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IN THE SUPREME COURT OF FLORIDA

Orestes Ferrer,
Claimant/Petitioner,

vs.

Case No.: SC15-818
Lower Tribunal No.(s):
1D14-5178; 11-002409MAM

Truly Nolen of America, Inc., and
Broadspire Services, f/k/a/, Crawford & Company,

Employer/Servicing Agent/Respondents.

APPENDIX TO
RESPONDENT'S RESPONSE TO THIS COURT'S
ORDER TO SHOW CAUSE

Exhibit 1. Order of the Judge of Compensation Claims, pages1-6

Exhibit 2. Verified Motion for Attorney's Fees and Costs/ Motion For Stay of Proceedings or Reservation of Ruling/Request For Hearing, pages 1-14

Exhibit 3- Employer/Servicing Agent's Verified Response to Claimant's Verified Motion For Attorney's Fees And Costs/And Objection to Motion For Stay of Proceedings or Reservation of Ruling, pages 1-13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that the foregoing Appendix was sent, via electronic mail on this 13th day of July, 2016 to: Paul Rosenberg, Attorney for the Petitioner/Employee/Claimant, 2501 Hollywood Blvd., Ste. 110, Hollywood, Fl 33020-6631, prosenberg@rrpalaw.com, Kimberly A. Hill, Co-Counsel for the Petitioner/Employee/Claimant, 821 S.E. 7th Street, Ft. Lauderdale, FL 33301, kimberlyhillappellatelaw@gmail.com.

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

Orestes J. Ferrer,
Employee/Claimant,

vs.

Truly Nolan of America Inc./Crawford and Company,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 11-002409MAM

Accident date: 12/8/2010

Judge: Mark Massey

FINAL EVIDENTIARY ORDER ON ATTORNEY'S FEES AND COSTS

This cause came for hearing before the undersigned Judge of Compensation Claims on 9/30/14. Present and representing the claimant was Matthew Sosonkin, Esquire. Present and representing E/C was Janet Greene, Esquire. The subject of the hearing was claimant's Verified Petition for Attorney's Fees and Costs filed 5/19/14.

The following items were marked into evidence. The letter "D" in parentheses followed by a number refers to the OJCC docket number.

JOINT EXHIBITS

1. Deposition of Patricia Remp with attachments (D-139, 140)

CLAIMANT'S EXHIBITS

1. Verified Petition for Attorney's Fees and Costs with attachments (D-119)
2. Defense time sheets (D-150)

EMPLOYER/CARRIER'S EXHIBITS

1. Verified Response to Verified Petition with attachments (D-121)
2. Letter to Dr. Wender with Dr. Wender's response (D- 149) (objection overruled)
3. Case law as cited in E/C's Memo of Law and Fact, for argument only (D-141)

JUDICIAL NOTICE

E/C requested that I take judicial notice of the OJCC docket. There was no objection from claimant. Therefore I hereby take judicial notice of the docket and all filings therein.

EXHIBIT "J"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The essential facts of the case are largely undisputed. Claimant was involved in a compensable accident on 12/8/10. He has been represented by his current counsel's law firm since about 1/19/11. As a result of petitions for benefits filed 1/27/11 and 2/17/11 claimant's counsel was successful in securing a one-time change of physician. That issue was resolved on or about 5/12/11. At that time E/C paid to claimant's counsel, and counsel accepted, an attorney fee in the amount of $1500.00. This was characterized as a one-time "medical only" fee pursuant to section 440.34(3)(a) and (7), Fla. Stat. (Supp. 2010).

On or about 9/9/11 carrier denied further treatment with Dr. Wender, based on the doctor's response to a "major contributing cause" inquiry letter. On 5/15/12 and 9/24/12 claimant's counsel filed petitions for benefits for authorization of further treatment with Dr. Wender. Litigation ensued and included depositions, physician conferences and mediation. The matter was set for hearing on 12/19/12. On 11/28/12, however, carrier rescinded its denial and agreed to provide continued treatment. They also stipulated that claimant's counsel was entitled to attorney's fees and costs for securing said treatment, and reserved on the amount.

The parties stipulate and agree that the monetary value of the benefits secured is $675.12, on which a statutory guideline fee would be $135.02.

On 2/20/14, counsel for E/C filed an amended motion to compel the filing of a verified petition for attorney's fees and costs, seeking resolution of the fee and cost issues associated with the 5/15/12 and 9/24/12 petitions, and the 11/28/12 agreement. More than 15 days elapsed and no response or objection was filed by claimant's counsel. Therefore on 3/13/14 the undersigned entered an order compelling claimant's counsel to file a verified petition within 45 days, or by 4/27/14. Claimant's counsel subsequently requested an extension of time, which was granted by order dated 5/1/14.

The verified petition was filed on 5/19/14. The verified response was filed 6/6/14, and the matter was set for hearing on 9/30/14. Claimant's counsel requested a "stay" or reservation on ruling, essentially asking that the matter be held in abeyance pending a Supreme Court decision in the *Castellanos* case (SC13-2082). That request was denied by order dated 6/11/14.

At the outset of this hearing, claimant's counsel made an *ore tenus* motion for continuance, in essence asking again that the matter be held in abeyance until a ruling is issued in *Castellanos*. That motion was denied for the reasons explained on the record at the hearing.

Counsel for claimant asserts that his firm spent approximately 35 hours prosecuting the claim, which means that the guideline fee of $135.02 equates to about $3.86 per hour. Counsel for claimant acknowledges that the current statutory scheme limits fees to the guideline percentage, but nevertheless asserts that a reasonable hourly fee should be awarded because the guideline fee is so extremely unreasonable. Absent a finding that the statute is unconstitutional,

however, claimant's counsel concedes that there is no viable basis on which I would be authorized to award an hourly fee. Further, claimant's counsel acknowledges that as a JCC, I have no jurisdiction or authority to rule on constitutional issues. Nevertheless, claimant's counsel was given the opportunity to create a record in support of a potential constitutional challenge, or a potential appeal pending the outcome of *Castellanos.*

Claimant's counsel also sought to establish what an hourly fee would be, if an hourly fee were ultimately allowed in this case, compared to the guideline fee. Although I am constrained to award only a guideline fee, the following is the analysis I would use, if an hourly fee were permitted in this case.

