

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

Pedro Garcia,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 07-032925GCC
)	
Crum Services, Inc., Cargo Services, Inc.,)	Accident date: 11/5/2007
Crum Services,)	
)	
Employer,)	
)	
and)	
)	
Broadspire, Crum and Forster Insurance,)	
and Crum & Forster,)	
)	
Carrier/Servicing Agent.)	
_____)	

FINAL COMPENSATION ORDER

(I) PROCEDURAL HISTORY:

The above-styled workers' compensation claim came to be heard before the undersigned Judge of Compensation Claims (hereinafter: "JCC") for Final Hearing on October 12, 2009. Jesus Ravelo, Esq. of the Law Offices of Richard Zaldivar appeared on behalf of the Claimant. Geoffrey C. Curreri, Esq. appeared on behalf of the employer Crum Services and carrier/servicing agent Broadspire (collectively hereinafter: "E/SA"). This Order ensues.

(II) EVIDENCE:

Unless otherwise indicated, the following exhibits were admitted into evidence:

(a) *Documentary Evidence:*

The Pretrial Stipulation was the only exhibit moved into evidence.

(b) *Live Testimony:*

1. Pedro Rafael Garcia (claimant)
2. Gino Perez, General Manager (for employer)
3. Jesus Flores, Operations Manager (for employer)

(c) *Stipulations:*

1. Those stipulations entered into by the parties via the pretrial stipulation are accepted.

(III) CLAIMS AND DEFENSES:

(a) *Claims Presented:*

1. Payment of TT/TP from DOA forward;
2. Adjustment of the AWW;
3. Payment of IIB's if at MMI;
4. Authorize transportation to all medical appointments; PICA; Authorization of an alternate MCC/PCP;
5. Authorization of an IME with Dr. R. Moya;
6. Authorization of an orthopedist for evaluation and treatment;
7. Provision of initial care;
8. Authorization of an neurologist for evaluation and treatment;
9. Payment of 3 hours of attorney time to claimant's counsel at a rate of \$250.00 per hour as claimant's counsel was required to attend claimant's deposition scheduled by the employer/carrier on 5/13/08;
10. Provision of a medical exam with a neurologist.

(b) *Defenses:*

1. TT/TP not due or owing. No accident occurred in course and scope of Claimant's employment. Claimant was aggressor in altercation. Total denial. Wage loss not causally related to

- industrial accident. Claimant voluntarily limited income. Claimant earned income subsequent to industrial accident;
2. Change to AWW not due or owing. T/TP not due or owing. No accident occurred in course and scope of Claimant's employment. Claimant was aggressor in altercation. Total denial. Wage loss not causally related to industrial accident. Claimant voluntarily limited income. Claimant earned income subsequent to industrial accident. Claimant voluntarily limited income. Claimant earned income subsequent to industrial accident;
 3. Payment fo IBs not due or owing. TT/TP not due or owing. No accident occurred in course and scope of Claimant's employment. Claimant was aggressor in altercation. Total denial. Wage loss not causally related to industrial accident. Claimant voluntarily limited income. Claimant earned income subsequent to industrial accident;
 4. Transportation not due or owing. No accident occurred in course and scope of Claimant's employment. Claimant was aggressor in altercation. Total denial;
 5. PICA not due or owing. No accident occurred in course and scope of Claimant's employment. Total denial. Claimant aggressor in altercation;
 6. Not due or owing. No accident occurred in course and scope of Claimant's employment. Total denial. Claimant was aggressor in altercation;
 7. Not due or owing. No accident occurred in course and scope of Claimant's employment. Total denial. Claimant was aggressor in altercation;
 8. Not due or owing. No accident occurred in course and scope of Claimant's employment. Total denial. Claimant was aggressor in altercation;
 9. Not due or owing. No accident occurred in course and scope of Claimant's employment. Total denial. Claimant was aggressor in altercation;
 10. Not due or owing. No accident occurred in course and scope of Claimant's employment. Total denial. Claimant was aggressor in altercation;
 11. E/C/SA stipulates to fee entitlement for attendance at 5/13/8 deposition, E/C/SA reserves as to amount of fee;
 12. Not due or owing. No accident occurred in course and scope of Claimant's employment. Total denial. Claimant was aggressor in altercation;
 13. Apportionment per 440.15;
 14. Costs per 440.34.

