

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case No: LAO 0780842

DANIEL McCORMICK,

Applicant,

Vs.

CATALINA ISLAND PLUMBING;
BROADSPIRE TPA FOR CIGA ON BEHALF
OF SUPERIOR NATIONAL INSURANCE, IN
LIQUIDATION,

Defendants.

FINDINGS AND AWARD

Attorney for Applicant
Jamey Teitell, Esq.
LAW OFFICES OF LESSING SOLOV

Attorney for Defendant
Courtney E. Nakatani, Esq.
KEGEL, TOBIN & TRUCE

An application having been filed herein; all parties having appeared and the matter having been regularly submitted, the **Honorable MARJORIE FIREMAN**, Workers' Compensation Administrative Law Judge, finds, awards, and orders as follows:

FINDINGS OF FACT

1. Daniel McCormick, born 1/21/62, did at Avalon, California, on 3/24/00, sustain an injury to his left minor thumb arising out of and occurring in the course of employment as a plumber apprentice, by Catalina Island

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Plumbing, insured by Broadspire TPA for CIGA on behalf of Superior National Insurance, in liquidation.

2. The applicant's claim for injury to his psyche is barred by Labor Code §3208.3(d).
3. Applicant's earnings were sufficient to establish average weekly earnings of \$660.67, sufficient to produce a temporary disability rate of \$440.45 per week.
4. The injury caused temporary total disability beginning 3/25/00, to and including 6/30/00, payable at the weekly rate of \$440.45 per week, less credit for sums previously paid.
5. The parties stipulated that the left thumb injury caused permanent disability of 17 percent equivalent to for the period of 8/14/03 to and including 7/26/04 at \$160.00 per week, in the total sum of \$7,922.00 paid to the applicant, and the rest withheld as attorney fees.
6. There is no basis for apportionment.
7. Further medical treatment is required to cure or relieve from the effects of the injury to his left (minor) thumb as prescribed by Robert Hunt, M.D., in his report dated 7/8/03.
8. Applicant secured necessary medical/legal services to cure or relieve from the effects of his injury payable as follows:
\$30.00 to the Law Offices of Lessing Solov.

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9. Based on the court's finding of additional temporary benefits due the applicant based upon payments at the incorrect rate, the County of San Bernardino Department of Child Support Services is awarded its lien in the sum of \$707.22, to be deducted from the benefits awarded.


10. The reasonable value of the services of applicant's attorney is fifteen percent of the additional temporary disability benefits awarded herein, payable forthwith.

A W A R D

AWARD IS MADE in favor of **Daniel McCormick** against **Broadspire** as follows:

- a) Temporary disability in accordance with Finding 4 above;
- b) Permanent disability in accordance with Finding 5 above, less attorney's fees in accordance with Finding 10 above;
- c) Apportionment in accordance with Finding 6 above;
- d) Further medical treatment in accordance with Finding 7 above;
- e) Medical-legal costs in accordance with Finding 8 above;
- f) The County of San Bernardino & Department of Child Care Support Services lien is awarded in accordance with Finding 9 above;

Dated: 4/18/06


 MARJORIE FIREMAN,
 Workers' Compensation ALJ

Service by mail on parties as shown
 on Official Address Record

By: Gregory A. McFall
 Gregory A. McFall

on: 4/19/06

STATE OF CALIFORNIA
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**A PETITION FOR RECONSIDERATION FROM THIS DECISION SHALL BE FILED
ONLY AT THE LOS ANGELES DISTRICT OFFICE
OF THE WORKERS' COMPENSATION APPEALS BOARD.**

CASE NUMBER: LAO 0780842**DANIEL McCORMICK
APPLICANT****vs.****CATALINA ISLAND PLUMBING
EMPLOYER****BROADSPIRE TPA FOR CIGA
ON BEHALF OF SUPERIOR
NATIONAL INSURANCE, IN
LIQUIDATION
INSURANCE COMPANY****WORKERS' COMPENSATION JUDGE:****MARJORIE FIREMAN****DATE OF INJURY:****March 24, 2000****OPINION ON DECISION****INJURY: PARTS OF THE BODY**

Defendant admits industrial injury to applicant's left minor thumb.

