

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGES OF COMPENSATION CLAIMS
FORT LAUDERDALE DISTRICT

LUIS GORDILLO, OJCC#: 06-033574 KSP
Employee/Claimant, D/A: 10/16/06

v.

FRANK CRUM and FRANK
WINSTON CRUM INS. CO.,

Employer/Carrier.

_____ /

Richard E. Zaldivar, Esquire, Counsel for Employee/Claimant

Dominic C. Locigno, Esquire, Counsel for Employer/Carrier

**ORDER ON E/C'S MOTION TO ENFORCE EXECUTION OF
SETTLEMENT AGREEMENT**

THIS CAUSE came before the undersigned Judge of Compensation Claims on May 19, 2009 in Broward County, Florida for a duly noticed evidentiary hearing on E/C's Motion to Enforce Execution of Settlement Agreement. The hearing record closed on May 26, 2009 when the translation from Spanish to English of the contents of Exhibit D was e-filed. E/C's motion was e-filed on February 6, 2009. Employee/Claimant will be referred to as "Claimant." The Employer and the Carrier will be referred to in their respective individual capacities or collectively as "E/C."

Claimant did not appear at the duly noticed evidentiary hearing. The undersigned issued an *ore tenus* Order to Show Cause directing Claimant to respond in writing within

10 days as to why the requested relief should not be granted for his failure to appear at the duly noticed evidentiary hearing.

On or about May 22, 2009, Claimant e-filed an affidavit, which will be marked into evidence as Judge's Exhibit 1. Claimant averred in the affidavit that he received notice of the May 19, 2009 evidentiary hearing from his attorney on approximately May 8, 2009. Claimant further stated under oath that at approximately 11:00 p.m. on May 18, 2009, he began to experience severe pains in his low back and neck. As a result, he did not fall asleep until 4:30 a.m. and did not wake up until 10:30 a.m. At that point, Claimant contacted his attorney's office and was told to come in to the office immediately. The explanation is accepted and the oral Order to Show Cause is discharged.¹

Michael Elstein, Esquire, former counsel for Claimant, testified in person before the undersigned at the evidentiary hearing. The following documentary and testimonial exhibits were admitted into evidence:

E/C Ex. A	Ltr. dated 2/15/08 to E/C Atty. from Mr. Elstein
E/C Ex. B	Ltr. dated 3/17/08 from E/C Atty. to Mr. Elstein
E/C Ex. C	Ltr. dated 4/13/08 from Mr. Elstein to E/C Atty.
E/C Ex. D	Ltr. dated 4/9/08 from Mr. Elstein to Claimant (in Spanish) and a copy of the letter translated to English by a Court Interpreter Translator for the 15th Judicial Circuit (e-filed 5/26/09)
E/C Ex. E	E/C Motion to Enforce Execution of Settlement Agreement
Clmt. Ex. 1	Claimant's deposition

The undersigned considered all of the testimonial and documentary evidence, notwithstanding that there may not be an express recitation of same within the four

¹ While the undersigned accepts Claimant's explanation, that still does not negate the fact that he did not make provision to ensure that he did not sleep through the evidentiary hearing specifically set on a motion to enforce him to execute a settlement agreement.

corners of the instant Order, as well as resolved all material conflicts in the evidence, before rendering the following findings and conclusions:

1. The undersigned has jurisdiction over the parties and the subject matter.
2. By letter dated March 17, 2008 to Michael Elstein, who was counsel of record for Claimant at that time, from Dominic Locigno, counsel for E/C, Mr. Locigno stated that his client [E/C] authorized him to offer \$7,500, inclusive of attorney's fees and costs to settle the claim, as well as enter into a stipulation where the Carrier would assume responsibility for the payment of Dr. Aparacio's bills pursuant to fee schedule. E/C Ex. B.

3. Mr. Elstein sent a letter dated April 9, 2008 addressed to Claimant. The letter was addressed to Claimant at the 1311 S.W. 30th Street, Ft. Lauderdale, FL 33315, the address that has been used on every Petition for Benefits filed in this case. E/C Ex. D. The letter was sent in Spanish, and was translated into English by a Court Interpreter and Translator for the 15th Judicial Circuit. E/C Ex. D.