As noted, claimant's counsel testified that his firm spent about 35 hours prosecuting the claim. E/C objected to some of the hours but agreed that 29.20 hours would be reasonable for purposes of an hourly fee.

E/C's objections as to the time entries on 7/16, 8/3, 10/3, and 10/29 are sustained on the basis that these appear to be duplicate entries. The objection as to the 10/25 entry (review file, prepare motion for advance) is sustained on the basis that there is no indication the motion for advance was actually filed, and if it was, it had nothing to do with the medical issue at hand or with the benefit obtained. The remainder of the objections are overruled.

(Prior to this hearing, there was an issue as to whether defense counsel should be required to produce her time records. I reluctantly ordered the time records to be produced pursuant to *Anderson Columbia v Brown,* 902 So. 2d 838 (Fla. 1st DCA 2005). However, I find them to be of little relevance, as comparing defense time to claimant time is like comparing apples to oranges. *HCA Health Services v Hillman,* 870 So. 2d 104 (Fla. 2d DCA 2003); *Mangel v Bob Dance Dodge,* 739 So. 2d 720 (Fla. 5th DCA 1999). Therefore, while I have allowed the records into evidence to allow claimant's counsel to make a record for appeal purposes, I find that they have no bearing on a determination of the reasonableness of the hours claimed by claimant's counsel, and have not given them any significant weight one way or the other).

In sum, I find that 32.8 hours would be considered reasonable for purposes of an hourly fee. I further find, however, that claimant presented no competent substantial evidence of what the applicable hourly rate(s) would be, and therefore it is not possible, based on this record, to determine what an hourly fee would be in this case, even if it were to ultimately be allowed.

Initially, I note that the verified petition is somewhat confusing and internally inconsistent. Although it is "sworn to" by Matthew Sosonkin, it contains what appear to be first-person statements by Paul Rosenberg. Therefore, as observed by E/C in their response, it is difficult to tell who is attesting to what. (For example, the introduction states that Paul Rosenberg is appearing, but paragraph 1 immediately after that states that Matthew Sosonkin is appearing. Throughout most of the petition "the undersigned" appears to refer to Mr. Sosonkin, but then on page 5, when addressing experience and reputation, "the undersigned" is used to refer to Mr. Rosenberg).

Adding to the confusion is the assertion on page 4 of the verified petition that "The undersigned [apparently Mr. Sosonkin] . . . seeks that median $375.00 per hour" yet, on page 3 (and at the hearing) Mr. Sosonkin asserts that in his opinion, a reasonable fee would be $14,000.00 based on 35 hours at $400.00 per hour.

The time sheets attached to the petition are also confusing if not misleading. All of the time entries contain the initials "PSR" which refers to Paul Rosenberg. However, claimant's counsel admitted at hearing that much of the work was actually performed by attorneys other than Paul Rosenberg, who is described as the "senior partner." Initially, Mr. Sosonkin only offered testimony as to the hourly rate that Mr. Rosenberg would be entitled to, and only upon questioning from the court did he state that the hourly rates for the other attorneys who worked on the file would be $325.00 and $275.00. However, because all of the time is attributed to Paul Rosenberg, rather than to the attorney(s) who actually performed the work, it is simply not possible, on this record, to accurately calculate an hourly fee, because it is not possible to determine which rate should apply to which task.[1]

The importance of accurate time sheets when considering hourly fees is well established. *Gerogia-Pacific Corp. v DeLoach,* 603 So. 2d 702 (Fla. 1st DCA 1992); *Marion County Sch. Bd.v Griffin,* 667 So. 2d 358 (Fla. 1st DCA 1995); *Barr v Pantry Pride,* 518 So. 2d 1309 (Fla. 1st DCA 1987). Further, clearly designating which attorney performed which task is a very important detail because this can have a significant effect on either the hourly rate or on the hours claimed. *Miller v JFK Memorial Hospital,* 624 So. 2d 322 (Fla. 1st DCA 1993) (relative inexperience of counsel may justify either a reduction in hours or a reduction in the hourly rate); *Feinberg v Miami-Dade County,* 788 So. 2d 417 (while there was some testimony as to the hourly rate for "lead" attorney, there was no testimony, and therefore no evidentiary basis, to determine the hourly rates for other attorneys who worked on the file).

I find that claimant's counsel has not produced competent substantial evidence of the amount of an hourly fee in this case, because it is not possible to tell who actually performed the work, and therefore it is not possible to determine what hourly rate(s) should apply. I find that the verified petition and attached time sheets are confusing and misleading, and do not constitute competent substantial evidence as required for claimant's burden of proof, even if an hourly fee were applicable to this case.

As an aside, I make no finding as to whether claimant's counsel could have represented (or continued representing) claimant if some other attorney had previously collected the $1500.00 medical only fee. I also make no finding as to whether the fee statute in general would have prevented this claimant, or any claimant, from securing counsel to represent them.

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[1] There might be some who would consider this (attributing all the time to the senior partner and demanding a senior partner rate for work the senior partner did not perform) as an attempt to artificially inflate the amount of the fee beyond that which is justified. There might also be some who would see this as an example of the type of practice which ultimately led to the demise of hourly fees because of the perception it created. However, I pass no judgment on these matters, as it is not necessary to a determination of the issues herein.

Although claimant's counsel made some conclusory allegations along these lines, no actual statistical or economic evidence was presented to provide an evidentiary basis for such a conclusion.

