

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 05-017768

Employee: Serafin Carpio
Employer: Chataqua Airlines
Insurer: Insurance Company of the State of Pennsylvania
c/o AIG Domestic Claims, Inc.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: February 23, 2005
Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 21, 2008. The award and decision of Administrative Law Judge Kathleen M. Hart, issued April 21, 2008, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 17th day of October 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Serafin Carpio

Injury No.: 05-017768

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Chataqua Airlines

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (open)

Insurer: Insurance Company of the State of Pennsylvania
c/o AIG Domestic Claims, Inc.

Hearing Date: January 23, 2008 & January 30, 2008

Checked by: KMH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 23, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant was assaulted by co-employee.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Part(s) of body injured by accident or occupational disease: Head, legs, body as a whole
14. Nature and extent of any permanent disability: 7.5% body as a whole
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Serafin Carpio

Injury No.: 05-017768

- 17. Value necessary medical aid not furnished by employer/insurer? \$1,965.70
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: unknown/\$354.05
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:	\$ 1,965.70
30 weeks of permanent partial disability from Employer	\$10,621.50

- 22. Second Injury Fund liability: Open

Total: \$12,587.20

- 23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Colleen Joern Vetter

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Serafin Carpio

Injury No.: 05-017768

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Chataqua Airlines

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (open)

Insurer: Insurance Company of the Sate of Pennsylvania
c/o AIG Domestic Claims, Inc.

Checked by: KMH

A hearing was held on the above captioned matter January 23, 2008. Serafin Carpio (Claimant) was represented by attorney Colleen Joern Vetter. Chataqua Airlines (Employer) was represented by attorney Hugh

O'Sullivan. The claim against the Second Injury Fund (SIF) was left open.

Employer submitted the deposition of Mr. Dave Decker as Exhibit 3. Claimant objected to the deposition based on the seven day rule. Claimant's objection was initially sustained, and the exhibit was not admitted. The parties requested an opportunity to go back on the record to provide the court additional information regarding the exhibit. On January 30, 2008, the record was reopened and both attorneys made additional statements. Based on this additional information and Rule 57.07, I reverse my earlier ruling and the exhibit is admitted into evidence. Claimant's attorney made several objections during the deposition. Those objections are all sustained.

The parties were asked to submit a proposed award by February 8, 2008. Claimant submitted a proposed award February 8, 2008. Employer submitted no proposed award.

STIPULATIONS

The parties stipulated to the following:

1. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law and Employer's liability was fully insured by Insurer on the alleged date of injury.
2. Employer had notice of the injury and a claim for compensation was timely filed.
3. Claimant's average weekly wage was sufficient to entitle him to the maximum rate for PPD.
4. Employer has paid no benefits to date.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Whether Claimant sustained an accident arising out of and in the course of his employment.
2. Whether Claimant's injuries are medically and causally related to a work injury.
3. Whether Claimant is entitled to past medical expenses of \$1,965.70.
4. Whether and to what extent Claimant has sustained any PPD.

FINDINGS OF FACT

Based upon the competent and substantial evidence and my observations of Claimant at trial, I find:

1. Claimant is a 39 year-old male who worked for Employer from 2003 through 2006. In 2003 he received the Outstanding Employee Award. Dave Decker, Claimant's supervisor, later nominated him for, and he received, the President's Award.
2. Claimant mainly worked on the Man Power Coordinator (MPC) desk. He typically worked the MPC desk Tuesday through Saturday from 1:50 p.m. until 10:20 p.m. He also trained co-employees to work the MPC desk, which required knowledge of the Sabre computer system used by airlines to track flights, baggage, and other information. He also worked some shifts as a Ramp Lead.
3. On a Sunday in February 2005, Claimant was called in to work overtime, and his supervisor assigned him to the MPC desk. Another employee, Mario Zayas, was "bumped" from the desk to instead work the ramp. This meant

working outside on a rainy day handling baggage and cleaning incoming planes. Claimant had already bumped Mr. Zayas from working the desk at least once before this.

4. The following Tuesday, Mr. Zayas approached Claimant in the break room and said things in an angry tone, including “you are taking my job” and cursing. An argument ensued, which was overheard by the safety coordinator who asked both men to go to the supervisor’s office.

5. The supervisor, Dave Decker, spoke with both men, encouraged them to get along, and sent them back to work.

6. The next day, Wednesday, February 23, 2005, Mr. Zayas again approached Claimant in the break room and again angrily said Claimant was “taking my job”. He slammed his hand on the desk and cursed at Claimant.

7. Mr. Zayas followed Claimant into Mr. Decker’s office. Claimant told Mr. Decker that Mr. Zayas had cursed at him and threatened him. Mr. Decker told them both to cool off and go home.

8. Both men left Mr. Decker’s office. Mr. Zayas then stepped in front of Claimant, put his hands on Claimant’s chest, and pushed him into the wall. Claimant’s head hit the wall, his vision became blurry, and he felt tingling down into his feet. Two supervisors were present in the hallway when this altercation occurred.

9. Claimant left the building and began walking four blocks to the parking lot provided by Employer. About two blocks into the walk, Claimant saw Mr. Zayas drive out of the parking lot and pull into the Amoco station near Claimant.

10. Mr. Zayas got out of his car and began yelling at Claimant that he was “going to teach him a lesson”. He swung at Claimant and Claimant swung back. They struck each other in the head, face, and body. Mr. Zayas, 6’3” tall, lifted Claimant, who is 5’2” tall, and dropped him face down on the ground and pummeled the back of his head. Bystanders intervened to break up the fight.