(IV) FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) The parties stipulated to venue and jurisdiction. The record evidence wholly supports that the Office of the Judges of Compensation Claims (hereinafter: OJCC) has jurisdiction over both the subject matter and the parties, respectively.

(2) Proper venue lies with the Miami District Office of the OJCC.

(3) This case must be decided upon the testimony of three live witnesses: Claimant Pedro Garcia, General Manager Gino Perez and Operations Manager Jesus Flores. A Judge of Compensation Claims sitting as the trier of fact may accept that testimony which he finds more credible and reject that which he finds incredible. See, *Strickler v. Florida Power Corp.*, 667 So. 2d 239 (Fla. 1995); *Ullman v. City of Tampa Parks Dept*, 625 So. 2d 868 (Fla. 1st DCA 1993); *Irving v. City of Daytona Beach*, 472 So. 2d 810 (Fla. 1st DCA 1985) The discretion allows the Judge of Compensation Claims to accept parts of a witness' testimony and reject other parts of same. *Id.* The facts of this case lend themselves to the full utility of these legal principles.

(4) Claimant Pedro Rafael Garcia is a white Hispanic male born July 29, 1968 in Holguin, Cuba. He has resided in the United States for approximately the last nine (9) years.

(5) Mr. Garcia does not speak English. He testified at Final Hearing in his native language of Spanish with the assistance of an interpreter.

(6) Mr. Garcia started working for employer Cargo Services in 2002. At that time he held two jobs. He left Cargo Services voluntarily.

(7) Mr. Garcia came back to work with Cargo Services sometime in 2007. This was full time employment requiring him to work forty (40) hours a week.

(8) In 2007, he was assigned to work in the shipping and receiving department exclusively. His daily duties included receiving merchandise coming into warehouse, unloading trucks, weighing merchandise loaded into truck and other related duties.

(9) In order to unload trucks, Mr. Garcia used a forklift. He operated it himself.

(10) In November 2007, the General Manager above Mr. Garcia in the chain of command was Gino Perez. In the chain of command, there was a supervisor between the two gentlemen. However, Mr. Garcia recognized that he was obligated to carry out any instructions which came from Mr. Perez.

(11) Mr. Jesus Flores, the Facilities Manager was above Mr. Perez in the chain of command. His position was next-in-line immediately below the owner.

(12) Mr. Garcia never had any difficulties with Mr. Perez prior to November 2007. The two would have normal, friendly conversations and occasionally exchanged laughs.

(13) The alleged incident which this claim centers around took place on Monday, November 5, 2007. It has roots in events that took place the week before.

(14) Mr. Garcia took Wednesday and Thursdays off. He reported to work on Friday, November 2, 2007. Shortly thereafter, Mr. Garcia's supervisor called him into an office to meet with Gino Perez. Claimant obliged.

(15) Gino Perez informed Mr. Garcia then and there that he was fired. Mr. Perez also asked the claimant to turn in his identification. He explained that the employer needed same before they could give him his paycheck for fifteen (15) days of work period claimant had just completed. (Note: Though not translated verbatim, the word utilized by the claimant was to describe the pay period was "quincena" - which translates literally to fifteen day period.)

(16) Mr. Garcia was surprised. He asked Mr. Perez for an explanation. None was provided. Mr. Garcia asked if he had done anything wrong. He stressed that he wanted an opportunity to correct whatever he had done wrong. He also told Mr. Perez that he had a newborn baby and a toddler son and thus could ill afford to be out on the street and unemployed.

(17) The claimant perceived that Mr. Perez laughed at him. It is not clear that he did. However, it is clear that whatever transpired was perceived by Mr. Garcia as being offensive. It contributed to a downward spiral in the relationship between the two gentlemen.

(18) Mr. Garcia refused to turn over his identification until he could speak to Operations Manager Jesus Flores, or someone else higher up the chain of command who could consider giving him another chance.

(19) The identification being referred to herein was a required I.D. used for access to the airport. The employer had charged Mr. Garcia a \$100 deposit for it. Such identifications were required.

