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Arbitrator

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

BEN TOR PLAINTIFF, Plaintiff, vs. NONDESCRIPT BANK, Defendants.	CASE NO. WEC 142592 ARBITRATOR'S STATEMENT OF DECISION Date: August 1, 1991 Time: 4:00 pm Place: 12424 Wilshire Blvd., Ste. 1120, Los Angeles

FINDINGS

LIABILITY

EVIDENCE

This case involves an alleged slip and fall on January 19, 1991 by Mr. Plaintiff at a branch of the Nondescript Bank. His part time employer Dr. Doctor and he were at the bank meeting with Jerry VP, a Senior Vice President, when Plaintiff asked to go to the bathroom. Olivia, a bank employee, walked him in the direction of the stairs, and Plaintiff fell 20 feet from where Dr. Doctor and Mr. VP were chatting. Plaintiff testified that he was following Olivia by about ten feet, never noticed the plastic mat, and then tripped on the hard mat that was protruding upward above the height of his foot — approximately one to two inches above the carpet height.

Plaintiff claims that immediately following the fall, Dr. Doctor, his employer who accompanied him to the bank, came over and assisted him to control the bleeding from his mouth caused by his face striking the corner of a desk. (Mr. VP agreed that Plaintiff was bleeding from his mouth.) Dr. Doctor lives in Denver, Colorado and was unavailable to testify about these events.

By contrast, Mr. VP testified that he and Dr. Doctor noticed the commotion, and did nothing. He claims that they continued to discuss the loan application. Then Dr. Doctor got up and went over to new accounts, but he did not go over to assist Mr. Plaintiff. Mr. VP testified that Mr. Plaintiff then on his own went to the bathroom. Mr. Plaintiff testified that this was up a small flight of stairs. Mr. VP never went over to the scene of the incident to see what caused the fall. Mr. Plaintiff, by contrast, testifies not only did Dr. Doctor come over, but so did Mr. VP. Plaintiff claims that while Mr. VP was discussing the matter with him, that another employee standing next to Mr. VP stated in effect that the bank was aware that the mat protruding up could cause a problem, they meant to roll it up out of the way, and had not done so. Mr. VP denied not only coming over to Mr. Plaintiff's assistance, but also that any such conversation took place. Mr. VP could not recall any employee other than Olivia being in the vicinity of Mr. Plaintiff after the accident.

The mat itself was never produced. Nor were photos obtained. Even though the bank agreed that Olivia was still an employee of the bank, she was not produced. Also, Mr. VP testified that her statement was taken (as he recollected), but it was not produced. The bank was aware within 6 months of the accident from a statement of Mr. Plaintiff that the mat was the focus of concern, yet no photos or testimony about whether the mat was removed, repaired, or kept in place was offered. And Mr. VP gave a halting yet negative response to the direct question whether he was aware of anyone ever discovering after the incident that there was a curl in the mat. Mr. Plaintiff and the medical testimony indicated that he had a trick knee caused by a loose bone fragment. This could cause his knees to give way at any time, spontaneously.

a. CAUSATION

The most credible evidence is that Mr. Plaintiff did trip on the mat. Defendant

claims that his prior testimony that he did not "hit" the buckle with his "foot" (Depo at 22:6-7) is inconsistent. However, Mr. Plaintiff continues to insist that he felt then and now that this is true; instead, it was his ankle that hit the mat. His foot instead slipped under the mat. This is consistent with his prior testimony in deposition (27:7-8). His statement (at page 13) taken six months after the accident does appear in conflict, but the same statement later includes a reference that he tripped on the mat so interpreting the statement appears inconclusive. I am convinced, however, that Mr. Plaintiff's testimony is not a recent fabrication because in subsequent review of Dr. Doctor's treatment notes of January 23, 1989, **only six days after the accident**, it records Mr. Plaintiff's version as saying "[he] was walking through a bank, following a bank employee, when he tripped over a plastic floor mat which was curled up and upside down ...." (See Exhibit 2 to plaintiff's arbitration brief). And because Mr. Plaintiff stood unimpeached in all other details of the events and treatment, he appeared to be credibly relating his recollection of tripping on the mat at the bank.

