

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

CONNIE FLOYD,

CASE No. LAO 0755177

Applicant

vs.

HERBALIFE INTERNATIONAL, TRAVELERS
INSURANCE COMPANY,

Defendants

FINDINGS, AWARD
AND ORDERS

FINDINGS OF FACT AND LAW

1. Connie Floyd, born March 11, 1968, while employed for the period April 16, 1997 to May 22, 1998 as a switchboard operator, occupational group 112 at Inglewood, California, by Herbalife International, then insured for workers' compensation by Travelers Insurance Company, did not sustain injury arising out of and occurring in the course of her employment.

2. Average weekly earnings were sufficient to produce a compensation rate of \$274.00 a week for temporary disability and maximum for permanent disability.

3. Reasonable expense to prove a contested claim was incurred for the services of Med-Legal Photocopy, \$347.54 and \$207.90, and Maria Mayoral, M.D., \$1,250.00.

4. D. Appleton, Ph.D. has complied with the requirements of Labor Code Section 5703.

5. A presumption of compensable injury did not arise as liability was timely denied.

6. There are no funds available for attorneys' fees.

7. All other issues are moot.

AWARD

AWARD IS MADE against Travelers Insurance Company and in favor of providers of medical legal services as shown in finding 3 above.

ORDERS

IT IS ORDERED that applicant Connie Floyd and lien claimants Employment Development Department, Maria Mayoral, M.D. for medical treatment services, AD-RX Pharmacy and lien claimant for attorney services Hinden, Grueskin & Aguirre, take nothing herein.

Filed May 15, 2000
at Los Angeles, California
Served by mail as shown on
the Official Address Record
on MAY 18 2000
by [Signature]

[Signature]
WCJ Barbara Burke

CONNIE FLOYD

vs

HERBALIFE INTERNA-
TIONAL; TRAVELERS
INSURANCE COMPANY

Workers' Compensation Judge:

Barbara Burke

Date of Injury:

04/16/97-5/22/98

OPINION ON DECISION

Reliance is placed on the credible, persuasive testimony of witness Catherine Garmany and the court's evaluation of applicant Connie Floyd's testimony in determining applicant has not sustained her burden of proof to support of finding of compensable injury arising out of and occurring in the course of her employment. Specifically, witness Garmany rebuts the history that is the foundation for the opinion of psychiatrist Maria Mayoral, M.D., applicant's primary treating physician for her psychiatric claim of continuous trauma. Garmany's testimony also establishes employer action and reaction to applicant's conduct as lawful, non-discriminatory good faith personnel action which bars applicant's recovery. Labor Code Section 3208.3(h).

A presumption of compensable injury did not arise in this case as applicant's claim was made June 15, 1998 and denial timely issued September 1, 1998. The burden of proof for any disputed injury lies with applicant, Labor Code Section 3202.5, Swezey, California Workers' Compensation Practice, 3d ed., Section 8.45. For a claim of psychiatric cumulative trauma applicant has the additional burden of showing that employment events were "predominant as to all causes" Labor Code Section 3208.3(b)(1). Section 3208.3, effective for injuries after January 1, 1990, was enacted to raise the threshold of compensability for psychiatric injuries, Section 3208.3(c) here, too high for applicant to prevail.

Defendant employer and its compensation carrier have the burden of proof to show the employer's personnel actions were lawful, non-discriminatory, and taken in good faith. If those actions were the basis of applicant's claim of psychiatric injury, her claim for benefits is barred by Labor Code Section 3208.3(h).

Dr. Mayoral's history in her initial report, dated August 13, 1998, is at pages 2-3. [App.#1]. She notes stress began June 1997 when another employee "set out to humiliate her and assassinate her character" : . . "did not like her and picked on her." [page 2]. Applicant was taken aside by supervisor "Debra", who asked why applicant was "picking on Lynn". Dr. Mayoral notes a history of applicant not wanting to come to work and feeling a great deal of stress and tension.

Other sources of stress are cited by Dr. Mayoral as requiring contemporaneous medical treatment, for a kidney infection, for migraine headaches, and 36 days of continuous menstrual bleeding. The kidney infection is attributed to being denied use of bathroom facilities at work. The migraine headaches and extended menstrual bleeding are attributed to stress, from being singled out, treated differently from other employees, told she did not get along well with others, denied access to a meeting of employees to learn how to make money selling the employer's products, being considered overweight and stupid, and being told she was late for work twice in one week although she arrived at work an hour early.

Dr. Mayoral notes applicant weighed 240 pounds, and lost weight running and taking her employer's products, for which she was appreciative [page 2]. After her kidney infection and extended period of menstrual bleeding, however, she felt humiliated by her supervisor, felt her supervisor wanted to humiliate her, and applicant began overeating, developed crying spells, headaches and began vomiting. [at page 3].