(20) Mr. Garcia reported that Cargo Services was later fined for having employees at the airport who lacked required proper identification cards. However, there is no evidence that the employer's alleged problems with identification cards had anything to do with the compensable accident at issue.

(21) Subsequent to the discussion with Perez, Mr. Garcia ran into Julio, another manager. This gentleman told Mr. Garcia that he could work for him, but that they needed to wait until Monday and speak to Operations Manager Jesus Flores to obtain approval.

(22) Mr. Garcia typically would have worked Saturday and Sunday. However, he could not work the week-end of November 3 and November 4 based on the termination instruction from Perez.

(23) Monday, November 5, 2007 was the day of the alleged incident. Mr. Garcia arrived at Cargo Services early that morning and went to Jesus Flores' office. This office is located physically at a location different from where the claimant worked loading and unloading.

(24) An initial series of conversation took place. The first was between Mr. Garcia and Mr. Flores. The second was between Mr. Garcia and Mr. Perez. A second series of conversations took place later. The first unfolded as follows:

(25)(a) Mr. Garcia spoke to Mr. Flores about the termination situation and about his conversation with Mr. Gino Perez. He stressed that he needed the job, wanted another opportunity and advised of the other supervisor's (Julio) willingness to take him. Mr. Garcia also advised Jesus Flores that he still had not received his check.

(25)(b) Flores did not ask for airport I.D. Perez had previously requested of Mr. Garcia. Mr. Flores told Mr. Garcia to go back to Perez and ask for his check.

(25)(c) Mr. Garcia then drove to the location where Perez worked. The two spoke. Garcia asked Perez for another opportunity. When that proved fruitless, Garcia asked for his check. Perez did not provide it, but instead said he would go to Jesus Flores' office and tender it to Garcia there.

(26)(a) Shortly thereafter, a second series of conversations took place.

(26)(b) Mr. Perez's office was not near Flores' office. Mr. Flores had to call Perez and have him come to the main building where Flores' office is located.

(26)(c) Mr. Garcia drove to the main office. When he arrived, Mr. Perez was already there and speaking with Flores. Flores instructed Garcia to go to Human Resources, which was located on the second floor, to obtain his check.

(26)(d) Mr. Garcia spoke to the lady at Human Resources. He was given his check and he did not have to turn in his I.D. card.

(27) Mr. Flores makes the ultimate determination as to who is hired and fired. No termination can take place without his approval. Despite this, it is clear that Mr. Garcia believed he had been terminated by Gino Perez back on Friday, November 2 - before Flores had made an ultimate determination.

(28) It is also clear that at the root of the dispute lies the claimant's frustration with the employer's failure to give him a credible explanation as to why he was fired. Gino Perez explained - not too convincingly - that the claimant had been warned on at

least one prior occasion and via a subsequent formal reprimand that he was taking more time than allotted on his breaks; and that conversation had during these extended breaks were keeping other employees from doing their work.

(29) Mr. Perez provided no documentation of the alleged violations or reprimands. In fact, it is clear that no written reprimand was ever effectuated. Additionally, none of the other employees involved in these alleged conversations were reprimanded, much less terminated. Claimant Garcia denies that the extensive breaks ever occurred. On this point, the claimant was credible and Mr. Perez was not.

(30) Reinforcing the latter, the grounds Flores reported as those advanced by Perez to justify Garcia's termination were not those testified to by Perez. Jesus Flores explained how Perez reported wanting to fire Mr. Garcia for performance deficiencies. He did not mention the grounds offered by Perez. Mr. Perez and Mr. Flores testified at different times during the final hearing. They did not hear each other's testimony. Their conflicting explanations raised more doubts regarding the employer's actions and more credibility to the claimant's.

(31) General Manager Gino Perez is notably younger than the claimant. He has worked at the employer as a supervisor since 2001. His responsibilities include assuring that all work crews finish their assignments in the allotted time.

(32) Mr. Perez acknowledges that his workers are largely Hispanic. He was born in New York, but his parents are from Puerto Rico. He acknowledges speaking some Spanish, but denied being able to understand much. In particular, he noted that he could not understand the lingo of his employees. His explanation was not remotely credible.

