

STATE OF CALIFORNIA  
DIVISION OF WORKERS' COMPENSATION

**JOE DEATHERAGE and JEANNINE DEATHERAGE, guardians ad litem and trustees for WILLIAM DEATHERAGE, injured employee.**

Case No. LBO 211192

*Applicant,*

vs.

**FINDINGS AND AWARD**

**TOYS R US;  
TRAVELERS INS. CO.;  
K-MART, PERMISSIBLY SELF-INSURED;**

*Defendants.*

Elliott Wachtel, attorney(s) for applicant.

Kegel, Tobin & Truce, By Dennis Triplett, attorney(s) for defendant, Toys R Us/Travelers Insurance Company

Floyd, Skeren & Kelly, By: Dona Skeren, Attorneys for Defendant K-Mart/ Permissibly self-insured.

The above-entitled matter having been heard and regularly submitted, the Honorable CHARLES C. RINGWALT, Workers' Compensation Referee, now makes his decision as follows:

**FINDINGS OF FACT**

1. William Deatherage, born December 4, 1957, while employed as a sales clerk/cashier on or about January 28, 1990 at Torrance, California, by Toys R Us, sustained injury to his left thumb, neck, shoulders, and back arising out of and occurring in the course of the employment.

2. The employer's workers' compensation insurance carrier was The Travelers

F&A 290.1

STATE OF CALIFORNIA  
DIVISION OF WORKERS' COMPENSATION

Insurance Company, on the date of injury.

3. Applicant's actual earnings at the time of injury were \$162.00 a week .
4. The injury caused no compensable loss of time to date and became permanent and stationary on or about September 19, 1991.
5. The injury contributed to cause permanent partial disability, after adjustment for age and occupation, of 27 1/2%, before apportionment, payable after apportionment at the rate of \$66.60 a week for 108 weeks.
6. Applicant actually, reasonably, and necessarily incurred expenses for self-procured medical treatment to cure or relieve from the effects of injury, to be adjusted between the parties.
7. Applicant actually, reasonably, and necessarily incurred medical-legal costs to prove a contested claim, for the examination, diagnostic services and report of Ronald Perelman, M.D. The amount is to be adjusted.
8. Applicant is in need of further medical treatment to cure or relieve from the effects of injury herein.
9. As a result of this injury in conjunction with a subsequent injury on September 19, 1990 the applicant is unable to perform his usual and customary employment.
10. As a result of non-industrial emotional disorder, the applicant is unable to benefit from rehabilitation services and has been so since his last day of work.
11. Reasonable medical and legal doubt existed with respect to the payment of vocational rehabilitation maintenance allowance.
12. Applicant's attorney has performed services of a reasonable value of \$1,100.00 to date herein.

STATE OF CALIFORNIA  
DIVISION OF WORKERS' COMPENSATION

AWARD

**AWARD IS MADE** in favor of **JOE DEATHERAGE** and **JEANNINE DEATHERAGE**, as guardians ad litem and trustees for **William Deatherage**, and against **Travelers Insurance Company** as follows:

(A) Medical-legal costs to be adjusted by the parties or to be heard and determined by the workers' compensation referee if the parties are unable to adjust the matter among themselves.

(B) Reimbursement for self-procured medical expenses in an amount to be determined by a workers' compensation referee if the parties are unable to adjust the matter among (between) themselves.

(C) Further medical treatment in accordance with paragraph 8, above.

(D) Permanent disability in the total amount of \$7,182.00, payable forthwith, less credit for any sums heretofore paid on account thereof, and less attorney's fees in the amount of \$1,100.00, payable to Elliott Wachtel, whose lien is allowed.

(E) Interest as provided by law from the date of service of this award.

ORDERS

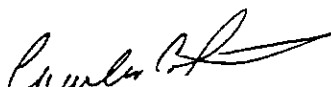
IT IS ORDERED THAT the lien of the Employment Development Department be denied.

IT IS ORDERED THAT jurisdiction is reserved over the issues of self-procured medical treatment and medical-legal costs and all liens of record.

STATE OF CALIFORNIA  
DIVISION OF WORKERS' COMPENSATION

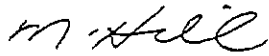
IT IS ORDERED THAT the decision of the Rehabilitation Unit is modified to reflect Findings of Fact 9 and 10, above.

IT IS ORDERED THAT jurisdiction is reserved for contribution by K-Mart to the Travelers Insurance Company is designated to pay or adjust the awards of medical treatment and medical-legal costs.

  
CHARLES C. RINGWALT  
Workers' Compensation Judge

*November 5, 1998*

Service by mail on parties as shown  
on Official Address Record effected  
on above date.

By:   
M. Hill

-4-

LBO 211192

DIVISION OF WORKERS' COMPENSATION

CASE NO. LBO 211192, LAO 734292; LAO 734293

JOE DEATHERAGE and JEANNINE vs. TOYS R US, TRAVELERS INS. CO.;  
DEATHERAGE, guardians ad K-MART, permissibly  
litem and trustees for self-insured.  
WILLIAM DEATHERAGE, injured  
employee.

OPINION ON DECISION

Temporary disability.

Temporary disability is claimed from September 19, 1990 through December 19, 1990 and again from March 25, 1991 through March 23, 1992. The applicant testified that he was taken off work by Dr. Kothari for the initial period, for his orthopedic injuries. The records of the Employment Development Department indicate that they paid based upon certifications of Dr. Scheinbaum, a psychiatrist.

