

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION

248772

CASE NOS. MON 240099; MON 24772

<p>JAY MORGAN,</p> <p style="text-align: right;"><i>Applicant,</i></p> <p style="text-align: center;">v.</p> <p>SEARS RETAIL; TRAVELERS INSURANCE PROPERTY CASUALTY COMPANY,</p> <p style="text-align: right;"><i>Defendant(s).</i></p>

**FINDINGS AND AWARD
AND ORDER**

LAW OFFICES OF PHILIP M. KURTZ

By: Philip M. Kurtz
Attorneys for Applicant

KEGEL, TOBIN AND TRUCE

By: Ameneh K. Ernst
Attorneys for Defendant

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

FINDINGS OF FACT

1. Applicant **JAY MORGAN**, born July 14, 1966, while employed at Barstow, California, by Sears Retail, sustained injury to his back, arising out of and in the course of said employment on April 22, 1998.
2. Travelers Property Casualty Company was the employer's insurance carrier.
3. Applicant was employed as a truck driver/loader/unloader
4. Applicant did not sustain injury arising out of and in the course of his employment during the period March 13, 1998 to and including May 18, 1998.

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4. Applicant did not sustain employment during the period March 13, 1998 to and including May 18, 1998.

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11. To the extent that the liens of Dr. Perelman, Dr. Shorr and Dr. Curtis and Medical Diagnostic Associates were incurred by applicant to prove a contested claim, said liens are to be adjusted and paid by defendant in accordance with the applicable fee schedule, with jurisdiction reserved in the event of a dispute.

12. Jurisdiction is reserved over the lien of Med-Legal Photocopy Service.

13. The issue of defendant's alleged violation of Labor Code Section 5402 is moot.

14. The primary treating physician was Dr. Padmanabha

15. Defendant did not unreasonably fail to pay or delay the payment of temporary disability indemnity, permanent disability indemnity, or medical treatment.

16. There being no fund against which a lien for attorney fees may be assessed, none is awarded.

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on the above date.

Anita Alvarado

By: Anita Alvarado

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CASE NO. MON 240099, 248772**JAY MORGAN**

v.

**SEARS RETAIL; TRAVELERS
PROPERTY CASUALTY CO.****WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:****PAMELA W. FOUST****DATE OF INJURY:****APRIL 22, 1998;
CT 3/13/98 - 5/18/98****OPINION ON DECISION****Injury AOE/COE**

Applicant claimed that he sustained an injury in the course of delivering a refrigerator which defendant disputed. The matter came on for trial. Applicant testified on his own behalf. Rodney Krug, the employer, and Linda White, a co-employee testified for defendant.

Overall, applicant did not make a credible witness. His memory was extremely unreliable. For example, he claimed that he had worked for this employer from January 1998 to the day after his injury on April 20, 1998; whereas in reality, he had been hired the middle of March and continued working for a month after the injury. There were also major inconsistencies between his version of the facts and various medical records. Rodney Krug was an outstanding witness. Where there was conflict between Mr. Krug's testimony and that of applicant, I believe that Mr. Krug's version was accurate. Linda White was biased against applicant, but her testimony was not particularly relevant to the disputed issues.

Applicant claimed that he reported the injury to Mr. Krug on the day that it occurred. Mr. Krug testified that he reported it approximately a week later at which time he referred applicant to the industrial clinic, Prime Care, where he was first seen on April 30, 1998. At that time, applicant complained of pain in his lower and mid back. Dr. Padmanabha diagnosed a thoracolumbar sprain and strain and returned him to work subject to restrictions which the employer accommodated. When he returned to the clinic on May 8, 1998, applicant was reportedly asymptomatic and was discharged from care.

According to the Prime Care records, applicant again returned to the clinic on May 20, 1998, the day he stopped working, and gave a history of injuring his mid back at work on the previous day. No claim was asserted for a second specific injury nor did applicant testify concerning an injury of May 20, 1998.

On this record, I believe that applicant probably did injure his back in connection with the refrigerator delivery on April 22, 1998, the date indicated in the initial records, and that he reported it a week later. Mr. Krug doubted that he had injured himself because of the delay in reporting it. However, employees often put off reporting minor injuries in the hope that the pain will go away. During the week after the injury, applicant continued to work, presumably performing his usual and customary job duties which also tends to demonstrate that the injury was not a serious one.

I believe that this very minor injury resolved completely as reported by Dr. Padmanabha on May 8, 1998. It is probable that applicant's departure from the job two weeks later was related to the conflict between him and Ms. White and had nothing to do with his physical condition. The notation in the records about a new injury on May 19, 1998 was not brought up as an issue in this case. If there was such an injury and if it had anything to do with applicant going off work, it is reasonable to assume that applicant would have testified to this effect.

