

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

Nivia L. Lascaibar,
Employee/Claimant,

OJCC Case No. 13-028208RDM

vs.

Accident date: 11/25/2013

Stack, Fernandez, Anderson &
Harris/Castlepoint Florida,
Employer/Carrier/Service Agent.

Judge: Robert D. McAliley

_____ /

ORDER TAXING COSTS

THIS MATTER was considered without a hearing pursuant to the employer/carrier's (E/C) verified motion to tax costs filed March 1, 2016. Claimant filed her response on March 31, 2016. E/C did not request a hearing on the present motion and claimant indicates in her response that a hearing is unnecessary. Under the circumstances, I agree.

Initially, I find the judge of compensation claims has jurisdiction over the parties and subject matter.

E/C maintains it is entitled to tax costs attaching to petitions for benefits (PFB) filed December 5, 2013, and January 26, 2015, which were voluntarily dismissed on April 25, 2014, and April 21, 2015, respectively. E/C also seeks to tax costs attaching to a PFB filed April 10, 2015. The issues raised in this PFB went to a final hearing on February 16th, 2016, and resulted in a merits order entered February 19, 2016, which is now final. That final order was favorable to E/C.

It is unnecessary to address the issue of costs attaching to the two PFBs which were voluntarily dismissed. All costs listed in E/C's affidavit executed March 1, 2016, delineating

costs figure significantly into the February 2016 final order. All documents involved were either placed in evidence directly or provided to the physician serving as the expert medical advisor. Hence, if any expenses delineated on E/C's affidavit factor into the PFB's that were voluntarily dismissed, said expenses are subsumed by their application in obtaining the favorable final order on the part of E/C.

The costs involved totaling \$3,072.40, which are not seriously challenged in this proceeding, are reasonable on their face. The bulk of this figure is the EMA's fee for services totaling \$2,400.00.

As to this expense, the amount that may be charged is established by "department" rule. §440.13 (9) (b) Fla. Stat. (2015). E/C is subject to a fine up to \$500 if it fails to timely compensate the EMA physician. §440.13 (9) (f) Fla. Stat. (2015). Although the issue not specifically raised in these proceedings, I am mindful that section 440.13 (9) (f) provides, "If the employee prevails in a dispute as determined in an order by a judge of compensation claims based upon the expert medical advisor's findings, the employer or carrier shall pay for the costs of such expert medical advisor." There is no similar provision in regards to E/C prevailing. I do not find this provision limits the recovery of an EMA expense as a taxable cost to situations where the E/C prevails.

Instead, I find this provision was intended by the Legislature to ameliorate the possibility of a claimant having to fund an EMA under the same provisions of this subsection. In practice (but not in theory) the necessity of claimant paying for his or her own EMA has been all but eliminated by case law. *See Banuchi v. Department of Corrections*, 122 So. 3rd 999 (Fla. 1st DCA 2013). Construing this provision in conjunction with section 440.34 (3), I find the cost incurred by E/C in securing an EMA opinion is taxable, under the circumstances of this case, as a

prevailing party cost. See *F.A. Richard & Assoc. v. Fernandez*, 975 So.2d 1224 (Fla. 1st DCA 2008).

WHEREFORE, it is

ORDERED AND ADJUDGED that the employer and carrier herein, Stack, Fernandez, Anderson & Harris and Tower Group Companies may recover from the claimant, Nivia Lascaibar, the sum of \$3,072.40 for costs expended in the defense of this matter.

DONE AND ORDERED this 5th day of April, 2016, in Port St. Lucie, St. Lucie County, Florida.



Robert D. McAliley
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CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing has been e-mailed to Counsel on April 5th, 2016.



Secretary to Judge of Compensation Claims

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