

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE

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| Esteban A. Farias |) | |
| |) | |
| Employee/Claimant, |) | OJCC Case No. 13-008320EDS |
| |) | |
| vs. |) | Accident date: 3/27/2013 |
| |) | |
| BAM Delivery/Protective Insurance Co. |) | Judge: E. Douglas Spangler |
| |) | |
| Employer/ Carrier/ Servicing Agent. |) | |

COMPENSATION ORDER

A merit hearing was conducted before the undersigned in Fort Myers, FL on August 26, 2014. Attorney Tania Ogden represented the Claimant. Attorney Jonathon Cooley represented the Employer/Carrier (E/C).

At issue were claims brought in a Petition for Benefits (PFB) filed on February 10, 2014 requesting a determination of compensability of an accident alleged to have occurred on March 27, 2013; authorization for evaluation and treatment of low back and groin injuries alleged to have occurred in the accident; and an award of costs and attorney's fees.

These claims were defended by the E/C principally by stating that there was no proof or competent evidence of an accident or injury occurring on March 27, 2013; and, there is no competent medical evidence to establish that the alleged injury was the major contributing cause of the low back and groin conditions and the need for treatment. The E/C also demurred as to entitlement for the Claimant to be awarded costs and attorney's fees.

Live testimony was provided during the hearing by the Claimant, Esteban Farias; and, Mr. Juan Amaya, and, Ms. Gail Sloper, both employees of BAM Delivery. The parties admitted depositions and documents into the record in support of their legal positions and the list of that documentary evidence is contained in the Appendix attached to this Order. Based on the testimony provided by the witnesses during the hearing, the testimony of the witnesses who

testified by deposition and a review of the documents and records in evidence, the undersigned concludes that the Claimant did not present convincing testimony that he sustained a compensable accident resulting in an injury while working for BAM delivery On March 27, 2013, and did not present competent medical evidence of an injury related to the alleged accident. Therefore, the Claimant's February 10, 2014 PFB must be denied and dismissed. The reasons for this determination follow.

Material Facts

Prior to March 27, 2013, the Claimant had worked for BAM Delivery as a package deliverer for about a year. BAM is a contractor with Fed Ex. Delivery and share a common terminal in Ft. Myers, FL. Prior to working with BAM the Claimant had been a seasonal worker driving for Fed Ex. There is no indication that the Claimant had been the subject of any disciplinary actions with either Fed Ex. or BAM prior to March 27, 2013.

On March 27, 2013, at approximately 9:30 a.m., before Claimant left the terminal to begin his scheduled deliveries, he was handed a package by Anne Caviston, a supervisor, and instructed to deliver this package to the addressee in Naples, FL between 9:00 and 11:00 that morning. However, the special package was not delivered until approximately 11:30 a.m. Later, while the Claimant was attempting to deliver other packages at another destination listed on his manifest, he allegedly fell on a slippery walkway landing on his low back, and experiencing an injury and pain in and to his low back and groin area. He completed his route that day. But, before he returned to the terminal, he was called by Caviston to inquire about the late delivery of the package to the address in Naples. Claimant alleged he informed Caviston in that conversation that he had fallen and was injured. The Claimant stated that before completing the route and arriving at the terminal he received a text message from Caviston advising him to attend a meeting at the terminal at 7:30 the next morning. Claimant thought the meeting was about the accident.

However, when Claimant arrived the next morning he was sent into a meeting room with Caviston, and was presented with paperwork terminating his employment, and instructed to sign the papers, surrender his keys and ID badge, and leave the premises. Claimant contends, again,

that in this meeting he told Caviston about the fall, and the injuries, and expressed that it was illegal for him to be fired. Claimant became angry and refused to sign the papers, surrender his keys or ID badge, and leave the premises. The police were called and arrived on the scene at approximately 7:45 a.m and remained on the scene for approximately 40 minutes. Claimant contends that before he left the terminal that morning he also told Wayne Morrison, owner of BAM Delivery, and had also told two co-workers, Gail Sloper and Juan Amaya, that he had been injured the preceding day.

About four hours later, at approximately 12:35 p.m. on March 28, 2013, the Claimant, on his own, and without authorization from the Employer, was admitted and evaluated at a Lee Memorial Health System facility located at 2776 Cleveland Avenue, Fort Myers, Florida . He was evaluated for low back pain, headache, and neck pain which he attributed to a fall at work the previous day. The records in evidence note that diagnostic tests were run and recommendations for further follow up care were made.

The Employer denied that any accident occurred on March 27, 2013. Mr. Morrison and Ms. Caviston never testified. Mr. Amaya and Ms. Sloper testified during the hearing and denied that they were ever advised by Claimant about his accident and injuries on March 27, 2013, in contradiction to the Claimant's testimony. In short, Claimant's version of the events is contradicted by some of the very people he named as persons in authority that he advised about the accident. Testimony from Caviston and Morrison was not presented, either by way of deposition, or by testimony during the trial.

