

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

Case No. ADJ9751139

ADAM ARISTA,

Applicant,

vs.

**NESTLE DREYERS ICE CREAM;
SEDGWICK 14450 LONG BEACH;**

Defendants.

FINDINGS AND ORDER

MAXIMUM MEDICAL

Ana Perez, Hearing Representative
Hearing Representative for Southland Spine Rehab and MH
Express Pharmacy

FLOYD SKEREN MANUKIAN LANGEVIN

Oscar Rodriguez, Hearing Representative
Hearing Representative for Defendant

The above entitled matter having been heard and regularly submitted on April 24, 2018, the **Honorable Eric K. Yee**, Workers' Compensation Administrative Law Judge ("WCJ"), finds and orders as follows:

FINDINGS OF FACT:

1. Applicant, Adam Arista, born on August 20, 1984, while employed during the period from April 1, 2003 to September 23, 2014, as a driver at Corona, California, by Nestle USA, sustained injury arising out of and in the course of employment to his back.
2. Applicant did not sustain injury to his hands, digestive system or stress arising out of and in the course of employment.
3. It is found that the bill and lien of Southland Spine Rehab is disallowed.
4. It is found that the bill and lien of MH Express Pharmacy is disallowed.

ORDER:

IT IS ORDERED that Southland Spine Rehab and MH Express Rehab shall take nothing further on their respective liens filed herein.

DATE: 5/11/18



Eric Yee

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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

BY: R. ENGLISH 5/11/2018

ADAM ARISTA, US Mail
FLOYD SKEREN PASADENA, Email
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MH EXPRESS PHARMACY MONROVIA, US Mail
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SOUTHLAND SPINE REHAB COSTA MESA, US Mail

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

WCAB Case No. ADJ9751139

ADAM ARISTA
Applicant

vs.

NESTLE USA
Employer

4/1/2003 – 9/23/2014

Date of Injury

ACE INSURANCE administrated by
SEDGWICK CMS
Insurance Company

Workers' Compensation Administrative Law Judge:

ERIC K. YEE

DATE: May 11, 2018

OPINION ON DECISION

The matter was heard and submitted on April 24, 2018, regarding the liens of Southland Spine Rehab of \$24,407.74 and MH Express Pharmacy of \$18,051.74.

DISCOVERY ISSUE:

Defendant objects to the admissibility of Southland Spine's (lien claimant) Exhibits 9 through 13, asserting these five exhibits were not clearly or properly identified with specificity on the pre-trial conference statement (EAMS ID 66355896, pages 7 through 9) as required pursuant to Title 8, California Code of Regulations ("Regulation"), section 10629, subsection (d).

These exhibits are five Requests for Authorization of treatment ("RFA") dated 2/18/15, 4/3/15, 5/18/15, 9/4/15 and 10/27/15 by Evan Marlowe, M.D., which were attached to respective PR-2 reports dated 2/17/15, 4/2/15, 5/15/15, 9/3/15, and 10/14/15.

The court agrees and adds that these exhibits were not listed as an exhibit. The pre-trial conference statement exhibit list only notes 14 medical reports by Dr. Marlowe, but none of the listed documents correspond to these RFAs attached to the medical reports contained in Exhibits 9, 10, 11,

12, or 13. There is also a question of whether or not these PR-2 medical reports of Exhibits 9 through 13 are substantial medical evidence.

Regulation section 10770.1, subsection (h) states, "Discovery shall close on the date of the lien conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the lien conference." In this case, the lien conference was held on January 11, 2018, and the parties completed the Pre-trial Conference Statement and listed their respective exhibits (EAMS ID 66355896). The RFAs were not properly identified or listed.

Based on the foregoing objection and noted Regulations, the RFAs attached to Exhibits 9 through 13 are excluded and not admitted into evidence.

This court found an illegible permanent and stationary report by Dr. Marlowe dated April 5, 2016. It was attached to a second bill review request identified as Exhibit 6, pages 27 to 48. Since this report was not properly identified and is completely illegible, this court excludes Exhibit 6, pages 27 to 48, the report of Dr. Marlowe dated April 5, 2016.

STIPULATED FACTS:

The parties stipulated to the following facts:

Applicant, Adam Arista, born on August 20, 1984, while employed during the period from April 1, 2003 to September 23, 2014, as a driver, at Corona, California, by Nestle USA, sustained injury arising out of and in the course of employment to his back, and claims to have sustained injury arising out of and in the course of employment to his hands, back, digestive system, and stress. The employer has furnished no medical treatment and the primary treating physician is Evan Marlowe, M.D.

The issues are: 1. Liability for self-procured medical treatment; 2. Liens of MH Express and Southland Spine and Rehab; 3. Disputed AOE/COE; 4. Whether services were reasonable and

necessary per Labor Code section 4600 and CCR 9785; 5. Southland Spine's compliance with Labor Code section 4903.8; 6. Whether the treating physician is entitled to medical-legal services and at the medical-legal rate; 7. Lien claimants' entitlement to penalties and interest; 8. Whether lien claimants are entitled to OMFS; and, 9. Whether lien claimants are entitled to treat up to \$10,000 prior to the denial of claim per Labor Code section 5402, subsection (c).

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT:

Based on the parties' stipulation, the court only finds applicant had a cumulative trauma to his back while working for Nestle USA from April 1, 2003 to September 23, 2014.

The court does not find any other compensable claim, part of the body or condition. There was no testimony offered by the parties to support additional findings. Specifically, no witnesses testified at trial to support the claim or the additionally asserted parts and conditions of hands, digestive system or stress. The lien claimants' representative stated the applicant was under a subpoena to testify but was not present at trial. The lien representative declined the court's offer to continue the trial to allow applicant's testimony. Both parties did not call a witness to testify and rested after submitting their respective exhibits.

