STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
ST. PETERSBURG DISTRICT OFFICE

Kimberly Fox,
Employee/Claimant,

vs.

Sarasota County School Board/Commercial Risk Management, Inc.,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 17-018538EBG

Accident date: 04/24/2012, 08/30/2017, 03/23/2018, 11/19/2020

Judge: Erik B. Grindal

ORDER DENYING STIPULATION ON FEES AND COSTS AND ORDER TO SHOW CAUSE WHY BRADLEY G. SMITH, ESQUIRE, AND BEN H. CRISTAL, ESQUIRE, SHOULD NOT BE SANCTIONED

THIS CAUSE came on for hearing before the undersigned Judge of Compensation Claims on July 27, 2023, and September 12, 2023, for adjudication of the parties' Motion for Approval of Stipulation on Fees and Costs, filed June 23, 2023 (DN 193).

Ben H. Cristal, Esquire, appeared on behalf of the employer/carrier at both hearings. Nicolette E. Tsambis, Esquire, appeared on behalf of the claimant for the hearing on July 27, 2023. Bradley G. Smith, Esquire, appeared on behalf of the claimant for the hearing on September 12, 2023.

RELEVANT PROCEDURAL HISTORY

On June 23, 2023, at 10:40 am, Mr. Cristal filed the parties' Motion for Approval of Attorney's Fee and Allocation of Child Support Arrearage for Settlement Under Section 440.20(11)(c),(d),&,(e), Florida Statutes (DN 191). This motion reflected a settlement of $114,900.00, from which claimant's counsel sought approval of an attorney's fee in the amount of $12,240.00. The Order approving the attorney's fee and child support allocation was entered later that day at 3:11 pm. Receipt of the Order was acknowledged through e-service by Mr. Cristal at 3:13 pm and Mr. Smith at 3:21 pm.

At 4:15 pm, Mr. Cristal filed a motion for approval of the parties' Stipulation on Fees and Costs (Side Stipulation) (DN 193). The Side Stipulation reflected an agreement between the parties that Mr. Smith was entitled to receive a carrier-paid attorney's fee in the amount of $60,308.72 and reimbursement of $24,691.28 in taxable costs.

On June 26, 2023, the undersigned issued a Notice of Deficiency (DN 194). The deficiency notice stated: "*Please provide time records of Claimant's counsel.*" Concurrent with the request for claimant counsel's time records, the undersigned directed that a hearing be set to address the reasonableness of the attorney's fee and costs sought in the Side Stipulation. It was further directed that both the claims adjuster and the claimant be present at hearing and prepared to testify.

On June 30, 2023, Mr. Smith filed his *"Time Delineation for Attorneys' Fees (As Related to Stipulation on Fees and Costs Filed 6/23/23)*" (DN 195). This document was verified and signed by Mr. Smith.

On July 5, 2023, an evidentiary hearing was scheduled to take place on July 27, 2023. On July 27, 2023, a hearing was conducted and recorded via Zoom. Present at the hearing were Ms. Tsambis, Mr. Cristal, Kimberly Fox, and the adjuster, Cheryl Challenger. Mr. Smith did not appear for the hearing.

Upon commencement of the July 27, 2023, hearing, the undersigned identified the Judge's exhibits (JCC exhibits). The following exhibits were identified at that time: JCC-1, Petition for Benefits, filed August 2, 2017 (DN 1); JCC-2, Response to Petition for Benefits, filed August 10, 2017 (DN 6); JCC-3, Petition for Benefits, filed August 31, 2022 (DN 102); JCC-4, Response to Petition for Benefits, filed September 9, 2022 (DN 104); JCC-5, Motion for Approval of Attorney's Fees & Allocation of Child Support Arrearage, filed June 23, 2023 (DN 191); JCC-6, Settlement Order, entered June 23, 2023 (DN 192); JCC-7, Stipulation on Fees and Costs, filed June 23, 2023 (DN 193); and JCC-8, Verified Time Delineation for Attorney's Fees (as related to Stipulation on Fees and Costs), filed June 30, 2023 (DN 195).

The claimant and employer/carrier stated that they did not have any objections to the JCC exhibits. Thereafter, the parties were asked whether there was an objection to the undersigned taking judicial notice of the documents on the docket. Both the claimant and employer/carrier verbalized that there was no objection to doing so. Judicial notice was taken of the documents filed on the docket in OJCC case number 17-018538, pursuant to Section 90.202(6), Florida Statutes.

The employer/carrier and the claimant were afforded the opportunity to offer additional exhibits at this hearing and declined.

Following identification of the exhibits to be considered, the parties were given the opportunity to make a presentation before the undersigned identifying the questions raised by, and, relative to, the Side Stipulation (JCC-7). The parties requested that the undersigned identify the questions prior to their presentation of evidence.

The following questions/issues were identified at that time:

1. The stipulation reflects that there is attorney fee entitlement for Petitions for Benefits filed August 2, 2017, August 31, 2022, and February 22, 2022. The August 2, 2017, Petition for Benefits requested authorization of pain management with Dr. Diaz. The carrier responded to the Petition for Benefits within eight days, agreeing to provide pain management. The first question was why is there attorney fee entitlement from this Petition for Benefits?

2. The August 31, 2022, Petition for Benefits sought authorization of a follow-up appointment with the treating doctor for the claimant's knee and right shoulder. The employer/carrier responded to the Petition for Benefits within ten days, agreeing to provide the benefits sought. The second question was why is there attorney fee entitlement from this Petition for Benefits?

3. The Side Stipulation states that there is attorney fee entitlement for a Petition for Benefits, filed February 22, 2022, seeking a follow-up appointment with Dr. Moustoukas. The docket does not reflect that a Petition for Benefits was filed that date. The third question was why is there attorney fee entitlement from the carrier from this Petition for Benefits?

4. The motion for approval of the settlement attorney's fees was filed without the Side Stipulation and did not disclose that there was a Side Stipulation yet to be filed. After the Order approving the attorney's fees from the settlement was entered, the Side Stipulation was filed. Why was the Side Stipulation filed after the approval of the washout? Why was the box on the attorney fee data sheet giving notice that a side stipulation would be filed not checked? Was the filing of the Side Stipulation after Order approving the washout intentional?

5. There are questions regarding the time expended, as some of it appears contrary to the docket. For example, on December 1, 2017, there was a six-hour billing for preparation and attendance at mediation. However, a Notice of Resolution was filed at 10:45 am; prior to the 1:00 mediation. Why is there a six-hour billing for attending a mediation that did not occur?

6. There is a billing entry on December 14, 2017, for one and a half hours for preparation and attendance at a Pretrial Conference, after the referenced notice of resolution was filed. Please explain

why this billing took place.

7. At regular intervals there are billing entries for two and a half hours or one and a half hours for "*preparation for and attendance at telephone conference with claimant*." Examples of these billing entries occurred on: June 14, 2016, December 28, 2016, June 12, 2017, October 17, 2017, August 3, 2018, July 29, 2019, July 2, 2020, August 27, 2020, October 5, 2020, December 21, 2020, March 29, 2021, November 16, 2021**,** February 22, 2022, and September 14, 2022. Did these events occur, and how are they related to the benefit's secured?

8. There is billing throughout June 2015, when Mr. Smith was out of the country. Ms. Tsambis stated at hearing that she and Mr. Smith were married on Memorial Day 2015 and went on their honeymoon for 10 days in June 2015. There being no ten-day billing break in June 2015, were these activities performed?

9. These time records represent what appear to be duplicative entries: May 4, 2021, 0.5, Records request to Kennedy White; May 26, 2021, 0.5, Records request to Kennedy White; December 30, 2021, 0.5, Records request to Kennedy White; January 21, 2022, 0.6, receipt and review of records from Kennedy White; and February 22, 2022, 0.5, Records request to Kennedy White. Please explain whether these are duplicative.

10. On August 25, 2022, there is 1.5 hours billed for review of 147 pages of records from Dr. Moustoukas. Also on August 25, 2022, there is an entry representing an additional 1.4 hours for review of 129 pages of records from Dr. Moustoukas. Then on September 7, 2022, there is a billing entry of 1.2 hours for 107 pages of records from Dr. Moustoukas. As there only appears to have been three office visits with Dr. Moustoukas, please explain these entries.

11. On March 30, 2022, there is a 3.5-hour billing entry for the deposition of the claimant. However, the description of the time expended was for 2.5 hours. Please explain whether this billing entry is accurate.

12. On September 14, 2022, there is a 3.5-hour billing entry for the deposition of Dr. Satia, but the time description says the deposition lasted 42 minutes. The deposition was done by an associate and not Mr. Smith, as represented. There is also a 2.5-

hour entry on September 14, 2022, for preparation and a telephone conference with the claimant. Was 6 hours actually expended on that date?

13. On October 11, 2022, there are two 0.4 billing entries for receipt and review of the same employer/carrier motion to substitute private mediation for mandatory mediation. Is this accurate?

14. On January 12, 2023, there are 2.5 hours for preparation and attendance at pretrial conference, but there was not a hearing on that day.

15. With regard to the costs alleged, please explain why there is so much billing for copies. Additionally, there is billing for scanning documents. I do not understand why scanning is a taxable cost or why there are so many charges for internal copies. Please explain.

16. Why is the Side Stipulation not a sham, as there does not appear to be colorable attorney fee entitlement from the employer/carrier?

Following identification of the issues referenced above, the claimant's counsel requested a continuance to prepare a response. The continuance was granted and a hearing was coordinated to take place on September 12, 2023.

At 4:51 pm, on September 11, 2023, claimant's counsel filed a seven-page document titled Claimant's Memorandum in Support of Joint Stipulation for Fees/Costs Regarding Response to JCC's Inquires (C-1, DN 202) (Memorandum). The 9:30 am hearing scheduled the next day, on September 12, 2023, was conducted and recorded via Zoom.

On November 2, 2023, Mr. Smith filed a Notice of Filing Supplemental Exhibits Relating to Stipulation on Fees and Costs and Courtesy Request for Status of Court's Entry of Order Regarding Same (DN 203). The exhibit attached to the Notice of Filing contained an August 21, 2017, letter form Mr. Cristal to Mr. Smith. The letter is accepted into evidence as exhibit C-2.

This Order ensues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In making my findings of fact and conclusions of law, I have carefully considered and weighed all of the evidence presented to me. Although I will not cite or summarize in explicit detail each witness' testimony and may not refer to each piece of documentary

evidence, I have attempted to resolve all conflicts in the testimony and evidence. I have reviewed every record and all documentary evidence admitted into evidence. I have referenced in this Order what I consider to be the most relevant testimony and evidence. Any objections raised neither previously ruled upon, nor ruled upon in this Order, are hereby overruled.

I find that venue is proper in Sarasota County, Florida.

JURISDICTION

Pursuant to Section 440.34(1) Florida Statutes, 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. Section 440.29(1) Florida Statutes, states:

> *In making an investigation or inquiry or conducting a hearing, the judge of compensation claims shall not be bound by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct such hearing, in such manner as to best ascertain the rights of the parties.*

In *Delgado v. City Concrete Systems*, 220 So. 3d 539 (Fla. 1st DCA 2017), the court held:

> *Thus, the JCC here had both the authority and the obligation to review the attorney fee stipulation and to approve or disapprove the agreed-upon fee. See Luces v. Red Ventures, 140 So.3d 999, 999–1000 (Fla. 1st DCA 2014) (affirming JCC's disapproval of stipulated attorney's fee based on JCC's finding that evidence did not support purported statutory basis for fee, but reversing JCC's award of disapproved fee amount directly to claimant as improper reformation of contract).*

In *Luces v. Red Ventures*, the court upheld the denial of the parties' stipulation regarding attorney's fees when the stipulation lacked a meaningful legal or factual basis.

I find that I have jurisdiction over the parties and the subject matter of this dispute.

Motion for Approval of Attorney's Fees and Allocation of Child Support Arrearage for Settlement under Section 440.20(11)(c), (d), &, (e)

The parties' Motion for Approval of Attorney's Fees and Allocation of Child Support Arrearage for Settlement under Section 440.20(11)(c), (d), &, (e) was filed by counsel/counsel's paralegal on June 23, 2023, at 10:40 am (JCC-5). The motion represented that the total amount of the settlement was $114,900.00. The motion

sought approval of statutory attorney's fee of $12,240.00. Paragraph three of the motion states "*The claimant's net settlement after fees and costs will be $102,660.00*."

Pertinent to the issues here is paragraph 9 of the Attorney Fee Data Sheet, filed with the Motion for Approval of Attorney's Fees and Child Support Allocation. Paragraph 9 of the Attorney Fee Data Sheet states:

> *9. Check here if an attorney fee requiring submission of form AFDS-WOA is being sought in this case.*

Paragraph 9 was not checked. Below paragraph 9, the Attorney Fee Data Sheet submitted states:

> *By submitting this document, the attorney attests each entry is accurate and consistent with applicable instructions, to the best of his or her knowledge, information, and belief.*

Mr. Smith's signature is immediately below this statement.

There was no information provided with the Motion for Approval of Attorney's Fees and Allocation of Child Support Arrearage providing notice to this tribunal of any additional attorney's fees or costs to be paid to claimant's counsel.

The undersigned entered the Order approving the motion for approval of attorney's fees and allocation of child support at 3:11 pm on June 23, 2023 (JCC-6). The Order was served electronically on Mr. Cristal, Mr. Smith, and Commercial Risk Management. The Order is now final. Pertinent to the issue here is paragraph 3 of the Order, which states: "*The attorney's fee shall not be subject to modification*."[1]

Stipulation on Fees and Costs

The Side Stipulation was filed on June 23, 2023, at 4:14 pm (JCC-7). The body of the stipulation states as follows:

> *COMES NOW the Employer/Servicing Agent and the claimant, by and through their undersigned attorneys, hereby stipulate to Employer/Servicing Agent paid fees and costs as follows:*
>
> *1. That workers' compensation benefits were secured on behalf of the claimant to include, but not limited to:*

[1] *See* Section 440.20(11)(c), Florida Statutes*, "Any order entered by a judge of compensation claims approving the attorney's fees as set out in the settlement under this subsection is not considered to be an award and is not subject to modification or review."*

a. *Authorization of pain management concerning the 4/24/2012 accident as contained in the 8/2/2017 Petition for Benefits (PFB).*

b. *Authorization of a return appointment with the claimant's orthopedic knee surgeon concerning the 3/23/18 accident as contained in the 8/31/2022 PFB.*

c. *Authorization of a return appointment to Dr. Moustoukas for the right hand/wrist injury concerning the 11/19/2020 accident as contained in the 2/22/2022 PFB.*

2. *That pursuant to Fla. Stat. § 440.34 (2003), the parties agree that Bradley G. Smith, Esq. is entitled to a reasonable fee and taxable costs for helping to secure the aforementioned benefits following the filing of the aforementioned Petition for Benefits. Further, the Employer/Servicing Agent acknowledges that the aforementioned benefit was not timely provided within 30 days of the filing of a Petition for Benefits entitling claimant's counsel to Employer/Servicing Agent paid fees and taxable costs.*

3. *That, specifically, the Employer/Servicing Agent agrees to pay and Bradley G. Smith, Esq., agrees to accept, the total sum of $85,000.00 representing the total amount due for fees and taxable costs for all issues and benefits secured from the date of the subject accident through the date an Order is entered approving this agreement. The breakdown is as follows:*

    a. Attorney Fees: $60,308.72
    b. Taxable Costs: $24,691.28

4. *That upon execution of this agreement by the parties, all outstanding entitlement to attorney fees and taxable costs will hereby be extinguished with prejudice.*

5. *That approval of this agreement is contingent upon approval of the attorney fee application in connection with an overall settlement of this claim being submitted to this Court simultaneously. Furthermore, it is agreed by the parties that any admissions or assertions contained in this document are not admissible for any other purpose other than for the request to this Court for an Order to be entered to approve this agreement.*

6. Pursuant to the Rules, the claimant's counsel certified that the claimant has been provided with notice of the payment of this fee.

7. That if this agreement is not approved in its entirety then no party shall be binding on either Party.

8. That the parties shall have 30 days from the date and Order is entered approving this agreement within which to comply with its terms.

WHEREFORE, the parties respectfully request this Court to enter an Order approving this Stipulation in the same form in which it is being submitted.

This stipulation affirmatively represented to this tribunal that Mr. Smith secured workers' compensation benefits on behalf of the claimant and was being paid an attorney's fee of $60,308.72 and was being reimbursed $24,691.28 for taxable costs.

The stipulation affirmatively represented to this tribunal that Mr. Smith was entitled to an employer/carrier-paid attorneys' fees and reimbursement of taxable costs pursuant to section 440.34.

