

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS  
FT. MYERS DISTRICT OFFICE**

John Whitmore, )  
 )  
Employee/Claimant, )  
 )  
vs. )  
 )  
FPL C/O Helmsman Management Services, )  
 )  
Employer, )  
 )  
and )  
 )  
Helmsman Management Services, Inc., )  
 )  
Carrier/Servicing Agent. )

OJCC Case No. 06-021810DFT  
APPELLATE CASE NO. 1D08-2620

Accident date: 8/1/1983

**ORDER ON CLAIMANT'S VERIFIED PETITION FOR APPELLATE  
ATTORNEY'S FEES AND COSTS**

This cause comes before the undersigned by the December 18, 2008 Order of the First District Court of Appeal relinquishing jurisdiction to the undersigned for a period of sixty (60) days from the date of the mandate for determination of the amount of appellate attorney's fees, due to the prevailing party. By that Order, the Claimant/Appellee ("Claimant") was required to file with the lower tribunal a Verified Petition to determine the amount of Appellate Attorney's Fees within fifteen (15) days from the date of the mandate. The mandate was dated January 6, 2009, and the Verified Petition for Attorney's Fees filed by Claimant for attorney's fees in the proceeding in the lower tribunal was filed on January 20, 2009 and averred anticipation of receipt of the mandate from the District Court of Appeal, but that it had not been received as of January 15, 2009. The Verified Motion for Appellate Fees was filed January 29, 2009. The E/C /Appellant ("E/C") responded to Claimant's Verified Motion for Appellate fees on February 4, 2009. The hearing on the Motion for Appellate fee was initially set for hearing to occur on February 17, 2009. On February 19, 2009, the First District Court of Appeals entered an Order extending the time period for relinquishment of jurisdiction to the lower tribunal to April 15, 2009. The hearing on the Appellate Attorney's Fees was then continued to April 9, 2009. On March 31, 2009 the E/C filed an Affidavit in support of their response to the Motion for Appellate Attorney's Fees. Counsel for the Claimant objected to the filing of the Affidavit at the hearing based on it not being timely filed. No ruling was made on that objection at the time of the motion hearing.

At the motion hearing the Claimant/ was represented by Alex Lancaster, and the E/C was represented by Allison Twombly. Both parties relied upon their Verified Pleadings. E/C did cross-examine the Claimant's attorney regarding his time entries and Claimant's attorney briefly questioned the E/C's counsel present at the hearing.

As the Order of the Court Granting Claimant's Motion for Appellant Attorney's Fees does state that in all other respects a Verified Response shall be prepared in the same manner as the Verified Petition,

a list of all exhibits to be offered in support of their opposition to the proposed fee award and copies of documents to be submitted as exhibits should have been attached to the Response to the Petition filed by the E/C. However, striking of the evidence is extremely harsh, and insufficient prejudice was shown to Claimant. Therefore, Claimant's objection to the Affidavit of John Gierach is overruled

The evidence at the hearing was as follows:

1. Claimant's Verified Motion for Appellate Attorney's Fees.
2. E/C's Response to Claimant's Verified Motion
3. Court File document-Notice of Fee Hearing
4. Court File document-1st DCA Order extending relinquishment of jurisdiction
5. Court File document-Order on Motion to Reset Attorney's Appellate Fee
6. Claimant's Verified Response to E/C's response.
7. E/C's Second Verified Response to Claimant's Verified Motion for Appellate Attorney's Fees and Costs
8. Court file document-E/C's Notice of Appeal dated 5/22/08
9. E/C's Notice of Filing and Affidavit of Attorney John Gierach

Although the Lee Engineering factors are not required to be applied in this matter, they were referenced in the verified pleadings and were generally considered by me in making my findings. In that regard it is found that positive factors in this case included, the time constraints imposed by the appellate court deadlines, the contingency of the fee, and the benefits to the Claimant at stake. The initial notice of appeal referenced generally the award of permanent total disability benefits which was a benefit of great value to Claimant. Although the Initial Brief then limited the issue on appeal to the issue of apportionment, had the E/C prevailed on appeal, Claimants benefits would have been significantly limited, so the value of benefits to Claimant at stake were significant. In addition, the fees are entirely contingent, and had E/C prevailed on appeal no appellate fee would have been due to Claimant's counsel.

A significant positive factor was the time and labor required and difficulty of the questions involved. Although E/C urges that this should be evaluated based on the time records of E/C's appellate counsel that is only one fact to be considered in that determination. Although it is apparent that Claimant's attorney did spend considerable time in researching and preparing his answer brief, there was insufficient evidence presented at the hearing to reduce the number of hours that he spent. His testimony regarding the process of preparing for the answer brief, and the additional research required due to the fact that it was an unusual though narrow issue requiring study and analysis of case law back to the 1983 statutes on the issues of apportionment and merger is accepted. In addition, his testimony regarding the fact that he did not have the computerized research capabilities is also accepted, and may mean that his research might have taken him longer than it took the E/C's attorneys. It is noted that this testimony may be more appropriately applied to a reduction in the hourly rate, than to the number of hours, as there is no meaningful way to quantify what the appropriate number of research hours should be when comparing computerized research to book research. There was no evidence presented as to whether or not the attorney who prepared the briefs for the E/C was a full time appellate attorney, or not. There was evidence that Claimant's attorney has handled over 100 appeals, but that he is not primarily an appellate lawyer. This is also to be taken into account in determining the appropriate amount of the hourly rate of the attorney's fees to be awarded to Claimant's counsel for the appellate work, but is not a reasonable basis for reducing the number of hours.

