

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

ALCIRA FLORES,

Applicant,

vs.

**FOOD LESS;
SEDGWICK 14450 LONG BEACH;**

Defendants.

Case No. ADJ8606517

**ORDER RESCINDING
ORDER
(PER RULE § 10859)**

IT APPEARING THAT the Board having received and reviewed Defendant's Petition for Reconsideration filed herein on August 18, 2014, and

GOOD CAUSE APPEARING:

The Finding and Award issued on July 24, 2014, is hereby rescinded/set aside pursuant to Title 8 C. C. R. §10859. The matter is set for a Status Conference before Judge Hughes on October 29, 2014, at the hour of 8:30 a.m. at the Workers' Compensation Appeals Board at 464 West Fourth Street, Second Floor Suite 239, and San Bernardino, California.

DATE: 8/29/2014

TLH:
DATED: 8/29/2014
BY: S LOPEZ



Tracy L. Hughes
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

08-29-2014

“PROOF OF SERVICE”

OFFICIAL ADDRESS RECORD

Case Number: ADJ8606517

ALCIRA FLORES	<i>Injured Worker, 14392 DEL AMO DR VICTORVILLE CA 92392</i>
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FOOD LESS	<i>Employer, 16266 BEAR VLY RD VICTORVILLE CA 92392</i>
FOOD LESS	<i>Self Insured Employer - Public, 16266 BEAR VLY RD VICTORVILLE CA 92392</i>
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SERVICE: DATE: 8-29-2014 BY: S LOPEZ	<i>“ORDER RESCINDING ORDER RULE SECT 10859”</i>

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The Kroger Company dba Food 4 Less of California (PSI)

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALCIRA FLORES,

Applicant,
vs.

THE KROGER COMPANY DBA FOOD-
4-LESS OF CALIFORNIA, INC. (PSI)
ADMINISTERED AND ADJUSTED BY
SEDGWICK,

Defendants.

Case No. ADJ8606517

DEFENDANTS' PETITION FOR RECONSIDERATION

COME NOW defendants, The Kroger Company dba Food-4-Less Of California, Inc. (PSI) administered and adjusted by Sedgwick (defendants), by and through their attorneys of record, the Law Offices of Bradford and Barthel, and hereby respectfully submit this Petition for Reconsideration pursuant to Labor Code section 5903¹ on the following grounds:

- A) That the evidence does not justify the findings of fact;
- B) That the findings of fact do not support the order, decision, or award; and
- C) That the opinion and findings of fact do not constitute substantial evidence.

STATEMENT OF FACTS

Applicant Alcira Flores (applicant) suffered an admitted lumbar and left knee injury on May 7, 2012, arising out of and in the course of her employment as a cashier for the Kroger Company. (MOH, 05/20/2014, 2:5-7). She underwent left knee surgery on August 30, 2012.

¹ All further statutory references are to the Labor Code, except where otherwise noted.

1 (12/10/2013 Report of David Doty, M.D., p. 1, [Applicant Ex. 8 admitted on 05/20/2014]).

2 At some point thereafter, applicant fell under the care of two physicians at Arrowhead
3 Orthopedics – David Doty, M.D. and Jonathan Lee, M.D. While treating with Dr. Doty,
4 applicant underwent a second knee surgery on May 23, 2013. (03/25/2014 Report of Peter
5 Sofia, M.D., p. 2, [Defendant Ex. A admitted on 05/20/2014]).

6 On December 10, 2013, Dr. Doty saw the applicant for treatment. (12/10/2013 Report
7 of David Doty, M.D., [Applicant Ex. 8 admitted on 05/20/2014]). He noted applicant's history
8 of surgery with Dr. Pathi on August 30, 2012, but did not have the operative report and
9 expressed uncertainty as to what type of procedure had been performed. (Id., p. 1). He also
10 noted applicant had undergone a left knee arthroscopy on May 24, 2013 and was doing well
11 with physical therapy. (Id.) He noted applicant was to begin treatment with Jonathan Lee,
12 M.D., for her low back complaints. (Id.) Left knee examination revealed normal range of
13 motion, no effusion, normal gait, but some "diffuse tenderness." (Id., p. 2). There was no
14 crepitus or patellar instability and the patella tracked well. (Id.) All clinical signs of ACL and
15 posterior cruciate ligament instability were negative. (Id., pp. 2-3). Dr. Doty administered an
16 injection into the left knee. (Id., p. 3). As to work status, Dr. Doty stated, "Temporarily
17 totally disabled 6 weeks with modified duty." (Id.)

18 Applicant was seen by Dr. Lee on December 17, 2013. (12/23/2013 Report of David
19 Doty, M.D., [Applicant Ex. 7 admitted on 05/20/2014]). Dr. Lee noted applicant was last seen
20 on November 6, 2013. (Id., p. 1). On physical examination, applicant demonstrated normal
21 heel to toe gain, 20% loss of flexion and extension, but normal motor strength, sensory
22 function and reflexes. (Id., pp. 2-3). Observation of the lower extremities did not reveal any
23 atrophy. (Id., p. 2). The examination was negative for root tension signs. (Id.) Dr. Lee's
24 recommended course of treatment was ongoing medication and continued activity. (Id., p. 3).
25 The doctor's only diagnosis was "low back pain." (Id.) Applicant's disability status was TTD
26 per the doctor. (Id.)

27 On December 23, 2013, applicant was seen by Dr. Doty. (12/23/2013 Report of David
28 Doty, M.D., [Applicant Ex. 6 admitted on 05/20/2014]). Applicant was reported to have

1 undergone and completed physical therapy, (Id., p. 1). Dr. Doty again made the statement that
2 applicant was to see Dr. Lee the following week “to begin treatment of [her] low back.” (Id.,
3 p. 2). Applicant was currently on modified duties of six hours a day, but stopped working
4 because of back spasms which made it difficult to sit or stand. (Id.) She complained of
5 “severe back spasms and state[d] her buttocks hurt to sit on.” (Id.) The doctor recommended
6 six weeks of TTD. (Id., p. 3).

7 Applicant was again seen by Dr. Lee on January 7, 2014. (01/07/2014 Report of David
8 Doty, M.D., [Applicant Ex. 5 admitted on 05/20/2014]). Strangely, he noted applicant had last
9 been seen on November 6, 2013 and at that time recommended treatment was home exercise.
10 (Id., p. 1). Applicant’s physical examination was identical to the December 17, 2013
11 examination. (Id., pp. 2-3). Disability status was simply noted by means of a question mark.
12 (Id.)

13 The parties obtained a panel QME in orthopedics from Peter Sofia, M.D., who
14 evaluated the applicant on January 10, 2014. (01/27/2014 Report of Peter Sofia, M.D.,
15 [Defendant Ex. B admitted on 05/20/2014]). Dr. Sofia took a detailed history and noted
16 applicant still complained of being “very symptomatic” and that Dr. Doty was “puzzled and
17 does not understand why her knee has not done well.” (Id., pp. 2-3). Applicant described her
18 low back pain as “constant and 9/10 every single second of the day.” (Id., p. 3). Waddell
19 signs consisted of “verbal outbursts of pain complaints, non-cooperation, diffuse tenderness to
20 light touch, low back pain on simulated rotation, [and] low back pain on head compression.”
21 (Id., p. 5). Physical examination of the lower extremities was normal with the exception of
22 decreased range of motion on the left knee. (Id., p. 6). Other than tenderness to light touch
23 and decreased range of motion, the lumbar spine examination was normal. (Id.) There was no
24 radiating pain. (Id.) Applicant was not cooperative with range of motion testing secondary to
25 pain. (Id.) Applicant did not have increased pain on rotation when distracted. (Id.) Based on
26 that examination, Dr. Sophia deemed applicant P&S November 24, 2013, having reached that
27 point six months post operatively from her second surgery.

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1 On February 3, 2014, applicant was seen by Dr. Doty. In his PR-2 of that same date,
2 he noted in his history of the injury that he did not have the operative report from Dr. Pathi.
3 (02/03/2014 Report of David Doty, M.D., p. 1, [Applicant Ex. 4 admitted on 05/20/2014]). He
4 did report applicant was doing well in physical therapy, but that she was unable to sit, stand,
5 walk, bend or squat without pain “for long periods of time.” (Id.) He acknowledged applicant
6 “had an AME with Dr. Sofia on 1/10/14.” (Id., p. 2). The physical examination was identical
7 to that reported in Dr. Doty’s December 10, 2013 report. (Id., pp. 2-3). The only treatment for
8 the left knee was the recommendation for a sports brace. (Id., p. 3). Follow-up was
9 recommended in 6 weeks for P&S report. (Id.) Dr. Doty continued applicant’s TTD status.
10 (Id.)

