STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
SEBASTIAN/MELBOURNE DISTRICT OFFICE

Yolanda Banuchi, Employee/Claimant,	)	
vs.	)	OJCC Case No. 09-024352DSR
Department of Corrections/Indian River Correctional Institute/State of Florida Division of Risk Management, Employer/Carrier/Servicing Agent.	)	Accident Date: 9/9/2008 Judge John J. Lazzara

FINAL COMPENSATION ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on this matter was held on March 19, 2012 in Sebastian, Melbourne County, Florida, and simultaneously in Tallahassee, Leon County, Florida by way of the Division of Administrative Hearing's Video Teleconferencing System. The parties were represented by counsel of record as indicated below. Deputy Chief Judge David W. Langham selected the undersigned judge of compensation claims to preside over the trial of the case in the absence of Judge Paul T. Terlizzese, who was initially assigned the case. The undersigned judge of compensation claims has jurisdiction of the parties and the subject matter.

The litigation history of this matter reflects that unresolved pending Petitions for Benefits (PFBs) were filed on August 2, 2011 and November 11, 2011. The matter was mediated on November 8, 2011 and the parties resolved certain issues/claims relative to the PFB of August 2, 2011, and all the issues/claims contained in PFB of November 11, 2011 except for fees and costs. The claim was subsequently pre-tried on November 18, 2011 and scheduled for trial on January 12, 2012. On December 15, 2011 a Joint Motion for Continuance was filed and an Order was entered on December 30, 2011 rescheduling the final hearing to March 19, 2012.

At the final hearing, the claimant specifically sought the following benefits:

1. Temporary partial disability (TPD) benefits for the following periods: 10/2/2009 through 12/7/2009; 2/1/2010 through 4/17/2011; and 6/18/2011 to the present and continuing;

2. Interest and penalties on all past due payments of compensation;

3. Reasonable attorney's fee for claimant's counsel of record; and

4. Cost of these proceedings.

The claim was defended on the following grounds:

1. Claimant reached maximum medical improvement (MMI) with a 4% permanent impairment rating (PIR) of the whole body on 10/1/2009;

2. Claimant has voluntarily limited income;

3. Claimant has voluntarily terminated his employment with this employer;

4. Deemed Earnings apply;

5. Claimant sustained a new work accident with this employer on 10/21/2009, which was a temporary exacerbation, with return to MMI and the same 4% PIR;

6. Claimant underwent unrelated gastric bypass surgery which was the cause of the claimant's disability;

7. Claimant underwent intestinal blockage surgery which was the cause of the claimant's disability;

8. Claimant sustained an unrelated subsequent motor vehicle accident which is the cause of the claimant's loss of earnings;

9. Industrial accident is not the major contributing cause or proximate cause of claimant's disability;

10. Employer/Carrier entitled to offsets for unemployment compensation benefits and subsequent earnings received;

11. Employer/Carrier has provided the claimant with an Advance on Compensation which should be credited against any benefits due or awarded; and

12. Employer/Carrier denies claimant's entitlement penalties, interest, costs and attorney's fees at their expense.

The parties have entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Indian River County, Florida.

3. Notice of Hearing and Notice of Injury were properly furnished and received as required by the Workers' Compensation Law.

4. On September 9, 2008, the captioned claimant was employed by the captioned employer and on that date sustained an injury to her left ankle by accident arising out of and within the course and scope of said employment, earning an average weekly wage (AWW), including fringe benefits, of $811.99 per/week yielding a compensation rate (CR) of $541.33 per/week.

5. At the final hearing, the parties also stipulated to the following:

(a) The issues/claims in petition for benefits filed 11/1/2011 have been resolved and the issue of entitlement to and the amount of fees and costs, if any, regarding PFB of 8/9/2011 and 11/1/2011 is specifically reserved for later hearing; and

(b) Petitions for Benefits filed 2/21/2012 and 3/16/2012 are not the subject matter of this final hearing as they have yet to be mediated.

At the trial of this cause, the following Exhibits were admitted into evidence:

Claimant's Exhibits

1. Petition for Benefits filed 8/2/2011.

2. Petition for Benefits filed 7/28/2011. *(Employer/Carrier's objection that the exhibit was irrelevant was overruled).*

3. Deposition of Dr. Mark Bornstein, D.P.M, filed 12/21/2011, together with

exhibits.

