

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

**Case No. ADJ10493638 (MF);
ADJ10245813**

JOSE CERVANTES,

Applicant,

vs.

**SHAPCO INC DBA IMPERIAL PIPE;
INSURANCE CO OF THE WEST SAN
DIEGO;**

Defendants.

**JOINT
FINDINGS OF FACT**

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

FINDINGS OF FACT

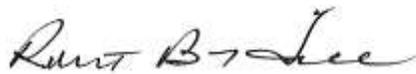
1. Jose Cervantes, born 11/19/1957, while employed as a welder at Riverside, California, by Shapco, Inc. dba Imperial Pipe Services, did not sustain injuries as alleged: (1) ADJ10493638 (MF) on 12/1/2015 to the right knee and right elbow, nor (2)ADJ10245813 on 11/14/2014 through 11/14/2015 to the neck, wrists, back, shoulders and right knee.
2. As to the claim of injury ADJ10493638 on 12/1/2015, the defendant has sustained its burden of proof that such claim is barred as a post-termination claim pursuant to Labor Code Section 3600(a)(10).
3. At the time of the claimed injuries, the employer's workers' compensation carrier was the Insurance Company of the West.

4. As to the claim of injury ADJ10245813, the court finds the opinion of the panel qualified medical evaluator (PQME) Dr. Anthony Fension persuasive that the applicant did not sustain cumulative trauma injury as alleged, and further that this case is barred as a post-termination claim pursuant to Labor Code Section 3600(a)(10).

ORDERS

- a. The report of Dr. Anthony Fension dated 5/5/2017 is admitted as Joint Exhibit "2".
- b. The correspondence of defense counsel dated 5//10/2017 to include the affidavit of Jerry Wilkow is admitted as Defendant's Exhibit "D".

DATE: 6/15/2017



Robert Hill

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the
Official Address record on the above date.
BY: S. Burke 6/15/17

EDD SDI SAN BERNARDINO, Email
FLOYD SKEREN RIVERSIDE, Email
GILBERT MATURINO MIRA LOMA, US Mail
INSURANCE CO OF THE WEST SAN DIEGO, US Mail
JOSE CERVANTES, US Mail

OPINION ON DECISION
[Labor Code Section 5313]

Jose Cervantes, born 11/19/1957, while employed as a welder at Riverside, California, by Shapco Inc., dba Imperial Pipe, claims to have sustained the following injuries:

- ADJ10493638(MF)-12/1/2015 to the right knee and right elbow.
- ADJ10245813-11/14/2014 through 11/14/2015 to the neck, wrists, back, shoulders and right knee.

At the time of these injuries, the employer's workers compensation carrier was the Insurance Company of the West.

In connection with these claims, the applicant's treating physician was Dr. Roland Lopez (Applicant's Exhibit "1"), and further he was evaluated by the panel qualified medical evaluator Dr. Anthony Fenison (Joint Exhibit "1").

Based on the applicant's testimony, his injury was unwitnessed, although he claims to have reported this to his lead man Felipe Vasquez. The applicant's testimony as well as his deposition of 6/29/2016 confirmed that he had not reported the injury to anyone else (Defendant's Exhibit "B"). It was the defendant's position, based on the combined testimony of Mr. Vasquez, as well as the plant manager Albert Chico and the projects manager Henry Atilano, that the claimed injury was not reported until after his lay off on 12/4/2015 (Defendant's Exhibit "A"). Noteworthy is that the applicant continued to work after his claimed injury, and continued to do so up until his layoff.

The combined testimony supports that on 12/2/2015, the applicant received a favorable work performance which would support a raise, but that shortly after that he was called to the office to receive his lay off notice, and that he was the only employee to be laid off at the time.

Dr. Fenison concluded that as the result of the claimed specific injury, the applicant would not be deemed to have reached a point of maximum medical improvement (MMI) and

that he was in need of continuing medical treatment for the right knee. He also did not find evidence of the claimed cumulative trauma, nor injury to the other claimed body parts.

The record also reflects the applicant's prior cases as against his former employer Ameron International, both as for the left knee, under case numbers ADJ9840952 (date of injury 10/13/2013) and ADJ10271749 (date of injury 1/1/2013 through 5/1/2014).

