

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

FAUSTINO AGUILAR ARIAS, *Applicant*

vs.

**AGR CONTRACTING; STAR INSURANCE COMPANY, administered by
MEADOWBROOK INSURANCE GROUP, *Defendants***

**Adjudication Number: ADJ9916195
Fresno District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND
DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact of October 17, 2023, in which the workers' compensation administrative law judge ("WCJ") found that after applicant's deposition on May 20, 2015, defendant had knowledge of the specific injury at issue herein, that defendant also had knowledge of this injury based on the medical report of Dr. Bhatia dated May 16, 2019, that defendant failed to provide applicant with notices pursuant to Labor Code section 138.3, and that the Statute of Limitations was tolled.

Defendant contends that the WCAB does not have jurisdiction over applicant's alleged specific injury, that applicant's claim of specific injury is barred because the Statute of Limitations expired no later than April 1, 2013, and that the doctrine of laches precludes applicant from litigating his claim of specific injury eleven years after it allegedly occurred.

The Appeals Board did not receive an answer from applicant.

The WCJ submitted a Report and Recommendation ("Report"). In the excerpt attached to this decision, we adopt and incorporate the WCJ's statement of facts. We do not adopt or incorporate the remainder of the Report.

At the outset, we reject defendant’s contention that the WCAB does not have jurisdiction over applicant’s claim of alleged specific injury. The record reflects that applicant originally claimed he sustained an industrial injury by way of cumulative trauma from June 1, 2012 to June 23, 2013. (Minutes of Hearing, 9/20/18, p. 2.) In its petition for reconsideration herein, defendant does not assert that the WCAB lacks jurisdiction over applicant’s claim of cumulative trauma injury. The question is whether the WCAB retains jurisdiction to amend this claim to assert a claim of specific injury occurring in March 2012. We conclude the answer to that question is yes.

In our Opinion and Decision After Reconsideration of April 28, 2023, we affirmed the previous WCJ’s finding that applicant failed to prove his claim of cumulative trauma injury from June 1, 2012 to June 23, 2013. At the same time, however, we found an unresolved issue as to whether applicant may have sustained a specific injury. This interlocutory finding was based on our review of Dr. Bhatia’s report of May 16, 2019, which suggested that applicant sustained a specific industrial injury to his back, neck and shoulders in March 2012 – a suggestion supported by applicant’s narrative and by Dr. Bhatia’s statement that applicant evidently received medical treatment for this alleged injury. In our April 28, 2023 decision, we explained in footnote one:

Under WCAB Rule 10517, “[p]leadings may be amended by the Workers’ Compensation Appeals Board to conform to proof.” (Cal. Code Regs., tit. 8, § 10517.) However, we do not invoke the rule here because amending applicant’s claim of cumulative trauma injury to find a specific injury is so different from the original claim that it raises due process concerns about defendant’s right to assert potential defenses to the specific injury claim. Moreover, the specific injury claim apparently involves new and additional body parts – the neck and shoulders - that were not alleged in the cumulative trauma claim.

In proceedings at the trial level subsequent to our April 28, 2023 decision, defendant had notice and opportunity to be heard on the alleged specific injury and to assert defenses against it. Therefore, our previous concerns about due process have been allayed, and WCAB Rule 10517 is properly invoked to amend applicant’s claim of cumulative trauma injury to a claim of specific injury. (*Jamerson (Patrick) v. Commercial Metals Company* (2022) 2022 Cal. Wrk. Comp. P.D. LEXIS 64 (87 Cal.Comp.Cases 530), citing *Blanchard v. Workers’ Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590, 595 (40 Cal.Comp.Cases 784) and *Ray v. Industrial Acc. Com.* (1956) 146 Cal.App.2d 393, 397 [The remedy for party disadvantaged by insufficiency of pleading is to allow

leave for party to prepare its case or defense; failure to comply with pleading rules as to details is not jurisdictional.].)

Nevertheless, defendant relies upon WCAB Rule 10450(b) to contend that the WCAB is without jurisdiction over applicant's alleged claim of specific injury. Subdivision (b) of the rule states: "Until an application or other case opening document has been filed, the [WCAB] may not conduct hearings, issue orders or authorize the commencement of formal, compelled discovery, including the use of subpoenas to obtain records or sworn testimony." (Cal. Code Regs., tit. 8, § 10450(b).) Defendant's reliance upon this provision is misplaced. As explained before, the WCAB is not without jurisdiction over applicant's pleading of a cumulative trauma injury, and this pleading is the one that is being amended to conform to proof pursuant to WCAB Rule 10517.

