

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

ZTF

FRANCINE P. MORALES

Applicant

vs.

LOTIONS & LACE, INC.;
WILLIAMSBURG NATIONAL INS. CO.

Defendants

ADJ 9242068

FINDINGS AND ORDER

Trial having been held herein; all parties having appeared and the matter having been regularly submitted, the Honorable **CHRIS ELLEN WILLMON** now finds and orders as follows:

FINDINGS OF FACT

1. Francine P. Morales, born 6/22/61, did not sustain injury arising out of and in the course of employment from 1/1/08 through 11/6/13.

ORDER

IT IS ORDERED that applicant take nothing from her claims.

Dated 12/22/15 at Riverside, California

Chris Ellen Willmon

CHRIS ELLEN WILLMON
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on parties checked on the
Official Address Record effective on above date.

BY: *L. Saralyza*

STATE OF CALIFORNIA
WORKER'S COMPENSATION APPEALS BOARD
CASE NO. ADJ 9242068

FRANCINE P. MORALES

LOTIONS & LACE, INC.;
WILLIAMSBURG NATIONAL I. C.

APPLICANT

vs.

DEFENDANTS

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:

CHRIS ELLEN WILLMON

DATE: 12/22/15

OPINION ON DECISION
(Labor Code Section 5313)

This matter was tried and submitted 11/17/15, on issues relating to injury arising out of and in the course of employment, as more fully set forth in the Minutes of Hearing ("MOH").

Per the stipulations of the parties in the MOH, which are accepted as fact herein: Francine Morales, born 6/22/61, while employed from 1/1/08 – 11/6/13 as a store manager by Lotions & Lace, Inc., claims to have sustained injury AOE-COE to psyche/anxiety/ depression; cervical/thoracic/lumbar spine; shoulders/arms/wrists/upper extremities; knees; and internal/GI complaints.

EXHIBITS

Citing lack of service and failure to list the exhibit on the Pre-Trial Conference Statement ("PTCS"), defendants object to applicant's Exhibit 1, a report from Philip Sobol, MD, dated 10/19/15, served by the doctor on applicant's attorney and the carrier 11/5/15; and served by applicant's attorney on defense counsel on 11/9/15. Exhs. 1 and 25. Applicant argues that discovery at the priority conference was not closed.

Defendants filed an 8/4/15 Declaration of Readiness for a priority conference on injury AOE-COE. Applicant did not object. The conference was held on 9/29/15, the PTCS was jointly created, and the matter was set for trial. If applicant had objected showing good cause why discovery was not complete, the matter would have been put over for status conference. It would have continued on status conference until set for trial because "discovery is complete or when the workers' compensation administrative law judge determines that the parties have had sufficient time in which to complete reasonable discovery." LC 5502(c). Instead of objecting and showing good cause, applicant merely listed the hoped-for report in the Pre-Trial Conference Statement (applicant's exhibit list) as "Supplemental record review pending" by Dr. Sobol. This did not prevent discovery from closing. Even now, applicant still offers no showing of why it

took so long to obtain prior records and seek their review by the PTP. Exhibit 1 is not admitted.

Applicant objects to defense Exhibits A, B and C, arguing they were not served before the priority conference. Defendant did not file proofs of service. It appears the applicant was in possession of the records of AIG Claims and SCPMG/Kaiser since they were included in applicant's PTCS exhibit list. Exhibit A is not admitted. Exhibits B and C are admitted.

FACTUAL SUMMARY

Ms. Morales was hired in 2001 as a sales clerk in a shop that sells lingerie, lotions, DVDs, costumes and sexual toys. Managerial duties were added around 2003, continuing until 11/6/13, her last date of work. She testified she was full time from 2000, which was 38 to 40 hours per week, with some overtime. Around 2003 or 2004, she worked 50 to 60 hours per week. MOH page 5. Per supervisor Janel Hargreaves, overtime was rare. MOH page 11.

Ms. Morales testified that in 2005, she was injured at work when she "fell off a ladder" and hurt her right shoulder. She was referred to Richard Claveria, MD, who performed arthroscopic decompression surgery. His 8/23/05 report included the history that on 4/2/05, applicant was on a ladder and was simply reaching when she heard her shoulder "pop". Exh. B. Gregory Heinen took a history that instead of falling off a ladder, her right shoulder "went into the wall." Exh. B. She was off work three or four days. MOH page 6.

Applicant testified she hurt both shoulders while lifting a box at work in 2007. MOH page 6. She said she did not file a claim and did not consult an attorney because the owners had harassed her daily due to her 2005 claim. The incident was reported by applicant to Dr. Heinen in his 10/22/07 examination, along with the history that she had been "sent to US Healthworks again" for treatment and therapy, and was evaluated for surgery. He noted her weight was 201 pounds.

