mr. Bond securing the medical benefits on this claim. Although Mr. Bond is not board certified in workers' compensation I find, as the defense counsel so acknowledges, that he is well experienced in the handling workers' compensation claims. This I likewise find to be a positive factor in evaluating a proper fee amount in this case.

f. The contingency or certainty of a fee:

I find that the contingency of the fee was also a positive factor in this case. Under his contract of representation with Ms. Redding, Mr. Bond could not claim a fee from his client unless benefits were actually secured. This was a purely contingent case and there was no certainty of a fee in this matter.

CONCLUSIONS

THE CLAIM FOR ATTORNEY FEES

I find based on the evidence presented a reasonable attorney fee is \$11,182.50. This figure is representative of an hourly fee based on the reasonable number of hours expended in the successful prosecution of the claim for the podiatrist and

surgery. Although Mr. Bond filed other petitions for benefits in this case, I find that he is only entitled to a carrier paid fee for benefits untimely furnished as addressed above, to wit the authorization of the podiatrist and foot surgery. He is entitled to the reasonable time expended in the necessary prosecution of those benefits but no other.

In reaching what I believed to be the reasonable number of hours expended in this case I have omitted and/or reduced hours deemed to be excessive. I have disregarded those time entries that are vague and do not clearly evidence that they are occasioned for or related to the benefits secured. I have also discounted what appear to be secretarial or administrative tasks. I have examined line by line each and every time entry made by claimant's counsel and each and every response made by the defense attorney in opposition to those time entries. I have thoroughly considered the expert attorney affidavits submitted as well as the sworn trial testimony of the litigating attorneys and their affidavits. This evaluation includes my interpretation of Attorney Augustine's affidavit which I find expressed his opinion that an appropriate fee for Mr. Bond would be \$9,000.00 based on 45 hours reasonably expended on the claim at an hourly rate of \$200.00. I interpret this to have been his intent even though the actual figures were filled-in on the affidavit in the wrong blanks.

I find that I am not required to except all of the time that Attorney Bond claims he spent on the case but that I am only required to accept all of the time that is clearly and reasonably spent to secure the podiatrist and surgery authorization. In short I do not accept as believable Attorney Bond and Attorney Gumula's representation that 168.6 hours were reasonably required to obtain the agreed upon benefits. Of the conflicting opinions expressed I am more persuaded by the opinions as expressed by Attorney Turner under oath in his response affidavit and as further expounded upon during his direct testimony and cross-

examination of Mr. Bond at the attorney fee amount hearing. I find that forty-nine and seven-tenth (49.7) hours were reasonable and necessary to successfully prevail on the claim. I reject Mr. Bond and Gumula's positions as well as that of Attorney Augustine as not being the most persuasive in light of the record evidence as a whole. In doing so I do not find the fact that Mr. Turner spent over 101 hours in litigating the claims between 11/12/08 and 11/25/09 is dispositive of how much time was actually necessary to address the podiatrist and foot surgery issues only. As pointed out before, multiple petitions were filed seeking other benefits that are not the basis of this fee claim. In fact a total of eight (8) petitions for benefits had been filed on this claim between 08/16/07 and 07/13/10. I find that most of Mr. Bond's claimed hours were attributable to collateral matters and other claims that are not related to the benefits secured that this fee order is required to address.

I find that based on the nature of the issues, his experience and the nature of the matters for which he successfully handled the claim, the reasonable hourly rate in this case for Mr. Bond is \$225 per hour. In determining an appropriate hourly rate I have considered not only the experience and skill of the attorney involved but also the nature and complexity of the issues litigated and the prior fees awarded to Attorney Bond in this district as well as to other attorneys. Based on those considerations I do not find that Attorney Bond should be awarded in this case and on these facts an hourly rate at the higher end of the range that have been awarded in this geographical area nor the lower end. I find that the hourly rate assigned is appropriate in light of the totality of the evidence before me. In this regard I specifically reject Attorney Bond's position and argument that he should be awarded an hourly rate of between \$235 and \$275 per hour. I likewise reject Attorney Augustine's position and argument that Mr. Bond should be awarded an hourly rate of \$200.

Lastly, I reject as expressed in greater detail below the argument that Mr. Bond should be paid a guideline attorney fee.

