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Case No. NOR 0195000; 0198308

LUIS CORDOVA,

Applicant

vs.

BEN-WAL;
REPUBLIC INDEMNITY CO.A

Defendants.

FINDINGS AND ORDER

SCHEFFIELD MEDICAL GROUP, lien claimant
KEGEL, TOBIN & TRUCE BY THEODORE HANF, attorneys for defendants

Application having been filed herein; all parties having appeared and the matter having been regularly submitted, the Honorable JULES L. GREENBERG, WORKERS' COMPENSATION JUDGE, now finds and orders as follows:

FINDINGS OF FACT

1. The medical legal reports of Dr. Azari were violative of Labor Code 4628(3)(d).

2. The medical legal reports of Dr. Azari are denied admission into evidence for any purpose and defendant is not liable to pay lien claimant pursuant to Labor Code 4628(3)(e).

3. The initial medical legal report of Dr. Azari took place before a contested claim existed.

4. The initial medical legal report of Dr. Sulindro took place before a contested claim existed.

5. The medical legal reports of Dr.Sulindro were violative of Labor Code 4628(1).

6. The medical legal reports are denied admission into evidence for any purpose and defendant is not liable to pay lien claimant pursuant to Labor Code 4628(1).

7. Because of the above findings 1-6, the lien claimant has no scientific (expert medical) proof of industrial injury. This and the fact that applicant did not offer any lay testimony means that lien claimant failed to prove industrial injury and as a result any medical treatment lien charges must be disallowed.

8. The lien claimant would be unjustly enriched by retention of sums already paid to it by defendant as a result of defendant following the order of the WCAB to pay a prior award to the lien claimant.

9. It remains to be determined if Dr. Azari knowingly violated Labor Code 4628.

10. It remains to be determined if Dr. Sulindro knowingly violated Labor Code 4628.

ORDER

IT IS HEREBY ORDERED THAT THE SCHEFFIELD MEDICAL GROUP CAN TAKE NOTHING BY REASON OF THESE FINDINGS AND THIS OPINION HEREIN. FURTHER, SCHEFFIELD MEDICAL GROUP BE AND HEREBY IS ORDERED TO RETURN FORTHWITH TO THE DEFENDANT WITH INTEREST ACCRUED THEREON THE SUM OF $6,772.72 PAID BY DEFENDANT REPUBLIC INSURANCE ON NOVEMBER 1, 1995..

FURTHER IF THE LIEN CLAIMANT OR THE DEFENDANT KNOWS THE WHEREABOUTS OF THE PHYSICIANS NAMED HEREIN AS VIOLATING LABOR CODE 4628, THEY ARE ORDERED TO PROVIDE THAT INFORMATION TO THE BOARD WITHIN 10 DAYS OF SERVICE OF THIS ORDER, SO THAT SUPPLEMENTAL HEARINGS MAY TAKE PLACE AS TO CIVIL PENALTIES.

JULES L. GREENBERG
WORKERS' COMPENSATION JUDGE

Dated at Anaheim, California
Served by mail on parties checked on the
Official Address Record effected on above date.
BY: 81 20/96

A PETITION FOR RECONSIDERATION FROM THIS DECISION SHALL BE FILED ONLY AT THE ANAHEIM DISTRICT OFFICE OF THE WORKERS' COMPENSATION APPEALS BOARD.

CASE NO. NOR 0195000; 198308

LUIS CORDOVA VS. BEN-WAL
REPUBLIC INDEMNITY CO.

WORKERS' COMPENSATION JUDGE: JULES L. GREENBERG

OPINION ON DECISION FOLLOWING RE-SUBMISSION
IN RE: THE LIENS OF SCHEFFIELD MEDICAL GROUP

A short review of the history of this case is in order.

I wrote an opinion on decision and issued a findings and award on October 23, 1995. It contained a very comprehensive history of this litigation and the findings that Scheffield was entitled to its charges for both medical legal and medical treatment.

Here is what happened. This was your standard post - termination stress claim filed before the Reform Act of 1993 ended almost all of these types of claims. The applicant, a pressman was laid off on October 23, 1991 and alleged psychiatric stress and stress to other body parts. The employer was served the claim form, for this C.T. injury by mail on November 8, 1991.

The original attorney Moton B. Holt substituted out of the case in favor of Helen E. Simmons. The defendant in an effort to bring closure to this case filed an application on February 25, 1994.

The case was set before me at a mandatory settlement conference on April 5, 1994. The parties and Scheffield did appear and stipulations and issues were drafted. The defendant listed numerous violations of the labor code including 4620, 4621, 4628, reimbursement of payments made, costs of defending a case of fraud, violation of insurance code 1871.4 (fraudulent claim). Further the defendant asked for exclusion of all the medical reports prepared on behalf of the applicant for the case in chief.

I continued the MSC, because at the time, the applicant attorney stated she would be filing a new claim for a specific injury to applicant's finger. I allowed her time to do that so that the two claims would then be consolidated and the defendant would have a chance to engage in discovery before the MSC concluded.

On August 17, 1994, the date set for the MSC, applicant, defendant, and lien claimant appeared but not applicant's attorney.

I granted defendant leave to complete the stipulations and issues and set the matter for trial on all issues on March 1, 1995. As to any finger injury, that matter was taken off calendar.

On March 1, 1995, the parties appeared as did lien claimant and Mr. Cordova was able to enter into a compromise and release which I approved for $1,650 with a Thomas Waiver. The Thomas waiver recited inter alia that :

> *"Defendant would introduce the sworn testimony of Jamshid Azari, M.D., given in U.S. District Court proceedings (sic) (and admissible under Labor Code Section 5703) to demonstrate that applicant's medical reports are invalid and inadmissible as a violation of Labor Code Section 4628. Defendant would also show that the purported presenting complaints as contained in the Scheffield (aka Pace) medical reports are standard language appearing in virtually every report prepared by Dr. Azari during most of 1991 and early 1992. As such it does not constitute substantial medical evidence."*

On March 1, 1995, I ordered the defendant to give notice of a lien claim trial to all lien claimants and to serve them with any medical reports. The applicant was ordered back to the new trial date of July 7, 1995.

On the date of the lien claim trial, applicant did not appear but Scheffield and defendant agreed to submit all issues on the exhibits. After a findings and award in favor of the lien claimant, defendant petitioned for reconsideration in a timely fashion on November 13, 1995. The Findings and Order were then rescinded and the matter set for hearing on 12-18-95. The defendant is now seeking in addition to disallowance of all the lien charges, an order directing repayment of the award paid to Scheffield, should this petition be successful.

Before the decision could be served, the Norwalk board closed and all files were transferred to Anaheim. This file was one of several that surfaced just recently and had not appeared on a list of submitted cases. I apologize for the delay that this caused, as it certainly was not intended.

The petition by defendant sets forth a clear sequence of events and cases relating to those facts, which calls for a finding in opposite of the one previously reached. The issue clearly is the admissibility of the PROOFERED medical reports, according to the defendant. But as I indicated in my first opinion, that is only half the story.

This threshold issue of admissibility under 4628 was raised by the defendant at the MSC. The offer of proof on the Thomas waiver identifies evidence to be utilized to prove a violation of 4628 took place. The copy of the transcript made reference to was placed in evidence, and I have had a chance to review it, again.

The physician, Dr. Azari, testifying at his deposition (11-10-92) in Zenith v. Leonard Breslaw, et. al. provided evidence that he was paid only a certain amount of money per patient.

The amount paid for an initial evaluation was $80 and the amount of money for a final or permanent and stationary evaluation was $50. The billing from Scheffield, is as illustrated by defendant far in excess of those sums. The inference is raised that this physician (as well as others) may have acted in the capacity of independent contractors, turning out reports by the dozens while the provider reaped a whirlwind of profits. Defendant contended it shifts the burden to the lien claimant to rebut, to show that the charges, considering all overhead expenses were reasonable. The defendant suspected a "mill" type operation where numerous reports of this kind were produced on a mass basis.

That this is more than just a suspicion, is revealed by the other reports filed during this same period of time by this physician. The reports, all of different individuals, from various employers and different occupations, were given essentially the same diagnoses, of:

"NERVOUSNESS, ANXIETY, DEPRESSION & SLEEP DISORDER TENSION HEADACHE WITH MUSCLE CONTRACTION. MYALGIA. ABDOMINAL PAIN., POSSIBLE ESOPHAGITIS."

