

K/CT 3226
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OCT 17 2011

KENNITH L. PETERSON

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
ANAHEIM, CA

Case No. AHM 0112217

JOSE LUIS TORRES-DIAZ,

Applicant

vs.

LASCO BATHWARE; GALLAGHER
BASSETT SERVICES, INC.

Defendants.

FINDINGS & ORDER

ATTORNEY FOR APPLICANT
PAYAM SHAYANI

ATTORNEY FOR DEFENDANT
KENNITH PETERSON

The above-entitled matter having been heard and regularly submitted, the Honorable Workers' Compensation Administrative Law Judge Howard Lemberg now makes his decision as follows:

FINDINGS OF FACT

1. Jose Luis Torres-Diaz, born 1/9/70, while employed as a roller sheet metal, on 8/27/03, by Lasco Bathware, at Anaheim, California, insured by National Union Fire Insurance Company whose claims are administered by Gallagher Bassett Services, Inc., did not sustain injury arising out of and occurring in the course of the employment to his right middle finger.
2. Defendant's Petition for Restitution/ Reimbursement is denied.
3. All other issues are moot.

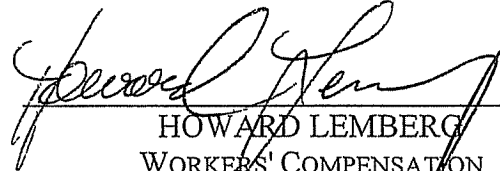
JOSE LUIS TORRES-DIAZ
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ORDER

IT IS HEREBY ORDERED that applicant takes nothing from the injury herein.

Date:

OCT 16 2007


HOWARD LEMBERG
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Filed and Served by mail on: OCT 16 2007
On all parties on the
Official Address Record.

**A PETITION FOR RECONSIDERATION FROM THIS DECISION SHALL BE
FILED ONLY AT THE ANAHEIM DISTRICT OFFICE OF THE WORKERS'
COMPENSATION APPEALS BOARD.**

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CASE NO.

JOSE LUIS TORRES-DIAZ

vs.

KENNETH L. PETERSON
LASCO BATHWARE
GALLAGHER BASSETT
SERVICES, INC.

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE:
HOWARD LEMBERG

DATE: 10/11/07

OPINION ON DECISION

Applicant, born 1/9/70, while employed on 8/27/03 as a roller sheet metal at Anaheim, California by Lasco Bathware, then insured by National Union Fire Insurance Company whose claims are administered by Gallagher Bassett Services, Inc., claims to have sustained injury arising out of and during the course of employment to his right little finger. The primary issues in dispute are AOE/COE, temporary disability, permanent disability, need for further medical treatment and Defendant's Petition for Reimbursement of Costs.

AOE/COE

Applicant testified that as a roller sheet metal his job duties required him to use a hand held roller and roll out bubbles on fiberglass materials that had been sprayed with fiberglass. The injury occurred when the applicant was rolling out Jacuzzis. The Jacuzzis were hung on chain from a conveyor line. The applicant described the size of the Jacuzzis as "big" and that they varied in size. Applicant reached over the top of one of the Jacuzzis with the roller to roll out the bubbles before the fiberglass dried. He slipped and his right hand was jammed in a bent position against the

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Jacuzzi. Applicant testified that he felt an immediate burning pain in his right little finger.

The medical reports of the various physicians who either evaluated or treated the applicant contain different histories of the mechanism of injury.

Post injury applicant received treatment at M.D. Medical Clinics. The doctor's first report of occupational injury or illness dated 9/5/03 (Applicant's Exhibit A-3) states that the injury occurred when the applicant twisted his hand.

On page 1 of the medical report for Dr. Dara Saghafi dated 9/29/03 (Applicant's Exhibit A-2), the doctor states that the applicant experienced sudden pain in his right hand when he reached up to apply fiberglass to the top portion of the Jacuzzi.

On page 2 of the medical report of Dr. John W. Witczak dated 12/3/03 (Applicant's Exhibit A-1), the doctor states that the applicant felt a crack in his small right finger when he was leaning his entire bodyweight on his right hand to support himself while rolling a Jacuzzi.

On page 2 of the defense medical report from Dr. Todd H. Katzman dated 2/12/04 (Defendant's Exhibit D-1), the doctor states that applicant was standing and trying to reach overhead when he placed his right hand behind him for support. As he did so he placed increased weight on his right little finger and noted pain.

Applicant's testimony about when he reported the injury to the employer is confusing. Initially, he testified that he reported the injury on 9/5/07. He did not identify

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the name or job title of the person he reported the injury to. He did testify that after reporting the injury he was referred to the company clinic for treatment.

Applicant then testified that he "told people" at work about the injury 2 days after it occurred and then reported the injury again sometime later. He then testified that he "let the company" know 2 days after the injury occurred and then reported the injury again several days later. Applicant did not identify the name or job title of the person he reported the injury to 2 days after the injury occurred.

