

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

Ela Gonzalez,  
Employee/Claimant,

vs.

McDonalds/Amerisure Insurance,  
Employer/Carrier/Service Agent.

OJCC Case No. 12-005404MGK

Accident date: 12/6/2011

Judge: Margret G. Kerr

**EVIDENTIARY ORDER ON VERIFIED PETITION FOR ATTORNEY FEES**

**THIS MATTER** came before the undersigned Judge of Compensation Claims for an evidentiary hearing on September 9, 2014 based on Claimant's Verified Motion for Attorney Fees filed on July 7, 2013. Monica De Fera Cooper Esq., of the law offices of Richard Zaldivar P.A., appeared on behalf of the Claimant and Zal Linder Esq., appeared on behalf of the Employer/Carrier/Service Agent "E/C/SA". This Order ensues.

**EVIDENCE PRESENTED:**

**CLAIMANT:**

1. Verified Motion for Attorney Fees filed on 7/7/2013 (ID#101).
2. Uniform Pretrial Stipulation and Questionnaire approved 2/11/2013 (ID#43).

**E/C/SA:**

1. Verified Response to Claimant's Verified Petition for Attorney's Fees filed 7/8/2014 (ID#102).

**CLAIMS AND DEFENSES:**

a. Claims:

Claimant seeks an hourly fee of \$275.00 an hour and a total attorney's fee of \$20,625.00.

b. Defenses:

Claimant is entitled to a statutory fee of \$139.44 based on total benefits secured of \$ 697.18.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

1. Attorney Cooper and attorney Linder testified live before the undersigned.
2. The claimant bears the burden of proving (1) entitlement to attorney's fees and (2) the quantum of same.
3. Any and all issues regarding attorney's fees and costs either raised in the Verified petition and not considered at hearing, or not raised before the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant and, therefore, are denied and dismissed with prejudice.
4. The Claimant, through her attorney, filed a Petition for Benefits on 9/24/2012 seeking an adjustment in the average weekly wage and temporary disability benefits. The E/C/SA responded on 10/1/2012 that the average weekly wage was correct and no temporary disability benefits were owed.
5. The matter then proceeded to Final Hearing before the undersigned on 5/13/2013.
6. On 5/23/2013 the Final Merits Order was entered awarding temporary partial disability benefits from the date of accident until 2/14/2012, for any weeks where her earnings were less than 80% of her pre-injury wage plus penalties and interest. The E/C/SA thereafter paid the Claimant \$697.18 including penalties and interest.
7. On 10/17/2013 the Claimant filed a Petition for Benefits seeking a follow up appointment with Dr. Jay Stein and transportation to that appointment. The E/C/SA did not respond to the petition, but on 1/9/2014 agreed to schedule the appointment and provide transportation.
8. I find that the Claimant is the prevailing party on the issues of provision of temporary disability benefits with penalties and interest as well as an appointment with Dr. Jay Stein, and is therefore entitled to attorney's fees and costs for securing these benefits.
9. On 7/7/2014, the Claimant filed a verified Motion for Attorney Fees and Costs. The Motion alleged that a total of 75 hours were spent by various attorneys at the law firm of Richard Zaldivar P.A. securing the above benefits with a total value of \$982.02.
10. The time sheets of the various attorneys who worked on the file were attached to the motion as Exhibit "A" and support Claimant's assertion of 75 hours spent securing benefits.
11. While the motion referenced entitlement to taxable costs, no evidence as to the

amount of costs was provided either with the motion or at the hearing. I therefore conclude that the claim for costs is waived.

12. The motion further argued that a statutory fee of \$196.40 on the benefits secured resulted in the attorneys who worked on the case being awarded fees at an hourly rate of \$2.62.

13. In their Verified Response, filed on 7/8/2014, the E/C/SA stipulated to fee entitlement of the temporary disability benefits awarded under the Final Merits Order, which were paid in the amount of \$697.18, but did not address the Claimant's allegation of fee entitlement for obtaining the appointment with Dr. Stein and transportation to the appointment.

14. Rule 60Q-6.124(3) requires that E/C/SA counsel have filed a response to the Verified Petition within thirty (30) days. The E/C/SA clearly filed a response timely. However, for reasons explained below, same is wholly insufficient in light of the explicit requirements contained in Rule 60Q-6.124(3). The E/C/SA did not timely seek an extension in which to file a more specific response. See, Rule 60Q-6.115(5). Without same, it is appropriate to deem the allegations raised in the Verified Petition to be admitted and wholly accepted. See Rule 60Q-6.124(3).