11. Mr. Zayas returned to his car, got a baseball bat, and began chasing Claimant. Claimant ran away. The police arrived and took the two men to the police station. Each man gave a statement and was released. The Police Chief drove Claimant back to his car at Employer’s parking lot.

12. As Claimant drove home, he had to stop several times because his head hurt and his eyes were bothering him. Due to these complaints, Claimant went to the Emergency Room at Christian Hospital.

13. The Emergency Room physician ordered a head CT scan which was negative. Claimant was given a prescription for Darvocet and discharged from the hospital.

14. When Claimant returned to work, he reported the incident to Mr. Decker who told Claimant to leave his office. Claimant was later arrested based on charges raised by Mr. Zayas, but those charges were dismissed because Mr. Zayas did not appear to testify in court.

15. Claimant continued to work for Employer. He was taken off the MPC desk, and he and Mr. Zayas were assigned to separate ramps. One month later, Claimant was put back on the MPC desk. Employer closed its ramp operation in February 2006 and was bought out by Trans States Airlines. Claimant was hired by Trans States to work at the same MPC desk, and was promoted to the supervisory position of Transfer Coordinator.

16. Claimant continues to have headaches 8-10 times per month, lasting 1-2 hours. He occasionally has tingling in his legs causing his feet to trip up or stumble. He did not experience any of these symptoms prior to the accident. Claimant is diabetic and takes medication. He has not reported the complaints related to the assault to his internist because he does not want to take any more prescription medicine. He occasionally takes Tylenol for the headaches.

17. Claimant is credible.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Claimant sustained an accident by assault that arose out of and in the course of his employment on February 23, 2005.

Assaults which are the outgrowth of the frictions of employment are compensable. *Scullin Steel Company v. Samuel Whiteside*, 682 S.W.2d 1, 2 (Mo. App. E.D. 1984). An injury suffered by an employee stemming from activities of mutual benefit for employer and employee arises out of and in the course of employment. *Id.*

In this case, an argument arose over Claimant's having "bumped" Mr. Zayas from the MPC desk. This job would have allowed Mr. Zayas to work inside during inclement weather and could have resulted in additional pay. Claimant and Mr. Zayas had no personal quarrel during the two years they worked together before the assaults. The assaults occurred within minutes of the two men being sent home by their supervisor following an argument.

Claimant credibly testified the cause of the argument was Mr. Zayas' allegation that Claimant was "taking his job". Mr. Zayas did not testify at trial. The supervisor, Mr. Decker, was not present for the argument. His deposition testimony as to the cause of the argument is hearsay and is not admissible. Claimant's credible testimony regarding the cause of the argument was unimpeached. I find the argument resulted directly from Claimant's duties for Employer.

I further find Claimant was not the aggressor in the assault in the hallway outside Mr. Decker's office or in the assault that occurred on the way to his car. This finding is supported by the statements made to the police by Mr. Zayas and by a witness.

Although the second assault occurred as Claimant was walking to his car, he was walking his usual route to the parking lot provided by Employer. "Injuries sustained by an employee while going to or coming from work can be compensable where the off-premises point is on the only route or the normal route that employees must take to get to their employment and there exists a special hazard, one to which the employee is exposed by reason of the employment, to which the general public is not subjected." *Id.* at 3. Mr. Zayas was the "special hazard" to which Claimant was exposed by reason of his employment. This second assault, like the assault in the hallway, was work-related.

2. Claimant's injuries are medically and causally related to the assaults occurring on February 23, 2005.

Claimant's injuries are the direct result of his work-related assaults. Claimant went to the emergency room the evening of the assaults. These records show Claimant said he was hit with fists on his head. He complained of headaches and wobbly legs. The doctor found Claimant was swollen and bruised on the right side of his face, and he had swelling, reddened areas, and was tender and bruised on the back of his head. Mr. Zayas also told the police he hit Claimant with his fist and "took him to the ground". In addition, Claimant's expert, Dr. Cohen, diagnosed Claimant with post-traumatic headaches and found the assaults were a substantial factor in causing these headaches. Employer submitted no medical evidence to refute Dr. Cohen's findings.

3. Claimant is entitled to \$1,965.70 in past medical expenses.

"In *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. banc 1989), our Supreme Court stated that "when [employee] testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate to the *professional services rendered as shown by the medical records in evidence*, a sufficient factual basis exists for the commission to award compensation." *Id.* at 111-12[7] (emphasis added)." *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo.App. E.D. 1994).

Claimant testified he sought emergency medical treatment for his injuries from the assaults. The medical records corroborate his testimony. Claimant testified the medical bills have not been paid. I find Claimant is entitled to payment for past medical care in the amount of \$1,965.70.

4. Claimant has sustained 7 ½% PPD to the body as a whole and is entitled to \$10,621.50.

A permanent partial disability award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App.1991)(overruled in part). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770,773 (Mo.App. 1983) (overruled in part).

Claimant credibly testified he continues to have headaches 8-10 times a month that last for an hour or two. The headaches cause pain at the back of his head and into his eyes. He continues to feel his feet trip over each other from time to time causing him to stumble. Claimant testified he did not have these problems before the assault and has continued to have them since.

Dr. Cohen diagnosed Claimant with post-traumatic headaches or common migraine type headaches. He recommended treatment with medication but Claimant does not want to take medications since he takes medications to control his diabetes. Dr. Cohen rated Claimant's disability at 20% of the body as a whole from the head injury.

After giving careful consideration to the entire record and based on the testimony, the competent and substantial evidence presented and the applicable law, I find Claimant sustained 7 ½% PPD to the body as a whole and is entitled to \$10,621.50 in compensation.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffery W. Buker
Director
Division of Workers' Compensation