

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

LUIS ANGEL HERNANDEZ HERRERA, *Applicant*

vs.

**FRANCISCO JAVIER CALISTRO RAMIREZ AKA FRANCISCO RAMIREZ AKA
FRANCISCO RAMIREZ CALIXTRO DBA CALISTRO'S TREE SERVICE, AND THE
DIRECTOR OF INDUSTRIAL RELATIONS, AS ADMINISTRATOR OF THE
UNINSURED BENEFITS TRUST FUND (UEBTF), *Defendants***

**Adjudication Number: ADJ15480882
Oakland District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons discussed below, we will affirm the Findings and Award (F&A).

With respect to the WCJ's comment that UEBTF did not challenge the Order of Joinder of June 14, 2022, if that order is treated as a non-final order, UEBTF may not have been required to seek removal. This is because non-final decisions may later be challenged by a petition for reconsideration once a final decision issues. (See Cal. Code Regs., tit. 8, § 10955(a).)

Here however, while the failure to raise an objection in a timely fashion may raise the issue of waiver, and UEBTF's continued appearances indicate an agreement that jurisdiction over UEBTF was proper, UEBTF was provided with notice and an opportunity to be heard on the issue of whether joinder was proper at the hearing on May 25, 2023, in their response to the Notice of Intention on June 16, 2023, and by filing the instant Petition.

However, we agree that UEBTF should not have been named in the Award because its liability is derivative, and we will amend the Findings and Award accordingly.

Therefore, we will grant the Petition, affirm the F&A, except that we amend it to remove UEBTF from the Award.

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 and Award of July 17, 2023 is **AFFIRMED** except that it is **AMENDED** as follows:

AWARD

AWARD IS MADE in favor of LUIS HERNANDEZ HERRERA against FRANCISCO JAVIER CALISTRO RAMIREZ, FRANCISCO RAMIREZ, and FRANCISCO RAMIREZ AKA FRANCISCO RAMIREZ CALIXTRO of:

- a. Temporary disability indemnity disability for the period 09-25-2021 to date and continuing payable at the rate of \$500.00 per week in accord with Finding number 3 and Finding number 4, less attorney fees of 15% in accord with Finding number 6;

b. Medical treatment reasonably required to cure or relieve from the effects of the injury herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 10, 2023

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

**LUIS ANGEL HERNANDEZ HERRERA
VALENCIA WILBERDING &. ROMERO
OFFICE OF THE DIRECTOR - LEGAL UNIT
UNINSURED EMPLOYER BENEFIT TRUST FUND-OAKLAND
FRANCISCO RAMIREZ
FRANCISCO RAMIREZ AKA FRANCISCO RAMIREZ CALIXTRO**

AS/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Date of Injury: 09-25-2021

Party of Body Injured: right hand, right index finger, right long finger
resulting in finger amputation and psyche/PTSD

Petitioner: Defendant UEBTF

Timeliness: The petition, filed on 08-11-2023 is timely

Verification: UEBTF contends no verification is required

Petitioner's Contention: Defendant the Uninsured Benefits Trust Fund (UEBTF) seeks reconsideration of an Order Joining UEBTF issued on 06-14-2022 and alleges that the joinder of UEBTF did not meet statutory requirements in Labor Code sections 3716 and 5502. UEBTF further alleges due process violations in submission of this case for decision.

II. PROCEDURAL HISTORY

The procedural history set forth in the Opinion and Decision and below is based upon filings in EAMS.

On 11-30-2021, Applicant Luis Angel Hernandez Herrera filed an Application for Adjudication for date of injury 09-25-2021 to his fingers and hand. The employer was listed as JR Landscaping and Tree Service at **4950 Dickinson Drive, San Jose, CA 95111** and the insurer was listed as Markel Insurance Glen Allen.

On 12-06-2021, an Amended Application was filed by applicant to update the employer to **Francisco Ramirez, an individual** who is not insured. The address listed for Francisco Ramirez was 1950 Dickinson Drive, San Jose, CA 95111.

On 01-24-2022, a Stipulation and Order was approved by Judge James Griffin dismissing JR Landscaping and Markel Insurance as parties. The stipulation was submitted by applicant's attorney Ronald Valencia and attorney Bernard Finnegan for Markel Insurance. However, before the dismissal, Dr. Peter Mandell was selected as the orthopedic qualified medical evaluator (QME).

On 03-08-2022, an Amended Application was filed by applicant again listing Francisco Ramirez as the employer but to correct the address to 4950 Dickerson Lane, San Jose, CA 95111.

On 03-25-2022, an Amended Application was filed "to correct the employer's name and address" and amending the employer name to Francisco Ramirez AKA Francisco Ramirez Calixtro at 4950 Dickerson Drive, San Jose, CA 95111.

With the filing of an Application for Adjudication and every filing of an Amended Application for Adjudication, the Official Address Record was updated as reflected in Board Exhibit 101, Case Participants in EAMS. The "start date" column memorializes the date that the address record was updated and the "end date" column indicates the date a party was removed from the official address record.

To date, there is no record of any returned mail that was served by the DWC; that is, there is no returned mail from 4950 Dickinson Drive, San Jose, CA 95111.

On 05-06-2022, applicant filed a verified Petition for Joinder of the Uninsured Employers Benefit Trust fund (UEBTF) indicating service of a Notice of Special Lawsuit on 03-08-2022.

At hearing on 06-14-2022, an Order Joining Party UEBTF issued by Judge James Griffin. Defendant Francisco Ramirez was listed in the caption of the order. Minutes of Hearing of 06-14-2022, show no appearance by the employer.

On 06-23-2023, applicant filed a Declaration of Readiness for a Status Conference to request an additional QME panel for psychiatric injury based on QME Dr. Mandell's report of 04-21-2022.

After requesting a continuance before the hearing, OD Legal representing UEBTF filed an objection to Joinder and Declaration in Support of Objection, both dated 08-09-2022. The objection stated that according to the Contractors' State License Board, Francisco Javier Calistro Ramirez is the sole owner of Calistro's Tree Service located at 4950 Dickinson Drive, San Jose. (Objection to Petition to Join Party Defendant UEBTF dated 08-08-2022, paragraph 3.) Therefore, the correct name of the employer is Francisco Javier Calistro Ramirez, individually dba Calistro's Tree Service. (Id., paragraph 4.) Despite the objection, no petition for reconsideration was ever filed.

On 08-08-2022, Applicant filed a Response to Objection to Petition for Joinder asserting that UEBTF "attempts to use the Spanish speaking Applicant's lack of education, lack of English and his poor reading skills against him in arguing that the Petition for Joinder is defective because the Uninsured Employer's name may have been slightly misspelled." (Response to Objection to Petition for Joinder dated 08-18-2022, paragraph 2.) Applicant asserted that the Order of Joinder issued 06-14-2022 and because no Petition for Reconsideration was filed, the order of 06-14-2022 is a final order. (Id., at 1.) In accord with the UEBTF's objection of 08-08-2022, an Amended Application was filed on 08-18-2022 to correct the employer's name to Francisco Javier Calistro Ramirez.

On 12-15-2022, a hearing occurred before Judge Joanna Stevenson. Minutes of Hearing dated 12-15-2022 memorialize an appearance by OD Legal representing UEBTF and by applicant's attorney Ronald Valencia. The case was taken off calendar for further discovery upon the joint request of the parties. OD Legal was designated to serve the Minutes of Hearing and did so according to a Proof of Service dated 12-29-2022. The proof of service indicated service on Francisco Javier Calistro Ramierz and Francisco Ramirez AKA Francisco Ramirez Calixtro at 4950 Dickinson Drive, San Jose CA 95111.

On 02-10-2023, applicant filed a Declaration of Readiness for Expedited Hearing dated 02-08-2023.

On 05-25-2023, applicant, his attorney, and OD Legal for UEBTF appeared for the Expedited Hearing. At hearing, UEBTF lodged a verbal objection to joinder stating UEBTF was not properly joined to this case because the employer has not made a special appearance and the service of a special notice of lawsuit was defective. Specifically, the Proof of Service indicated an incorrect address for the uninsured employer, the name of the person who was substitute-served was not indicated in the Proof of Service, and there was no declaration of due diligence showing the addresses and dates of the previous attempts made to personally serve the uninsured employer. (Minutes of Hearing/Summary of Evidence of 05-25-2023 at p. 3, lines 5-37.) UEBTF objected to the trial moving forward based on improper joinder and therefore lack of jurisdiction. Applicant requested that all issues be tried, including but not limited to employment, temporary disability, need for further medical treatment. The issues were memorialized and testimony was taken on the record.

On 06-16-2023, this office served the Minutes of Hearing/Summary of Evidence of 05-25-2023, the Official Address Record, and a Notice of Intention to Submit Case for Decision allowing fifteen days for an objection showing good cause. The notice expressly acknowledged the objections raised by UEBTF and memorialized in the Minutes of Hearing as recited above.

On 07-03-2023, UEBTF filed an Objection to Notice of Intention to Submit Case for Decision raising again the contention that the service of the application and special notice of lawsuit was defective, that there was no notice to the employer to adjudicate the

issue of employment, that the hearing was improper as an expedited hearing because a priority conference was required, and finally, there is “clear evidence supporting existence of another potential employer” who must be joined. Francisco Ramirez filed nothing.

Findings of Fact and Award issued on 07-17-2023 finding injury, employment, and determining average weekly earnings and awarding applicant temporary disability indemnity and medical treatment against the employer and UEBTF.

An Answer to the Petition for Reconsideration was filed on 08-14-2023.

III. FACTS AT TRIAL

Applicant appeared with his attorney in person at DWC Oakland for Expedited Hearing on 05-23-2023. Applicant testified credibly under that his employer was Francisco who goes by Francisco Ramirez. (MOH/SOE 05-25-2023 at page 5/lines 13-26.) On September 25, 2021, applicant injured the fingers on his right hand when he was carrying some trunks to the chipper and he fell. (Id.) When he fell, he dropped the trunk he was carrying which struck his fingers on his right hand. (Id.) He had surgery on his right hand, specifically his index finger and middle finger, and the surgery involved a partial amputation of the right index finger. (Id.)

At the time of the injury, applicant was earning \$750.00 per week in cash. (MOH/SOE 05-25-20223 at page 5/lines 39-40.) At the time of the injury, applicant had worked for the employer for three months on a regular full-time schedule, Monday through Friday from 7:00 a.m. to 4:00 p.m. (MOH/SOE 5-25-2023 at p. 6/lines3-8.) While on the job, it was Francisco Ramirez who gave applicant all the orders of what to do. (Id.) In sum, applicant was paid cash by employer Francisco Ramirez and applicant did not answer to anyone else.

IV. DISCUSSION

The trial in this case took place on 05-23-2023. UEBTF was joined to this case on 06-14-2022 by Order of Joinder issued by Judge Jim Griffin. UEBTF fails to mention in its Statement of Facts that the Order of Joinder was never appealed. UEBTF indicates in its Petition for Reconsideration, Objections in EAMS and at the trial that it conducted investigations after being joined as a party defendant and also participated in hearings. Furthermore, the record is sufficient to show that the employer has been properly served in this case and given notice and an opportunity

to be heard. As a result, findings of fact are based on substantial medical evidence must be given full force and effect.

A. UEBTF's Failure to Appeal the Order of Joinder of 06-14-2022 and Subsequently UEBTF Actively Participated in This Case so UEBTF Should Not Be Dismissed at This Late Date

As set forth above, UEBTF did not appeal the Order of Joinder issued on 06-14-2022.

Originally, when a carrier was involved, QME Dr. Peter Mandell was selected for the orthopedic QME. After UEBTF was joined, a Declaration of Readiness was filed by applicant 06-17-2022 for additional panels in plastic surgery and psychiatry based on Dr. Mandell's report of 04-21-2022.

On 12-15-2022, a hearing occurred before Judge Joanna Stevenson. Minutes of Hearing dated 12-15-2022 memorialize an appearance by OD Legal representing UEBTF and by applicant's attorney Ronald Valencia. The case was taken off calendar for further discovery upon the joint request of the parties. OD Legal was designated to serve the Minutes of Hearing and did so according to a Proof of Service dated 12-29-2022. The proof of service indicated service on Francisco Javier Calistro Ramierz and Francisco Ramirez AKA Francisco Ramirez Calixtro at 4950 Dickinson Drive, San Jose CA 95111. (EAMS Doc. ID No. 42698470.)

