

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case Nos. SDO 315046; 0315894

BONIFACIO RIVERA ,

Applicant

v.

T.G.I. FRIDAY'S; HARTFORD
INSURANCE/ZURICH NORTH AMERICA,

Defendants

JOINT FINDINGS AND ORDER

FINDINGS OF FACT

1. Bonifacio Rivera, born May 8, 1976, while employed on May 17, 2003, as a line cook, at San Diego, California, by T.G.I. Friday's, then insured as to workers' compensation liability by Hartford Insurance, did not sustain injury arising out of and in the course of employment to his right shoulder and right upper extremity with pain radiating into his neck and back.

2. Bonifacio Rivera, born May 8, 1976, while employed during the period May 17, 2003, to September 23, 2003, as a line cook, at San Diego, California, by T.G.I. Friday's, then insured as to workers' compensation liability by Hartford Insurance and Zurich North America, did not sustain injury arising out of and in the course of employment to his right shoulder and right upper extremity with pain radiating into his neck and back.

ORDER

IT IS ORDERED that the worker take nothing for his claims of injury on May 17, 2003, and during the period May 17, 2003, to September 23, 2003, while employed by T.G.I. Friday's.

DATED AT SAN DIEGO CALIFORNIA.

12/29/04

FILED AND SERVED ON SAID DATE
TO ALL PARTIES AND LIEN CLAIMANTS
SHOWN ON THE OFFICIAL ADDRESS
RECORD.

By: E. Abano *E Abano*


J.P. McHENRY
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

BONIFACIO RIVERA ,

Applicant

v.

T.G.I. FRIDAY'S; HARTFORD
INSURANCE/ZURICH NORTH AMERICA,*Defendants*

Case Nos. SDO 315046; 0315894

JOINT OPINION ON DECISION

OPINION

Bonifacio Rivera, born May 8, 1976, while employed on May 17, 2003, as a line cook, at San Diego, California, by T.G.I. Friday's, then insured as to workers' compensation liability by Hartford Insurance, claims to have sustained injury arising out of and in the course of employment to his right shoulder and right upper extremity with pain radiating into his neck and back. Bonifacio Rivera, while similarly employed during the period May 17, 2003, to September 23, 2003, when T.G.I. Friday's was insured as to workers' compensation liability by Hartford Insurance and Zurich North America, claims to have sustained injury arising out of and in the course of employment to his right shoulder and right upper extremity with pain radiating into his neck and back.

INJURY:AOE/COE

The worker claims to have sustained a pulling injury to his right shoulder and right upper extremity on May 17, 2003, and a continuous trauma to his right shoulder and right upper extremity from May 17, 2003, to September 23, 2003. The worker testified that he had immediate symptoms in his right shoulder, right elbow and neck while employed at T.G.I. Friday's when a loose piece of metal on a French fryer basket stabbed the palm of his right hand and he felt a pull in his right upper extremity. He testified that he did not turn the basket over but set the basket back down and then picked up the basket with both hands and turned it over, emptying the contents. He testified that the next day he reported the broken basket to someone at T.G.I. Friday's but did not report his injury until October 2, 2003.

The worker's initial written complaint to the employer is for an injury to the right shoulder, right hand, right wrist, and right forearm that is due to cumulative injury from May 12, 1998, to September 22, 2003. This written complaint was received by the employer on October 3, 2003. There is no evidence the worker made a written complaint of a specific injury occurring on May 17, 2003, until he filed a claim form with the employer that is dated December 16, 2003.

The worker's first report to the employer was made on October 2, 2003. The worker testified that he was treated by Glenn C. Nusbaum, D.C., before he reported his injury to the employer on October 2, 2003. The worker said that, after he told Dr. Nusbaum of the incident with the fryer basket, Dr. Nusbaum told him to report his injury to his employer. However, Dr. Nusbaum says, in his First Report of Occupational Injury or Illness dated October 27, 2003, that his initial examination was on October 27, 2003.

The injury discussed by Dr. Nusbaum in his October 27, 2003, report is the fryer basket injury of May 2003. He does not describe a cumulative trauma injury in his first report. The worker said that his duties remain the same from May 2003 until October 2003, but he implied that he did his duties differently during this period. He testified that he also worked at a Red Robin restaurant. Dr. Nusbaum says that the worker's duties at T.G.I. Friday's from May 2003 until October 2003 aggravated the May 2003 injury. Dr. Nusbaum says that the work at the Red Robin restaurant between May 2003 and October 2003 did not aggravate the May 2003 specific injury. However, Dr. Nusbaum does not give any description of the duties at T.G.I. Friday's and at the Red Robin restaurant and does not compare the duties at the two work locations. Dr. Nusbaum does not justify his opinion that the work at T.G.I. Friday's was the only employment that aggravated the May 2003 specific injury. Dr. Nusbaum does not describe any new injury at T.G.I. Friday's during the period May 17, 2003, until September 23, 2003.

In his report of October 27, 2003, Dr. Nusbaum says that the worker injured himself "as he emptied the basket." However the worker testified and Dr. Nusbaum reported on February 28, 2004, that the worker sustained a pulling type injury due to the awkward way he held the fryer basket after his palm was punctured and that he set the basket down before emptying the contents of the fryer basket.

The worker testified that he had immediate pain in his shoulder on May 17, 2003, and that the pain remained unchanged from May 2003 until September 2003. He later said that the pain in his neck increased in December 2003. However, in the report of the initial examination on October 3, 2003, by Stephen P. Gormican, M.D., at the Emergency Department at Scripps Memorial Hospital, the worker's initial complain was of right shoulder pain that he told Dr. Gormican was present for a month prior to the exam of October 3, 2003.

Based on the extended period between the May 17, 2003, incident and the time the worker sought initial medical treatment, and the discrepancies in the evidence on the mechanism of injury, on the onset of symptoms, and on the initial treatment by Dr. Nusbaum, I cannot conclude that it is more likely than not that the worker sustained either a specific injury on May 17, 2003, or a cumulative injury from May 17, 2003, until September 23, 2003. Based on the foregoing, I conclude that the worker did not sustain injury arising out of and in the course of employment to his right shoulder and right upper extremity on May 17, 2003, and during the period May 17, 2003, to September 23, 2003.

///

///

///

OTHER ISSUES.


Based on my conclusion above regarding the issue of injury arising out of and in the course of employment, I conclude that the issues of temporary disability, permanent disability, need for further medical treatment, liability for self-procured medical treatment, including the liens of Dr. Bernicker, Dr. Nusbaum, and Wilson Associates Interpreting, shall be determined adverse to the worker.

DATED AT SAN DIEGO CALIFORNIA

12/29/04

FILED AND SERVED ON SAID DATE
TO ALL PARTIES AND LIEN CLAIMANTS
SHOWN ON THE OFFICIAL ADDRESS
RECORD.

By: E. Abano *E. Abano*



J.P. McHENRY
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE