

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS  
MIAMI DISTRICT OFFICE**

**EMPLOYEE:**

Daniel Carcamo  
15115 SW 297th Terrace  
Homestead, FL 33033

**ATTORNEY FOR EMPLOYEE:**

Mr. Michael Goldstein  
Law Office of Jose M. Francisco  
6100 Blue Lagoon Drive, Suite 360  
Miami, FL 33126

**EMPLOYER:**

Business Representation International  
815 NW 57th Avenue  
Suite 118  
Miami, FL 33126

**ATTORNEY FOR  
EMPLOYER/CARRIER/SERVICING  
AGENT:**

Mr. Robert S. Gluckman  
Hurley, Rogner, Miller, Cox, Waranch &  
Westcott, P.A.  
1280 SW 36th Avenue, Suite 100  
Pompano Beach, FL 33069

**CARRIER/SERVICING AGENT:**

North River Insurance Company  
P.O. Box 958426  
Lake Mary, FL 32795

**OJCC NO.:** 08-021999-HHH

**D/A:** 6/5/2007

**JUDGE:** Henry H. Harnage

---

**FINAL MERITS ORDER**

---

**THIS CAUSE** came before me for Final Hearing on July 10, 2009 regarding Petitions for Benefits filed on December 4, 2008 and January 12, 2009. The matter concluded on July 16, 2009, and I ruled in a summary manner by letter on July 30, 2009. This Final Order is in substantial compliance with that letter ruling .

## **CLAIMS, DEFENSES, AND EVIDENCE**

The claimant sought temporary partial disability (TPD) benefits from 6/5/07 to date and continuing, temporary total disability (TTD) from March 9, 2009 through April 6, 2009, all at an adjusted average weekly wage (AWW) with corresponding corrected compensation rate, plus penalties, interest, costs and attorney's fees.

The Employer/Carrier/Servicing Agent (E/C) maintained that: all indemnity was paid at the correct rate; the claimant voluntarily limited his own income by resigning from his position with the employer; no penalties, interest, costs or attorney's fees were due; and the E/C should recover seeks costs per §440.34(3), Fla. Stat.

The trial evidence is contained within the ATTACHMENT to this Order.

### **FINDINGS**

1. The claimant testified before me that he was a baggage handler for approximately 12 years at Miami International Airport for this employer. On June 5, 2007 he complained of low back pain after lifting luggage.

2. Accepting the accident as compensable, the employer/carrier authorized medical treatment and paid temporary partial disability benefits from June 7, 2007 through January 11, 2008 based on an AWW of \$413.17 with a corresponding compensation rate of \$275.46. Dr. Brown placed the claimant at Maximum

Medical Improvement on 1/11/08 and thereafter the carrier paid the claimant income impairment benefits.

3. The claimant exercised his one-time change in physicians and, in December of 2008, began treating with Dr. Donshik, an orthopedic spine specialist. Dr. Donshik recommended medical treatment (including surgery) and placed the claimant on a light-duty work status.

4. Mr. Livan Acosta, Vice-President and Operations Manager for the employer, and Ms. Nancy Duran, Human Resources Director for the employer, testified before me that the claimant returned to work with the employer on a light duty basis from January 2008 through October 11, 2008.

5. The employer accommodated the claimant's restrictions by placing him in a position as wheelchair dispatcher and later, upon the claimant's request, as a traffic controller. The wheelchair dispatcher position was essentially sedentary work issuing wheelchairs for airline passengers. As a traffic controller, the claimant's duties were to direct passengers toward the proper gate. Both positions allowed the claimant to stand and sit, as needed, and there was no evidence that the claimant was not physically capable of doing either position. Dr. Donshik testified that both positions were within his assigned work restrictions, which included no lifting greater than 20 pounds.

6. The claimant transferred from wheelchair dispatcher to traffic controller because -- I particularly find -- he wanted more hours; traffic controllers averaged 30 hours per week and wheelchair dispatchers averaged 20 hours per week.

7. The claimant was classified as a part-time employee both prior to and subsequent to the accident, as he worked in departments where the hours of the employees fluctuated based on passenger boarding. The number of passengers flying at any given time varies by season and the economy. In turn, the number of hours all employees work in such departments also varies by season and the economy. I find any reduction in the claimant's hours was due to a reduction in passenger boarding rather than to the consequences of his work restrictions from the industrial accident.

8. On October 10, 2008, when the claimant was employed as a traffic controller, Mr. Acosta noticed the claimant was not at his post at the Airport's Concourse C/D Checkpoint for over an hour. Mr. Acosta (and allegedly other employees) searched for the claimant but were unable to locate him.

9. When the claimant was again at his post, he insisted he was there the whole time and had never left. He was suspended for the day with a written warning, which he signed. He was told to return to work the following day. As part of the suspension procedure, the claimant was required to relinquish his I.D. badge for the remainder of the day.

10. The claimant returned to work the next day, on October 11, 2008, and worked four and a half hours. He obtained his ID badge as it was clear from the testimony that he required this badge in order to return to his work area. He requested a meeting with Mr. Acosta and during that meeting maintained that he had not left his post on the preceding day. I find that the claimant voluntarily relinquished his I.D. badge to Mr. Acosta, as if he did not want to continue working there anymore.

11. I find the testimony of Ms. Duran credible and persuasive as to what happened. She testified that the claimant had come to her after October 11, 2009, when she asked him to write out a statement about what had happened. She made contemporaneous notes which included the exact quotation of the claimant saying "Toma"-- which in Spanish translates to "take this." With this word Ms. Duran demonstrated the claimant as making a gesture of throwing the I.D. down at the desk. To the extent the claimant's testimony is in conflict, I find Ms. Duran's testimony credible, and the claimant's testimony not credible.

12. The claimant testified that, after leaving the employ of Business Representation, he performed a job search but was unable to find work within his restrictions. The claimant asserted that he looked for work three to four days per week for 24 weeks. Yet later during cross-examination, he acknowledged that he applied for only 15 jobs, an inconsequential number. I find the claimant lacked

sufficient evidence of a job search for not only specific time periods, but also for the totality of the time for which he is seeking indemnity benefits.

## CONCLUSIONS

### *Temporary Partial Disability Benefits*

13. The claimant had medical restrictions during the time at issue and was therefore eligible for TPD benefits.<sup>1</sup> However, a claimant must still prove a causal connection between a work-related injury and resulting wage loss in order to recover TPD benefits. Garrick v. William Thies, 521 So.2d 179 (Fla. 1<sup>st</sup> DCA 1998); Burger King v. Nicholas, 580 So.2d 656 (Fla. 1<sup>st</sup> DCA 1991).

14. I find that the claimant was timely and appropriately paid temporary partial disability benefits from June 6, 2007 through Dr. Brown's MMI date of January 14, 2008 [which I accept], and thereafter income impairment benefits. The claimant returned to work for the employer and continued to be so employed until October 11, 2008. Therefore, the only viable period of TPD was from October 11, 2008 and continuing.

15. Based upon the credible testimony of Ms. Duran, and my review of the other testimony at trial, I find that the employer accommodated the claimant's work restrictions through October 11, 2008, and would have continued to do so if the claimant had not voluntarily resigned his position. Any reduction in the

---

<sup>1</sup> I accept the testimony of Dr. Donshik that the claimant's job duties were within his restrictions of no lifting greater than 20 lbs.

number of hours while the claimant was working in a modified duty position was not the consequence of the claimant's work accident. *Cf. Publix v. Hart*, 609 So.2d 1342 (Fla. 1<sup>st</sup> DCA 1992) (holding that but for claimant's insubordination, claimant would have maintained employment and there is no causal connection between the change in employment status and the compensable injury).

16. A claimant who refuses (or resigns from) suitable employment is not entitled to TPD benefits. *A. Duda & Sons, Inc. v. Kelley*, 900 So.2d 664 (Fla. 1<sup>st</sup> DCA 2005). I conclude from a totality of the evidence that the claimant voluntarily resigned his position as I accept the credible testimony of the employer representative, and reject the claimant's testimony that he was fired; the claimant's testimony is inconsistent with his prior deposition testimony and inconsistent with the totality of the other facts and testimony presented.

17. Finally, I reject the claimant's testimony that he continuously looked for work after his employment ended. There is not sufficient competent substantial evidence of a good faith job search after he resigned his position. I conclude that the claimant failed to meet his burden of proving the causal connection between the work-related injury and the claimed wage loss. Therefore, no temporary partial or temporary total disability benefits are due and owing after October 10, 2008.

#### *Average Weekly Wage*

18. I accept the AWW of \$413.17 (with a corresponding compensation rate of \$275.46) as stipulated to by the Employer/Carrier in the Pre-Trial Stipulation.

The evidence suggests that \$413.17 was actually *too high* based on the actual payroll records.

19. There is insufficient evidence to support the AWW sought by the claimant. He was employed during the entire 13 weeks before the date of accident and therefore the appropriate method of calculation is one-thirteenth of the earnings during the 13 calendar weeks before the accident, excluding the week of the accident.

20. The claimant was paid bi-monthly. Both the employer representative and the claimant testified that the claimant's work week was Monday through Sunday. Therefore, I conclude that the 13 calendar weeks before the accident should be based on Monday through Sunday, and accept the Employer/Carrier's argument. That argument, however, yields a *lower* AWW than was stipulated to in the Pre-Trial Stipulation. The Employer/Carrier acknowledged that the stipulated rate should be used and therefore, I award the higher AWW of \$413.17.

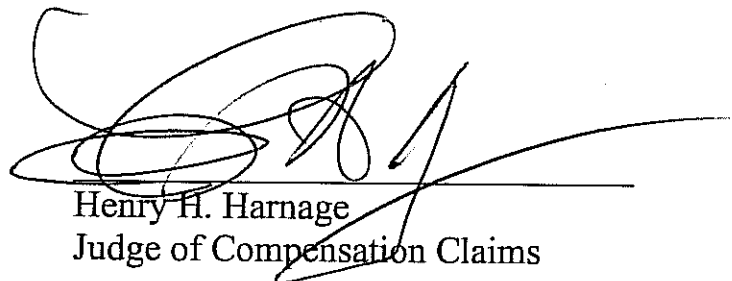
**WHEREFORE**, it is **ORDERED** and **ADJUDGED** that:

- A. The Claim for TPD from 6/5/07 and continuing is **Denied** (as well as the one month of TTD);
- B. The Claim for adjustment to the AWW is **Denied**;
- C. Penalties and Interest are **Denied**;
- D. Jurisdiction is reserved, both as to entitlement to any attorney's fees and costs for procuring any other previously-obtained indemnity or medical benefits,



and as to any costs to which the Employer/Carrier may be entitled pursuant to  
Section 440.34 (3), Fla. Stat.

**ORDERED** in Chambers, Miami-Dade County, Florida this 14<sup>th</sup> day of  
August, 2009.



Henry H. Harnage  
Judge of Compensation Claims

## **ATTACHMENT:**

### **Documentary Evidence:**

#### **Judge's Exhibit:**

1. Pre-Trial Stipulation of April 22, 2009;

#### **Claimant exhibits:**

1. Petitions for Benefits docketed 12/4/08 and 1/12/09
2. Claimant's wage records (as well as DWC-19s)
3. A single letter from the Claimant's personnel file;

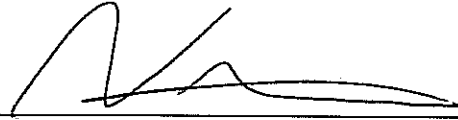
#### **Employer/Carrier exhibits:**

1. 12/10/08 Response to Petition for Benefits
2. 01/29/09 Response to Petition for Benefits
3. Payout Ledger
4. Deposition of Dr. Donshik with attachments
5. Deposition of Janet Turner, Adjuster
6. Medical Record of Orthopedic USA (which included those of Dr. Brown and Dr. Hobbs); and

#### **Testimony at trial:**

1. Daniel Carcamo, Claimant
2. Nancy Duran, Human Resources Director for the Employer
3. Livan Acosta, Vice President and Operations Manager of Employer.

**THIS IS TO CERTIFY** that the foregoing Order was entered on the 14 day of August, 2009, and that a copy thereof was sent by regular U.S. Mail to all parties noted previously at their last known address.



Secretary to Judge of Compensation Claims

Daniel Carcamo  
15115 SW 297th Terrace  
Homestead, Florida 33033

Business Representation International, Inc.  
815 Northwest 57th Avenue, Suite 305  
Miami, Florida 33126

Crum & Forster  
Post Office Box 958426  
Lake Mary, Florida 32795

Jose M. Francisco  
Jose M. Francisco, P. A.  
6100 Blue Lagoon Drive, Suite 360  
Miami, Florida 33126  
workerscompsec@jmflawyers.com

Robert S. Gluckman, Esquire  
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.  
1280 SW 36th Avenue, Suite 100  
Pompano Beach, Florida 33069  
zzevallos@hrmcwbroward.com