RVS

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

RAFAEL VAZQUEZ,

Applicant,

vs.

THE KROGER COMPANY DBA FOOD 4 LESS, PERMISSIBLY SELF-INSURED, ADMINISTERED BY SEDGWICK CMS,

Defendant(s).

Case No(s). **ADJ9663211**

SUPPLEMENTAL FINDINGS OF FACT AND ORDER RE LIENS OF EDWIN HARONIAN, M.D., SHERRY LEONI, D.C. AND PHYSICAL MEDICINE INSTITUTE

DR. HARONIAN, PHYSICAL MEDICINE INSTITUTE AND DR. LEONI
By: Armando Mercado
Hearing Representative

BRADFORD & BARTHEL
By: Robert J. Simmonds, Esq.
Attorneys for Defendant

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

FINDINGS OF FACT

1. Applicant Rafael Vazquez, born June 19, 1948, while employed during the cumulative trauma period ending April 21, 2014, as a janitor, at Winnetka, California by The Kroger Company dba Food 4 Less, permissibly self-insured, administered by Sedgwick CMS, claims to have sustained injury arising out of and in the course of employment to the upper extremities, back, knees, neck and ankles.

2. The claim is not presumptively compensable pursuant to Labor Code §5402.

3. Lien claimant Edwin Haronian, M.D. has not sustained the burden of proof necessary to establish injury arising out of and in the course of employment.

4. Lien claimant Sherry Leoni, D.C. has not sustained the burden of proof necessary to establish injury arising out of and in the course of employment.

5. Lien claimant Physical Medicine Institute has not sustained the burden of proof necessary to establish injury arising out of and in the course of employment.

6. As a result of the above findings of fact, all other issues raised are moot.

ORDERS

a. **IT IS ORDERED** that the lien of Edwin Haronian, M.D. be, and it hereby is, **DISALLOWED.**

b. **IT IS ORDERED** that the lien of Sherry Leoni, D.C. be, and it hereby is, **DISALLOWED.**

c. **IT IS ORDERED** that the lien of Physical Medicine Institute be, and it hereby is, **DISALLOWED.**

Dated: January 25, 2018

SHILOH ANDREW RASMUSSON
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Filed and Served by mail on above date on all parties/liens on the Official Address Record.
By: Virgel Alberto

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

CASE NUMBER ADJ9663211

RAFAEL VAZQUEZ, APPLICANT	v.	**THE KROGER COMPANY DBA FOOD 4 LESS, PERMISSIBLY SELF-INSURED, ADMINISTERED BY SEDGWICK CMS,** DEFENDANT
DATE OF INJURY:		APRIL 21, 2014
WORKERS' COMPENSATION JUDGE:		SHILOH A. RASMUSSON
DECISION DATE:		JANUARY 25, 2018

OPINION ON DECISION

BACKGROUND

Applicant Rafael Vazquez, born June 19, 1948, while employed during the cumulative trauma period ending April 21, 2014, as a janitor, at Winnetka, California by The Kroger Company dba Food 4 Less, permissibly self-insured, administered by Sedgwick CMS, claims to have sustained injury arising out of and in the course of employment to the upper extremities, back, knees, neck and ankles.

The case in chief settled by Compromise and Release approved December 14, 2016.

These supplemental lien proceedings involve the following liens:

1. Edwin Haronian, M.D., medical treatment, in the amount of $38,351.54.
2. Sherry Leoni, D.C., medical treatment, in the amount of $817.39.
3. Physical Medicine Institute/Dr. Tabibian, medical treatment, in the amount of $3,516.57.

Lien trial was held on January 17, 2018. The issues raised for decision were:

a. injury AOE/COE;
b. the above liens;
c. whether the claimed CT injury was distinct from a previously settled specific injury with the same employer (ADJ7103537);

d. whether compensation was barred per Labor Code §3600(a)(10);
e. whether the reporting of Drs. Haronian and Leoni, and the Physical Medicine Institute constituted substantial medical evidence as based on an incomplete medical history;
f. whether the claim is presumptively compensable per Labor Code §5402; and
g. whether the time in which defendant may deny the claim is extended by five days for mailing per Title 8, Cal. Code Regs. §10507.

The applicant was called to testify by the lien claimants, and testimony was adduced under direct and cross-examination. The matter was submitted for decision the same day, and this Opinion now follows.

LABOR CODE §5402 PRESUMPTION

Lien claimants have raised the issue of whether the claim is presumptively compensable per Labor Code §5402(b) which holds:

> **If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.**

The Record of Proceedings herein reflects a DWC-1 claim form signed by the applicant. However, the form signed by the applicant bears no date, and offers no indication of receipt by the employer. A proof of service filed by applicant's counsel is dated September 19, 2014, with service on Sedgwick CMS and Food 4 Less. Defendant denied the claim 95 days later on December 23, 2014. Pursuant to Title 8, Cal. Code Regs. §10507(a), if a document is served by mail, fax, e-mail, or any method other than personal service, the period of time for exercising or performing any right or duty to act or respond shall be extended by five calendar days from the date of service, if the physical address of the party, lien claimant, attorney, or other agent of record being served is within California. Here, the proof of service of the claim form on Food 4 Less

reflects service on the address of the employer in Canoga Park, California on September 19, 2014. Defendant's time to act on the claim form is thus extended by five days, making the denial of the claim on December 23, 2014 a timely denial. The presumption of compensability of Labor Code §5402 does not attach herein.

