WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DERRICK WASHINGTON, *Applicant*

vs.

NATIONAL GYPSUM; XL SPECIALTY INS. CO., adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ17195883
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Orders (F&O) issued by a workers' compensation administration law judge (WCJ) issued on August 16, 2024 wherein the WCJ found that applicant's claim was barred by the statute of limitations in Labor Code section 5405, subdivision (a), and ordered that applicant take nothing by way of the application for adjudication of claim filed. The WCJ also admitted defendant's Exhibits F and G into evidence.

Applicant contends that the statute of limitations should not bar his claim because he was not provided with a DWC-1 claim form or notice of his rights by his employer prior to filing his claim; that applicant credibly testified that he never received any correspondence with a DWC-1 form and notice of his rights from defendant although he did confirm that a letter presented to him at trial had the correct address; that the WCJ erred in applying the mailbox rule to presume service of defendant's letter with the DWC-1 claim form and notice of rights on applicant because defendant offered no proof of service or other form of evidence that its letter was ever mailed or placed for mailing with the post office; and, that there is new evidence not discoverable prior to the hearing evidencing that mail to applicant's address as listed in the official address record and as he testified was on the letter shown to him during trial, was being returned to sender and not delivered to applicant.

Defendant filed an Answer to Applicant's Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending denial of the petition.

We have reviewed the record in this matter, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. Based on our review of the record and for the reasons set forth below, we grant reconsideration and as our decision after reconsideration, we rescind the F&O and return this matter to the trial level for further proceedings consistent with this decision.

I.

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.
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> (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.
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> (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 October 2, 2024 and 60 days from the date of transmission is Sunday, December 1, 2024. The next business day that is 60 days from the date of transmission is Monday, December 2, 2024. (See Cal. Code

Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, December 2, 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 October 2, 2024, the same date the case was transmitted to the Appeals Board, and therefore 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 October 2, 2024.

II.

It is undisputed that "since no benefits have been provided to applicant, the only applicable limitation is one year from the May 4, 2021 claimed date of the injury." (F&O, Opinion on Decision, p. 10 citing Lab. Code, § 5405(a).) Applicant filed his claim on January 18, 2023. (Application for Adjudication, January 18, 2023.) Therefore, applicant's claim was filed more than one year from the May 4, 2021 claimed date of injury.

The issue presented in this case appears to be whether applicant's one year statute of limitations period was tolled because of defendant's failure to provide applicant with a DWC-1 claim form and notification of his workers' compensation rights. (*Kaiser Found. Hosps. Permanente Medical Group v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57 [50 Cal.Comp.Cases 411; see *Reynolds v. Workmen's Comp. Appeals Bd. (Reynolds)* (1974) 12 Cal.3d 762 [39 Cal.Comp.Cases 768]; *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.*

[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."

(Carls) (2008) 163 Cal.App.4th 853 [73 Cal.Comp.Cases 771].] The duty of notification arises when the employer has ". . . *actual or constructive knowledge* of any work-related injury . . ." (*Carls, supra,* 163 Cal.App.4th at 864, fn. 8, quoting *Martin, supra*, 39 Cal.3d at 64, emphasis added in *Carl*; Lab. Code, §§ 5400, 5402(a).)[2]

> Within one day of receiving notice or knowledge of injury under section 5400 or 5402, which injury results in lost time beyond the employee's work shift at the time of injury or which results in medical treatment beyond first aid, the employer shall provide, personally or by first-class mail, *a claim form and a notice of potential eligibility for benefits*…"

(Lab. Code, § 5401(a), emphasis added.)

The WCJ determined that the statute of limitations barred applicant's claim because the one year could only have been tolled until the latest, June 9, 2021, because defendant mailed applicant a DWC-1 claim form on June 4, 2021 at a valid address:

> This time could be extended in this case no later than June 9, 2021, because the claim form was mailed to applicant on June 4, 2021 at a valid address where he admitted at trial that he receives his mail, with 5 days added to June 4, 2021 due to service via US Mail. Pursuant to *Suon v. California Dairies* (2018) 83 CCC 1803, 1817 (appeals board en banc), the presumption that a mailed document was received is rebuttable, but a mere allegation that the recipient did not receive the mailed document is insufficient to rebut the presumption. Here, the letter sent to applicant with the DWC-1 (Exh. H) was mailed on June 4, 2021, at the same address that applicant has received other documents via mail in this case. Applicant has not rebutted the presumption that the June 4, 2021 letter and the claim form were not properly served on applicant. Furthermore, applicant testified at the second day of trial that he filed his application in January of 2023 because he couldn't find an attorney at the time, thinking that he couldn't afford one.

(F&O, Opinion on Decision, p. 10.)