Applicant also alleges injury to his psyche.

Based upon the range of evidence before the court, including testimonial and documentary evidence, it is found that applicant's claim for injury to his psyche is barred by Section 3208.3(d).

First the court would note that the applicant was not deemed credible. While he appeared likable and, from employment records with the City of Avalon, to also be a good, hard worker, his testimony was full of inconsistencies and contradictions. He appeared to have a highly unreliable memory, and was riddled with confusion as to what dates he worked for this employer, or even who he was employed by for his secondary jobs at any given time. With regard to his employment only one thing was clear: he was employed full time by the City of Avalon (not the defendant in the instant action) as a maintenance worker for twelve years. With regard to the applicant's employment by the defendant in this action, Catalina Island Plumbing, the waters were far murkier. At trial, the applicant first testified to knowing the owners, Jaime Montano and Jaime's father, for over ten years, and working for them "dozens and dozens of times," or even "hundreds of times". In fact, he claimed to have had so many jobs with them that it was hard to pinpoint when he began working for them. He contended that he had done "at least a year's worth of work" for them during the last ten years. (The court would observe that this alleged "year's worth of work" was not long enough to cause him to remember the company name, or distinguish them from

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another contracting company he worked for in Catalina, the Fine Line Construction Co. The Application for Adjudication and other legal pleadings, including a subpoena, wrongly named the employer as "Catalina Plumbing/Fine Line Construction," even though the two companies appeared to have no relationship with each other, beyond being located on Catalina Island. The WCIRB letter sought for Fine Line Construction located that business at a separate address with a different insurance carrier.)

Also the times and numbers for his side jobs during the year before he was injured did not add up. The applicant estimated that he worked for Catalina Plumbing at least a dozen times between 3/24/99 and 3/24/00, most of the jobs for a couple days. He also worked for various other contractors beside Catalina Plumbing on similar jobs. The jobs paid \$100.00 per day. Yet during the year he received about "\$1,000.00, if that".

The times testified to at deposition differed more drastically. He testified that he had only worked for Catalina Plumbing for three days, and only one time. When asked on page 22, "Did you ever work for Catalina Island before you were hired in March 21, 2000?" the applicant responded, "no." When questioned further about his employment history, he mentioned several other employers, but he never indicated that he had worked for Catalina Island Plumbing at other times, nor attempted to change his answer after reviewing the deposition. Then, at trial he testified to hauling rubbish and performing back hoeing for Catalina Island Plumbing after his thumb injury. This testimony, too, was at odds with the answers he gave at his deposition.

(The applicant's testimony regarding his work history with Catalina Island Plumbing was also rebutted by the testimony of the owner, Jaime Montano. Applicant attorney objected to the testimony of the employer as he was not listed at MSC. This WCALJ believes that the testimony was admissible under the exception set forth in *Kuykendall v WCAB* (2000) 65 CCC 264, when the applicant testified at deposition that he had only been employed by Catalina Island Plumbing once, and at trial that he worked for them dozens of times. However, even absent the testimony of Mr. Montano, this WCALJ's findings would have been the same based upon the multiple contradictions in the applicant's own testimony and pleadings.)

The applicant's memory was equally faulty with regard to other aspects of his medical history, especially those aspects which related to his alcoholism. (Not only did the applicant acknowledge at trial that he is an alcoholic, but also treatment records revealed that the applicant has a long history of chronic alcohol dependence and abuse dating back to his teenage years.) For instance, he forgot he was reprimanded at least three times by the City of Avalon for coming into work drunk; originally, he insisted that he had only been reprimanded for coming to work late, not for coming to work drunk. Then, after being shown a

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letter where he was reprimanded for being late and accused of purchasing beer for other employees, he acknowledged that he had a long term drinking problem. He also acknowledged that he had received a one day suspension for the incident (although he still denied purchasing beer for coworkers). Another memo in the Annual Review from 1997 in the applicant's personnel file that Public Works Director of the City of Avalon stated that the applicant had a "serious problem with alcohol" which the Director feared could be "life threatening," and that he discussed this with the applicant and recommended that the applicant enroll in a rehab program. (A similar recommendation was made in 1999.) *This not only contradicts the applicant's initial testimony that he had no memory of his employer at the City of Avalon recommending that he seek treatment for alcoholism, but also it contradicts the applicant's testimony that his alcohol problem was "minimal" before his thumb injury of 3/24/00.*

To what extent long term alcohol and substance use affected his memory and thinking, this court can only speculate. But his recollection differed significantly information contained within the medical file. To give a few examples: (1) the applicant denied that he told the doctors at the County USC hospital after he was airlifted there following his thumb injury that he had been drinking beer at lunch, even though that is what the records reflected. (See Exh O); (2) he also denied that he told the doctors at the alcohol rehab center that he had problems with substance abuse other than alcohol, even though the records reflect that he had problems with marijuana use as well (the applicant's excuse was that he did not believe his marijuana use to be a problem); and (3) he denied telling his rehab counselors that his wife was going to leave him if he did not stop drinking, whereas the treatment records demonstrate that this was precisely what he said.

(As a side note, the court would observe that the applicant's claim might also be barred by Section 3203.3(b) as well, in light of his personal history and family history of alcoholism. However, the psychiatric record has not been completed, and the reports at hand fail to constitute substantial evidence. The applicant's psychiatrist, Noel Lustig, M.D., Ph.D. still had the applicant totally temporarily disabled as of 8/6/04, and no P & S reports have been obtained. Dr. Lustig's reports also, however, appeared to contain and reference erroneous symptoms stemming from his accepted thumb injury, such as difficulty performing a full day at his regular employment with the City of Avalon and sexual dysfunction, which are not supported by the rest of the psychiatric and orthopedic record. The defense psychiatrist Gregory Marusak, M.D. evaluated the applicant on 6/7/04. But he failed to analyze the case in light of either disability evaluation system which might apply, either the eight work functions, inasmuch as the applicant was reported to be permanent and stationary in the field of orthopedic medicine in 2004, or even the GAF, for injuries where a permanent disability report had not issued before 1/1/05).

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The court is cognizant both that the defendant carries the burden of proof with regard to Section 3208.3(d) and that it is difficult to prove a negative. This WCALJ believes that the defendant met its burden by: (1) bringing forth the deposition testimony where the applicant indicated that the job where he injured himself was the only time that he worked for Catalina Island Plumbing; and (2) demonstrating at trial that the applicant's testimony was rife with inconsistencies and misrepresentations. Moreover, when the applicant's testimony at trial proved to completely contradict his statements at deposition, the defendant offered the employer as a rebuttal witness.

The fact is that even if the applicant did work for the defendant on more than one occasion, the court would have no way of knowing the number of times the applicant was employed by Catalina Plumbing, or for what periods of time. At trial the applicant changed his testimony to "dozens of times" or even "hundreds of times," whereas at deposition he said only once. But it is beyond the powers of this WCALJ to discern to what extent the applicant was exaggerating, or speaking with an addled memory, or simply confusing the jobs he performed for Catalina Island Plumbing from those performed at Fine Line Construction, which he erroneously believed was the same entity as the named employer.

Further, this WCALJ does not believe that the wording of Section 3208.3(d) that the six months of employment need not be continuous absolves the applicant of the need to have performed six months of actual employment. As stated by the court in *Wal-Mart*, 68 Cal.Comp.Cases 1575 at 1580:

"Although Section 3208.3, subdivision (d) does provide that the six months of 'employment' need not be continuous, we interpret the word to mean the performance of actual service for the employer.' The court there rejected the argument that an employee on disability who retains employment status despite not performing any service could be found to be employed for the requisite six month period. Employment for a single day per month does not equal 'performance of actual service' for an entire month. Therefore, in determining whether applicant met the threshold six month employment requirement, the WCJ must make an adequate record which demonstrates the applicant performed actual service for the City of Los Angeles for six months at the time

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she sustained her claimed industrial injury."

See also *L.A. Unified School Dist. v Workers Comp. Appeals Bd. (Carpenter)* (2004) 69 Cal.Comp.Cases 1048 (writ denied).

Here there is no evidence that such employment occurred.

EARNINGS

Based upon applicant's testimony regarding his average yearly take for concurrent employment and the wage information in Exh. 6, it is found that applicant's earnings were sufficient to establish average weekly earnings of \$660.67, sufficient to produce a temporary disability rate of \$ 440.45 per week.

TEMPORARY DISABILITY

Defendant has paid temporary disability during the period beginning 3/25/00 to and including 6/30/00, at a weekly rate of \$120.00 per week. These temporary disability benefits were paid for the applicant's orthopedic injuries.

Applicant contends that he was paid temporary disability benefits at the wrong rate. Based upon the court's findings with regard to earnings in the section above, it is found that the applicant was entitled to temporary total disability benefits from 3/25/00 to and including 6/30/00, at a weekly rate of \$440.45, less credit for sums previously paid.

Applicant claims temporary disability for the (additional) period beginning 7/18/04 to and including the present, and continuing, on a psychiatric basis. Based upon the court's finding that the applicant's claim for psychiatric injury is barred by Section 3208.3(d), no additional period of temporary disability is awarded herein.

PERMANENT DISABILITY

The parties stipulated to permanent disability on an orthopedic basis of 17%, which was paid at the rate of \$160.00 per week for the period 8/14/03 to and including 7/26/04, with \$7,922.00 paid to the applicant, and the rest withheld as attorney fees. From what this WCALJ could discern, there was no issue as to the extent of permanent disability on an orthopedic basis, or the rate at which it was paid.

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NEED FOR FURTHER MEDICAL TREATMENT

Based upon the medical report of Robert Hunt, M.D., dated 7/8/03, it is found that applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein to his left (minor) thumb.

SELF-PROCURED MEDICAL TREATMENT AND MEDICAL-LEGAL COSTS

Based on the record at hand, it is found that applicant incurred necessary medical-legal expense and costs payable as follows:

\$30.00 to the Law Offices of Lessing Solov

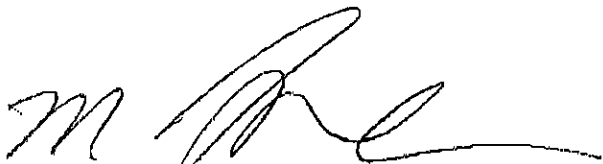
LIEN OF DEPARTMENT OF CHILD SUPPORT SERVICES

Based on the court's finding of additional temporary benefits due the applicant based upon payments at the incorrect rate, the County of San Bernardino Department of Child Support Services is awarded its lien in the sum of \$707.22, to be deducted from the benefits awarded.

ATTORNEY FEES

Based on the WCAB Rules of Practice and Procedure, section 10775, and the guidelines for awarding attorneys fees found in Policy and Procedure Manual Index Number 6.8.4., a reasonable attorney fee is found to be fifteen percent of the permanent disability benefits awarded herein, and fifteen percent of the additional temporary disability benefits awarded herein, payable forthwith.

Date: 4/18/06



**MARJORIE FIREMAN
WORKERS' COMPENSATION JUDGE**

Filed and Served by Mail
on: 4/19/06
on all parties as shown on the
Official Address Record

By: Audrey A. McFall
Audrey A. McFall