As to the appropriate number of hours E/C made notation on each time entry submitted by Claimant's counsel as either excessive, vague, redundant, unrelated, or some combination of the above. There was no explanation, reasonable or otherwise, made either in the Verified Response or at the motion hearing for some of these reductions. For example, the first time entry dated May 27, 2008, the E/C has

marked "excessive and vague" and has reduced the 3.75 hours claimed to zero (0), with no explanation. That time entry will not be reduced. The E/C did make a point of noting that the minimum time billing unit used by Claimant's attorney was a quarter hour, whereas many attorneys use a tenth of an hour billing increments. Claimant's attorney did acknowledge that four of the entries for a quarter of an hour really were strictly unit billing and probably did not take that much time. Accordingly, those four entries as testified to during the hearing will be reduced to a tenth of an hour as opposed to a quarter of an hour. E/C also questioned Claimant's counsel about the July 21, 2008 entry for 2.25 hours regarding receipt and review of the Order Forwarding Record on Appeal and preliminary review of record on appeal. E/C's Response avers that the appropriate time entry for that matter should have been .50 hours. Based on the testimony and evidence that entry is reduced to .50 hours. E/C also argues in their response that the undated last entry regarding preparation of attorney's fee documents pursuant to the 12/18/08 Order, awarding Appellate Fees should be reduced to zero (0), as not being due to Claimant's attorney for the appeal. That entry is stricken in its entirety. A review of the Verified Pleadings reveals that the time records of the E/C attorney may be incomplete. Mr. Lancaster's first time entry on May 27, 2008 is for review and receipt of the E/C's Notice of Appeal. However, the time records submitted by the E/C for its work on the appeal show no time entries prior to August 3, 2008. There was no explanation for this in either pleading filed by the E/C, or hearing. Based on the foregoing it is found that the appropriate number of hours for determination of the appellate attorney's fee for Claimant's counsel is 52.85 hours.

It is noted that although the affidavit of Mr. Gierach was received into evidence it was given limited weight as it contained little if any factual basis for the assertions set forth therein. It did not give any indication of the basis for his knowledge of appellate attorney's fees in workers' compensation matters, or any information as to his own experience in appellate practice. Although the undersigned is familiar with Mr. Gierach and his excellent reputation in proceedings before Judge's of Compensation Claims, I have no knowledge of his appellate experience and his affidavit does not address that. The affidavit also gives no explanation as to why the twenty (20) hours he recommends would be more reasonable and appropriate than the hours the defense attorney expended, or that the Claimant's attorney is claiming. However, it is noted that his testimony regarding \$200.00 per hour as being an appropriate hourly rate is consistent with many of the cases provided by both sides and is accepted.

Claimant's attorney has requested \$300.00 an hour for his appellate fee and E/C avers that the appropriate rate for appellate attorneys would be \$175.00 to \$200.00 per hour. Both parties submitted many cases of other appellate fees awarded in other cases. However, E/C's attorney cited two cases addressing the appropriate hourly rate for appellate attorney's fees in workers' compensation cases E/C's attorney asserted that the recent Childers case involved an appellate fee awarded to Claimant's counsel at \$225.00 per hour. The Childers case involved a relatively simple issue, but a matter of first impression, and great public importance, for which Mr. Lancaster also claimed 57.5 hours and a \$ 300.00 hourly rate. The Whitmore case involved may have involved more complex issues, and was based on 1983 law necessitating significant research; however I find that those factors go more to the appropriate number of hours than the amount of the hourly rate. Mr. Lancaster is not a full or part time appellate attorney, nor a board certified appellate or workers' compensation attorney. Based on these facts the skill and experience of the attorney is found to be a neutral factor in the Lee Engineering analysis. Based on the forgoing it is found that an appropriate appellate fee hourly rate for him in this case is \$200.00 per hour. Applying the reduction in hours as detailed above, the number of hours for the appellate attorney's fee determination is 52.85, resulting in an appellate fee of \$ 10, 570.00. It is found that the costs sought by Mr. Lancaster are sufficiently itemized and costs of \$ 113.70 are awarded for the appeal.

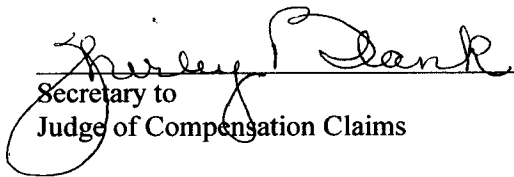
**DONE AND ORDERED** this 15 day of April, 2009, in Fort Myers, Lee County, Florida.



  
Kathy A. Sturgis  
Judge of Compensation Claims  
Division of Administrative Hearings  
Fort Myers District Office  
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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that the foregoing Order was entered and a true copy furnished by regular U.S. Mail to the above-named parties at their last known address, on this the 15 day of April, 2009.

  
Secretary to  
Judge of Compensation Claims

**HARD COPIES MAILED TO:**

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