This entitlement was affirmatively represented to be based on Mr. Smith securing benefits for the claimant through Petitions for Benefits filed: on August 2, 2017, for the April 24, 2012, date of accident; August 31, 2022, for the March 23, 2018, date of accident; and February 22, 2022, for the November 19, 2020, date of accident.

Paragraph two of the Side Stipulation affirmatively represented to this tribunal that "*the Employer/Servicing agent acknowledges that the aforementioned benefits was not timely provided within 30 days of the filing of a Petition for Benefits entitling claimant's counsel to Employer/Servicing Agent paid fees and taxable costs*" (JCC-7, pg. 2).

Actual Settlement Reached

At the hearing on September 12, 2023, Mr. Cristal testified to the actual settlement reached and the subsequent restructuring of that agreement. He stated:

A: …[W]e reached an agreement to settle. And then after, on it, … on an amount, based on what the school board had approved for a settlement. And based on what all of the people on my side, that I had to get approval from, that was negotiated and reached. Subsequently we were informed that it would be broken down in a particular manner.

Q: So the case, from your perspective, settled for how much?

A: I believe it was 200.

Q: That was a settlement offer that you made $200,000.

A: That was the top offer that was eventually accepted.

I accept Mr. Cristal's testimony in this regard. I find that this case was settled for a total of $200,000. I find that after the settlement amount was agreed to, Mr. Smith informed Mr. Cristal how the settlement proceeds would be divided.

The $200,000 settlement amount was divided into a settlement and a Side Stipulation. The revised settlement amount was $114,900.00. From this figure, Mr. Smith received a statutory attorney's fee of $12,240.00. Ms. Fox's net recovery was $102,660.00. The remainder of the settlement funds were disposed of through a separate stipulation for payment of attorney's fees and taxable costs in the amount of $85,000.00.

A statutory attorney's fee on $200,000.00, is $20,750.00. As restructured, Ms. Fox received $102,660.00, and Mr. Smith would receive $97,240.00.

August 2, 2017, Petition for Benefits

The first Petition for Benefits the parties' counsel affirmatively represented to be the source of employer/carrier's agreement to pay attorney's fees and taxable costs was filed on August 2, 2017 (JCC-1). The claim made in this Petition for Benefits was for "*Authorization of and set up of pain management to Dr. Carlos Diaz, per the attached from Dr. Page dated 6/7/17.*"

The employer/carrier filed its response to this Petition for Benefits eight days later, on August 10, 2017 (JCC-6). The response states:

> *Employee already had an authorized pain [m]anagement physician[,] Dr. Auerbach. [A]n appointment was scheduled for 6/26/17 which the employee did not attend. Dr. Auerbach has left the office and currently Dr. Mauna Rahdad has taken on the patients. An appointment was scheduled for 8/9/17 and appointment letter was mailed with copy to all parties.*

On December 1, 2017, Mr. Smith filed a Notice of Resolution of Issues relative to the August 2, 2017, Petition for Benefits (DN 191). This Notice of Resolution reported that the issues for the August 2, 2017, Petition for Benefits, were resolved and requested that the State Mediation scheduled for December 1, 2017, at 1:00 pm, be

canceled.[2]

Significant to the assessment here, the Notice of Resolution did not reserve claims for attorneys' fees and costs. I find that the claims for attorneys' fees and costs in the August 2, 2017, Petition for Benefits were dismissed by operation of the Notice of Resolution. *See Louis v. Hooters of West Palm Beach*, 36 So. 3d 701 (Fla. 1st DCA 2010) ("Notice of Resolution of Issues" tantamount to a voluntary dismissal); *Airey v. Wal-Mart*, 24 So. 3d 1264 (Fla. 1st DCA 2009); *Bednarik v. Ebasco Services*, 527 So. 2d 251 (Fla. 1st DCA 1988).

During the September 12, 2023, hearing, Mr. Smith testified regarding the representation that there is colorable attorney fee entitlement based on this Petition for Benefits. Mr. Smith testified that he did not know if his office had notice of the appointment with Dr. Rahdad prior to the filing of the Petition for Benefits. Mr. Smith testified that the basis of the fee entitlement for this Petition was addressed in his Memorandum. The Memorandum states in relevant part:

> *Claimant filed a Petition for Benefits under the 4/24/12 Date of Accident (OJCC 17-01853EBG) on 8/2/l7. The Petition sought authorization/set up of pain management to Dr. Diaz per Dr. Page. The good faith letter to the E/C requesting the same benefit was sent on 7/12/17. The E/C responded to the Petition on 8/10/17 indicating that the Employer already authorized pain management with Dr. Auerback. However, the Claimant was not able to see Dr. Auerback because he left the practice. The E/C sent the Claimant to Dr. Rahdad and argued that this was the Claimant's one-time change. However, the Claimant disputed the issue regarding use of a one-time change since Dr. Auerback left the practice and the Claimant's need to see an alternate physician was not by request. Eventually, the appointment with the physician was agreed upon by the parties but did not take place until 12/14/17.* (C-1, pg. 3)

Of note is Mr. Smith's time records regarding these issues from August 3, 2017, through December 1, 2017. There are two notes specifically relevant to the issue.

8/10/17	*Receipt and review from OJCC: electronic service of EC's Response to 8/2/17 PFB advising Claimant already had an authorized pain management physician Dr. Auerbach but has left the office and Dr. Rahdad has taken on the patients. An appointment was scheduled for 8/9/17. DN6 17-018538DBB*	*.50*
8/23/17	*Receipt and review from OC: letter dated 8/21/17*	*.30*

[2] Mr. Smith's Verified Time Records reflect expenditure of 6.0 hours for attending the canceled mediation on December 1, 2017. This billing entry is discussed further below.

confirming receipt of request for authorization of Dr. Diaz for pain management advising that Claimant has been authorized to see Dr. Auerbach but Dr. Auerbach left the practice and Dr. Rahdad (sic) has taken over Claimant's care and reminding that Claimant has already Used the one-time free change of physician. (JCC-8, pg. 9*).*

There are two things important about these entries. The first is that Mr. Smith billed 30 minutes for review of the notice of the appointment with Dr. Rahdad on August 10, 2017. I find that Mr. Smith was aware of the appointment with Dr. Rahdad on August 10, 2017.

The second important issue about these entries is with regard to whether the carrier asserted that Dr. Rahdad was being offered as a one-time change. Mr. Smith testified and asserted in his Memorandum, that he did not want to use up Ms. Fox's one-time change on Dr. Rahdad and did not let her go to see Dr. Rahdad until he was able to overcome the carrier's assertion that Dr. Rahdad would be the claimant's onetime change.

The billing entry on August 23, 2017, Mr. Smith notes that Dr. Rahdad was authorized to replace Dr. Auerback and that Mr. Cristal had advised that "*Claimant has already used the one-time free change of physician"* (JCC-8, pg. 9).

In context, Mr. Smith represented that he was entitled to attorney's fees because he was able to have the carrier agree that Dr. Rahdad is not a one-time change.

In reality, the carrier provided an appointment with Dr. Rahdad for August 9, 2017, and said the claimant had already used her one-time change, such that she could not select an alternative (one-time change) to Dr. Rahdad. There are no billing entries reflecting that a request to set an appointment with Dr. Rahdad was made after receipt of the August 21, 2017, letter from Mr. Cristal, Considering that the claimant ultimately went to Dr. Rahdad on December 14, 2017, Mr. Smith did not overcome the carrier's position in this regard.

In review of the Mr. Smith's time records from August 3, 2017, through December 14, 2017, I note that there are no billing entries reflecting that Mr. Smith advised Ms. Fox of the August 9, 2017, appointment with Dr. Rahdad.

I do note however that Mr. Smith billed 2.5 hours on October 17, 2017, for preparation and attendance at a telephone conference with Ms. Fox and 6.0 hours on October 24, 2017, for preparation and attendance at the claimant's deposition[3]. There is

[3] The claimant's October 24, 2017, deposition, was filed on August 12, 2022, at docket number 95. As the deposition took less that two hours, this would mean that Mr. Smith must have spent at least four hours reviewing the file and consulting with Ms. Fox.

additionally a billing entry for 6 hours on December 1, 2017, for preparation and attendance at mediation. Based on these billing entries, between October 17, 2017, and December 1, 2017, Mr. Smith spent 14.5 hours reviewing Ms. Fox's claims and interacting with her.

Q: Okay. Are you seeing anybody at the present to treat your shoulder?

A: No.

Q: Okay.

A: I also had a pain management doctor.

Q: Okay. Who was that?

A: You know what? I don't remember his name. The first lady there was like Rahdad or something.

Q: Okay. Maybe was the first pain management doctor that you saw was a Dr. Michael Auerbach?

A: Yes.

Q: Okay. So you actually saw Dr. Auerbach?

A: Yes.

Q: Okay. And then I believe that Dr. Auerbach may have left the practice and then Dr. Rahdad took over for him. Does that sound accurate?

A: Well, Rahdad was there first and then Auerbach came. And then I don't know if Rahdad came back or not.

Q: Okay. Did you have an appointment set up with Dr. Rahdad for August of this year, 2017?

A: To my knowledge, that was for Dr. Auerbach.

Q: Okay. Did you attend that appointment?

A: No.

Q: And why is that?

A: I was not happy with that office.

Q: Okay. And what was the reason that you were not happy with them?

A: Extremely rude.

Q: The physicians or the staff or...

A: The Dr. Auerbach himself was very rude.

Q: Okay. And what -- the times -- let me strike that.

A: How many times total did you see either Dr. Auerbach or Dr. Rahdad?

A: I want to say three times. He couldn't remember what we did from one thing to the other.

Q: What specific body parts or conditions were either Dr. Auerbach or Rahdad treating you for?

A: My shoulder. (DN 95, pgs. 54-55)

Based on the evidence submitted, I find that Mr. Smith did not tell Ms. Fox about the August 2017 appointment with Dr. Rahdad. Rather than secure a fee by proving that Dr. Rahdad was not a one-time change, Mr. Smith's activity delayed care for Ms. Fox with Dr. Rahdad by four months.

The parties were afforded the opportunity to present evidence regarding the assertion relative to Dr. Rahdad being presented as a one-time change physician. No credible documentary evidence was offered.

Additionally, the adjuster, Ms. Challenger, and the claimant were present for both the July 27, 2023, and September 12, 2023, hearings. Mr. Smith and Mr. Cristal were asked whether they had questions for, or, testimony that should be elicited from, these two witnesses. Both declined to do so. I find that Mr. Smith's representation that the employer/carrier asserted that the appointment with Dr. Rahdad was for a one-time change, lacks credible support.

Mr. Smith asserted that prior to the filing of the Petition for Benefits, Ms. Fox contacted the adjuster and requested a change in doctor from Dr. Auerback. Mr. Smith asserted that Ms. Fox was told that she could utilize her one-time change to obtain a change in physician.

However, as clearly stated in the response to the Petition for Benefits, by the time the Petition for Benefits was filed, Dr. Auerback had left the practice and Dr. Rahdad was authorized as a replacement, not a one-time change. I find there to be no credible evidence that the employer/carrier asserted that the appointment with Dr. Rahdad was a one-time change, after the Petition for Benefits was filed.

Mr. Cristal testified at hearing on September 12, 2023, regarding the basis for the representation that Mr. Smith was due attorney's fees from the employer/carrier for the August 2, 2017, Petition for Benefits. He testified as follows:

> *Q: So we've got this 8/2/2017, petition for benefits, at docket number…docket number one, seeking pain management. That the carrier responded to on August 10th, saying that it would be provided. Or, that an appointment was being set up with Dr. Rahdad. And had been set for 8/9/17. Based on your records, did the claimant attend that appointment?*
>
> *A: As far as I can tell, she did not.*
>
> *Q: OK. And was there some, … Mr. Smith has raised an issue about a one-time change. I don't see reference to the one time change in the response to the petition for benefits filed August 10, 2017. Was there some issue about that, that you're aware of?*
>
> *A: I believe that that he may be referring to, I think, at the time. And again, I looked back as well as I could, because we have since become paperless. And, I don't know that we were paperless at the time. And, so, some of those documents open properly, some don't. But, that may have been an issue where she wanted to see Dr Diaz.*
>
> *I think the basis for the entitlement, originally, in just looking over, because, just if I may digress just a bit, your honor. This stipulations for separate fees in these types of instances, aren't litigated in the way that a verified petition for attorney's fees may be. So, the level of really digging into, and looking at case law, and all those things to make arguments for or against entitlement is not is not done, I would say, as thoroughly as if it were a litigated issue. And, so, when there are issues, that there are arguably. So for example, Ms. Fox, I believe, she wasn't seen until December of…*

that December 14th 2017. Which Mr. Smith put in his response, as well.

And I don't. When I was going over this at the time, I didn't know the reason, or, understand what happened on the August appointment. Or, back when we were preparing the stipulation, I just saw that she had been seen then. And, I know, that there are always issues that are raised. And it's difficult to predict how a judge would rule, in general, about whether or not the appointment took place timely in relation to the petition for benefits.

I mean, obviously, there's going to be times where things get scheduled before the 30 days, and don't take place until after the 30 days. But it is pretty hard to keep up with the case law. And, I do, have had experience, of having inconsistent decisions from different judges depending on how they see those issues. And so, it's not really for me. I didn't feel that my role was to act as a judge and take an adversarial role on making a point of whether or not that a fee would be due, if it was an instance where I could see that arguably the… I could see a judge saying that the appointment didn't take place timely. Then, you know, that would seem to satisfy the level for. I mean, it's a legitimate basis to question entitlement if the appointment didn't take place until 5 months, or, whatever it was, after the petition, although, it was timely scheduled. I've had crazier things happen, where judges found entitlement under less clear circumstances.

Q: *And what I'm looking for is whether there's colorable fee entitlement. And so, the response says that an appointment's been set. And then, the… Apparently, the claimant didn't go. And then, another appointment was set in December, on December 14th 2017.*

And so, what I'm looking for is, what happened between those two things that would raise the question of attorney fee entitlement? Do you have anything in your file that would assist me in seeing that there are some colorable fees?

A: *My records are scant. The color that I saw at the time, was that there was a petition filed in whenever August 2nd or I'm sorry July 17th or July 12th, maybe. I'm not sure which one of these is referring to that petition. But, and, then, the. And, then, the appointment happened on 12/14. So that, you know, was enough color from my review, that. OK, I could see a judge saying that that was not*

timely for that appointment. I didn't look into at the time, you know, what happened to that original appointment. Or, you know, why she didn't attend or what occurred.

Q: *OK, but if you looked into it now?*

A: *I haven't looked into it further past just… it appearing … cause when I read Mr. Smith's brief, that was how I recalled it. And as we were sitting here, I was reviewing my notes and I didn't see in my notes or in my file why that appointment didn't take place.*

Q: *And do you see an appointment letter setting up the September 17th appointment?*

A: *Yes.*

Q: *When was that sent?*

A: *The appointment letter for Dr. Rahdad was sent. If I'm looking [at] the right one, July 18th.*

Q: *You're talking about the August appointment. I'm talking about the December one.*

A: *That one. I don't have that one. I don't have that appointment letter.*

Q: *Do you have any communication with Mr. Smith's office telling him that the appointment's been set? Anything? I'm trying to find colorable fee entitlement.*

A: *I understand your honor. I only have the July 18, 2017, appointment letter Rahdad for 8/9. And I don't have. I'm scanning through my emails and my documents. And I'm not seeing why that appointment wasn't attended. Except for all. Except that it was attended in December. And so, I don't have in my notes here the reason for that.*

Q: *Based on what you see in your file is there are some colorable entitlement to attorneys' fees based on the documents?*

A: *Like I suggested, your honor, from just the fact that it was a petition that was filed four months before the appointment took place, was what was the color that I felt that could justify it.*

> *Because like I said, I didn't know at the time, and haven't since found it, found anything in my file, as you and Mr. Smith were discussing it, that would suggest the reason. I and. So, at the time when this when the settlement occurred, or when the stipulation was being prepared, that was the color that I was looking for, was that four-month gap, from the time that the appointment took place from when the petition was filed.*

While the parties are certainly free to reach an agreement on disputed attorney fee entitlement, that is not the issue here. The issue is whether there is some colorable and legitimate basis for this agreement. The attorney fee stipulation states:

> *Further, the Employer/Servicing Agent acknowledges that the aforementioned benefit was not timely provided within 30 days of the filing of a Petition for Benefits entitling claimant's counsel to Employer/Servicing Agent paid fees and taxable costs.*

This is more than simply boilerplate language. This is a representation made by both lawyers that provides the legal basis upon which the employer/carrier may legally pay extra money to claimant's counsel to secure a total settlement of this case.

