

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case No. ADJ9831834

LUIS RAMIREZ,

Applicant,

vs.

~~FINDINGS AND ORDERS~~

**BARKENS HARDCHROME INC;
INSURANCE CO OF THE WEST SAN
DIEGO, ESIS SOUTHFIELD,**

Defendants.

Law Offices of Telleria, Telleria & Levy
By: Dustin Salidi, Esq.
Attorneys for Applicant

Greenup, Turchin, Hartston & Rosenfeld
By: Gina T. Hartston, Esq.
Attorneys for Defendant ICW Insurance

Adelson, Testan, Brundo, Novell & Jimenez
By: Megan Cross, Esq.
Attorneys for Defendant ACE Property and
Casualty, administered by ESIS

The above-entitled matter having been heard and regularly submitted, the Honorable Diane E Phillips, Workers' Compensation Administrative Law Judge, now decides as follows:

FINDINGS OF FACT

1. LUIS RAMIREZ, born on J , while employed during the period September 1, 2007 through July 1, 2014 as a laborer at Arcadia, California, by BARKENS HARDCHROME INC, whose workers' compensation insurance carrier was INSURANCE CO OF THE WEST during the period October 1, 2012 to October 1, 2015 and ACE PROPERTY AND CASUALTY, ADMINISTERED BY ESIS, did not sustain injury arising out of and occurring in the course of employment to psyche, back and hands.

ORDER

IT IS ORDERED THAT Applicant LUIS RAMIREZ take nothing on his application herein.

ORDER ADMITTING DOCUMENTARY EVIDENCE

IT IS ORDERED THAT the following be admitted into evidence as designated in the Minutes of Hearing and Summary of Evidence:

Applicant's Exhibit 1;

Defendants' Exhibits B-K, N-P.

DATE: July 8, 2016



**Diane E Phillips
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE**

Served by Mail on: 7/11/16
on parties as shown on
the Official Address Record.

By: 

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

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LUIS RAMIREZ

-VS.-

BARKENS HARDCHROME
INC; INSURANCE CO OF

THE WEST SAN DIEGO;
ACE PROPERTY AND
CASUALTY,
ADMINISTERED BY ESIS

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:

DIANE E PHILLIPS

DATE:

JULY 8, 2016

OPINION ON DECISION

INJURY AOE/COE

Applicant Luis Ramirez, while employed during the period September 1, 2007 to July 1, 2014 as a laborer by defendant Barken's Hardchrome, Inc., claims to have sustained injury arising out of and in the course of employment to his psyche, back and hands.

First, there is no medical evidence or testimony to substantiate or support a psychiatric injury as alleged. Thus applicant has not met his burden of proof in that regard. In connection with the applicant's complaints to his back and hands for the continuous trauma as alleged, the applicant did not testify to orthopedic complaints and pain during his employment as indicated in the medical reporting submitted. Instead, applicant testified to a specific injury and he could not remember when it occurred. While the medical reporting mentions an onset of pain which appears to be the lifting incident applicant testified to at trial, the medical reporting does not set forth the alleged

hospital visit applicant testified to at Gardena Hospital nor any of the details of missed work or any modified work which applicant testified to at trial.

Additionally, applicant is not a credible. Applicant testified at trial and deposition that he has not used crystal meth since 2014. However, the lab reports and the reporting of Dr. Saeid dated May 8, 2015 (Defendant's Exhibits L, N and O) reflect that the applicant had continued to use methamphetamines in 2015. Applicant also used the name of Mario Peneda when first hired by defendant, signing W-4 forms under penalty of perjury that this was his name when he knew that Mario Peneda was not his true identity. Applicant may have had permission from Mr. Peneda to use his name and social security number. Although applicant tried to rectify the situation by changing his name to his actual name with defendant, he waited over 5 years to do so. Additionally, when Applicant signed documents under penalty of perjury that his name was Mario Peneda, he knew that this was not his true identity. It also appears that, contrary to applicant's testimony, that defendant did in fact explain the termination check list and termination letter to him in Spanish based on the trial testimony of defense witness Rosandra Esquivel. Overall, after reviewing his testimony and the documents submitted by the parties at trial, his credibility is questionable at best.

After a review of the medical evidence presented and the testimony of applicant and the defense witnesses, it is found that the applicant did not sustain an injury arising out of and in the course of employment to his psyche, back and hands on an industrial basis.

PRESUMPTION OF COMPENSABILITY PURSUANT TO LABOR CODE SECTION 5402

Labor Code Section 5402 establishes a presumption that an injury is compensable if the employer does not deny liability "within 90 days after the date the claim form is filed" under Labor Code Section 5401. No presumption arises under Labor Code Section 5402 if the employer denies a claim before expiration of the 90-day period.

Here defendant issued its denial letter on May 18, 2015 (Defendant's Exhibit A). Based on the proof of service contained in EAMS, it appears that applicant's counsel's office served the employer with an application for adjudication of claim, DWC-1 claim form and additional opening documents at the employer's PO Box on February 6, 2015 and also appears to have mailed said opening documents by certified mail, return receipt requested. Unfortunately, it is unclear as to when the documents were actually received by the employer. Although applicant presented a signed certified mail receipt and copy of their representation letter which supposedly contained the corresponding numbers to the certified mail receipt (Applicant's Exhibit 1), it is unclear when it was actually mailed to the defendant employer, when it was received by the defendant employer because the date of delivery and received date is missing, or if the attached signed certified mail receipt actually goes with the letter presented because the numbers are obscured on the letter. It is thus impossible to say when the employer actually received notice of the claim by way of the DWC-1 claim form so as to compute the 90-day period. Applicant's counsel provided no testimony to substantiate that the certified mail receipt and the letter went together and therefore did not meet their burden of proof in this regard. Therefore, the presumption of compensability pursuant to Labor Code Section 5402 is not applicable in this matter.

POST-TERMINATION DEFENSE PURSUANT TO LABOR CODE SECTION 3600(a)(10)

This issue is rendered moot by the findings noted above.

ADMISSIBILITY OF DOCUMENTARY EVIDENCE

Both applicant and defendant objected to the admissibility of exhibits introduced as evidence at the time of trial in this matter.

Defendant objected to Applicant's Exhibit 1 on the basis that it could not be authenticated or verified. Additionally, that the delivery section of the return receipt was not completed as the date

of receipt and delivery were missing. After considering defendant's objection and in accordance with Labor Code Section 5708, the Exhibit is deemed admissible as it was necessary to ascertain the substantial rights of the parties.

Applicant initially objected to Defendant's Exhibits A through M and then at the second day of trial withdrew the objections to Defendant's Exhibits A, L and M and those exhibits were admitted. Defendant also introduced for impeachment purposes Exhibits N through P. Applicant's objections to defendant's exhibits were primarily that the documents were not served prior to trial. However, Defendant's Exhibit M is a proof of service noting that defense exhibits were served on applicant's counsel the day before the Mandatory Settlement Conference and were also listed on the Pre-Trial Conference Statement. Applicant's counsel thus was aware at the time of the Mandatory Settlement Conference what evidence defendant intended to introduce as evidence even though applicant's counsel noted an objection at the time of the Mandatory Settlement Conference. Overall, after considering the applicant's objections, and in accordance with Labor Code Section 5708, the Defendant's Exhibits B-K and N-P are deemed admissible as necessary to ascertain the substantial rights of the parties as well as admissible for impeachment purposes as witness credibility was an issue.

Therefore, Applicant's Exhibit 1 is admitted into evidence and Defendant's Exhibits B-K and N-P are also admitted into evidence.

DATE: July 8, 2016



Diane E Phillips
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE