

# WORKERS' COMPENSATION APPEALS BOARD

KAREN TAYLOR,

Applicant

vs

CARROWS RESTAURANT,

Defendants

CASE NO. SBA 72170  
SBA 73326  
SBA 73327  
MINUTES OF HEARING  
( AND )  
SUMMARY OF EVIDENCE

Place and Time: 30125 Agoura Road, Agoura Hills, CA., 91301, June 7, 1994, @ 9:50 A.M.

Judge: THE HONORABLE JEROLD S. COHN

Reporter: Sheila Smith

**Appearances:**

KAREN TAYLOR

GLASS & SEEBOLD

BY: DONALD M. WYLER, Attorney for Applicant

KEGEL, TOBIN & TRUCE

BY: E. CHARLES MAKT, Attorney for Defendants  
Carrows Restaurant/Travelers Insurance

WITNESSES:

Tony O. Garcia

Ramzi Zahr

Roberta Lewis

WITNESS IN REBUTTAL:

Karen Lynn Taylor

**EXHIBITS:**

Defendant's E - Portions of Karen Taylor's personnel file, designated "COMM LOG".

Defendant's F - A two-page document of medical records from Dr. Podry, dated July 28, 1993.

(Continued):

LET THE RECORD SHOW:

Although MARSHALL SETTIG, ESQ. of GLASS & SERROLD had appeared at the hearing of May 31, 1994, for the Applicant, DONALD M. WYLLIE, ESQ. of said firm is here today representing the Applicant.

LET THE RECORD FURTHER SHOW:

That the May 31, 1994, Minutes of Hearing were served on both counsel for their respective parties and same were stipulated to by both sides.

DISPOSITION:

The case stands submitted on the record.

SUMMARY OF EVIDENCE

TONY O. GARCIA, having been called by the Defendants, was first duly sworn, and was examined and testified as follows:

He is presently employed by Carrows, the same employer of the Applicant in these cases, and has been for 14 years. He is currently the general manager for Carrows. He has worked with the Applicant and is familiar with the Applicant.

He relied upon Roberta (Robbie) Lewis to do the hiring of Applicant. Although in retrospect, he probably would not have hired her, indicating that in his opinion her work is, at best, mediocre and not up to Carrow's standards. He states that Carrows received numerous complaints from customers about her.

On Friday night, November 12 or 13, 1992, an incident occurred. He describes that Karen went to the back of the kitchen and was almost hysterical stating that Ramzi had hit her. Ramzi denied hitting her, stating that he only tapped her on the shoulder and said, "Good job, Karen." This conversation took place some time during the evening after the rush of the dinner crowd and towards the back of the kitchen area. Those present were the witness, Tony Garcia, Ramzi and the Applicant. Thereafter, Karen went home stating that she wasn't feeling good.

The Applicant kept working up until March of the following year and sometime between November 1992 and March, Karen Taylor told this witness that she had been struck by not just Ramzi but also on four different occasions by the following four different co-employees: Eileen, Leonardo, Octavio and Francisco.

When he talked to all of the foregoing people about whether or not they had struck Ms. Taylor, they all denied having done so stating that she was crazy; they had never touched her; that they had never hit her. He never witnessed an incident involving Octavio striking the Applicant, although Applicant states that he saw Octavio tap her and he should have been able to hear her say to Octavio "Don't hit me." The Applicant had told this witness that Octavio had hit her.

(Cross-examination):

On the night of the alleged "hit," the Applicant was crying. She was hysterical and screaming out loud. On the night of the alleged hit, in response to

SUMMARY OF EVIDENCE (continued):

a question as to whether or not the Applicant was crying, the witness states that although she was hysterical and screaming out loud, she was not crying.

Ramzi did not deny having tapped the Applicant. However, he did definitely deny having hit her or hurt her. The Applicant had told this witness that she was hurt, but this witness simply states that she was out of control and couldn't serve customers and for that reason, she was sent home.

He knows Candice.

RAMZI ZAHR, called by Defendants, having been first duly sworn, was examined and testified substantially as follows:

He is presently employed as a general manager for Carrows and in 1991 or 1992, he worked for Carrows in Chatsworth along with the Applicant. At the time, he was an associate manager. There were a lot of complaints about Applicant's work from customers. However, as an associate manager, he helped her in some ways such as asking customers if the food delivered to them was correct; he took orders from her customers for her and filled up the customer's beverages.

He told the Applicant when there were customer complaints about her work. However, she would deny having made any errors stating that it was the customers who were crazy.