Section 440.32(3) states in relevant part:

> *The signature of an attorney constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, … If a pleading, motion, or other paper is signed in violation of this section, the judge of compensation claims or any court having jurisdiction of proceedings, upon motion or upon its own initiative,* ***shall*** *impose upon the person who signed it an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.* (emphasis added)

I find that the assertion that Mr. Smith was entitled to an attorney's fee and reimbursement of taxable costs based on the employer/carrier failing to respond timely to this claim to be specious.

I find the parties have presented no credible evidence or explanation to support even a minimally colorable argument that attorney's fees and reimbursement of taxable

costs at the expense of the employer/carrier could be due pursuant to section 440.34 based on this Petition for Benefits.

I find that both Mr. Smith and Mr. Cristal signed the attorney fee stipulation without knowledge, information, or belief, formed after reasonable inquiry, that it was well grounded in fact or that was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

I further find that the attorney fee stipulation was interposed for the improper purpose of making an unlawful payment of attorney's fees by the employer/carrier to claimant's counsel for the purpose of securing a settlement.

August 31, 2022, Petition for Benefits

The second Petition for Benefits the parties' counsel affirmatively represented to be the source of the employer/carrier's agreement to pay claimant's counsel attorney's fees and reimburse taxable costs, was filed on August 31, 2022 (JCC-3).

This Petition for Benefits sought "*Authorization of and set up of a return appointment with her treating physician for the left knee and right shoulder. Please forward to the adjuster as the request is for authorization of and set up of treatment for the left knee."* As referenced above, the Side Stipulation represents that the employer/carrier was to pay attorney's fees and reimburse taxable costs, as due for securing authorization of a return appointment with the claimant's orthopedic knee surgeon.

The employer/carrier responded to this Petition for Benefits at 1:19 pm, on September 9, 2022 (JCC-4). With regard to the claim for a follow-up appointment with the treating physician for the knee injury, the response states:

> *The request for a follow up appointment to address the injury to the claimant's left knee sustained in the [M]arch 23, 2018 workplace accident is authorized. An appointment was requested with Dr. Talluri however he is not seeing WC patients currently. I will secure an appointment with an alternate physician, and noticed under separate cover shortly.*

In his Memorandum (DN 202, pg. 4), Mr. Smith represents that the appointment with the alternative knee orthopedist, Dr. Bright, took place on October 25, 2022. It is the date the appointment was scheduled, rather than the date of the appointment took place, that would be relevant to a determination of whether there was some colorable basis for attorneys' fee entitlement.

Mr. Smith testified regarding the representation that there is attorney fee entitlement from the August 31, 2022, Petition for Benefits, at hearing on September 12, 2023. He testified as follows:

A: The records we had show the appointment wasn't scheduled until over 30 days after the petition with a different doctor.

Q: Show me that. Where's that?

A: Not everything is on the docket, your honor. We don't. Not an entire file is put on the docket. I mean, I'm. I'm going in that direction. I'm just like, considering filming the entire experience, but not everything is on the docket.

Q: Do you want to identify something that shows… Because it looks like they're agreeing to provide the benefit. When was the benefit provided?

A: I said it was generally agreed to, but it wasn't from our records, wasn't done until over 30 days after that petition.

Q: OK. And what do you, … Is there something that you can point to that shows me that? Or, tell me about, that says that?

A: Not on the record, no. Not on the DOAH docket.

Q: Do you have something that you want to file, that would show me that?

A: I can if it's a. I'm sure I could find something, yes.

Q: All right. Are you going to do that now? I don't understand.

A: I can do that in a pause at the, you know. I can't do it at this station where I'm at right now. But, I can do it after the hearing[4].

Q: OK. Do you want to identify what it is you're going to be filing?

A: The appointment date.

Q: OK. And were there some activities on your part that did that?

[4] Notably, Mr. Smith's testimony here is that he could not upload a document to the OJCC docket from the station where he was conducting the hearing. This was a Zoom hearing and Mr. Smith appeared to be his own desk in his own office. His stated inability to file documents to the docket from his office would appear to be in conflict with the time entries in which he billed for filing documents to the docket. Because there was no specific evidence that Mr. Smith was in his own office during the hearing, I have not utilized this issue as a basis for the conclusions reached here.

Because, it seemed like they were they were authorizing it. They provided it. And then you're saying they took a couple, … more than 30 days to set the appointment. Did you … other than the filing of the petition, were there any activities on your part that made that happen or secured that benefit?

A: The good faith request. I don't know how many emails are sent in that regard, or, you know, back and forth, but good faith request, a petition, and then eventually we got the doctor true.

Q: OK. Let me go back and look at your memo. OK, so I'm looking at the bottom of your memo page 4, paragraph, … your section B. It says the claimant's appointment with Dr. Miller took place 9/27, with the appointment with Dr Bright took place 10/25/22. So, that was the appointment date. When one was … when were you given notice of the appointment?

A: I don't know.

Q: Was it within 30 days received over the filing of petition?

A: I don't know from our records. Ms. Fox was a client who was able to be self-sustaining. She was a school teacher during most of this and sometimes she would get direct communication and figure things out on her own. So, I wanted to show that.

Q: Do you have notice of the appointment with Dr Bright for 10/25/22?

A: I don't know. I can find out, but. They don't have it in any of the emails here, the exact date when we learned.

Q: So you don't have an appointment letter for Dr Bright for 10/25/22?

A: I don't know. I don't have it in front of me. I asked for the relevant emails we printed out and I have to study a little bit more on that. I only have one screen here. It's hard for me to go through all the emails to know exactly when that date was.

I find that Mr. Smith's representation that the appointment with Dr. Bright took place on October 25, 2022, is contrary to Mr. Smith's "*Verified Time Delineation for Attorney's Fees (as related to Stipulation on Fees and Costs Filed 6/23/23)*" (JCC-8, pg. 30).

Specifically, Mr. Smith's cost ledger reflects that a records request was sent to Dr. Bright on September 23, 2022 (JCC-7, pg. 48). The verified time records represent that Mr. Smith expended 0.4 hours for receipt and review of nine pages of electronically mailed medical records from Dr. Bright, fourteen days before October 25, 2022, on October 11, 2022.

Dr. Bright's DWC 25 reflects that Ms. Fox was seen on September 21, 2022 (DN 166, pgs. 3-4). Dr. Bright also confirmed in his deposition that he evaluated Ms. Fox for her left knee pain on September 21, 2022 (DN 161, pg. 5).

As Dr. Bright actually examined Ms. Fox within 30 days of the August 31, 2022, Petition for Benefits, I find no credible basis for the representation that Mr. Smith was entitled to an employer/carrier-paid attorneys' fee or reimbursement of taxable costs associated with the August 31, 2022, Petition for Benefits.

I reject Mr. Smith's testimony that the appointment with Dr. Bright was not provided within 30 days of the subject Petition for Benefits. Despite the parties having been provided ample opportunity to provide evidence in support of this assertion, I find there is no credible evidence establishing that a basis exists for entitlement to attorney's fees based on the appointment with Dr. Bright taking place on October 25, 2022.

Mr. Cristal testified on September 12, 2023, regarding whether there was some colorable basis for attorney fee entitlement from this Petition for Benefits, as follows:

> *Q:* *And, so, the next petition for benefits looks like it's at… It was filed 8/31/22, … seeking a follow up appointment with the treating physician for left and right shoulder. Authorization of and set up of treatment of left knee.*
>
> *And then, I see the response to that petition was filed, looks like September 9. The first one is at docket number 104. Docket 104 saying, setting appointment with Dr. Satia, or saying an appointment will be authorized with Dr. Satia. And that the appointment was requested with Dr. Talluri, but that Dr. Talluri wasn't available.*
>
> *And then there's a second response at docket number 105. Also filed September 9th, saying that there's an appointment for the shoulder with Dr. Miller. And they're still trying to get, it looks like, an alternate doctor for the knee. So, where is there colorable fee entitlement here? Or, why was there colorable fee entitlement on this petition?*

A: I am recalling that it had something to do with the initial response. Before it was amended. Where it addressed Dr. Satia. Because, I believe Dr. Satia was not originally authorized for that, but I have to go back and see again. But that is my recollection. And I believe it is also not clear whether filing an amended response from the original response, is if it's within the 30 days, if that means that you can no longer can be entitled to fees if the position changes before the 30 days. I don't think that the case law is clear about filing amended responses and fee entitlement.

Q: But the response at 104 and 105 were filed…it looks like the one at 104 was filed September 9th at 1:19 pm and the amended was filed September 9th at 1:29 pm.

A: And I am not arguing for or against fee entitlement, because that's not really what this was about. But it's like, for example, if my client, filed a response to the petition, didn't allege the statute of limitations. Then filed an amended response ten minutes later, alleging the statute of limitations, I think my client would have a problem being able to assert the statute of limitations, because it wasn't their first response from the claim. Even if it was amended. There's no case law that addresses that circumstance.

And so, again, I'm not trying to look for case law justification or anything like that to make an argument. That seemed to be colorable enough to serve the purpose of there being a, you know. If there was a fee petition filed asking for a fee for that issue, I suspect that we would have opposed it.

But that's not what the context is for a stipulation at that point. The context is, did he do something? And does he have an argument. Whether or not it's the winning argument for entitlement? That's not for me to decide if, if that is an argument that will successfully secure fee entitlement, if it went to a hearing. The context is, is he making an argument where he's saying that fee entitlement is due, and there's an argument being made… Again, whether I think that it is something that I would win on or lose on is not the issue.

Q: Was payment or agreement to entitlement on attorney's fees with regard to these petitions for benefits that we've referenced contingent on settlement of the case?

A: I'm sorry, could you repeat that your honor?

Q: Yeah, so at the same time, from what I'm gathering, an offer of $200,000 was made. And a stipulation was prepared from a portion of that, paying attorney's fees based on these three petitions for benefits. My question is whether that side stipulation or that agreement to attorney fee entitlement and payment, was conditioned on settlement of the case.

A: I believe it probably was. So let me just take a quick look at the stipulation. That approval of this agreement is contingent upon approval of the attorney fee application in connection with an overall settlement of this claim being submitted to this court simultaneously. So yes, approval of that fee, which is I think fairly common in this industry, that while you might agree in a stipulation as part of a settlement to get something resolved, if that's how the overall money gets spent, that has been allocated for the value of the claim, that's one thing.

But if there's a verified fee petition asking for fees on those things, that's entirely something different. Which is why that language is in that stipulation. That it's contingent upon settlement of the case because if the settlement the case wasn't approved, the fee stipulation. We certainly, my client would certainly not agree to the fee stipulation. That's what settlement is a compromise of positions.

Why some cases are settled for what is often termed nuisance value. For example, even if the client doesn't think that there's any liability, they know that they're going to pay that amount one way or the other. Or potentially a lot more.

In this case for example, your honor, I believe the present value of permanent total disability benefits was extraordinarily high. And I'll tell you very quickly. It was over $400,000. The present value. And I'm sure Mr. Smith calculated even higher, because I use the 4% discount rate.

My clients felt that there was very real exposure for permanent total disability, which justified just the indemnity portion being worth 200 alone. Not to mention how much they were spending on medical care every year, which was a lot.

I find that the assertion that Mr. Smith was entitled to an attorney's fee and reimbursement of taxable costs, based on the employer/carrier failing to respond timely to this Petition for Benefits, to be fallacious. I find the parties have presented

no credible evidence or explanation to support even a minimally colorable argument that attorney's fees and reimbursement of taxable costs at the expense of the employer/carrier could be due, pursuant to section 440.34, based on this Petition for Benefits.

I find that both Mr. Smith and Mr. Cristal signed the attorney fee stipulation without knowledge, information, or a belief, formed after reasonable inquiry, that it was well grounded in fact, or that was warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law. I further find that the Side Stipulation was interposed for the improper purpose of making an unlawful payment of attorney's fees, by the employer/carrier to claimant's counsel, for the purpose of obtaining settlement.

February 22, 2022, Petition for Benefits

The third Petition for Benefits the parties' counsels affirmatively represented to be the source of the employer/carrier's agreement to pay claimant's counsel attorney's fees and reimburse taxable costs, was filed on February 22, 2022. There is no record of this Petition for Benefits in OJCC case number 17-018538EBG.

However, in the *Claimant's Memorandum in Support of Joint Stipulation for Fees/Costs Regarding Response to JCC's Inquires* (Memorandum), filed at 4:51 pm, the day before the September 12, 2023, hearing, Mr. Smith identified this Petition for Benefits as having been filed in OJCC case number 22-003535EBG (DN 202, pg. 4).[5] The Petition for Benefits filed on February 22, 2022, in OJCC case number 22-003535, requested "*authorization of and set up of return appointment to Dr. Moustoukas for the right hand/wrist, 11-19-20 doi*" (DN 6).

The employer/carrier responded to this Petition for Benefits on March 7, 2022 (OJCC# 22-003535, DN 8). In relevant part, the response states:

> *Employee remains authorized to treat with Dr. Moustoukas for the right wrist sprain/right scapholunate ligament tear. Last seen on 6/28/21. I*

[5] The Petition for Benefits filed February 22, 2022, in case number 22-003535EBG, was not directly offered into evidence by either party, at either the July 27, 2023, or the September 12, 2023, hearing. While the undersigned took judicial notice of the docket in OJCC case number 17-018538EBG during the hearing on July 27, 2023, hearing, judical notice was not specifically taken of the docket in OJCC case number 17-018538EBG. Recognizing that the failure of claimant's counsel to offer the February 22, 2022, Petition for Benefits into evidence, may have been due to potential confusion and the belief that judical notice was also taken of the docket in 22-003535, I take judical notice pursuant to Section 90.202(6), Fla. Stat., of the docket in case number 22-003535, including the February 22, 2022, Petition for Benefits contained therein.

have requested a follow up appointment. Appointment information will be sent under separate cover.

An amended response to the February 22, 2022, Petition for Benefits, was filed on June 16, 2022 (OJCC Case number 22-003535, DN 14). The amended response states:

Dr. Moustoukas has opined that the major contributing cause for any further treatment of right wrist is not related to the work comp injury of 11/19/20. Further treatment of right wrist injury has been denied.

A Pretrial Stipulation was entered into by the parties one month after the June 16, 2022, amended response, on July 12, 2022 (DN 89). In response to the claim for authorization of a follow-up appointment with Dr. Moustoukas, as pled in the February 22, 2022, Petition for Benefits, the employer/carrier responded as follows in the July 12, 2022, Pretrial Stipulation:

[Claimant] has remained authorized for treatment with Dr. Moustoukas for her right wrist sprain/right scapholunate tear and remains authorized for such tx through the present. (DN 89, pg. 5)

At hearing, Mr. Smith testified that he is entitled to an attorneys' fee and reimbursement of taxable costs based on successfully securing renewed authorization of Dr. Moustoukas through testimony subsequently obtained during the doctor's deposition. Mr. Smith testified as follows:

Q: All right, so this is the petition for benefits that I couldn't find before. And that's the one in case number 22-003535, in the 11/19/20, date of accident. And it was filed 2/22/22. So, 2/22/22, you filed a petition for benefits for authorization/set up of a return appointment with Dr. Moustoukas for the right wrist. And now Dr. Moustoukas was a treating doctor, authorized doctor? Is that right?

A: Correct.

Q: OK. So, 2/22/22, you filed a petition for a follow up appointment with him. And then 3/7, at docket number 8, there's a response. It says employee remains authorized to treat with Dr. Moustoukas for the right wrist. Right wrist strain/right scapholunate ligament tear, last seen on 6/28/21. I've requested a follow up appointment. Appointment will be sent under separate cover.

OK. So they responded. The carrier responded to your 2/22, petition on 3/7, saying that they were going to provide the evaluation. Why would you be due attorney's fees for that?

A: *Keep looking at the docket. They amended the response to deny that.*

Q: *OK. Where's that amended? Oh, I see. OK. So that's at 14?*

A: *Right. Right.*

Q: *Let me see that. Hold on. OK, so the carrier denied further treatment of the right wrist with Moustoukas on 6/16. I see that.*

So let me ask you. So the petition's filed 2/22. On 3/7, the response says that they're going to send Ms. Fox back to Moustoukas. So it looks like three months later they denied it. So was there something? Were there appointments in the interim there with Dr. Moustoukas.

