

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**

3
4 **Case No. LBO 240604**

5 **MARIBEL GARCIA,**

6 *Applicant,*

7 **vs.**

8 **J & A SHOE COMPANY, INC.; TRANS-
AMERICA INSURANCE COMPANY,**

9 *Defendants.*

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11 **OPINION AND ORDER
GRANTING RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

12 Defendant carrier seeks reconsideration of portions of the Findings
13 and Award and Order issued June 13, 1994, contending the workers'
14 compensation judge (WCJ) (1) erred in awarding applicant's attorney a
15 reasonable fee of \$825.00 for services in connection with taking applicant's
16 deposition pursuant to Labor Code section 5710 (§ 5710), and (2) erred in
17 imposing on defendant a penalty of \$82.50, or 10% of the § 5710 attorney's
18 fee, based on defendant's unreasonable refusal to pay the fee. Defendant
19 further contends that there is a "clerical error" in Finding of Fact No. 8.

20 At the outset, we note that the WCJ did not submit a Report and
21 Recommendation on Petition for Reconsideration because he retired on June
22 30, 1994, before the petition was filed. Based on the record, however, and
23 for the reasons set forth below, we will grant reconsideration for the limited
24 purpose of rescinding the \$82.50 penalty imposed on defendant for its non-
25 payment of applicant's attorney's deposition fee.

26 Defendant first contends that it was unreasonable for the WCJ to allow
27 an attorney's fee under § 5710 because the WCJ found that applicant was not
a credible witness. defendant argues that the language of the statute

1 indicates the allowance of a deposition fee under § 5710 is discretionary and
2 for the benefit of the deponent, not his or her attorney. Defendant also
3 claims that if an attorney's fee is allowed, it should be allowed at \$125.00 per
4 hour, not the \$150.00 per hour allowed by the WCJ. Defendant asserts that
5 the language of the statute means that the fee allowance does not accrue to
6 applicant's attorney, and further argues that applicant's alleged lack of
7 credibility means that no payment should be made to her, the putative
8 beneficiary of the statute.

9 In fact, § 5710 (b) specifically states, *inter alia*, that the deponent is
10 entitled to receive a "reasonable allowance *for attorney's fees* for the
11 deponent, *if represented* by an attorney licensed by the state bar of this
12 state. The fee shall be discretionary with, and, if allowed, shall be set by, the
13 appeals board, but *shall be paid by the employer or his or her insurer.*"
14 (Emphases added.) Defendant's claim that the benefit accrues to the
15 deponent is essentially a distinction without a difference since the sum
16 allowed must be paid by the employer or its carrier, for the purpose of
17 paying the attorney for his or her services. The statute describes a benefit
18 for the deponent, who may wish to have an attorney present and who is
19 entitled to the representation of such an attorney in accordance with
20 workers' compensation law and the tenets of due process.

21 In this matter, applicant was represented and chose to have her
22 attorney present at the deposition which, the parties stipulated, took 5.5
23 hours. The WCJ indicates that defendants sought admission of the transcript
24 and used the deposition for purposes of impeachment through cross-
25 examination, all to their own benefit. The WCJ determined that applicant's
26 attorney's representation of applicant was worthy of a fee, and that his
27 requested fee of \$150.00 per hour was not unreasonable.

1 We are accordingly persuaded that the WCJ did not abuse his authority
2 in allowing a fee of \$825.00 for applicant's attorney's services in connection
3 with the deposition, particularly in light of the fact that the WCJ found that
4 applicant, although not a credible witness, did sustain an industrial injury to
5 her lower back on March 7, 1991, albeit without any residual permanent
6 disability. The cases cited by defendant in favor of reducing the hourly fee to
7 \$125.00 are distinguishable from this matter on the grounds that none found
8 industrial injury to the applicants. Furthermore, the cases mentioned by
9 defendant as using a \$125.00 per hour fee are several years old, when the
10 cost of living was lower. Accordingly, we are persuaded that the \$150.00 per
11 hour is not unreasonable and we will affirm the fee allowance of \$825.00.

12 We will, however, rescind the penalty against this fee on the grounds
13 that defendant appears to have had an arguably genuine doubt from a legal
14 standpoint as to whether a fee was warranted herein in light of applicant's
15 lack of credibility. (See *Kerley v. Workmen's Comp. Appeals Bd.* (1971) 4
16 Cal.3d 223 [36 Cal.Comp.Cases 152].) We will also amend the decision to
17 reflect that the Award is made in favor of applicant, but the fee allowance is
18 payable to Pablo Molina, applicant's attorney.