As a further aside, I do not find it necessary to address the *Lee Engineering* factors cited in the verified petition, other than to say that if those factors were to be considered, I would agree that an upward departure from the guideline would be warranted based on the time spent. *Davis v Bon Secours-Maria Manor,* 892 So. 2d 516 (Fla. 1st DCA 2004); *Rivers v SCA Services of Fla.,* 488 So. 2d 873 (Fla. 1st DCA 1986). Again, however, those factors and those cases do not apply to this date of accident under the law as it currently stands, and even if they did, there is no way I could accurately and fairly apply them based on the information and testimony presented, as discussed above.

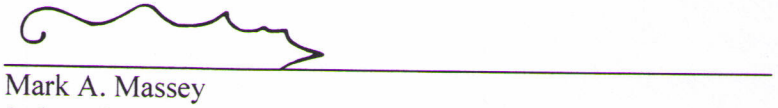
COSTS

Claimant claims a total of $517.73 in taxable costs. E/C agree that $267.73 of that sum is properly taxable. However, E/C object to the $250.00 cost for a second conference with Dr. Wender, on the grounds that it was unnecessary or duplicative. Given the fact that Dr. Wender apparently kept going back and forth with his opinion on major contributing cause, I find that it was not unreasonable for claimant's counsel to have the second conference prior to the deposition of Dr. Wender, to see if there had been any additional changes in his opinion. Therefore I find that this cost is properly taxable. *Martin v Code Enforcement, City of Jacksonville,* 122 So. 3d 438 (Fla. 1st DCA 2013).

WHEREFORE it is hereby ORDERED AND ADJUDGED as follows:

1. E/C shall pay to claimant's counsel a guideline fee in the amount of $135.02.
2. Claimant's claim for an hourly fee is DENIED on the grounds that (a) hourly fees are not permitted under the statute applicable to this date of accident; and (b) claimant failed to present competent, substantial evidence as to the amount of an hourly fee in any event.
3. E/C shall reimburse claimant's counsel in the amount of $517.73 in taxable costs.

DONE AND ORDERED this 8th day of October, 2014, in Miami, Dade County, Florida.



Mark A. Massey
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I HEREBY CERTIFY that the foregoing order

was posted to the DOAH website

www.jcc.state.fl.us

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
MIAMI-DADE DISTRICT

OJCC NO.: 11-002409HHH
D/ACCIDENT: 12/8/2010
JUDGE: Mark A. Massey

Orestes J. Ferrer,

Employee/Claimant,

vs.

Truly Nolen of America, Inc. and
Crawford & Company,

Employer/Carrier.

VERIFIED MOTION FOR ATTORNEY'S FEES AND COSTS/
MOTION FOR STAY OF PROCEEDINGS OR RESERVATION OF RULING/
REQUEST FOR HEARING

BEFORE ME, the undersigned authority, personally appeared Paul S. Rosenberg, Esq., who after first being duly cautioned and sworn deposes and says:

1. My name is Matthew D. Sosonkin. My occupation is attorney at law. I have engaged in the practice of law in the State of Florida primarily in the practice of Workers' Compensation Law and personal injury litigation for over 14 years. Along with myself, this claim was prosecuted by a senior partner from my office, Paul S. Rosenberg, who has significant experience prosecuting workers' compensation claims as a seasoned and experienced litigator.

2. My firm commenced representation of the claimant in the above-captioned matter on or about January 19, 2011 with respect to back, knee, and head injuries suffered December 8, 2010 while employed by Truly Nolan of America, Inc., in Miami, Miami-Dade County, Florida. My firm has continued representation of Mr. Ferrer through the present time.

EXHIBIT "2"

Filed May 19, 2014 4:48 PM ET Office of the Judges of Compensation Claims.

3. This Verified Motion is being filed pursuant to a March 13, 2014 Order granting the E/SA's Second Amended Motion to Compel Verified Petition.

4. With respect to benefits secured, I filed a Petition for Benefits on May 15, 2012 seeking an update appointment with authorized orthopedist Dr. Stephen Wender. The E/SA filed a Response on May 21, 2012 denying future medical care.

5. I subsequently filed a Petition for Benefits on September 19, 2012 seeking authorization, provision, and scheduling of return/follow up visit with Dr. Wender for evaluation and treatment. The E/SA responded on September 24, 2012, by again denying the request for a follow up visit with authorized treating physician Dr. Wender.

6. Following the E/SA's denials of follow up medical care, State Mediation and a Final Hearing were scheduled for September 6, 2012 and December 19, 2012 respectively.

7. The September 6, 2012 State Mediation resulted in an impasse, necessitating preparation for Final Hearing. As a result, my firm attended the depositions of the Claimant on September 19, 2012 and Dr. Stephen Wender on November 27, 2012.

8. On November 28, 2012, less than a month prior to Final Hearing, the E/SA rescinded its denial of medical benefits, agreed to schedule a follow up visit with Dr. Wender, and stipulated to my entitlement to carrier paid attorney's fees.

9. As a result of the E/SA's stipulation, the sole issue is the amount of the E/SA paid fees and costs.

10. Under the current statutory scheme, my attorney's fee is limited to a percentage of the benefits secured on behalf of the Claimant. In the instant case, the attorney's fee would amount to 20% of the value of the follow up visits with Dr. Wender/prescription medications, irrespective of the amount of time spent securing said benefits.

11. After the carrier rescinded its denial, the Claimant attended two visits with Dr. Wender,

and received prescription medications. The value of these medical benefits total $675.12.

12. Accordingly, the value of my attorney's fee under the current statutory scheme is $135.02. In addition, I am entitled to reimbursement of costs in the amount of $517.73. (See attached Exhibit "1", Cost Ledger)

13. In order to secure follow up medical care for the Claimant, my firm expended approximately 35 hours of attorney time. (See attached Exhibit "2", Time Ledger)

14. The statutory fee of $135.02 amounts to an hourly rate of $3.86 per hour. Clearly a $3.86 hourly rate does not amount to a reasonable attorney fee.