November 14 is a date he recalls as having been a busy Friday night at Carrows during the dinner hour and had almost a full staff working. At the end of the rush hour, he patted Applicant on the shoulder. She was standing with two other persons behind the counter and the two other persons were Annie and Casey. He called to her twice about having done a good job without acknowledgement and then he touched her on the shoulder.

She did not move in any way. He said, "Good job" and she said nothing at that moment. However, 20 minutes later, she approached this witness stating that she didn't appreciate what he did today. She stated that it hurt her. The witness states that he expected her to say, "thank you" in response to the statement he had made to her about a job well done. He immediately asked for an investigative statement from Annie and Casey. Just prior to leaving for the evening, the Applicant had, apparently,

SUMMARY OF EVIDENCE (continued):

made the statement to him, "You're the problem. I want to make sure you pay for it. I'm going to make sure that you're fired."

After that night, Applicant kept working from November of 1992 through March of 1993. And in the interim, she said nothing about the incident until March 12, 1993, her last day at work. And during the interim, she did continue to work as she had before and the witness continued to help the Applicant by giving refills, helping her take orders, checking to see that the orders were right, et cetera.

On the night of March 12, 1993, a customer complained about the Applicant, Karen Taylor. Bobbie Lewis handled the complaint.

(Cross-examination):

The November 1992 discussion involving Ramzi, Tony Garcia and the Applicant took place four feet from the cook's station and five to ten feet from the cash register. Applicant was not trying to pick up food. She was talking to two people. It took place about 8:30 P.M. And in response to a second question, he states that the Applicant was not at the cook station to pick up food; rather the Applicant was speaking to two people.

In addition to checking on the Applicant's service to customers, this witness also checks the service being provided to customers by other waitresses. The incident involving the "pat" was one in which he was actually congratulating her for a job well done. They may have been short staffed that evening.

This witness was asked a direct question as to whether or not the Applicant was becoming the brunt of jokes and comments by fellow employees, like a small kid in a schoolyard who takes punches, and he denies that the Applicant was becoming a punching bag.

While this witness did not doubt that the Applicant had hurt her shoulder, he states he admitted he "tapped" her. He doesn't remember apologizing. After the Applicant talked to Tony and him together, 15 minutes later she left and he assumed she left because of shoulder pain. He may have said that he was sorry for touching her but he denies having stated that he was sorry for hurting her or hitting her.

SUMMARY OF EVIDENCE (Continued):

ROBERTA LEWIS, called by the Defendants, was first duly sworn, and was examined and testified substantially as follows:

She is presently an associate manager for Carrows and has worked at the Chatsworth facility for 14 years, having hired Karen Taylor in July of 1991 and becoming familiar with Ms. Taylor's work. She received complaints about Karen Taylor's work by some managers in training indicating that Karen Taylor was difficult to find; that Karen Taylor disappeared from the floor; that Karen Taylor was found in the breakroom smoking; that Karen Taylor had difficulty with the computers; that Karen Taylor would give the wrong checks to customers.

Karen Taylor started working there in July of 1991. The computers were brought in to take orders and convey them to the kitchen in August or September of 1991 and at that time they switched from the handwritten checks and Karen had trouble learning the new system.

In November of 1992, the day after the incident with the Ramzi Zahr, the Applicant called this witness at work from Applicant's home. At that time, the witness recalled that one year before there had been an incident in which the Applicant had told a manager-in-training named Harvey Caper that a co-employee named Francisco had touched Applicant one year before and Applicant did not like being touched.

As a result of that incident one year before, this witness told all the employees not to touch Karen Taylor and that Karen Taylor did not like being touched. On the morning after the November 14, 1992, incident involving Mr. Zahr when Applicant called, Applicant stated that it really didn't hurt and that she may have overreacted and that she would return to work on her next scheduled workday. Indeed, Applicant did continue working regularly until March of 1993.

The witness stated that it was the Applicant who stated that the Applicant may have overreacted. Most of the complaints about Applicant were about little things of neglect or sidework (re: work off of the waitressing floor) in terms of statements from other employees but they were also customer complaints, three of which were actually written out and sent to upper management. These three particular complaints concerned not delivering food on time; delivering the wrong food; handing out the wrong checks; failure to refill beverages and neglecting

SUMMARY OF EVIDENCE (continued):

customers.

One regional vice-president and/or general manager was apparently given copies or sent copies of two complaints within two weeks and as a result, this witness was told to do something. And consequently, this witness went to work at Carrows in Chatsworth on March 12, 1993, and told Karen Taylor that she would be given the opportunity to retrain as a waitress and she would stop serving as a waitress for a while so that she would be able to convince upper management of her ability to continue working and to again achieve her certification.

Karen Taylor stated that she needed to continue working as a waitress in order to make the salary and the tips for gas money. The witness stated that she needed to go through the program of retraining in order to assure upper management of her abilities or they could no longer allow her to wait on customers. That night, that same night, a customer stated that she got terrible service from Applicant and no refills. That night, the witness took Karen Taylor upstairs and told Karen Taylor about the complaint and Karen Taylor's response was that it was not Karen Taylor's fault; that the customer didn't know what she was talking about.

This witness states that the Applicant always said it wasn't her fault. This witness states that the Applicant did not say that she had been struck. The Applicant states that shortly after the meeting that night, Karen Taylor went home. The next morning, Karen Taylor called the witness and stated that before she could return for retraining, she needed to go to a chiropractor for a reevaluation as a result of all the times that she had been hurt on the job.

When the witness asked her as to what injury she was talking about, Karen Taylor described the incident that Tony Garcia is alleged to have seen. This witness indicated that Tony Garcia stated that he didn't see the incident. However, the witness offered to take and, in fact, did take Applicant to Advantage Care for treatment at which time the Applicant stated she couldn't recall when the incidents took place.

Whereas, Eileen had recalled having tapped the Applicant with the back of her hand once. The Applicant stated it took place twice and that Claudia and Annie were supposed to be witnesses. In statements to this witness, they both denied seeing the supposed hitting

SUMMARY OF EVIDENCE (continued):

by Eileen and actually gave written statements.

Since March of 1993, the Applicant has not returned to work at Carrows in Chatsworth but the witness has had several conversations with her since then. The Applicant having called after the treatment at Advantage Care, stating that she was tired of doctors; was bored; was not in pain and wanted to return to work. The Applicant wanted a transfer to the Camarillo or Panorama store but the manager there said no. The Applicant said she had not been hurt and there was no reason why she couldn't work.

The witness described write-ups in the personnel file (see defendants' exhibit e), three complaints letters from customers and statements from Casey, Annie and Claudia as well as entries in the communications logs about Applicant which the witness described as a "COMM LOG."

The COMM LOG is a way of communicating between day managers and night managers.

Karen Taylor is not the only person who has been written up in the personnel file or COMM LOG. There is a March 12, 1993, entry documenting the offer for counseling or retraining.

(Cross-examination):

There is a March 12, 1993, entry stating that the Applicant states that she had been hit so many times at work that she doesn't recall or know. The Applicant also got some customer complaints, but states that Applicant was known as light hearted and smiley and got some high marks on her SMILE certification course and had, in fact, received her "SMILE" certificate, which is Carrows' way of certifying someone as a waitress that is polite, courteous and smiley. She got that in 1991, but became erratic thereafter.

She received no complaints from the Applicant stating that the Applicant had been treated unfairly. The witness denies that Applicant was required to bear the weight of high-handed activities by other employees. When the Applicant had stated that she was not hurt, she also stated that she was bored and she also stated that she needed money. The witness told the Applicant that the Applicant needed a "Doctor's Release" to return to work.

SUMMARY OF EVIDENCE (Continued):

Defense rests.

The Applicant recalls Karen Taylor on rebuttal.

KAREN LYNN TAYLOR, called by the Applicant, having been first duly sworn, was examined and testified substantially as follows:

The Applicant demonstrated to the Court and all present how she was contacted in the pushing incident indicating that it went, quote, "like that" and that it scared her and the attorney was asked to make a record as to what the Applicant was demonstrating but he did not do so.

Shoppers often fill out employee questionnaires about Carrows' employees and at times she got a 98 grading and her scores were generally good.

Ramzi apologized to her stating, "Karen, I'm sorry. I didn't . . . he said he was sorry."

Comments by trial judge: This witness has, on several occasions, failed to complete sentences.

It was Ms. Lewis, not Applicant, who suggested that Applicant was overreacting. This witness states that she didn't always get complaints about her service, and indeed, she had gotten some compliments on her waitressing abilities and felt that co-employees made her the brunt of situations and circumstances at work.

She thinks four or five different people hit her in the workplace five or six times.

She walked up to her attorney (here in the courtroom) by way of demonstration, put her hand on his shoulder and pushed him. She had earlier stated that Ramzi had patted her. She states that the Ramzi incident felt more like a push or a shove. She states it scared her and that her whole body moved toward the cook's station and that if Ramzi hadn't touched her, she wouldn't have been scared.