15. A verified petition is competent evidence upon which the trier of fact may rely to support adjudication. Accordingly, those facts and the ultimate conclusions stated in the Verified Petition are expressly incorporated herein by reference into this Order. They are adopted as the undersigned's findings of fact herein.

16. As the E/C/SA did not challenge the Claimant's time entries in their response to the motion, and objection to the reasonableness of the entries is waived.

17. The E/C/SA argues that there is no basis for the award of an hourly fee based the Claimant's date of accident, and that he is entitled to a statutory fee only.

18. Section 440.34(3)(a) & (b), Fla. Stat. (2009), provides that

"A claimant is responsible for the payment of her or his own attorney's fees, **except that a claimant is entitled to recover an attorney's fee in an amount equal to the amount provided for in subsection (1) or subsection (7) from a carrier or employer:**

(a) Against whom she or he successfully asserts a petition for medical benefits only, if the claimant has not filed or is not entitled to file at such time a claim for disability, permanent impairment, wage-loss, or death benefits, arising out of the same accident;

(b) In any case in which the employer or carrier files a response to petition denying benefits with the Office of the Judges of

Compensation Claims and the injured person has employed an attorney in the successful prosecution of the petition." (*Emphasis added*).

19. The Claimant argues that section 440.34(1), Florida Statutes (1990) does not allow for an award of adequate fees. He therefore seeks an hourly rate for his attorney's fee, rather than the statutory percentage fee under §440.34(1). The fee sought is \$20,625.00 based on a total of 75 hours claimed expended on representing the Claimant at \$275.00 per hour.

20. Section 440.34(1), Fla. Stat. (2009), provides that

"A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved by the judge of compensation claims or court having jurisdiction over such proceedings. Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant **must equal** to 20 percent of the first \$5,000 of the amount of the benefits secured, 15 percent of the next \$5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years. **The judge of compensation claims shall not approve a compensation order, a joint stipulation for lump-sum settlement, a stipulation or agreement between a claimant and his or her attorney, or any other agreement related to benefits under this chapter which provides for an attorney's fee in excess of the amount permitted by this section.**" (*Emphasis added*).

21. Attorney Cooper testified that she has practiced in the workers compensation field for twelve years. Attorney Coopers further testified that 75 hours were spent litigating this case, including taking the depositions of the parties, medical experts and attending mediation and final hearing. The Claimant, through the efforts of his attorneys, ultimately prevailed at Final Hearing and was awarded temporary disability benefits plus penalties and interest. He then requested to return to the authorized physician, Dr. Jay Stein, and filed a petition for benefits to which the E/C/SA did not respond. Only in January 2014 did the E/C/SA agree to provide the follow up appointment and transportation as requested by the Claimant the previous October.

22. Attorney Cooper testified that the value of the appointment with Dr. Stein and transportation combined with the value of the temporary disability benefits and penalties and

interest is \$982.02. This testimony is uncontroverted.

23. I find that the 75 hours expended by the attorneys at the law firm of Richard Zaldivar P.A., in litigating this case to Final Hearing and thereafter in obtaining the appointment with Dr. Stein and transportation were reasonable.

24. Attorney Cooper testified that she has been awarded \$275.00 per hour in Miami-Dade. An hourly fee of \$275.00 per hour for 75 hours would result in an attorney fee of \$20,625.00.

25. A statutory fee on the benefits secured in this case is \$196.40, which is equal to an attorney fee of \$2.62 per hour.

26. Throughout the litigation of this claim, both counsel vigorously represented the interests of their clients.

27. I find that without the aid and assistance of counsel, the Claimant in this case would not have received the benefits which were ultimately awarded and secured for her.

28. Section 440.34(1), Florida Statutes (2009) and subsequent case law provides the undersigned with authority to award only a statutory percentage fee of \$196.40 and I have no authority to deviate from the statutory requirements.

Based on the foregoing, it is hereby:

**ORDERED AND ADJUDGED THAT:**

1. The E/C/SA shall pay to Richard Zaldivar P.A., a statutory fee of \$196.40 in full and complete satisfaction of any and all attorneys fee obligations incurred to date.

Done and Ordered in chambers in Miami, Miami-Dade County, Florida this 11<sup>th</sup> day of September, 2014.

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Margret G. Kerr  
Judge of Compensation Claims

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