INJURY AOE/COE

Applicant's Testimony

The applicant was called to testify at trial. The applicant testified to work for the employer that led to the development of pain in the left hip and left knee. (MOH/SOE at 10:11.) The applicant was somewhat unclear on the dates and symptoms experienced, although he did indicate that he felt management did not respond to his complaints of pain to the left hip and left knee pain. However, the applicant also testified that he did not report any workplace injuries to management other than the specific injury of 2009. (Id. at 11:4.) The applicant admitted a prior workplace injury in 2009, and a 1995 motor vehicle accident. (Ibid.) The applicant testified to treatment with Dr. Haronian, always with an interpreter present. (Id. at 10:16.)

The applicant's testimony, while not indicative of any intentional attempt to mislead the court, does not adequately differentiate between the presently claimed cumulative trauma injury, and the applicant's prior admitted injury to the left hip on January 26, 2009 (ADJ103537). The applicant appeared to be somewhat confused as to the etiology of the hip and lower extremity complaints, and further appeared to be testifying to the cumulative trauma interchangeably with the admitted specific injury. The history of the alleged injuries appeared to be somewhat confused, and did not specifically identify causative factors for the alleged CT injury other than gradual onset of pain. As a result, the court is affording little evidentiary weight to the applicant's testimony.

Medical Evidence of Injury AOE/COE

The applicant's testimony notwithstanding, injury AOE/COE may be established via medical reporting. In this regard, lien claimant relies upon the reporting of Dr. Haronian to establish injury. Indeed, Dr. Haronian finds injury arising out of and in the course of employment in his report dated January 14, 2015 (Exhibit L3 at p.10.) However, Dr. Haronian also observes the applicant is a "somewhat poor historian," and that no medical records have been submitted for review. The issue of the review of the pertinent medical records is especially important as applicant had another industrial injury to the left hip and lower extremity in 2009. The applicant made Dr. Haronian aware of this prior injury (see Exhibit L3 at pp.1-2) but it appears that no records, including diagnostic studies or operative reports, were ever submitted to Dr. Haronian for review during the pendency of the case in chief.

In order to constitute substantial medical evidence, a medical report must be premised on an accurate medical history. To be "substantial" means that the evidence must be of ponderable legal significance. It must be reasonable in nature, credible, and of solid value. It cannot be just any evidence. It must be substantial proof of the essentials that the law requires. It is more than a scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (Bolton) (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566]; *People v. Bassett* (1968) 69 Cal.2d 122.) In this regard, the Appeals Board will look to the underlying facts of a medical opinion to determine whether or not it constitutes substantial evidence, and accordingly, an expert's opinion is no better than the facts on which it is based. (*Turner v. Workers' Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036 [39 Cal.Comp.Cases 780].) A medical report is not substantial evidence if it is known to be based on an incorrect medical history. (*Hegglin v. Workmen's Comp.*

Appeals Bd. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525].)

Here, the medical report of Dr. Haronian reflects an understanding that the applicant has undergone a prior hip surgery, but does not benefit from a review of *any* medical reporting, diagnostic testing, or other contemporaneous evidence regarding the significant injury the applicant sustained in 2009 to the left hip while working for the same employer. In fact, it does not appear that any medical records of any nature were submitted to Dr. Haronian for his review. The resulting analysis of causation is impaired by the lack of medical history. The reporting of Dr. Haronian does not constitute substantial medical evidence as based on an incomplete and relevant medical history.

Conclusion

Thus, the record speaking to injury AOE/COE consists of medical reporting that is not substantial medical evidence, and witness testimony that cannot be relied upon. Based on these factors, the lien claimants herein have not met their burden of establishing that applicant sustained injury arising out of and in the course of employment.

LIENS

There being no persuasive evidence of injury arising out of and in the course of employment, the liens of Edwin Haronian, M.D., Sherry Leoni, D.C., and Physical Medicine Institute are hereby DISALLOWED.

All other issues raised are rendered moot by the above finding.

Dated: January 25, 2018

SHILOH ANDREW RASMUSSON
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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SUPPLEMENTAL FINDINGS OF FACT AND ORDER

RE LIENS OF EDWIN HARONIAN, MD, SHERRY LEONI, DC,

AND PHYSICAL MEDICINE INSTITUTE

Case Number: ADJ9663211

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Served on above-parties by mail on 01/25/2018

By: Vergel Alberto