15. Based on the foregoing, it is the opinion of the undersigned that a reasonable attorney's fee to be awarded would be the sum of $14,000.00 (35 hours at $400 per hour) plus costs expended in the amount of $517.73. This fee is pursuant to F.S 440.34(3) defined as reasonable and interpreted by the criteria and factors set forth *Emma Murray v. Mariner Health*, 994 So.2d 1051 (Fla. 2008) and *Lee Engineering & Construction Company v. Fellow*, 209 So.2d 454 (Fla. 1968) as follows:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly:

The employer/carrier asserted a total denial of benefits this claim after initially providing benefits. The undersigned continued representation of the claimant in the face of this denial, and ultimately secured authorization of medical care and treatment. Due to the nature and complexity of the claim, the time and labor was extensive and difficult. The level of skill required to secure benefits in a previously denied claim is undeniable. *Due to the circumstances of this claim, undersigned considers this a positive element for approval of the time expended and applicable hourly rate.*

(b) The fee customarily charged in the locality for similar services:

For this date of accident, fees are based on a statutory formula set forth in Florida Statuts section 440.34. As noted above, this results in an unreasonable fee of $3.76 per hour. For a reasonable attorney fee, the starting point for a fee amount determination is the hours expended coupled with the customary hourly rate. Pursuant to recent workers' compensation orders on attorney fees from across the state, the undersigned counsel attests that a reasonable and customary fee for these services, within the past 30 days in the Tri-County area (Miami-Dade, Broward, and Palm Beach; 02/26/2013 through 03/28/2013) has ranged from $325 to $425 per hour. JCCs from across the Tri-County area have awarded a median $375.00 per hour. The undersigned, in this complex and hard fought claim, seeks that median asserting $375.00 per hour to be reasonable in the prosecution of this claim; clearly, the evidence supports a proper range of $325 to $425 per hour. Moreover, given that legal costs have escalated at a far greater rate than the general rate of inflation, the First DCA has long upheld the payment of attorney's fees in excess of the above range. Even litigation involving relatively common benefits secured for the claimant well over 15 years ago supported an award of attorney's fees at a rate of $350. See *Spiker's All Amer. Custom Access v. Spiker)*, 647 So.2d 201 (Fla. 1st DCA 1994). *The undersigned considers this a strongly positive factor for approval of the time expended and applicable hourly rate.*

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

This case involved the securing of benefits following a total controvert by the employer/carrier. As set forth above, my firm secured all of the Claimant's medical care and treatment following the employer/carrier's denial. This amounts to over $650.00 in benefits. *The undersigned considers this a positive factor for approval of the time expended and applicable hourly rate.*

(d) The time limitation imposed by the claimant or the circumstances:

The employer/carrier wrongfully denied the Claimant medical care and treatment on multiple

occasions. The actions of the employer/carrier caused delays in medical care and treatment. This took a toll on the Claimant both mentally and physically. Totally controverted cases necessarily involved the strictest of time limitations, as even the tiniest delays cause the Claimant to endure pain and disability without appropriate medical treatment. *The undersigned counsel considers this a strong positive factor for approval of the time expended and applicable hourly rate.*

(e) The experience, reputation, and abilities of the attorneys performing the services:

The undersigned counsel has been practicing worker's compensation law in the State of Florida since 1989. I have successfully represented thousands of Claimants before Judges of Compensation Claims throughout the state. The efforts of counsel and the Law Offices of Rosenberg & Rosenberg, PA were instrumental in obtaining a positive result for the Claimant throughout the course of this claim. Mr. Sosonkin, a senior litigation associate in this firm, has fourteen years of experience as an attorney, and has practiced in both the defense and prosecution of worker's compensation claims, as well as in medical malpractice and personal injury claims. All counsel have extensive litigation experience in the workers' compensation arena. *The undersigned considers this as a positive factor for approval of the time expended and applicable hourly rate.*

(f) The contingency or certainty of the fee:

The fee was a totally contingent, and no fee would have been awarded related to the benefits secured which are at issue for the purposes of this pleading, if the Claimant was not successful in the claims asserted. The undersigned considers this a strongly positive factor, as under the law for this date of accident, the undersigned was wagering his firms time (and over $500.00 in expenses) against a successful result. Under *Murray* an hourly fee is now due for the time expended securing these benefits. Unlike the attorneys that represent the employers and insurance carriers, the undersigned firm has no assurances of being paid. In fact, had the undersigned not prevailed and obtained benefits for the Claimant, the fee would be zero and costs lost. The E/C could have and,

under the law, should have, never wrongfully denied care. Had they acted properly and provided the benefits due, exposure to legal fees and costs would be mitigated or, possibly, not due at all. They made no efforts to mitigate that exposure to legal fees and costs. In fact, the E/C waited until weeks before the Final Hearing to rescind its total controvert. *The undersigned considers this as a strong positive factor for approval of the time expended and applicable hourly rate.*

16. This motion is filed pursuant to rules of procedure for Workers' Compensation Adjudication 60Q-6.124 (3) and was served on the E/C by electronic means, accordingly, the Employer/Carrier is permitted thirty (30) days within which to respond to this motion. Failure to file any objections timely shall be deemed to be an acceptance of the above stated allegations as true.

17. This Verified Petition is being provided for use at the hearing on attorney's fees. Counsel for the Employer/Carrier has previously been contacted in an effort to resolve the disputed fees and, to date, said matter remains unresolved.

18. The total amount of reasonable attorney's fees and costs claimed for which the Employer/Carrier is responsible is $14,517.73.

19. While the current statutory scheme does not provide for a reasonable fee in workers' compensation claims, the constitutionality of the statutory limitation on attorney's fees is currently before the Supreme Court of Florida.

20. On March 14, 2014, the day after an Order was entered in the instant claim granting the E/SA's Second Amended Motion to Compel Verified Petition, the Supreme Court of Florida accepted jurisdiction of the case Castellanos v. Next Door Company, et al.

21. Depending on the outcome in Castellanos, the undersigned law firm may be significantly prejudiced if required to proceed on this Verified Motion for Attorney's Fees and costs under the current statutory scheme.

