WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CLAUDIUS FREDERICK, *Applicant*

vs.

FEDERAL EXPRESS CORPORATION, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ17793590
San Francisco District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on June 24, 2024, wherein the WCJ found in pertinent part that applicant did not demonstrate that defendant had notice of his injury sufficient to require defendant to provide a claim form to applicant; that the statute of limitations is not tolled; that the statute of limitations expired one year after the claimed injury of February 12, 2007; that the application for adjudication of claim was filed on June 7, 2023, outside the statute of limitations period so that applicant's claim is barred by the statute of limitations; that applicant did not show that the defendant had knowledge of the claimed injury prior to the termination of his employment by defendant; that applicant has not provided medical records in existence prior to the termination of employment which contain evidence of injury; and that applicant's application was filed after applicant's employment was terminated so that his claim is therefore barred by Labor Code section 3600(a)(10). The WCJ also found that defendant did not meet its burden of proof that this claim is barred by the equitable doctrine of laches; and that defendant did not meet its burden of proof that applicant was not working for the employer on February 12, 2007. The WCJ ordered that applicant take nothing.

Applicant contends that the statute of limitations should have been tolled since defendant did not provide a claim form or otherwise notify applicant of his rights; and that the post-termination defense under Labor Code 3600(a)(10) was inapplicable.

We received a Report and Recommendation (Report) from the WCJ, wherein she recommends that the Petition for Reconsideration be denied. We received an Answer from defendant.

We have considered the allegations of the Petition for Reconsideration (Petition), defendant's Answer, and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O and substitute a new Findings of Fact that finds that defendant did not meet its burden of proof that this claim is barred by the equitable doctrine of laches and did not meet its burden of proof that applicant was not working for the employer on February 12, 2007, and defers all other issues.

BACKGROUND

Applicant filed an Application for Adjudication (Application) on June 7, 2023, claiming injury to his back on January 1, 2008, while working for defendant as a mail handler. Applicant later amended his application, to correct the date of injury of February 12, 2007. Defendant denied applicant's claim and asserted all affirmative defenses including statute of limitations, post-termination defense and laches.

On May 14, 2024, the matter proceeded to trial. The parties stipulated that applicant while employed on February 12, 2007, as a sorter/checker, by defendant, claims to have sustained injury arising out of and in the course of employment to his back. The issues raised were "whether the applicant's claim of injury is barred by the affirmative defenses of statute of limitations, laches, and post-termination claim; and defendant's claim that the applicant was not working on the claimed date of injury." (Minutes of Hearing, Summary of Evidence (MOH), May 14, 2024, p. 2.) The admitted medical records did not include any records regarding treatment for applicant's claimed injury nor a Qualified Medical Examiner (QME) report. (Applicant's Exhs. 2-6; Defendant's Exh. D.)

Applicant testified in relevant part that:

> He agreed he stopped working in 2007. He agreed it was for a physical injury. It was at or around February 12th, 2007.

They were shorthanded that day. It was a rainy night. They were short by two people. They were in the foreign delivery area. The ball-bearing mats were slippery. One container came too fast. He was the pivot guy. The container was too heavy. He twisted his back and almost fell off the platform with the container. His teammates helped him. They helped him sit down. An ambulance was called because of the injury.

He worked mid-shift so he thinks it was about 1:00 a.m. He started at 11:00 p.m. and left at 7:00 a.m. It's the night shift. He is the pivot guy on the line of people to get the containers.

He was pretty sure he was taken by ambulance. He assumed it was to the Alameda Hospital. It was the hospital nearby. He spoke to his supervisor. Two coworkers were there too. He doesn't know any of their names.

He did not sign a Workers' Compensation Claim Form. He was not sent a claim form. No one gave him his rights regarding workers' compensation. He does not recall anyone at FedEx telling him to go to a doctor.

A month or so later he was called in, sat with a counselor, and told he was being medically terminated. He agreed it was the last time he came to FedEx. He denies being told anything regarding the statute of limitations.

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He recalls that Greg Martinez was the overall supervisor. He may have spoken with him regarding the injury. He can't remember. He is the guy in charge of the materials in the warehouse and the loading dock. He agrees the name jogs his memory and he reported the injury to him. He does not recall a Tim Marks.

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Around February 12th or February 13th was the last time he was at the FedEx facility. He knows he physically could not work after the injury. He was not able to sit down and could hardly drive.

After he left, the next month he was called in to sign medical termination paperwork. He does not recall the date. He knows he went in for treatment, but does not recall where. He was directed by a letter from FedEx to go to a certain physician, but he doesn't have that letter.

The two coworkers with him were male and female. They assisted him to the office where he waited for an ambulance. He does not recall their names. He has no connections at all to people who work at FedEx now.

(MOH 5/14/24, pp. 1-6.)

The parties jointly submitted payroll records, which show that applicant was still on the payroll as of March, 2007 (Exh. 101), but defendant did not provide any evidence as to how the payroll system operates. Defendant did not submit any witness testimony and did not submit any evidence that applicant was terminated. The only evidence submitted by defendant with respect to applicant's employment was an Employment Agreement, dated September 21, 2005. (Exh. C.)

