



April 3, 2023

VIA EMAIL

Mr. Mark A.J. Fassold, Mr. Francisco Guerra, IV, and Ms. Bailey VanNatta  
Watts Guerra LLP  
4 Dominion Dr., Bldg. 3, Suite 100  
San Antonio, TX 78257

Mr. Jerry Fazio and Mr. Christopher Lollis  
Owen & Fazio, P.C.  
10670 N. Central Expwy., Suite 550  
Dallas, TX 75231

Mr. Carl J. Kolb  
Carl J. Kolb, P.C.  
501 Congress Avenue, Suite 150  
Austin, Texas 78701

**Re: Maribel Lerma, Individually and as Representative of the Estate of Marisela Cadena,  
Deceased, Antonio Lerma, Jr., Maricela Lerma and Marissa Lerma v. River Sub, LTD.,  
d/b/a Subway  
JWA No. 3319-A 2021**

Dear Counsel:

Please find enclosed the Final Award submitted by Judge Carlos Cortez in the above referenced case.

Pursuant to our Document Retention Policy, please be advised that the Arbitrator will be free to dispose of all documents and evidence submitted by the parties including pleadings, briefs, exhibits and depositions unless requested otherwise by one or both parties. If you would like to have any of the materials returned to you, please notify us no later than **May 3, 2023**. If we have not heard from you by this date, all materials will be destroyed.

If you have any questions or concerns, please do not hesitate to contact me.

With kind regards,

A handwritten signature in cursive script that reads 'Charlotte Huff'.

Charlotte Huff  
Case Administrator

*Enclosure(s)*

**JUDICIAL WORKPLACE ARBITRATIONS, INC.**

MARIBEL LERMA, Individually and as §  
Representative of the Estate of MARISELA §  
CADENA, Deceased, ANTONIO LERMA JR §  
MARICELA LERMA and MARISSA LERMA, §  
*Claimants* §  
§  
v. §  
§  
RIVER SUB, LTD. d/b/a SUBWAY, §  
*Respondent* §

JWA No. 3237-A 2021

---

**AMENDED FINAL JUDGMENT AND AWARD OF ARBITRATOR**

On February 21, 2023, the parties attended the arbitration hearing on the above-referenced matter in San Antonio, Texas. Claimants (Maribel Lerma, Individually and as Representative of the Estate of Marisela Cadena, Deceased, Antonio Lerma Jr., Maricela Lerma, and Marissa Lerma) appeared in person by and through their attorneys of record and announced ready. Respondent (River Sub, Ltd. d/b/a Subway) likewise appeared through its attorneys of record and announced ready. Counsel for both parties presented their evidence over the course of the hearing regarding both liability and damages. Both parties requested (and were allowed) to send post-trial briefing on March 16, 2023. After reviewing the evidence presented by the parties, as well as the arguments presented by counsel for both parties in their post-hearing briefs, I, Hon. Carlos R. Cortez, having been designated in accordance with the agreement entered into by the above-named parties, Find and Award as follows:

## DISCUSSION

Marisela Cadena, Deceased, ("Cadena") was employed by Respondent, River Sub, Ltd. as a store manager at Respondent's Subway Restaurant number 41652 in San Antonio, Texas. Respondent is a non-subscriber to workers' compensation insurance. Cadena was acting in the course and scope of her employment with Respondent when she was attacked and fatally shot at the subject restaurant location on the morning of February 28, 2020.

Sergio Martinez ("Martinez") was Cadena's direct manager at the subject restaurant. Martinez was employed by Respondent as a District Manager. Martinez was a vice-principal for Respondent and had authority with respect to a wide array of matters, including store and employee safety, the hiring and firing of employees, the direction of employees, the transfer of employees from one restaurant to another, and generally performing nondelegable duties. Martinez was also involved in approving schedules proposed by subordinates such as store managers. In sum, Respondent gave Martinez authority to manage a department or division of the company.

Cadena's ex-boyfriend, Andrew Munoz, ("Munoz") was the assailant who murdered Cadena on February 28, 2020. On February 16, 2020, Munoz had kidnapped Cadena at gunpoint and taken her into a field for a number of hours. On February 25, 2020, Cadena told Martinez about the kidnapping incident wherein Martinez told Cadena to notify the police or that he would. On February 25, 2020, Martinez was present when

Cadena met with San Antonio police officer Christopher Torres (“Officer Torres”) and with a victim's advocate, Dalia Rivas, (“Rivas”) at the subject restaurant to report the kidnapping and work on a protective order and a safety plan. Martinez’s testimony acknowledges he foresaw Cadena was in danger of being harmed by her ex-boyfriend and that he foresaw Munoz could come to Cadena’s Subway location and assault her. Both parties’ experts also testified that Martinez foresaw Cadena might be harmed by Munoz at the Subway location.

