STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

JOE ELLIS,

Applicant,

vs.

BELL PLASTICS
INSURANCE CO OF THE WEST,

Defendants.

Case No. ADJ9312688

FINDINGS OF FACT AND OPINION ON DECISION

The above entitled matter having been heard and regularly submitted, the Honorable Jeffrey Friedman, Workers' Compensation Administrative Law Judge, now decides as follows:

FINDINGS OF FACT

1. JOE ELLIS born on 11-26-1985 while employed on May 9, 2013 as an on-line sales associate at Hayward, California, by BELL PLASTICS, whose workers' compensation insurance carrier was INSURANCE CO OF THE WEST PLEASANTON, did not sustain injury arising out of and occurring in the course of employment to his cervical spine.

2. As applicant failed to meet his burden to prove that he sustained an industrial injury, it is found that he take nothing on his claim.

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OPINION ON DECISION

INTRODUCTION

This case arises out of a denied claim of injury to the neck (amongst other body parts) alleged to have occurred on May 9, 2013 to a 28-year-old on-line sales associate for Bell Plastics. Issues submitted for decision are injury AOE/COE and, if injury AOE/COE is found, which of the two QME panels that have issued is appropriate. All other issues are deferred.

STATEMENT OF FACTS

Applicant commenced work as an on-line sales associate for Bell Plastics (hereinafter referred to as defendant) in April of 2013. His duties included handling customer service, packaging and shipping of items and lifting of materials (Summary of Evidence, 12/1/2014, page 6, lines 3-10).

Applicant contends that he suffered an injury to his neck on May 9, 2013. Initially, applicant stated that Bruce Kennedy, defendant's owner, asked him to locate an item in the office. After he performed this task, applicant stated that he was asked by Elizabeth Oaks, an e-commerce manager for defendant, to locate a large, heavy item in the office and prepare that item for shipment. Applicant related that he located the item, although he could not recall exactly what the item was, but that it was a car part or a carburetor. He did recall that the item was heavy and bulky, but he could not state the weight of the item with any specificity. At his deposition, applicant estimated the weight of the item to be between eighty and one hundred pounds, however, at trial, applicant estimated the weight of the item to be at least fifty pounds, but admitted that he did not have any specific knowledge of the weight (Summary of Evidence, 12/1/2014, page 6, lines 26-40 & page 11, lines 11-20).

Applicant stated that when he located the item requested by Ms. Oaks, he had to drag the item to the shipping area for packaging, as it was too heavy to lift. He estimated that he had to drag the item fifty or sixty feet to the shipping area. He then used several boxes and shipping bubbles to prepare the item for shipment. When he lifted the item for packaging, applicant claims that he felt a pain in the right side of the neck which he described as a "cold discomfort". Applicant completed the packaging of the item for shipment and finished working on that day. Applicant did not notify any individual in defendant's employ that he had sustained an injury to his neck when lifting the heavy item (Summary of Evidence, 12/1/2014, page 7, lines 6-22, 36-42 and page 8, line 1).

Applicant did not recall discussing his injury with any co-workers. He did recall that May 9, 2013 was payday and that he recalled Amy Wells, office manager for defendant, gave him an envelope which contained his paycheck on the day of the claimed injury. Applicant stated that he never returned to work for defendant and never contacted defendant to advise why he failed to return to work after May 9th. Applicant noted that he was contacted by Ms. Oaks by e-mail as to why he had not returned to work, but he did not respond to the e-mail as he was injured and rehabilitating his condition and that was "all that was on his mind at that time" (Summary of Evidence, 12/1/2014, page 8, lines 38-42 and page 9, lines 1-9 & 24-35).

Prior to the incident on May 9th, applicant advised defendant that he had sustained an injury to his back on May 1, 2013 while walking to work. On May 2, 2013, applicant notified Elizabeth Oaks by email that he "tweaked" his back and that he was going to the doctor for treatment. On May 3, 2013, applicant sent a second e-mail to Ms. Oaks, stating he saw a doctor who told him that the problem was related to his SI joints and that he was to have several

sessions with a chiropractor. Applicant did not come to work on either May 2 or May 3 (Applicant Exhibit 1, subpoenaed records of Bell Plastics, pages 12-13).

However, applicant admitted at both deposition and trial that there was no injury to his back while walking to work. He acknowledged that he did not injure his back and he did not see either a physician or a chiropractor. Applicant described the false allegation as "padding" and that he "made up" the entire incident (Summary of Evidence, 12/1/2014, page 13, lines 10-40).

Applicant testified that he reported his neck injury to Bruce Kennedy on Monday, May 13, 2013. Applicant stated that he called the office phone number from his cell phone, intending to advise Ms. Oaks that he had injured his neck. However, applicant claims that Mr. Kennedy answered the phone and when he did so, applicant stated that he told Mr. Kennedy that he had injured his neck the prior week. Applicant contended that Mr. Kennedy said "okay" and the call was then disconnected. No subsequent call was placed by applicant and applicant admitted that he did not have any further contact with defendant as to his injury (Summary of Evidence 12/1/2014, page 8, lines 11-24 & page 10, lines 23-27).

Defendant presented three witnesses at trial to rebut applicant's testimony. Elizabeth Oaks, who is no longer employed by defendant, testified that she had no knowledge of applicant sustaining an injury. She stated that she had researched the shipments processed by applicant through May 7, 2013 and she assisted in the preparation of a chart which noted all packaged shipped by applicant. The chart reflected that of the 34 packages which applicant shipped, the heaviest item was thirty-five pounds and that only five items weighed over twenty-five pounds. No items were located as being shipped by applicant on May 9, 2013. In addition, Ms. Oaks stated that any item which weighed over seventy-five pounds was too

heavy for UPS or USPS, defendant's regular shippers, and that the item would have to be shipped by being strapped to a pallet and then picked up by a private freight company who would pick up the pallet by use of a forklift (Summary of Evidence, 3/10/2015, page 6, lines 14-24 & page 8, lines 1-13).

Bruce Kennedy also testified on behalf of defendant. He stated that he did not recall asking applicant to assist him in finding an electrical motor part or carburetor on May 9th. He further testified that he had no recollection of applicant calling him to report a work injury. While Mr. Kennedy did recall receiving phone calls from applicant previously, he emphatically stated that applicant never contacted him to report a work injury. Mr. Kennedy noted that there have been workers compensation claims filed against defendant and that Amy Wells is the person who is in charge of handling the workers compensation paperwork. After reviewing applicant's testimony and the shipping research performed by Ms. Oaks and Ms. Wells, Mr. Kennedy concluded by stating that the claim "seems like it's all made up" (Summary of Evidence, 3/10/2015, page 10,lines 1-8, page 11, lines 7-22 & page 12, lines 1-2).

Amy Wells was the third witness to testify on defendant's behalf. She confirmed that she completed the shipping chart referenced by Ms. Oaks and confirmed that no item of the weight estimated by applicant was shipped by applicant during his tenure with defendant. Ms. Wells also refuted applicant's testimony that he received his paycheck from her on May 9th. Ms. Wells had a specific recollection that applicant did not pick up his paycheck until Friday, May 10th. She remembered that applicant did not come to work on May 9th, which was payday, which she thought was odd. Ms. Wells testified that she had no knowledge of applicant sustaining an injury on May 9th and that it appeared as if applicant did not work for defendant

after May 7, 2013 (Summary of Evidence, 3/10/2015, page 14, lines 39-45, page 15, lines 41-45 & page 16, lines 33-40).

Day one of trial was conducted on December 1, 2014 with applicant the only witness to testify. As defendant's cross –examination of applicant and defendant's witnesses' testimony could not be completed as to time, a second day of trial was conducted on March 10, 2015. Applicant failed to appear at that time. Testimony from the three defense witnesses was concluded at that time. Applicant was given an opportunity either to request additional testimony or to rebut the defense witnesses' testimony but chose not to do so. The matter was submitted for decision on March 10, 2015.