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[2] The Supreme Court held that, ". . . the remedy for breach of an employer's duty to notify is a tolling of the statute of limitation if the employee, without that tolling, is prejudiced by that breach." (*Martin, supra*, 39 Cal.3d at 64.) "An employee would be prejudiced without the tolling if he has no knowledge that his injury might be covered by workers' compensation before he receives notice from the employer." (*Ibid*.) In this context, ". . . prejudice means ignorance, and ignorance is presumed until the employee is given the requisite notice or otherwise gains *actual* knowledge that he may be entitled to workers' compensation." (*Carls, supra,* 163 Cal.App.4th at 860 citing *Martin, supra,* 39 Cal.3d at 65, 67, fn. 8, emphasis added.) Actual knowledge of the ". . . potential eligibility for a particular injury . . ." cannot be proven by showing an injured worker's ". . . general awareness of the existence of the workers' compensation system . . ." or ". . . past experience with workers' compensation . . ." (*Carls, supra*, 163 Cal.App.4th at 863 referencing *Reynolds, supra*, 12 Cal.3d at 729.)

Labor Code 5313 requires that after a matter is submitted, and together with findings of fact, orders, and/or awards, a WCJ "shall" serve "a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-22.) This opinion on decision must be based on admitted evidence (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc); and, must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952 (d); *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *Le Vesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

Here, the determination that defendant properly mailed a DWC-1 Claim form to applicant is not supported by substantial evidence. Applicant is correct that in order to rely on the presumption that a mailed document was received, a party must actually establish that the letter was "correctly addressed and properly mailed..." (Evid. Code, § 641; *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1817.) Unfortunately, the WCJ relied on Exhibit H, the letter allegedly sent to applicant with the DWC-1 claim form. Exhibit H is a 7-page document which contains no DWC-1 claim form, and only page 1 (of 3) of the DWC-1 claim form instructions. (Def. Exh. H.) Of equal significance, there is no contemporaneous proof of service attached to Exhibit H to establish that the letter was actually or properly mailed. (*Ibid.*) Finally, defendant's witness Adam Black could not authenticate the letter or its contents, or testify to when or whether it was actually or properly mailed. (Minutes of Hearing and Summary of Evidence (MOH), May 30, 2024, p. 5.)

In addition, it now appears that there is some new evidence related to whether applicant always receives mail at his address of record, the same address used by defendant to allegedly serve the DWC-1 form. (Petition for Reconsideration, p. 3, and Exhs. 9-10.) After trial concluded, staff at the District Office of the Department of Workers' Compensation e-mailed applicant's counsel on June 18, 2024 and August 28, 2024 regarding returned mail that had been addressed to applicant at the address applicant testified at trial was his correct address. (*Ibid.*) It appears from the new evidence that an order issued by the WCJ on May 29, 2024 addressed to applicant at that address was returned (Exh. 9), and the F&O at issue herein addressed to applicant at that address was also returned (Exh. 10). (*Ibid*.)

With respect to the WCJ's concerns with the applicant's failure to seek legal advice sooner than he did because he did not believe he had the money to do so, please note that the DWC-1 claim form includes various notices to an injured employee, i.e., that they may disagree with decisions affecting their claim and how to do so; how to contact an Information & Assistance Officer at the Department of Workers' Compensation; and, that most attorneys offer a free consultation and that any attorney fee will be taken out of benefits. (Workers' Compensation Claim Form (DWC 1) & Notice of Potential Eligibility, p. 3 [https://www.dir.ca.gov/dwc/DWCForm1.pdf].)

Finally, we note defendant's contention that it was not required to provide a DWC-1 claim form or notice of rights to applicant because his injuries only required first-aid treatment. (Lab. Code, § 5401(a).) However, the WCJ made no findings on this issue. Applicant did testify at trial that he "faxed information from his private doctor to his employer" after receiving treatment from a doctor at Kaiser who purportedly took him off work due to the injury at issue herein. (MOH, May 30, 2024, at pp. 5-6.) Thus, the record may need development on this issue pursuant to the WCJ's discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; T*yler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).) The WCJ, ". . . may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264].)

Accordingly, given that the WCJ's decision to bar applicant's claim based on the statute of limitations is not based on substantial evidence, and given that there is new evidence related to the issues presented at trial, we grant the Petition for Reconsideration. It is our decision after reconsideration to rescind the F&O and to return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Orders issued by a workers' compensation administration law judge issued on August 16, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Orders issued by a workers' compensation administration law judge issued on August 16, 2024 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 2, 2024

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

THOMAS KINSEY, LLP
LAW OFFICE OF CHRISTINA LOPEZ
DERRICK WASHINGTON

AJF/abs

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