Martinez had the authority to transfer employees from one store to another (among other things) and Cadena asked Martinez to transfer her to another store. Cadena had taken other steps in her life to hide from Munoz but Munoz still knew where she worked. Cadena reported Munoz to the police, sought protection from the authorities via a restraining/protective order, moved in with her daughter, switched cars with her daughter, and had someone else feed her pets so she could avoid her apartment where Munoz knew she lived and could find her.

Martinez did not transfer Cadena and credible evidence and testimony (including but not limited to the bodycam video from Officer Torres of Cadena speaking with the victim's advocate Rivas) suggests that Martinez may have demanded an inappropriate *quid pro quo* before he would agree to transfer Cadena. Five days after Cadena was murdered, Martinez authored a statement wherein he told Cadena that “we would do what she needed to keep her safe.” Although Cadena was admittedly told this by

Martinez, Martinez never transferred Cadena or even initiated a transfer. Despite Martinez's aforementioned knowledge as to the risk, Cadena continued to work at the same Subway location with no added security measures. Uncontroverted testimony from Respondent's Director of Operations (J. Brown), its HR Director (A. Nazario), and one of Martinez's fellow District Managers also suggests Martinez did nothing regarding the harm Martinez foresaw.

On February 28, 2020, Cadena was working alone at the store, in the course and scope of her employment, when Munoz enters, walks towards Cadena and pulls a gun from the waistband of his jeans. Cadena recognizes Munoz and begins to run towards the back of the store when Munoz jumps the counter, chases Cadena through the halls and brings her back into the kitchen area of the restaurant. Cadena struggles to escape at various times during this time period when finally Munoz shoots Cadena in the abdomen and then a final shot to her head.

When paramedics arrived they attempted lifesaving procedures and then transported Cadena to the hospital. Cadena was pronounced dead at 5:02 pm on February 28, 2020.

Cadena was attacked and murdered while working in the course and scope of her employment with Respondent as a store manager. Because Cadena's injury and death occurred while working for Respondent, a non-subscriber to the Texas workers' compensation system, this case is evaluated based upon the application of Chapter

406.033 of the Texas Labor Code and applicable case law. While Claimant's own negligence may or may not have been a proximate cause of her injuries and/or death in this case, the question presented at arbitration was whether Respondent's negligence, however slight, was a proximate cause of the death of Cadena, as well as the injuries claimed by Claimants.

Respondent, as Cadena's employer, actually foresaw the danger (by and through Martinez) but failed to exercise ordinary care to protect Cadena from the danger that existed at that Subway location. Moreover, Respondent, by and through Martinez, stated it would "keep her safe" from the danger it foresaw, knew or should have known was necessary, however, Respondent failed to exercise reasonable care in performing those services, and in fact, did nothing.

While Munoz, the assailant, shares the overwhelming percentage of responsibility for Cadena's death, but for Respondent's negligent acts and omissions, Cadena would not have been murdered on February 28, 2020 at Respondent's Subway Store number 41652. Respondent, by and through Martinez, shares 1% responsibility at a minimum for Cadena's death.

Accordingly, based upon the non-delegable duties owed by Respondent to Cadena, including but not limited to a duty to provide a safe place to work, Claimant met their burden of proving by a preponderance of the evidence that Respondent's

negligence, however slight, was a proximate cause of Cadena's death and the wrongful death beneficiaries' injuries.

While Respondent alleged the wrongful death beneficiaries failed to mitigate their damages, Respondent did not prove the same by a preponderance of the evidence. In fact, there was no expert testimony whatsoever that counseling, medication, etc. would have helped or to what degree, if any, or for what period of time.