In summary, after considering all the factors set forth in 440.34, *Florida Statutes*, along with the applicable case law and evidence presented, I find that a reasonable attorney's fee to be awarded and paid by the E/C for Attorney Bond's representation of Ms. Redding on this matter is \$11,182.50. In reaching this conclusion I find that awarding a fee based on the reasonable number of hours expended in securing the benefits is appropriate. Based on this date of loss I am not persuaded that under the Murray opinion, supra, a statutory guideline would be a presumptively preferred fee before further analysis could be had. However, even if it were a presumptive requirement I do not find that a guideline fee in this case would be reasonable.

In that I find it was reasonable and necessary for Mr. Bond to expend 49.7 hours in the prosecution of the claim I conclude that a guideline fee applied here would be manifestly unfair. I find that such a ruling would result in a fee of approximately \$20 per hour based on the monetary value of the benefits ultimately secured. I find that the time expended by Attorney Bond was very valuable and essential to his client; that his legal services if not provided would have likely resulted in the continued denial of Ms. Redding's' care with a podiatrist or the authorization of her surgery. I find that compensating Attorney Bond with only a guideline fee under the circumstance would most likely discourage him as well as other similarly situated attorneys from assuming the representation of clients with otherwise legitimate claims. That such a scenario may also lead to an added disincentive for some employer/carriers to provide a quick and efficient delivery of clearly compensable benefits to injured workers under the self-executing system that *Section 440.015* contemplates.

THE CLAIM FOR COSTS

In regard to the issue of costs, *Rules of Procedure for Workers' Compensation Adjudications*, Rule 60Q-6.6.124(3)(a) 6, provides that any motion for attorney's fees and costs shall be filed and shall include a detailed list of all taxable costs advanced or incurred.

Rule 60Q-6.6.124(3)(e) provides that the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions shall be considered by the judge in determining the reasonableness of an award of costs reimbursement. Moreover the decision of *Morris v Dollar Tree Store*, 869 So.2d 704 (Fla. St DCA 2004) holds that Section 440.34(3) permits the prevailing claimant to tax against the employer "the reasonable costs of such proceeding." The language contained within that *Morris v Dollar Tree Store* opinion appears to stand for the proposition that the employee can be made whole for all costs necessary to maintain the claim.

I have considered both authorities in evaluating this cost claim recognizing that the procedural rules governing the determination of costs were drafted and effectuated after the *Morris v Dollar Tree Store* decision, a decision that acknowledged a then existing deficiency in authority clearly addressing the parameters of reimbursable cost in workers' compensation proceedings. The amended procedural rules were in part designed to address that questionable clarity. The Statewide Uniform Guidelines for Taxation of Costs in Civil Actions provides that the taxation of costs in any particular proceeding is within the broad discretion of the trial court and that the court should exercise that discretion in a manner that is consistent with the policy of reducing the overall costs of litigation and of keeping such costs as low as justice will permit. I have taken all of those factors into consideration here.

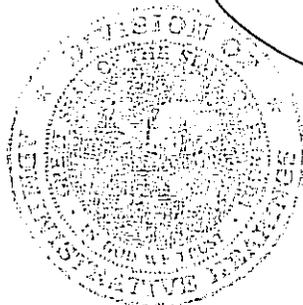
In considering the arguments advanced by counsel with respect to cost I find \$2,177.20 in costs to be reasonable and

reimbursable as cost necessary to successfully prosecute the claim. In reaching this conclusion I have rejected the E/C's argument that the taking of the adjuster, Shawn Hackleberg's deposition on 08/03/10 was not reasonable and necessary in the prosecution or advancement of the claim. I find that the requested foot surgery was not authorized as of the time the deposition was taken and that the discovery had by the claimant at that juncture in pursuing the benefit was reasonable and appropriate. In regard to the claim for costs associated with telephone conferences with certain physicians, the claimant conceded that the costs of the telephone conferences were not taxable under the uniform guidelines for taxation of costs. The claimant subsequently withdrew the requests for cost relating to the telephonic conferences with doctors Shea on 05/29/09, Talbert on 06/29/09 and Pascarella on 01/27/10. With the withdrawal of those cost requests, I have not considered them as reimbursable costs but have considered all the other costs claimed.

WHEREFORE, it is ORDERED AND ADJUDGED:

1. That the employer/carrier shall pay Attorney Douglas W. Bond a reasonable attorney's fee in the amount of \$11,182.50.
2. That the employer/carrier shall pay reasonable costs in the amount of \$2,177.20.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida.



A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

W. James Condry, II
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Judge of Compensation Claims entered the foregoing order. A true and accurate copy of the order was served on this the 30th day of November 2010 by e-mail on the parties' attorneys of record and on all other parties by US Mail.


Assistant to Judge of Compensation Claims