Applicant did testify that prior to the date of the injury he told coworkers that he had played soccer. Applicant admitted that he never played soccer and only told his coworkers he played soccer so he would become part of the group. On direct examination he then denied telling anyone at work that he injured his hand playing soccer. On cross examination applicant initially testified that he did tell coworkers he injured his hand playing soccer. He then denied telling his coworkers that he injured his finger playing soccer. He then changed his testimony again and admitted that he did tell his coworkers at the lunch table that he injured his finger playing soccer as a goalie. On redirect examination applicant testified that he did not tell his coworkers at the lunch table he injured his finger playing soccer.

The personnel records (Defendant's Exhibit D-5) indicate that applicant's date of hire was 6/16/03. Applicant testified that after being hired he was put on 3 months probation. He is familiar with the company point system for attendance. He is aware that he could be suspended if he accumulates enough points. Applicant denied that he was

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suspended for points. Applicant was shown a document identified as document 5 from Defendant's Exhibit D-5 entitled attendance dated 9/5/03 which states applicant was suspended for 3 days excessive absenteeism. Applicant could not recall being suspended but admitted that he signed this document.

Applicant denied that he was terminated for excessive absenteeism. The personnel records contain an employee termination/separation report dated 9/10/03 stating that applicant was terminated because of "*Unsatisfactory Probationary Employee Absenteeism...*"

Defense witness, Ricardo Gutierrez testified that he worked as the Health and Safety and Environmental Manager for Lasco Bathware from 1/83 through 10/06. His job duties included responsibility for workers' compensation claims. Mr. Gutierrez testified that after the applicant was notified of his suspension (9/5/03) he reported his injury to the company

Mr. Gurierrez testified that about a week after applicant reported the injury he was told by the applicant's supervisor that several employees had spoken with the applicant several weeks before the injury at which time applicant told them he had been injured playing soccer.

Defense witness, Juan Fuentes testified that he has been employed for Lasco Bathware for 8 ½ years and knew the applicant through work. On several occasions applicant told Mr. Fuentes that he played soccer. Mr. Fuentes testified that on 2 occasions applicant stated that he injured his finger while playing soccer as a goalie. The

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second time applicant told Mr. Fuentes that he was injured playing soccer was when applicant was taking a doctor's slip to the company. .

Defense witness, Jorge A. Hernandez testified that he has worked for Lasco Bathware as a roller for about 5 years and that he worked with applicant. Applicant told this witness on 1 occasion that he had injured his finger playing soccer.

Both Mr. Gutierrez and Mr. Hernandez testified that they each spoke with the applicant separately and that no one else was present when these conversations took place.

The defense evaluator, Dr. Katzman notes that the mechanism of injury is inconsistent with the diagnosis. Dr. Katzman believes that the injury is consistent with being struck by a soccer ball. Unlike Dr. Katzman none of the other medical reports from the physician's who treated or evaluated the applicant for this injury reviewed any reports or records or considered that the injury may have occurred while applicant was playing soccer.

The Court finds that applicant's testimony is vague and confusing and that the applicant medical reports are incomplete.

Based on the medical report of Dr. Todd H. Katzman dated 2/12/04 as well as the testimony of the defense witnesses, it is found that applicant did not sustain injury arising out of and in the course of employment to his right middle finger on 8/27/03.

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DEFENDANT'S PETITION FOR REIMBURSEMENT OF COSTS

Defendant filed a Petition for Restitution/Reimbursement dated 9/15/05. The petition states that defendant is requesting restitution/reimbursement in the amount of \$22,291.36 on the grounds that all of the applicant medical reports are based on a materially false history.

Attached to the petition is a pay record containing a breakdown of the monies defendant seeks to be reimbursed by applicant. The pay record indicates that the sum of \$21,361.49 is for costs and expenses which include investigation, attorney fees, court reporter/court costs, medical records photographs/photocopies and surveillance. The WCAB does not have the power to require applicant to repay administrative and other related costs. An applicant can only be ordered to reimburse a defendant for workers' compensation benefits he has received.

The pay record lists the sum of \$603.75 for indemnity payments. However, the parties stipulated on the record at trial that no indemnity payments were made to the applicant.

The pay record lists the sum of \$2,053.30 for medical payments. However, Defendant's Exhibit D-4 contains a payment summary with a printout attached. The printout contains 2 entries for medical expenses as follows: Angelica Frey in the amount of \$145 and Dr. John Witczak in the amount of \$825. No reports or records were offered into evidence to indicate that Angelica Fry is a physician or provided the applicant with treatment.

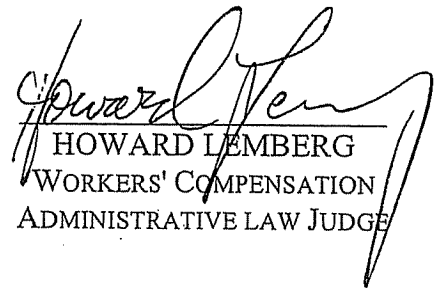
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The pay record also states that defendant recovered the sum of \$1,727.18. The pay record does not contain a breakdown of the monies recovered. Therefore, it is unclear whether this amount includes any medical expenses.

Based on review of the entire record, Defendant's Petition for Restitution/ Reimbursement is denied.

ALL OTHER ISSUES

All other issues are moot.


HOWARD LEMBERG
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

nbg