OPINION ON DECISION

AND FINDINGS AND AWARD

This Applicant in order to be better understood, should be looked at, as this trier of fact did, in order to interpret her demeanor and manner in testifying, her pauses mid-sentence both before and after questions, as well as her expressions, facially and otherwise, the overall record indicates a claim form or claim forms that would make it very difficult for an examining physician to know what was claimed, as it would be difficult for a Defendant to understand from the applications what is being alleged.

The Applicant has had other Workers' Compensation cases involving injuries to "both shoulders" as late as April 11, 1990, which she settled for \$6,000, (see September 8, 1992 order approving Compromise and release.) It is noticed that the incidents here in the first complaint of injury took place in November of 1992, some two months later. Although, Applicant alleges three incidents, one wonders as to the accuracy of the history when taken as a whole by virtue of the December 30, 1993, medical/legal evaluation performed by Dr. Nelson as compared to the history taken by Dr. Plotke on August 16, 1993.

Overall, our system of Workers' Compensation provides for benefits to employees injured on the job. The Workers' Compensation judge in this case is not convinced that this Applicant suffered any injury on the job, albeit that there may have been more than one touching. Rather, this Workers' Compensation judge feels that any touching resulted in no injury; that Applicant was able to continue working after the alleged incidents of November 9, 1992, January 15th, 1993, January 9, 1993, until March of 1993, when threatened with the loss of her job and/or a reduction in her income, she decided to proceed with a claim or claims.

Ironically, even assuming that an injury arising out of and in the course of employment should have occurred, very little, if any, Disability would be found based on Applicant's own testimony. And the work restrictions suggested in the December 30, 1993, report of Dr. Nelson indicating that quote, "the patient's upper extremity disability precludes prolonged sitting and repetitive pushing and pulling with the shoulders bilaterally," close quotes, appears to this trier of facts as a statement by weight and in conjunction with the other evidence as preposterous. Dr. Nelson should feel free at

SUMMARY OF EVIDENCE (continued):

his own expense to submit a supplemental report if he disagrees with the trier of facts' interpretation of his work restrictions.

Overall, the evidence presented by Applicant was less than convincing and Applicant has failed to offer, and/or rebut, and/or impeach credible evidence from witnesses offered on behalf of defendant.

Throughout both days of trial, certain references were made to the state of the record and/or the evidence and no attempts were made by Applicant's attorney to correct same. It will be assumed that the attorneys for Applicant would agree that the services performed by said attorneys should be valued at less than \$70 per hour although it is not unusual for Workers' Compensation attorneys to be awarded \$150 per hour for average services.

The medical/legal costs sought in this case include claims for and/or on behalf of Channel Islands Orthopedic Medical Group for the December 30, 1993, report of Dr. Nelson (\$960), together with the reasonable value of services sought for an initial report at Channel Islands Medical Group.

Ironically, the only evidence as to the reasonableness of those costs that was even offered came from the bills of Channel Islands Medical Group and albeit that both counsel were requested to contact people about the reasonable value of costs, no other evidence was offered, and therefore, Channel Islands' bill is ordered paid in the amounts sought.

There's no showing that the reports from Dr. Plotke were sought to prove or disprove a contested case, and therefore, his bills will be disallowed as medical/legal costs. Since no injury arising out of and in the course of employment is found, no order will be made for payment of past medical care.

The only evidence as to the time spent in deposition is the August 29, 1993, petition John Lamotte, Esq. indicating a total time spent of two hours, 15 minutes, which is being multiplied by \$70 per hour as the amount to be awarded under Labor Code Section 5710.

FINDINGS AND ORDER

FINDINGS:

1. Applicant did not sustain an injury arising out of and in the course of employment.
2. Applicant is entitled to reasonable legal/medical costs for the reports, billings and liens of Channel Islands Medical Group as indicated above and no others.
3. Applicant's attorneys are entitled to \$70 per hour for their services rendered at the deposition, multiplied by two hours and 15 minutes.
4. Defendant did not unreasonably delay payment for benefits in this case since it appears that the case was so poorly prosecuted and so inadequately documented that there is a reasonable doubt as to whether or not they would be liable for anything.

AWARD:

As stated above.

  
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JEROLD S. CORN  
WORKERS' COMPENSATION JUDGE

SERVICE BY MAIL:  
DATE: 6.21.94

BY:   
 