11 On February 18, 2014, applicant was seen by Dr. Lee. In his PR-2, he reported
12 applicant’s current complaints were unchanged and that applicant continued to have low back
13 pain and discomfort. (02/18/2014 Report of Jonathan Lee, M.D., p.1, [Applicant Ex. 3
14 admitted on 05/20/2014]²). His physical examination was identical to that from January 7,
15 2014. The same day Dr. Lee also issued a “disability status form” noting applicant was
16 temporarily totally disabled. (02/18/2014 Report of Jonathan Lee, M.D., [Applicant Ex. 2
17 admitted on 05/20/2014]). On April 1, 2014, Dr. Doty issued a “disability status form” noting
18 “TTD for 6 weeks.” (02/18/2014 Report of David Doty, M.D., [Applicant Ex. 1 admitted on
19 05/20/2014]).

20 Shortly after receipt of Dr. Sophia’s initial report, defendants terminated TD benefits
21 on March 27, 2014. (Pre-trial Conference Statement, p. 2).

22 PROCEDURAL HISTORY

23 The matter proceeded to trial before Workers’ Compensation Judge (WCJ) Tracy
24 Hughes on May 20, 2014. The issues were applicant’s claim of TD from March 28, 2014, to
25 the present and continuing, or whether applicant was permanent and stationary on November
26 24, 2013, as found by Dr. Sofia, or alternatively, January 27, 2014, the date of Dr. Sofia’s
27

28 ² Contrary to how the WCJ described applicant’s Exhibit 3 on page 3 of the MOH, the progress report of
02/18/2014 is authored by Dr. Jonathan Lee.

1 report, and the application of Labor Code section 4656(c)(2). (MOH, 05/20/14, 2:21 – 3:1).
2 No testimony was taken.

3 WCJ Hughes issued his Findings and Award on July 24, 2014. He found applicant
4 entitled to TD for the period beginning March 28, 2014 to and including the present and
5 continuing, payable at the rate of \$574.42 per week, less credit for payments made by EDD.
6 (F&A, 07/24/14, p. 1). She then awarded accordingly. (Id.)

7 In his Opinion on Decision, WCJ Hughes explained he based his F&A on “the medical
8 reports of Dr. Doty, dated April 1, 2014, February 18, 2014, February 3, 2014, December 23,
9 2013, December 17, 2013, and December 10, 2013, and the medical reports of Dr. Lee, dated
10 February 18, 2014 and January 7, 2014.” (Op. on Decision, 07/24/14, p. 1). As a result, all
11 other issues were deemed moot.

12 QUESTIONS PRESENTED

- 13 1. Whether the award of TD from March 28, 2014 and continuing is supported by
14 substantial evidence?
- 15 2. Whether applicant is permanent & stationary as of November 24, 2013?

16 ARGUMENT

17 **I. THE AWARD OF TD FROM MARCH 28, 2014 AND CONTINUING IS NOT 18 SUPPORTED BY SUBSTANTIAL EVIDENCE.**

19 WCJ Hughes based his award of TD from March 28, 2014 and continuing on “the
20 medical reports of Dr. Doty, dated April 1, 2014, February 18, 2014, February 3, 2014,
21 December 23, 2013, December 17, 2013, and December 10, 2013, and the medical reports of
22 Dr. Lee, dated February 18, 2014 and January 7, 2014.” (Op. on Decision, 07/24/14, p. 1).
23 This statement is wholly conclusory. A close examination of the medical reports relied upon
24 by the WCJ reveals that the award of TD is not supported by substantial evidence.