The QME report for psychiatric injury issued shortly after the hearing of 12-15-2022 by QME Dr. Alberto Lopez. Dr. Lopez's report of 01-09-2023 is addressed to applicant's attorney and UEBTF's adjuster and legal counsel. (Ex. 4.)

That UEBTF is now objecting to joinder, having failed to do so at the hearing on 12-15-2022 has caused applicant to act in detrimental reliance. Applicant has attempted to perfect the record based upon UEBTF's objections and investigations. At this late date, for UEBTF to now object to joinder despite its appearances at hearing is disingenuous at best and arguably grounds for admonishment.

B. Requirements for Joinder of UEBTF Under Labor Code section 3716 by way of Substituted Service Are Satisfied

UEBTF alleges that Francisco Ramirez has not been served with the Application for Adjudication and the special notice of lawsuit in compliance with Code of Civil Procedure and Labor Code section 3716. In essence, UEBTF alleges that the proper substituted service was not

Importantly, the only amendment to the Applications included for service was the name Francisco Ramirez to Francisco Javier Calistro Ramirez. As outlined above, any and all amendments to the legal name of the employer Mr. Ramirez by applicant was at the behest of UEBTF.

UEBTF criticized the date of the Declarations of Mailing as differing from the enclosed documentation, but they are consistent with the cover letters which were drafted by a different Gemini employee than the process servers. There is no evidence of returned mail from Mr. Ramirez to DWC Oakland or any other party in this case. Service has been effectuated on the employer Francisco Ramirez.

C. No Due Process Violation in Issuing Findings of Fact

UEBTF contends that it was a violation of defendants' due process rights to convert the Expedited Hearing of 05-23-2023 to include other issues. However, UEBTF's objections filed prior to the hearing as well as argument at hearing suggesting that other persons and entities were identified as the employer gave rise to the issue of employment and applicant's sworn testimony was needed to establish that the employer was Francisco Ramirez.

On 06-16-2023, DWC Oakland served the Minutes of Hearing/Summary of Evidence of 05-25-2023, the Official Address Record, and a Notice of Intention to Submit Case for Decision allowing fifteen days for an objection showing good cause. The notice expressly acknowledged the objections raised by UEBTF and memorialized in the Minutes of Hearing as recited above. UEBTF filed another objection on the same grounds as memorialized in the Minutes of Hearing of 05-25-2023. Francisco Ramirez did not respond, nor was any done on Francisco Ramirez pursuant to Code of Civ. Proc. section 415.20, subdivision (b) because the proof of service of 09-19-2022 by Gemini failed to attach a Declaration of Due Diligence, and there is no credible proof that follow up mailing was done. However, after attempts for personal service failed, all the documents in Exhibit G were served on Francisco Ramirez at 4950 Dickinson Drive, San Jose, CA 95111 by Gemini process servers.

In reference to Exhibit 6, the Declaration of Mailing dated 09-19-2022 by Bela Morales of Gemini contained: a cover letter to Francisco Javier Calistro Ramirez of 09-19-2022, a Proof of service of Amended Application dated 08-18-2022, and a Special Notice of Lawsuit.

Then, in reference to Exhibit 6, the Declaration of Mailing 03-15-2023 by Bela Morales of Gemini contained: a cover letter to Francisco Ramirez of 03-15-2022 a Proof of service of Amended Application dated 08-18-2022, Declaration of Due Diligence dated 03-08-2022, Special Notice of Lawsuit and Amended Application of 12-06-2021.

returned from him. As such, the parties were given ample notice and opportunity to respond such that there is no due process violation.

D. The Findings of Fact are Based on Substantial Evidence

Findings number 1, 4, and 5 pertaining to the injury, need for temporary disability and need for medical treatment are based on the QME Dr. Peter Mandell for orthopedic body parts and QME Dr. Alberto Lopez for psychiatric injury. (Exhibits 1-5.) Finding number 3, applicant's earnings, are based on his testimony summarized above. As such, there is substantial medical evidence to support the Findings of Fact in this case.

V. RECOMMENDATION

Based on the foregoing, it is respectfully recommended that the Petition for Reconsideration be DENIED.

DATE: 08-18-2023

Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE