

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case No. 87 SBA 55876

GARY L. HALL,

Applicant

vs.

COUNTY OF SAN LUIS OBISPO;
GALLAGHER BASSETT SERVICES, INC.

Defendants.

FINDINGS AND AWARD

The above-entitled matter having been heard and regularly submitted, the Honorable BRUCE M. LANG, Workers' Compensation Judge, now makes his decision as follows:

FINDINGS OF FACT

- (1) The stipulations in the Minutes of Hearing of August 14, 1990 are true and are incorporated herein by reference.
- (2) Applicant did not sustain an injury to his left ear which arose out of and occurred in the course of his employment on May 5, 1986, by the County of San Luis Obispo.
- (3) Applicant did not sustain an injury to his psyche which arose out of and in the course of his employment on May 5, 1986, by the County of San Luis Obispo.
- (4) This injury has resulted in 63% permanent disability amounting to 332 weeks of disability payments at the rate of \$56.00 per week, in the total sum of \$18,592.00.
- (5) 75% of the applicant's neck disability is due to this injury.
- (6) 40% of the applicant's back disability is due to this injury.
- (7) Applicant is in need of further medical treatment to cure or relieve the effects of this injury.
- (8) Applicant did not incur any self-procured medical expense due to this injury.
- (9) Applicant's self-procured drug rehabilitation treatment program was not reasonably or necessarily incurred to cure or relieve the effects of this injury.

E. CHARLES MAKI
OCT 22 1990

(10) Defendant is entitled to a credit for the applicant's third party recovery of \$30,119.65 against its liability for benefits payable to the applicant due to his neck injury.

(11) The reasonable value of the services and disbursements of applicant's attorney is \$2,230.00.

AWARD

AWARD IS MADE in favor of GARY L. HALL, against GALLAGHER BASSETT INSURANCE SERVICES as follows:

(a) Permanent disability of 63%, entitling applicant to 332 weeks of disability indemnity at the rate of \$56.00, in the total sum of \$18,592.00, payable beginning the fourth day after temporary disability ends, less credit to defendants as set out in Finding #9, and less \$2,230.00, payable to Haynes, Wilkison, Stone and Frederick as attorney's fees;

(b) Further medical treatment as may be required to cure or relieve from the effects of this injury.

Dated: October 18, 1991
Served by mail on all parties on the Official Address Record.

By: N. Dorfman
N. Dorfman

Bruce M. Lang
BRUCE M. LANG
WORKERS' COMPENSATION JUDGE

GARY L. HALL

vs. COUNTY OF SAN LUIS

OBISPO, permissibly self-
insured, GALLAGHER
BASSETT INS. SERVICES,
adjusting agent

BRUCE M. LANG
Worker's Compensation Judge

87 SBA 55876
90 GRO 01622

OPINION ON DECISION

CASE NO: 87 SBA 55876

INJURY

It is found the applicant did not sustain an injury to his left ear which arose out of or occurred in the course of his employment on May 5, 1986, by the County of San Luis Obispo. There are no medical reports to support the claim.

It is found the applicant did not sustain an injury to his psyche which arose out of and in the course of his employment on May 5, 1986, by the County of San Luis Obispo.

This finding is based on the lack of credibility of the applicant. The applicant claims that he was having a great deal of pain due to his orthopedic injury which was unrelieved by the drugs prescribed by his doctor, so he turned to heroin for pain relief. This story can not withstand scrutiny on several counts.

The medical record contemporaneous to his onset of heroin use does not support his claim he had a lot of pain. The applicant testified he started using heroin in February 1988. In his report of January 28, 1988, Dr. Richard Williams, his treating doctor, found that the applicant's general appearance was good, his wound was well heeled and nontender, straight leg raising caused no discomfort, and reflexes and sensation were normal. When Dr. Williams reexamined the applicant on March 28, 1988, he stated the applicant was progressing well except for some residual muscular discomfort in the posterior shoulder girdle and low back when over extending himself. He had no redicular pain, normal range of motion of the neck without discomfort; strength, relflexes, and sensation were normal in

both the upper and lower extremities. Dr. Williams released the applicant to return to light work at that time.

I find it incredible that the applicant could have been in so much pain that he started using heroin for relief at the same time that his treating doctor's reports show the applicant was essentially pain free.

The applicant testified he told Dr. Williams at this time that he was using heroin. He testified that he was truthful about his heroin use with all the doctors he saw so they could decide what was best to do. I find it incredible that Dr. Williams would not record that history if it was given to him. I find it incredible that if he was given a history that the applicant was using heroin because of extreme pain which the prescription medication had failed to provide, Dr. Williams would have released the applicant to return to work with the comment he was to be seen in the future only on a p.r.n. basis, and that the doctor found it "gratifying to see his progress since his necessary surgical decompression."

I find it incredible that the applicant could perform a manual labor job, which required regular use of a shovel according to the credible testimony of the applicant's supervisor, for 18 months, and not seek any medical treatment or return to Dr. Williams during that period, all the while he was taking heroin on a daily basis allegedly for relieve of extreme pain. If the pain was the reason for his heroin use during this period, his failure to return to Dr. Williams is inexplicable in light of his prompt attempt to return to Dr. Williams upon the occurrence of his alleged injury of September 29, 1989.

I find it incredible that the reason for the use of heroin could be the failure of the prescription medication to ease his pain, when he continued to call Dr. Williams office to obtain refills of that medication and continued to use it during the 18 month period he did not feel it necessary to return to Dr. Williams for treatment of his alleged pain.

It does not go unnoted that while the applicant testified he was truthful about his heroin use with all the doctors so they could decide what was the best treatment course, Dr. Weatherford, the applicant's examining psychiatrist, reported that the applicant failed to relate to her that he had ever used heroin, was currently using heroin, had in the past been treated for heroin use, and was currently in a methadone treatment program while still using heroin.