25 An award, order or decision of the Board must be supported by substantial evidence.
26 (*Lab. Code §5952(d)*; *Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280 [39
27 Cal.Comp.Cases 310].) However, not all medical evidence is substantial evidence. (*Hegglin v*
28 *Workman's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93, 97]; *Place v*
Workman's Comp. Appeals Bd. (1970) 3 Cal.3d 372, 378–379 [35 Cal.Comp.Cases 525].) In

1 order to constitute substantial evidence, a medical opinion must be predicated on reasonable
2 medical probability. (*Escobedo v Marshall's* (2005 en banc) 70 Cal.Comp.Cases 604;
3 *McAllister v Workman's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416–417 [33
4 Cal.Comp.Cases 660]; *Rosas v Workmen's Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692,
5 1700–1702, and 1705 [58 Cal.Comp.Cases 313].) Whether a physician's opinion constitutes
6 substantial evidence "must be determined by the material facts upon which his opinion was
7 based and by the reasons given for his opinion." (*Id.*) A medical report is not substantial
8 evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her
9 conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal. 2d 399, 407 [445 P.2d
10 294, 71 Cal.Rptr. 678, 33 Cal.Comp.Cases 647] (a mere legal conclusion does not furnish a
11 basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd.*, *supra*, 68 Cal.2d at pp. 799, 800–
12 801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion
13 does not constitute substantial evidence); see also *People v. Bassett* (1968) 69 Cal.2d 122, 141,
14 144 [443 P.2d 777, 70 Cal.Rptr. 193] (the chief value of an expert's testimony rests upon the
15 material from which his or her opinion is fashioned and the reasoning by which he or she
16 progresses from the material to the conclusion, and it does not lie in the mere expression of the
17 conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).)
18 Appellate courts and the Appeals Board have consistently rejected medical opinions when the
19 physician provides no explanation for the reasons for his opinion. (*Grossmont Hospital v*
20 *Worker's Comp. Appeals Bd.* (2007) 71 Cal.Comp.Cases 85).

21 Where the Board's decision is not within the realm of what a reasonable trier of fact
22 could find, the decision is not supported by substantial evidence and must be annulled. (*Skip*
23 *Fordyce, Inc. v. Workers' Comp. Appeals Bd.*, (1983) 149 Cal.App.3d 914 921 [197 Cal.Rptr.
24 626; 48 Cal.Comp.Cases 904]; *Insurance Co. of North America v. Workers' Comp. Appeals*
25 *Bd.*, (1981) 122 Cal.App.3d 905, 911 [176 Cal.Rptr. 365, 46 Cal.Comp.Cases 913].) Medical
26 evidence is necessary to establish entitlement to TD benefits. (*Novelty Specialties v. Workers'*
27 *Comp. Appeals Bd.*, (Schrieber) (1996) 61 Cal.Comp.Cases 1115.)

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1 While it is unclear as to who precisely the primary treating physician is, it appears
2 applicant was treating with Dr. Lee for her back and with Dr. Doty for her knee. Although
3 both doctors are associated with Arrowhead Orthopedics, neither physician appears to have
4 reviewed the other's medical reporting. Here, the only evidence to support the award of TD,
5 which falls after the March 28, 2014, start date of TD, is the "disability status form" dated
6 appropriately April 1, 2014, from Dr. Doty. This report is not a PR-2 or a narrative report.
7 More importantly, it falls woefully short of the evidentiary standard set forth in Rule 10606.
8 To be solid and credible, the evidence must comply with California Code of Regulations, title
9 8, section 10606. (See *Insurance Co. of North America v. Workers' Comp. Appeals Bd.* (1981)
10 122 Cal.App.3d 905, 917 [176 Cal.Rptr. 365, 46 Cal.Comp.Cases 913], ["Unless a medical
11 report complies with [California Code of Regulations, title 8,] section 10606 . . . neither the
12 workers' compensation judge, the WCAB, nor this court on review can make a rational
13 decision on whether such report constitutes the kind of evidence on which a reasoned decision
14 can be based"].) In order for Dr. Doty's report to constitute solid and credible evidence of TD,
15 the report should at the very least include discussion of applicant's complaints, her interim
16 history, findings on examination, an examination, a diagnosis, treatment indicated, and most
17 importantly, the reasons for any opinions on disability status. None of these relevant factors
18 are discussed in this report. While the report states, "The temporary modified duties are not
19 appropriate" (02/18/2014 Report of David Doty, M.D., [Applicant Ex. 1 admitted on
20 05/20/2014]), there is no mention of whether applicant had been working modified duties or
21 what sort of modified work was offered. The doctor's conclusion that applicant is TTD is
22 completely unsupported by any explanation or analysis.