The history and the medical findings like the diagnoses were carbon copies:

HISTORY: *" PATIENT WAS UNDER HEAVY SUPERVISORY PRESSURE AND WAS INJURED AT WORK."*

MEDICAL FINDINGS: *"NERVOUSNESS, HEADACHES, GASTROINTESTINAL DISCOMFORT AND MYALGIA."*

DISCUSSION

The applicant was evaluated by physicians from Scheffield, initially prior to the inception of a contested claim. The defendant is correct that the same date the claim form. was prepared, the evaluation was performed. The employer did not receive notice of this claim until two days later. This initial evaluation by definition and case law, could not be one that was needed for forensic purposes. The defendant should not be liable then to pay for the $995.00 in charges, for this report.

I will now address the admissibility argument. The defendant did properly raise that at the time of the MSC. In fact if they are able to make a showing of inadmissibility of the medical legal reports, because of 4628 violations, they are also relieved of liability to pay for those same reports..

There were two reports by Dr. Azari, the initial one discussed above which was prior to a contested claim arising and the final one, a P & S internal medicine report billed at $980.00.

The remaining reports are those by another physician, Dr. Sulindro (initial and P & S evaluations each at $970.00).

First, the evidence presented by the defendants, was specific to the reports by one physician, Dr. Azari. While it is not, specific to this case, it does show a pattern of conduct, from which some logical inferences can and should be drawn. The evidence is sufficient to cause me to believe that Dr. Azari, was an independent contractor and the billing is as pointed out far in excess of what Scheffield was paying to Dr. Azari.

Being an independent contractor and receiving payment under what is billed to the carrier, is in and of itself not necessarily a violation of Labor Code 4628(d). The carrier must use some caution in approaching this subject, from a purely monetary standpoint. This was the case in National Union Fire Ins. Co. v. W.C.A.B. 60 Cal. Comp. Cases 235. In the latter case the physician was paid as an independent contractor, the sum of $268.00 and the provider medical group billed the carrier for $1,070.00.

In the instant case the disparity between provider billing and payment that the physician obtained is 150% greater. Given such a large disparity existed, the burden became one of the provider showing that there was reasonable overhead expense included in the billing to the carrier. Since no such showing was made by Scheffield the conclusion can be drawn that the charges were in violation of the statute and the report is inadmissible. The report being inadmissible under 4628(d), the carrier is relieved of liability under 4628(e) to pay for it.

The physical medicine, (orthopedic) reports of Dr, Sulindro were also at issue. The defendant has never directly addressed these reports as it did with respect to Dr. Azari to show a violation of 4628.

Dr. Sulindro, examined the applicant on December 3, 1991. The applicant injured the tip of his right index finger in August of 1990, as well as other other injuries alleged.* when he reached into the rollers to grab some paper and the tip of his finger was caught. He lost his fingernail and the wound was treated with sterile dressing, and X-rayed. He was released to return to work at his regular duties, which he was able to perform for a year. He used a plastic protective covering over his finger tip, which he bought on his own.

He last worked on October 23, 1991 when he was laid off. He signed a claim for E.D.D. benefits on November 6, 1991. On that same day, he filled out the top portion of a DWC-1 claim form alleging a continuous trauma claim to *"various body parts & stress to psyche"*

The employer acknowledged receipt of this claim on November 8, 1991. The issue then becomes, when did the employer or carrier have the requisite notice/knowledge of the body parts alleged as injured (other than psyche)? This generally comes in one of two ways. First, by service of a new or amended claim form upon the defendant. Secondly, by way of service of a medical report detailing the injury and asking for provision of some benefit(s), usually medical treatment and temporary disability indemnity.

Applicant's counsel did not file an application to adjudicate the claim, it was the defendant that did so, at the beginning of 1994. Even at that point all the body parts alleged injured were not listed and no specific injury was claimed. Not until I began meeting with the parties in the summer of 1994, did it become apparent to the applicant's attorney that various aspects of this case needed to have the pleadings corrected. My notes at the June 10, 1994 MSC indicate that no specific finger injury had yet been claimed, although a forensic report had been obtained.

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* The exact date of this injury is either February 1991 or August 1990, depending on whether it is applicant's or defendant's report.

The earliest the defendant would have been put on notice exactly which orthopedic injuries, were being alleged and why, would have been by service of the medical report and billing of Dr. Sulindro. This took place according to the record no earlier than January 13, 1992 (or several days thereafter).

The point behind the recitation of these facts is simply that the carrier is being asked to pay for a forensic examination, before a claim was filed, and before they learned what body parts were alleged to be injured. This subverts the very essence of the statutory scheme which is to prevent these kinds of expenses, unless the carrier is knowingly denying some benefit to which the applicant is entitled or there is no question that litigation must take place. On the other hand if the employer had by service of the report constructive if not actual notice of an injury.

The need for such a report is highly questionable, when a claim is not even filed for two and a half years from the date the examination is conducted.

The reports by this physician are alleged to be medical-legal ones, Scheffield must face the fact that the initial evaluation took place prior to a contested claim, since the employer's first notice of a claim for this injury could only have come after the report was served.

Both reports however suffer from another shortcoming. The WCJ is in agreement with the defendant that the content of the reports could not be used to prove a disputed medical fact about this claim. That is because the content is sheer and utter nonsense disguised as a medical legal report.

The fact that the applicant had no labor disabling symptoms, took off no time from work, and required no treatment prior to his layoff is ignored. The applicant at this point was also re-employed, doing essentially the same job as he did for his former employer and continued in this capacity at least through February 1993.

Nonetheless, Dr. Sulindro concludes that he is totally and temporarily disabled. The treatment prescribed, home exercises and rubbing Vickes medicated cream on his finger, is not shown to preclude him from his usual and customary occupation.

A defendant who desires to deny payment on the basis of a false and inaccurate history, must plead and prove that defense which is usually served on the provider initially in the form of a written objection to payment by the defendant.

However I must point out that a "complete history" is I believe a lower and more basic standard of requirement under Labor Code 4628. Notwithstanding if the history is "false and inaccurate" if it turns out that the report's history is merely *incomplete* it is violative of 4628. It will denied admission and the defendant will not be liable to pay for it. I decided to utilize the standard Webster Dictionary definition of the word incomplete:

1 *"lacking a part or parts; not whole; not full"*
2 *"unfinished; not concluded"* 3 *" not perfect; not thorough"*

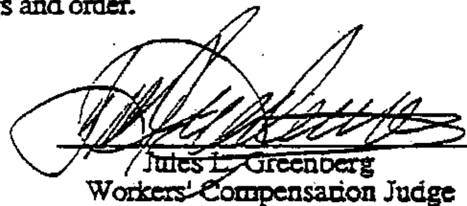
A complete, history is one that would not leave out the fact that the applicant was searching for employment in the same field that he just left. That he did not consider himself disabled for employment as a printer because of his finger injury and that at just about the same time as he was being examined by Dr. Sulindro, he did find employment with Mailing Marketing as a printing press operator. He was laid off from Mailing Marketing only two weeks before he was examined for defendant by Dr. Benjamin E. Lesin, M.D. a hand surgeon.

What Dr. Sulindro had in her report might rise to the level of false and inaccurate but it is unnecessary in this case to reach that analysis. Suffice it to say that it was incomplete enough to render the report useless as a vehicle to prove a compensable injury, that is, one that was worthy of considering it the source for applicant to be the recipient of temporary and total disability indemnity.

This brings us to the last of the charges, those for treatment. This of course may be the shortest of the analyses of the billings and charges by Scheffield. Indeed if there are no admissible reports on behalf of the applicant, i.e. if every report is deemed inadmissible secondary to violations of 4628, then there is no basis to conclude that lien claimant could show even a prima facie case for an industrial injury. Thus, despite the award in the form

of a small lump sum, lien claimant is unable to obtain payment as there is no medical evidence of a compensable injury. Even with admission of the medical evidence there would still be considerable problems because of the rebuttal effect of defendant's medical reports. All things being equal, in addition to the medical expert or scientific evidence, Scheffield would still need credible lay testimony from the applicant, which was not presented.

The defendant acted properly by making payment to Scheffield based on the findings and award made in Scheffield's favor. They are also acting properly now by requesting that Scheffield return those funds to them. They are entitled to reimbursement/restitution by this findings and order.



Date: 8/20/96

Jules L. Greenberg
Workers' Compensation Judge

JLG:nbg