19 With respect to defendant's final contention that Finding of Fact No 8
20 contains a "clerical error" because the WCJ "specifically did not make any
21 findings as to the medical/legal liens and /or treatment liens," we decline to
22 change the WCJ's language. The language in the decision states that
23 "[d]efendants are to adjust and/or pay all medical legal, self-procured
24 medical treatment, and liens of record, with jurisdiction reserved by this
25 Board." We are not persuaded that defendant's amended language, e.g.,
26 "Defendants are to litigate and/or adjust and/or pay ... with jurisdiction
27 reserved by this Board[.]" is necessary. The WCJ's reservation of jurisdiction

1 allows defendants to litigate any lien claim if no adjustment can be reached.
2 Hence, there is no need to amend the finding and we will leave it
3 undisturbed. In light of our disposition with respect to the attorney's fee
4 allowance, we will also amend the WCJ's Order to indicate that applicant
5 shall "take nothing further."

6 For the foregoing reasons,

7 IT IS ORDERED that defendant carrier's Petition for Reconsideration
8 filed July 1, 1994 is GRANTED.

9 IT IS FURTHER ORDERED that the Findings and Award and Order
10 issued June 13, 1994 is AMENDED as follows:

11 "FINDINGS OF FACT

12 "9. Applicant's counsel is entitled to a reasonable attorney's fee of
13 \$825.00 for services in connection with applicant's deposition, pursuant to
14 Labor Code section 5710.

15 "AWARD

16 AWARD IS MADE in favor of MARIBEL GARCIA against TRANSAMERICA
17 INSURANCE COMPANY of \$825.00 as a reasonable attorney's fee pursuant to
18 Labor Code section 5710, payable directly to PABLO MOLINA.

19 "ORDER

20 IT IS ORDERED that applicant take nothing further by virtue of her
21 claim herein, and further ordered that defendants adjust and/or pay all
22 medical-legal costs, self-procured medical treatment expenses, and lien
23 claims of record in accordance with Finding of Fact No. 8."

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GARCIA

1 IT IF FURTHER ORDERED that the Findings and Award and Order of
2 June 13, 1994, as AMENDED herein, is AFFIRMED and ADOPTED as our
3 Decision After Reconsideration.

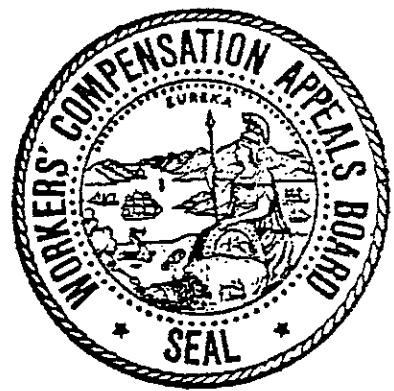
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5 WORKERS' COMPENSATION APPEALS BOARD

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7 Diana Marshall

8 I CONCUR,

9
10 Robert J. Pearson

11
12 [Signature]



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14 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA
15 AUG 25 1994

16 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES
17 LISTED ON THE OFFICIAL ADDRESS RECORD EXCEPT
18 LIEN CLAIMANTS.

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e d Conchita L. Lopez

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

MARIBEL GARCIA,

Applicant

v.

J&A SHOE COMPANY, INC.;
TRANSAMERICA INSURANCE,

Defendants.

Case No. LBO 240604

FINDINGS AND ORDER
AND AWARD

Pablo Molina, attorney for applicant.
Law Offices of Kegel, Tobin & Truce
by Joseph Truce, attorney for defendant.

An application having been filed herein; all parties having appeared, and the matter having been regularly heard and submitted, the Honorable FRANK S. FALERO, Workers' Compensation Judge, now makes his decision as follows:

FINDINGS OF FACT

1. Maribel Garcia, born September 29, 1961, did at Gardena, California, on March 7, 1991, sustain an injury to her lower back arising out of and occurring in the course of her employment as a laborer by J & A Shoe Company whose compensation insurance carrier was Transamerica Insurance Company.
2. Maribel Garcia, did not sustain an injury arising out of and occurring in the course of her employment on March 7, 1991, to her psyche, chest, vision, and resulting headaches.
3. Applicant's earnings were \$175.00 per week.
4. Applicant is not entitled to temporary disability.
5. There are no permanent disability residuals in this injury.
6. There is no basis for apportionment.
7. There is no need for further medical treatment.

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8. Defendants are to adjust and/or pay all medical legal, self-procured medical treatment, and liens of record, with jurisdiction reserved by this Board.

9. Applicant's counsel is entitled to a reasonable attorney's deposition fee of \$825.00, plus, the additional amount of a 10 percent penalty of \$82.50.

10. All other issues are moot.


AWARD

AWARD IS MADE in favor of Pablo Molina, applicant's attorney, against Transamerica Insurance Company, in the sum of \$907.50 in accordance with Finding No. 9.