(33) It is clear that the grounds offered by the employer at final hearing to justify Mr. Garcia's termination were at best pre-textual. The claimant's alleged pre-termination conduct constitutes a minor infraction worthy of minor discipline. The complete lack of documentation of alleged poor performance furthers the notion that the alleged poor performance simply did not occur. Where the employer utilizes - as this employer did at the time - progressive discipline, none of what was testified to by Mr. Perez and or Mr. Flores with regards to Mr. Garcia's pre-termination conduct in any way supports the drastic action of termination

(34) The finding in (33) hereinabove explains the claimant's sense of outrage and injustice at what was done to him. However, it does not assist him for the purposes of his workers' compensation claim. Florida is a state in which employees are terminable at will. See, *Linafelt v. Beverly, Inc.*, 662 So. 2d 986, 989 (Fla. 1st DCA 1995); *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 68, 69 (Fla. 3rd DCA 1986); *La Rocca v. Xerox Corp.*, 587 F. Supp. 1002, 1003 (S.D. Fla. 1984)) The employer may fire an employee at will without cause. The facts demonstrate that, however meritless the pretext utilized, same is precisely what occurred here.

(35) Understanding the predicate events, the claimant was upset when he partook of the events that took place during the morning of Monday, November 5, 2007.

(36) After having heard from both the claimant and Mr. Perez, Mr. Jesus Flores he set a meeting on Monday, November 5, 2009 to give everyone a chance to be heard. His expectation was that Gino Perez and the claimant would meet together with him or the employer's Human Resources director. The Human Resources director would then make a recommendation to Mr. Flores.

(37) Gino Perez was at the door to Flores office. Mr. Garcia walked by. The discrepancies escalated from this point forward.

(38) Mr. Garcia acknowledges walking by and tapping Gino Perez on the shoulder to get his attention. According to Mr. Perez, the claimant punched him in the arm with sufficient force to leave a welt. The claimant stated during this encounter: "There is a God in the sky. Everything in life gets paid for." Of one form or another, the claimant did initiate physical contact with the General Manager.

(39) As Garcia walked out, Jesus Flores was sitting at his desk as if nothing major had happened. The employer's director of security was in Mr. Flores' office when the physical encounter initiated by Garcia and aimed at Perez took place. The director of security did nothing - suggesting that any encounter was inconsequential, just as Garcia had indicated.

(40) However, Perez called the police. Mr. Perez - the same Mr. Perez who could not understand Spanish - recalled that the claimant hurled obscenities at him in Spanish. Perez alleged ignorance of Spanish prevented him from understanding what was being said. Claimant indicates that he simply continued down the small stairs to his car in parking lot. Both explanations - Perez's and Garcia's - are self-serving. It is clear that the two gentlemen at this point had an exchange of words which no mother would be proud of. It is also clear that Perez, as a member of management, should have refrained from participating in same.

(41) Jesus Flores reports that the claimant engaged in disruptive behavior and directed various expletives at Perez from outside of the main office. Again, the security chief did nothing - clearly suggesting that nothing done by Garcia up to this point constituted a perceived threat. Flores, who was viewed by the undersigned to be approximately eight (8) inches taller and one-hundred (100) pounds heavier than the claimant did not consider the situation dangerous - simply disruptive. He went out to direct the claimant to leave.

(42) In the parking lot, Flores and Garcia exchanged heated words. Claimant Garcia alleges that before getting to his car, the much larger Jesus Flores caught him by surprise, pushed him hard from behind and caused him to fall. He alleges that Jesus then grabbed him by his neck with both hands, shook him and then banged the claimant's head against the hood of the car several times. This is rejected.

(43) Garcia not had any prior indication that Flores was upset with him. Flores had always treated him fairly.

(44) Flores acknowledged he and Garcia exchanging heated words in the parking lot. However, he advised that Aurelio Rodriguez, another employee came between the two, and that this intervention prevented the situation from escalating. This is credible. Mr. Rodriguez was not presented as a live witness. Mr. Garcia indicates that Richard, a cargo services supervisor saw everything and told him to leave. Mr. Garcia alleges that Richard was to come in and testify on his behalf. However, this witness was not presented. Thus, both Mr. Flores and Mr. Garcia had alleged independent witnesses to support their respective versions of events. Neither secured either witness. Thus, the case falls back on a determination of credibility of the witnesses who appeared live.