A: *I'm not aware of any. I don't think so. Yeah, they've been that response to complete the response. They denied any ongoing compensability due to the work injury of the right wrist.*

Q: *Right. But that was three months later. So were there treatments or treatment with Moustoukas in that interim period.*

A: *I don't believe so. I don't believe so. I mean. I don't. I didn't scour the records to be able to give you a hard fact yes or no, but I, near certain the answer is, no she did not.*

I'm beginning to feel I need to upload more things on the docket. Just make the docket a file almost.

Q: *OK. I'm looking on 7/12. There's a pretrial entered, and I'm looking at it. So it says, on page 5, of the pretrial. It has your claim for Dr. Moustoukas. And then the response is that he remains authorized; which is odd because it's after the June 17th. So we've got the petition 2/22. The response 3/7, saying that Moustoukas is authorized. Then we've got 6/17/22, saying he's not authorized. And then 7/12, pretrial stipulation, saying he is. When did he start going back? When did the claimant treat her, or see Dr. Moustoukas, after the filing petition? Or, did she?*

A: I don't know. Just compensability was reinstated for the hand. And that bared a significant component to what was soon to come, which would be a long-term disability issue, since she was a teacher in the hand. So compensability was reestablished through our efforts. They went all the way up to pretrial. Then, we overcame the denial. The rules…

Q: That's why I'm asking. What did you do to secure that benefit?

A: Well, we filed a request. The good faith effort. Then we filed a petition, and then we went to a mediation, and then we had some discovery. We overcame the denial. We went through the system successfully. I'm not sure what you mean?

Q: Did you take a deposition? Did you point out to them that Dr. Moustoukas has been authorized for 120 days. Did you do something to get them to change their mind? That's what I'm looking for, is what you did to secure the fee.

A: Well, what I recall was the carrier had gotten a letter from Dr. Moustoukas and there was an issue about fingers. That she had trigger point or trigger fingers that were not related, but the hand and wrist. Anyway, we had to, there was a letter they had gotten from Dr. Moustoukas that served as a basis for the denial.

And then through our efforts, and I don't remember right now which depositions, but, through our efforts, obviously in the in the, you know, in the matter we prevailed on overcoming the defenses. I don't have like the moment that it happened, or, I can't cite that smoking gun I guess of when they said oh. But I think it was part to do with challenging what Moustoukas had said in a letter to the adjuster, the nurse case manager, versus what the other doctors and involved I'm not able to go to my doctor right now to show you the timing of anything. But quite clearly, we ever came to defenses and prevailed on the petition.

Contrary to the testimony that the authorization of follow-up care after the June 16, 2022, amended response, was secured through deposition of Dr. Moustoukas, is the doctor's deposition (DN 94). The first contrary evidence is the actual date of his deposition, August 3, 2022. The second is the testimony contained therein regarding the dates of treatment.

In context, a Petition for Benefits seeking a follow-up appointment with Dr. Moustoukas was filed February 22, 2022. The employer/carrier responded to the

Petition for Benefits on March 7, 2022, stating that Dr. Moustoukas remained authorized and that an appointment would be set for the follow-up evaluation requested.

Dr. Moustoukas testified that he first evaluated Ms. Fox on January 12, 2021, and provided treatment which included an injection (DN 94, pg. 8). Thereafter, Ms. Fox was seen by the doctor on January 22, 2021, February 22, 2021, March 22, 2021, April 19, 2021, May 17, 2021, June 28, 2021, and January 19, 2022 (DN 94, pg. 9-10).

Three months later, on June 16, 2022, the employer/carrier filed an amended response to the February 22, 2022, Petition for Benefits. The amended response asserted that Dr. Moustoukas had opined that the major contributing cause of *further treatment* was not the November 19, 2020, accident. The employer/carrier denied further treatment of the right wrist.

Then, in the July 12, 2022, Pretrial Stipulation, the employer/carrier agreed that Dr. Moustoukas remains authorized for treatment of the right wrist. After the agreement to authorize ongoing care with Dr. Moustoukas in the Pretrial Stipulation, the doctor's deposition was taken on August 3, 2022. The deposition reflects that Ms. Fox was not seen since January 19, 2022.

A final hearing was scheduled to take place on August 16, 2022, to adjudicate the issues presented in the February 22, 2022, Petition for Benefits. On August 15, 2022, claimant's counsel filed a Notice of Voluntary Dismissal Without Prejudice/Resolution of Issues (DN 100). With regard to the claim for "*authorization of and set up of return appointment to Dr. Moustoukas for the right hand/wrist, 11-19-20 doi",* the Notice of Voluntary Dismissal states:

> *The Petition for Benefits dated 2/22/22 on the 11/19/20 date of accident is resolved. The Employer/Carrier authorized Dr. Moustakas* (sic) *for care and treatment of the Claimant's right wrist/hand.*

There is no evidence that Ms. Fox was actually evaluated or treated by Dr. Moustoukas after the Petition for Benefits was filed on February 22, 2022. Similarly, no evidence was presented which credibly shows the possibility that Ms. Fox received any treatment of her right wrist thereafter with any doctor for an injury sustained on November 19, 2020.

Ms. Fox's January 20, 2023, deposition is found at docket number 164. The following testimony was elicited regarding whether she had seen Dr. Moustoukas since March 2022.

> *Q: Okay. And how about a Dr. Michael Moustoukas?*

A: *I haven't seen him in a long, long time.*

Q: *What were you seeing him for?*

A: *My wrist. It got bent all the way back, my hand.*

Q: *All right. And that would be -- is that your right wrist?*

A: *Yes.*

Q: *Okay. Are you currently having any ongoing difficulties or problems with that right wrist?*

A: *Yes, I do.*

Q: *What kind of problems are you having with the right wrist?*

A: *I really -- like, I have pain in it. But the thing is, I can't grip things very long or it becomes painful, and I had a trigger finger.*

Q: *Okay. So whenever the last time it was, you said it was a while ago that you saw Dr. Moustoukas, what, if anything, was he recommending for the right wrist?*

A: *I did therapy.*

Q: *So are you still going to therapy for the right wrist?*

A: *No.*

Q: *When was the last time you think you went to therapy for the right wrist?*

A: *Oh, gosh, I don't even know.*

Q: *Would you say it's been at all within the last ten months or the last year?*

A: *I don't know because he was just kind of dismissive.*

Q: *That was going to be my next question. You said you hadn't seen him in a while, but you're still having problems. Why is it that you have not returned back to see Dr. Moustoukas?*

A: Workers' comp wouldn't approve my stuff.

Q: So you've attempted to go back to see Dr. Moustoukas, and you were told he couldn't see you anymore?

A: Yeah. I had called workers' comp a bunch of times, and they didn't return my calls or nothing.

Q: Who did you call through workers' comp?

A: Cheryl Challenger.

Q: Okay. And you called Ms. Challenger specifically regarding what?

A: I think I called her for a couple of different things. I just couldn't get my pain management, and there was something else I needed. Then she just wouldn't answer. I just gave up with workers' comp.

Q: Okay. But have you specifically tried to contact Dr. Moustoukas' office to set up an appointment?

A: No, because I think they had to go through workers' comp, and workers' comp never called and set it up.

Q: But you have not attempted even though to -- you have not even attempted, though, to call and set up an appointment with Dr. Moustoukas; is that correct?

MR. MASON: Asked and answered.

THE WITNESS: I'm not even sure. I couldn't even tell you

BY MS. McGORY:

Q: Okay.

A: -- because I was getting so frustrated.

Q: Okay. But has anyone ever told you that you are not authorized or that you are not allowed to go back and see Dr. Moustoukas?

A: I can't definitely say for sure, but I know that I wasn't receiving calls back or anything.

Q: *Okay. And, again, just for clarification, when you say you're not receiving calls back, you're saying that is receiving calls back from Ms. Challenger?*

A: *Yes.* (DN 164, pgs. 22-25)

Based on this testimony, I find that Ms. Fox did not have an evaluation with Dr. Moustoukas after the February 22, 2022, Petition for Benefits, at least as of January 20, 2023. Pertinent to the analysis here, is whether the claimant received treatment as represented in the attorney fee stipulation; not whether her reasons for not seeing the doctor are accurate.

Dr. Moustoukas' records were filed by the employer/carrier on April 13, 2023 (DN 170). These records do not contain any reference to the claimant being seen by Dr. Moustoukas after January 19, 2022. On May 10, 2023, claimant's counsel filed a Notice of Settlement (DN 186).

The Attorney Fee Data Sheet (JCC- 5, pg. 7) filed in support of the Side Stipulation states:

Description of Benefit	**Claimed Monetary Value**	**Basis for Valuation**
Workers' compensation benefits including, but not limited to: authorization/provision of return appointment with Dr. Moustoukas for right hand/wrist injury (concerning the 11/19/2020 d/a)	$100.00	Payout from E/C

Significant to the analysis here, I find the Attorney Fee Data Sheet is a representation that the employer/carrier paid $100.00 for a return appointment with Dr. Moustoukas, and, that the basis for this representation is the employer/carrier's payout ledger. The carrier's pay ledger is not in evidence.

Mr. Cristal testified that there is colorable attorney fee entitlement for reestablishing compensability of the right wrist. He pointed to Dr. Moustoukas' deposition as the basis for reestablishing the compensability. However, the deposition took place on August 3, 2022, and the Pretrial Statement was completed prior to that deposition on July 12, 2022.

Based on the foregoing evidence, I find that Ms. Fox did not have a return appointment with Dr. Moustoukas after the February 22, 2022, Petition for Benefits.

I find there is no credible factual support for the representation that the monetary value of the appointment was $100.00.

Following a detailed review of the pleadings, docket entries, and consideration of over three hours of testimony at hearing, I find that the representations contained in the Side Stipulation that *workers' compensation benefits were secured on behalf of the claimant* based on the employer/carrier failing to timely provide the benefits sought in the Petitions for Benefits filed August 2, 2017, August 31, 2022, and February 22, 2022, are false and without any credible basis in fact.

Time Delineation for Attorneys' Fees (As Related to Stipulation on Fees and Costs Filed 6/23/23)

Pursuant to this tribunal's June 26, 2023, instruction, claimant's counsel filed his "*Time Delineation for Attorneys' Fees (As Related to Stipulation on Fees and Costs Filed 6/23/23)*", on June 30, 2023 (JCC-8). The document was verified and sworn to on June 30, 2023, by Bradley G. Smith, Esquire.

Writ large, this document represents that 245.5 hours of attorney time were expended by Mr. Smith and other lawyers in the firm that are related to the benefits allegedly obtained through the Petitions for Benefits filed August 2, 2017, August 31, 2022, and February 22, 2022. This representation that 245.5 hours were expended and related to the attorneys' fees alleged to be due from the employer/carrier is contrary to the 150.77 hours represented for this same purpose in the Attorney Fee Affidavit accompanying the Side Stipulation (JCC-7, pgs. 8-12).

In the claimant's Memorandum (JCC-9, pg. 2), claimant's counsel represents:

> *The undersigned's office full time delineation for the entire representation of the injured worker shows 390.2 hours (which does not include all the required time to prepare for this Court's inquiry into the joint stipulation). However, the Undersigned only submitted 245.5 hours related to the benefits secured in this matter.*

The time records consist of 39 pages of time entries. The time entries begin on February 6, 2015, with a 2.5-hour initial consultation, and end on June 26, 2023, with 4.0 hours spent preparing the time delineation document itself.

Separate from whether the time entries accurately reflect time actual expended, is the breadth of time encompassed therein. Ms. Fox has claims for four dates of injury: April 24, 2012, August 30, 2017, March 23, 2018, and November 19, 2020. Attorneys' fee and taxable cost entitlement is represented to have been secured for the accidents occurring on April 24, 2012, March 12, 2018, and November 19, 2020.

The only assertion of attorney's fee and taxable cost entitlement for the April 24, 2012, date of injury, is from the Petition for Benefits filed on August 2, 2017. This Petition for Benefits sought authorization of a pain management physician. The response to the Petition for Benefits was filed eight days later on August 10, 2017, authorizing Dr. Rahdad for pain management and providing an appointment date of August 9, 2023.

The first eleven pages of the time records are for time expended before the March 12, 2018, and November 19, 2020, accidents even occurred. Stated more succinctly, the time allegedly expended to secure benefits for these three dates of injury could only apply to the April 24, 2012, accident, and August 2, 2017, Petition for Benefits, at least until the accident on March 12, 2018, actually happened.

The attorney time represented to have been expended prior to the March 12, 2018, accident, and thus only possibly related to the August 2, 2017, Petition for Benefits, totals 76.8 hours.

A stipulation that this time was reasonably expended to secure the benefit provided in response to the August 2, 2017, Petition for Benefits, is patently and facially false. I find there is no credible basis upon which anyone could conclude that there is potential attorney fee entitlement for this time for "securing" the benefit as alleged to have occurred here. I find the stipulation to the contrary, entered into by the parties' counsel, to be shocking to the conscience and spurious.

Similarly, the time records submitted, and represented to have been expended to secure the benefits sought, occurring before the November 19, 2020, accident occurred, total 110.3 hours. A stipulation that this amount of time was reasonably expended to secure the benefits provided in response to the August 2, 2017, and/or August 31, 2022, Petition for Benefits is patently and facially lacking in credibility.

On the issue of the breadth and amount of time stipulated to have been expended in pursuit of the benefits reflected in the identified Petitions for Benefits, Mr. Cristal testified as follows:

> *Q: I'm looking for … colorable entitlement on this. So, if you have something, show it to me.*
>
> *A: Certainly, in as far as getting back to your question to me, as to whether Mr. Smith's hours are reasonable or not. I don't know that that is my role to even say. If Mr. Smith is submitting timesheets, my job is not to question whether he spent that amount of time, in those time entries. And, in fact there could be an issue with, like, if I going through and looking at each individual time entry and saying is it reasonable to spend this much time on this event. The*

one thing I could tell you is, I don't think I charged my client the amount of fees that Mr. Smith is asking for. However, defense gets far less a hourly rate than plaintiff attorneys do. Number one. And number two. This case is one of the higher amounts of time… this is one of the biggest bills that I've sent, had with a client, as far as attorney's fees are concerned.

It's in the top ten in 26 or 27 years, that I've been doing this. Right. Now I'm talking about as far as how much time that I've spent. I will also say that, you know, when looking at whether Mr. Smith's time is reasonable. Different. I've had to litigate extensively with their office. They practice in a way where they're proving their case. They're developing evidence. They do things a lot differently than, say, another law firm, that's just looking to settle cases.

And so they actually litigate the issues and they go to trial regularly. I probably had the most trials of my career against Mr. Smith and others in his office, of all of the trials that I've been to.

So, for me to say whether or not his hours are reasonable. I can tell you. I could tell you that I know that they do a lot of work over there. And they spend a lot of time doing things. If you're asking me, is it reasonable to have spent that many hours on these issues. Again, that's not really for me to say. That's I think for the court.

I think that's the court's role, not my role. My role is, at least in the context of where we are right here and right today, or where we were at the time of this settlement, is to settle the case within an amount that my client wanted to settle it for, based on their assessment of their exposure. Which we did.

And, if there was a separate contract between Mr. Smith and Ms. Fox, about how they're going to deal with the disbursement of those funds, that's not for me to say. That's an issue of contract between Mr. Smith and Ms. Fox, and I can't get in the middle of their …. something that they've contracted with. And so, when it is, when, I'm when. When you're asking questions of me about whether or not there is a colorable entitlement, or good entitlement issues here. It's a very different answer than if there are …

Like Mr. Smith said, they were, I can't remember how many petitions he said there were filed among all four different cases. I mean it's probably in the range of 20 to 30 or more, I would guess.

It was the most one of the more highly litigated cases in my office for years.

And, to identify each and every petition, and then go through the lengths to see if there's actually a fee entitlement, that I think a judge would agree with it. Again, that's really a little bit beyond my role also.

Because that is number one, an issue of contract between Mr. Smith and Ms. Fox. And it is. If there is something there. If it's being asserted by Mr. Smith, also. And, his office, that they believe that that's sufficient to establish entitlement. And, from a brief review of the facts at the time, it, you know, that makes, there's a colorable argument there. You know, such as the, you know, months passing by between being seen and filing a petition. It's not my role to say whether or not that's an issue, where fee entitlement was has been established.

And that's why there's disputes over fees all the time. Even in, not in settlements. In regular petitions that get dismissed, and they reserve. And they're making arguments. We're making arguments.

I hear arguments from claims attorneys all the time that I think there's … I don't see that at all. And they're ready to go to a fee hearing on it. And, then, my client has to make an assessment of is it worth paying me to attend a fee hearing over entitlement, where they can resolve the issue for less money.