DISCUSSION

Injury AOE/COE

It is applicant's burden to prove by a preponderance of the evidence that his injury arises out of and occurs in the course of employment *Labor Code 3202.5, Lundberg v. Workmens' Compensation Appeals Board (1968), 69 Cal. 2d 436, 33. Cal Comp. Cases 636.* In addition, the trial judge is entrusted with weighing the credibility of all witnesses and making a determination thereon *State of California v. Workers Comp. Appeals Bd. (Hunt)(1981) 46 Cal. Comp Cases 333, Hidalgo v. Workers Comp. Appeals Bd. (2003) 68 Cal. Comp. Cases 1727.* In applying these standards to the present case, I find that applicant did not testify credibly as to the claimed work injury and that the objective evidence presented by defendant outweighs any valid claim of injury alleged by applicant.

Specifically, I find that the personnel records contained in Applicant Exhibit 1 clearly lead me to rule against applicant. The time cards submitted reflect that applicant did not work after May 7, 2013 which is contrary to applicant's contention that he was injured on May 9,

2013. The shipping chart completed by Ms. Oaks and Ms. Wells reflects that applicant never shipped an item that was close to fifty pounds and that no items were shipped by applicant on the claimed date of injury. These points, which were not rebutted by applicant, are strong indicators that the event claimed by applicant did not occur.

In addition, I make the specific finding that the testimony of Ms. Oaks, Mr. Kennedy and Ms. Wells was far more credible than applicant's testimony. Ms. Oaks, who is no longer an employee of defendant, testified credibly as to the shipping research performed by her. Mr. Kennedy testified credibly that applicant never called him to report an injury. Ms. Wells was remarkably credible in her testimony relative to applicant's shipment chart and relative to applicant not picking up his paycheck on May 9th.

It cannot be ignored that applicant admitted at both deposition and trial that the commentary contained in the emails sent on May 2nd and May 3rd claiming an "injury" to his back was false. No justification for these fraudulent acts was provided by applicant. No supporting evidence was submitted by applicant to rebut Mr. Kennedy's contention that applicant did not call to report an injury. Even after defense counsel requested that an adverse inference be drawn by applicant's failure to produce cell phone records to confirm his call to Mr. Kennedy did applicant submit such records on day two of trial.

Finally, applicant's failure to appear at day two of trial and his failure to request the opportunity to rebut the testimony of the three employer witnesses speaks loudly to his lack of commitment to his testimony. Applicant's decision not to present rebuttal evidence or testimony after day two of trial stands out as a strong basis to make the formal ruling that his lack of credibility prevents a ruling in his favor.

In order for a decision by a Workers Compensation Administrative Law Judge to be upheld, it must be supported by substantial evidence. *Labor Code §5903, Garza v. Workmens' Compensation Appeals Board (1970) 3 Cal.3d 312, 35 Cal.Comp.Cases 500.* In applying the standards expressed above to the present case, I find that there is clear support for a finding of no industrial injury to applicant's cervical spine. Applicant failed to testify credibly as to the claimed injury and failed to submit any independent evidence to rebut the credible testimony of three employer witnesses and failed to rebut the documentary evidence submitted which showed applicant did not work on the date of the claimed injury and showed that none of the items shipped by applicant were anywhere near the weight claimed by applicant.

Based upon applicant's non-credible testimony as well as the credible testimony of the employer witnesses and the unrebutted objective evidence reflecting that applicant failed to work on the claimed date of injury, I find strong support to find that applicant did not sustain an injury to the cervical spine on May 9, 2013. I specifically find that applicant take nothing on this matter.

DATE: 5/6/2015

Jeffrey Friedman
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

PROOF OF SERVICE

Case Number: ADJ9312688

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FINDINGS OF FACT
OPINION ON DECISION

SERVED ON: 5/6/2015
BY: W. Brooks