When applicant was seen by Dr. Perelman and Dr. Curtis, he claimed that his injury involved his upper back, neck and arms. Yet the reports of the industrial clinic refer to mid and low back symptoms. The only reference to the upper back concerns a finding of tenderness in the interscapular area in connection with the reported history of a new injury on May 19, 1998.

Dr. Perelman took applicant's complaints at face value, but reported no objective factors of disability. Applicant's demeanor at trial did not suggest the depression and other emotional problems described by Dr. Curtis. Overall, the trial record simply does not support the premise that applicant has physical or emotional disability that is related to the injury of April 22, 1998. There is further no substantial lay or medical evidence of cumulative trauma.

Based on the foregoing, it is found that applicant sustained an industrial injury to his back on April 22, 1998, but that he did not injure his psyche, nor did he sustain an injury by way of cumulative trauma.

Earnings

The parties stipulated to earnings from the job with Rodney Krug of \$215.00 per week. Additionally, applicant had earnings of \$50.00 per week from selling used appliances, for a total of \$265.00 per week.

Temporary and Permanent Disability

Based on the records of Prime Care, it is likely that applicant made a complete recovery from the effects of the injury by May 8, 1998. Thus, the injury caused neither temporary nor permanent disability.

Need for Further Medical Treatment

Applicant is not in need of further medical treatment to cure or relieve of the effects of the injury herein. His need for medical treatment ended on May 8, 1998.

Liens

The liens of Hudson and Walker, R.P.T. and Wilshire Roxbury Medical Pharmacy are denied by way of the finding that medical treatment was not reasonably required to cure or relieve from the effects of the industrial injury after May 8, 1998. This same rationale would apply to the medical treatment aspects of the liens of Dr. Perelman, Dr. Shorr and Dr. Curtis. It is unclear whether the lien of Medical Diagnostic Associates involves medical treatment or medical-legal expense.

To the extent that the liens of Dr. Perelman, Dr. Shorr and Dr. Curtis and Medical Diagnostic Associates were incurred by applicant to prove a contested claim, said liens are to be adjusted and paid by defendant in accordance with the applicable fee schedule, with jurisdiction reserved in the event of a dispute.

Costs

Med-Legal Photocopy service filed a lien in the amount of \$141.82 for photocopy services. Since it is not clear exactly what was photocopied, jurisdiction will be reserved over this lien. However, defendant should make payment voluntarily if the lien claimant demonstrates that the services in question constitute valid medical-legal costs or costs of litigation.

Defendant's Alleged Violation of Labor Code §5042

Applicant claimed entitlement to a presumption of compensability for defendant's failure to timely deny the claim. However, this issue is moot in view of the fact that industrial injury has been found. It is not necessary to presume an injury to be compensable if it is compensable. Compensation was furnished in the form of the treatment at Prime Care.

Presumption of Correctness of Treating Physician

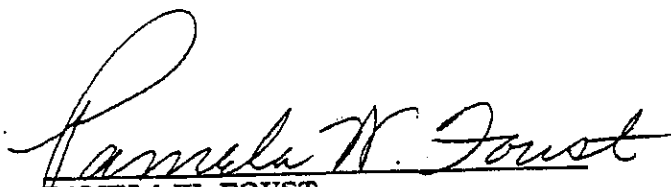
Applicant claimed that the opinion of Dr. Perelman was entitled to a presumption of correctness because there was no reasonable basis for a denial of liability. Even if Labor Code §4062.9 is applicable to this case, the primary treating physician was Dr. Padmanabha who discharged applicant from treatment on May 8, 1998.

Penalties

Based on the findings that applicant was not entitled to further benefits, it must be found that defendant did not unreasonably delay the provision of disability payments and medical treatment.

Attorney's Fees

There being no fund against which a lien for attorney's fees may be assessed, none is awarded.


PAMELA W. FOUST
Workers' Compensation
Administrative Law Judge

AWARD

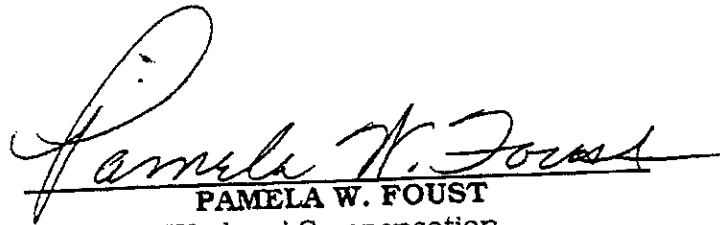
AWARD IS MADE in favor of **JAY MORGAN** against **TRAVELERS PROPERTY CASUALTY COMPANY** of:

(a) Reimbursement of medical-legal costs as provided herein or in an amount to be adjusted or determined in further proceedings.

ORDER

IT IS ORDERED that applicant take nothing further.

DATE: 5/23/01



PAMELA W. FOUST
Workers' Compensation
Administrative Law Judge

Served on counsel for parties and interested lien claimants on the above date.


By: Anita Alvarado

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