With respect to her findings that defendant did not meet its burden that the claim is barred by laches and that was applicant was not working on the day of the injury, in her Opinion on Decision, the WCJ stated that:

> *Is the claim barred by laches?*
>
> Defendant raised the equitable statute of laches as a bar to this claim. In order to prevail on this defense, defendant must establish that there was an unreasonable delay in filing the claim and that defendant was prejudiced by that unreasonable delay.
>
> It can certainly be presumed that defendant was prejudiced by applicant waiting 15 years from the claimed date of injury to file a claim for workers' compensation benefits. Applicant could not recall the names of coworkers who he believed witnessed the injury, nor could he recall the names of doctors or facilities from which he claimed to have he sought medical treatment. However, defendant presented no evidence as to how it was prejudiced by the delay in filing a claim. Instead, they are relying on the undersigned to infer prejudice. "Prejudice is not presumed, it must be affirmatively demonstrated." (*Ragan v. City of Hawthorne* (1989) 212 Cal.App.3d 1361, 1367.) As defendant did not affirmatively demonstrate it was prejudiced by the applicant's failure to timely file a claim, I find that defendant has not meet its burden of proof that this claim is barred by the doctrine of laches.
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> ***
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> *Was the applicant working on the claimed date of injury?*
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> The Fed Ex payroll records show that the applicant was paid for 25.3 hours of work for the pay period ending February 17, 2007. (Joint Exhibit 101, page 2.) The actual days worked in that pay period were not broken down. Applicant was written up of a February 12, 2007 incident that was determined to be an unsafe practice. (Exhibit 1.) No evidence was presented that the applicant did not work at Fed Ex on February 12, 2007. I therefore find that the defendant has not shown that the applicant did not work on the claimed date of injury.

In its Answer, defendant contends that the WCJ correctly applied the statute of limitations defense and the post-termination defense. It does not address the findings that it did not meet its burden as to the issues of laches or whether applicant was working on the day of the claimed injury.

DISCUSSION

I.

Former Labor Code[1] 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, 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 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 23, 2024, and 60 days from the date of transmission is Saturday, September 21, 2024. The next business day that is 60 days from the date of transmission is Monday, September 23, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, September 23, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

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[1] All further statutory references are to the Labor Code, unless otherwise noted.

[2] 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.

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. 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 WCJ's Report, the Report was served on July 23, 2024, and the case was transmitted to the Appeals Board on July 23, 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 23, 2024.

II.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board 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].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

As relevant here, section 3600(a)(10) states, that:

> Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
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> (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
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> (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.

(C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

(D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.

(Lab. Code, § 3600(a)(10).)

The initial burden in asserting a post-termination bar to compensation, an affirmative defense, rests with the defendant, who must establish that the claim for compensation was filed after a notice of termination or layoff, including voluntary layoff, and that the claim is for an injury occurring prior to the time of notice of termination or layoff. (Lab. Code, §§ 3600(a)(10), 5705.) Defendant must meet this burden by a preponderance of the evidence, and this requires "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code, § 3202.5.) The bar to compensation under section 3600(a)(10) does not apply to employees who resign voluntarily. (*CJS Co. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 294, 298 [64 Cal.Comp.Cases 954].)

Here, defendant did not meet its burden of proof that applicant's claim was a post-termination claim. Defendant's evidence regarding applicant's employment consisted of a 2005 employment agreement and payroll records documenting applicant's compensation for pay periods ending January 6, 2007, through March 7, 2008. (Defendant's Exh. C; Joint Exh. 101.) Defendant put on no evidence regarding whether applicant was terminated nor the date of any such termination. Defendant did not establish, by a preponderance of the evidence, as required, that "the claim for compensation was filed after a notice of termination or layoff, including voluntary layoff, and that the claim is for an injury occurring prior to the time of notice of termination or layoff." (Lab. Code, §§ 3600(a)(10), 3202.5, 5705.) Thus, there is no adequate evidence to support the finding that applicant was terminated, and no adequate evidence that applicant's claim is barred by the post-termination defense.

Once the defendant has made the initial showing necessary to a post-termination defense, the burden shifts to applicant to establish one of the available exceptions listed in section 3600, subdivisions (a)(10)(A) through (D).

Here, although defendant failed to make the required initial showing, applicant has demonstrated that an exception to the compensation bar, in section 3600, subdivision (a)(10)(A),

may apply. That section states that if "employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff," than compensation may be paid to the employee, even if the claim was made post-termination. (Lab. Code, §§ 3600(a)(10), 3600(a)(10)(A).) Here, applicant did not stipulate that he was terminated. (MOH 5/14/24, at p. 2.) Applicant testified that he "stopped working in 2007. He agreed it was for a physical injury." (*Id*. at p. 4.) He testified, further that "a month or so" after his February 12, 2007, injury, "he was called in, sat with a counselor, and told he was being medically terminated. He agreed it was the last time he came to FedEx." (*Id*. at p. 5.)

This matter must be returned for development of the record on the questions of whether applicant was terminated, the date of any such termination, and whether applicant was terminated for "medical reasons," as he testified. If this was the basis for defendant ending the employment relationship, then defendant had timely notice of applicant's injury, and thus the section 3600, subdivision (a)(10)(A), exception to the post-termination compensation bar is applicable.

III.

The time limit to file a claim for workers' compensation benefits is one year from either (1) the date of injury, (2) the last payment of disability indemnity or (3) the last date on which medical benefits were provided. (Lab. Code § 5405.) The statute of limitations is an affirmative defense, and the burden of proof is on the defendant. (Lab. Code § 5409.) If an applicant is claiming an exception to, or an exemption from, the statute of limitations, then he has the burden of providing sufficient evidence that the statute of limitations does not apply. (*Permanente Medical Group v. Workers' Comp. Appeals Bd. (Williams)* (1985) 171 Cal.App.3d 1171, 1184 [50 Cal.Comp.Cases 491].)

The statute of limitations is tolled if the employer failed to notify the injured employee of a potential right to workers' compensation benefits by providing the claim form (DWC-1 form) and notice of potential eligibility of benefits required under section 5401. (*Kaiser Found. Hosps. Permanente Medical Group v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 60 [50 Cal.Comp.Cases 411].) An employer's obligation to provide a claim form arises when the employer receives written notice of an injury or obtains knowledge of the injury. (Lab. Code §§ 5400, 5402.) Section 5402, subdivision (a) explains that "Knowledge of an injury, obtained from any source, on the part of an employer, the employer's managing agent, superintendent, foreman,

or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under Section 5400." (Lab. Code § 5402(a).)

Here, the WCJ explained that "As no indemnity or medical treatment has been provided, the statute of limitations runs from the date of the claimed specific injury of February 12, 2007." (Opinion on Decision, at p. 5.) The WCJ found that applicant did not show "that defendant had notice of injury or notice of claim sufficient to raise a duty for defendant to provide the applicant with a DWC-1 claim form and notice of potential eligibility for workers' compensation benefits" and found that there is no basis for tolling the statute of limitations. (F&O, at p. 1.)

The evidence suggests, however, that the statute of limitations should have been tolled, based on defendant's failure to timely provide a claim form to applicant, as required. (*Martin, supra,* 39 Cal. 3d at 60; Lab. Code §§ 5401, 5402(a).) Applicant testified that he was not provided with a claim form. (MOH 5/14/24, at p. 5.) Applicant provided written evidence and testimony demonstrating that defendant was aware of the incident which caused his injury, and of the injury itself. First, applicant was reprimanded, in writing, for this incident. (Applicant's Exh. 1.) Moreover, as discussed above, applicant testified that he was "medically terminated" within "a month or so" of his 2007 injury, which belies defendant's assertions that it was unaware of applicant's injury until the 2023 claim was filed. (MOH 5/14/24, at p. 5.) Applicant also testified that after he stopped working for FedEx, "the next month he was called in to sign medical termination paperwork. He does not recall the date. He knows he went in for treatment, but does not recall where. He was directed by a letter from FedEx to go to a certain physician, but he doesn't have that letter." (MOH 5/14/24, at p. 6.)

We also observe that if applicant's medical treatment was provided by defendant, the statute of limitations may have been tolled under section 5405.

Further development of the record is required, to determine if defendant did in fact have contemporaneous knowledge of applicant's injury, and if so, whether the statute of limitations was tolled.

IV.

Labor Code section 5904 states that:

> The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration.

Here, defendant did not challenge the findings that it did not meet its burden of proof with respect to the issues of whether applicant's claim is barred by the equitable doctrine of laches and that applicant was not working for the employer on February 12, 2007 by way of a timely filed petition for reconsideration. Moreover, defendant did not raise the issues in its Answer. We agree with the WCJ that defendant did not meet its burden on those issues, and therefore, we will find that it did not.

Accordingly, we grant reconsideration, rescind the WCJ's orders, and substitute a new Findings of Fact that finds that defendant did not meet their burden of proof that this claim is barred by the equitable doctrine of laches and did not meet their burden of proof that applicant was not working for the employer on February 12, 2007, and defers all other issues.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order of June 24, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Claudius Frederick, while employed on February 12, 2007, as a sorter/checker at Oakland, California by Federal Express Corporation, claims to have sustained injury arising out of and in the course of employment to the back.

2. The employer was permissibly self-insured for workers' compensation purposes.

3. Defendant did not meet their burden of proof that this claim is barred by the equitable doctrine of laches.

4. Defendant did not meet their burden of proof that the applicant was not working for the employer on February 12, 2007.

5. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 23, 2024

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

CLAUDIUS FREDERICK
ARNS DAVIS LAW
LAUGHLIN, FALBO, LEVY & MORESI

MB/*ara*

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