23 The report preceding that disability status report, is a PR-2 dated February 18, 2014
24 from Dr. Lee. Dr. Lee noted applicant was TTD. (02/18/2014 Report of Jonathan Lee, M.D.,
25 p. 3, [Applicant Ex. 3 admitted on 05/20/2014]). However, that opinion, like Dr. Doty's, is not
26 explained. Dr. Lee fails to demonstrate how the physical examination supports this finding.
27 When one reviews Dr. Lee's physical examination it is questionable that such a finding is
28 supported. Bear in mind that applicant was almost two years post injury by this point in time.

1 Although she continued to complain of pain and had slightly decreased flexion and extension
2 (Id., pp. 1, 2), all objective testing was normal. Applicant had normal heel-toe gait, no
3 radiating pain, no atrophy, negative tension signs, full motor strength, normal reflexes, and
4 normal sensory exam. (Id., pp. 2-3). Dr. Lee's only diagnosis was merely "low back pain."
5 (Id., p. 3). As will be discussed further below, Dr. Lee's physical examination and treatment
6 remained essentially unchanged during the entire period of treatment in the evidentiary record.
7 In his December 2013 report, Dr. Lee's recommended course of treatment was ongoing
8 medication and continued activity. (12/17/2013 Report of David Doty, M.D., p. 3, [Applicant
9 Ex. 7 admitted on 05/20/2014]). This remained Dr. Lee's recommendation over the course of
10 approximately the next four months in light an essentially identical physical examination over
11 the course of that same time. (see 02/18/2014 Report of David Doty, M.D., pp. 2-3,
12 [Applicant Ex. 3 admitted on 05/20/2014]); (01/07/2014 Report of David Doty, M.D., pp. 2-3,
13 [Applicant Ex. 5 admitted on 05/20/2014]).12/17/2013 Report of David Doty, M.D., pp.2-
14 3[Applicant Ex. 7 admitted on 05/20/2014).

15 Aside from the April 1, 2014 report from Dr. Doty, his prior reports pertaining to the
16 left knee suffer from the similar problems. Dr. Doty's reports do not support the need for
17 ongoing TTD. Applicant's last knee surgery was on May 24, 2013. (02/03/2014 Report of
18 David Doty, M.D., p. 1, [Applicant Ex. 4 admitted on 05/20/2014]). By February 2014, she
19 was noted to be doing well in physical therapy (although every single report from Dr. Doty in
20 evidence makes the same comment). (Id.) The physical exam was objectively normal.
21 Applicant had full range of motion. (Id., p. 2). There was no effusion, no varus or valgus
22 deformity, to crepitus or instability. (Id.) The patella tracked well. (Id.) The only negative
23 finding was applicant's complaint of tenderness. (Id.) And in fact, applicant was to return in
24 six weeks for a P&S report. (Id., p. 3). This last point highlights the need for some sort of
25 analysis or support for Dr. Doty's reporting of ongoing TTD in his "disability status form" on
26 April 1, 2014. (02/18/2014 Report of David Doty, M.D., [Applicant Ex. 1 admitted on
27 05/20/2014]). Again, that support is completely lacking.

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1 None of the medical records, for the period concerned, evidence someone who is
2 completely incapable of doing any work whatsoever. Surely if an evidentiary standard means
3 anything, an applicant must be required to provide some proof of TTD status that shows
4 definitive treatment issues, objective findings or a worsening of her condition to warrant a
5 finding of TD. A one page disability status form is not something a reasonable trier of fact
6 would accept as sufficient evidence of TD status. Applicant failed to meet her burden of proof
7 on entitlement to TD and on this record, it was error for the WCJ to award TD benefits.

