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STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

CYNTHIA D. WOOTEN,

Applicant,

v.

K-MART CORPORATION,

Defendants.

CASE NO. SDO 0215713

DECISION, FINDINGS AND ORDER

MAR 7 1999

OPINION

The stipulations of fact entered by the parties at the hearing of November 12, 1998, are accepted as true.

EVIDENCE.

On December 30, 1998, defendant filed extracts from two depositions. These extracts have not been admitted in evidence. However, the WCJ did obtain a partial transcript of the proceedings of November 12, 1998. These five pages are attached to this opinion as an appendix and are incorporated by reference in the Summary of Evidence of this case.

INJURY AOE/COE.

The worker claims injury on March 18, 1996, arising out of and in the course of employment with K-Mart Corporation to her back, right leg, and right arm. The employer originally accepted this injury and paid benefits, but now disputes the injury and contends that the worker's claim was fraudulent. The worker also alleges injury to her left shoulder.

The worker filed an Application for Adjudication of Claim on April 10, 1996, alleging injury to her back, right leg and right shoulder. There was no mention of an injury to her left shoulder. During the course of the treatment for the worker's alleged injury and the defendant's investigation, the worker has given various accounts of the mechanics of her injury and has made various misrepresentations to the physicians and during depositions. She made misrepresentations about a prior motor vehicle accident, about a previous filing of a personal injury lawsuit, about the filing of two previous workers' compensation claims, and she denied a prior felony conviction. In her testimony, the worker sought to explain each of these misrepresentations. She testified that she did not understand the questions regarding her prior workers' compensation claims and believed that she was only being asked about workers' compensation claims filed in California. She said that she thought the judge in Oklahoma had told her she was being placed on probation for a misdemeanor and not a felony. She said her answers to questions by physicians were to the questions that were asked. In addition to her misrepresentations the worker's testimony regarding her earnings at K-Mart is in conflict with the documentary evidence provided by defendant. Her claim for an injury to her left shoulder was not made during her initial treatment.

The worker bears the burden of proving injury. The worker said that her injury was witnessed by a coworker but she did not send any testimony to corroborate her account of the injury. Based on the conflicting statements and testimony made by the worker and the lack of corroboration, I conclude that

the worker has failed to prove by a preponderance of evidence that she sustained injury arising out of and in the course of employment to her back, right leg, right arm and left shoulder.

LIABILITY FOR MEDICAL-LEGAL COSTS.

The worker was evaluated by Paul C. Murphy, M.D., an agreed medical evaluator, on November 5, 1996. When the worker was later found permanent and stationary by Sam Maywood, M.D., in June 1997, the worker objected to Dr. Maywood's determination regarding permanent disability and asked defendant to agree for further evaluation by Dr. Murphy. There is no evidence of a response by defendant. (The responsibility for seeking agreement with the worker on a physician to prepare a comprehensive medical evaluation of the worker's permanent impairment and limitations and any need for continuing medical care resulting from the injury is on the employer.) Labor Code § 4061(g) provides "If, after a comprehensive medical evaluation is prepared, the employer or the employee subsequently objects to any new medical issue, the parties, to the extent possible shall utilize the same medical evaluator who prepared the previous evaluation to resolve the medical dispute." The worker's attorney scheduled an appointment with Dr. Murphy for a final evaluation. Defendant told Dr. Murphy that the worker could not get an evaluation from a former agreed medical evaluator. This statement was not only incorrect but is contrary to the mandatory requirements of Labor Code § § 4061(g) and 4067. Defendant further intimidated Dr. Murphy with the threat of litigation to the point that he cancelled evaluation of the worker. The worker then scheduled a qualified medical evaluation with Dr. James McClurg. Defendant has offered no written objection to the medical-legal reports of Dr. McClurg. Therefore, I conclude that the lien of Dr. McClurg for reasonable medical expense incurred to prove a contested claim should be allowed.