The medical reports which provide some insight to the case are by Mitchell Geiger, M.D., the panel Qualified Medical Examiner ("QME").

Dr. Geiger's initial QME report dated February 12, 2016 (Exhibit C) summarized his opinion about causation on page 35. He stated the examination of the back was completely normal and the x-rays of the hands and back were normal. He opined there was currently insufficient objective findings to conclude that the applicant has residual lower back and hand pain.

Dr. Geiger issued a subsequent report dated October 27, 2016. (Exhibit B.) He questioned applicant's veracity and noted applicant last worked for Nestle in September 2014 when he was terminated. (Exhibit B, page 2.) On page 3 of Dr. Geiger's report dated October 27, 2016, Dr. Geiger continued:

My diagnoses were: Cumulative trauma claim, post termination, CT April 1, 2003, through September 23, 2014, with bilateral hand, back pain; CT claim for digestive psyche and stress; per medical records, bipolar disorder, currently on multiple medications.

I discussed causation. I noted that there were some issues with regard to the applicant's claim that he had no prior history of injury, problem or need for medical care for the lower back, wrists or with regard to other conditions such as psychiatric. I found that there were multiple issues with regard to the applicant's history.

Dr. Geiger further noted applicant's MRI report dated September 1, 2016 showed minimal findings and the EMG/NCV study of the lower extremities was normal. He concluded the lumbar MRI is normal for age with small disc protrusions. His examination was normal with the exception of complaint of tenderness in the lumbar paraspinals and minimal loss of lumbar range of motion. (Exhibit B, page 3).

LIEN CLAIMANTS' BURDEN OF PROOF:

Labor Code section 3202.5 states: "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law."

Labor Code section 5705 states: "The burden of proof rests upon the party or lien claimant holding the affirmative of the issue."

As stated on page 1117 of the Appeals Board's en banc decision of *Tito Torres vs. AJC Sandblasting and Zurich North America* (2012) 77 CCC 1113:

After an applicant's underlying claim is settled, a lien claimant becomes a party and stands in the shoes of the applicant. Like any other party, a lien claimant bears the burden of proving all elements necessary to establish its claim.

In this case, the case in chief resolved by a \$35,000 compromise and release agreement on December 21, 2016 (EAMS ID 62651746). On page 15 of this agreement, the parties included a *Thomas* finding addendum which stated AOE/COE was in dispute. The Honorable Robin Woolsey approved this agreement on January 25, 2017 (EAMS ID 62651775), noting that a finding is made that a serious and legitimate issue exists which, if resolved against the injured employee, would defeat the employee's rights to all workers' compensation benefits."

Applying the above-referenced authority to this case, the court finds lien claimants, Southland Spine and MH Express Pharmacy, failed to meet their burden of proof to allow recovery of their liens. Based on the parties' stipulation, they have only proven that applicant has a compensable cumulative trauma injury to the back. However, both Southland Spine Rehab and MH Express Pharmacy have not proven all of the other elements necessary to establish its claim. They have not provided evidence that the services rendered were related to the back claim.

WHETHER SERVICES WERE REASONABLE AND NECESSARY AND AUTHORIZED:

Labor Code section 4600 states "Medical, surgical, chiropractic, acupuncture, and hospital treatment . . . that is reasonably required to cure or relieve the injured worker from the effects of his or her injury shall be provided by the employer."

Title 8, California Code of Regulations, section 9785 provides the reporting duties of the primary treating physician.

Applicant was not present and did not testify that the purported services helped him or was related to this case. In contrast with Dr. Geiger's QME reports (Exhibits B and C), it appears the providers' services were excessive and unwarranted. The lien claimants' exhibits showed they provided many types of services including acupuncture, biofeedback, chiropractic manipulation, functional capacity evaluations, internal medicine, neurology, physical therapy, psych and urinalysis. However, Dr. Marlowe, the primary treating physician, did not prove such services were reasonable or necessary to cure or relieve applicant from the effects of his injury as required by Labor Code section 4600.

Moreover, Dr. Marlowe, the primary treating physician, failed to show that he complied with Title 8, California Code of Regulations, section 9785. Dr. Marlowe referred applicant to many specialists but failed to incorporate those specialists' findings or provide a medical assessment of applicant's condition.

Lastly, both lien claimants did not present admissible evidence that their services were properly requested as required under the statutes and regulations, including Title 8, California Code of Regulations, section 9792.9.1(a). They attempted to introduce five RFAs, but those exhibits marked for identification as Exhibits 9, 10, 11, 12, and 13 were excluded.

Further, MH Express Pharmacy's medication were prescribed by E. Richard Dorsey, M.D., a secondary psychiatric treating physician. (Exhibits 22, 30, 31 and 32.) However, this lien claimant failed to establish a compensable psychological claim as addressed above under the AOE/COE heading. In addition, a psychological condition was never formally plead. The Application for Adjudication dated November 21, 2014 (EAMS ID 54698589) had "841 Nervous system – stress" and not "842 Nervous system – Psychiatric/psych."

Thus, based on the foregoing issues which the lien claimants failed to prove, the liens of Southland Spine and MH Express Pharmacy are disallowed.

OTHER ISSUES:

All other issues are rendered moot by the finding that the liens of Southland Spine Rehab and MH Express Pharmacy are disallowed.

DATE: 5/11/18



Eric Yee
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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ON: 5/11/2018 BY: R. ENGLISH