8 **II. INSTEAD OF AWARDING ADDITIONAL TD, THE WCJ SHOULD HAVE**
9 **FOUND APPLICANT WAS P&S AS OF NOVEMBER 24, 2013.**

10 As the WCJ found applicant entitled to TD benefits, he did not reach the issue of
11 whether applicant is permanent and stationary. "Permanent and stationary" is defined in the
12 2005 PDRS as "the point in time when the employee has reached maximal medical
13 improvement (MMI), meaning his or her condition is well stabilized and unlikely to change
14 substantially in the next year with or without medical treatment." (2005 PDRS, p. 1-2; *AMA*
15 *Guides*, p. 2). Not only does the report of Dr. Sofia demonstrate applicant's condition had
16 plateaued but even applicant's own evidence does so as well.

17 From the first report of applicant's treating physician, Dr. Doty, until the last progress
18 report in evidence, there is no change in the physical examination or diagnosis. In the first
19 report in evidence from Dr. Doty, December 10, 2013, Dr. Doty noted applicant's history of
20 surgery with Dr. Pathi on August 30, 2012, but did not have the operative report and expressed
21 uncertainty as to what type of procedure had been performed. (12/10/2013 Report of David
22 Doty, M.D., p. 1, [Applicant Ex. 8 admitted on 05/20/2014]). He also noted applicant had
23 undergone a left knee arthroscopy on May 24, 2013 and was doing well with physical therapy.
24 (Id.) This history is repeated almost word for word in Dr. Doty's next two reports over the
25 next two months. (See 02/03/2014 Report of David Doty, M.D., [Applicant Ex. 4 admitted on
26 05/20/2014]); (12/23/2013 Report of David Doty, M.D., [Applicant Ex. 6 admitted on
27 05/20/2014]). Left knee examination in the December 10, 2013 report revealed normal range
28 of motion, no effusion (as opposed to +1 effusion in June 4, 2013 report (01/27/2014 Report of

1 Peter Sofia, M.D., p.1 of "Review of Medical Records", [Defendant Ex. B admitted on
2 05/20/2014])), normal gait, but some "diffuse tenderness." (12/10/2013 Report of David Doty,
3 M.D., p. 2, [Applicant Ex. 8 admitted on 05/20/2014]). There was no crepitus or patellar
4 instability and the patella tracked well. (Id.) All clinical signs of ACL and posterior cruciate
5 ligament instability were negative. (Id., pp. 2-3). Again, the doctor notes an identical physical
6 exam over the course of the next two exams through February 2014. (02/03/2014 Report of
7 David Doty, M.D., [Applicant Ex. 4 admitted on 05/20/2014]); (12/23/2013 Report of David
8 Doty, M.D., [Applicant Ex. 6 admitted on 05/20/2014]).

9 Dr. Lee's reporting follows the same pattern. The first report from Dr. Lee in evidence
10 is the report from December 17, 2013. (12/17/2013 Report of David Doty, M.D., [Applicant
11 Ex. 7 admitted on 05/20/2014]). On physical examination, applicant demonstrated normal
12 heel to toe gain, 20% loss of flexion and extension, but normal motor strength, sensory
13 function and reflexes. (Id., pp. 2-3). Observation of the lower extremities did not reveal any
14 atrophy. (Id., p. 2). The examination was negative for root tension signs. (Id.) Dr. Lee's
15 recommended course of treatment was ongoing medication and continued activity. (Id., p. 3).
16 The doctor's only diagnosis was "low back pain." (Id.) This physical examination is repeated
17 verbatim over the course of the next two examinations. (02/18/2014 Report of Jonathan Lee,
18 M.D., [Applicant Ex. 3 admitted on 05/20/2014]); (01/07/2014 Report of David Doty, M.D.,
19 [Applicant Ex. 5 admitted on 05/20/2014]). In fact, it appears the examinations for applicant's
20 back were no different at least as far back as February 19, 2013. (01/27/2014 Report of Peter
21 Sofia, M.D., p.1 of "Review of Medical Records", [Defendant Ex. B admitted on
22 05/20/2014]).

23 These physical examinations over a three month period of time are consistent with Dr.
24 Sofia's examination and support his finding that applicant was P&S by November 24, 2013 or
25 January 10, 2014, the date of Dr. Sofia's examination. Here, Dr. Sofia took a detailed history
26 and noted applicant still complained of being "very symptomatic" and that Dr. Doty was
27 "puzzled and does not understand why her knee has not done well." (01/27/2014 Report of
28 Peter Sofia, M.D., pp. 2-3, [Defendant Ex. B admitted on 05/20/2014]). Unlike Dr. Doty, Dr.

