WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANTHONY MELTON, ***Applicant***

vs.

UNITED STAFFING ASSOCIATES;
ZURICH AMERICAN INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ13397189
Oxnard District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the November 9, 2021 Findings and Order wherein the workers' compensation administrative law judge found that applicant's workers' compensation claim was barred by the statute of limitations.

Applicant contends that his claim is not barred by the statute of limitations because the employer did not provide applicant with notice of the time limits for instituting proceedings with the WCAB.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied. We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration, rescind the WCJ's November 9, 2021 decision and issue a new decision finding that applicant's claim is not barred by the statute of limitations.

FACTS

The parties stipulated that applicant sustained a specific industrial injury to his back on October 15, 2014. Defendant provided applicant with a DWC-1 claim form and a medical release form on October 16, 2014. Applicant completed the forms and received medical treatment from defendant through 2015.

On July 13, 2020, Mr. Melton, now represented by an attorney, filed an Application for Adjudication of Claim for the October 15, 2014 back injury. Defendant disputed the timeliness of the application.

The trial in this case began on April 22, 2021 and was continued to May 13, 2021 in order for the parties to properly file exhibits. On May 13, 2021, although exhibits had not yet been filed and although stipulations and issues had not yet been framed, testimony was taken from defendant's branch manager, Brian Charles Mulligan. No party objected to this unorthodox procedure.

Because there were no exhibits at the time he testified, Mr. Mulligan was unable to authenticate exhibits. Mr. Mulligan testified that he gave applicant a claim form on October 16, 2014 and that applicant completed the employee portion and he completed the employer portion. (May 13, 2021 Transcript, pp.6-7.) Mr. Mulligan also testified that he gave applicant a medical release form and a return to modified work form. (Id. at 7-8.) Mr. Mulligan could not confirm that the file was closed and did not have any communications with applicant's physicians. (Id. at 11-12.) Mr. Mulligan did not remember whether he advised applicant regarding any time limits he had to file a workers' compensation claim. (Id. at 13.)

At a third trial session on August 13, 2021, the WCJ framed formal stipulations and issues, admitted exhibits, and received oral testimony. According to the Minutes of Hearing and Summary of Evidence, applicant testified that "[i]n 2015, he was scheduled to see a surgeon for his work comp. case. He did not go because Brian from the employer/insurance carrier said he would get an appointment closer to his home." (August 13, 2021, Minutes of Hearing and Summary of Evidence, (MOH/SOE), p.5.)

In reviewing the documentary evidence, it appears that the claims adjusters and employer discussed closing applicant's claim in April of 2015 because applicant was no longer in contact with them. (Exh 1, Exh. G, April 13, 2015, E-mail with handwritten notes from Cathy Bugg to Brian Mulligan, Melissa La Russa, and Norman White.) A handwritten note indicates that a closing letter was sent and another note indicates that the file will be closed by the end of the month. (Ibid.)

On April 23, 2021, Shaun Beckerman sent the following e-mail to David Jones:

> Hi David J,
> Per your request, here is the 04/2015 email thread between Cathy Bugg and SRM Melissa Larussa. Please note that if a 30 day Closing Letter was issued, it doesn't appear to have made it to the file. Thanks! (Exh. 2, April 23, 2021, E-mail from Shaun Beckerman to David Jones.)

On July 29, 2020, defendant sent applicant a letter indicating that his claim for a low back injury on October 15, 2014 was accepted. (Exh. 4, July 29, 2020, Correspondence from Shaun Beckerman, Gallagher Bassett Services, Inc. to Anthony Melton.)

DISCUSSION

"The period within which proceedings may be commenced for the collection of the benefits...is one year from any of the following: "(a) The date of injury. (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650)... (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600)...were furnished." (Lab. Code, § 5405.) "If statutes of limitation are subject to conflicting interpretations, one beneficial and the other detrimental to the employee, section 3202 requires that they be construed favorably to the employee. (*Colonial Ins. Co. v. Ind. Acc. Com.* (1945) 27 Cal.2d 437 [164 P.2d 490].)" (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53].) The statute of limitations is an affirmative defense, and therefore, the burden of proof rests with defendant. (Lab. Code, §§ 5409, 5705.)

"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.) An employer can receive "notice or knowledge" via service by the injured worker or someone on his/her behalf. (Lab. Code, § 5400.) "Service" includes, "[k]nowledge of an injury, obtained from any source, on the part of an employer...or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts..." (Lab. Code, § 5402(a).) Thus, the duty of notification arises when the employer has "'...*actual or constructive knowledge* of any work-related injury...'" (*CIGA v. Workers' Comp.*

Appeals. Bd. (Carls) (2008) 163 Cal.App.4th 853, 863-864, fn. 8 [73 Cal.Comp.Cases 771] quoting *Martin*, *supra*, 39 Cal.3d at 64, emphasis added in *Carls*.)

