

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

Case No. ADJ9024038

RICHARD FLORES,

Applicant,

vs.

TRADER JOES;
SEDGWICK 14153 RIVERSIDE,

Defendants.

**FINDINGS OF FACT
AND ORDER**

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

FINDINGS OF FACT

1. RICHARD FLORES, born _____ while employed on 6/27/2013 as a crew member, Occupational Group Number 360, at Studio City, California, by Trader Joe's, claims to have sustained injury arising out of and in the course of employment to the right shoulder, neck, cervical spine, lumbar spine and left shoulder. At the time of injury the employer's workers' compensation carrier was Ace American Insurance Company administered by Sedgwick. The primary treating physician is Dr. Shiva Drakhshani, D.C.

2. Based upon the medical report(s) of AME Stuart Green, M.D. dated 2/7/18, it is found that applicant did not sustain injury to his right shoulder, neck, cervical spine, lumbar spine and left shoulder arising out of and occurring in the course of employment on 6/27/2013.

ORDER

The lien of Edwin Haronian, M.D. shall be disallowed.

DATE: JUN 28 2019



ROBERT SOMMER
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the
Official Address record on the above date.
BY: David Cuyler 6-28-19

STATE OF CALIFORNIA
Division of Workers' Compensation
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CASE NUMBER: ADJ9024038

RICHARD FLORES

-vs.-

TRADER JOES;
SEDGWICK 14153
RIVERSIDE

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:

ROBERT SOMMER

OPINION ON DECISION

Richard Flores, while employed on 6/27/2013 as a crew member, Occupational Group Number 360, at Studio City, California, by Trader Joe's, claims to have sustained injury arising out of and in the course of employment to the right shoulder, neck, cervical spine, lumbar spine and left shoulder. At the time of injury the employer's workers' compensation carrier was Ace American Insurance Company administered by Sedgwick. The primary treating physician is Dr. Shiva Drakhshani, D.C.

THE ISSUES ARE AS FOLLOWS:

Injury arising out of and in the course of employment.
Liability for self-procured medical treatment.
The lien of Edwin Haronian, M.D.

Other issues by Lien Claimant:

Penalties and interest. (b) Labor Code Section 4603.2.
Labor Code Section 4610.
Failure to serve AME reports and subrosa films.
Exclusion of AME medical report post Compromise & Release.
Neglect of treatment.
Labor Code Section 4616.
Regulation 10622.

Tito Torres Sanctions and Costs; Knight versus United Parcel Services.

Other issues by Defendant:

(a) Whether the liens of Edwin Haronian, M.D. should be dismissed pursuant to Labor Code Section 4903.05(c)(3). (b) Whether the liens of Edwin Haronian, M.D. are invalid and should be excluded from admission into evidence based on failure to comply with Labor Code Section 4903.8 (d). Whether any medical reports offered into evidence by Edwin Haronian, M.D. that are unsigned or fail to include within their bodies a signed declaration under penalty of perjury stating unequivocally that there has been no violation of Labor Code Section 139.3 as mandated by Labor Code Section 5703(a) (2). Whether pursuant to Labor Code Section 4604.5 (c) (1). Defendant has no liability for more than 24 physical therapy, occupational therapy or chiropractic visits. (e) Whether the services and medications referenced in the liens and bills of Edwin Haronian, M.D. were provided or prescribed by duly licensed and accredited persons. (f) Whether the services and medications referenced in the liens and bills of Edwin Haronian, M.D. were reasonably required to cure and/or relieve from the effects of the industrial injury in compliance with the Medical Treatment Utilization Schedule.

Whether the medications referenced in the lien and bills of Edwin Haronian, M.D. were dispensed in accordance with the mandatory provisions of the Business & Professions Code Sections 4170 (a) (4), 4170 (a) (6) and 4170 (a) (7). Whether the charges of Edwin Haronian, M.D. are in excess of the Official Medical Fee Schedule and Official Pharmacy Fee Schedule.

Pursuant to the Solicitation of AME Supplemental Report with proof of service upon Lien Claimant dated 12/21/17.

Dear Dr. Green:

Our office now represents the defendant in the above action. You have examined the Applicant as Agreed Medical Examiner and have issued medical reports dated April 27, 2015, June 8, 2015, March 28, 2016 and April 10, 2017. Your supplemental report dated April 10, 2017 was issued in response to an interrogatory submitted by our predecessor. Within that report you found that the Applicant was totally, temporarily disabled. At the time the interrogatory was submitted you were not made aware of the Applicant's subsequent employment in construction or of subrosa videos showing him engaged in certain physical activities he was denying the ability to engage in. Enclosed are copies of the transcript of the Applicant's March 7, 2016 deposition wherein he admitted to being employed by a construction company, and subrosa videos shot in April, 2016 showing him engaged in relatively significant physical activities including playing baseball, bending, stooping and running, and using his allegedly injured right arm to throw a baseball. The case in chief has been resolved by Compromise and Release, but in order to deal with certain outstanding liens we request your updated opinions on the issues of whether the Applicant was ever totally, temporarily disabled and in need of medical

treatment after he stopped working for Trader Joe's. Please review these exhibits and reconsider your previous finding that the Applicant was totally, temporarily disabled after he stopped working for Trader Joe's in July, 2013. Please recall that he did not stop working at that time because he was disabled but because he was fired for cause. He performed his regular job duties without restriction until the day he was fired. Consider the possibility that he was exaggerating his complaints at the time of your exam.

