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STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

JOVANNI MONTELONGO, ***Applicant,*** **vs.** **PHIL BRUNO ENTERPRISES, INC., dba EXCLUSIVE FRESH, INC., and ILLINOIS MIDWEST INSURANCE on behalf of PROCENTURY INSURANCE COMPANY,** ***Defendants.***	**Case No. ADJ9338498** OAKLAND VENUE **FINDINGS OF FACT and ORDERS**

The above-entitled matter having been heard and regularly submitted, Stanley E. Shields, Workers' Compensation Judge, now makes his decision as follows:

FINDINGS OF FACT

1. Defendant's Exhibits N, O, Q, R, T, U, V, and W are admissible in this proceeding.

2. Applicant is not currently entitled to temporary disability indemnity for any periods not previously paid.

3. Applicant's occupational group is 460.

4. The record is in need of development on issues of permanent disability and need for further medical care.

5. Applicant's attorney has provided valuable services, but there is currently no fund from which an attorney's fee can be awarded.

ORDERS

Defendant's Exhibits N, O, Q, R, T, U, V, and W **ARE HEREBY ORDERED ADMITTED** into evidence.

The parties **ARE HEREBY ORDERED** to develop the record consistent with the discussion in the Opinion on Decision.

Dated: January 20, 2016

Stanley E. Shields
WORKERS' COMPENSATION JUDGE

Served by mail on all parties listed on the Official Address record on the above date.

BY: Ben Aguilar

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STATE OF CALIFORNIA
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CASE NUMBERS: ADJ9338499, ADJ338498

JOVANNI MONTELONGO	**-vs.-**	**PHIL BRUNO ENTERPRISES, INC., dba EXCLUSIVE FRESH, INC., and ILLINOIS MIDWEST INSURANCE AGENCY on behalf of PROCENTURY INSURANCE COMPANY**

WORKERS' COMPENSATION JUDGE: Stanley E. Shields

DATE: January 20, 2016

JOINT OPINION ON DECISION

INTRODUCTION

Jovanni Montelongo, while employed as a delivery driver by Phil Bruno Enterprises, Inc., dba Exclusive Fresh, Inc., sustained admitted injury to his back on November 2, 2013 (Case No. ADJ9338499) and to his left knee on January 4, 2014 (Case No. ADJ9338498). At the time of both injuries, the employer was insured by Procentury Insurance, with claims administered by Illinois Midwest Insurance Agency.

After the November, 2013 injury, Mr. Montelongo was provided with modified work by the employer. The duration of the modified work was disputed at the recent trial.

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Mr. Montelongo has been seen by a number of physicians, and he currently is treating with Brendan Morley, M.D., a pain management specialist. Howard Sturtz, M.D., an orthopedist, acted as Panel Qualified Medical Evaluator (PQME).

At Trial, Applicant testified on his own behalf. Testifying for Defendant was Vanessa Arroyo, identified as an office assistant for the employer, and Thomas Esteves, a private investigator who testified regarding *sub rosa* films being offered at Trial. The *sub rosa* films were viewed by the undersigned outside court, and a separate summary of the films was filed and served on the parties.

On the day of Trial, Defendant filed a Trial Brief. Applicant was allowed through close of business on November 30, 2015 to file a responsive brief but did not do so.

ADMISSIBILITY OF EXHIBITS

Applicant objected to most of Defendant's exhibits. A ruling on the challenged exhibits was deferred until now.

In regard to Defendant's Exhibit N (subpoenaed records from East Bay Accident Injury), Exhibit O (subpoenaed records of Kemper Specialty Insurance), Exhibit P (report of Matthew Vuksinich, M.D., dated November 4, 2013); Exhibit Q (report of James Boyle, M.D., dated January 10, 2014), Exhibit R (MRI of cervical spine, dated January 23, 2014), and Exhibit T (subpoenaed records of San Francisco General Hospital), Applicant objected on the basis that the exhibits were irrelevant. Exhibit P is a record of a medical provider in connection with Applicant's November, 2013 injury, and Exhibits Q, R, and T are all records of medical providers in connection with the January, 2014 injury. I find each of these relevant as to what was reported by the Applicant and what the medical professionals' initial assessments were.

Exhibits N and O relate to a motor vehicle accident which preceded Mr. Montelongo's injuries at Exclusive Fresh. There is overlap between at least one of the body parts claimed in the motor vehicle accident which occurred on December 6, 2012, and the industrial injury on November 2, 2013. For that reason, I find these exhibits relevant.

Exhibit U, the *sub rosa* films, was objected to on the basis that the films had not previously been turned over to Applicant's attorney. Defendant's attorney made an offer of proof that he personally hand-delivered the films to Applicant's representatives at the Mandatory Settlement Conference (MSC) on August 13, 2015. On that basis, I find the films to be admissible.

Applicant objected to Defendant's Exhibit V, the report of PQME Dr. Sturtz, on the basis that it had not been listed on the Trial Exhibit List filed by Defendant prior to Trial. Although Dr. Sturtz's report was not listed on the document referred to, it was listed on the Pretrial Conference Statement, as required by Labor Code Section 5502, and it was filed and served roughly two months prior to the MSC. I find that there is no basis to preclude its admission into evidence.

Applicant finally objects to Defendant's Exhibit W, a copy of the transcript of Applicant's deposition, taken May 8, 2014. Applicant correctly asserts that this document was not listed on Defendant's Trial Exhibit List, but it was listed on the Pretrial Conference Statement, with the notation that it would be used for impeachment purposes. Applicant's attorney also argued that the deposition had been used improperly. I disagree. The point of offering deposition testimony is to show that the witness has made inconsistent statements under oath. A few minutes before cross-examination of the Applicant began, he testified, under direct examination, that "he had a motor vehicle accident in 2012." (Minutes of Hearing and Summary of Evidence [MOH/SOE], 7:1.) On cross-examination, defense counsel brought out that Mr. Montelongo testified at deposition on May

8, 2014 (Exhibit W, 13:16-18) that he had never been involved in a motor vehicle accident. I find the deposition both admissible and germane to the issues presented for Trial.

