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STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case No. MON 147097

MARGARITO MARTINEZ,

Applicant,

FINDINGS AND AWARD
AND ORDER

LULU'S DESSERT FACTORY; REPUBLIC
INDEMNITY CO. and STATE FARM FIRE
AND CASUALTY CO.

Defendants.

An application having been filed herein; all parties having appeared and the matter having been regularly submitted, the Honorable MAURY D. GENTILE, Workers' Compensation Judge, finds, awards, and orders as follows:

FINDINGS OF FACT

1. MARGARITO MARTINEZ, born 6/10/60 while employed as a LABORER, at HUNTINGTON BEACH, California, by LULU'S DESSERT FACTORY, insured by REPUBLIC INDEMNITY CO. and STATE FARM FIRE AND CASUALTY CO., did NOT sustain any injury in the course and scope and/or arising out of his employment with the employer herein on 11/90 THROUGH 8/15/91, to any part of his body.

2. The liens for self-procured medical treatment; Larchmont Radiology, I.S.I., Inc., Psychological Health Center and/or Employment Development Dept. are hereby DENIED in their entirety.

3. If there is any part of the said above MEDICAL liens which involve only MEDICAL-LEGAL aspects of the case, those liens are to be paid, adjusted or litigated with jurisdiction reserved. This of course does not apply to the lien of E.D.D. However, the liens of NUNEZ AND BARRERA, interpreters, are to be considered as medical-legal and paid or adjusted accordingly.

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4. Attorney fee liens are hereby denied, as there is no finding of injury.

AWARD

AWARD IS MADE in favor of **MARGARITO MARTINEZ** against **REPUBLIC INDEMNITY CO. and STATE FARM FIRE AND CASUALTY CO.**

a. Medical-legal costs in accordance with Finding 3 above.

ORDER

IT IS ORDERED that applicant take nothing.

Dated: 11-13-98



MAURY D. GENTILE
Workers' Compensation Judge

Service by mail on parties as shown
on Official Address Record effective
on above date.

By: 

WCAB CASE NO: MON 1470987

MARGARITO MARTINEZ

VS.

LULU'S DESSERT
FACTORY

JUDGE:

MAURY D. GENTILE

DATE OF INJURY:

11/90 THROUGH 8/15/91

OPINION ON DECISION

This matter involved an applicant who claimed a Continuous Trauma injury to his back during his employment with the defendant employer from 11/90 through 8/15/91. The case was set for TRIAL on a number of occasions because of multiple witnesses, and eventually there were three TRIAL dates on which testimony was taken.

Prior to the last date of TRIAL, which was 9/14/98, the applicant had already testified and had been cross-examined at any earlier hearing of 9/19/98. However, for reasons still unknown he did not appear at the TRIAL on 9/14/98. The TRIAL on that date continued with testimony from defense witnesses. The COURT nevertheless did not submit the case at that time in order to determine whether there was some valid reason why the applicant did not appear on that trial date. No reasons have been given, and after an extension of time the COURT allowed by letter of 10/16/98 to applicant's attorney to which there has been no response, the case is has now been SUBMITTED on the record.

INJURY AOE/COE

The undisputed evidence shows the applicant worked through Thursday, 8/15/91 at his regular duties. Thursday was the last day of a five day week at this place of employment. Friday and Saturday were off-days, and the week began again on a Sunday and continued through Thursdays.

Prior to the said Thursday, 8/15/91, he claims that he had reported some back problems to his immediate supervisors, but this is denied by them. There was also one time in about February 1991 that he was transferred from one department to another. However, the best evidence is that this was not related to any back injury claim, and in fact was caused, pursuant to defense testimony, by absences that he had from a drinking problem.

In any event he did not work on either Friday and Saturday, 8/16/91 or 8/17/91 because those were days off. He later claimed in testimony that he could not work on those days because of back pain, but there is no support for that claim. In any event he DID NOT go to work on the Sunday, 8/18/91 which was a regular work

day. Rather, he called in about 10:00 A.M. saying essentially that he was sick and debatably mentioned his back. There is strong evidence from the defense witnesses that the back was not the reason for not coming to work that day.