4. Deposition of Dr. Mark Bornstein, D.P.M, filed 12/21/2011, together with exhibits.

5. Notice of Conflict in Medical Opinions and Request for Court to Appoint an Expert Medical Advisor (EMA) filed 12/19/2011.

6. Order on Claimant's Notice/Motion to Appoint Expert Medical Advisor entered by Judge Paul T. Terlizzese on 1/4/2012.

7. Amended Order on Claimant's Notice/Motion to Appoint Expert Medical Advisor (As a Substitute Expert Medical Advisor) entered by Judge Paul T. Terlizzese on 1/11/2012.

8. Claimant's Motion for Rehearing and Clarification filed on 1/20/2012.

9. Order Denying Claimant's Motion for Rehearing entered on 1/23/2012.

10. Claimant's Motion for Rehearing and/or Clarification filed on 1/30/2012.

11. Financial Affidavit of Claimant filed on 2/9/2012. *(Employer/Carrier's hearsay objection was overruled when the document was identified and authenticated by the claimant during trial).*

12. Claimant's Motion to Compel Authorization of Testing and Motion to Continue Final Hearing filed 3/15/2012.

13. Order Denying Motion to Compel and to Continue Final Hearing entered on 3/16/2012.

14. *(Proffered only).* Employer/Carrier's Motion for Summary Final Order filed 3/16/2012.

Employer/Carrier's Exhibits

1. Claimant's deposition taken 11/25/2009 and filed on 3/9/2012.

2. Claimant's deposition taken 10/26/2011 and filed 3/9/2012.

3. Deposition of Dr. Jeffrey Lazarus, M.D., filed 3/9/2012, together with exhibits.

4. Deposition of Dr. John A. Papa, M.D., filed 3/9/2012, together with exhibits.

5. Deposition of Records Custodian of Cleveland Claims filed 3/9/2012 *(received for factual purpose only under Office depot, Inc. v. Sweikata, 737 So.2d 1667 (Fla. 1st DCA 1999)).*

6. Deposition of Dr. John House, D.C., filed 3/9/2012, together with exhibits *(received for factual purpose only under Office depot, Inc. v. Sweikata, 737 So.2d 1667 (Fla. 1st DCA 1999)).*

7. Deposition of Records Custodian of Dept. of Economic Opportunity Records *(Unemployment Compensation Records)* filed 3/9/2012, with attachments.

8. Carrier's response to motion to appoint EMA filed 12/15/2011.

9. Surveillance video of 1/26/2012.

Joint Exhibits

1. Medical Records Composite of Dr. James Cain, M.D.; Dr. Seth D. Coren, M.D.; and Dr. Jeffrey Lazarus, M.D., filed 11/15/2011.

2. Deposition of Dr. David Haile, D.P.M., filed on 3/9/2012, together with exhibits.

3. Pretrial Stipulation and Order entered 11/22/2011, together with amendments to pretrial stipulation.

The following individual testified live before me:

1. Yolanda Yvette Banuchi, the claimant/employee.

After due consideration of this matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having observed and considered the candor and demeanor of the witnesses who appeared and testified before me, and having endeavored to resolve all conflicts of facts in the evidence presented herein, I hereby make the following findings of fact and conclusions of law:

1. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. The stipulations entered into by and between the parties herein are hereby approved and adopted as findings of fact and are incorporated herein by reference.

3. In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts. Because I have not done so should not be construed that I have failed to consider all of the evidence.

4. Any and all issues raised in the petition for benefits described above which were the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved or, in the alternative, deemed abandoned by the employee/claimant and therefore **denied.** *See* Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On September 9, 2008, the captioned claimant, Yolanda Yvette Banuchi, who is 43 years of age and has 1½ years of college studies, was employed by the captioned employer as a correctional officer and on that date sustained and suffered a compensable injury to her left lower extremity; specifically, the left ankle, while engaged in physical training when she twisted her left ankle, felt a pop and her foot began to swell. She was eventually furnished medical care at a walk-in-clinic and ultimately began receiving orthopedic care with Dr. Kristin Kelly, M.D.; Dr. James Cain, M.D.; and Dr. Seth Coren, M.D. Ms. Banuchi also was provided with an independent medical examiner (IME) Dr. Mark Bornstein, D.P.M., a board-certified podiatrist in the employer/carrier's medical care arrangement. Claimant was also seen by Dr. Jeffrey J. Lazarus, M.D., a board certified orthopedic surgeon. When the claimant relocated her residence to Apopka, Florida, Dr.