ORDER

IT IS ORDERED that applicant take nothing by virtue of this claim; it is further ordered that defendant's adjust and/or pay all medical legal, self-procured medical treatment, and liens of record in accordance with Finding No. 8.

DATED: *June 13, 1994*


FRANK S. FALERO
Workers' Compensation Judge

Served by mail on all parties on the
Official Address Record on above date.

BY: *Agatha Magaña*

MARIBEL GARCIA

- vs -

J&A SHOE COMPANY, INC.;
TRANSAMERICA INSURANCE,

WORKERS' COMPENSATION JUDGE:

FRANK S. FALERO

DATED:

June 13, 1994

OPINION ON DECISION

This case came to trial on February 16, 1994, and May 6, 1994, at which time testimony was heard orally and by way of deposition. Reports, records, and photographs were identified as exhibits and admitted into evidence.

OCCUPATION: Trier of fact finds applicant's occupation to be that of a laborer.

INJURY AOE/COE: I find applicant not to have sustained an injury AOE/COE on March 7, 1991, to her psyche, chest, vision, and resulting headaches.

I find applicant to have sustained an injury AOE/COE on March 7, 1991, to her lower back, but with no resulting permanent disability residuals.

Applicant was found not to be credible by this trier of fact who was in a position to view her and the other witnesses during their delivery of testimony on the witness stand.

Applicant testified that her shift was from 7:00 in the morning until 3:30 in the afternoon, and that on the date of the alleged incident, a rack fell on her around 9:00 in the morning; she finished her shift, and in fact, continued to work without reporting it nor missing time through March 12, 1991. Further, that she hasn't returned to work for anyone since March 13, 1991. Of note, applicant placed an issue of claim for temporary disability commencing March 8, 1991. Applicant first sought treatment on April 16, 1991, and she further testified as concerns her psychiatric allegation, if offered, she would accept psychiatric further medical, then in the same sentence admitted she has no emotional problems now.

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On cross-examination applicant admits to vaginal bleeding on March 12, 1991, and that's why she left work, telling her supervisor, who in turn offered to send her to the clinic, but she declined, and that day went to Martin Luther King Hospital where she was told she had suffered a miscarriage.

Applicant was impeached through inconsistencies in her oral testimony, her deposition testimony, and the records subpoenaed from various medical providers. The records are silent as to any injury occurring at work.

These findings are substantially supported by the better reasoned conclusions of Dr. Jaime B. Anselen, psychiatrist, and Dr. J. Fred Znider, orthopedist (defendant's exhibit A).

PERMANENT DISABILITY/APPORTIONMENT: I find applicant not to have any permanent disability residuals to her lower back as a result of the March 7, 1991, incident. This finding is supported by the conclusion of Dr. Znider in his reporting of no observable, measurable, objective findings in this regard. There is also no apportionment in this matter.

FUTURE MEDICAL: There is no need for future medical treatment.

TEMPORARY DISABILITY: I find applicant not entitled to her claim of temporary disability for March 8, 1991, through November 22, 1991.

MEDICAL LEGAL SELF-PROCURED MEDICAL TREATMENT LIENS: Defendant is to adjust and/or pay all liens of record, with jurisdiction reserved.

5710 ATTORNEY'S FEES FOR DEPOSITION AND PENALTY: I find applicant's counsel entitled to reasonable attorney's deposition fee for the deposition taken of the applicant on February 3, 1993, by the defendants (defendant's exhibit B). The parties have stipulated further that applicant's counsel has spent five and a half hours in this regard and is claiming a rate of \$150.00 per hour.

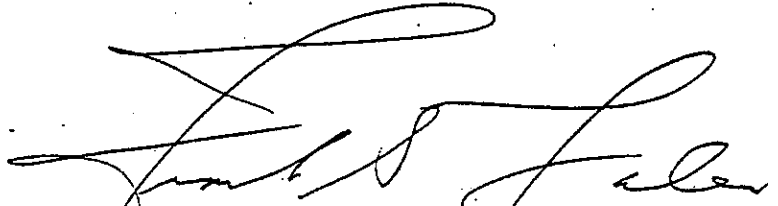
It is ordered that applicant's attorney be paid the deposition fee of \$825.00.

Defendant not only utilized the deposition having admitted it as a defendant's exhibit, but throughout its cross-examination of the applicant utilized it for its own purposes. It is only fair and equitable that defendant not be unjustly enriched having availed itself of its worthiness.

MARIBEL GARCIA
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I find applicant's counsel to be entitled to the additional amount of a 10 percent penalty for the unreasonable non payment of this deposition fee, and it is so ordered to be paid in the additional amount of \$82.50.

All other issues are rendered moot.



FRANK S. FALERO
Workers' Compensation Judge

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