22. The undersigned law firm therefore seeks a stay of proceedings or a reservation of ruling

with respect to this Verified Motion for Attorney's Fees and Costs, pending an outcome in Castellanos, in order to avoid an unjust result in the determination of the amount of attorney's fees due.

FURTHER AFFIANT SAYETH NOT.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by electronic service, on May ~~12~~ 15, 2014 to: Janet M. Greene, Esq. , JG3910@msn.com and e-filed to Judge of Compensation Claims.

ROSENBERG & ROSENBERG, P.A.
Counsel for Claimant
2501 Hollywood Blvd., Suite 110
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(954)963-0443/624-6649

BY: _____
MATTHEW D. SOSONKIN, ESQ.
Florida Bar No.: 0132357
msosonkin@rrpalaw.com

[mds].F

STATE OF FLORIDA

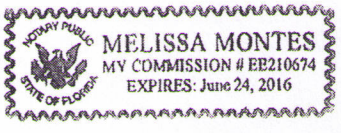
COUNTY OF BROWARD

Before me personally appeared Matthew D. Sosonkin, Esq., who is personally known to me and acknowledged to and before me that he/she executed said instrument for the purpose therein expressed.

WITNESS my hand of official seal, this 19 day of May, 2014.

NOTARY PUBLIC
STATE OF FLORIDA AT LARGE

My Commission Expires:



Time Sheet

FERRER, Orestes v. Truly Nolen
Date Range: 5/6/2012 - 12/13/2012
Status: Pending/Released/Transfered/Exception

Date	Attorney	Hrs	Recorder Timekeep	Amount
05/08/2012	PSR	.20	Telephone conference with Cl	$50.00
05/08/2012	PSR	1.20	Review file; Prep Petition for Benefits and Req for Production	$300.00
05/08/2012	PSR	.40	Telephone conference with CL re: status	$100.00
05/25/2012	PSR	.20	Receipt and Review of E/SA Response to PFB	$50.00
05/25/2012	PSR	.30	Conference with CL re: Response to PFB	$75.00
06/04/2012	PSR	.20	Telephone conference with OC re: Response	$50.00
06/04/2012	PSR	.50	Rev. file; Prep ltr to Dr. Wender	$125.00
06/05/2012	PSR	.40	Telephone conference with Cl re: Petition and status	$100.00
06/09/2012	PSR	.30	Telephone conference with Cl	$75.00
06/19/2012	PSR	.20	Telephone conference with OC	$50.00
07/03/2012	PSR	.30	Telephone call to mediator	$75.00
07/03/2012	PSR	.50	Rev. file; Prep Mediation ltr to Cl	$125.00
07/03/2012	PSR	.60	Rev. file; Pre R/Production	$150.00
07/16/2012	PSR	.40	Rev. file; Prep mediation ltr to CL	$100.00
07/20/2012	PSR	.30	Telephone call to Cl	$75.00
08/02/2012	PSR	.60	Review file; Prep Motion to Compel	$150.00
08/03/2012	PSR	.20	Telephone call with OC	$50.00
08/03/2012	PSR	.30	Telephone call with Cl	$75.00
08/03/2012	PSR	.50	Rev. file; Prep ltr to Cl re: mediation	$125.00
08/03/2012	PSR	.10	Receipt and Review Not. of Mediation.	$25.00
08/03/2012	PSR	.10	Rev. file; Fax Transmittal to OC	$25.00
08/30/2012	PSR	.40	Telephone call with CL re: mediation and issues in claim.	$100.00
08/30/2012	PSR	.60	Telephone conference with Cl	$150.00
08/30/2012	PSR	.00		$0.00

Exhibit "2"
PAGE 10

Time Sheet

FERRER, Orestes v. Truly Nolen
Date Range: 5/6/2012 - 12/13/2012
Status: Pending/Released/Transfered/Exception

Date	Attorney	Hrs	Recorder Timekeep	Amount
09/06/2012	PSR	1.00	Prep for and attendance at mediation	$250.00
09/06/2012	PSR	.10	Rev. file; Fax Transmittal to Dr. Wender	$25.00
09/07/2012	PSR	.30	Prep depo letter to CL	$75.00
09/10/2012	PSR	.20	Receipt and review Notice of Taking Depo	$50.00
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09/12/2012	PSR	.30	Prep Ltr to Dr. Wender	$75.00
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09/14/2012	PSR	.60	Rev. File, Prep Petition for Benefits	$150.00
09/17/2012	PSR	1.00	Rev. file; Prepare Pretrial Stipulation	$250.00
09/17/2012	PSR	.30	Prepare ltr to oc re: Pretrial	$75.00
09/19/2012	PSR	1.80	Prep for and attendance at deposition of Cl	$450.00
09/25/2012	PSR	.30	Prep ltr to JCC re: Pretrial	$75.00
09/26/2012	PSR	.20	Receipt and review of E/SA Response to RFP	$50.00
09/26/2012	PSR	.30	Telephone call with Cl	$75.00
09/27/2012	PSR	.50	Rev. file; Prep Response to R/Production	$125.00
10/03/2012	PSR	.30	Receipt and review of Request for Production	$75.00
10/10/2012	PSR	.60	Rev. file; PrepN/Deposition of Adj	$150.00
10/12/2012	PSR	.40	Rev. file; Prep Re-Notice of Taking Adj Depo	$100.00
10/16/2012	PSR	.50	Prep for and attendance at hearing	$125.00
10/24/2012	PSR	.10	Left message for OC	$25.00
10/25/2012	PSR	.30	Rev. file, Prep ltr to opposing counsel	$75.00
10/25/2012	PSR	.60	Rev. file; Prep Motion for Advance	$150.00

Time Sheet

FERRER, Orestes v. Truly Nolen
Date Range: 5/6/2012 - 12/13/2012
Status: Pending/Released/Transfered/Exception

Date	Attorney	Hrs	Recorder Timekeep	Amount
10/29/2012	PSR	.40	Rev. file; Prep Response to R/Production	$100.00
10/29/2012	PSR	.30	Rev. file; Prep ltr re: Records of Dr. Wender	$75.00
10/29/2012	PSR	.50	Rev. file; Prep Motion to Admit Medical Records	$125.00
10/29/2012	PSR	.60	Rev. file; Prep Amendment to Pretrial	$150.00
10/30/2012	PSR	.00		$0.00
10/30/2012	PSR	.20	Rev. file; Prep Mediation ltr to Cl	$50.00
11/02/2012	PSR	.40	Rev. file; Prep ltr. to CL re: case status	$100.00
11/06/2012	PSR	.30	Receipt and review of E/SA' M/Strike	$75.00
11/08/2012	PSR	.60	Rev file; prep Cl's Response to M/Strike and Objection	$150.00
11/08/2012	PSR	.30	Receipt and review of E/SA's Objection	$75.00
11/08/2012	PSR	.60	Rev. file; Prep Cl's Response to M/Deny Admissibility	$150.00
11/08/2012	PSR	.30	Rev. file; Prep N/Deposition	$75.00
11/09/2012	PSR	.20	Receipt and review JCC order	$50.00
11/12/2012	PSR	.40	Receipt and review of Request for Clarification	$100.00
11/13/2012	PSR	.20	Receipt and review of Order denying request for clarification	$50.00
11/16/2012	PSR	.80	Receipt and review of Cl's depo transcript	$200.00
11/19/2012	PSR	.30	Rev. file; Prep ltr to client	$75.00
11/19/2012	PSR	.30	Rev. file; Ltr to Mediator	$75.00
11/21/2012	PSR	.60	Rev. file; Prep Petition for Benefits	$150.00
11/21/2012	PSR	.40	Rev. file; Prep ltr to Dr. Wender	$100.00
11/26/2012	PSR	1.40	Prep for and attendance at conference with Dr. Wender	$350.00
11/26/2012	PSR	.30	Rev. file; dictate memo to file	$75.00
11/27/2012	PSR	2.50	Prep for and attendance at deposition of Dr. Wender	$625.00
11/28/2012	PSR	.70	Telephone conference with Cl	$175.00

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

EMPLOYEE/CLAIMANT:
Orestes J. Ferrer
17630 N.W. 73rd Ave., Apt. 100
Hialeah, FL 33015

EMPLOYER:
Truly Nolen of America, Inc.
3636 E. Speedway Blvd.
Tucson, AZ 85716

D/A: 12/8/2010

OJCC#: 11-002409MAM

SERVICING AGENT:
Crawford & Company
2301 Lucian Way, Ste. 360
Maitland, FL 32751

Mathew Sissonkin, Esq., Counsel for the Claimant, Rosenberg & Rosenberg, 2501 Hollywood Blvd. Ste. 110, Hollywood, FL 33010. 954-963-0444

Janet M. Greene, Esq., Counsel for the Employer/Servicing Agent, 3225 S. MacDill Ave., Ste. 129-308, Tampa, FL 33629. 813-831-9448

EMPLOYER/SERVICING AGENT'S VERIFIED RESPONSE TO CLAIMANT'S VERIFIED MOTION FOR ATTORNEY'S FEES AND COSTS/ AND OBJECTION TO MOTION FOR STAY OF PROCEEDINGS OR RESERVATION OF RULING

Comes now Janet M. Greene, counsel for the Employer/Servicing Agent (hereinafter "E/SA"), who states that the following Verified Response to Claimant's Verified Motion for Attorney's Fees and Costs and Objection to the Motion for a Stay of Proceedings or Reservation of Ruling is true and correct to the best of her knowledge and belief.

1. The only outstanding issue in this claim is the request for attorney fees and costs related to a petition for benefits filed on May 12, 2012 which the E/SA denied and later rescinded the denial. This petition involved a return visit to Dr. Wender, the authorized treating physician.

EXHIBIT "3"

Filed June 5, 2014 5:17 PM ET Office of the Judges of Compensation Claims.

The denial was based on a report, a conference with Dr. Wender and a subsequent letter from him in which he said that the claimant was at MMI as of August 21, 2011, with a 0% PPI and that his current complaints were unrelated to the industrial injury.

2. It was not until 3 months after the PFB was filed, that the claimant's attorney had a conference with Dr. Wender in which he changed his opinion stating that he had not had the benefit of a review of the MRI films which had been taken by unauthorized medical providers. It was then, September 19, 2012, that the claimant's attorney filed another PFB with a letter from Dr. Wender attached.

3. The E/SA then set the deposition of Dr. Wender to clarify the two conflicting opinions. Upon learning that Dr. Wender still felt that he needed to see the unauthorized medical reports, the E/SA rescinded its denial and provided the claimant with two more appointments with Dr. Wender, after which another conference was held in which Dr. Wender stated that his original MMI of August 21,2011 had been correct, that the claimant was at MMI with a 0% PPI and that his complaints were no longer related to his industrial injury

4. As stated in the Claimant's verified petition, and under the current statutory scheme, the attorney's fee is limited to a percentage of the benefits secured. Here, that equals 20% of $675.12, or $135.02.

5. As further stated by the Claimant, the law in effect which governs the attorney fee entitlement of the claimant's attorney limits the fee to the percentages outlined in F.S. 440.34. See: McCoy v. US Pipeline/Liberty Mutual Insurance OJCC Case No. 10-030124JJL, May 27, 2014.

6. The issue of attorneys fee is ripe for adjudication and has been presented to this court for determination. As stated by the Claimant in his verified petition, paragraph 9, "as a result of the

E/SA's stipulation, the sole issue is the amount of the E/SA paid fees and costs."

7. The issue of the pending Florida Supreme Court case of Castellanos v. Next Door Company, SC13-2082, on the attorney's fee issue is not relevant to the issue before the Court. It is speculative to base a determination on the ripe issue before this Court on what the Supreme Court may or may not do, and as said before, is irrelevant to the issue presented for determination.