John A. Papa, M.D., an orthopedic surgeon in Winter Park, Florida, was authorized as a replacement physician. After the claimant filed her request for appointment of expert medical advisor (EMA), the predecessor presiding judge, The Honorable Paul T. Terlizzese, entered an Order on 1/11/2012 appointing Dr. Joseph Rojas, M.D., to perform he EMA evaluation and in accord with §440.13(9) (f), Florida Statutes, required the claimant, the party requesting such examination, to pay for the costs of EMA evaluation with the right to recover such costs in the event the claimant prevailed her claim. To date, however, the claimant has failed to report to or undergone the requested and ordered EMA evaluation, claiming she is financially unable to pay for the same.[1]

6. Medical evidence indicates that as a result of the work accident the claimant suffered an internal derangement of the left ankle and partial tear of the anterior talofibular ligament. On 1/29/2009 she underwent left ankle arthroscopic surgery performed by Dr. Seth D. Coren, M.D., an orthopedic surgeon. She received post-surgical care with Dr. Coren and Dr. James Cain, M.D., an orthopedic surgeon, who are both affiliated with Vero Orthopaedics. The doctors found that Ms. Banuchi had reached maximum medical improvement (MMI) on 7/21/2009 with a 4% permanent impairment rating (PIR) of the whole person. Physician-imposed restrictions consisted of wearing high top or athletic or work type boot; walking and standing no more than 6 consecutive hours; avoid step ladders; and not walk more than 2 hours consistently on rough, uneven terrain future. Swelling and intermittent aching sensations would be anticipated, but no further diagnostic studies or evasive surgery was recommended.

7. The claimant then requested a one-time change of physician, and the employer/carrier authorized Dr. Jeffrey Lazarus, M.D., a board certified orthopedic surgeon in Port St. Lucie, to provide care for the accident of 9/9/2008. Dr. Lazarus found that after

[1] Section 440.13(9)(c) provides that if "[a]n employee who fails to report to and cooperate with such evaluation forfeits entitlement to compensation during the period of failure to report or cooperate."

a period of physical therapy the claimant had reached MMI on 10/1/2009 with a 4% PIR of the body as a whole. The doctor stated that Ms. Banuchi could return to full duty as of 10/2/2009 without need of further clinical services. It appears that indemnity payments were paid through several days past her MMI date of 10/1/2009 and then stopped because she had reached MMI. The claim here is for temporary partial disability (TPD) benefits from the period beginning 10/2/2009 and continuing as further described above.

8. The evidence indicates that following the work accident the claimant returned to work for Department of Corrections (DOC) as a teaching assistant at the Indian River Correctional Institute beginning 9/18/2009. She earned $856.54 biweekly, over 80% less than her AWW. Since 2/11/2012 the claimant has been employed on a part-time basis as a cashier at Publix earning $9.50 per hour and working an average of 28 to 32 hours per week. The primary issue here is whether the claimant is entitled to further TPD benefits or whether she had reached overall MMI as of 10/1/2009, as the employer/carrier asserts, which would bar further temporary indemnity benefits.

9. Claimant testified that she sustained a 2nd work-related accident on 10/21/2009 when she again twisted her left ankle and heard a pop. However, that work accident is not the subject matter of this hearing, and the parties have entered into a pretrial stipulation that the left ankle injury is accepted as compensable and related to the 1st work accident of 9/9/2008. Moreover, the medical evidence indicates that the accident of 10/21/2009 essentially was a temporary aggravation of her initial left ankle injury.

10. Ms. Banuchi testified that since her 1st accident she has undergone significant medical procedures consisting of non-work related gastric bypass surgery in November 2009 and surgery for an intestinal obstruction in April 2011. She testified that on 7/7/2011 she voluntarily resigned her employment with DOC on the belief that her position was going to be privatized; although, admitting that she could physically perform the teaching assistant job regardless of her ankle injury. On July 19, 2011 the claimant said she was

involved in a motor vehicle accident.

11. After Ms. Banuchi relocated her residence, the carrier authorized Dr. John Papa, M.D., a board certified orthopedic surgeon in Winter Park, to provide continued palliative orthopedic care for her 1st work accident injury. The carrier also authorized Dr. David Haile, D.P.M., board certified podiatrist, to treat the claimant for her 10/21/2009 2nd work accident.