If an employee provides timely notice to his employer of the injury, and the employer fails to provide the employee with the notices required by the Labor Code, the statute of limitations for his claim should be tolled. (See *Reynolds v. Workmen's Comp. Appeals Bd. (Reynolds)* (1974) 12 Cal.3d 762 [39 Cal.Comp.Cases 768] and *Kaiser Found. Hosps. Permanente Medical Group v. Workers' Comp. Appeals Bd.* (*Martin*) (1985) 39 Cal.3d 57 [50 Cal.Comp.Cases 411].) The Supreme Court found in *Reynolds* that "when an employer fails to perform its statutory duty to notify an injured employee of his workers' compensation rights, and the injured employee is unaware of those rights from the date of injury through the date of the employer's breach, then the statute of limitations will be tolled until the employee receives actual knowledge that he may be entitled to benefits under the workers' compensation system." (*Martin, supra,* 39 Cal.3d at p. 63 citing to *Reynolds, supra*.) Thus, "...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.*)

Finally, even if there is evidence that the injured worker had actual knowledge of his or her right to file a claim, an employee may not assert the statute of limitations "...where there was no evidence the employee had been advised of the time limits for filing a claim." (*Carls, supra,* 163 Cal.App.4th at p. 861, fn. 7 citing *Galloway v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.App.4th 880, 887 [63 Cal.Comp.Cases 532].)

Thus, if an action is not commenced, i.e., an application for adjudication of claim was not filed within the applicable period under section 5405, the issue becomes whether the statute of limitations period should be tolled based on whether defendant breached its duty to notify applicant of his workers' compensation rights, including the statute of limitations. (See *Reynolds, supra,* 12 Cal.3d 762; *Kaiser Found. Hosps. Permanente Medical Group v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57 [50 Cal.Comp.Cases 411]; *Carls, supra,* 163 Cal.App.4th 853.)

An employer has the duty to provide reasonable medical treatment upon learning of the need. (Lab. Code, § 4600). This was made clear in *Braewood Convalescent Hospital v. Workers'*

Comp. Appeals Bd. (*Bolton*) (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566], where the Supreme Court wrote as follows:

> Section 4600 requires more than a passive willingness on the part of the employer to respond to a demand or request for medical aid. [] This section requires some degree of active effort to bring to the injured employee the necessary relief. [] Upon notice of the injury, the employer must specifically instruct the employee what to do and whom to see, and if the employer fails or refuses to do so, then he loses the right to control the employee's medical care and becomes liable for the reasonable value of self-procured medical treatment.

Here, it is undisputed that the application was not filed within one year of applicant's specific injury. It is also undisputed that applicant's employer was notified of applicant's claim, applicant completed a claim form, the employer accepted the claim and began providing medical treatment. At some point in 2015, applicant's employer stopped providing medical treatment. According to applicant's testimony, the employer stopped responding to applicant's requests for treatment. (August 13, 2021, MOH/SOE, p. 5.) The employer provided some documentary evidence that they stopped providing treatment because they were unable to reach the applicant and planned to close their file. (Exh 1, Exh. G, April 13, 2015, E-mail with handwritten notes from Cathy Bugg to Brian Mulligan, Melissa La Russa, and Norman White.)

Defendant has not presented evidence that it provided Mr. Melton with notice of the requirement that he file an application within one year of the last provision of benefits. Finally, defendant wrote to applicant and agreed to provide benefits after the application was filed. Defendant's conduct in this case would not put applicant on notice that applicant was required to take additional steps to secure benefits.

This is an accepted claim. Defendant agreed to provide benefits to applicant for his low back injury both before and after the application was filed. (Exh. 4, July 29, 2020, Correspondence from Shaun Beckerman, Gallagher Bassett Services, Inc. to Anthony Melton.) Defendant has not explained why it should be permitted to rescind its post-application acceptance of a claim in order to argue that the application is untimely. Therefore, we will grant reconsideration and find that applicant's claim is not barred by the statute of limitations.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the November 9, 2021 Findings and Order is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 9, 2021 Findings and Order is **AFFIRMED, EXCEPT** Finding of Fact No. 4 and the Order are **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

4. Applicant's Application for Adjudication of Claim is not barred by the statute of limitations because defendant has not met its burden of proof under Labor Code section 5405.

ORDER

IT IS ORDERED that the Application for Adjudication of Claim was timely filed.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 18, 2022

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

ANTHONY MELTON
LAW OFFICES OF DAVID JONES
LAW OFFICES OF JOSEPH LOUNSBURY

MWH/oo

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