The burden of producing evidence shifted to the bank to prove that Mr. Plaintiff's trick knee was more likely the explanation for the fall. However, the most important evidence — that which tended to disprove any unusual bend in the mat and hence the lack of any dangerous condition – is wholly missing. No photographs were introduced. No bank employee in charge of maintenance established that no mats were replaced after the fall. Crucially, Olivia was not called when presumably she was on the spot, unlike Mr. VP who the bank in fact called as a witness. It must be inferred from the failure to produce more convincing evidence, that such evidence would have been unfavorable to the bank.

Hence, causation is established.

b. FORESEEABILITY

Because I find there was a dangerous condition in the mat, as stated above, and this mat's fold was visible to Mr. Plaintiff after the incident, I conclude that any reasonable inspection of the premises would have revealed it. Moreover, Mr. Plaintiff was told by a bank employee that they were aware of such condition prior to the incident and meant to fix it in advance. While Mr. VP denied his own knowledge, his testimony is suspect on other material matters (such as no one going

to Mr. Plaintiff's assistance immediately after the fall), that I find none of his testimony on this point is credible.

c. TRIVIALITY CONTENTION

Defendant Nondescript Bank claims that this fold in the mat, if it existed, was a minor elevation in the floor which is "bound to occur in spite of the exercise of reasonable care by the party having the duty of maintaining the area involved," quoting *Graves v. Roman*, 113 Cal. App. 2d 584 (1952). Not only is *Graves* distinguishable because there the difference in elevation was one-eighth of an inch in linoleum flooring, but also *Graves* presupposes that the dangerous condition is virtually unavoidable. However, here the dangerous condition is a plastic mat that can be removed and replaced with relative ease. And while the danger from a small 1 to 2 inch fold may not seem serious, the court in *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal. 3d 49, 192 Cal. Rptr. 857 (1983) held that the risk of a slight possibility of injury "justifies liability if a reasonably prudent person would" have foreseen injury.

Hence, I find that Nondescript Bank knew or should have known of the dangerous condition in the mat, it was not a trivial condition, the Bank could easily have corrected the condition, but failed to do so or warn Mr. Plaintiff, and he tripped on the dangerously protruding bend in the mat.

d. COMPARATIVE FAULT

While there was no claim that the plaintiff was contributorily negligent, it manifestly appears that plaintiff Plaintiff was partly at fault for this incident. Both his weight and his trick knee were known handicaps to Mr. Plaintiff. The trier of fact may find that "persons with known handicaps may have to exercise a greater degree of care in particular circumstances than other persons." *Scott v. Alpha Beta Co.*, 104 Cal. App. 3d 305, 310, 163 Cal. Rptr. 544 (1980) (trick knee). Mr. Plaintiff had 10 feet between himself and Olivia walking in front of him at the moment of his fall. He admits that he did not even see the mat prior to the fall. While partly explained by its translucent quality (apparent from photos of other mats in the bank than the one involved), he should have been very careful given his complaints to his medical doctor only one month before of weak knees.

I thus find Mr. Plaintiff was 25% at fault for this accident.

DAMAGES

EVIDENCE

Plaintiffs injuries were solely to his neck, arm, upper back, and his mouth. He claimed no knee injury. There was an IME, but only an orthopedic one. No dental or knee examination was conducted in an IME. Dr. P'ss medical report and testimony that soft tissue injuries to neck, back and arm (a radicular pain with numbness) had subsided in May 1989 stood essentially uncontradicted by any medical testimony. Dr. P's also explained the recent treatment in 1991 as related to a degenerative disk disease at C5-6 and C6-7 which is evident from x-rays taken in 1988, and, of course, thus predate this accident. Dr. P admitted that he underestimated the degree of pain at the outset of the injury because he was unaware of Mr. Plaintiff's treatment with Dr. Doctor. Dr. Doctor's records were produced as Exhibit 2 by plaintiff to his arbitration brief. Nevertheless, treatment for these conditions continued only until April 1989. The later visits appear to be simple check-ups. And according to a May 25, 1989 report of the Orthopedic Medical Center (Exhibit 4 of plaintiff's brief), Mr. Plaintiff virtually had no complaints of neck, back, or arm pain or discomfort at that time.

Then in August 1989, Mr. Plaintiff had swelling of the left foot. From the records of the Orthopedic Medical Center (Exhibit 4 of plaintiff's brief), it appears this condition was related to possibly gout or some diabetic condition. There appears no evidence to relate this to the accident here. All other neck, arm, or back pain is noted at that time to be markedly reduced and virtually non-existent.

Plaintiff also sustained injuries to his mouth. During the fall, plaintiff"'s face went directly into the edge of an office desk, and the top row of his teeth were pushed in. One tooth was broken and another displaced. Dr. N also confirms a lower lip abrasion. Mr. Plaintiff was fitted with an archbar under an anesthetic. He wore this device for eight weeks which he described as uncomfortable, preventing him from eating normal foods, and creating pain from the metallic edges. Dr. N, D.D.S., says in his report that root canal may be necessary to stabilize one of his traumatized teeth. Dr. B concurred, and said that such root canal was necessary for two teeth to restore them

to their original condition. (Exhibit 3 to plaintiff's exhibits). Dr. B provided a detailed estimate that such future root canal would cost an estimate $3720. Defense provided no rebuttal to this testimony or evidence.

Significantly, plaintiff testified that he is usually uncomfortable eating or drinking hot and cold drinks or foods. No medical testimony was offered to dispute this claim. Because of the absence of contrary evidence, I assume that this a permanent condition of ongoing pain and suffering.

Mr. Plaintiff has incurred over $7,105 in medical expenses to date. No evidence was offered to dispute the reasonableness of the bills submitted. (There were no bills offered for the recent treatment by Mr. Plaintiff with a chiropractor. Even had they been offered, I find such treatment unrelated to the incident).

Mr. Plaintiff also claimed to have lost income as a self-employed salesman of medical equipment to doctors. Plaintiff testified that he earned in the year prior to this incident $52,000 in commissions, but in the year of this incident of January 17, 1989, he only earned $10,000 in commissions. Mr. Plaintiff related this to discomfort in driving and sitting for more than 45 minutes at a time. While plaintiff offered no records to support this claim, the defense did not provide any basis to impeach these statements either. The evidence was vague as to when Mr. Plaintiff returned to full-time work, which should have been by the end of May 1989. It is thus unclear why Mr. Plaintiff's income was so drastically reduced in 1989. Nevertheless, a sole-proprietor can demonstrate loss of income or earning capacity by evidence of past profits where attributable to himself predominantly. (4 Witkin, *Torts*, § 883 at 3170 (1974)). While Mr. Plaintiff did not provide documentation, this alone does not make his lost income speculative. His testimony alone, if credible, is sufficient evidence. The defense did not cast suspicion on the lack of documentary proof by establishing that Mr. Plaintiff had records in his possession to prove his loss, but he failed to produce them at this arbitration. Based on the foregoing, lost income will be awarded for approximately four months at an annualized rate of $52,000.

FINDINGS

Mr. Plaintiff's damages are found to be: $7,105.00 in past medical expenses, $3,720 in future medical expenses, lost income and earning capacity of $17,333.33, $20,000 for past pain and suffering, and future pain and suffering of $20,000. All damages total $68, 158.33.

However, these damages are reduced by plaintiff's 25% contributory negligence, to a net award of $51,118.75.

Plaintiff is also awarded ordinary costs.

DATED: August 2, 1991

NELSON, SHEEHAN, DEL TONDO & GUGGENHEIM

By: _____
Douglas J. Del Tondo
Arbitrator

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