Rather, subsequent testimony from the defense witnesses proved conclusively to the satisfaction of the JUDGE that he was at the home of RIGOBERTO ALDANA, the supervisor of the applicant and that he had been there for a birthday party for the daughter of that person on the Saturday evening before the Sunday when he did not report to work. There absolutely was drinking of at least beer for a number of hours by the applicant until he left in the early morning hours with a woman companion.

Later testimony indeed indicated he came to the same house on the said Sunday morning with the woman companion after he had called in about not being able to work that day. Nothing was told to RIGOBERTO and/or REGELIO, his brother and co-employee, that day about a back injury of claim, pursuant to their testimony. At best he said he was "INFIRM" and could not work and/or that he could not drive to work for that reason.

When the applicant reported for work on Monday, 8/19/91 the vice-president, SALVATORE TITONE, found out he did not work on the prior Sunday and there was a discussion about this absence and/or his other prior absences over the course of time. He decided to suspend him for TWO DAYS, counting the Sunday as one day and the Monday as another day. The applicant was angry and in any event did not appear on Tuesday, 8/20/91, as the employer would have allowed him to do. Hence, after not showing up on that day, and his absence on the prior Sunday, he was terminated from the job. Thereafter he filed his Continuous Trauma basis, which claim was denied and created the litigation herein.

In summary, on the basis of the extensive litigation and listening to the applicant and defense witnesses, it is quite clear to the JUDGE that the case involves a retaliation-type of claim against the employer AFTER A JOB TERMINATION. If he indeed had any back symptoms at any time from his work before the Termination, they were minimal and debatably even mentioned to co-workers-supervisors prior to the termination.

Further, the most damaging and very clear evidence of why he did not work on Sunday, 8/18/91 was not from any back injury, but his "partying" at the home of one of his supervisors and the drinking that went along with it. In a nut-shell he had a "HANGOVER" and not any back injury. His denial even of engaging in drinking and/or being at the party the night before Sunday is totally un-accepted by the COURT on the evidence produced. Accordingly, as a natural consequence of his unacceptable testimony about drinking and other evidence of what occurred on Saturday, all of his other testimony about a back injury is hereby rejected.

It will thus be FOUND that the applicant herein DID NOT SUSTAIN ANY INJURY IN THE COURSE AND SCOPE AND/OR ARISING OUT OF HIS EMPLOYMENT with the employer herein on the claimed dates of injury, to any part of his body.

LIENS FOR SELF-PROCURED MEDICAL TREATMENT AND/OR E.D.D.

Inasmuch as it will be found that there was NO AOE/COE INJURY to the back or any other part of the body, as claimed, all medical treatment liens of Larchmont Radiology, I.S.I., Inc., Psychological Health Center and/or Employment Development Dept. are hereby DENIED in their entirety.

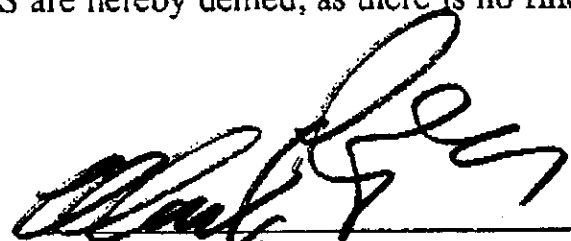
MEDICAL-LEGAL LIENS

If there is any part of the said above MEDICAL liens which involve only MEDICAL-LEGAL aspects of the case, those liens are to be paid, adjusted or litigated with jurisdiction reserved. This of course does not apply to the lien of E.D.D. However, the liens of NUNEZ AND BARRERA, interpreters, are to be considered as medical-legal and paid or adjusted accordingly.

ATTORNEY FEES

Also, any and all ATTORNEY FEE LIENS are hereby denied, as there is no finding of injury.

Dated: 11-13-98



MAURY D. GENTILE
WORKERS' COMPENSATION JUDGE