8. However, in an excess of caution, and without admitting that there is any basis for an hourly fee as alleged by the claimant, the E/SA respond to the verified petition as follows:

Paragraph 1- There is internal conflict between the name of the person allegedly giving the verified petition, Paul S. Rosenberg and the signatory, Matthew Sisonkin, the person to whom the hours on the time sheet are attributed, and statements made throughout the Motion upon which it is difficult to determine who is swearing to the assertion.

Paragraph 2 - The E/SA agrees that the Rosenberg firm has represented Mr. Ferrer throughout these proceedings.

Paragraph 3- The E/SA agrees that the Verified Petition was filed pursuant to a Court Order.

Paragraph 4- The E/SA agrees that the Petition for Benefits at issue here was filed on May 15, 2012 and denied by the E/SA on May 21, 2012. As stated before, the denial was based on the report of Dr. Wender finding the claimant at MMI with a 0% PPI and that the current complaints were not causally related to the industrial injury.

Paragraph 5- According to the Claimant's time sheet, after the denial, he waited until September 9, 2012, over three months later, to conference with Dr. Wender, after which he filed the PFB on September 19, 2012, which repeated the claim made in the May 15, 2012 PFB but

added a letter from Dr. Wender. The E/SA responded again denying the PFB with the added reason that Dr. Wender's letter was not based on competent substantial evidence as the reports upon which he based his opinion were inadmissible.

Paragraph 6- The letter from Dr. Wender attached to the PFB of September 19, 2012 was inadmissible hearsay and based on inadmissible medical records, however, the Claimant made no attempt to set Dr. Wender for deposition and it was not until November 27, 2012 that the E/SA was able to depose Dr. Wender.

Paragraph 7- The September 6, 2012 State Mediation resulted in an impasse as the only evidence which the E/SA had was that of Dr. Wender from May, 2012. It was not until September 9, 2012 that O/C conferenced with Dr. Wender resulting in the changed opinion.

Paragraph 8- November 28, 2012, was the day after the E/SA deposed Dr. Wender in which his changed opinion was recorded and the E/SA immediately rescinded its denial and set up appointments with Dr. Wender for the Claimant and acknowledged that O/C was entitled to a fee for obtaining the return appointment.

Paragraph 9- The E/SA agrees that the sole issue here is the amount of E/SA paid attorneys fees and costs, based on the statute in effect, F.S. 440.34.

Paragraph 10- The E/SA agrees with the statement in paragraph 10, that the attorney's fee is limited to a percentage of the benefits secured on behalf of the Claimant.

Paragraph 11- The E/SA agrees that the value of the benefits obtained totaled $675.12.

Paragraph 12- The E/SA agrees that the fee to which O/C is entitled is $135.02. The E/SA submits that O/C is entitled to costs of $267.73 but objects to the $250.00 cost for a second conference with Dr. Wender.

Paragraph 13- The E/SA submits that the hours claimed by O/C are irrelevant to the issue

here as the fee entitlement is solely based on the statutory scheme of F.S. 440.34. The E/SA has, however, chosen to refute many of the hours listed by the Claimant as evidenced by the attached annotated Time Ledger.

Paragraph 14- The E/SA agrees that under the relevant statutory scheme, the statutory fee amounts to an hourly rate of $3.86 per hour. The E/SA also notes that all worker's compensation cases taken by claimant's counsel are contingency fees and the attorney takes the risk that he may not be compensated as he wishes.

Paragraph 15- The hourly rate set forth by the Claimant is not applicable to the case at bar and neither the Murray case nor Lee Engineering are to be used in determining a fee. However, without conceding application of the factors in Lee Engineeering the E/SA responds as follows:

a. Time and Labor required. This was not a difficult case. Once the E/SA denied the claim based on Dr. Wender's report, O/C waited over three months to conference with Dr. Wender and, in the meantime, between May 15, 2012 and his conference of September 9, 2012, only filed multiple requests to produce for documents which had previously been produced. This is a negative element.

b. Fee customarily charged in the locality. The Fee changed in the South Florida locality is irrelevant to the issue before this Court as the fee here is to be determined solely on the statutory percentage scheme. Additionally, O/C has submitted no proof of the fees alleged. This is neither a positive nor negative factor as it is not applicable here.

c. The Amount in controversy. The amount is controversy is that upon which the statutory formula is based, and as conceded by the Claimant, is $675.12. Additionally, the E/SA submits that at the time the PFB was filed in May, 2012, the only medical evidence available was

that of Dr. Wender in which he stated that the Claimant was at MMI with a 0% :PPI and the current complaints were unrelated to the industrial accident. Upon receipt of the denial, O/C made no attempt to conference with or depose Dr. Wender as to his opinions. This is a negative factor.

d. The time limitations. Any time limitations were those self-imposed by the Claimant's attorney. It is worthy of note, that the Claimant has never missed a day at work, had no entitlement to indemnity benefits, and continues to work for the employer today. This is a negative factor.

e. The experience, etc of the attorneys. There were four attorneys in the Rosenberg office involved at one time or another in this claim. But, on the submitted time sheet, all hours are attributed to PSR, Paul Rosenberg, which is not possible. The E/SA believes that this is a negative factor..

f. The contingency of a fee. As stated before, all fees for the Claimant in workers compensation claims are contingent upon obtaining benefits for the client. It is a risk the attorney's take. Here, it was the counsel for the Claimant who waited over three months to conference with Dr. Wender as to his opinions, and after presenting unauthorized medical records to Dr. Wender, received a changed opinion. The day after the E/SA was able to depose Dr. Wender, the denial was rescinded and appointments provided. This is a negative factor.

Paragraph 16- The E/SA is responding to the Claimants Verified Petition with this Verified Response within the permitted 30 days.

Paragraph 17- Although many discussions were held to resolve this matter, the parties were unable to reach an agreement. Consequently, both the Claimant's Verified Petition and the E/SA's Verified Response are provided for use in the hearing on attorney's fees.

