

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

Yolanda Banuchi,
Employee/Claimant,

OJCC Case No. 09-024352DSR

vs.

Accident date: 9/9/2008

Department of Corrections/Indian River
Correctional Institute/The Division of Risk
Management,
Employer/Carrier/Servicing Agent.

Judge: John J. Lazzara

ORDER DENYING CLAIMANT'S MOTION FOR ADVANCE ON COMPENSATION

THIS MATTER came for telephonic hearing before the undersigned Judge of Compensation Claims on 7/9/2014 pursuant to the Claimant's Amended Second Motion for Advance of \$900.00 under §440.20(12)(c) & (d), Fla. Stat., together with supporting documentation consisting of medical records composite of treating physicians, carrier's payout ledger, previously entered EMA Order and the claimant financial affidavit. The amended second motion was filed on 6/10/2014.¹ The purpose of the advance is for travel expenses of the claimant to fly from Puerto Rico, where she currently resides, to Broward County, Florida, to attend the expert medical advisor evaluation she requested. The employer/carrier filed its Response thereto on 6/10/2014 contesting entitlement to the advance asserting that a \$1,000.00 was previously awarded by former Judge Paul Terlizzee; no attempt at re-payment of said advance has been made; and there is no nexus between the captioned work accident and the claimant's financial state.

The employer/carrier specifically objected to the admissibility in evidence, as evinced by its Notice of Objection filed on 7/1/2014 and *ore tenus* at the hearing, of the claimant's financial affidavit and medical records on the grounds of hearsay and lack of authenticity. The claimant, Yolanda Banuchi, and counsel for the parties all appeared telephonically for the hearing. There was no official qualified to do so in Puerto Rico to administer the oath to the claimant, and the undersigned judge was not able to administer said oath telephonically, as permitted by Rule 60Q-6.116(3), Fla. Admin. Code, because there was no stipulation by counsel for the parties for "administration of the oath telephonically by the judge." Therefore, the claimant's testimony at the hearing was unsworn and since the claimant's financial affidavit was not authenticated, it was not received in evidence. The medical records of authorized treating physicians were received in evidence over the objection of defense counsel, as well as the carrier's payout ledger which was uncontested. Based on the evidence presented and the arguments of counsel, the undersigned judge finds as follows that:

1. The JCC *may* award an advance payment of compensation not in excess of \$2,000 after considering a claimant's interests. See Lopez v. Allied Aerofoam/Specialty Risk Servs., 48 So.3d 888, 888-89 (Fla. 1st DCA 2010); Worthy v. Jimmie Crowder Excavating, 100 So.3d 727, 728 (Fla. 1st DCA 2012). For requests of advances up to \$2000 under subsection §440.20(12)(c)(2), a JCC must perform a two-step inquiry. First, the JCC must

¹ Similar motion for advance was filed on 2/28/2014, but was withdrawn on 3/17/2014 before it was heard.

determine whether the claimant falls into one of the three specified statutory categories: (1) claimants who have not "returned to the same or equivalent employment with no substantial reduction in wages"; (2) claimants who have "suffered a substantial loss of earning capacity"; or (3) claimants who have suffered a "physical impairment. § 440.20(12)(c)(2), Fla. Stat. Second, a JCC must determine that the claimant (a) is a proper claimant and (b) has provided adequate justification for her request. See ESIS/Ace American Ins. Co. v. Kuhn, 104 So.3d 1111, 1113 (Fla. 1st DCA 2012).

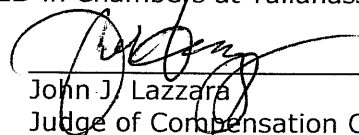
2. Counsel for the claimant argues that Ms. Banuchi is currently unemployed and resides in Puerto Rico with family due to financial difficulties. The claimant offered that she suffered an intervening motor vehicle accident (MVA) in 2011 injuring her shoulder and neck and underwent surgery. There is pending litigation or claim regarding the MVA. She was also involved in a subsequent intervening work accident at Publix on or about August 2012 when she sustained a torn ligament to her arm. She settled that workers' compensation claim in February 2013, netting approximately \$17,000.00. Apparently she has no funds leftover from the settlement.

2. Claimant's counsel argues that Ms. Banuchi has suffered a substantial loss of earning capacity and is employed. These are all elements of proof. However, counsel arguments and representation are not evidence. Hale v. Shear Express, Inc., 946 So.2d 94, 96 (Fla. 1st DCA 2006) (unsworn responses and arguments of counsel are not evidence upon which a JCC can rely). Moreover, as the claimant's testimony was unsworn and her financial affidavit excluded as hearsay, the arguments of counsel and the unsworn testimony of the claimant cannot be used as evidence to buttress the request of an advance. I am constrained to find that the claimant has failed to establish entitlement for an advance under §440.20(12)(c) & (d), Fla. Stat., as there was no admissible evidence or testimony that she has suffered a substantial loss of earning capacity or is unable to return to equivalent as a result of the captioned work accident. Moreover, the medical records presented, most which are over four years old and stale, do not demonstrate a physical impairment, actual or apparent, from the captioned compensable left ankle sprain². Consequently, the request for an advance must be denied here because there is no evidence connection the claimant's financial condition to the captioned claim. It is, therefore,

ORDERED Claimant's Second Amended Motion for Advance is hereby **DENIED**.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida.



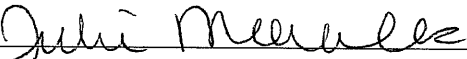


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² The second amended motion alleges that the authorized treating physician in Puerto Rico have refused to provide him with current medical records.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing order was entered and a copy furnished electronically to counsel of record on this 15th day of July, 2014 at the following addresses:



Secretary to
Judge of Compensation Claims

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