At the time of Trial, the applicant raised the alleged late denial of the cumulative trauma claim and the presumption of injury under Labor Code Section 5402. As this would go to the overall issue of injury AOE COE, but noting this had not been raised in the Pre-Trial Conference Statement, the matter was continued to 4/24/2017 to allow the defendant to provide further evidence on this issue. Further the parties were directed to have Dr. Fenison review the Summary of Evidence, and to re-review the claim of cumulative trauma injury.

At the time of the continuation Trial of 4/24/2017, the parties confirmed that a supplemental report had been requested of the PQME Dr. Fenison. As to the issue of the late denial of the companion case ADJ10345813, the defendant indicated that further evidence would be submitted in the form of witness affidavit, and was given until 5/12/2017 to submit such evidence. The parties were given until 5/26/2017 to advise as to the status of Dr. Fenison's report and whether further discovery was necessary, and the applicant given until that same date as to their objection to the entry of the additional evidence proposed by the defendant. The case was to be otherwise submitted for decision as of 5/26/2017.

Subsequently, Dr. Fenison's report dated 5/5/2017 was filed, to include his review of the Summary of Evidence, and his conclusion that this did not alter his previously stated opinion. Further, the defendant's correspondence dated 5/10/2017 was received, to include the affidavit of Jerry Wilkow, confirming the employer's first knowledge of injury as being subsequent to termination on 1/7/2016. A Notice of Intention to Submit Case for Decision issued on 5/24/2017. No objection was received.

The issues presented at the time of Trial were as follows:

ADJ10493638(MF):

Injury AOE COE:

The issue here is whether the claimed is barred as a post-termination reporting of the claimed injury pursuant to Labor Code Section 3600(a)(10). The applicant testified in a

credible manner that he reported this to his lead man Felipe Vasquez; in rebuttal, Mr. Vasquez testified in a credible manner that no such report had been made.

Defense witness Chico recalled the applicant reporting a fall from a ladder at home with a resulting cut chin and 2 lost days from work.

Defense witness Atilano likewise testified that such an injury had not been reported to him.

The affidavit of Jerry Wilkow (Defendant's Exhibit "D") confirmed that the employer's first knowledge of injury occurred after termination on 1/7/2016.

There is no record of medical treatment to the right knee or elbow which would otherwise serve as an exception to Labor Code Section 3600(a)(10). Thus, this issue rests on the respective credibility of the applicant as opposed to witness Vasquez.

Noteworthy is that following the claimed injury, the applicant continued to work through the time of his layoff two days later, and was observed at work with no apparent impairment. Further, the un rebutted testimony of witness Chico was that the applicant had lost 2 days from work following a fall from a ladder at home, closely paralleling the claim of injury in this case.

While Dr. Fenison has concluded that the applicant is temporarily disabled, this is predicated upon the history of the specific injury. Likewise, the reporting from Dr. Lopez is predicated upon that same history. After considering the respective testimony of the witnesses, and the totality of the circumstances in this case, the court concludes that the applicant did not report an injury prior to the notice of termination or layoff, and further that there is no record of medical treatment prior to this notice, and as such the claim is barred as a post-termination claim under Labor Code Section 3600(a)(10).

All other issues to include the applicant's knowledge under Labor Code Section 5412 are deemed moot.

ADJ10245813:

Injury AOE COE:

While the defendant's denial of the cumulative trauma claim is not timely pursuant to Labor Code Section 5402, this shifts the burden of proof to the defendant to establish that the injury did not occur as alleged.

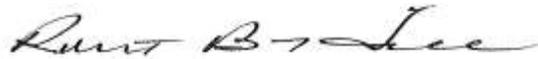
The PQME Dr. Fenison stated in his reporting that he does not find evidence of a cumulative trauma. Further, there is no record of the report of such claim or prior medical treatment prior to the notice of termination or layoff. His opinion was not altered in his supplemental report.

The reporting of applicant's Dr. Lopez, while confirming treatment for the alleged cumulative trauma, does not contain a detailed history, record review or conclusion as to causation.

Thus, the court finds Dr. Fenison's report persuasive on this issue, and it is found that the defendant has sustained its burden of proof that the injury as alleged did not occur, and further is barred as a post-termination claim.

All other issues are moot.

DATE: 6/15/2017



Robert Hill

WORKERS' COMPENSATION
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