

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

Adrian Mejia-Gaspar
Employee/Claimant,

OJCC Case No. 13-028560NSW

vs.

Accident date: 10/17/2013

New China Buffet
and
Technology Insurance Company
Employer/Carrier/Service Agent.

Judge: Nolan S. Winn

FINAL EVIDENTIARY ORDER TAXING COSTS

THIS CAUSE came on to be heard in Pensacola, Florida and Ft. Lauderdale, Florida via VTC on 09-05-14 upon the Employer/Carrier's (E/C's) Verified Motion to Tax Costs. The Motion was filed 05-16-14. The Final Hearing occurred one hundred twelve (112) days thereafter and this Order was entered zero (0) days following such hearing. Kate Albin, Esquire, was present in Ft. Lauderdale on behalf of the E/C. Scott Cohen, Esquire, was present in Ft. Lauderdale on behalf of the Claimant.

Submitted into evidence at the Final Hearing were the following documents, each accepted, identified and placed into evidence without objection except where noted, as Judge's Exhibits, Joint Exhibits, Claimant's Exhibits, or E/C Exhibits, as follows:

JUDGE'S EXHIBITS MARKED FOR THE RECORD:

- #1. E/C's Verified Motion to Tax Costs and attached affidavit filed 05-16-14.

JOINT EXHIBITS:

None.

E/C's EXHIBITS:

- #1. Composite Petition for Benefits filed 12-10-13; 01-10-14; 01-16-14; 03-17-14; and 03-26-14.
- #2. Composite Responses to Petitions for Benefits filed 12-23-13; 01-16-14; 01-29-14 and 04-18-14 (2).
- #3. Notice of Voluntary Dismissal without Prejudice filed 05-02-14.

CLAIMANT'S EXHIBITS:

- #1. Petition for Benefits filed 05-05-14.

In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary to resolve this claim. I have not attempted to painstakingly summarize the substance of the parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel for the respective parties, and analyzed statutory and decisional law of Florida.

Based upon the parties' stipulations and the evidence and testimony presented, I find:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.
2. Any and all issues raised by way of the Verified Motion, but which issues were not dismissed or tried at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the E/C and, therefore, are Denied and Dismissed with prejudice. See, *Scotty's Hardware v. Northcutt*, 883 So.2d 859 (Fla. 1st DCA 2004).
3. The Claimant filed, and later dismissed, five (5) Petitions for Benefits and the E/C seeks to tax costs incurred in defending these five (5) Petitions. There is no dispute the costs claimed by the E/C were not incurred in the amounts claimed or that such costs are properly taxable. The Claimant contends the E/C's motion should be denied however, as she voluntarily dismissed each of her five (5) Petitions as the stated date of accident was incorrect and following dismissal, she filed another Petition setting forth the correct date of accident and claiming benefits identical to those asserted in her initial five (5) Petitions. The Claimant contends as this sixth Petition is currently scheduled for Final Hearing, it is not until an adjudication is rendered following such hearing that the E/C may be said to be the prevailing party entitled to tax costs.
4. Review of the five Petitions at issue reveals the first three (3) set forth 10-27-13 as the date of accident while the last two (2) set forth 10-17-13 as the date of accident. All five Petitions state the Claimant had injured her left elbow. The Claimant's sixth Petition, filed after she voluntarily dismissed the initial five Petitions states she injured her right elbow, rather than her left, on 10-17-13, rather than 10-27-13.
5. Whether the Claimant or the E/C ultimately prevails at Final Hearing with regards to the sixth Petition for Benefits, the E/C is the prevailing party with regards to the first five (5) Petitions which Claimant voluntarily dismissed. The E/C correctly contends *Palm Beach County School District v. Ferrer*, 990 So.2d 13 (Fla. 1st DCA 2008) controls disposition in this regard and that the E/C became the prevailing party entitled to tax costs upon the

Claimant's voluntary dismissal whether such was with or without prejudice and whether or not the Claimant thereafter filed a new Petition for Benefits. See also, Costco Wholesale Corp. v. Ulett, 995 So.2d 1016 (Fla. 1st DCA 2008). As the E/C is the prevailing party and as there is no dispute as to the amount of taxable costs due,

It is therefore,

ORDERED AND ADJUDGED that:

1. The E/C's Verified Motion to Tax Costs is **GRANTED**. The E/C is entitled to recover from Claimant taxable costs in the sum of \$1,877.37.

DONE AND SERVED this 5th day of September, 2014, in Pensacola, Escambia County, Florida.



Nolan S. Wimm
Judge of Compensation Claims
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