

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION

SAD

EMMA FOLGAR,

Case No: MON 155876

Applicant

vs.

SERVALL PACKAGING;
FIREMAN'S FUND; CALIFORNIA
COMPENSATION; UNICARE
INSURANCE

Defendants.

FINDINGS
AND
ORDER

KEGEL, TOBIN & TRUCE
By: Anju Khurana
Attorneys for Defendant
Fireman's Fund

LIEN CONTROL
By: Barbara Brothers
Hearing Representative for
California Compensation

UNICARE INSURANCE
By: Mike Tippins
Hearing Representative

DR. MICHAEL SCHIFFMAN;
DR. GREGG SMALL
By: Arlene Stafford
Hearing Representative for
Lien Claimants

The above-entitled matter having been heard and regularly submitted, the Honorable
KEIGO OBATA, Workers' Compensation Judge, now finds, awards as follows:

FINDINGS OF FACT

1. The stipulations filed by the parties are true and are adopted by reference as though fully set forth here.
2. Based on the presumption of Labor Code Section 5402, it is found that applicant sustained industrial injury as alleged; the injury period pursuant to Labor Code Section 5500.5 is 10/8/91-10/8/92.

3. The medical-legal reports of Dr. Michael Schiffman dated 9/29/93 and 8/25/93, and of Dr. Gregg Small dated 9/15/93 are inadmissible in evidence pursuant to Labor Code Section 5703 and 139.3; the liens for medical-legal costs therefor are accordingly disallowed.

ORDER

GOOD CAUSE APPEARING:

IT IS ORDERED that applicant take noting further in this claim.

IT IS FURTHER ORDERED that the lien claims of **DR. MICHAEL SCHIFFMAN** and **DR. GREGG SMALL** be, and they hereby are, disallowed.

DATED: APR 19 1996
Served by mail on ~~parties~~ *by airt*
listed on the Official Address
Record.
By: Jane Renko
Jane Renko

Keigo Obata
KEIGO OBATA
Workers' Compensation Judge

NOTICE TO
KEGEL, TOBIAS
Pursuant to Rule 10500 you are designated to
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shown on the Official Address Record.

CASE NO.: MON 155876**Emma Folgar****vs.****Servall Packaging;
Fireman's Fund;
California Compensation;
Unicare Insurance****Workers' Compensation Judge:
Injury Date:****Keigo Obata
1977/10-8-92****OPINION ON DECISION**

The case in chief as between applicant and defendant was resolved by Order Approving Compromise and Release issued 5/4/95. At issue at present are the lien claims for medical treatment and/or medical-legal services provided by Dr. Schiffman and by Dr. Small.

The parties had no witnesses to present, waived testimony, and submitted the case for decision on the documentary record.

**INJURY AOE/COE TO RIGHT SHOULDER, HANDS, NECK, LUNGS
DURING EMPLOYMENT 1977-10/8/92****Based on merits:**

Based on Labor Code Section 3202.5, the party raising the issue must prove it by the preponderance of the evidence. Lien claimants' rights are subrogated to those of applicant; hence, lien claimants step into the shoes of applicant on the issue of injury.

The 3/22/94 rather detailed report of Paul Wakim, D.O., filed by defendant indicates that this is a post-termination claim after lay-off by reason of plant closure, and that applicant did not sustain cumulative industrial to his back and legs as claimed.

The 9/29/93 and 8/25/93 reports of Michael Schiffman, M.D., filed by lien claimant indicate that applicant sustained several industrial injuries during the course of her employment at Servall Packaging and thereafter was fired along with 15 other co-workers on 10/8/92; the diagnosis for the present injury is indicated as sprains of the cervical spine and right rotator cuff.

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There being no testimony by applicant, or by anyone else to corroborate either of these medical opinions, it cannot be determined whose opinion is correct.

Accordingly, the only decision that can issue on the existing record on the merits is that the evidence does not indicate by the preponderance of the evidence required by Labor Code Section 3202.5 that applicant sustained industrial cumulative injury during the period of employment 77-10/8/92 as alleged.

Based on Presumption of LC 5402:

The Injury Claim Form for this injury, a cumulative trauma to the right shoulder, hand, neck and lungs during the period 1977-10/8/92, is noted as received by the employer on 10/20/92 (although dated by applicant on 11/6/92). (See Lien Claimant Schiffman Exhibit 1.)

The denial of claims are dated 11/30/92 and 12/23/92 by Fireman's Fund and Unicare, respectively, both based on lack of insurance coverage during the last year plead, i.e., 10/8/91-10/8/92. Fireman's Fund and Unicare in fact had coverage during the periods 3/31/92-3/31/93 and 1987-1990, respectively, which are both within the period of cumulative trauma injury plead.

The issue is whether these denials meet the requirements of Labor Code Section 4502.

The answer is no. Fireman's Fund in fact had coverage for the period 3/31/92-10/8/92 making its denial defective. California Compensation which had coverage from 10/8/91-1/1/92 did not issue a denial at any time. Under 5402, this claim is therefor presumptively compensable. Pursuant to Labor Code Section 5500.5, only those defendants within the year preceding the last date of harmful exposure are liable, i.e., the period 10/8/91-10/8/92. This places Unicare outside of the liability period.

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Pursuant to LC 5402, Fireman's Fund's medical-legal report of Paul Wakim, D.O. dated 3/22/94 is inadmissible in evidence on the issue of injury inasmuch as it is a report that could have been procured within the 90-day period following claim of injury. It is accordingly found by presumption of LC 5402 that applicant sustained cumulative trauma injury to the parts of the body alleged during the period 10/8/91-10/8/92 and that the liable carriers are Fireman's Fund and California Compensation.

Admissibility of Reports of Drs. Schiffman and Small for failure to comply with LC 4628, 139.2. and 139.3:

A review of these reports indicates that these reports satisfy the requirements of LC 4628. Defendant points out in its Points and Authorities that LC 5703 states that medical reports are admissible "...only if the physician has further stated in the body of the report that there has *not* been a violation of Section 139.3...". A review of the reports of Drs. Schiffman and Small reveals that no such statement is included in their respective reports. Accordingly, the reports of Drs. Schiffman and Small are inadmissible in evidence.

LIENS FOR MEDICAL TREATMENT

Lien claimant indicated at trial that she did not know what portion of the lien was medical-legal and what portion medical treatment. The reports of Drs. Schiffman and Small indicate that all of the services they provided were for medical-legal purposes.

Dated: APR 19 1996
Served by mail on parties *dy*
listed on the Official Address Record.
By: *Jane Renko*
Jane Renko

Keigo Obata
KEIGO OBATA
Workers' Compensation Judge

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