PERMANENT DISABILITY / APPORTIONMENT

It is found this injury has resulted in 63% permanent disability amounting to 332 weeks of disability payments at the rate of \$56.00 per week; in the total sum of \$18,592.00.

It is found that 75% of the applicant's neck disability is due to this injury. It is found that 40% of the applicant's back disability is due to this injury.

These findings are based on Dr. Donald Schwartz's reports.

MEDICAL TREATMENT

It is found the applicant is in need of further medical treatment to cure or relieve the effects of this injury.

This finding is based on Dr. Schwartz's opinion.

It is found the applicant did not incur any self-procured medical expense due to this injury. There is no evidence of any treatment self-procured for the orthopedic injury.

It is found the applicant's self-procured drug rehabilitation treatment program was not reasonably or necessarily incurred to cure or relieve the effects of this injury. The reasons for these findings are set out above.

THIRD PARTY RECOVERY CREDIT

It is found the defendant is entitled to a credit for the applicant's third party recovery of \$30,119.65 against its liability for benefits payable to the applicant due to his neck injury.

Defendant's credit is not barred by Civil Code §3333.1 as the applicant has failed to establish demonstrably that his recovery in the third party action was reduced to reflect collateral source contributions.

The Court of Appeal in *Graham v. WCAB* (1989), 54 CCC 160, stated at page 167:

"To harmonize Civil Code section 3333.1 with the Labor Code credit provisions, we interpret section 3333.1 as implied creating an exception to the credit provisions whenever an injured party has demonstrably had his recovery reduced to reflect collateral source contributions."

In *Graham* the reduction in the third party recovery due to collateral source contributions was shown by the introduction of the trial transcript from the third party action in which the parties stated the recovery was for pain and suffering only, the action for special damages was dismissed, and the judge found the settlement was in good faith.

In *Tracy Unified School District v. WCAB (Perata)* (1989), 54 CCC 458, a writ denied case, the employer's credit was denied by the operation of 3333.1 where the transcript of the third party action reflected the fact that Perata's economic losses were limited by the fact that the defendant intended to introduce evidence, pursuant to Civil Code section 3333.1 of collateral source payments, including workers' compensation payments.

In *Barme v. Wood* (1984), 37 Cal. 3d 174, the Supreme Court held that the damage-reducing effect of Civil Code section 3333.1 comes into play where the defendant in the third party action filed a document indicating their intention to introduce evidence of workers' compensation benefits into the malpractice action.

In the present case, applicant did not present any of the demonstrable evidence presented in the above cases. There was no transcript from the third party action showing that the applicant's recovery in that action was limited by the intention to introduce evidence of the applicant's worker's compensation benefits.

The only evidence of what occurred in the third party action came from the applicant's attorney in that action, Curtis Simpson. He testified that the settlement of the third party action did not include a waiver of special damages; there was nothing in writing to indicate the settlement was for general damages only; and there was no written waiver of special damages. He testified he could not recall if the third party defendant's attorney had written or spoken to him about Civil Code section 3333.1 or the offsetting of special damages as a defense or negotiating tool over the amount of the settlement.

The credit extends only to that portion of future compensation benefits representing the third party's responsibility for exacerbating the applicant's condition. *Hodge v. WCAB* (1981), 46 CCC 1034. In the present case, that is all of the disability due to the applicant's neck injury. The medical record shows that the applicant only injured his back in the industrial injury on May 5, 1986. He went to Dr. Cancero approximately one month later. Dr. Cancero manipulated the applicant's neck, causing the neck disability. There was no initial industrial injury to the neck.

ATTORNEY'S FEES

A fee of \$2,230.00 is allowed as a reasonable attorney's fee.

CASE NO: 01622

INJURY

It is found the applicant did sustain an injury to his low back which arose out of and in the course of his employment on September 29, 1989, by the County of San Luis Obispo.

This finding is based on the handwritten records of Dr. Wood, and the reports of Dr. Schwartz.

TEMPORARY DISABILITY

It is found the applicant is entitled to temporary disability indemnity at the rate of \$224.00 from October 5, 1989, through February 1, 1990.

In his report of February 5, 1990, of an examination on February 1, 1990, Dr. Schwartz felt the applicant was temporarily disabled. In his subsequent report of May 3, 1990, of an examination on April 30, 1990, he found that the applicant's condition was unchanged from the earlier exam, and found his condition to be permanent and stationary. Since there was no change in the applicant's condition between the exams on February 1, and April 30, it is apparent that the applicant's condition was permanent and stationary as of the first exam.

PERMANENT DISABILITY/APPORTIONMENT

It is found this injury has resulted in 59% permanent disability amounting to 304 weeks of disability payments at the rate of \$84.00 per week, in the total sum of \$25,536.00.

It is found that 60% of the disability is due to this injury. These findings are based on the reports of Dr. Schwartz.

MEDICAL TREATMENT

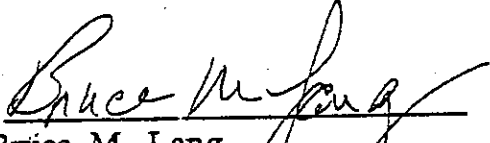
It is found the applicant is in need of further medical treatment to cure or relieve the effects of this injury.

This finding is based on Dr. Schwartz's opinion.

It is found the applicant did not incur any self-procured medical expense due to this injury. There is no evidence of any treatment self-procured for the orthopedic injury.

ATTORNEY'S FEES

A fee of \$3,064.00 is allowed as a reasonable attorney's fee.


Bruce M. Lang
Worker's Compensation Judge