

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARING
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
DAYTONA BEACH DISTRICT**

EMPLOYEE:

Pascual Hernandez
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Deland, FL 32720

ATTORNEY FOR EMPLOYEE:

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EMPLOYER:

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CARRIER:

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Bradenton, FL 34206

OJCC CASE NO.: 06-009814TGP
D/A: 5/3/2005

**ORDER DENYING MOTION TO STAY
WORKERS' COMPENSATION PROCEEDINGS**

After proper notice to all parties, an evidentiary hearing was held on Alfonso Hernandez's, as personal representative of the Estate of Pascual Hernandez, Motion to Stay Workers' Compensation Proceedings in Daytona Beach, Volusia County, Florida, on May 1 2007, before the undersigned Judge of Compensation Claims. Laura Arriaga, the natural mother and legal guardian of the minor dependents of the deceased, Brian and Berenice Hernandez, was represented by Jose Alvarez. The employer/carrier was represented by Andrew Borah. Alfonso Hernandez as personal representative of the Estate of Pascual Hernandez was represented by Mark Zimmerman. The only live witnesses were Laura Arriaga and Alfonso Hernandez. Argument in this case was presented through the Motion to Stay Workers' Compensation Proceedings, as well as through arguments of counsel. By letter dated May 7, 2007, the undersigned issued asked the attorney for the employer/carrier to draft a proposed order.

Alfonso Hernandez, as personal representative of the Estate of Pascual Hernandez, filed a Motion for Stay of Workers' Compensation Proceedings with the undersigned Judge of Compensation Claims on August 4, 2006, September 13, 2006, and October 30, 2006. The motion asks the undersigned Judge of Compensation Claims to stay the workers' compensation proceedings filed by Jose Alvarez, the attorney for Laura Arriaga, the natural mother of the minor dependents of the deceased.

The following exhibits were admitted into evidence:

1. May 1, 2006 Petition for Benefits (JCC Exhibit #1).
2. April 3, 2006 PFB/June 15, 2006 Notice of Voluntary Dismissal of April 3, 2006 PFB (JCC Composite Exhibit #2).
3. Stipulation for Substitution of Counsel filed on May 25, 2006 (JCC Exhibit #3).
4. Notice of Appearance of Mark Zimmerman dated November 2, 2006 (JCC Exhibit #4).
5. Motion to Reset Evidentiary Hearing dated February 16, 2007 and corresponding Order granting such motion dated March 15, 2007 (JCC Composite Exhibit #5).
6. Motion for Stay of Workers' Compensation Proceedings dated August 4, 2006, September 13, 2006, and October 30, 2006 (Alfonso Hernandez's Composite Exhibit #1).
7. Documents attached to Motion for Stay of Workers' Compensation Proceedings, which are: a civil cover sheet dated June 26, 2006 signed by Earl L. Denney, Jr.; Plaintiff's Complaint totaling five pages signed by Earl Denney, Jr.; birth certificate of Berenice Hernandez; and birth certificate of Brian Hernandez (Alfonso Hernandez Composite Exhibit #2).

8. Notice of Filing dated March 6, 2007, which filed: Letters of Guardianship of the Properties of Minor for Brian Hernandez, entered by Circuit Court Judge C. McFerrin Smith, III on March 6, 2007; and Letters of Guardianship of the Property of Minor for Berenice Hernandez, entered by Circuit Court Judge C. McFerrin, Smith, III on March 6, 2007 (Alfonso Hernandez Composite Exhibit #3).
9. Notice of Filing and Request to Take Judicial Notice dated April 2, 2007, which filed: Petition for Administration filed by Lawrence Welch, Esquire on April 11, 2006 in the Circuit Court for Volusia County, Florida; Letters of Administration, entered by Circuit Court Judge C. McFerrin Smith, III on May 2, 2006; Petition for Appointment of Guardian filed by Lawrence Welch, Esquire, for Brian Hernandez, minor; Petition for Appointment of Guardian filed by Lawrence Welch, Esquire, for Berenice Hernandez, minor; Mother's Answer to Petition for Appointment of Guardianship of Property of Minor filed December 5, 2006; Letters of Guardianship of the Property of Minor for Brian Hernandez, entered by Circuit Court Judge C. McFerrin Smith, III on March 6, 2007; Letters of Guardianship of the Property of Minor for Berenice Hernandez, entered by Circuit Court Judge C. McFerrin Smith, III on March 6, 2007; Order Appointing Guardian of Property of Minors for Brian Hernandez, entered March 6, 2007 by Circuit Court Judge C. McFerrin Smith, III; Order Appointing Guardian of Property of Minor for Berenice Hernandez, entered March 6, 2007 by Circuit Court Judge C. McFerrin Smith, III; Motion for Rehearing filed by Hector R. Cuprill, Jr., Esquire on March 9, 2007; Order Denying Motion for Rehearing for

Brian Hernandez and Berenice Hernandez, entered by Circuit Court Judge C. McFerrin Smith, III on March 12, 2007; and Order Denying Motion for Rehearing for Pascual Hernandez, deceased, entered by Circuit Court Judge C. McFerrin Smith, III on March 12, 2007 (Alfonso Hernandez Composite Exhibit #4).

