WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ADAN VALVERDE, *Applicant*

vs.

SPACE AGE MEN MAINTENANCE, INC.; UNINSURED EMPLOYERS BENEFITS TRUST FUND; BENNY EARL SANDERS, Individual Shareholder; SETARA S. SANDERS, Individual Shareholder; JAZZMINE JACKSON, Individual Shareholder, *Defendants*

Adjudication Number: ADJ12542212
(Los Angeles District Office)

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of June 10, 2024, wherein it was found that while employed during a cumulative period ending on August 10, 2019 as a construction or maintenance worker, applicant did not sustain industrial injury as alleged to the lumbar spine, thoracic spine, cervical spine, shoulders, right foot, or in the form of headaches. The WCJ also found that applicant was not entitled to a presumption of injury pursuant to Labor Code section 5402(b). It was thus ordered that applicant take nothing by way of his workers' compensation claim.

Applicant contends that the WCJ erred finding that he did not sustain industrial injury, arguing that his injury was entitled to the Labor Code section 5402(b) presumption, and that, alternatively, he presented substantial medical evidence of industrial injury. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration, rescind the WCJ's decision and return this matter to the trial level for further development of the record and decision with regard to the issues of the Labor Code section 5402(b) presumption and industrial injury.

Preliminarily, we note that former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days

from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on July 17, 2024 and 60 days from the date of transmission is Sunday, September 15, 2024. The next business day that is 60 days from the date of transmission is Monday, September 16, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday September 16, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on July 17, 2024, and the case was

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

transmitted to the Appeals Board on July 17, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 17, 2024.

Turning to the merits, we note that, while injury was not admitted, the issue of industrial causation was not explicitly listed in the Minutes of the July 25, 2023 or April 2, 2024 trial hearing dates. The issues listed on the first date of trial were temporary disability, permanent and stationary date, occupation and group number, attorney's fees and "Applicant raises Labor Code section 5402 in that the late denial triggers the presumption of compensability." Although the WCJ found that applicant was not entitled to a presumption of compensability, which was listed as an issue, she went on to additionally find that applicant did not sustain industrial injury, which was not expressly listed. As the Court of Appeal stated in *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 711 [57 Cal.Comp.Cases 230], "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citation.]' *(Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1453 [56 Cal.Comp.Cases 537].) Due process requires that all parties 'must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. [Citations.]' (*Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd. (Harris)* (1980) 103 Cal.App.3d 1001, 1015 [45 Cal.Comp.Cases 381].)" In the further proceedings, all issues for determination should be listed in the minutes.

With regard to the issue of the Labor Code section 5402(b) presumption, Labor Code section 5401 requires that a worker be provided with a DWC-1 claim form after the employer gains knowledge of the worker's injury or claim of injury. Labor Code section 5402(b) states: "If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period."

In this matter, applicant presented evidence that his former counsel mailed a DWC-1 claim form to the employer on August 28, 2019. The DWC-1 claim form was not signed by the employee, although an accompanying letter was signed by a legal assistant of applicant's former counsel. The WCJ found that the DWC-1 claim form was invalid because it was not signed by the applicant. Although the better practice is clearly for an applicant to sign the claim form, we note that Labor Code section 5401(a) states that a claim form "shall request the injured employee's name and address, social security number, the time and address where the injury occurred, and the nature of and part of the body affected by the injury." A signature is not required by the statute. Additionally, Labor Code section 5401(c) states that "The completed claim form shall be filed with the employer by the injured employee, or, in the case of death, by a dependent of the injured employee, *or by an agent of the employee or dependent*." (Emphasis added.) Since the statute does not expressly require the employee's signature, and since the claim form here was filed by an agent of the employee who signed a letter accompanying the claim form, we find that the mailing of the claim form substantially complied with Labor Code sections 5401 and 5402 and required the defendant to deny the claim within the statutory time period to avoid being subject to the presumption.

Although we are not "bound by the common law or statutory rules of evidence and procedure," (Lab. Code, § 5708), we note that a "writing is presumed to have been truly dated," (Evid. Code, § 640) and a "letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Evid. Code, § 641.) Unless evidence is presented to the contrary in the further proceedings, we presume that the DWC-1 was received by the employer within five days of its mailing. (Cal. Code Civ. Proc., § 1013; *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1817 [Appeals Bd. en banc].)

The WCJ in this case found that any claim form was timely rejected. The WCJ correctly notes that the relevant date under section 5402 for rejecting liability is the date that liability is rejected by the defendant, not the date that the injured worker is notified of the rejection. (*Rodriguez v. Workers' Comp. Appeals Bd.* (1994) 30 Cal.App.4th 1425, 1432-1433 [59 Cal.Comp.Cases 857].) However, there was insufficient evidence, either testimonial or documentary, of when liability was rejected by the employer. The WCJ relied upon employer's testimony that the claim was rejected in "November or December" (Minutes of Hearing and Summary of Evidence of April 2, 2024 trial at p. 4) and a January 2020 email referencing a prior,

but undated, denial. The WCJ writes in her Report, "Here the email evidence defendant had rejected the claim in November or December when he retained counsel, and certainly before January 8, 2020, when his counsel had already discussed the denial of the injury with prior counsel for applicant multiple times." (Report at p. 5.) However, adding five days per mailing (Code Civ. Proc., § 1013, subd. (a)), defendant had until December 1, 2019 to timely deny liability. Thus a denial in almost all of December would still invoke the presumption. In the further proceedings, the WCJ should further develop the evidentiary record and reanalyze the issue of whether the Labor Code section 5402(b) presumption arose. To the extent that the presumption did arise, the parties should present evidence and argument regarding whether it was rebutted. (See generally *Williams v. Workers' Comp. Appeals Bd.* (1998) 74 Cal.App.4th 1260.)

Regardless of the viability of the section 5402(b) presumption, any outstanding medical issues should be further developed with a report by a qualified or agreed medical evaluator. The evaluator should be informed of the WCJ's reservations regarding applicant's credibility and the history given to the primary treating physician. After development of the record in the form of a report by a qualified or agreed medical evaluator, the WCJ should evaluate the evidence and decide whether applicant has sustained his burden of proof on any issue for determination.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) In accordance with that mandate, we will grant reconsideration rescind the WCJ's decision, and return this matter to the trial level for further proceedings and decision on the issue of industrial causation and all other outstanding issues. In granting reconsideration and returning this matter to the trial level for further proceedings and decision, we are mindful of the fact that "[t]he applicant for workers' compensation benefits has the burden of establishing the 'reasonable probability of industrial causation.'" (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.App.4th 644, 650 [63 Cal.Comp.Cases 253] citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) To the extent that the Labor Code section 5402(b) presumption does not apply or is properly rebutted, applicant is reminded that he will have the burden of

establishing industrial injury in the further proceedings. We express no opinion on the ultimate resolution of any issue in this case.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Order of June 10, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of June 10, 2024 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE DODD WILLIAMS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 16, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

ADAN VALVERDE
WACHTEL LAW
SHELDON F. SINGER
DIR, OFFICE OF THE DIRECTOR, LEGAL UNIT

DW/oo

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o