

IT IS FURTHER ORDERED that the court retains jurisdiction over any valid medical/legal liens.

DATE: 09/24/2019

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Filed and Served by Mail on 09/24/2019
On all parties as shown of the Official Address Record.

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

CASE NUMBER: (Master File)

-vs.-

WORKERS' COMPENSATION
ADMINISTRATIVE LAW
JUDGE:

DATE OF INJURY: 04/09/2018

OPINION ON DECISION

This matter proceeded to trial on the issue of AOE/COE. All other issues were deferred.

AUDIO RECORDINGS OFFERED AS EXHIBIT 1

Applicant's Exhibit 1 consisted of audio recordings made during a closed door meeting between applicant and his supervisors wherein applicant was facing disciplinary action. Applicant admitted that he did not inform his supervisors that he was recording the meeting and did not obtain their consent to do so. Under California Penal Code §632, enacted under the California Invasion of Privacy Act, it is illegal for an individual to record a confidential communication carried on among the parties in the presence of one another without obtaining the other parties' consent. In order to be considered confidential the conversation needs to take place in circumstances that reasonably indicate that at least one party to the conversation intends for no one else to overhear it. §632(c). Whether or not criminal charges are ever filed, any evidence obtained in such a manner must be excluded as evidence from any judicial, administrative or legislative proceeding. §632(d). Here, given that the recorded conversation was made during a disciplinary meeting, held behind closed doors, the circumstances indicate that it was not intended to be overheard by those not a party to it.

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INJURY AOE/COE

Applicant, who was a site foreman, testified that he was working on April 9, 2019 with [redacted] near downtown Los Angeles. He stated that [redacted] the Field Operations Manager, arrived with a load of very large pipe. The three men proceeded to unload the pipes, one slipped, and the applicant attempted to slow, or arrest, its fall. In so doing the applicant claims he felt a pop and pain in his low back which radiated down his leg.

[redacted] testified on behalf of the applicant there was an incident with the pipe on April 9, 2018 in a manner reasonably consistent with applicant's description of events. This witness has credibility problems. On the morning of trial, Mr. [redacted] spoke with the Information and Assistance Officer at the WCAB. He informed the I&A Officer that he couldn't be at trial as he was going to the hospital because his daughter was sick. The trial was delayed into the afternoon and during the intervening time it was discovered that the witness was not at the hospital, but on a job site for [redacted] in San Pedro. When questioned, he admitted that he had lied to the court officer. Notwithstanding same, the witness testified that the applicant never complained of being injured on April 9, 2018. Mr. [redacted] was surprised to learn, in December of 2018, that applicant claimed he had been injured in April. He did state that he had seen applicant a few times between April and December, and that applicant had been walking funny, but applicant never volunteered a reason and the witness never inquired as to why.

[redacted] testified that not only had he never delivered any pipe to applicant on any job-site in April of 2018, Applicant never complained of a work injury until a disciplinary meeting in late October 2018.

Applicant further testified that he did not tell anyone that he had suffered an injury until October of 2018. He continued to work his usual and customary duties through October of 2018. He never went to the doctor until sent by the employer in October of 2018. He only informed his supervisors of the alleged injury during a meeting on October 24th or 25th, 2018. Initially, he testified that he didn't know he was going to be fired at that meeting. However, under cross-examination, Defense counsel impeached this testimony using his prior deposition. In that deposition he testified that he went into that meeting believing his was going to be fired,

having been informed of such by a gentleman named _____ and his brother _____ who was also a foreman with _____

After that meeting, as required by law, the employer gave him a claim form and sent him to a doctor.

Applicant then testified that on October 26, 2018, he was walking down some stairs at a job site by himself, when he fell. He claims this fall was witnessed by several people. Defense, again using his prior deposition testimony, showed he had changed his story. In that deposition he testified his brother was with him on the stairs and witnessed the fall.

When Applicant's brother, _____ was called to the stand he ultimately testified:

- 1) That he had warned his brother of the impending discipline that was the subject of the October meeting. He initially was evasive under questioning about this, first stating that he was not aware applicant was going to be fired, then recanting and stating he was aware and had, in fact, begged for his brother's job – a large discrepancy between knowing and not knowing; and
- 2) That he never witnessed his brother fall on the job at any time. Further, he indicated that despite being roommates with applicant and foremen at that same company his brother never told him he'd been injured on the job at any time. _____ did state he'd been outside the state of California during much of the summer but then became very evasive as to why he hadn't discussed these injuries with his brother despite his claim that he'd seen applicant "walking badly" upon his return to California in early October.

Sub-rosa video was viewed. It showed views of applicant, shot from a public street, on the roof of his trailer. He appeared to be patching the roof and the video was one hour and twenty minutes long. The court did not view the entirety of the video as the investigator,

_____ indicated, and the defense agreed, that the activities shown in the first ten minutes of the video were indicative of the entire video. It was filmed after applicant reported his claim and prior to his deposition and showed him engaged in squatting, kneeling and bending but not

in an overly strenuous manner. This video would have been unremarkable except that first, applicant testified that he'd done some work on the roof for about an hour on one day and a half-hour another, but was not squatting, and then was impeached by his prior deposition testimony where he had claimed to have never been up on the roof repairing or maybe did so one brief time.

The doctors' reports are sparse at best. The most comprehensive one being a handwritten form from [redacted] on November 26, 2018. The date of reported injury is October 26, 2018, but the mechanism described is what was testified to happening on April 9, 2018. The October 26, 2018, date is constantly reported as the only date of injury in the medical evidence provide. The April date is not mentioned in any report. Nor is the mechanism of injury of a fall on stairs ever mentioned.

While the court is not sure what to make of the testimony of [redacted] what is certain is neither the Applicant, nor any of the witnesses he called on his own behalf, were credible witnesses helpful to applicant's case. They all appear to trade in half-truths and evasiveness. Was there an incident on April 9, 2018...maybe? Applicant and, to a lesser extent, Mr. [redacted] have credibility issues. Applicant states one thing and then when called out on it, equivocates, deflects and sometimes utterly changes his story. And then applicant's own brother barely props up the contention that applicant had some manifestation of possible injury when he saw him in October and flatly denies being the witness to the alleged second injury.

Ultimately it is applicant's burden to prove industrial injury and there was no credible evidence presented to show that applicant suffered an industrial injury on either April 9, 2018 or October 26, 2018.

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Division of Workers' Compensation
Workers' Compensation Appeals Board

09-24-2019

OFFICIAL ADDRESS RECORD

Case Number: (MASTER FILE)

Employer,

Claims Administrator,

DIETZ GILMOR
ONTARIO

Law Firm, 3333 CONCOURS ST BLDG 7 FL 2 ONTARIO CA 91764

Injured Worker,

CHINO HILLS

Law Firm,

CHINO HILLS

Lien Claimant, .

\PROOF OF SERVICE

I am over the age of 18, not a party to this proceeding, and am employed by the State of California, DWC, Pomona District Office of the WCAB, located at 732 Corporate Center Drive, Pomona CA 91768

On 09/24/2019, I served the attached **FINDINGS AND ORDER / OPINION ON DECISION** dated 09/24/2019 on the interested parties in said cause, by e-mail, fax, or by placing a true copy thereof, enclosed in a sealed envelope, with postage fully paid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Signed by