12. Dr. Papa first saw the claimant on 12/15/2011 for complaints of chronic left ankle pain and difficulty walking. Although Dr. Papa found that the work injury of 9/9/2008 was the major contributing cause of the claimant's posttraumatic left ankle pain, he testified that the source of Ms. Banuchi's continued symptoms was not particularly clear and that her complaints of pain were out of proportion with the objective medical findings. Dr. Papa did not recommend further surgical treatment, but did recommend a fixed ankle-foot brace and a topical pain gel and the use of ice or heat packs as necessary. He stated that she could return on a p.r.n. *(as occasion arises)* basis. He also suggested that the claimant gradually increase her activities as comfort allows, and recommended exercise consisting of swimming and bicycling. The doctor found that Ms. Banuchi could return to work at light duty with permanent restrictions consisting of no standing or walking greater than 15 minutes per hour and no running or jumping. Dr. Papa found that the claimant had reached MMI on 7/15/2009 with a 4% PIR, and later changed the MMI date to 10/1/2009 in his deposition testimony.

13. Ms. Banuchi requested and the employer/carrier provided an IME with a physician within the employer/carrier's medical care arrangement. Dr. Mark Bornstein, D.P.M., a board certified podiatrist, was selected for that purpose. Dr. Bornstein performed his IME on 10/2/2010. Unlike the other medical providers he found that the claimant had "significant" problems with her left ankle and foot and significant restrictions in range of motion. He also found that she had "significant" limping and antalgic gait and

hypersensitivity of the left ankle with pain upon range of motion. Dr. Bornstein concluded stated that he could not complete his IME evaluation after the 1st visit until an MRI of the left ankle and a functional capacity exam (FCE) were performed. He said that once the testing was performed he could provide a final IME report, yet he found that the claimant was not at MMI and should be restricted to sit-down sedentary work.

The employer/carrier then authorized the MRI and FCE Dr. Bornstein had recommended and he acknowledged receiving the test results per his correspondence of 10/10/2010. The MRI of the left foot showed degenerative changes but "no other significant abnormalities." MRI of the left ankle showed expected post-operative changes in the ankle. The FCE showed that Ms. Banuchi was capable of sedentary light duty employment with essentially the same work restrictions and limitations consistent with those assessed by the treating orthopedic physicians. Nevertheless and in spite of the claimant's rather static medical picture for a period of over two years relative to the initial left ankle injury, Dr. Bornstein did not believe that the claimant had reached MMI and that she would need additional care "in light of the restrictions and range of motion" and the "significant hypersensitivity and still ligmentous damage as seen on the MRI". This assertion the basis for not having achieved MMI is less than clear and demonstrates a lack of understanding of the meaning for MMI.

14. In Dr. Bornstein's deposition of 11/30/2011 he was asked why he thought the claimant had not reached MMI for her ankle injury. He testified "that in light of the clinical presentation when I last saw her *(on or about December 10, 2010),* and the anticipation of the problems seen in the operative report, I would anticipate she's going to have severe limitations" for a long period of time, if not permanently.[2] The doctor followed by suggesting pain management. He then opined that he anticipated an extensive amount of arthritis and that ultimately, in 3, 5 or 10 years, Ms. Banuchi would need a fusion or total

[2] *See* Deposition of Mark Bornstein, M.D. *(sic)* of November 20, 2011, page 10, L 16-25, and page 11, L 1-3.

implant. He said that with the passage of time the symptoms from the degeneration would require some additional arthroscopic procedures. When asked again what Dr. Bornstein was basing his opinion that the claimant had not reached MMI, he changed his earlier position somewhat and stated it was based on the medical records, clinical examination and all of the testing. However, other than the possibility of future surgical intervention described above, I find that Dr. Bornstein offered little testimony regarding what current treatment would be recommended to supposedly improve the claimant's left ankle condition. In fact, he stated the Ms. Banuchi's symptoms would wax and wane and finally concluded with "I don't think she is going to have a permanent improvement..."

15. I find that the medical evidence presented demonstrates that all the physicians that treated the claimant for her left ankle injury of 9/9/2008 found that she reached MMI no later than 10/1/2009. Dr. Bornstein is the only physician that believes the claimant has not reached MMI at this time after undergoing surgery and being over 3 ½ years post-accident. This is simply not credible and contrary to the greater weight of the medical evidence. I also find, as the defense argues, that Dr. Bornstein has conflated his understanding of the date of MMI, which under § 440.02(10), Florida Statutes, is defined as "the date after which further recovery from, or lasting improvement to, an injury or disease can no longer be reasonably be anticipated, based upon reasonable medical probability." Dr. Bornstein was under the impression that if the claimant was at MMI he doubted she would continue to receive necessary treatment. But more significantly, it is clear that Dr. Bornstein labored under the impression that because the claimant may need future surgical intervention to improve her condition, that alone would prevent her from having reached MMI at this time. Dr. Bornstein's understanding is incorrect and contrary to case law. *See* Wal-Mart Stores v. Krause, 696 So. 2d 443 (Fla. 1st DCA 1997) (monitoring of injured worker's condition to determine need for future surgery does not overturn previous date of MMI); Emanuel v. David Piercy Plumbing, 765 So. 2d 761 (Fla. 1st DCA 2000) (once a

claimant's medical condition has improved as much as is reasonably expected under available and recommended remedial treatments, the claimant may be considered to be at maximum medical improvement and entitled to permanent benefits for continuing disability even though it is anticipated that the claimant will likely become a candidate for additional remedial treatment at some time in the future). Therefore, I reject Dr. Bornstein's opinion that the claimant has not reached MMI in its entirety.

16. Furthermore, I also reject Dr. Bornstein's opinion regarding MMI because it conflicts with the opinions of the claimant's treating board-certified orthopedic surgeons, Doctors Cain, Coren and Lazarus who saw and/or treated the claimant on more than two occasions Dr. Bornstein's visits. I find the physicians' expertise in the field of orthopedic surgery far exceeds Dr. Bornstein's experience in the limited field of podiatric medicine. Therefore, for all of these reasons, the claim for additional temporary indemnity benefits following claimant's overall MMI of 10/1/2009 for her left ankle injury sustained at work on 9/9/2008 must be denied.

17. I address two issues which claimant's counsel interjected in this pending litigation regarding further IME testing and the EMA matter. The first deals with the claimant's Motion to Compel Authorization of Testing to Complete Employer/Carrier's-Paid Claimant's IME and Motion to Continue March 19, 2012 Final Hearing, filed on 3/15/2012, 4 days prior to trial. The employer/carrier filed its Response to said motions on 3/15/2012. The 1st motion alleged that Dr. Bornstein, the claimant's IME physician, indicated that an updated or 2nd MRI and CT Scan of the left ankle was necessary for him to complete his examination or render an updated opinion. This recommendation was made in Dr. Bornstein's deposition of 11/30/2011. The employer/carrier refused to authorize the request for additional diagnostic testing primarily because the employer no longer had a managed care arrangement in place. Moreover, employer/carrier asserted in its response that Dr. Bornstein had on 10/1/2010 requested an updated MRI, bone scan and FCE to

complete his IME evaluation, and that his request for testing was authorized by the employer/carrier then and reflected in Dr. Bornstein's report of 10/10/2010, The doctor was able to complete his IME report of 12/10/2010, and I find that an additional CT Scan and MRI scans are not reasonable or medically necessary, nor is there any statutory authority that the claimant at the employer/carrier's expense would continue to ask for updated IMEs indefinitely as the litigation progresses. In addition, the motions were found to be untimely since filed on the eve of trial, and were summarily denied as untimely, dilatory and for lack of due diligence.

18. The second issue raised by claimant's counsel was incorporated in the pleading entitled "Notice of Conflict in Medical Opinions and Request for the Court to Appoint an Expert Medical Advisor (EMA)" filed on 12/19/2011. The claimant alleged that there was a conflict in the medical opinions regarding claimant's date of MMI as opined by Dr. Bornstein, Dr. Cain, Dr. Coren and Dr. Lazarus. Claimant's counsel alleged that Ms. Banuchi was unable to pay for the cost of an EMA. The pleading was not verified or signed by the claimant, nor was there any support presented for these allegations. The claimant requested that "[t]his Court (*sic*) appoint an EMA to address the issues referenced above." In Judge Terlizzese's Order of 1/4/2012 on the claimant's notice and request as the claimant's motion to appoint expert medical advisor, and the request for an EMA was granted and the judge appointed Dr. William Stolzer of Port St. Lucie as the EMA physician to resolve the disputed IME opinions. As provided in § 440.13(9)(f), Florida Statutes (Supp. 2008), the order required the claimant to be responsible for all cost associated with the EMA evaluation. An amended order was later entered by Judge Terlizzese substituting the appointed medical advisor with Dr. Joseph Rojas of Titusville. Due to Judge Terlizzese's vacating the District Office of Judge of Workers' Compensation, Deputy Chief Judge David W. Langham assigned this case to the undersigned judge for purpose of adjudicating the PFB of 8/2/2011. Subsequently, claimant's counsel filed a Motion for Rehearing and

