WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MELVIN THOMAS, *Applicant*

vs.

STATE OF CALIFORNIA, Legally Uninsured, *Defendant*

Adjudication Number: ADJ9807190
Los Angeles District Office

OPINION AND ORDER DENYING
PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of December 7, 2020, wherein it was found that applicant sustained presumptive injury while employed by the State of California, Department of Corrections and Rehabilitation (CDCR). In finding industrial injury, the WCJ found that the pneumonia presumption for peace offers working for CDCR in a custodial role codified in Labor Code section 3212.10 applied to this matter, and that applicant's claim was not barred by the statute of limitations.

Defendant contends that the WCJ erred in finding industrial injury. Defendant's Petition is not a model of clarity. It appears that defendant is arguing that the pneumonia presumption did not arise because there was insufficient evidence that applicant's pneumonia developed or manifested itself during applicant's service, or the statutory period afterwards. Defendant also argues that applicant's claim is barred by the statute of limitations. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will deny the defendant's Petition.

We find that the Labor Code section 3212.10 presumption arose for the reasons stated by the WCJ in the Report.[1] As noted by the WCJ, the applicant amply proved that he suffered from coccidioidomycosis (commonly known as valley fever). The WCJ found applicant's testimony that he was diagnosed and hospitalized with valley fever to be credible. A WCJ's credibility

[1] As noted below, we do not adopt the WCJ's discussion of the statute of limitations issue in his Report.

determinations are "entitled to great weight." (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) The earliest medical records given to panel qualified medical evaluator, internist Paul J. Grodan, M.D., including records from 1998 and 2000, list a history of valley fever. (January 17, 2019 deposition at p. 16; June 13, 2019 deposition at p. 58; October 10, 2019 deposition at p. 98.) Dr. Grodan testified that valley fever was endemic where the applicant worked (June 13, 2019 deposition at p. 62), and the applicant also testified that other prison employees and prisoners were afflicted with valley fever during his time of service. (Minutes of Hearing and Summary of Evidence of September 14, 2020 trial at pp. 7, 9.) Additionally, the doctor who treated applicant's valley fever, Greg. C. Warner, M.D., wrote a December 14, 2014 note confirming his treatment of applicant for valley fever. Defendant does not allege that this note is not genuine.

Defendant argues that we cannot be certain of applicant's diagnosis of valley fever without contemporaneous medical records. However, certainty is not the evidentiary standard in workers' compensation proceedings. Rather, the proper standard is a "preponderance of the evidence," meaning "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code, § 3202.5.) Defendant's apparent argument that applicant made up a diagnosis of valley fever in 1998 and 2000, almost 15 years before developing significant lung problems, crosses into the supernatural.

Thus, applicant had valley fever during his period of service which required hospitalization. Dr. Grodan testified that valley fever constitutes pneumonia. (October 10, 2019 deposition at pp. 101-102.) Therefore, applicant had pneumonia that developed or manifested itself during his service in a custodial role at CDCR. The burden thus shifted to defendant to show that applicant did not develop industrial pneumonia. However, defendant never rebutted the presumption. To the contrary, Dr. Grodan found applicant's condition to be industrial even without applying the presumption.[2]

[2] Since the WCJ only made a finding of industrial injury, and not the disability caused by the injury, we need not address the issue of disability. However, as stated by the WCJ in his Report, Dr. Grodan linked applicant's valley fever to his significant lung complaints, including his lung transplant. The Supreme Court has held, "In the workers' compensation system, the industrial injury need only be a contributing cause to the disability." (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 299 [80 Cal. Comp. Cases 489].) We also note that disability caused by a presumptive injury in the form of pneumonia is not subject to section 4663 apportionment. (Cal. Lab. Code, § 4663, subd. (e).)

Turning to the statute of limitations issue, we do not adopt the reasoning in the WCJ's Report. We find that regardless of applicant's date of injury, the statute of limitations was tolled by virtue of defendant's failure to provide applicant with written notice of his potential eligibility for workers' compensation benefits.