And in those cases, I may think that, I'm even going to win on that issue. But, if my client says they don't want to spend the money on the entitlement issue, then, that's their prerogative to agree to that entitlement. So, that's a lot of this, is I feel, really outside of my role in what I'm doing here.

If it is a stipulation that Mr. Smith and Ms. Fox feel like there is an argument for entitlement, I'm not sure that I'm the right person to be questioning whether or not that that's a legitimate entitlement issue. When I hear entitlement issues every day that I think are bogus. But people still pursue them. And, I have clients that will still pay them off, because it costs more to litigate than to then to resolve things in many instances.

Q: *So, Mr. Cristal let me just direct you, because in terms of your assessment, let me just ask you this question. So, if you look at*

440.32(3), it talks about every pleading, motion, and other paper of a party represented by an attorney, shall be signed by at least one attorney of record, in the in the attorney's individual name. The signature of an attorney constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or good faith argument for extension. So, don't you have an obligation?

A: *Sure. And, if I am being presented with these facts; that there's fee entitlement here. And like I said, from a, you know, looking at dates of when certain things happened, that I've seen crazier things happen. I've seen judges award attorney's fees under circumstances that I would have never imagined.*

What happened then, that, is that is a possible scenario. I've had fee petitions filed on petitions that established fees …. that had that had lesser arguments to establish fee entitlement that got resolved by paying money, because my client didn't want to pay me to litigate it over. And even if they had a 75% chance of prevailing that 25% chance is still out there and they're going to pay an attorney on top of it. Then. It sometimes it makes financial sense for the client to do that.

So, if, and I'm sure your honor is reviews fee agreements all the time. When there was a verified petition filed, or, for one reason or another, and you know it may be one side or the other may have prevailed. And, decisions are being made because the of the unwieldy and unforeseeable costs of litigating.

Litigation is an expensive ordeal. My client is a, I don't believe they're actually municipality, but it is a school system that does not earn profit. And, so, if they look at things from a cost benefit analysis then. Then that that is what almost every settlement in this country is based on, a cost benefit analysis.

And, there's no deception or anything like that. Everything is good faith, if it's being presented to me by an attorney, who I've litigated against for 26 -27 years of my career, and have never known to do anything that is not above board. And presents to me as an officer of the court, this is our basis for entitlement. And it sounds reasonable. That seems to be a reasonable basis to rely on that, for

something that is already resolved. And is a contract between him and his client.

Q: *So, and I'm going to let you make whatever statement, or offer any evidence you want in a second. Let me just clarify this particular question. So, you're talking about the contract with the client, but this is an attorney fee stipulation, where the carrier is paying the attorneys fee. This is not related to a contract with the client is it?*

A: *My client agreed to settle this claim for $200,000. And, if it was later told to us: well, this is going to be the breakdown. That breakdown is based on whatever contractual relationship, or conversations Mr. Smith had with Ms. Fox. That I'm not privy to, nor entitled to know. And so, if Mr. Smith and Ms. Fox reached an agreement. Or, had an arrangement, or whatever it was, of how that money was going to be dispersed, after we agreed on that number, that is an issue that's between them.*

I'm not suggesting that I would just make up stuff on a stipulation to help somebody out. I'm not in the business to help anyone out except my client. Mr. Smith does quite well without me, I can promise you. He doesn't need to be making money from me and my clients. I'm sure he's still going to have that really nice building and have a great practice without me being a part of that.

So, when I say that, OK, there was a four- or five-month gap between a petition and an office visit; there was a request for a doctor who, or there was a response with which mentioned a doctor that wasn't part of a claim. And again, I've seen judges do things that that I wouldn't necessarily have predicted on fees.

And if I see a petition asking for continued authorization of Moustoukas, or whatever it said, that my client actually did deny. They deposed Dr. Moustoukas. And then, he changed his opinion from what he wrote on a letter. That is a legitimate basis to argue for fees.

I don't see courts denying or finding sham pleadings, or frivolous verified petitions, for claimant attorneys that are making novel arguments as to fee entitlement. Because, as we see in work comp, the law changes on a regular basis.

I tell my clients one thing and then a case comes out the next day and it says something completely different. That happens on a

> *regular basis in work comp in Florida. So all the reasons that Mr. Smith is raising for his entitlement, I've seen crazier things happen. That I could imagine a judge ruling against me on some of those issues.*

Mr. Cristal's testimony covered a number of issues in addition to the amount of time the parties stipulated to be related to the securing of these benefits. The first was his statement that "*If Mr. Smith is submitting timesheets, my job is not to question whether he spent that amount of time, in those time entries. And, in fact there could be an issue with, like, if I going through and looking at each individual time entry and saying is it reasonable to spend this much time on this event*."

The Side Stipulation affirmatively states that:

> *Workers' compensation benefits* ***were secured*** *on behalf of the claimant. That* ***pursuant to Fla. Stat. § 440.34 (2003), the parties agree that Bradley G. Smith, Esq. is entitled to a reasonable fee and taxable costs*** *for helping* ***to secure the aforementioned benefits*** *following the filing of the aforementioned Petition for Benefits. Further, the Employer/Servicing Agent* ***acknowledges that the aforementioned benefit was not timely provided within 30 days of the filing of a Petition for Benefits entitling claimant's counsel to Employer/Servicing Agent paid fees and taxable costs****. … That, specifically, the Employer/Servicing Agent agrees to pay and Bradley G. Smith, Esq., agrees to accept, the total sum of $85,000.00 representing the total amount due for fees and taxable costs* ***for all issues and benefits secured*** *from the date of the subject accident through the date an Order is entered approving this agreement.* (emphasis added)

While it may be true that Mr. Cristal does not have a duty to the claimant to review the time records before representing that $85,000 is being paid by the employer/carrier for benefits secured by Mr. Smith, he does have a duty to this tribunal. This duty is defined by section 440.32(2) & (3). Sections 440.32(2), & (3), place a duty on both Mr. Smith and Mr. Cristal to have their signatures be more meaningful than a rubber stamp.

A lawyer's signature means that the lawyer: (1) read the document; (2) performed a reasonable inquiry; (3) after that reasonable inquiry certifies that it is well grounded in fact; (4) is warranted by existing law, or a good faith argument for extension, modification, or reversal of that law; and (5) is not interposed for any improper purpose. Here, the premise that counsel for the employer/carrier met this obligation is contrary to any rational assessment.

In context, the parties have represented that Mr. Smith is due attorney's fees from the employer/carrier for follow-up appointments with three doctors. Two of those appointments took place within 30 days of the subject Petitions for Benefits. The third petition was for a follow-up appointment with Dr. Moustoukas that never occurred. The contention that 150.77 hours was reasonably expended in securing these benefits is, under the facts of this case, lacking in credibility.

I find there is no credible basis upon which anyone could conclude that there is potential attorney fee entitlement for this time for "securing" the benefits as alleged to have occurred here. I find the stipulation to the contrary entered into by the parties' counsel to be shocking to the conscience and obviously frivolous.

Accuracy of the Time Records

As to the accuracy of the time records submitted, claimant's counsel responded to some of the specific questions identified by this tribunal at hearing on July 27, 2023, through the Memorandum admitted into evidence as exhibit C-1.

The portion of the inquiry identified above as question 5, pertains to the six hours of billing on December 1, 2017, for preparation and attendance at a mediation that did not occur. Mr. Smith responded to this inquiry in paragraph 14 of his Memorandum (C-1, pg. 5). He asserts that while the mediation was canceled, the conference and preparation still occurred.

The mediation on December 1, 2017, was scheduled to occur at 1:00 pm (DN 23). The Notice of Resolution of Issues resulting in the cancelation of the mediation was filed by Mr. Smith at 10:45 am on December 1, 2017.[6] I reject this explanation based on a lack credibility of this testimony and inconsistency with the established facts.

The portion of the inquiry identified above as question 8, pertains to billing entries in June 2015. In his Memorandum, Mr. Smith states that he was out of the county as of June 8, 2015. Ms. Tsambis stated during the July 27, 2023, hearing, that she and Mr. Smith were out of the country for ten days.

The time records for this period represent that on June 9, 2015, he spent .3 hours for receipt and review of a copy of an executed social security disability information release from his client, and .5 hours preparing, instructing, reviewing, and coordinating the electronic mailing of this release to opposing counsel.

In context, Mr. Smith represents that he spent between 43 and 48 minutes reviewing a signed Social Security information release and emailing it to opposing counsel on the first full day of his honeymoon out of the country. I reject Mr. Smith's explanation

[6] Of note, 0.5 hours were billed for the Notice of Resolution; separately from the six hours billed for the preparation and conference.

in support of this entry that he works, reviews filings, pleadings, and communicates with the office regardless of his location, as lacking in credibility.

The portion of the inquiry identified above as question 6, pertains to one and a half hours of billing on December 14, 2017, for preparation and attendance at a pretrial conference that never took place.

Mr. Smith responded to the inquiry in his memorandum in paragraph 15 (C-1, pg. 5). The explanation advanced was that when the pretrial hearing was canceled, a conference was held with the claimant instead. While not identified as part of his explanation, I note that there is a billing entry on November 13, 2017, referencing a letter to the claimant advising of a telephone conference to take place on December 14, 2017 (JCC-8, pg. 10). I accept this explanation as supported by the evidence admitted.

The portion of the inquiry identified above as question 7, pertains to the multitude of billing entries for two and a half hours or one and a half hours for "*preparation for and attendance at telephone conference with claimant*." Examples of these billing entries occurred on: March 25, 2015, September 23, 2015, June 14, 2016, December 28, 2016, June 12, 2017, October 17, 2017, April 16, 2018, August 3, 2018, July 29, 2019, July 2, 2020, August 27, 2020, October 5, 2020, December 21, 2020, March 29, 2021, May 10, 2021, November 16, 2021**,** February 22, 2022, June 24, 2022, and September 14, 2022. Collectively, these conferences, along with the preparation for them, represents 41 hours of billing. Notably, the time expended preparing the claimant for depositions, mediations, and pretrial hearings was billed separately.

Mr. Smith explained why so much time was expended in these conferences and why they were so frequent stating:

> *[E]ach client conference related to separate issues [including] discussions of new events, accidents, questions from the injured worker, ect. On [August 27, 2020], the entry was a clerical/scrivener's error where the event was actually changed to occur on [October 5, 2020] which was a conference specifically requested by the Claimant. It should also be noted that all four dates of injury are combined into one file in the undersigned's systems and conferences pertained to different dates of accident and different events/pleadings.* (C-1, pg. 5).

Pertinent to the analysis here, is that Mr. Smith asserts that these conferences resulted from multiple different issues, accidents, questions, dates of accidents, claims, and pleadings.

This is contrary to the representation that this time was expended in relation to the benefits secured in the Petitions for Benefits filed August 2, 2017, August 31, 2022,

and February 22, 2022, and thus properly paid by the employer/carrier by separate stipulation. I find that no credible showing has been made establishing some colorable relationship between the expenditure of this time and the benefits allegedly secured.

The portion of the inquiry identified above as question 9, pertains to whether the following billing entries are duplicative: May 4, 2021, 0.5, Records request to Kennedy White; May 26, 2021, 0.5, Records request to Kennedy White; December 30, 2021, 0.5, Records request to Kennedy White; January 21, 2022, 0.6, receipt and review of records from Kennedy White; and February 22, 2022, 0.5, Records request to Kennedy White. I accept the explanation provided and find these are not duplicative entries.

The portion of the inquiry identified above as question 10, pertains to billing entries related to whether the following time entries are duplicative: August 25, 2022, 1.5 hours, Review of 147 pages of records from Dr. Moustoukas; August 25, 2022, 1.4 hours, Review of 129 pages of records from Dr. Moustoukas; September 7, 2022, 1.2 hours, review of 107 pages of records from Dr. Moustoukas and Dr. Silverstein.

Mr. Smith responded to this inquiry his memorandum, stating:

> *-clerical error-entry should have specified receipt of entire file from Kennedy White-Orthopedics including records from all other providers, arthrogram records, physical therapy reports, medication logs, lab reports and correspondence to and from adjuster. These records do not just include three office visit notes. (C-1, pg. 6)*

I find this response insufficient. It broadly describes potentially every medical record from multiple providers, as well as correspondence with the adjuster.

I also note that the explanation is contrary to other billing entries. For example, on September 7, 2022, there is an entry reflecting 1.5 hours expended in reviewing 79 pages of records from Dr. Shapiro of Kennedy White. If the entries stating that Dr. Moustoukas records were reviewed also included review of the records of all other providers from Kennedy White, then the records of Dr. Shapiro would not have been billed separately.

Additionally, while the records of Dr. Moustoukas would have a relationship to the benefits alleged to have been obtained via the referenced Petitions for Benefits, a review of all providers from Kennedy White, arthrogram records, physical therapy records, medication logs, lab reports, and correspondence to and from the adjuster would not be time that can be paid by the employer/carrier, unless their review was necessary for either securing the benefit for which fees are due or establishing entitlement to attorneys' fees and taxable costs for those benefits. I find that no

credible showing has been made establishing some colorable relationship between the expenditure of this time and the benefits allegedly secured.

The portion of the inquiry identified above as question 11, pertains to whether the entry on March 30, 2022, for 3.5 hours is accurate. The billing entry states:

> *Preparation for and attendance at deposition of Claimant and preparation of handwritten notes and memo to the file. (Conf: 9:00am-10:00am, Depo.: 10:03am-11:28am, via Zoom)* (JCC-8)

The description reflects time expenditure from 9:00 am to 11:28 am. This is 2.5 hours, not 3.5 hours as billed.

Mr. Smith responded to this inquiry with the following explanation:

> *Attorneys consistently request additional time of one hour for preparation to review file before speaking with Claimant/deponent and attending event. (C-1, pg. 6).*

I find this explanation insufficient. Whether attorneys broadly request additional time of an hour to prepare for an event, is not relevant. What would be relevant would be if Mr. Smith spent an hour preparing for this deposition. There being no representation that Mr. Smith spent an hour preparing for the deposition, I find this time entry is inaccurate.

The portion of the inquiry identified above as question 12, pertains to whether the entry on September 14, 2022, is accurate. The billing entry states that Mr. Smith expended 3.5 hours for:

> *Preparation for and attendance at deposition of Dr. Ashvin Satia and preparation of handwritten notes and memo to the file. (Depo.: 5:08pm-5:50pm, via Zoom).* (JCC-8, pg. 29)

The inquiry requested an explanation of why 3.5 hours were billed by Mr. Smith for a deposition lasting 41 minutes, that was conducted by his associate, not Mr. Smith; and there was already a billing entry on the same day for 2.5 hours for preparation for and conference with the claimant.

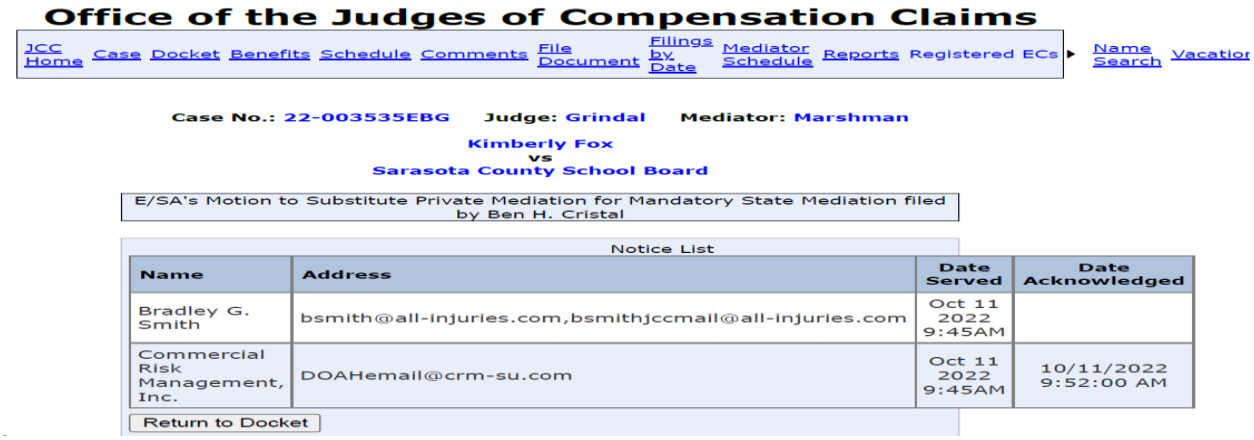
Mr. Smith's Memorandum explained that the representation that Mr. Smith took the deposition was a clerical error (C-1, pg. 6). There was no explanation offered relative to the amount of time represented to have been expended. I reject the representation that 3.5 hours were expended as inaccurate.

The portion of the inquiry identified above as question 13, pertains to whether the two entries on October 11, 2022, for 0.4 hours are accurate. In total, these billing entries represent an assertion that between 48 and 53 minutes was spent reviewing the employer/carrier's unopposed Motion to Substitute Private Mediation for State Mediation (DN 114). The referenced motion consisted of two pages.

Mr. Smith's Memorandum explained that the motion was twice reviewed as two separate notifications were received from the Judge of Compensation Claims under two separate case numbers.

I reject this explanation and the representation that this time was expended for multiple reasons. The first is that this was a common boilerplate motion and I find no reason reviewing them would take so much time. The second reason is that Mr. Smith never opened the emails sent by this office serving the motions.

There were three motions to substitute private for state mediation filed by the employer/carrier on October 11, 2022. They were filed in case numbers: 17-018538; 22-003535; and 20-010729. The e-service for each of the emails sent to Mr. Smith reflect that to date none of them have been opened. The e-service system's email acknowledgment screen is reproduced below.



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Case No.: 22-003535EBG **Judge:** Grindal **Mediator:** Marshman

Kimberly Fox
vs
Sarasota County School Board

E/SA's Motion to Substitute Private Mediation for Mandatory State Mediation filed by Ben H. Cristal

Notice List

Name	Address	Date Served	Date Acknowledged
Bradley G. Smith	bsmith@all-injuries.com,bsmithjccmail@all-injuries.com	Oct 11 2022 9:45AM	
Commercial Risk Management, Inc.	DOAHemail@crm-su.com	Oct 11 2022 9:45AM	10/11/2022 9:52:00 AM

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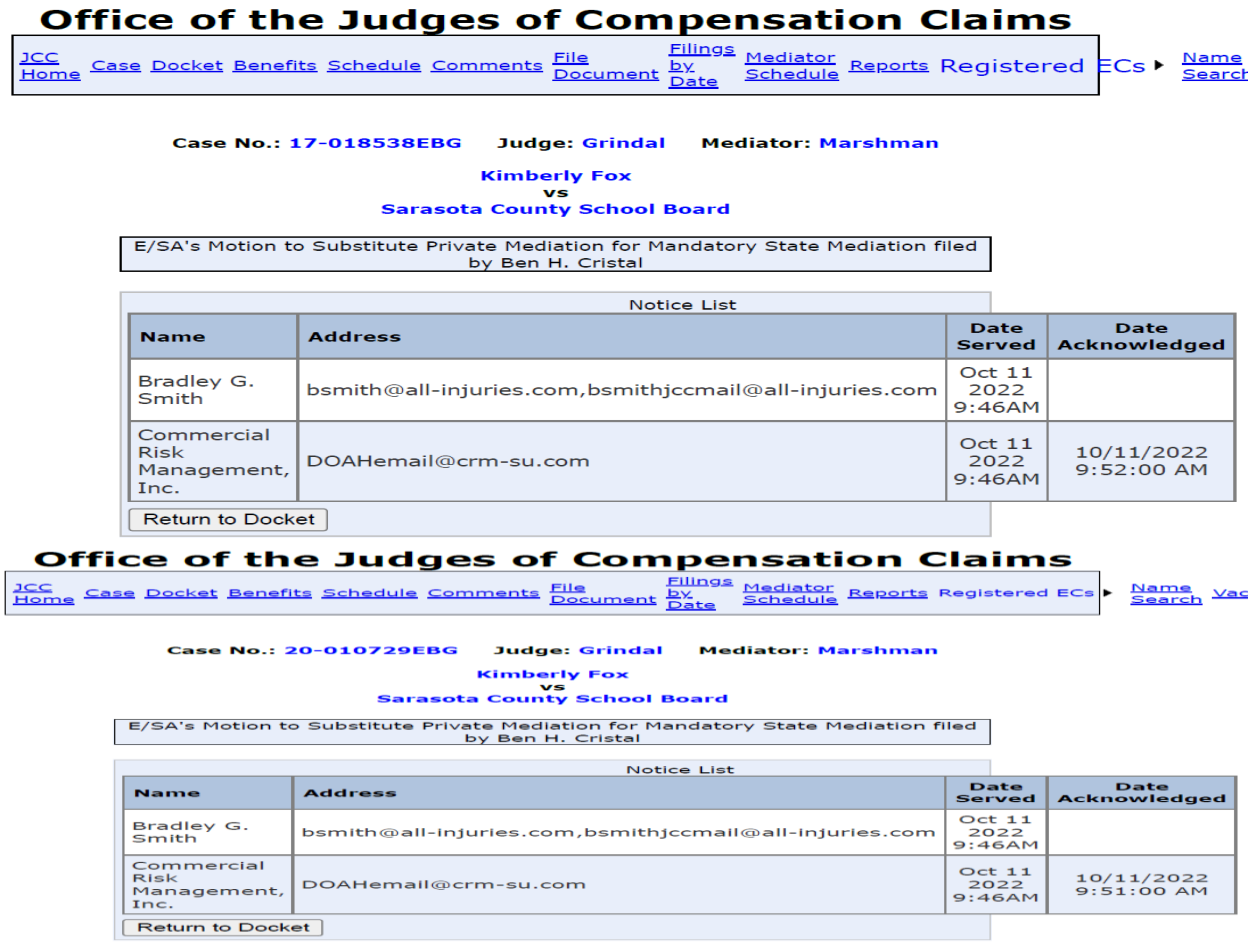

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Case No.: 17-018538EBG Judge: Grindal Mediator: Marshman

Kimberly Fox
vs
Sarasota County School Board

E/SA's Motion to Substitute Private Mediation for Mandatory State Mediation filed by Ben H. Cristal

Notice List

Name	Address	Date Served	Date Acknowledged
Bradley G. Smith	bsmith@all-injuries.com,bsmithjccmail@all-injuries.com	Oct 11 2022 9:46AM	
Commercial Risk Management, Inc.	DOAHemail@crm-su.com	Oct 11 2022 9:46AM	10/11/2022 9:52:00 AM

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Case No.: 20-010729EBG Judge: Grindal Mediator: Marshman

Kimberly Fox
vs
Sarasota County School Board

E/SA's Motion to Substitute Private Mediation for Mandatory State Mediation filed by Ben H. Cristal

Notice List

Name	Address	Date Served	Date Acknowledged
Bradley G. Smith	bsmith@all-injuries.com,bsmithjccmail@all-injuries.com	Oct 11 2022 9:46AM	
Commercial Risk Management, Inc.	DOAHemail@crm-su.com	Oct 11 2022 9:46AM	10/11/2022 9:51:00 AM

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I find that both the verified representation of the time expended in this matter (JCC-8, pg. 30) and the sworn Memorandum filed in response to the inquiry regarding these entries (C-1, pg. 6), inaccurately state that 0.8 hours was expended reviewing these documents.

The portion of the inquiry identified above as question 15, pertains to whether the entry on January 12, 2023, is accurate, as there was no hearing conducted on that date. The entry represents that 2.5 hours were expended by Mr. Smith for:

> *Preparation for and attendance at pre-trial conference with Claimant and preparation of handwritten notes and memo to the file.* (JCC-8, pg. 34)

Mr. Smith responded to the inquiry regarding this time entry in his Memorandum, stating:

> *- clerical error- on scheduled events in file calendar not marked canceled/rescheduled -conference with client in lieu of PTC- notes*

> *were as follows: PTD at issue as well as a medical claim: Authorization of and set up of a return appointment with her treating physician for the left knee and right shoulder. Please forward to the adjuster as the request is for authorization of and set up of treatment for the left knee. STRATEGY* (C-1, pg. 6).

I reject this explanation on multiple grounds. The first is that the Pretrial Hearing was scheduled for January 11, 2023, not January 12, 2023 (DN 126). The date of the Pretrial Hearing was known to Mr. Smith as he billed 0.4 hours for review of the hearing notice on December 19, 2022 (JCC-8, pg. 33). The Pretrial Stipulation was filed December 29, 2022 (DN 127). This was known to Mr. Smith as he billed 0.5 on that date for reviewing the electronic service of the document (C-1, pg. 33). I reject this explanation.

Taxable Costs Paid by Carrier

Separate from whether there was any colorable basis for the attorney fee entitlement represented by the parties in the Side Stipulation, and separate from whether claimant counsel's time records are accurate or reliable, and separate from whether the time expended related to the benefits secured, is the agreement for reimbursement of taxable costs contained within the Side Stipulation. Paragraph 3(b) of the Side Stipulation represents that the employer/carrier agrees to reimburse Mr. Smith taxable costs totaling $24,691.28 (JCC-7, pg. 2).

Mr. Smith submitted an Affidavit in Support of Employer/Carrier Paid Attorneys' Fee along with the Side Stipulation. Paragraph 6 of this verified document states:

> *That the Employer/Carrier has also agreed to pay $24,691.28 for costs relative to securing these benefits.* (JCC-7, pg. 11).

Collectively, the Side Stipulation and Affidavit both represent that the employer/carrier is paying $24,691.28 to reimburse taxable costs incurred by the claimant in connection with the benefits secured through the Petitions for Benefits filed August 2, 2017, August 31, 2022, and February 22, 2022.

These taxable costs were not categorized in the Side Stipulation or the Attorney Fee Affidavit. Rather, a 206-page document titled "*Universal List of Operating Expenses Items*" was attached (JCC-7, pgs. 14-220).

During the July 27, 2023, hearing, the undersigned instructed claimant's counsel to categorize these expenses and explain why so many scanning and photocopy charges were incurred. The Memorandum filed at 4:51 pm, the day before the hearing held on September 12, 2023, states:

COSTS

23) The Judge of Compensation Claims' powers are strictly granted by statute and only those powers granted by the statute are within this Honorable Court's jurisdiction. Florida Statute Section 440.34(5) states "if any proceedings are had or review of any claim, award, or compensation order before any court, the court may award the injured employee or dependent an attorney's fee paid by the Employer or carrier." The statute does not grant jurisdiction over [sic] *the JCC to address E/C paid costs.*

24) Nonetheless, internal copies and scans are allowed under the Statewide Uniform Guidelines for Taxation of Costs.

25) This Honorable Office raised the question as to why the undersigned's firm is not "paperless." While the undersigned's finds this inquiry irrelevant, the firm has begun the process of some paperless conversion by some attorneys but we continue to receive mail/ send letters and documents, receive the same that must be scanned into the computers and some medical providers including EMAs and IMEs will only accept paper medical records prior to any deposition, evaluation, etc.

26) Specific breakdown of copies vs. scans-

a. Certified/Regular Postage $121.88.

b. Copies $559.00 (1118 pages@ $0.50 per page)

c. Black & White Prints -$3,896.00 (7792 pages@ $0.50 per page)

d. Scanning $1129.70 (3765.66 pages@ $0.30 per page)

(C-1, pgs. 6-7)

Pursuant to section 440.34(3), *"[i]f any party should prevail in any proceedings before a judge of compensation claims or court, there shall be taxed against the nonprevailing party the reasonable costs of such proceedings, not to include attorney's fees.*" Rule 60Q-6.124(3)(e), requires that *"[t]he Statewide Uniform Guidelines for Taxation of Costs in Civil Actions shall be considered by the judge in determining the reasonableness of an award of cost reimbursement*."

Although not specifically argued by the parties, the court's opinion in *Gobel v. American Airlines*, 177 So. 3d 1289 (Fla. 1st DCA 2015), has been considered. In *Gobel*, the court reversed the judge of compensation claims' denial of a stipulated cost,

finding that Florida Administrative Code Rule 60Q-6.123(5) is inapplicable. Because of the inapplicability of rule 60Q-6.123(5) and the factual finding that the claimant was not being asked to pay the costs incurred, the court reversed the judge's denial.

This case is distinguished on two grounds. The first is that the claimant was being asked to pay the photocopy and scanning charges. Mr. Smith testified during the September 12, 2023, hearing:

> *So, part of the goal of the settlement was to protect Ms. Fox from any and all costs. And so that was part of the stipulation, is maybe they picked up some cost that would be more difficult to tax. But it doesn't change that parties can create agreements on issues like that.*

Based on this testimony, I find that Mr. Smith was seeking payment of the internal photocopy and scanning charges from the claimant.

I find the court's analysis in *Demedrano v. Labor Finders*, 8 So. 3d 498 (Fla. 1st DCA 2009), to be applicable here. In *Demedrano*, the court held:

> *Because the JCC is authorized to do whatever is necessary to insure that a fee in excess of the fee schedule is not approved, the JCC had jurisdiction to determine whether what claimant's attorney characterized as costs should have been included in the attorney's fee.*

In *Demedrano*, the JCC's rejection of the argument that taxable costs do not include payment for paralegal time was affirmed. The court found that paralegal time fell within the ambit of attorney time and was therefore a fee.

Similarly, here the primary issue is the payment for internal copy charges and internal scanning charges. The issue being determined is whether these charges are taxable costs or are within the ambit of attorney's fees. Overhead/office expenses are not generally taxable because they are subsumed within an attorney's fee.

Based on the analysis in *Demedrano*, I find this tribunal has jurisdiction to review stipulations for costs to determine whether the costs stipulated to are in actuality attorney's fees. I further find, based on *Demedrano,* that a Judge of Compensation Claims has the statutory authority to deny a stipulation for payment of costs, should the costs be found to actually be attorney's fees.

The attorney fee and cost stipulation purports to reimburse $24,691.28 as taxable costs for the benefits secured through Petitions for Benefits filed August 2, 2017, August 31, 2022, and February 22, 2022. Claimant's counsel states in the Affidavit in Support of Employer/Carrier Paid Attorney's Fee, that *"the Employer/Carrier has also agreed to pay $24,691.28 for costs relative to securing these benefits."*

The issue presented here is not whether these costs are overhead expenses or whether they are properly billed to the claimant. The issue is whether there is some colorable argument that these costs were reasonably necessary in conjunction with the benefits obtained, whether they are actually costs that may be taxed against the employer/carrier, and whether the costs identified are actually attorney's fees.

The Uniform Guidelines for Taxation of Costs addresses litigation costs that should be taxed in Section I(B), stating:

> *B. Documents and Exhibits*
>
> *1. The costs of copies of documents filed (in lieu of "actually cited") with the court, which are reasonably necessary to assist the court in reaching a conclusion.*
> *2. The costs of copies obtained in discovery, even if the copies were not used at trial.*

Litigation costs that should not be taxed as costs are discussed in Section III. Relevant to the analysis here are sections III, (A) and (C). These portions state:

> *III. Litigation Costs That Should Not Be Taxed as Costs.*
>
> *A. The Cost of Long-Distance Telephone Calls with Witnesses, both Expert and Non–Expert (including conferences concerning scheduling of depositions or requesting witnesses to attend trial)*
>
> *C. Cost Incurred in Connection with Any Matter Which Was Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence*

In *Rodrigo v. State Farm*, 166 So. 3d 933 (Fla. 4th DCA 2015), the court held:

> *In an effort to "reduce[ ] the overall costs of litigation and [keep] such costs as low as justice will permit," the Florida Supreme Court has adopted the Uniform Guidelines for Taxation of Costs to assist trial courts in fashioning cost awards. In re Amendments to Unif. Guidelines for Taxation of Costs, 915 So.2d 612 (Fla.2005). The Guidelines, however, are advisory only and trial courts have broad discretion in awarding otherwise nontaxable costs. Id. Accordingly, "the trial court may deviate from [the] guidelines depending on the facts of the case as justice may require." Madison v. Midland Nat'l Life Ins. Co., 648 So.2d 1226, 1228 (Fla. 4th DCA 1995); see also Bright v. Baltzell, 65 So.3d 90, 93–94 (Fla. 4th DCA 2011). However, when doing so, the trial court is required to sufficiently identify what nontaxable costs are being awarded and is further required to make specific findings as to the*

unique and extraordinary circumstances justifying such an award. See Bright, 65 So.3d at 94.

Here, the trial court awarded State Farm all of its requested costs, including unspecified costs for travel time and expenses, transcripts, expedited delivery services, and copies. These costs may or may not have been taxable, depending on the circumstances. See generally In re Amendments to Unif. Guidelines for Taxation of Costs, 915 So.2d at 612–17. Although the final judgment included the above referenced potentially nontaxable costs, the court failed to make any findings as to whether the specific costs awarded were taxable, and if not, why they were being awarded.

Accordingly, I conclude that while the Uniform Guidelines for Taxation of Costs are advisory, a departure from them requires specific findings as to the unique and extraordinary circumstances justifying taxation of same.

