

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Debbie W. Kelly,
Applicant,
v.
Being Spa Inc.,
and
The Hartford,
Defendants.

Case No(s). ADJ 7442619

FINDINGS AND ORDER

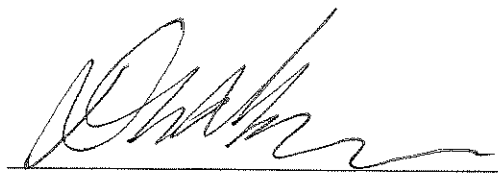
This matter having been heard and submitted, DAVID L. LAUERMAN, Workers' Compensation Judge, finds and orders:

FINDINGS OF FACT

1. Debbie W. Kelly, born 9/19/1964, while employed as a massage therapist at San Jose, California on 4/3/2010 by Being Spa Inc., insured for workers' compensation liability by The Hartford, sustained injury arising out of and occurring in the course of his employment to her vocal cords and claims to have sustained injury to her psyche and lungs.
2. Applicant was not employed by Defendant for a period of at least 6 months.
3. Applicant's injury was not the result of sudden or extraordinary events of employment.
4. Applicant's claim to have suffered injury to her lungs is deferred.
5. All other issues are deferred.

ORDER

IT IS ORDERED that Applicant, Debbie W. Kelly, take nothing by reason of her claim to have suffered injury to her psyche as a compensable consequence of her injury to her vocal cords



DAVID L. LAUERMAN
WORKERS' COMPENSATION JUDGE

Filed and Served by mail on: 03/06/2013
By: *maryj*

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

On all parties on the
Official Address Record.

**STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION**

Case No. ADJ-7442619

Debbie W. Kelly v. Being Spa Inc., and The Hartford

OPINION ON DECISION

The first issue is whether the Applicant was employed for a period of at least 6 months. Since the last date on which Applicant worked for Defendant occurred on 4/3/2010, Applicant should be found to have worked for the requisite 6 months if she became employed on or before 10/3/2009. Based upon the present record I do not find any convincing evidence that any employment relationship began earlier than 10/20/2009, and a more likely date would be that employment began on 11/14/2009.

Although Applicant's deposition was not admitted into evidence, Applicant testified before me under cross examination that during her deposition of 7/5/11 she stated under oath that her first date of work for defendant occurred on 11/14/2009. Applicant now believes this to have been an error, but as a declaration against interest made under oath, at a time much closer to the event, her admission carries a good deal more weight than her subsequent denials. Applicant freely admits that she was never paid for services to the employer prior to 11/14/2009. While Applicant alleges that she was doing "sales" prior to October of 2009, there was no indication given that any sales were made (except on one day when she helped staff a booth at a church bazaar), or that she met with any potential customers, or that whatever sales activity she engaged in provided any actual benefit to the employer. The activity Applicant claims to have engaged in prior to 11/14/2009 seems to have been otherwise limited to several (how many is unclear, but certainly not more than 5) massages she provided to various persons at Being Spa, none of whom were customers. While these massages may have provided the Applicant with some valuable experience, assisted her with licensing, and may have allowed defendant to more correctly gauge Applicant's skills as a masseuse, overall it cannot be said that these services provided more than a *de minimis* benefit to Defendant. Had the free massages been provided to Defendant's customers or prospective customers, a different result might have been required.

It must be said that, while I never had cause to suspect that Applicant testified with any intent to deceive, it was clear throughout her testimony that Applicant's memory is rather poor. She was consistently unable to provide an exact sequence of events, or even approximate dates more precise than month and year. Her mode of speech, facial expressions, and body language made her seem confused and uncertain. In a situation where precise dates are crucial, these defects in her testimony, while certainly not indicative of any bad intent, are problematic. I do not believe that a prudent person would willingly rely upon such testimony in a situation where precision is required.

Viewed in this light, Applicant's testimony before me, that she first signed an agreement to work for Defendant on 10/20/2009, is significant. Before that, it does not appear that any employment relationship existed, even taking Applicant's testimony at face value and ignoring her prior declaration to the contrary. Combined with the straightforward and credible testimony of Ms. Laporte, together with the data contained in Defendant's H, it seems far likelier than otherwise that Applicant first became employed by Defendant on or about 11/14/2009. This means she did not work for defendant for at least 6 months.

The next issue is whether the Applicant's injury was caused by a sudden and extraordinary employment condition. At the time of injury, the Applicant was conversing with Ms. Laporte, her supervisor, when the two were interrupted by word of a chemical spill (later found to have been chlorine intended for the Jacuzzi) in the gym and Jacuzzi area. After a brief discussion, Applicant left the building and reentered the building by the back door, which was in the locker area, close to the area where the chemical fumes were reported. In the locker room, Applicant found two clients. There is no indication that these people were in any sort of distress, or had even noticed any fumes. Applicant instructed them to leave the building for their safety, and went on to the gym and Jacuzzi area. There, she found a co-worker using an exercise bicycle, who was also instructed to leave the building. Although the co-worker was exercising, and presumably breathing more heavily than normal, there is no indication that this co-worker was in any way distressed or inconvenienced by the fumes, which Applicant states were by then quite noticeable and bothersome to her.

There is nothing unusual about the use of chlorine to purify the water in a pool or Jacuzzi. Where such chemicals are used it is reasonable to assume that they are sometimes spilled. Given the

nature of chlorine, such a spill is bound to give off fumes. Any person who has ever used a public pool, spa, or whirlpool bath has had occasion to notice the smell of chlorine from time to time. It is not unusual, much less extraordinary.

It is certainly conceivable that such a spill might be so severe and so extensive as to bring such an incident sufficiently outside the realm of the ordinary to meet the test of Section 3208.3(d). In such a case, one would expect anyone nearby to notice the unpleasant odor and be adversely affected, even if only mildly or temporarily. This is not the case here. The Applicant encountered three individuals in close proximity to the apparent source of the fumes, and as far as we know, none of them noticed anything unusual or complained of any adverse effects. The evidence does not disclose that anyone other than Applicant suffered any ill effects from the incident. On balance, there is nothing about this incident to suggest it was anything other than an ordinary, garden-variety spill, bound to happen when human beings are involved.

None of the above alters the fact that (according to Dr. Allems, the QME) the effect on Applicant has been unusually severe for an incident of this sort. There is no particular reason to doubt the correctness of Dr. Allems' belief that Applicant has indeed suffered from adverse psychiatric consequences. Nevertheless, these consequences are plainly not of the sort compensable under Labor Code section 3208.3(d). This harsh result is the one required by application of the law to the facts of this case, to Applicant's misfortune.



DAVID L. LAUERMAN
Workers' Compensation Judge

SEARCHED BY PERSONS SHOWN
ON THE OFFICIAL ADDRESS RECORD

03/06/2013 *maisy*

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

03-06-2013

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Case Number: ADJ7442619

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HARTFORD SACRAMENTO	Insurance Company, PO BOX 14475 LEXINGTON KY 40512
MED LEGAL PHOTOCOPY SERVICES	Lien Claimant - Other, PO BOX 1288 WEST COVINA CA 91793

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