Defendant's reliance upon the equitable doctrine of laches is similarly misplaced. We note that "[p]rejudice is never presumed; rather it must be affirmatively demonstrated by the party asserting the defense in order to sustain its burden of proof." (*Stickle v. Staffmark, Inc.* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 41, slip op. at p. 28, citing *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1050.) In the instant case, defendant refers to nothing specific in the record establishing that it has been prejudiced by the delay in amending applicant's claim from a cumulative trauma claim to a specific injury claim.

Although we will amend applicant's claim of industrial injury to reflect a specific injury rather than a cumulative trauma injury, we are persuaded that the WCJ must revisit whether or not the specific injury claim is barred by the one-year Statute of Limitations, as well as tolling of the Statute, if any. (Lab. Code, § 5405(a).)

We note that the Application for Adjudication of Claim submitted by applicant, originally asserting that he sustained a cumulative trauma injury from June 1, 2012 to June 23, 2013, was filed on April 13, 2015. Of course, this filing occurred well over one year from the date of the claimed injury, whether the filing was for a cumulative trauma injury or the alleged specific injury of March 2012.

In his Opinion on Decision, the WCJ cites *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726 [39 Cal.Comp.Cases 768] and concludes that the one-year Statute of Limitations was tolled because, due to applicant's deposition of May 20, 2015 and/or Dr. Bhatia's

report of May 16, 2019, defendant had knowledge of the alleged March 2012 injury but failed to give applicant notice of his workers' compensation rights.¹

Based on our review of applicant's deposition and applicable law, however, we are persuaded that the WCJ must revisit his analysis of the Statute of Limitations and tolling issues.

In his deposition of May 20, 2015, applicant testified that "around March 2012," he injured his back and waist at work while lifting heavy trailer connectors. However, applicant also testified that he never reported the injury to defendant AGR Contracting, either for fear that he would lose work to other drivers or "because they never told us there was a doctor or somebody where we could report." (Defense exhibit A, pp. 30-32.) However, it also appears from applicant's deposition testimony that between March 2012 and the end of 2014, his supervisor called him to work again, but applicant declined further work and declined to tell his supervisor that the reason he could not work was that he had sustained an injury. When asked directly why he filed a claim two years after the alleged injury of March 2012, applicant testified that "one wants to keep one's work [so] one just holds and takes the pain until one no longer can...that is when one tells the boss that one no longer can, but that is only when one is sick very seriously." (Defense exhibit A, pp. 33-35.) Applicant's deposition testimony also indicates that he did not seek medical treatment until after he stopped work in June 2013. (*Ibid.*)

Under Labor Code section 5401(a), an employer has a duty to inform an injured employee of his workers' compensation rights when an employer has actual or constructive knowledge of a work-related injury. However, this duty does not arise whenever the employer learns of facts that would lead a reasonable person to conclude with some certainty that an industrial injury has occurred or is being asserted; the duty arises when the employer knows of an injury or claim, not when it should have known. (See *Moua v. Port of Stockton* (2019) Cal. Wrk. Comp. P.D. LEXIS 205, slip op. at p. 15, citing *Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24 [70 Cal.Comp.Cases 97].)

In this case, it appears from applicant's deposition testimony that AGR Contracting had neither actual nor constructive knowledge of the alleged March 2012 injury, sufficient to trigger AGR's duty to give applicant notice of his workers' compensation rights, before applicant's deposition of May 20, 2015. Therefore, it is unclear whether or not the one-year Statute of

¹ Under *Reynolds*, the one-year Statute of Limitations of Labor Code section 5405 is tolled if the employer has notice of a potential industrial injury and fails to notify the employee of his workers' compensation rights.

Limitations was tolled between March 2012 and May 20, 2015. Although the WCJ reasoned in his Opinion on Decision that defendant had notice of applicant's alleged March 2012 injury from his May 20, 2015 deposition, thus triggering defendant's duty to give applicant notice of his workers' compensation rights, applicant had obtained legal representation and had filed his claim of cumulative trauma by then. Given those circumstances, we are persuaded the WCJ needs to revisit whether or not applicant knew or should have known of his right to pursue a claim of specific injury after his May 20, 2015 deposition. If so, the WCJ also must revisit whether defendant still had a duty to notify applicant of his right to pursue the specific injury claim. (Cf. *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd. (Carls)* (2008) 163 Cal.App.4th 853, 863-864 [retention of counsel insufficient to defeat tolling of Statute of Limitations where applicant still lacked actual notice of injury].)