The Side Stipulation purports to reimburse claimant's counsel for 8,910 photocopies. Attached to the stipulation is a 206-page cost ledger reflecting the individual copies made. Of the 206 pages of copy charges, the first 172 pages predate the filing of the August 2, 2017, Petition for Benefits. These copies are billed separately from funds paid to medical providers to obtain records.

During the September 12, 2023, hearing, inquiry was made of Mr. Smith about the number of photocopies being reimbursed in the stipulation as a taxable cost. The following exchange occurred regarding representations made in the Memorandum.

Q: Another question I had is in paragraph 24. And that's with regard to the costs that are listed, and you had indicated in in paragraph 24, "nonetheless internal copies and scans are allowed under the Statewide Uniform Guidelines for Taxation of Costs." I'm unaware of that. Where is that provided for in the in the State Uniform Guidelines for Taxation of Costs? Or, is there a case? I don't understand where you're getting that statement.

A: The Uniform Guidelines for Taxation of Costs, the purpose and application is to create guidelines for cost. But it says itself, is not the exclusive, you know in other words, costs are to be broadly considered to make the party whole. So with the intent of the rules themselves, the litigation cost that should be taxed, you know, it also different in other cost that you can have as an attorney, but there's outlines that the cost of copies of documents, obtaining discovery, even if not used at trial, are appropriate and can be taxed.

Q: Can you give a specific rule, or portion of the taxation guidelines, that you're referring to? Or is there a case? Because, I read the taxation guidelines last night too, after I saw that, and I didn't see any reference to internal copies or scans. Where is that in the taxation of costs? Because you're saying that it's allowed. Right?

A: OK. The Guidelines are advisory only. OK. They're not…

Q: I agree. I agree that they're advisory. But your statement here is that they're allowed under the statewide uniform guidelines for taxation of costs. What I'm asking you with is what? Why are you saying that? Where does it say that?

A: Right. Well, I just first want to no doubt that or make a note that I'm happy to answer your questions. These are hearings on issues, though, that you don't have jurisdiction over by statute and. But I do agree. I don't mind you asking questions about it or you know, I think you can. You know, I guess can have your investigation or. Do things. But the framework…

Q: Hold on. You took a step out. Where in the statue does it say I don't have jurisdiction.

A: The jurisdiction over costs is left out of the statute.

Q: For settlements, yeah, but this is a stip.

A: OK. Yeah. So you're saying that you do have jurisdiction over cost.

Q: In stipulations, I do. Or if you want to tell me why I don't. I'm interested.

A: The legislative intent, the way that the statute's written. The plain language of the statute.

Q: What provision of the statute are you referring to?

A: I can get you a memo on that. I don't have it memorized in my head.

Q: I was asking because you wrote it. That's why I'm asking the question. I'm looking for clarification on that issue.

A: Right. But the question you had about the cost, is if you read the guideline of taxation of costs, that this expectation of cost for discovery and reasonable cost. What my office does is probably about 15 years ago, we bought software that accounts for every individual cost item, or, copy. And links when it was done. And the reference point in which it was done. And that was the contained in that probably 200-page list of things that you had. So that contains the documentation of each of those costs, because you also seem to throw shade on my office because we weren't paperless. But, we are partly paperless, but not the whole world is paperless.

Q: Mr. Smith, are you trying to insult me?

A: Well that was my question for you. You know the way that…

Q: I'm doing my job Mr. Smith. If you want to stick to the issue that's fine, but…

A: Well, you asked, you made the point about being paperless, like it was, you know, something that, you know. That I'm. The world is not paperless judge. There are attorneys that don't even have computers that practice law. That there are doctors that require copies. I mean, I have to adjust to a variety of things and some are not paperless. So, the suggestion in front of my client, making it seem like not being paperless was somehow a secondary status, is just, I felt, an inconsiderate way of addressing that issue. We have to adjust to EMAs that want hard copies. We have to adjust to doctors that still have composites, that have written records. And so, while for the most part you know our copies are drastically down, you know, over 8-year period of litigation, keeping up with IMES and different things, I can't control the world. You know, the world is what we have to adjust to, and not everyone is paperless. That's the point, I just wanted to make you aware of, and make sure Ms. Fox, knew that there is no Bar requirement or no requirement to be paperless[7]. Even though that's basically

[7] This statement is accurate in the sense that there is indeed not a Florida Bar REQUIREMENT that a law firm be paperless. However, the introductory paragraph to the Uniform Guidelines for the Taxation of Costs does say in relevant part:

> ***Purpose and Application.***
> *The taxation of costs in any particular proceeding is within the broad discretion of the trial court. The trial court should exercise that discretion in a manner that is consistent with the policy of reducing the overall costs of litigation and*

what we are. I guess you'd call us a hybrid, so.

Q: But Mr. Smith, I don't think it's an unreasonable question. You billed for copies: 1,118 pages; black and white prints 7,792 pages; that that's like over $9000 over 9000 pages of copies. Do you have 9000 pages of copies? That's not an unreasonable question.

A: We, right. We broke it down. In the original documents, I think we gave you the 200 pages outlining the details of it. Every little one. So you had, I think, very specific, sufficient evidence. And I don't mind your investigation and questions about it, but you know, this was. It's broken down. The black and white prints were seven thousand seven hundred and ninety-two pages. There was a separate scanning charge and. Yes, I think to keep up with the case and keep the doctors involved. Those are appropriate copies in over an eight-year period. You know if this was an 8-month period, that might seem out of context but. We're doing this 28 years, and …

Q: Are there are physically some 9000 pages that you've printed that are in your file.

A: I don't think…

Q: That's what I don't understand Mr. Smith. I don't understand. It seems like a lot of paper. And that's why I'm wondering if that's accurate. Do you have a 9000, you know, some 9000 pages in your file? That you printed?

A: We have portions of that in the file. But remember, this is 22 different petitions over 4 dates of accident with multiple doctors, depositions, IME physicians. And so those records may exist in the offices of those doctors or other specialists that were involved. So the answer is question is no. I don't have 9000 pages in my file, but those weren't exclusively done for me. They were done to accommodate the vendors and the people you have involved in the

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of keeping such costs as low as justice will permit. With this goal in mind, the trial court should consider and reward utilization of innovative technologies by a party which subsequently minimizes costs and reduce the award when use of innovative technologies that were not used would have resulted in lowering costs.

This is not a Bar requirement that Mr. Smith's office convert to a paperless system. This provision is referenced here to avoid any misunderstanding relative to the efforts to reduce litigation costs that is recommended by the Florida Rules for Civil Procedure.

system. IME doctors.

Q: Scanning 3000. And then that was a little weird. 3765.66 pages, at $0.30 a page. But I've never seen scanning as a taxable cost. But is that based somehow on your cost of scanning the document is $0.30 a page.

A: Correct. Yep.

Q: So how did you how did you determine this the cost of scanning is to you is $0.30 a page?

A: And well there's…

Q: It's supposed to be your actual cost.

A: Right, I think there is a formula done originally as far as the cost. You know there's depreciation equipment. There's you know replacement equipment. There's software equipment. The other event that's happened in the last year is our office has tried to be avant-garde with technology and we went to the cloud system. And for anyone contemplating that, I would say going to the cloud is maybe not as great as it's cracked up to be. Because it creates, you know, issues. So as far as you know a formula right now, that I have, you know. If you'd like a formula I can try to, you know, go back through our records and see how that was derived. But I don't have it at this moment, to say the equipment cost X amount of dollars and the scans are this much, you know.

Q: Why isn't that just an overhead office expense?

A: Well, it, it, it could be, you know. But part of the negotiated bargained for exchange was that an exchange, you know, we wanted to protect Ms. Fox from having any of those cost paid for. You know, I don't think that, you know, it's not a cost that there's a law or basis that say the employer/carrier can't pay for that. So it's certainly a bargain. The whole process of a stipulation is a bargained for exchange. So, part of the goal of the settlement was to protect Ms. Fox from any and all costs. And so that was part of the stipulation, is maybe they picked up some cost that would be more difficult to tax. But it doesn't change that parties can create agreements on issues like that.

Whether these internal copy charges and/or scanning charges are properly characterized as overhead expenses, and not chargeable to Ms. Fox, is beyond the scope of my inquiry.

The inquiry here is whether there is some colorable legal argument, or some factual assertion, that would support the representation in the Side Stipulation and the verified Attorney Fee Affidavit, that these are taxable costs that have some relationship to the benefits allegedly obtained through the identified Petitions for Benefits, or if the costs are actually for payment of attorney's fees.

I find there is no causal relationship between the costs stipulated to and the benefits alleged to have been obtained. I find this reimbursement of "taxable costs," as pertains to internal copy charges and internal scanning charges, is actually a payment of attorney's fees. I find that stipulation to pay the internal copy and scanning charges is being utilized here as a method through which the employer/carrier agreed to pay Mr. Smith money he was not entitled to be paid.

I find based on the testimony at hearing, in conjunction with the evidence submitted, that these printing costs are internal copy charges and are not taxable costs. *See Vogel v. Allen*, 443 So. 2d 368 (Fla. 5th DCA 1983). I find no credible basis for concluding that these internal copy charges are taxable costs.

Separately, is whether scanning 3,765 pages in the amount of $1,129.70 could be a taxable cost. The Florida Uniform Guidelines for Taxation of Costs states:

> *II. Litigation Costs That May Be Taxed as Costs.*
>
> *C. Electronic Discovery Expenses.*
>
> *1. The cost of producing copies of relevant electronic media in response to a discovery request.*
>
> *2. The cost of converting electronically stored information to a reasonably usable format in response to a discovery request that seeks production in such format.*

No assertion was made that the scanning charges were incurred associated with responding to a discovery request.

I find there is no credible basis for scanning to be a taxable cost as has been presented. Rather, I find this is clearly an overhead expense and is not a taxable cost.

I find that the representation that the employer/carrier is paying $24,691.28 to reimburse taxable costs incurred by the claimant in connection with benefits secured

through the Petitions for Benefits filed August 2, 2017, August 31, 2022, and February 22, 2022, has no basis in fact or law and is a sham.

July 27, 2023, Hearing

The July 27, 2023, hearing was conducted via Zoom and the video recording was preserved. The issues of concern regarding the Side Stipulation referenced above were identified and claimant counsel's request for a continuance was granted.

During this hearing, counsel for the employer/carrier was advised that he need not respond to the questions raised as there was already a continuance granted. Mr. Cristal advised that he was ready to respond to the issues raised regarding the timing of submission of the Side Stipulation after approval of the washout, and why is there attorney fee entitlement based on the Petitions for Benefits referenced in the stipulation.

Mr. Cristal explained that the timing of the filing of the Side Stipulation after entry of the Order was due to a clerical error and not intentional. He stated that his normal paralegal was on a cruise at the time and the paralegal covering the case did not realize there was a separate attorney's fee stipulation until called by Mr. Smith's office after entry of the Order approving the washout.

I accept this explanation as truthful and the denial of the Side Stipulation here is not based on a finding that it was intentionally filed after the settlement motion was approved.

With regard to why there is attorney fee entitlement from the employer/carrier, as reflected in the Side Stipulation, Mr. Cristal stated:

> *As far as the rest of it, the settlement. When we reached a settlement agreement, it was for $200,000.00. And after the settlement was reached, I was told what the breakdown would be. And then I was, … when I was told what the breakdown would be, I asked for the explanation for fee entitlement. And so when I was given the explanation for fee entitlement, I, ... it was put in the stip exactly as the fee entitlement was given to me. And I assumed as an officer of the … I mean I didn't go through the file to scrutinize all the time and all the different fee entitlement issues. I assumed that as an officer of the court whatever information I was being given was legitimate fee entitlement. And so that's how the fee was put in there, based on what was given to me in an email.*

September 12, 2023, Hearing

Following notice of the questions regarding the Side Stipulation provided at hearing

on July 27, 2023, a two-and-a-half-hour hearing was conducted on September 12, 2023. Present at this hearing were Bradley Smith, Esquire, Ben Cristal, Esquire, Cheryl Challenger, and Kimberly Fox. The hearing was conducted and recorded via Zoom. The video recording has been retained and is available for review by the parties.

Throughout much of the hearing, Mr. Smith was disrespectful and argumentative with this tribunal. At commencement of the hearing, the following exchange occurred.

> *Q: At the last hearing Mr. Smith, I know that Ms. Tsambis was here at the last hearing, and we had gone through evidence and I had gone through some questions that I had with regard to the stipulation. Rather specific questions. I can review them for your now if you like or ….*
>
> *A: Did you see the memorandum we filed yesterday on this case?*
>
> *Q: Indeed and I was going to add that as JCC-9 for argument purposes, since it's not a sworn statement. I was going to add that as JCC-9. Did you want me to review all the exhibits from the last hearing and all the questions?*
>
> *A: No, I think the goal of that response was it went line item by each of your questions and some of your omissions that you made on the record. And covered all that. And significantly it goes far above and beyond your deficiency notice that you filed which did not state anything that which you covered in the last hearing. That you just dropped on everyone during the hearing. Your deficiency notice only said something about the hours. You didn't give any notice to anyone before that hearing. So I thought in fairness to you though, I would give you notice of the all the facts. Some of them that were I guess accidentally overlooked or not included. So I wanted you to have that in advance of the hearing. So we filed that detailed memorandum that outlined every single one of your questions. Or responded to every single one of your questions.*
>
> *Q: Ok, and I understand that, but that wasn't my question. My question was whether you want me to review what has been admitted as JCC exhibits and go through the questions. Do you want me to do that again?*
>
> *A: Only if it is a comfort for you. No.*
>
> *Q: I don't know why it would be a comfort for me, but I can review*

them if you like? Do you want me to do that?

A: I have a written copy of it your honor, I don't need that.

Similarly, when asked whether Mr. Smith had additional exhibits for consideration, the following exchange occurred.

Q: Mr. Smith let me start with you. Are there additional exhibits you would like to be considered today?

A: Well I would like the memorandum to be included as evidence. And I guess I either go through this and read but there are several things that were omitted that were highly relevant.

Q: Well, Mr. Smith, I could swear you in and you could say this is an accurate representation of your responses to the questions if that is what you want to do. This is just not a sworn statement.

Yeah, we can do that your honor. That way it will… we are already … Sarasota county has already held hearings and approved this settlement. And I think that forcing the tax payers of Sarasota to pay a lot of extra money on things that, you know, the claimant, the defense attorney, and the county have already agreed upon; so I want to try to respect the desires of the parties to close this quickly and efficiently, and I don't think seeing me reading all this you know for hours here is going to be helpful. I can just swear that in and then that will cover the exhibits that are mentioned in there on the docket because some of them fill in the holes or gaps that I think you had questions about.

…

Q: Any other exhibits?

A: No your honor, the response covers every little question you had.

There were further statements by Mr. Smith during the hearing. The following exchange occurred.

Q: Mr. Smith is there going to be any live testimony today?

A: Maybe brief, but I don't know that it's necessary. I feel like the response thoroughly… maybe you have more questions. I am happy to answer those for you. You are the one with the questions I guess. I have a few questions for you I guess. But outside of that

no.

Q: *What are your questions for me?*

A: *Um, I guess, what,… when we filed the paperwork, apparently, whenever … when I read the transcript of the last hearing, for lack of a better term, you seemed to shush Mr. Cristal when he was trying to jump in a couple different times to tell you why the paperwork came in staggered. And it was through no fault of the claimants. And I don't know if when paperwork is filed like that, I mean, I don't know how often that happens, but it seemed to upset you.*

And, so, my question is, does, is that something that, why would it be a trigger, or is that a bad thing, or what happened, because the initial settlement paperwork got filed, and then there was a mistake made by his staff and my office caught it and said hey you need to file that stipulation and it was done the same day but with a several hour gap. And I don't know if administratively that cast shade on your settlement, or what would be the trigger event, or is that a bad thing for you, does that have something to do with your execution of duties or … um

Q: *I am not sure I understand your question.*

A: *When a settlement is filed and there is a subsequent stipulation filed that seemed to enrage you to a certain degree.*

Q: *I am not enraged.*

A: *Ok. I've been doing this for 28 years and I have not encountered any judge from the bench with the imperi that you posed at that last hearing without any notice. That was a bizarre highly unusual event. And I think everyone here would feel the same way your honor.*

And so I don't know the explanation for that. And I am trying to find ...empathize with you to see if that creates a hardship on you … or appreciate your role in this if that is bad. Obviously, we are going to try to correct it so it never happens again where the paperwork is filed at the settlement.

But I just don't know how much of it is you know for filing for the chief judge or I just don't know what the circumstances is from

your part that if you have a settlement filed and several hours later you have a stipulation filed … what … is that…what's the problem with that? Even though it was totally accidental in this case.