Dr. Mayoral notes the names of two supervisors, "Debra" and "Katherine". At page 6 of her report Dr. Mayoral recites applicant was

stressed, pressured, and harassed by her supervisor who singled her out and humiliated her. The patient reports, this woman was out to get her. As a result, of the above, the patient suffered from a Depression [NOS] with Anxiety versus Major Depression as manifested by severe depression, crying spells, low self esteem, neurovegetative signs including increased appetite, and 10 to 15 pound weight gain.

Attributed to Deborah Lunscomb at pages 2-3 of her report were the questions about applicant picking on co-worker Lynn, denying applicant's request to attend meetings to learn how the company makes money, being told Deborah didn't think applicant was intelligent enough to benefit from attending the meeting, thinking Deborah thought applicant was overweight and stupid, and not returning applicant's phone inquiries about applicant's application for another position in the company.

Dr. Mayoral attributed to Catherine Garmany only an explanation that applicant did not get the job change she applied for because she had been late for work twice in one week.

Dr. Mayoral does not have a history of who denied applicant access to the bathroom.

Applicant testified at trial that Deborah Luscomb told applicant she was to use the bathroom only during breaks and lunch, and required applicant to sign a document acknowledging this

direction. Applicant also testified that she developed a urinary tract infection as a result of following this direction. There is no evidence supporting this contention.

Applicant's sworn deposition testimony is in evidence as Defendant's B. Applicant testified she handled 700 to 800 telephone calls a day [19:14-16], that she reported to work May 22, 1998, then started crying uncontrollably [32:2-4], though she couldn't say what, if anything, happened that day to cause her to start crying [32:20-25, 33:1-4], she left work and went to see Dr. Chu, who had been treating her for migraine [34:8-25, 35: 1-11].

Applicant testified at trial that Ms. Luscomb, hearing Ms. Lapert's complaints, stated that she "wouldn't want to come to work and feel this way either" [summary, 5:21-22], which was repeated during her deposition [37:15-25]. When asked again what Ms. Luscomb had said, applicant testified that Ms. Luscomb said applicant had no right to harass another and that she didn't trust her, and that she trusted Ms. Lapert [38:3-11]. This was not repeated at trial.

Applicant testified she missed work because of migraine, but this is not documented in the record. There is no medical opinion that applicant's headaches or migraine was related to her work. Applicant offered her opinion in her deposition and at trial that her urine infection was caused by not going to the bathroom except on breaks and during lunch, but there is no medical opinion to support this belief. She testified during her deposition that it was Ms. Luscomb's rule that no one was to use the bathroom except on breaks or during lunch and that she signed a paper acknowledging this direction. The paper was not produced.

Witness Luscomb's testimony is stricken on applicant's motion, witness Luscomb not appearing at trial March 29, 2000 for cross examination, without explanation.

Witness Garmany testified at trial March 9th that she was applicant's supervisor from January 1998 until her last day of work, that applicant gave her a note from her doctor asking that applicant be allowed access to the bathroom without regard to time, that the witness was unaware of any restriction on applicant's bathroom access, and so asked applicant if anyone was giving her 'a hard time' about her use of the bathroom, to which applicant replied that no one was giving her a hard time about bathroom use. Garmany testified that there was a company policy that switchboard operators, such as applicant, be at their work station seven hours and 15 to 20 minutes, that there were company incentives to employees to reach that goal and the time was monitored. She testified that the operators themselves were to log time away from their work station, and that applicant did so. Applicant did less work than other operators, and in her opinion applicant was not a good worker, but she did not do a performance evaluation of applicant.

Garmany also testified that applicant was once asked to "wait a minute" [Summary of Evidence, 9:12-15] by leadperson Lapert when applicant asked to go to the bathroom and there were ten callers waiting for an operator's handling. She testified this was the only occurrence of applicant's delayed access to the bathroom.

Garmany testified applicant discussed personal problems, her separation from her husband and her need for time off work to move her residence, but never discussed any work-related problems.

Garmany also testified applicant was not denied a promotion for being late, and while she was concerned about applicant's attitude towards attendance, applicant did not show a pattern of abuse of sick leave. Garmany testified that applicant did arrive early to work on occasion but that early arrival was of no benefit to the employer as applicant was an operator routing calls to other workers.