The Claimant presented the deposition of Vania Ferrer taken on July 14, 2014 to support his contention that he attempted to report an injury to Sloper on March 27, 2013. Ferrer did not testify at the trial. Ferrer works for another delivery contractor that shared the terminal with Fed Ex. She stated that she was speaking with Sloper, whom she believed to be a secretary working with Fed. Ex., when at approximately 4:00 p.m. the Claimant came up and began to explain to Sloper that he had had an accident. A review of the testimony from pages 5 and 6 of the deposition allows an inference that the Claimant was complaining to Sloper that Amaya, another Fed Ex. employee, had refused to take the report of the injury and directed the Claimant to report it to his own supervisors at BAM

Claimant asserted in testimony, and in the written trial memorandum submitted by

counsel, that the termination on March 28, 2013 was in retaliation for reporting a work accident on March 27, 2013. Documents in evidence consisting of two Employee Warning Notices and a Disqualification Event Form all of which were completed on March 28, 2013 document other causes for the disciplinary actions taken on March 28, 2013. The disqualification form was endorsed by Juan Amaya who testified at the trial, and corroborated the events listed on that form. Other than the Claimant's assertion of retaliation, there is nothing presented in the documentation in evidence that hints of retaliation as the cause of the termination.

Discussion and Conclusion

The Claimant's presentation in this case essentially is based on the rhetorical question: Who are you going to believe; me, or them? When a judge is presented with conflicting testimony the answer to the question depends upon what does the overall weight of the evidence presented suggest occurred? In this case, there is simply insufficient corroboration to support the Claimant's testimony which, except for the deposition testimony from Ferrer, virtually stands alone.

In contrast to that, the documentation and testimony presented by the E/SA suggest a different version of the truth that is more persuasive. That version essentially is that the Claimant missed a critical delivery of a package, which had been entrusted to him with special delivery requirements. He was confronted with the late delivery in a telephone conversation with Caviston a few hours later and subsequently texted by Caviston that he must attend a meeting first thing the next morning. Claimant's version that he had fallen in the interim and had told Caviston about the fall, and that he believed the meeting to be about the fall, is uncorroborated and makes no sense in the context of the actual events. When Claimant received the text, it is a fact that he knew he had missed a critical delivery and his supervisor was unhappy about that event. It is a logical inference that he had to be contemplating some discipline when he received the text. Whether a fall had occurred, or not, is known only by the Claimant. But a fall on that particular day would be an interesting and convenient coincidence.

There is nothing in Ferrer's testimony that refutes this inference. This inference is actually heightened by what occurred the next day. When it became clear that the Claimant was

being terminated, the Claimant's version is that he challenged the termination with the assertion that it was illegal for him to be fired because he had been injured the day before and all the principal parties knew it. However, the evidence presented does not prove that anybody in the chain of command at BAM knew about a fall on March 27.

The documents admitted into evidence, from which inferences can be drawn, indicate that in addition to the Claimant failing to timely deliver the package on March 27, he was also observed throwing packages into his delivery vehicle on that day. The phrase actually used was "launching packages into the truck". The forms also document reports of the company truck being taken home without permission. Finally, when confronted with all these allegations, the Claimant became hostile to the point that the management had to call police to investigate a disturbance of the peace for over forty minutes and to retrieve company property from the Claimant which he, in anger, was refusing to surrender. And, it was approximately four hours later, after the termination, before the Claimant first went to a medical facility to report what he alleged to be a work accident and injury.

At all times the Claimant has the burden of proof and persuasion. As previously stated several times, the Claimant's presentation in this matter is reduced strictly to his testimony alone. Claimant had every reason to present self-serving testimony. Based on inferences which are drawn from the testimony of Amaya and Sloper, Claimant's testimony is not worthy of belief. This conclusion is buttressed by the inferences drawn from the circumstances of the events occurring after the Claimant was confronted by Caviston regarding the late delivery, and Claimant's overreaction and conduct when terminated. There is no evidence that the Employer terminated the Claimant based on his report of a work accident as there is no competent evidence that a work accident actually occurred.

Finally, the only admissible testimony of an injury that may be attributable to the alleged accident comes from the Claimant's testimony alone. The medical records, which do suggest the Claimant attributed the complaints being evaluated to a work accident, do not contain any admissible medical opinions that would relate the complaints to a work accident. Any injury itself and its causal relationship to an accident must be established by substantial and competent medical evidence, which evidence is lacking in this record. Other than attribution by the Claimant of the origin of the complaints to an alleged accident, the records themselves do not

contain any conclusion that the conditions were in fact caused by the alleged accident.

WHEREFORE IT IS ORDERED AND ADJUDGED:

The Petition for Benefits dated February 10, 2014 is denied and dismissed, with prejudice.

DONE AND ELECTRONICALLY FILED in Chambers in Fort Myers, Lee County, Florida, this 11th day of September, 2014.



Honorable E. Douglas Spangler
Judge of Compensation Claims

Appendix

Claimant's Exhibits

1. Deposition of Steve Young
2. Deposition of Vania Ferrer
3. Deposition of records custodian Stephanie Roy, with attached documents.
Claimant's Trial Memorandum.

Employer/Carrier Exhibits

1. Video Surveillance Report, June 20-22, 2013
2. Video Surveillance Disc June 20-22, 2013
E/C's Trial Memorandum

Joint Exhibit

1. Composite portions of personnel file:
Employee Warning Notices
Disqualification Documents
Police Report

JCC's Exhibits

PFB's dated February 10, 2014; Mediation reports dated June 16, 2014; Pre-trial Stipulation filed June 19, 2014; Pretrial Order and Notice of Final hearing filed June 23, 2014; Supplement/Amendment to Pretrial stipulation filed by Claimant July 1, 2014; Amendment to Pretrial Stipulation filed by E/SA on July 2, 2014.