(45) Mr. Garcia did not report the incident - an alleged battery - to the police until two days after it happened. This alone raises doubts as to the credibility of his version of the alleged November 5, 2007 fight.

(46) A report was taken. The police Garcia that it would be up to the state attorney to decide whether to prosecute. However, Mr. Garcia also indicated that he chose not to press charges because he felt Mr. Flores would then give him a bad reference should Garcia attempt to obtain work with another company affiliated with airport cargo. The explanation is illogical for two reasons. First, Mr. Garcia would have soured the situation already via reporting the matter to the police. Second, no reasonable person having gone through the encounter alleged could have believed that Mr. Flores would give anything other than a negative reference.

(47) Mr. Garcia reported strong pains and headaches from the alleged encounter, and that his whole body hurt. However, he sought no medical attention because he had no insurance. Yet in prior workers' compensation claim in which he was also alleged injury from an on-the-job fight, he went to Jackson Memorial Hospital to obtain medical attention when he had no insurance. The claimant's explanation is illogical and unreasonable given his prior actions and experience.

(48) Mr. Garcia reports daily headaches since his alleged November 5, 2007 incident. These allegedly require him to take Tylenol or ibuprofen three to four times a day. This representation was neither convincing nor compelling.

(49) Mr. Garcia obtained work with Cargo Forrest approximately two months after his separation from Cargo Services. Later, he obtained employment with Centurion Air Cargo, from which he was terminated on June 15, 2009 due to a reduction in work force.

(50) While claimant's frustration over a termination without cause is understandable, his subsequent actions are not. It is clear that the incident alleged by the claimant wherein he claims to have been attacked and beaten did not take place. His own

actions significantly undermine his credibility. The event appears more a fabrication invented in retaliation for his belief that he was not treated fairly.

(51) Accordingly, the undersigned finds that no compensable accident occurred on November 5, 2007.

(52) At final hearing, the claimant requested that he be allowed to present evidence to allow the undersigned an opportunity to reconsider the denial of the claimant perfection of his IME. However, once on the stand, the claimant provided no evidence at all on this issue. Accordingly, it is deemed to have been abandoned.

(53) Additionally, the claimant sought attorneys fees for his counsel's attendance at a deposition. Again, no evidence was presented. Thus, this issue must also be deemed abandoned.

(54) All other issues claimed flow from a finding of compensability. As the undersigned has specifically found that no compensable accident took place, all other claims must be denied.

(V) DECREE:

It is hereby Ordered that the claim for a finding of compensability of the November 5, 2007 accident and all benefits that would flow from such a finding is DENIED.

Done and Ordered in chambers in Miami, Miami-Dade County, Florida this 16th day of October, 2009:



Gerardo Castiello
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I hereby certify that each of the above listed parties was served via E- mail this 16th day of October, 2009 with a true and correct copy of this Order.

Richard E. Zaldivar, Esq.
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W. Valgado-Alama

Assistant to the Judge of Compensation Claims

CERTIFICATE OF SERVICE

I hereby certify that each of the above listed parties was served via U.S. mail this 15th day of October, 2009 with a true and correct copy of this Order.

Pedro Garcia
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Final Hearing Statistics Worksheet

Please complete this form at the time of Order upload for any of the following:

Evidentiary Motion Hearing.
Expedited Final Hearing.
Fee Amount Hearing.
Fee Entitlement Hearing.
Final Hearing.
Fund Hearing.
Remand Hearing.
Appellate Fee Hearing.

OJCC Number(s) 07-032925GCC

Date Order Mailed/Emailed 10/16/09

Trial/Hearing dates opened 10/12/09; concluded 10/12/09

For Final Hearing or Expedited Final Hearing:

Dates of all pending petitions heard 12/24/08

OR

For Evidentiary Motion Hearing:

Type of Motion _____

Filing Date of Motion Heard Nov 28, 2009

OR

For Fee Amount Hearing or Fee Entitlement Hearing

Date motion or verified petition filed _____

OR

For Appellate Fee or Remand Hearing

Date of Mandate _____

AND

If abbreviated final/fee order was issued and later vacated:

Date Abbreviated Order Entered: _____

Date Abbreviated Order Vacated: _____