Dr. McClurg's evaluation of the worker occurred on December 15, 1997. In his report of that exam, signed December 22, 1997, he says that he referred the worker for an MRI of the lumbar spine and an MRI of the right knee. This diagnostic testing was performed by Radiology Medical Group on December 18, 1997, and Radiology Medical Group has submitted a lien for this testing in the amount of \$1,340.00. Dr. McClurg never incorporates the results of the MRIs in either his report signed December 22, 1997, or in his report of March 25, 1998. Therefore, the MRI tests by Radiology Medical Group was not used to prove a contested claim and were not reasonable medical expenses. The lien of Radiology Medical Group in the amount of \$1,340.00 will be disallowed.

Myoneurodiagnostics performed nerve conduction studies on December 16, 1997, and has billed \$1,550.00 for this testing. The bill says that the testing was done on the referral of Dr. McClurg. However, Dr. McClurg does not mention in his report signed December 22, 1997, that he is referring the worker for such testing and does not incorporate the results of the testing in his report signed December 22, 1997, or his report of March 25, 1998. Since the diagnostic testing performed by Myoneurodiagnostics was not used to prove a contested claim, the medical expense is not reasonable and the lien will be disallowed.

COSTS AND SANCTIONS.

Each attorney has requested costs and sanctions for the conduct of opposing counsel. I find no merit in the contention of either party and will not award either reasonable expenses or sanctions for the conduct of either attorney in this case.

RESTITUTION.

The parties stipulated that the worker received temporary disability in the total sum of \$573.28 and permanent disability indemnity in the total sum of \$3,800.00. Defendant asks for restitution from the worker for these monies claimed. On July 10, 1998, defendant filed a document entitled "Petition for Costs and Sanctions under Labor Code sections 5811 and 5813." At the bottom of each page of the

petition are the words "Petition for Restitution." The petition says that the worker's actions throughout the case clearly demonstrate a premeditated plan to fraudulently conceal her past accidents, injuries and felony conviction. Without deciding if such a plan were premeditated, I conclude that the worker did conceal her past accidents, injuries and felony conviction but I do not conclude that her actions were fraudulent as to her claim for an injury occurring on March 18, 1996. However, because the conflicts in her story at various points, I concluded above that the worker had not sustain her burden of proof on the issue of injury AOE/COE. I conclude that defendant has failed to prove that her actions were fraudulent and therefore there is no basis for an order of restitution.

OTHER ISSUES.

The conclusion above on the threshold issue of injury AOE/COE is determinative of the issues of earnings, permanent disability, and the liens of the worker's current and former attorney.

FINDINGS OF FACT

1. The stipulations in the Minutes of Hearing of November 12, 1998, are true and are incorporated herein by reference.
2. Cynthia D. Wooten, born May 21, 1964, while employed as a cook/cashier at San Diego, California, on March 18, 1996, by K-Mart Corporation, then permissibly self-insured as to workers' compensation liability, did not sustain injury arising out of and occurring in the course of employment to her back, right leg, right arm and left shoulder.
3. Worker is entitled to reimbursement of medical-legal costs for an evaluation by James R. McClurg, M.D., in an unknown amount to be informally adjusted by and between the parties.
4. Worker is not entitled to reimbursement of medical-legal costs for diagnostic testing performed by Radiology Medical Group Incorporated and Myoneurodiagnostics.
5. Defendant is not entitled to restitution for benefits paid to the worker.

ORDER

IT IS ORDERED that the worker take nothing by reason of the claim asserted herein.

IT IS FURTHER ORDERED that the lien of James R. McClurg, M.D., be, and it hereby is, allowed in accordance with Finding No. 3 above.

IT IS FURTHER ORDERED that the liens of Radiology Medical Group, Inc. and Myoneurodiagnostics be, and they hereby are, disallowed in accordance with Finding No. 4 above.

IT IS FURTHER ORDERED that defendant's petition filed July 10, 1998, and applicant's petition filed July 23, 1998, be, and they hereby are, denied.

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IT IS FURTHER ORDERED that the lien of Myles, Hanauer and Levy for reasonable attorney's fees filed February 7, 1997, be, and it hereby is, disallowed.

DATED AT SAN DIEGO, CALIFORNIA

3-18-99

FILED AND SERVED ON SAID DATE
TO ALL PARTIES AND LIEN CLAIMANTS
SHOWN ON THE OFFICIAL ADDRESS
RECORD.

E. Abano
By: E. Abano

J.P. McHenry

J.P. McHENRY
WORKERS' COMPENSATION JUDGE