ENTITLEMENT TO TEMPORARY DISABILITY INDEMNITY

Applicant claims to have been temporarily disabled from January 4, 2014 through the present. However, he testified (MOH/SOE, 5:21-22) that he received temporary disability indemnity until about April 10, 2014. He also testified (MOH/SOE, 6:17-18) that he received State Disability benefits for about three months, but he didn't know when. Unfortunately, the Employment Development Department has not filed a lien, and no printout of benefits was filed, making it impossible to determine what periods of time are actually at issue.

Since the knee injury in January, 2014, all of the medical evidence indicates that Mr. Montelongo was released to return to work, with or without restrictions. John Morgan, M.D., who saw Mr. Montelongo at San Francisco General Hospital on the day of the injury (Exhibit T), noted a "normal exam," with "no pain in back, no radiating pain" and a "stable gait." James Boyle, M.D., who saw him on January 10, 2014 (Exhibit Q) released him to modified work the same day. Sadegh Saki, M.D., who saw him on March 6, 2004 (Exhibit 8, report date March 7, 2014), released him to modified duty. As recently as July 6, 2015, Brendan Morley, M.D. (Exhibit 5), found that Mr. Montelongo could do modified work.

Vanessa Arroyo, testifying for the employer, gave credible testimony that the employer provided Mr. Montelongo with modified work in between his two injuries. She also testified that the employer tries to provide injured workers with modified work, and that there was one worker on modified duty at the time of the Trial of this matter (MOH/SOE: 9:9-10).

Mr. Montelongo testified that, after his January 4, 2014 injury, he never contacted his supervisor, Joel Ruiz, regarding return to work. (MOH/SOE, 2:2-3.) Mr. Montelongo stated that his experience after his November, 2013 injury—evidently, a short period of modified work—was the reason he didn't talk to Mr. Ruiz.

In this case, there was credible evidence that the employer was willing to accommodate its employees, including Mr. Montelongo, and he made no attempt to return to work on modified duty after his second injury. Under these circumstances, the employer is not responsible for payment of temporary disability indemnity.

I must also note here the general lack of credibility on the part of Mr. Montelongo. He testified at deposition on May 8, 2014 that he had never been involved in a motor vehicle accident. In fact, he had been involved in a motor vehicle accident on December 6, 2012, sought care, hired a lawyer, and received a settlement. Medical care for this injury extended at least through February 18, 2013 (see Exhibit O). It is not reasonable to believe that, at the time of his deposition, he "did not recall" the motor vehicle accident, as he claimed at Trial (MOH/SOE: 7:13-14). There are other inconsistencies between Mr. Montelongo's testimony and the contemporaneous documentary evidence which I find it unnecessary to go into at this juncture.

I find no evidence for entitlement to temporary disability indemnity in the period claimed.

OCCUPATIONAL GROUP

The parties placed occupational group at issue, Applicant claiming group number 491, and Defendant making no specific contention.

Occupational group number 491 applies to agricultural and livestock workers, which is clearly not appropriate.

The appropriate group number appears to be 460. Although this applies to material handlers, as opposed to truck drivers, the amount of lifting involved in Mr. Montelongo's work appears to qualify him for this slightly higher occupational group.

CASE NO. ADJ9338499: PERMANENT AND STATIONARY DATE, PERMANENT DISABILITY, APPORTIONMENT, FURTHER MEDICAL CARE

I find Applicant to have become permanent and stationary for his back injury on March 19, 2015, the date on which he was examined by Dr. Sturtz. Dr. Sturtz reviewed a great deal of records and appears to have conducted a thorough examination. He noted several Waddell's signs, indicating non-anatomical reactions by the Applicant. On examination, he noted that Mr. Monelongo had no problem bending at a 90 degree angle when he was distracted (when the doctor asked him to take off his socks). (Dr. Sturtz's observations mirror the *sub rosa* films viewed by the undersigned. I noted Mr. Montelongo repeatedly bending at a 90 degree angle from the waist, without exhibiting any pain behavior during or afterwards.) I also note that the x-ray and MRI findings for Mr. Montelongo have been relatively benign.

Based on Dr. Sturtz's opinion, I find no permanent disability, and no need for further medical treatment.

CASE NO. ADJ9338498: NEED TO DEVELOP RECORD

There is a conflict in evidence in regard to the Applicant's permanent and stationary date and status in regard to his left knee condition. Of particular significance, I note that the left knee MRI's accomplished on August 6, 2014 (Exhibit S) and March 30, 2015 (Exhibit 6) appear to demonstrate

materially different findings. The PQME was in possession of a lumbar MRI done in February, 2015, but he does not appear to have seen the March 30, 2015 left knee MRI.

I believe that the record is in need of further development to determine the seriousness of the knee condition. It is noted that the treating physician, who is a pain management specialist, not an orthopedist, is recommending a surgical consult.

Until further medical discovery is accomplished regarding the status of the left knee, I don't believe that a determination can be made in regard to permanent and stationary status/date, permanent disability and apportionment thereof, or need for further medical treatment.

ATTORNEY'S FEES

Applicant's attorney has provided valuable services but there is at this time no fund from which an attorney's fee can be paid.

Stanley E. Shields
Workers' Compensation Judge

Served by mail on all parties listed on the Official Address record on the date below:

BY: Ben Aguilar Date: 01-20-2016

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