

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

SMG

Case No. PAS 34012

NELIZZA USTARIS,

Applicant

vs.

AMERICAN EXPRESS TRAVEL RELATED
SERVICES;
TRAVELERS INSURANCE COMPANY,

Defendants.

FINDINGS AND ORDER

An application having been filed herein; all parties having appeared and the matter having been regularly submitted, the Honorable RUBY A. THEOPHILE, Workers' Compensation referee, finds and orders as follows:

FINDINGS OF FACT

1. NELIZZA USTARIS, born April 8, 1965, while employed during the period April, 1992 through November 29, 1993, by AMERICAN EXPRESS TRAVEL RELATED SERVICES, whose workers' compensation insurance carrier at time of injury was TRAVELERS INSURANCE COMPANY, did not sustain injury arising out of and occurring in the course of employment to her head, nose or psyche.
2. It is found that pursuant to timely and sufficient objection pursuant to Labor Code §§ 4601.5 and 4628, medical-legal expenses incurred by applicant with Nurit Cohen, Ph.D., are disallowed.
3. The Court finds Dr. Cohen's report inadmissible.
4. All other issues have been rendered moot.
5. There are no funds from which to award attorney fees.

O R D E R

IT IS ORDERED that applicant take nothing herein.

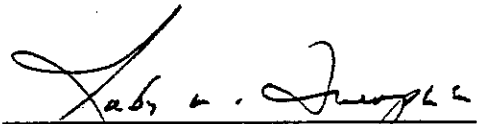
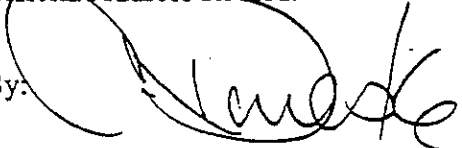
IT IS FURTHER ORDERED that medical-legal expenses incurred by applicant with Nurit Cohen, Ph.D., be, and they are hereby, disallowed; and

IT IS FURTHER ORDERED that all liens not awarded as medical-legal costs in Finding No. 2 above, be and they are hereby, denied.

Filed and Served by mail on: JUL 9 1997

On all parties on the
Official Address Record.

By:



RUBY A. THEOPHILE
WORKERS' COMPENSATION REFEREE

CASE NO.: PAS 34012

NELIZZA USTARIS

vs. AMERICAN EXPRESS TRAVEL
RELATED SERVICES;
TRAVELERS INSURANCE COMPANY,

Workers' Compensation Referee:
Date of Injury:

RUBY A. THEOPHILE
4/92 - 11/29/93

OPINION ON DECISION

INJURY AOE/COE

Based upon applicant's testimony, which this Court found to be of questionable persuasiveness based on the credibility factors set forth in Evidence Code § 780, the more persuasive testimony of the defense witness, and based on the record as a whole including the more substantial defense medical evidence (Deft's. Exhs. A, B, C & D), additional defense documentary evidence from applicant's personnel file (Deft. F), applicant's failure to offer any medical evidence in support of her allegation of nose (otolaryngological) or head (neurological) injuries and having properly considered and sustained the defense objection to the admissibility of Applicant's Exhibit 1 (5/27/94 medical report (psychological evaluation of Nurit Cohen, Ph.D.)), it is found that the applicant did not sustain injury arising out of and in the course of employment during the period April, 1992 to November 29, 1993 to her head, nose or psyche.

RULING ON ADMISSIBILITY OF MEDICAL REPORT

The defendant has objected to the admissibility of applicant's medical report of Nurit Cohen, Ph.D. (App. Exh 1), on the grounds that it fails to comply with Title 8, California Code of Regulations and that it does not constitute substantial evidence on which the Court may rely.

Both parties were requested to brief the issue and have timely complied. Having considered the respective written arguments, this Court finds that the challenged report fails to comply with the requirements of Labor Code § 4628, and as set forth in subsection (e):

"Failure to comply with the requirements of this section shall make the report inadmissible to evidence and shall eliminate any liability

for payment of any medical-legal expense incurred
in connection with the report".
[Labor Code § 4628, subsection (e)]

The above language (shall) is mandatory and not discretionary. Moreover, the above code section is applicable to injuries occurring on or after January 1, 1990 (1989 Stats. ch. 893 § 6). The terminal date of the applicant's alleged cumulative trauma injury is November 29, 1993, and the subject report is dated May 27, 1994. Clearly, there has been adequate time for Dr. Cohen to have familiarized himself with the applicable legislation and to have timely complied therewith on writing the report. The belated attempt to correct the deficiencies/errors by "corrective declaration" three years after the dissemination of the report is untimely.

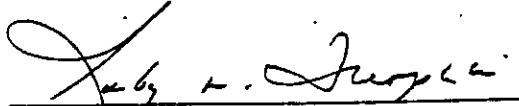
Having denied admissibility of the contested applicant's report on statutory grounds, this Court does not address the issue of the substantiality of the report.

MEDICAL-LEGAL COSTS

There having been timely and sufficient objection pursuant to Labor Code §§ 4601.5 and 4628, medical-legal expenses incurred by applicant with Nurit Cohen, Ph.D., are disallowed.

OTHER ISSUES

All other issues are rendered moot by the finding of no injury AOE/COE. All liens are denied. There are no funds from which to award attorney fees.



RUBY A. THEOPHILE
Workers' Compensation Referee

RAT:cd