I accept Mr. Cristal and his client. Mistakes happen. I make mistakes. Just like you made the mistake, you didn't realize there was a petition in which the carrier had denied. You know. We all have to tolerate each other and show professionalism to overcome these little mistakes. But I don't know if that gap between the settlement being filed and when the stipulation was filed has an impact on your role in execution of duties. What's the moment there. Is there one?

Q: *So, Mr. Smith, in the washout document that you submitted, in the attorney fee data sheet, there is a box to check off to let me know that there's a side stipulation coming. You didn't check that box off on this document. My job is to determine that the attorney's fees being paid are lawful and reasonable. That is what I am investigating. I am doing my job. I am not enraged. I have no interest in the outcome of this case. I am simply doing my job.*

A: *Ok, so a box wasn't checked on the documents. Ok. I am trying to take something away that could be positive to checklist our items and make sure that it doesn't stir things into a cycle like this again.*

Q: *Does that answer your question?*

A: *I think so…I just…. The box wasn't checked and that sounded alarms, I guess or did something. And so I'll make note of that. I don't … I haven't studied on that over the years to make sure. They're typically simultaneously filed and it was simultaneously filed the same day it just had this few hours gap.*

Q: *I am happy to answer your question Mr. Smith, but if I have addressed it at this point, let's move forward with the hearing. Do you want to offer testimony today?*

A: *No, I just offer dialogue and conversation because the way it came across upon reading that in the next week caused me concern. And you know we filed that motion to disqualify because it definitely seemed … what compounded that was that I realized that the significant petitions were portrayed as nonexistent.*

And that was done in front of me and my client and Mr. Cristal

and his client. And like the train got on the track and was rolling… that's … I am assuming you did not do that on purpose. I'm assuming that you overlooked the petition that we had included on the stipulation. Have you looked at it now to see that it does exist.

Q: *I have not reviewed all the evidence. I saw you filed your memo last night at four something. I reviewed it and I spent last night reviewing it.*

A: *Ok, well that was a deep concern because I haven't… I mean everybody makes mistakes and you can tolerate that, but it was … there was no notice in your deficiency as to that and so…*

Q: *But Mr. Smith, we had the hearing and you asked for a continuance to prepare responses, and I granted that. So, I don't understand what your notice concern is.*

A: *In the notice of deficiency you didn't include anything about the stipulation. You just said hourly fees. And so… then, in the hearing…when you… you know…there was no notice. I am just saying that it's probably a better practice that if you are going make it a habit of challenging these things, to just at least tip everyone off so they can prepare for it. Because you didn't give any notice in advance of the hearing.*

You did allow us a continuance to listen to the transcript to line item, and detail it. So I appreciate that. But, if you look at your notice of deficiency, you didn't give any notice about the subject matters that you brought in.

What was compounding it was you were dead wrong because the petitions did exist and they are in the record. And so, you made this border line, I mean really, I don't know the right words to tell you.

You made comments about Mr. Cristal, his client, the county, the county's ability to reach settlements. and me basically using the word sham. and you based it on a foundation that was 100% factually incorrect. it was borderline slanderous type situation where the facts weren't correct.

And it could be avoided for everyone if you just say in advance … you know …or alternative let Mr. Cristal tell you at the outset why the paperwork was filed because he tried to tell you at the

beginning then the end and you shushed him multiple times. It just seemed like there was too much momentum going without the ability to help correct you or to guide you to where you would see things in the record. And it may help you if you just tip us off in advance of the hearing so that we can say "Judge here's the answer."

Q: *So you don't approve of my telling you every question I had and then giving you seven weeks to prepare for the hearing?*

A: *What I am suggesting is that if there's a notice of deficiency, and you say "I don't see the petition in the docket to substantiate the stipulation", then at that hearing… because for a settlement with a stipulation to have…you know, I am sure the county was ready to have this done in June.*

It has now dragged on for several months. Which means attorney's fees and extra costs to a closed file. And if you extrapolate that across the state on settled cases, it adds up to thousands, maybe hundreds of thousands of dollars, on things that are unnecessary to the system.

And that we can point that out to you, because it was a fairly quick fix. If you had said in the deficiency, "hey I don't see the petitions." And so, it's an oversight. Like I said, I don't think it was done purposely, but it was... obviously the docket exists, the petition exists, the notice of denials exist.

So, I'm just suggesting that that would be a cleaner more efficient way, especially on a closed file, with entities… the government has already approved this settlement. The county. Ben had to go to a hearing and with the judges. Now I'm sure he may have to ask questions about why he's billing on a file that is closed.

To the extent that Mr. Smith's statements above constitute an objection to a lack of notice of the subjects to be adjudicated at the hearing on September 12, 2023, the objection is overruled.

I find that Mr. Smith's statements were intended to be insulting and disparaging of this tribunal. I find that these statements reflect negatively on the credibility of his testimony.

ANALYSIS

Attorney Fee and Cost Stipulation Submitted for an Improper Purpose

In *Spitzer v. Bartlett Bros. Roofing*, 437 So. 2d 758 (Fla. 1st DCA 1983), the court held:

> *When a party agrees to a stipulation for benefits in the face of uncertainty as to the meaning of the law, the deputy commissioner should not be permitted to reject the stipulation because he thereafter, on his own motion, decides that question of law contrary to the stipulation. The deputy's adjudication should be limited to those issues and benefits still in dispute between the parties. A contrary conclusion would defeat the salutary purpose and policy underlying and encouraging the usual binding effect of stipulations.*

Significantly, however, *Spitzer* also held that "*a deputy is not required to accept a stipulation if the facts proven are at substantial variance with the stipulation…*"

The analysis here is not whether there are alternate legal or factual interpretations that do not support the Side Stipulation for payment of attorney's fees and taxable costs. The issue is whether the stipulation was submitted for the improper purpose of circumventing Sections 440.20(11)(c), 440.34(1), and 440.34(3), Florida Statutes (1998).

In relevant part, section 440.20(11)(c) states:

> *The settlement agreement requires approval by the judge of compensation claims only as to the attorney's fees paid to the claimant's attorney by the claimant. … Neither the employer nor the carrier is responsible for any attorney's fees relating to the settlement and release of claims under this section.*

In relevant part, section 440.34(1) states:

> *A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings under this chapter, unless approved as reasonable by the judge of compensation claims. … The judge of compensation claims shall not approve … 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.*

Further, section 440.34(3) states:

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;

(c) In a proceeding in which a carrier or employer denies that an accident occurred for which compensation benefits are payable, and the claimant prevails on the issue of compensability; or

(d) In cases where the claimant successfully prevails in proceedings filed under s. 440.24 or s. 440.28.

The issue presented is whether the attorney fee and taxable cost stipulation seeks approval of payment of attorney's fees/gratuities/other consideration, from the employer/carrier to claimant's counsel, to secure settlement in violation of the afore-referenced statutory provisions.

Stated more succinctly, does this stipulation serve to unlawfully pay claimant's counsel money that he is not due, in order to secure a settlement of the case. I find that it does.

I find that an agreement was reached to settle Ms. Fox's claim for $200,000.00. The statutory attorney's fee on this settlement amount is $20,750.00. As presented through the settlement agreement and attorney fee stipulation, claimant's counsel would receive $97,240.00, for attorney's fees and "taxable" costs[8].

In analyzing whether there is a factual and/or legal basis for the agreement to pay Mr. Smith $85,000.00, I have utilized the legal standard for a sham pleading. A sham pleading has been defined as one that "*is palpably or inherently false, and*

[8] In the settlement agreement, Mr. Smith received an attorney's fee of $12,240.00. The $97,240.00 amount results from adding the attorney's fee from the washout to the $85,000 to be paid through the Side Stipulation.

from the plain or conceded facts in the case, must have been known to the party interposing it to be untrue".[9]

The standard that applies to whether a pleading is a sham is the same as the standard that applies to the disposition of a motion for summary judgment. A stipulation is a sham if the material facts are not in dispute and the pleading is not supported by the facts.

If the pleading is supported by any version of the evidence, or by at least some evidence, then the stipulation would not be a sham. Under this standard, a party may avoid the finding that a stipulation is a sham by presenting some evidence in support of the claim raised in that pleading. The general rule is that the trial judge must resolve all doubt in favor of the validity of the stipulation.

Attorney Fee Entitlement is a Sham

I find the attorney fee and taxable cost stipulation is a sham for three separate reasons. The first is attorney fee entitlement. I find that there is no factual or legal basis for concluding that Mr. Smith is entitled to payment of attorney's fees and taxable costs by the employer/carrier under the facts presented here.

I find the statement contained within the attorney fee stipulation that "*the Employer/Servicing Agent acknowledges that the aforementioned benefit was not timely provided within 30 days of the filing of a Petition for Benefits entitling claimant's counsel to Employer/Servicing Agent paid fees and taxable costs,"* is false.

The Amount of the Attorney's Fee is Clearly Excessive and a Sham

The second basis for finding this stipulation to be a sham is the clearly excessive amount of the attorney's fee. The number of hours represented as the basis for a reasonable fee, for the benefits allegedly obtained, is facially lacking in credibility under the facts of this case.

In *Jackson v. Ryan's Family Steak House*, the court upheld the JCC's unilateral reduction of the hours expended, stating:

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[9] *See Rhea v. Hackney, 117 Fla. 62, 70, 157 So. 190, 193 (1934). McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss, 704 So. 2d 214, 216 (Fla. 2d DCA 1998); Sargent, Repka, Covert, Steen & Zimmet, P.A. v. HAMC Industries, Inc., 597 So. 2d 427, 429 (Fla. 2d DCA 1992), Pacheco v. Wasserman, 701 So. 2d 104, 106 (Fla. 3d DCA 1997); Gleman v. MWH Americas, Inc., 309 So. 3d 681 (Fla. 4th DCA 2021). See also Rana v. Thomas, 983 So. 2d 745 (Fla. 3d DCA 2008); Wildflower, LLC v. St. Johns River Water Management Dist., 179 So. 3d 369 (Fla. 5th DCA 2015).*

> *Claimant argues the JCC reversibly erred by unilaterally reducing the hours expended based on non-record evidence. We affirm because the record supports the JCC's finding that the claimed fee was clearly excessive and unconscionable, and even if we were to remand for further proceedings, we have little doubt that upon remand, the employer/carrier (E/C) would introduce evidence establishing that a reasonable fee certainly would not exceed $3,860.00.*

Further, in his concurrence, Chief Judge Hawkes stated:

> *I concur with the majority opinion. A JCC has a duty to award fees that are reasonably related to the amount a conscientious and diligent attorney would be expected to charge under similar circumstances. To award a fee amount that is excessive to the point it "shocks the conscience" of the JCC who presided over the case is illogical and contrary to the primary goal of the statute. Therefore, I agree that the JCC's order should be affirmed.*

In *Sapp v. Berman Bros.*, 884 So. 2d 1080 (Fla. 1st DCA 2004), the court held:

> *"A JCC is not required to follow a stipulation which is refuted by competent substantial evidence (CSE)."1 Jacobs v. Volker Stevin Constr., et al., 609 So.2d 132, 133 (Fla. 1st DCA 1992) (citation omitted). However, stipulations should not be ignored or set aside, without a showing of fraud, overreaching, misrepresentation, or some other basis that would void the agreement. See Williams v. Kraft, Inc., 585 So.2d 1120, 1121 (Fla. 1st DCA 1991)*

Here, I find that the Side Stipulation has been refuted by competent substantial evidence. I further find that the Side Stipulation misrepresents the facts and is overreaching.

I find that an attorney's fee and reimbursement of "taxable" costs totaling $85,000.00, under the facts presented, is shocking to the conscious. The Side Stipulation is rejected on this basis independently and separately from the finding that there is no factual or legal basis upon which attorney fee entitlement at the expense of the employer/carrier could be due.

Payment of Non-Taxable Overhead/Office Expense Costs is a Sham

The third basis for finding this stipulation to be a sham is the payment of "taxable costs" therein. The stipulation provides for payment of costs that have no relevance to the benefits allegedly secured. These include $3,100.00 for a psychiatric examination and deposition with Dr. Ruano, and a $900.00 payment for a Functional

Capacity Evaluation. The claims for which attorney's fee and cost entitlement has been alleged have no connection to psychiatric treatment or indemnity benefits.

The primary indicia supporting the conclusion reached here that the representation that the employer/carrier is paying for taxable costs is false, is the payment of costs that are not taxable. The stipulation provides for payment to Mr. Smith of non-taxable overhead office expenses. These include payment to Mr. Smith's office of $5,587.47 for internal photocopies and scanning of documents. Additionally, the stipulation provides for payment of "*telephone charges since date of intake.*"

Payment of legitimate taxable costs that are unrelated to the benefits allegedly obtained could be part of a negotiated settlement and beneficial to the claimant. However, payment of overhead expenses such as scanning charges, internal copies, and phone charges, represent payment to Mr. Smith of costs that he is not otherwise entitled to.

To be entitled to tax the costs of scanning, phone charges, and internal copies, "*the trial court is required to sufficiently identify what nontaxable costs are being awarded and is further required to make specific findings as to the unique and extraordinary circumstances justifying such an award." Rodrigo v. State Farm*, 166 So. 3d 933 (Fla. 4th DCA 2015). No credible evidence has been presented which provides any unique or extraordinary circumstances to justify the representation that these are taxable costs.

I find that there is no factual or legal basis for concluding that Mr. Smith is entitled to payment of non-taxable costs by the employer/carrier under the facts presented here.

For the foregoing reasons, the stipulation for payment of attorneys' fees and taxable costs is **DENIED** with Prejudice.

ORDER TO SHOW CAUSE DIRECTED TO BRADLEY SMITH, ESQUIRE, AND BEN CRISTAL, ESQUIRE.

Section 440.32(1), Florida Statutes, states:

> *If the judge of compensation claims or any court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the cost of such proceedings shall be assessed against the party who has so instituted or continued the proceedings.*

The attorney fee and taxable cost stipulation submitted on June 23, 2023,

misrepresents that Mr. Smith is entitled to attorney's fees and costs at the expense of the employer/carrier. The stipulation further provides for payment by the employer/carrier of an excessive attorney's fee, for which there is no colorable basis in law or fact. The stipulation provides for payment to claimant's counsel of non-taxable overhead expenses, not otherwise payable to claimant's counsel.

For these reasons, it has been found here that the Side Stipulation is a sham and was presented for the improper purpose of circumventing sections 440.20(11)(c), 440.34(1), and 440.34(3), Florida Statutes (1998), by payment of extra fees/gratuities/consideration to Mr. Smith in order to secure settlement.

Section 440.32 (2) & (3) provide:

> *(2) If the judge of compensation claims or any court having jurisdiction of proceedings in respect to any claims or defense under this section determines that the proceedings were maintained or continued frivolously, the cost of the proceedings, including reasonable attorney's fees, shall be assessed against the offending attorney. If a penalty is assessed under this subsection, a copy of the order assessing the penalty must be forwarded to the appropriate grievance committee acting under the jurisdiction of the Supreme Court. Penalties, fees, and costs awarded under this provision may not be recouped from the party.*
>
> *(3) Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. The signature of an attorney constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this section, the judge of compensation claims or any court having jurisdiction of proceedings, upon motion or upon its own*

initiative, shall impose upon the person who signed it an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Based on the findings made here, absent additional evidence, the submission of the Side Stipulation constitutes violations of both sections 440.32(2) and 440.32(3), by Mr. Smith and Mr. Cristal.

The only attorney's fees that have been paid in this matter have been by the claimant to Mr. Smith. In the settlement agreement, Ms. Fox paid Mr. Smith an attorney's fee of $12,240.00.

Mr. Smith and Mr. Cristal are afforded 15 days to show good cause why sanctions should not be imposed on them to include reimbursement to the claimant of the $12,240.00 attorney's fee paid to Mr. Smith.

WHEREFORE, it is ORDERED and ADJUDGED that:

1. The Stipulation on Attorney's Fees and Costs, filed June 23, 2023, is **DENIED WITH PREJUDICE**.

2. Bradley Smith, Esquire, is **Ordered to Show Cause** within 15 days why sanctions should not be imposed on him pursuant to sections 440.32(2) & (3).

3. Ben Cristal, Esquire, is **Ordered to Show Cause** within 15 days why sanctions should not be imposed on him pursuant to sections 440.32(2) & (3).

4. No additional hearings will be held on the Orders to Show Cause, absent a timely request for same and good cause shown.

DONE AND SERVED this 3rd day of November, 2023, in St. Petersburg, Pinellas County, Florida.

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