Clarification of Judge Terlizzese's EMA order, which motion was denied by Order entered on 1/23/2012 and concurring with Judge Terlizzese's construction that the claimant's request for IME was in effect a motion for appointment for an IME under § 440.13(9)(c) & (f), Florida Statutes, which required the movant to absorb the financial cost of said EMA evaluation subject to recovery of said cost if the movant prevailed in adjudication on the merits. Claimant's counsel again filed another Motion for Rehearing and Clarification, this time addressing the undersigned's Order of 1/23/2012. By Order of 3/16/2012 the 2nd motion for rehearing and clarification was denied as redundant.

19. At the final hearing Claimant's counsel raised the issues again, and the ruling on the record was the same as previously entered. Counsel argued that the claimant was severely prejudiced by the prior rulings of this tribunal regarding her notice of conflict and medical opinions and request for an IME, in that requiring her to pay for the IME evaluation despite her financial inability to do so negatively impacted the claimant since the employer/carrier had such rights and financial means to avail themselves of those options.

Although this tribunal is sympathetic to the claimant's financial inability to pay for an IME, the undersigned judge has no statutory authority or jurisdiction to require an employer/carrier to pay the same when such the request for an EMA is initiated by the injured worker rather than independently by the judge of compensation claims' own motion. Moreover, I find no statutory authority or procedural vehicle under the statute or Ch. 60Q-6, Fla. Admin. Code, that allows an injured worker to shift the financial burden of an EMA evaluation to the employer/carrier, contrary to §440.13(9) (f), prior to the injured worker prevailing in an adjudication on the merits of the claim before this tribunal. The amendment to § 440.13(9)(f), Florida Statutes, provides that "...the party requesting such an *(EMA)* examination must compensate the advisor for his or her time..." The amendment also provided that should the movant prevail, the cost of the EMA evaluation can be

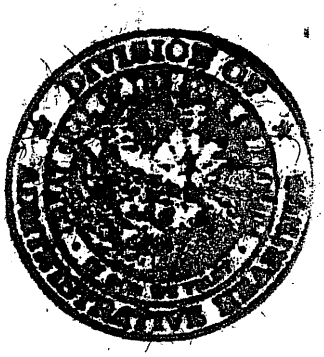
recovered as a taxable cost. Finally, claimant counsel's argument ignores the clear language and allegations in his motion which specifically requested that this tribunal appoint an EMA.

20. I also find merit to employer/carrier's counsel's argument that this tribunal's rejection of the claimant's request that the employer/carrier pay for the claimant requested EMA has prejudiced her ability to prosecute her claim is no similar than to a requirement asking this tribunal to provide claimant with the cost of discovery depositions. Rule 4-1.8(e), Rules Regulating the Florida Bar, provides that a "lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs in expenses of litigation on behalf of the client." Further, the commentary to said rule explains that there is no prohibition on a lawyer advancing the client court cost and litigation expenses, including the expenses of diagnostic medical examination used for litigation purposes and the reasonable costs of obtaining and presenting evidence...". Therefore, should the injured worker be financially unable to pay the cost of discovery and/or medical examination necessary to support his/her claim, the injured worker's attorney is permitted, and it is customary in workers' compensation matters depending on the risks, to advance those costs subject to the right to have those costs awarded should the injured worker prevail. § 440.13(9)(f), Florida Statutes. For all of the foregoing reasons, claimant's subsequent requests at the final hearing that an EMA physician be appointed at the expense of the employer/carrier and for further testing are s again denied.

WHEREFORE, it is **ORDERED** that the claim of the employee, Yolanda Banuchi, for temporary partial disability benefits from October 2, 2009 to the date of the final hearing,

together with penalties, interests, costs and attorney's fees at the expense of the employer/carrier is hereby **DENIED**.

DONE AND ORDERED at Tallahassee, Leon County, Florida.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing final compensation order was entered and a true copy was furnished by electronic transmission on this 19th day of April, 2012 to counsel of record.

Assistant to Judge of Compensation Claims

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