

## Attorney Fees and Costs: When Due and How Much? By Barbi L. Feldman, Esq. of RossVecchio, P.A.

The award of attorney fees and costs is not guaranteed in any form of litigation. There are areas of the law which allow for payment of attorney fees and costs, but these laws vary greatly. As a result, one must consider the type of litigation being pursued in order to determine the actual liability for potential payment of fees and costs.

In addition, not every type of civil litigation allows for recovery of attorney fees and costs. There are only certain statutes that make this recovery a guarantee for the prevailing party. Some of these statutes include wage disputes, employment law claims, medical malpractice, and workers' compensation. However, the Employer and Carrier in a workers' compensation matter is only entitled to recovery of fees and costs if they are able to go a step further and prove that the action filed by the claimant was filed and maintained frivolously. F.S. § 440.32. The Claimant in workers' compensation, however, is entitled to payment of attorney fees and costs in relation only to issues in which he prevailed. In employment law cases, wage disputes and medical malpractice cases, fees and costs can be awarded to the prevailing party regardless of who they are. The only question that remains is the amount payable for the fees and costs. We will briefly address how to properly determine the amount later in this article.

If attorney fees and costs are not specifically payable through the statute in which litigation ensued, then there are other methods to attempt to obtain this recovery. If the action is filed on a contract and the contract contains a provision for payment of fees and costs, the prevailing party may be entitled to the same.

In addition, in civil actions where attorney fees and costs are not specifically available under a statute or contract, either party can file an "Offer of Judgment" also known as a "Proposal for Settlement." F.S. § 768.79. This statute provides for an award of attorney fees and costs in practically any case. In order to qualify, certain criteria must be met. First, the offer must contain all terms of the agreement and a release to be executed by the accepting party. Second, if there is more than one party, there must be a separate offer for each. Third, the party the offer was served on must not accept it within the 30 days allowed by statute. (Obviously, if the offer is accepted then the issue of fees and costs is moot). Third, if filed by a plaintiff the judgment must be 25% higher than the offer; if filed by the defendant it must be 25% less than the offer to trigger fee and cost entitlement. If all of the criteria are met the last step is to file a formal motion with the Court for fees and costs within 30 days of the final judgment. Failure to file the motion within 30 days waives any right to claim fees and costs.

Finally, another method of obtaining fees and costs during litigation is under F.S. § 57.105 or § 440.32. Both of these statutes allow a party to recover fees and costs if an action is filed or maintained frivolously or without good cause. Many believe these statutes are for the benefit of the defendant's only. However, this would be incorrect. The statutes also provide for recovery of actions maintained without good cause. This means that if a claims or defense, motion, discovery, etc. is pursued which either party knew or should have know had no merit, then fees and costs are awardable for those instances if not the entire case. Accordingly, it is imperative that defenses and litigation be reasonable at every step.

NOTE: There is no definitive time limit for a claimant's attorney in a workers' compensation claim to file his/her verified petition seeking fees and costs.

Assuming that attorney fees and costs are due; how does one determine an appropriate fee and cost award?

The standard is an award of a "reasonable fee." But what is a reasonable fee? In Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), the Florida Supreme Court answered this question for us. It set forth criteria to be considered by the court to include: The time and labor required, the novelty and difficulty of the issues and the skill required; The likelihood this employment will preclude other employment by the lawyer and the lawyers experience and reputation; The fee customarily charged in the locality for similar legal services; The amount in controversy and the results obtained; The time limitations imposed by the client or by the circumstances of the case; The nature and length of the relationship with the client; and Whether the fee is fixed or contingent.

The party seeking payment of fees and costs will have to present evidence to the court in order to support their request. This will include their time records, evidence of entitlement, and an expert to testify on relevant issues such as hourly rate and reasonableness of the fees and costs being requested. To the same extent the opposite party will present similar evidence to either defeat the request for fees and costs entirely or reduce the amount being sought as much as possible. In workers' compensation cases, if the fee entitlement is in dispute then the attorney can also seek fees for proving entitlement.

When reviewing fee and cost claims, an attorney must carefully look at all entries included as there are many things claimed that are not payable. For example, attorney travel time and secretarial tasks are not recoverable regardless of the reason it was incurred. Mandel v. Decorator's Mart, Inc., 965 So.2d 311 (Fla. 4<sup>th</sup> DCA 2007).. Further, only taxable costs can be recovered. The issue of what is taxable is something within the discretion of the court and that has been widely litigated. However, the following are items that are not taxable and cannot be considered by the court: postage, delivery services, travel expenses, telephone charges, undifferentiated copies, facsimile charges, fees for depositions and witnesses not utilized at trial or unrelated to the benefits obtained, and legal research. Robbins v. McGrath, 955 So.2d 633 (Fla. 1<sup>st</sup> DCA 2007).

Further, if the case was a contingency matter, the party from whom fees are sought may also be entitled to a "multiplier" when determining the fee award. This could substantially increase ones exposure for attorney fees.

Unfortunately, this article only touches on the very basic issues surrounding attorney fee and cost issues. This area of the law is complex and varies greatly depending on multiple factors involved in each individual case. Due to the potential exposure that can result from mere entitlement of the prevailing party to seek fees and costs, it is imperative that an attorney is retained to assist in the litigation process and fully analyze every avenue of exposure for these issues as well as the underlying case itself.

Should you have any questions regarding this article, or wish for further information, please contact [Bfeldman@RossVecchio.com](mailto:Bfeldman@RossVecchio.com).