At the time of his initial evaluation, Dr. Kothari imposed temporary restrictions precluding heavy lifting, repetitive bending and stooping. In his history, he described the job as requiring the lifting of heavy boxes. He allowed the employee to continue in that job. (Report, August, 15, 1990.) There are no reports placing the employee on temporary disability. In fact, he indicates that the employee stated he had improved 90 % with respect to his back. While he concludes on December 14, 1990 that the employee is limited to light work which includes "preclusion from heavy lifting, repetitive bending and stooping, repetitive of (sic) heavy pushing, or pulling, prolonged sitting or driving and prolonged standing," he does not explain why the disability increased. While he states the applicant is a qualified injured worker, the applicant returned to the same job.

Dr. Scheinbaum reports on a cumulative stress claim. This is not the subject of the applications herein.

There is no medical evidence to support the claim of temporary disability. The decision of the board must be supported by substantial evidence. (Labor Code 5952 (d)). Evidence which is not substantial must be rejected. Lay testimony alone is insufficient to make a finding on a medical issue. (Peter Kiewit Sons v Ind. Acc. Com. (1965) 234 Cal.App.2d 831 [30 Cal.Comp.Cases 188])

There is no credible evidence that the injury of August 6, 1990 caused any ratable disability, or involved any part of the body other than the head or that the other injuries resulted in internal injury.

Permanent disability.

Dr. Kothari's permanent and stationary evaluation must be rejected for the reason that it is inconsistent to accept a history of 90 % improvement and increase the disability another 60 to 100 %.

Both Dr. Hester and Dr. Perelman find a disability precluding heavy lifting and repeated bending and stooping. I accept this level of disability as consistent with the record and the testimony of the applicant. In evaluating the subjective complaints, I find a large and inconsistent discrepancy in the doctors. Dr. Hester describes the subjectives as constant and Dr. Perelman as intermittent. The level is lower with Dr. Hester (slight) and greater with Dr. Perelman. The applicant describes the complaints as severe and chronic. They, to observation, are obviously not constant severe. I reconcile the difference by accepting Dr. Hester to mean an average of slight, i.e. something on the order of minimal to occasional moderate and Dr. Perelman to mean minimal to intermittently slight to moderate in the neck and shoulder and minimal to intermittently moderate in the back.

I must reject Dr. Woods because he relies upon Dr. Kothari, (whom I have found makes no sense) and yet also rejects Dr. Kothari who confirms the parts of the body injured. I accept Dr. Perelman as more consistent with the applicant's testimony, including his apportionment. With respect to apportionment, the only report that applies is that of Dr. Perelman. Dr. Woods, as indicated rejects the claim of injury to anything but the left thumb and is speculative as to apportionment to subsequent non-industrial injuries.

Dr. Perelman is ambiguous as to the permanent and stationary date of the back. In view of the applicant's testimony that the back pains increased as he continued to work, I find that he became permanent and stationary one year after the September 19, 1990 injury or on or about September 19, 1991.

In order to apply the apportionment, the over all rating must be arrived at. The overall subjectives merit a 30 % standard. 25 % for intermittent moderate back pain, raised to the next standard for intermittent slight to moderate pain radiating into the shoulder.

The overall rating, as the injuries became permanent and stationary at the same time, is:

18.1) - 30 % - 38 F - 30 - 27:2  
7.1)

William Deatherage, employee v. Toys R Us et al.

or a total amount of \$11,664.00 payable at the rate of \$108.00 per week beginning September 20, 1991, and continuing for 108 weeks.

The lumbar spine by itself is rated as:

18.1 - 25 % - 38 - 25 - 22:2

or 83 weeks of disability indemnity.

Fifty percent of the lumbar spine is due to each injury, or 41.5 weeks to each injury. Since the injuries became permanent and stationary at the same time, Wilkinson v. Work. Comp. App. Bd. (1977) 19 Cal. 3d. 491 [42 Cal. Comp. Cases 406] applies and they are rated as one injury.

In order to give full effect to Wilkinson, 41.5 weeks of disability are attributed to the injury of September 19, 1990 and 66.5 weeks to the injury of January 28, 1990. Since the compensation rate is \$108.00 a week, the first injury pays at the rate of \$66.50 ( $66.5/108 \times 108$ ) and the last injury at the rate of \$41.50 ( $41.5/108 \times 108$ ), each injury for 108 weeks. (It is coincidental that weeks and compensation rate are the same.)

#### Further medical treatment.

This is awarded on a may be basis, pursuant to Dr. Hester. Dr. Perelman's recommendations are noted, but no broad authorization should be given, due to the notation by the pain management group of the possible misuse of narcotic medication. (Dr. Ford, Oct. 13, 1993.)

#### Self-procured Medical Treatment.

This is to be adjusted by Travelers Insurance and jurisdiction will be reserved on contribution.

#### Medical-legal.

This is to be adjusted by Travelers Insurance and jurisdiction will be reserved on contribution.

#### Attorneys fees.

Applicant's attorney has performed services of a reasonable value of \$1,800.00 to date herein, payable \$1,100.00 in LBO211191 and \$700.00 in LAO 734293.

William Deatherage, employee v. Toys R Us et al.

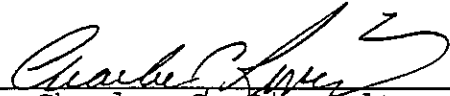
**Appeal from Determination of the Rehabilitation Unit**

Defendant's appeal is based upon the finding that the employee is a Qualified Injured Worker. That finding is supported by the opinions of Dr. Hester and Perelman and will be affirmed. However, it is obvious from the psychiatric reports and the report of Dr. Hester that the employee is not likely to benefit from rehabilitation services. As this is a trial de novo, a further finding will be made to that effect. In addition it appears that this has been true since he left employment and concurrent with the collection of Social Security Disability.

**Penalties**

No maintenance benefits are owing on which to attach a penalty and defendant had medical and legal cause for not paying.

October 28, 1998



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Charles C. Ringwalt  
Workers' Compensation Judge