In 2008, applicant and her then-attorney signed a Stipulation with Request for Award of 3% permanent disability for right upper extremity injuries on 4/2/05 and on 9/18/07. Exh. E.

Applicant testified she started getting pain and stiffness in 2009, although she did not say where pain was located. MOH page 6. She went to Kaiser with complaints of gastritis, and leg swelling in 6/2009. She weighed 225 pounds. Exh. C. She did not remember this. MOH page 9.

On 1/4/10, applicant went to Kaiser for a routine physical; she complained of being tired, and of heavy, irregular menses. She was tearful because of being tired. After lab results showing low thyroid, she was prescribed Levothyroid [sic]. Exh. C.

In a Kaiser notation dated 5/3/11, applicant complained of a 2-year history of

monthly crying spells "affecting her work", which she thought was due to her thyroid. She thought it was not depression but hormones, adding, "And it's stress at work." Her affect was normal on 5/16/11, and her weight was 239 pounds. Exh. C. Applicant testified she did not recall this situation. MOH page 9.

During the last month before 11/6/13, Ms. Morales testified she had been extremely busy, and did a lot of bending, running, stocking, lifting and pulling, resulting in feeling injury to her neck, shoulders, arms, wrists, mid back, low back and knees. During the last month, she said she was concerned about losing her job or being demoted. She said she was asked by Janel to step down. There were "write-ups." MOH pages 6 and 10. Janel Hargreaves testified that they had meetings but there was no threat to fire or demote her.

On the morning of 11/6/13, Ms. Morales fainted at work. She does not remember what she was doing before this. Her symptoms were that she could not stop crying. She was taken by ambulance to the emergency room, treated and discharged. She followed up with Kaiser on 11/7/13. MOH page 11.

Ms. Morales never sought treatment before 2013. MOH page 8.

Applicant saw Sookyung Chang, PhD, on 11/12/13, on referral by her brother. Dr. Chang addressed the report to attorney Michael Burgis. Exhs. D, 15 (page 5.) She consulted attorney Burgis on 11/14/15. Her first treatment for her cumulative trauma was with Max Matos, MD, whom she testified she saw for her shoulders. MOH page 10. On 4/16/14, Dr. Matos reported on her low back. Applicant testified Dr. Matos told her he was only authorized to treat her shoulder. MOH page 11.

On 11/5/14, she started treating with Philip Sobol, MD, who found 11 diagnoses including "whole body pain." Exh. 6.

Ms. Morales testified her orthopedic symptoms have not changed since she left work. MOH page 11.

DISCUSSION

Applicant has the burden of proving, by a preponderance of evidence, that cumulative, traumatic, actual events of her employment caused disability and/or need for treatment. Proving causation of a cumulative injury requires both credible lay evidence and substantial medical evidence. Medical reports must show the physician's reasoning process, not merely his opinion, and must show an accurate factual basis.

Applicant's claims fall into three groups: Psychiatric, orthopedic and internal/GI.

A. PSYCHIATRIC INJURY

Six days after she last worked, applicant was evaluated by Dr. Chang for "CT 01/01/08 to 11/06/13". Exh. D. He was given no records of prior treatment, so he did

not question her incorrect history that she had no prior serious physical injuries; no prior workers compensation claims; no history of unmanageable psychological problems (for example, monthly crying spells) or treatment; was losing weight recently; and, fainted on 11/6/13 due to harassment. She told Dr. Chang she loved her work, had excellent work habits, and was considered an efficient employee. Nevertheless she claimed to Dr. Chang that supervisor Janel harassed her and constantly threatened to terminate her. This is internally inconsistent with his finding that she was not facing disciplinary action or lay-off when she left work. He does not describe what "actual events" constituted predominant cause of injury. Dr. Chang did not think she claimed injury from "stress due to actual work duties or responsibilities," even though he was clinically impressed with her description of "an overwhelming amount of work" overcoming her coping mechanism. Without further explanation, he states she was injured by unlawful, discriminatory and bad faith events. Based on factual inconsistencies, and unsupported conclusions, it is found the report is not substantial evidence.

Applicant relies instead on the 6/17/15 report of Marc Nehorayan, MD. Contrary to Dr. Chang's history, Ms. Morales gave a history of average to poor performance evaluations. Again, applicant gave a history that omitted prior emotional problems, and Dr. Nehorayan, too, had no prior records to review. Dr. Nehorayan accepted a history of overtime (50-60 hour weeks) which was contradicted by applicant's testimony, Janel Hargreave's testimony, and the history in the only medical report Dr. Nehorayan reviewed. He attributed 40% of causation to the stress of being overwhelmed by the nature and overload of her regular work, not her claims of writes-ups and threats of demotion.

Dr. Nehorayan also accepted without comment applicant's estimate of pain at an 8 on a scale of 1 to 10, and even attributed 40% of psychiatric injury to pain. At trial, applicant stated her pain had been the same since she had left work, and her appearance at trial gave no hint of such severe pain. The doctor also failed to comment on his own psychological testing which suggested an Axis I diagnosis of Somatization Disorder (prominent hypochondriacal features). Before finding that chronic pain, from medical, industrial injury, is responsible for much of the psychiatric causation, the doctor should have described his analysis of such test results and his reasoning. He did not.

The Nehorayan report is not factually supported and is not substantial evidence.

B. ORTHOPEDIC INJURY

Applicant, a 13-year employee of a retail business that sells lotions, lingerie, DVDs, costumes and sexual toys, claims that her duties produced symptoms in her neck, shoulders, arms, wrists, upper extremities, mid and low back, and knees. Although the symptoms allegedly started in 2009, she did not lose time from work or seek treatment for orthopedic complaints while employed and medically insured.

Psychological testing by both Dr. Chang and Dr. Nehorayan found evidence of somatic symptoms. Dr. Chung's testing indicated she demonstrated "an unusual degree of concern about physical functioning and health matters and probable

impairment arising from somatic symptoms.” Exhibit D, page 11. Dr. Nehorayan's testing suggest an Axis I diagnosis of somatization, discussed above. Neither doctor analyzed these findings. None of her medical providers did either.

After 11/6/13, applicant did not seek orthopedic treatment until seeing Dr. Matos in April, 2014, for her shoulders. MOH page 10. The history he recorded was that low back pain started after her 2005 fall from a ladder at work, but the 2005 injury was to the right upper extremity, a discrepancy Dr. Matos did not explain. The maximum weight lifted per Dr. Matos was 30 pounds at page 2, and 50 pounds at page 5. Exh. 8.

Dr. Matos treated applicant and referred her to low back pain management for about four months, ostensibly because that was all he was authorized to treat of this denied injury. His diagnosis was lumbosacral sprain, sciatica and scoliosis. The discussion of causation consisted of a statement of belief that her lumbar spine symptoms were probably related to the physical demands of her job, followed by a description of her duties. Although Dr. Matos reviewed various medical studies at length, he gave no explanation of his reasoning based on the facts in this case. What activities crated a mechanism of low back injury, at what frequency and duration?

One year after she last worked, Dr. Sobol began treating applicant's entire spine, shoulders, upper extremities and knees, all of which he found to be industrially related. All were entirely caused by “the work-related continuous trauma injury.” No analysis was included. Exh. 6. Pain manager Randy Rosen, MD, wrote a similar, unsupported opinion. Dr. Sobol's P&S report also failed to describe a mechanism of injury to such varied body parts, or his reasoning. How does he rationalize the delay in seeking treatment, especially if her complaints were as great as she described?

A recitation of job duties is not a substitute for analysis of causation. It is a starting point for determining whether there was injury-producing trauma. The claim she made to Dr. Sobol that she lifted “50 pounds or more” on a “frequent basis” is credibly refuted by witness Hargreaves. She testified that since becoming a supervisor in 2009, her employees packed the boxes and she did not agree that any boxes weighed 50-75 pounds as applicant testified. Rather than 30 or 40 boxes, there were 20 boxes delivered by van once per week (not three times per week), carried into the store by others. FedEx deliveries were brought in for her. They used a cart for boxes, or items removed from boxes. Applicant was not the only employee available to do this work. Since there is no analysis of what activity supposedly caused each injury, we cannot tell if the applicant's exaggeration of her duties was significant.

Applicant testified that she did sales work about 2 out of 8 hours. This is inconsistent with Dr. Sobol's impression that she did “nearly continuous typing.”

The orthopedic reports suffer from an overstatement of the arduousness of the duties. Even if the job had been accurately described, no doctor has explained how each physical malady resulted. Merely identifying a medical condition does not establish industrial injury and disability, or the physician's reasoning.

C. INTERNAL / GI INJURY

Arthur Lipper, MD, found that applicant reported acid reflux and constipation following treatment with NSAIDs and narcotics. However, he took a history that the onset of acid reflux, nausea, diarrhea and constipation was in 2010, well before her orthopedic treatment started in 2014. The opinion is not substantial evidence, all the more so because it depends on determining that the orthopedic treatment was industrial.

Applicant has failed to show injury AOE-COE by substantial medical evidence.



CHRIS ELLEN WILLMON
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

CEW

Service made on all parties as listed
on the Official Address Record.

Effective 12/22/2015
By L. Sawalga

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