In said letter, Mr. Elstein states "[t]his will serve as a confirmation that we resolved your case ... As we have discussed, it is estimated that you can receive \$3,950 after our attorney's fees and costs have been paid." (emphasis in original). E/C Ex. D. The rest of the letter contained an explanation of the settlement process - and that it could take months before monies were actually paid out on the settlement. E/C Ex. D.

4. By letter dated April 13, 2008 to Mr. Locigno from Mr. Elstein, Mr. Elstein stated "[p]er our conversation last month, my client has approved the settlement offer of \$7,500 contingent upon the following breakdown. The settlement papers must reflect a side stipulation of \$1,500 for past medical benefits obtained ... Secondly, it is

my understanding that above and beyond the \$7,500, the carrier will agree to pay Dr. Paul Aparacio's medical bills, per fee schedule." E/C Ex. C.

5. Mr. Elstein testified at final hearing. Mr. Elstein testified that he never received a discharge letter from Claimant. Mr. Elstein admitted that he received a telephone call from Mr. Zaldivar's office in late 2008 informing him that Mr. Zaldivar's office was taking over the case.

Mr. Elstein testified that he spoke with Claimant over the telephone on March 19, 2008 and again on April 9, 2008. Mr. Elstein explained that he always used his Spanish speaking secretary, Myra, to facilitate telephone conversations with his Spanish speaking clients. Mr. Elstein testified that the notes in Mr. Elstein's file reflect that Myra spoke to Claimant on March 31, 2008.

Mr. Elstein testified without equivocation that there was no question that Claimant had given him authority to accept E/C's offer of settlement. Mr. Elstein further testified that he recalled the Claimant, Claimant was in financial straits, Claimant told him to resolve the claim, and Claimant relied upon him to settle the claim. Mr. Elstein testified that he was familiar with this case as he and Claimant attended two mediations.

Mr. Elstein admitted that he never received anything in writing from Claimant accepting the terms of the settlement. Mr. Elstein also admitted that he never presented Claimant with any settlement documents to sign. Mr. Elstein explained that there was an issue with drafting of the documents regarding the payment of Dr. Aparacio's bills and they had to be redrafted. By the time the settlement documents had been redrafted, he had been contacted by Mr. Zaldivar's office.

Mr. Elstein adamantly disagreed when informed that Claimant testified in deposition that he had never given Mr. Elstein authority to settle the case. Likewise, Mr. Elstein also retorted when informed Claimant testified that Mr. Elstein did not convey the monetary amount of the settlement to him.

6. Since Claimant was a no show for the evidentiary hearing, his deposition taken on April 13, 2009 was admitted into evidence as Claimant's Exhibit 1. Claimant testified at the deposition through an interpreter.

Claimant could not remember whether he was represented by Mr. Elstein in April, 2008, but definitely knew that he terminated Mr. Elstein in August of last year. Clmt. Ex. 1 at 5,6. When asked whether he was represented by Mr. Elstein at all times prior to that, Claimant responded "I don't know." Clmt. Ex. 1 at 6. Claimant first testified that he sent Mr. Elstein a letter (of termination), then stated that "[i]t was with the attorney I currently have. Clmt. Ex. 1 at 6,7.

Claimant testified that he did not give Mr. Elstein authority to settle the case. Clmt. Ex. 1 at 8, 9. Claimant admitted that Mr. Elstein called "my home" and indicated that there was an offer from the insurance company and that he [Mr. Elstein] "was going to call me afterwards in order to go and sign documents. But he didn't call." Clmt. Ex. 1 at 9; see also 14,16.² Claimant denied that Mr. Elstein spoke about an amount or that he had any discussions about the amount with Mr. Elstein. Clmt. Ex. 1 at 9,10,13,14. On another occasion, Claimant responded "I don't recall" when asked

² Consistent with Mr. Elstein's testimony, Claimant testified that the telephone conversation was facilitated by using Mr. Elstein's secretary as an interpreter. Clmt. Ex. 1 at 16.

whether Mr. Elstein ever told him that the Carrier offered \$7,500 to settle the case, plus pay the medical bills of Dr. Aparacio. Clmt. Ex. 1 at 12.

Claimant responded "never" as to whether Mr. Elstein ever sent any documents or letters telling Claimant about a settlement in an amount certain. Clmt. Ex. 1 at 9. Claimant testified that the letters he received "were basically for mediation." Clmt. Ex. 1 at 11.

Despite Claimant's testimony that he never gave Mr. Elstein authority to settle his case and that he was never informed of the amount of the settlement, Claimant on multiple occasions mentioned that Mr. Elstein was suppose to call him so that he could come into Mr. Elstein's office to sign documents pursuant to an offer from the insurance company, but Mr. Elstein never called. Clmt. Ex. 1 at 9,14,16.

7. The undersigned accepts Mr. Elstein's testimony that he had Claimant's authority to accept E/C's settlement offer over Claimant's contrary testimony. Beside the fact that Claimant's testimony was at times inconsistent, Claimant testified on repeated occasions that Mr. Elstein was suppose to call him so he could come into Mr. Elstein's office to sign the papers pursuant to the insurance company's offer. Clmt. Ex. 1 at 9,14,16. It simply does not make sense that Mr. Elstein would tell the Claimant to come in and sign papers or that Claimant anticipated going to Mr. Elstein's office to sign papers if there was no acceptance of a settlement offer for a specified amount of money.

Claimant denies receiving any correspondence from Mr. Elstein regarding settlement. The undersigned does not find Claimant's testimony in this regard persuasive. The April 9, 2008 letter sent by Mr. Elstein to Claimant, written in Spanish, states in pertinent part "[t]his will serve as a confirmation that we resolved your case ... As we

have discussed it, it is estimated that you can receive \$3,950 after our attorney's fees and costs have been paid...." E/C Ex. D (emphasis added). This evidence again supports Mr. Elstein's testimony that he had Claimant's authority to accept E/C's offer of settlement. In addition, the fact that the address on the letter is the very same address that Claimant has been using throughout the pendency of this case further diminishes the persuasiveness of Claimant's denial that Mr. Elstein sent him any correspondence regarding settlement.

The undersigned further accepts Mr. Elstein's testimony that he discussed the terms of the settlement with Claimant over the telephone while using his secretary to translate. While Claimant admitted to having one telephone conversation with Mr. Elstein facilitated by Mr. Elstein's secretary, the undersigned finds Claimant's testimony that Mr. Elstein did not discuss an amount to be unbelievable. It does not comport with logic and reason that Mr. Elstein would advise Claimant that the insurance company was making an offer to settle the case without discussing the amount being paid to settle the case. In addition, it makes no sense that Claimant anticipated being called into Mr. Elstein's office to sign settlement papers if he did not know the amount of the settlement.

8. Finally, the terms of the settlement are plain and unambiguous as set forth in the April 9, 2008 letter to Claimant and the April 13, 2008 letter to Mr. Locigno. The total amount of the settlement is \$7,500, from which a side stipulation for an attorney fee in the amount of \$1,500 would be paid for medical benefits paid for and provided, leaving \$6,000 as the lump sum settlement amount, less attorney's fees and costs, and E/C's payment of Dr. Aparacio's bills in addition to the \$7,500 settlement amount.

9. Since Mr. Zaldivar has undertaken representation of Claimant, petitions for benefits were filed on November 13, 2008 and May 4, 2009 seeking various medical and indemnity benefits, as well as attorney's fees and costs. Given the ultimate findings and conclusions that Mr. Elstein was authorized to accept the settlement offer and the terms of the settlement are plain and unambiguous, all pending the petitions for benefits, including those filed on November 13, 2008 and May 4, 2009 are dismissed with prejudice. Based on the foregoing, it is hereby

ORDERED AND ADJUDGED as follows:

1. E/C's Motion to Enforce Execution of Settlement Agreement is granted and the parties are directed to comply with the terms thereof.

2. All pending petitions for benefits, including those filed on November 13, 2008 and May 4, 2009 are dismissed with prejudice.

DONE AND ORDERED in Lauderdale Lakes, Broward County, Florida.



Kathryn S. Pecko

KATHRYN S. PECKO
JUDGE OF COMPENSATION CLAIMS

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing was furnished by mail this 5 day of June, 2009 to the following:

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ADMINISTRATIVE SECRETARY TO
JUDGE OF COMPENSATION CLAIMS