"[A]s a general rule, where a claimant asserts exemptions, exceptions, or other matters which will avoid the statute of limitations, the burden is on the claimant to produce evidence sufficient to prove such avoidance." (*Permanente Medical Group v. Workers' Comp. Appeals Bd.* (*Williams*) (1985) 171 Cal.App.3d 1171, 1184 [50 Cal.Comp.Cases 491].) One such exemption or exception is that the statute is tolled by an employer's failure to notify an injured employee of a potential right to benefits. At the time of applicant's hospitalization with valley fever, Labor Code section 5402 read in pertinent part:

> Knowledge of such injury, obtained from any source, on the part of an employer … or knowledge of an 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. Upon receiving such knowledge, the employer shall notify the injured employee … that he may be entitled to benefits under this division. Such notice by the employer shall be within the time period and in the manner prescribed by the administrative director for such purpose.

(Former Lab. Code, § 5402, Stats. 1975, ch. 1099, § 2.)

Former Administrative Rule 9880 read:

> Any employer upon receiving knowledge of an injury to an employee as defined in Labor Code Section 3208, or notice or knowledge of a claimed injury sufficient to afford an opportunity to make an investigation into the facts, shall within 5 working days advise the injured employee, or his or her dependents in event of death, of the benefits to which the employee or dependents may be entitled. The advisory document shall be in writing, but need not be in any particular form, and shall include in non-technical terms, advice as to the right to receive medical care, to select or change the treating physician pursuant to the provisions of Labor Code Section 4600, to receive temporary disability indemnity, permanent disability indemnity, death benefits and vocational rehabilitation where appropriate. The document shall also contain information as to the services of Rehabilitation Consultants and Information and Assistance Officers located in the offices of the Division of Industrial Accidents, Workers' Compensation Appeals Board, and of the services of the Worker's Compensation Appeals Board as final arbiter of claims.

(See *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 60, fn.1 [50 Cal.Comp.Cases 411].)

The Supreme Court has held that "the remedy for breach of an employer's duty to notify is a tolling of the statute of limitations if the employee, without that tolling, is prejudiced by the breach." (*Martin, supra,* 39 Cal.3d at p. 64.)

Thus, when applicant asserts that the statute is tolled based on the breach of the duty to provide the employee with the required notice of potential eligibility for benefits, applicant has the duty of showing that defendant had sufficient notice of injury to provide applicant with the notice of potential eligibility. The duty then shifts to defendant to show that the notice was sent to the applicant or that applicant had actual knowledge of his workers' compensation rights. (*Martin, supra*, 39 Cal.3d at pp. 60, 65; *Sidders v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 613, 622 [53 Cal.Comp.Cases 445].) Once the employer has provided the applicant with the requisite notice, or applicant gains the requisite actual knowledge of his rights, the tolling period ends. (*Martin, supra*, 39 Cal.3d at p. 65.)

In this case, the applicant testified at trial that he notified his employer of a claim of injury around the time of his original hospitalization with valley fever. According to the Minutes of Hearing and Summary of Evidence of the September 14, 2020 trial:

> The applicant tried to submit a claim for the valley fever back in around 1987, but the employer would not accept it because it was not recognized as a workers' compensation injury. The applicant does not have the paperwork for when he tried to submit his claim because his personnel file is gone. He does not recall who he spoke to at the Department of Corrections about that. It may have been a person named Nancy.

(Minutes of Hearing and Summary of Evidence of September 14, 2020 trial at p. 7.)

Applicant's claim of injury triggered defendant's obligation to provide the notice outlined in former Labor Code section 5402 and former Administrative Rule 9880.[3] Since defendant has not introduced evidence that it provided applicant with the notice, or that applicant acquired actual knowledge of his workers' compensation rights, regardless of applicants' date of injury, the statute of limitations was tolled by virtue of this violation, and applicant's claim is not barred by the statute of limitations.

[3] The current statutory and regulatory scheme imposes similar requirements on employers. (See Lab. Code, §§ 5401, 5402.)

Accordingly, we will deny the defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Order of December 7, 2020 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ DEIDRA LOWE, COMMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 1, 2021

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

MELVIN THOMAS
BOEHM ASSOCIATES
ROBERT NAVA & BRET GRAHAM
STATE COMPENSATION INSURANCE FUND

DW/bea

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