Concerning the foregoing issues, we note it is apparent from applicant's deposition that he did have actual notice that he suffered a specific work injury, but he never informed AGR Contracting about it. However, applicant's deposition testimony is in conflict over the reasons for his failure to report the specific injury. Although applicant testified that his employer "never told us there was a doctor or somebody where we could report," his testimony also includes two references to his fear of losing work if he reported a work injury. The WCJ should consider this conflicting testimony in addressing whether or not the one-year Statute of Limitations was tolled after March 2012 or after May 20, 2015, and if so, when the tolling started.

Finally, we note the WCJ also relied upon PQME Bhatia's May 16, 2019 report, which found that applicant sustained a specific injury, to conclude that the one-year Statute of Limitations was tolled at that time because the report triggered defendant's duty to advise applicant of his right to file a specific injury claim. As with applicant's deposition in which he testified that he sustained a specific injury around March 2012, it would appear from Dr. Bhatia's report that both applicant and defendant may have had equal knowledge of his workers' compensation rights. Here again, the WCJ must revisit and determine whether defendant nevertheless had a duty to notify applicant of his right to file a specific injury claim.

In summary, we will amend applicant's claim of cumulative trauma injury to a claim of specific injury to conform to proof. In reference to the claim of specific injury, however, the WCJ must revisit and resolve whether and when the one-year Statute of Limitations was tolled in light of the chronology detailed above, following the alleged March 2012 injury. We express no final

opinion on those questions. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq.*

For the foregoing reasons,

IT IS ORDERED, that defendant’s petition for reconsideration is **GRANTED**, and that as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, the Findings of Fact of October 17, 2023 are **RESCINDED**, and the following Finding and Order is **SUBSTITUTED** in their place:

FINDING

1. Stipulation 1 within the Minutes of Hearing (“MOH”) of August 31, 2023 is rescinded, and the following recitation of applicant’s claim is substituted in its place: “Faustino Aguilar Arias, while employed in March 2012 as a seasonal truck driver, occupational group number 350, at Delano, California by AGR Contracting, claims to have sustained injury AOE/COE to his waist and back, with jurisdiction reserved at the trial level over claimed injury to other body parts, if any, according to proof.”

ORDER

IT IS ORDERED THAT applicant’s claim of injury is amended as set forth above, and that the issues of the Statute of Limitations and tolling (if any) relevant to the amended claim are deferred pending further proceedings and determination by the WCJ, jurisdiction reserved at the trial level.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ on the outstanding issues, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 4, 2024

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

**FAUSTINO AGUILAR ARIAS
TAFOYA & ASSOCIATES
BRADFORD & BARTHEL**

JTL/ara

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

II.

FACTS

The case went to trial with Judge Scott on May 13, 2020. The issue presented included: AOE/COE, Parts of the body, Permanent disability, need for further medical treatment, attorney fees, Statute of Limitations pursuant to Labor Code § 5405, and whether Dr. Bhatia's assessment impairment utilizing *Almaraz/Guzman* is substantial evidence.

Judge Scott issued a decision finding that applicant did not meet his burden of proving he sustained a cumulative trauma injury. He also found that the applicant's CT and Specific injury claim were barred by the Statute of Limitations.

A Petition for Reconsideration was filed by applicant on July 23, 2020. Judge Scott recommended that the Petition be denied. The WCAB issued an Opinion and Order Granting Petition for Reconsideration to further study the [record] on August 25, 2020.

On April 28, 2023, [the Appeals Board] issued an Opinion and Decision after Reconsideration affirming Judge Scott's findings of July 9, 2020, but also rescinded and deleted Finding #3, to substitute a new Finding #3.

The court noted that the Statute of Limitations concerning applicant's claim of cumulative trauma injury [was] moot. However, the issue of whether applicant sustained a specific industrial injury, and any defense defendant may wish to raise, [was] deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

Defendant filed a Petition for Reconsideration after [this WCJ's] finding that the Statute of Limitations defense did not apply to the specific injury because the defendant, despite having notice of the specific injury, did not provide the applicant with a ... [notice of rights] letter [pursuant to *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726 (39 Cal.Comp.Cases 768)].