Paragraph 18- The E/SA disputes the fee and costs set forth by the Claimant as not applicable here, and states that the statutory fee entitlement is $135.02 and costs of $267.73.

Paragraph 19 - The case before the Supreme Court is still in the briefing stage and it is speculative as to the outcome and, it has no bearing on the case before the Court where the issues are complete and ripe for adjudication.

Paragraph 20 - As stated above, the Castellanos case is irrelevant as the issues before this Court are ripe for adjudication.

Paragraph 21 -Even if the Castellanos case were applicable and relevant here, there is no guarantee that its outcome would be retroactive as the current fee schedule is substantive, not procedural.

Paragraph 22 -The E/SA objects to any stay in the proceedings here as there is no basis to avoid ruling on an issue which has been properly presented and which is ripe for adjudication. The Florida Courts have held "[this court] will continue to consider the JCC's failure to rule reversible error based on the JCC's noncompliance with the duty to adjudicate all issues that are ripe for adjudication". Betancourt v. Sears Robuck, 693 So.2d 680 (Fla. 1st DCA 1997), citing to Dunn Lumber v. Roy, 382 So.2d 51 (Fla. 1st DCA 1980; on motion for clarification, April, 1980 ("The judge of industrial claims had a duty to adjudicate the issue of appellee's entitlement to temporary disability benefits since it was properly presented and ripe for disposition"); See also, Saddlebrook Resorts v. Heath, 686 So.2d 667 (Fla. 1st DCA 1996)(the JCC erred in withholding adjudication on her claim....because the claim was then ripe for adjudication).

FURTHER AFFIANT SAITH NAUGHT.

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me personally appeared Janet M. Greene, Esq. who is personally known to me and acknowledged to and before me that she executed said foregoing instrument for the purpose therein expressed.

WITNESS my hand and official seal, this 5th day of June, 2014.

Taffy Sanders
Notary Public
State of Florida at Large.

My Commission expires:

TAFFY SANDERS
Notary Public - State of Florida
My Comm. Expires Oct 17, 2016
Commission # EE 844584

CERTIFICATE OF SERVICE

This is to certify that a copy of the above E/SA's Verified Response to Claimant's Verified Motion for Attorney's Fees and Costs and Objection to Motion for Stay of Proceedings or reservation of Ruling was e-filed on the 5th day of June, 2014.

Janet M. Greene

Janet M. Greene, Esq.
Counsel for the Employer/Servicing Agent
3225 S. Mac Dill Avenue
Suite 129-308
Tampa, FL 33629
813-831-9448
FL Bar #: 0748552

Time Sheet

05/19/2014

FERRER, Orestes v. Truly Nolen
Date Range: 5/6/2012 - 12/13/2012
Status: Pending/Released/Transfered/Exception

$25.00/10 MINUTES = $150.00/HR

Date	Attorney	Hrs	Recorder Timekeep		Amount
05/08/2012	PSR	.20	Telephone conference with Cl		$50.00
05/08/2012	PSR	1.20	Review file; Prep Petition for Benefits and Req for Production		$300.00
05/08/2012	PSR	.40	Telephone conference with CL re: status	EXCESSIVE IN ONE DAY	$100.00
05/25/2012	PSR	.20	Receipt and Review of E/SA Response to PFB		$50.00
05/25/2012	PSR	.30	Conference with CL re: Response to PFB		$75.00
06/04/2012	PSR	.20	Telephone conference with OC re: Response		$50.00
06/04/2012	PSR	.50	Rev. file; Prep ltr to Dr. Wender		$125.00
06/05/2012	PSR	.40	Telephone conference with Cl re: Petition and status		$100.00
06/09/2012	PSR	.30	Telephone conference with Cl		$75.00
06/19/2012	PSR	.20	Telephone conference with OC		$50.00
07/03/2012	PSR	.30	Telephone call to mediator		$75.00
07/03/2012	PSR	.50	Rev. file; Prep Mediation ltr to Cl	EXCESSIVE	$125.00
07/03/2012	PSR	.60	Rev. file; Pre R/Production		$150.00
07/16/2012	PSR	.40	Rev. file; Prep mediation ltr to CL	DUPLICATE	$100.00
07/20/2012	PSR	.30	Telephone call to Cl		$75.00
08/02/2012	PSR	.60	Review file; Prep Motion to Compel		$150.00
08/03/2012	PSR	.20	Telephone call with OC		$50.00
08/03/2012	PSR	.30	Telephone call with Cl		$75.00
08/03/2012	PSR	.50	Rev. file; Prep ltr to Cl re: mediation	DUPLICATE	$125.00
08/03/2012	PSR	.10	Receipt and Review Not. of Mediation.		$25.00
08/03/2012	PSR	.10	Rev. file; Fax Transmittal to OC		$25.00
08/30/2012	PSR	.40	Telephone call with CL re: mediation and issues in claim.		$100.00
08/30/2012	PSR	.60	Telephone conference with Cl	EXCESSIVE	$150.00
08/30/2012	PSR	.00			$0.00

Exhibit "7"

Time Sheet

05/19/2014

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09/27/2012	PSR	.50	Rev. file; Prep Response to R/Production		$125.00
10/03/2012	PSR	.30	Receipt and review of Request for Production	DUPLICATE	$75.00
10/10/2012	PSR	.60	Rev. file; PrepN/Deposition of Adj	NOT TAKEN	$150.00
10/12/2012	PSR	.40	Rev. file; Prep Re-Notice of Taking Adj Depo	NOT TAKEN	$100.00
10/16/2012	PSR	.50	Prep for and attendance at hearing		$125.00
10/24/2012	PSR	.10	Left message for OC	~~[illegible]~~	$25.00
10/25/2012	PSR	.30	Rev. file, Prep ltr to opposing counsel		$75.00
10/25/2012	PSR	.60	Rev. file; Prep Motion for Advance	NOT FILED	$150.00

Time Sheet

05/19/2014

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11/19/2012	PSR	.30	Rev. file; Ltr to Mediator	NOT DONE	$75.00
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