1 Sofia reviewed the operative report from August 2012. (Id., p. 3 in "Review of Medical
2 Records"). Like Dr. Doty and Dr. Lee, the only negative findings were subjective. Applicant
3 described her low back pain as "constant and 9/10 every single second of the day." (Id., p. 3).
4 Applicant was not cooperative with range of motion testing secondary to pain. (Id.) Other
5 than tenderness to light touch and decreased range of motion (subject to one's control), the
6 lumbar spine examination was normal. (Id.) Physical examination of the lower extremities
7 was normal with the exception of decreased range of motion on the left knee. (Id., p. 6). As
8 Dr. Lee noted, there was no radiating pain. (Id.) Interestingly, applicant did not have
9 increased pain on rotation when distracted. (Id.) Likewise, Waddell signs consisted of "verbal
10 outbursts of pain complaints, non-cooperation, diffuse tenderness to light touch, low back pain
11 on simulated rotation, [and] low back pain on head compression." (Id., p. 5). Based on that
12 examination, Dr. Sofia deemed applicant P&S as November 24, 2013, having reached that
13 point six months post operatively from her second surgery. (Id., p. 9).

14 On this record, two things are very clear. One, applicant's condition has not changed
15 for several months. Two, her subjective complaints appear to be outweighed by the objective
16 evidence. With only medication and home exercise as treatment, it appears that all the doctors
17 in this case do not see much room for any substantial improvement in applicant's condition.
18 She has already been treated operatively and has had sufficient time to recover. Dr. Sofia's
19 P&S finding is well-reasoned, and when taken together with the subsequent examinations of
20 applicant's treating physicians, is consistent with the definition of P&S discussed above.

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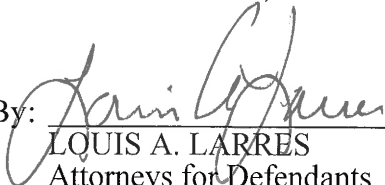
CONCLUSION

Based on the above, defendant respectfully requests that reconsideration be granted, that the WCJ's decision be rescinded and that an amended findings and order issue, finding applicant permanent and stationary as of November 24, 2013 or January 27, 2014 at the latest.

Dated: August 18, 2014

Respectfully submitted,

Bradford & Barthel, LLP

By: 
LOUIS A. LARRES
Attorneys for Defendants

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VERIFICATION

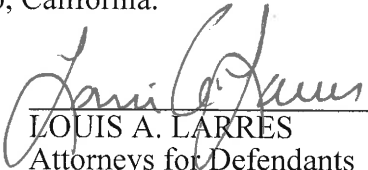
STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

I have read the foregoing DEFENDANTS' PETITION FOR RECONSIDERATION and know its contents.

I am an attorney for a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I am informed and believe that they are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 18, 2014, at Fresno, California.



LOUIS A. LARRES
Attorneys for Defendants

BRADFORD BARTHEL ONTARIO
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aalexander@bradfordbarthel.com
(559) 442-3602

PROOF OF SERVICE
(C.C.P Section 1013a, 2015.5)

STATE OF CALIFORNIA)
) ss.

COUNTY OF SAN BERNARDINO)

**RE: ALCIRA FLORES VS. THE KROGER COMPANY DBA FOOD-4-LESS
OF CALIFORNIA, INC. (PSI)**
Claim No.: 30120590572-0001
Our File No.: 0211.058825

I, Asheley Alexander, am a citizen of the United States and am employed in the county of the aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 1300 East Shaw Avenue, Suite 171, Fresno, California 93710.

On August 18, 2014, I served the within document(s) described as:

DEFENDANTS' PETITION FOR RECONSIDERATION

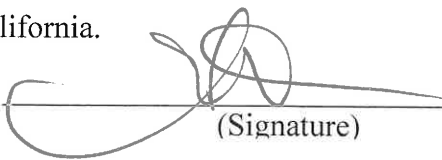
on the interested parties in this action as stated on the attached mailing list.

- ☒ (ORIGINAL) Filed Electronically via EAMS.
- ☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Fresno, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I, the undersigned, declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 2014, at Fresno, California.

Asheley Alexander
(Type or print name)


(Signature)

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