10. Transcript of hearing before Circuit Judge C. McFerrin Smith, III on March 6, 2007 in the matter of the Estate of Pascual Hernandez, Case. No. 06-11248 PRDL (Laura Arriaga and Employer/Carrier Exhibit #1).
11. Written statement of Laura Arriaga with attached translation from Maria L. Ritz (Laura Arriaga Exhibit #2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

I have carefully considered all of the evidence submitted to me for consideration and making my findings of fact and in reaching my conclusions of law, I have resolved the conflicts in the evidence and rejected all evidence and inferences that may be inconsistent with my findings of fact and conclusions of law.

1. Laura Arriaga is the natural mother of the minor dependents of the deceased, Brian and Berenice Hernandez. Ms. Arriaga was never married to the deceased, Pascual Hernandez. Ms. Arriaga is not only the minor dependents' natural mother, but also their personal guardian who takes care of them on a daily basis. As such, I find that Ms. Arriaga is in the best position to decide every day matters of financial interest with regard to the minor dependents' well being.
2. I find that Ms. Arriaga is the proper person under Fla. Stat. §440.17 to receive workers' compensation death benefits payable on behalf of the minor dependents of the deceased.

3. Based upon the totality of evidence presented to this Court, I find that Ms. Arriaga has standing to bring forth a Petition for Benefits in order to secure that all proper workers' compensation benefits are paid to the minor dependents pursuant to Fla. Stat. §440.17.
4. Alfonso Hernandez, as personal representative of the Estate of Pascual Hernandez, argued that the Letters of Guardianship of the Property and Order Appointing Guardian of Property of Minors prepared by Circuit Judge McFerrin Smith, severed Ms. Arriaga's standing to pursue workers' compensation benefits on behalf of the minor dependents. I reject this argument and find that insufficient legal authority has been presented to the undersigned to support this position.
5. Contrary to Alfonso Hernandez's position, the language of the transcript of the March 6, 2007, hearing before the Honorable Circuit Judge McFerrin Smith states that it will be left up to the parties to discuss whether the receipt of social security benefits and workers' compensation benefits should be included or excluded in the accounting of the guardianship. Judge McFerrin Smith states:

So, I will leave it to the two of you to discuss with each other whether social security benefits should be included or excluded in the accounting of this guardianship. The same arguably could be applied to the workers' compensation, but let me let the two of you sort that out between the two of you.

March 6, 2007 hearing before the Honorable McFerrin Smith, page 31, lines 14-

20.

6. Judge McFerrin Smith indicated in the March 6, 2007, transcript that the main asset of the guardianship he created was the wrongful death claim.
7. As such, I reject any interpretation of the Order Appointing Guardian of Property of Minors and Letters of Guardianship of the Property of Minors as a Circuit Court Order appointing Alfonso Hernandez as the personal representative solely capable of bringing forth a workers' compensation action for receipt of death benefits for the dependent minor children in this case. The interpretation of the Order Appointing Guardian of the Property of Minors and Letters of Guardianship of the Property of Minors, as argued by Alfonso Hernandez before the undersigned Judge of Compensation Claims, was not contemplated by the Circuit Court at the time the ruling was made. The Circuit Court clearly indicated that it would up to the parties to resolve the workers' compensation issue and to select a guardian ad litem.
8. At the time of the May 1, 2007, evidentiary hearing, neither party informed this Honorable Court of the appointment of an attorney ad litem. An Order appointing an attorney ad litem dated April 27, 2007, was filed with this Court on May 7, 2007, post-hearing. As such, this Order Denying Motion to Stay Workers' Compensation Proceedings may be subject to modification at a future date.
9. Based upon the totality of the evidence before this Court, I find that no guardian or other representative has been determined by the Circuit Court for purposes of pursuing and receiving workers' compensation benefits. Accordingly, I find that the natural mother, Ms. Arriaga is the proper person to receive workers' compensation benefits under Fla. Stat. §440.17.

10. Alfonso Hernandez argued that the workers' compensation proceedings should be stayed so the Estate of Pascual Hernandez could proceed with a wrongful death tort action in Circuit Court without the possibility of the tort action being dismissed due to an election of remedies defense. Such concern is not proper grounds to stay the workers' compensation proceedings in this matter. Ms. Arriaga has a right to pursue workers' compensation death benefits on behalf of the minor dependants if she believes the minor dependants have not received the benefits they are entitled to under the law. Alfonso Hernandez does not have standing to interfere with Ms. Arriaga's right to pursue workers' compensation death benefits on behalf of the minor dependants.
11. Since this Order denies the Motion to Stay Workers' Compensation Proceedings, Ms. Arriaga and the employer/carrier are compelled to complete mediation in this case and immediately proceed to trial in order to resolve any outstanding issues regarding payment of death benefits. This Court will be scheduling a state mediation to occur in the immediate future and Ms. Arriaga and the employer/carrier are ordered to submit a pretrial questionnaire immediately following the mediation.
12. The attorney for Ms. Arriaga, Jose Alvarez, Esq., is directed to comply with the requirements of The Florida Bar in maintaining and administrating his trust account with regard to all death benefits paid in this case.

13. Any arguments or issues not raised at the time of the May 1, 2007 evidentiary hearing are considered waived.

WHEREFORE, it is the Order of the undersigned Judge of Compensation Claims that Alfonso Hernandez's Motion to Stay Workers' Compensation Proceedings is denied.

DONE and ORDERED in Daytona Beach, Florida, this 15th day of May, 2007.

Thomas G. Portuallo

Honorable Thomas G. Portuallo
Judge of Compensation Claims

THIS IS TO CERTIFY that the foregoing Order was entered on the 15th day of May, 2007 and a copy was sent by regular mail to all interested parties at the addresses listed above.

Debra Smith

Judicial Assistant