J. Chu, M.D. treated applicant September 18, 1997 through the last day of her employment May 22, 1998 and thereafter, for internal complaints. His records are in evidence as Applicant's #5. Specifically, Dr. Chu treated applicant for gastroenteritis, releasing her to return to work September 18, 1997, for head trauma December 4, 1997, for complaints of strong vaginal odor January 23, 1998, when a urine test was negative, February 4, 1998, for pyelonephritis, a kidney infection. On February 5, 1998 Dr. Chu wrote a note certifying applicant was under treatment for a kidney infection and receiving treatment. He wrote "She should not hold her urine to prevent further infection", and released her to return to work February 6, 1998. There is no writing from him that applicant's kidney infection, or any other condition for which he was treating applicant, was related to her work.

On April 10, 1998 Dr. Chu noted applicant had lost her prescription for yeast infection, and wrote another. On May 12, 1998 he noted applicant complained of a period of 12 days duration. On applicant's last day of work, May 22, 1998 he noted her complaints of "stress out and stomach ache", and certified her for State disability benefits for an anxiety disorder which he stated was not due to her work. On her State disability certification he noted applicant's history of insomnia, heavy menstrual flow, stress, crying spell, for which he was prescribing estrogen and other medication.

Before she worked for defendant applicant had prolonged menstrual bleeding according to SCPMG treatment records, Applicant's #3: June 10-30, 1996. Records from St. Francis Medical Center, Applicant's #4 record history of no [menstrual] period for seven months, "history of same due to stress" June 29, 1989.

Dr. Mayoral's opinion lacks factual foundation and lacks support in the medical record.

There is no support from the treating physician for migraine or kidney infection or any other complaint applicant had on leaving work that those complaints are related to her work. Dr. Chu's certification to EDD for disability is to the contrary, certifying that applicant's disability is not related to her work. This is not rebutted by Dr. Mayoral's non-expert opinion on internal disability. Her opinion is expert only as to applicant's claim of psychiatric injury, and is based on a foundation that is factually false, or applicant's recovery is barred by law.

Applicant's statement that Ms. Luscomb was discriminating against her when Ms. Luscomb inquired about co-worker's complaint about applicant was applicant's reaction to lawful, non-discriminatory good faith personnel action, which consisted of Ms. Luscomb's relating to applicant what Ms. Lapert's complaint was about applicant and how Ms. Lapert said she felt about applicant's looking at her and not talking to her. The only consistent history of this event from applicant is that Ms. Luscomb said that she would feel the same way as Ms. Luscomb had those events transpired. Applicant offered no explanation or denial and there was no further conversation. Applicant did not deny the account given, either to Ms. Luscomb or during trial. As an event a supervisor should investigate and speak to an employee about, and did so, properly, this event may not be the basis of a psychiatric claim. Labor Code Section 3208.3(h).

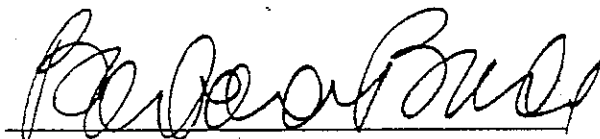
Applicant's testimony that she was ordered not to use the bathroom was rebutted by the credible testimony of witness Garmany, applicant's supervisor, who stated applicant and other operators were measured by their time at their work station, that the operators themselves logged their time away from their work station and the employer offered incentives to operators who logged the requisite time at their work station. Garmany thought it odd that applicant presented a doctor's certificate that asked applicant be allowed to use the bathroom whenever she wished as applicant already could do so. Garmany asked applicant about this note and asked her if anyone was giving her a 'hard time' about going to the bathroom whenever she wished. To this applicant said no one was giving her a hard time. Applicant did not deny this account nor otherwise rebut it. If applicant interpreted her employer's requirement that she log her time away from her desk to use the bathroom as a directive not to use the bathroom, she did not interpret the directive reasonably, nor did she share her private interpretation when invited to do so with Garmany. I do not find applicant's testimony at trial or deposition credible as to being ordered not to use the bathroom.

There is no support to applicant's claim that she was unreasonably denied a job change or that her arriving at work early is evidence of her value as an employee, unappreciated by her employer. Applicant was needed at work station as an operator, and it was not unreasonable or discriminatory of her supervisor to want to keep her there although applicant wanted to attend an employee development seminar.

Accordingly, I find there is no expert evidence based on an adequate foundation or at law to support a finding of cumulative trauma injury aoe/coe to the psyche or any other part of the body. A take nothing will issue except as to reasonable medical legal expense.

Reasonable expense to prove a contested claim was incurred for the medical legal reports and evaluations of Maria Mayoral, M.D. in the reasonable sum of \$1,250.00, and photocopying of records by Med-Legal Photocopy, in the reasonable sums of \$347.54 and \$207.90.

Filed May 17, 2000
at Los Angeles, California
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WCJ Barbara Burke