As to Respondent's issue of "standing" concerning Ms. Lerma's status as the Representative of the Estate of Marisela Cadena, although "standing" can be raised at any time, including on appeal, in this case the parties agreed to a date certain on dispositive motions being filed/heard and those deadlines were not met. Assuming that the Agreed Scheduling Order was or need not be followed, Ms. Lerma has standing as she is personally aggrieved, regardless of whether she is acting with legal authority. But Ms. Lerma's status as the representative of an estate is actually a matter of capacity, not standing. Again, as was the case with the issue of standing, Respondent also failed to timely raise the issue of capacity through a verified pleading (Rule 93(1) TRCP) challenging Ms. Lerma's capacity to sue on behalf of Cadena's estate. Further, no administration of the estate appears to be/have been necessary as it is uncontroverted that there are no debts and/or expenses of the estate, it is uncontroverted that all heirs arranged for any payment needed for debt/expenses and it is uncontroverted that the heirs have agreed to the distribution of the balance left after any needed payment(s).

As to the issue of damages to the estate, Claimant contends Cadena suffered conscious pain and suffering and mental anguish. Cadena did suffer conscious pain and suffering and mental anguish from the time Cadena recognized Munoz entering the store and coming over the counter (with gun in hand) to attack her at 7:53:16 and continuously thereafter when Cadena was first shot at 7:54:02 until the final shot to Cadena's head at 7:54:03. However, from that time forward until Cadena's death, there is no expert testimony by any medical professional of conscious pain, suffering, or mental anguish suffered by Cadena to provide any guidance on evaluating these damages. Although EMS records indicated Cadena "moaning" and "groaned and tried to move" (to stop the performance of a needle thoracostomy) this is not indicative of consciousness (without expert medical testimony) versus a reflexive action to a painful stimuli. Indeed, the medical records reflect Ms. Cadena was either unconscious or unresponsive (with the only mention of a response being a pain stimuli while scoring "1" on Eye/Verbal/Motor).

There is no gross negligence on the part of Respondent (by the legal standards and percentage that are required to make such a finding) and thus does not support an award for exemplary damages.

Lastly, the preponderance of credible evidence does not support an award for medical expenses, funeral expenses or loss of inheritance.

### **DAMAGES**

The preponderance of credible evidence does support a survivorship claim for



Cadena's conscious pain and suffering and mental anguish, the wrongful death beneficiaries' past and future loss of companionship and society, and the wrongful death beneficiaries' past and future mental anguish.

Therefore, after taking into account all of the credible evidence, testimony and arguments, I hereby Award and Rule as follows regarding Claimant's damages suffered as a proximate cause of Respondent's negligence in the above-referenced matter.

1. Damages for Marisela Cadena's conscious pain and suffering and mental anguish:

\$ 470,000.00

2. Damages for the wrongful death beneficiaries' past loss of companionship and society:

- Maribel Lerma: \$100,000 ;
- Antonio Lerma, Jr.: \$100,000 ;
- Maricela Lerma: \$100,000; and
- Marissa Lerma: \$200,000.

3. Damages for the wrongful death beneficiaries' future loss of companionship and society:

- Maribel Lerma: \$200,000;
- Antonio Lerma, Jr.: \$200,000;
- Maricela Lerma: \$200,000 ; and
- Marissa Lerma: \$400,000.

4. Damages for the wrongful death beneficiaries' past mental anguish:

- Maribel Lerma: \$100,000;
- Antonio Lerma, Jr.: \$100,000;
- Maricela Lerma: \$100,000; and
- Marissa Lerma: \$200,000.

5. Damages for the wrongful death beneficiaries' future mental anguish:

- Maribel Lerma: \$100,000;
- Antonio Lerma, Jr.: \$100,000;
- Maricela Lerma: \$100,000; and
- Marissa Lerma: \$200,000.

### CONCLUSION

Respondent therefore shall pay to Claimants and their attorneys the above amount for damages sought in this action.

Each party shall be responsible for payment of their own attorneys' fees and expenses incurred in preparing for the arbitration hearing.

Each party shall bear their own attorney's fees and costs in this case.


The administrative fees and expenses of the Judicial Workplace Arbitrations and the compensation and expenses of the Arbitrator.

This Award is in full and final settlement of all claims and counterclaims submitted in this Arbitration. All claims not expressly granted herein are hereby denied.

Payment of the above-referenced award shall be made within thirty (30) days of the date of this award with post-judgment interest on the above sums at 7.5% commencing thereafter until paid in full. Prejudgment interest is awarded at 7.5% from the date of the filing through the date of this Award.

This award is in full satisfaction and resolution of all claims submitted to this arbitration. All other claims not expressly granted herein, are hereby denied.

Signed and entered this 3<sup>rd</sup> day of April, 2023.



Hon. Carlos R. Cortez, Arbitrator