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

Joe Stutzman,
Employee/Claimant,

vs.

Howard Leasing/Corvel Corporation,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 14-002502RDM

Accident date: 3/13/2013

Judge: Robert D. McAliley

EVIDENTIARY ORDER DENYING MOTION FOR ADVANCE

THIS MATTER was considered at an evidentiary hearing pursuant to claimant's motion for advance payment of compensation filed April 3, 2014, and an amended motion filed April 15, 2014. The employer/carrier (E/C) filed a response to the initial motion on April 14, 2014.

The parties agree and I find the judge of compensation claims (JCC) has jurisdiction over the parties and subject matter. E/C agrees they were properly notified of the hearing.

Claimant is 42 years old, married and has no minor children. His wife is employed. Claimant makes a credible appearance as a witness. On the date indicated, claimant reports that he jarred and injured his lower back. He testifies this occurrence was promptly reported to his employer. E/C has from the onset controverted this claim in its entirety.

According to claimant's initial symptom was sharp low back pain. Treatment was obtained at a local emergency room and then with a chiropractor and an acupuncturist. Claimant next came under the care of Dr. Glenner known to me as an anesthesiologist and pain management specialist. Recently Dr. Glenner referred claimant to Dr. Paul, a neurosurgeon, whom claimant is scheduled to see in the immediate future.

Although the testimony is not presented in detail, claimant paid for some medical

expenses but has at least $10,000.00 in outstanding medical bills. Claimant reports his symptoms have shifted from primarily low back pain to pain and numbness in his left leg.

After his accident claimant continued to work for Howard Leasing. He subsequently obtained another, better paying job as a crane operator with a different company where he continues to be employed.

Determining claimant's eligibility for an advance payment of compensation requires a two- step inquiry, to wit, whether claimant falls into one of three specified statutory categories and if so whether after giving "due consideration" to claimant's interests if such an advance is warranted. Sec. 440.20 (12) (c) 2 *Fla.Stat.* (2013*); ESIS v. Kuhn*, 104 So. 3rd 1111, 1113 (Fla. 1st DCA 2012).

STEP ONE

The first prong of the analysis is normally based on objective criteria. Initially, claimant has returned to the same employment and did not incur a substantial reduction in wages. Next it must be determined if claimant "suffered a substantial loss of earning capacity". Although "earning capacity" is not necessarily synonymous with earnings, there is no evidence on point. What is more, claimant does not contend he falls within either of these categories for purposes of the present motion.

Instead claimant maintains he meets the first prong of the two-step inquiry because he has a "physical impairment, actual or apparent" with emphasis on "apparent." The parameters of an "apparent impairment" are not established by case law or specific statute. Hence, I am guided by the statutory definition of "permanent impairment" and determine there must be a demonstration of an anatomic or functional abnormality or loss resulting from the injury. See, Sec. 440.02 (22) *Fla. Stat.* (2013).

Claimant merely states that he injured his low back on the job, obtained medical treatment, and now at a point in time over one year later has pain and numbness in his leg. As the JCC, I am required to base a decision on competent and substantial evidence as opposed to personal knowledge and experience. Competent, substantial evidence does not include, of course, assertions made during argument or in pleadings.

There is simply no medical evidence such as a report or progress note on which to base a determination that claimant has a functional abnormality or loss *resulting from the injury*. See also, Sec. 440.09 (1) Florida Stat. (2013) (providing that establishment of the causal relationship between a compensable accident and injuries for conditions that are not readily observable must be by medical evidence only).

STEP TWO

Although the foregoing findings are determinative, in the interest of completeness, and in light of the comparatively little case law on point, I will also consider the second and more subjective step of this process.

Claimant seeks an advance in order to fund an independent medical examination (IME). Claimant testifies the potential IME doctor requires a $2,000.00 payment. E/C forcefully argues that requiring them to pay an advance for this purpose is at odds with other statutory provisions particularly section 440.13 (5) (a) providing, "The party requesting an selecting the independent medical examination shall be responsible for all expenses associated with said examination.…"

On the other hand, section 440.20 (12) (c) 2 requires that "due consideration" be given the interests of claimant, not E/C. The use of the word "may" in the statutory language as opposed to "shall" is interpreted by the district court as granting broad discretion to a JCC in awarding an advance. *ESIS v. Kuhn,* 104 So. 3rd 1111, 1114 (Fla. 1st DCA 2012); accord,

Herndon v. City of Miami, 224 So.2d 681, 683 (Fla.1969) (Drew, J., dissenting) (interpreting an analogous statute as giving the trial judge "vast discretion to determine the interest of the claimant and the employer.…").

The proposed use of an advance is a consideration especially where that use constitutes an end run around other provisions of the Workers' Compensation Law. I take this into account in conjunction with the actual testimony regarding the funding of an IME, a legal procedure which is unquestionably necessary in this case. See, *Miller Elec. Co. v. Oursler*, 113 So. 3rd 1004, 1009 (Fla. 1st DCA 2013) ("A claimant cannot use medical opinion part by section 440.13 (5) (d) to 'bootstrap 'itself – or other medical opinions from the same source – into evidence.").

Here, claimant merely testifies that the proposed IME physician requires a $2,000.00 payment. There is no evidence as to whether the doctor will accept a partial payment, a letter of protection or some combination of the two. There is no testimony as to whether claimant is able to place all or part of this payment on a credit card. For that matter, claimant's counsel does not express an unwillingness to front this expense which is a permissible cost to advance.

CONCLUSION

Taking all the factors discussed above into consideration, I find claimant fails to meet his proof as to either or both parts of the two -step process necessary to find in his favor.

MOTION FOR ADVANCE DENIED

DONE AND ORDERED this 18th day of April, 2014, in Port St. Lucie, St. Lucie County, Florida.

Robert D. McAliley
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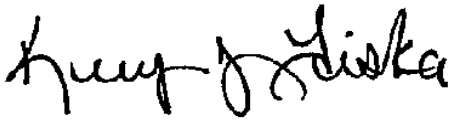
I HEREBY certify that a true and correct copy of the foregoing has been e-mailed to Counsel on April 18th, 2014.



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