Please indicate whether based on the fact that the Applicant did not stop working for Trader Joe's because he was no longer able to perform his job duties but because he was fired for cause, on his deposition testimony regarding subsequent employment in the construction industry, and on the activities he is seen to engage in in the subrosa videos, you are able to state within a reasonable degree of medical probability that he was ever totally, temporarily disabled after he stopped working for Trader Joe's in July, 2013. Please also provide your opinions regarding any reasonable periods of temporary disability, the date by which his condition reached maximal medical improvement, and whether he required any of the treatment you previously recommended if you are able to do so. (Defense Exhibit E)

Subsequently, Dr. Green produced the following report:

At 7:26 AM we see an individual from a distance wearing a baseball cap with a red visor. He has a beard that looks exactly like that of the applicant. Indeed, he appears to be the applicant, opening up the rear door of an SUV. He lifts his arms up to do so. Next, we see the subject getting into a vehicle at 10:40 AM. After that, he appears to be at a gas station pumping gas. He bends over doing so. The applicant's shoulder motion appears to be normal and free. This completes my review of the first days of surveillance.

The 2nd surveillance disc is particularly revealing, especially the applicant's conduct at the baseball field, The applicant is seen playing baseball with a young lad tossing the ball around, throwing grounders and pop flies. Furthermore, at one point the subject hangs up a sign by reaching fully overhead and attaching the sign to a chain-link fence. After that, while sitting in the bleachers, the applicant rests his arm in 90° of abduction over his companion, who was wearing a blue jacket.

I suspect that the employer and the defense attorney believe that throwing the ball is the most telling part of the subrosa video; it is, in fact, the way the applicant pulled up his pants when he internally rotated his arm to pull in the region of the back loop of the pants and lift them up because he was not wearing a belt. This particular movement, which we orthopedic surgeons call a "posterior lift off" is something that a person with any kind of shoulder disability would not do subconsciously. Moreover, the applicant does it

multiple times while tossing around the baseball. The same can be said regarding lack of impairment for the applicant's lumbar spine where he is seen lifting a very heavy jug of water, the type used in coolers. He lifts it into his vehicle and then takes it from there into a residence.

The parties will recall that, from the very first time I evaluated this applicant, I had problems with the claimant. For example, I wrote on page 32 of my April 27, 2015 report, "the applicant is, perhaps, reasonably temporarily totally disabled on the basis of his right shoulder. However, I need to see the medical records, particularly the visit that the applicant had to urgent care within a couple of days of his termination to see what he said and what was found. [The applicant tells me he was sent to urgent care by his "manager."]. From the above sentence, the parties can undoubtedly determine that I concluded that there were questions I had about this entire claim. It was, after all, filed after the applicant was terminated. Moreover, he was angry about his termination.

When I did get some medical records on June 8, 2015 and filed a report to the parties, I noted that there were discrepancies in the sequence of events. I wrote the following: "it is incumbent upon the applicant and his counsel to locate that doctor and obtain medical records for me because of chronologic sequence of the medical records in this case do not match up with the applicant's description while in my office."

To my knowledge, such records were never served on me. Under the circumstances, it is no surprise that I concluded, when deposed on this matter on March 28, 2016, that the applicant had no verifiable injury after his September 12, 2008 shoulder injury and that the applicant was never temporarily totally disabled on industrial basis. See page 28 at line 23.

Now, having reviewed the subrosa videos, my impression in this regard is confirmed. Not only was the applicant never temporarily totally disabled, he had no musculoskeletal impairment while under surveillance. Therefore, there was no reasonable basis for the applicant's evaluations and treatment subsequent to his termination. From an orthopedic perspective, the employer is not liable for the evaluations and treatment the applicant received after he was terminated for musculoskeletal injuries that allegedly, but incorrectly, were claimed to be work related. (Emphasis added) (AME report of Stuart Green, M.D. dated 2/7/18 Exhibit A)

Lien Claimant objected to Defendant's Exhibit E based on their petition with regards to exclusion of the AME Green report. Defendant's Exhibits A through D were admitted into evidence. Defendant's Exhibit E will be admitted into evidence, there is no legal basis for its exclusion.

INJURY AOE/COE

Based upon the medical report(s) of AME Stuart Green, M.D. dated 2/7/18, which is the better reasoned and more persuasive, it is found that applicant did not sustain injury to his right shoulder, neck, cervical spine, lumbar spine and left shoulder arising out of and occurring in the course of employment on 6/27/2013.

Based upon the above finding, all other issues are moot.

DATE: JUN 28 2019



ROBERT SOMMER
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE