WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALFONSO GREEN, *Applicant*

vs.

GOLDEN DROP, INC.; TRANSGUARD INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ10379948

Los Angeles District Office

OPINION AND ORDERS DISMISSING PETITION FOR RECONSIDERATION AND DENYING PETITION FOR REMOVAL

Defendant seeks reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration we issued on October 9, 2023, wherein we[1] rescinded the workers' compensation administrative law judge's (WCJ) findings that (1) applicant's claim is barred by the statute of limitations provided by Labor Code section 5405; (2) defendant is not estopped from asserting the statute of limitations defense; and (3) there is no good cause to set aside the order dismissing applicant's claim; and we returned the matter to the trial court for further proceedings consistent with our decision.

Defendant contends that we erroneously (1) found that applicant was denied due process; (2) found that the statute of limitations did not expire until one year after March 27, 2018; and (3) failed to find that applicant is precluded from reopening his claim.

We received an Answer from applicant.

We have reviewed the contents of the Petition and the Answer. Based on our review of the record, and for the reasons stated below and in our October 9, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, which we adopt and incorporate herein, we will dismiss the Petition for Reconsideration and treat it as one for removal and deny the Petition for Removal.

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[1] Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist was appointed in her place.

A petition for reconsideration is the mechanism by which a party may challenge a final order, decision, or award. (Labor Code § 5900[2].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075, [65 Cal.Comp.Cases 650, 650-651, 655-656].) The Court of Appeal has given examples of threshold issues to include "whether the injury arises out of and in the course of employment, the territorial jurisdiction of the appeals board, the existence of an employment relationship or statute of limitations issues." (*Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 (citations omitted).) "Such issues, if finally determined, may avoid the necessity of further litigation." (*Id*.) (internal quotation marks and citations omitted).)

By contrast, removal may be requested to challenge interim and non-final orders issued by a WCJ. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 275, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) Removal is discretionary and is generally employed only as an extraordinary remedy upon a showing of substantial prejudice or irreparable harm and a showing that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 272, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].)

In this case, our October 9, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration rescinded the WCJ's findings on the issues of the statute of limitations, estoppel, and good cause to set aside the order of dismissal, and returned the matter to the trial level to develop the record on the issue of employment as well as those same issues. Our decision thus did not adjudicate any substantive right or liability and is a non-final order. Accordingly, we will dismiss the Petition as one for reconsideration and treat it as one seeking removal.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

Defendant contends that we erroneously found that applicant was denied due process; and, more particularly, that we failed to identify "any particular item of evidence" which applicant was precluded from introducing at trial. (Petition, p. 7:5-6.)

In this regard, we are aware of no authority, and defendant cites none, requiring a particularized showing of precluded evidence in order to establish a violation of the right of due process.

In this case, we found a violation of the right to due process on the grounds that applicant had been denied a fair hearing when the WCJ denied his request for trial on the issue of employment, effectively setting aside the parties' statutorily-assigned burdens of proof:

> [A]pplicant requested trial of the issue of employment on the grounds that it was connected to other issues framed for trial and defendant requested trial only of the issues of jurisdiction and the statute of limitations. (Opinion on Decision, p. 6.) The WCJ denied applicant's request and proceeded to trial on the other issues. (*Id*.)
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> However, the denial of trial on the issue of employment effectively precluded applicant from establishing the legal presumption of employment and shifting the burden to defendant to prove that applicant did not work "under any appointment or contract of hire or apprenticeship." (See Lab. Code, § 3351; *Parsons v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629, 638 [46 Cal.Comp.Cases 1304].)
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> Consequently, defendant was not required to prove—and not found to have proven—that applicant was an independent contractor. Nonetheless, the WCJ deemed defendant's argument that applicant was an independent contractor as "colorable"; and, as such, grounds for finding defendant not estopped from asserting the statute of limitations defense. (Opinion on Decision, pp. 11-12.) It is thus clear the denial of the request for trial of the issue of employment also denied applicant a fair hearing on the merits of his estoppel defense.
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> All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158 [97 Cal. Rptr. 2d 852, 65 Cal.Comp.Cases 805].) A fair hearing is "... one of 'the rudiments of fair play' assured to every litigant ..." (*Id.* at 158.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [108 Cal. Rptr. 2d 1, 66 Cal. Comp. Cases 584]; *Rucker*, *supra*, 82 Cal.App.4th at 157-158 citing *Kaiser Co. v. Industrial Acci. Com*. (*Baskin*) (1952) 109 Cal.App.2d 54, 58

> [240 P.2d 57, 17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4th 703, 710 [7 Cal. Rptr. 2d 66, 57 Cal.Comp.Cases 230].) Due process requires "a 'hearing appropriate to the nature of the case.'" (*In re James Q.* (2000) 81 Cal.App.4th 255, 265, 96 Cal. Rptr. 2d 595, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865.) Although due process is "a flexible concept which depends upon the circumstances and a balancing of various factors," it generally requires the right to present relevant evidence. (*In re Jeanette V*. (1998) 68 Cal.App.4th 811, 817, 80 Cal. Rptr. 2d 534.)
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> Accordingly, we conclude that the denial of applicant's request for trial of the issue of employment violated applicant's right of due process.
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> The Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].)
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> Accordingly, we will rescind the F&O and return the matter to the trial level for development of the record of the issues of employment and the statute of limitations, including the parties' respective defenses thereto.
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> Although we have determined that the F&O should be rescinded and that the matter returned to the trial level for development of the issue of employment, we also conclude that adjudication of the employment issue is a necessary prerequisite to determination of defendant's prima facie statute of limitations defense.
> (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, October 9, 2023, pp. 10-11.)

Because our decision found a violation of the right of due process and returned the matter to the trial level for development of the issue of employment with the parties holding their statutorily-assigned burdens of proof, defendant did not sustain substantial prejudice or irreparable harm as a result. Accordingly, we discern no merit to defendant's contention that removal is warranted because we erroneously found that applicant was denied due process.

We next address defendant's contention that we erroneously found that the statute of limitations did not expire until one year after March 27, 2018.

Here we have explained that our decision made no findings on the merits of the issue of the statute of limitations and, instead, returned the matter to the trial level for development of the record on the issue of employment and the statute of limitations defense thereto. In doing so, we opined that because the issues of employment and the statute of limitations defense had not been properly framed for trial, defendant had not presented evidence to establish that applicant had failed to timely seek to reopen his claim:

> As the party holding the affirmative of the issue, defendant holds the burden of proof as to the statute of limitations issue. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal. App. 4th 298, 313 [79 Cal. Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (*Obernier*) (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289]; *Bolanos v. Workers' Comp. Appeals Bd*. (2014) 79 Cal.Comp.Cases 1531.)
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> Here it is undisputed that applicant received medical treatment and temporary disability benefits through an insurance policy he obtained at defendant's instruction—and applicant testified that these benefits continued until two years after his date of injury, or approximately March 27, 2017. (Opinion on Decision, pp. 3, 7.) Since the statute of limitations runs through the last date on which any employer-provided benefits were furnished, and since defendant presented no evidence to suggest that the benefits were not employer-provided to meet the burden of proving its statute of limitations defense, it appears that the statute of limitations did not expire until one year after the last date on which benefits were furnished, or March 27, 2018, leaving the WCJ's conclusion that the statute of limitations expired no later than August 17, 2016 without support. (Opinion on Decision, pp. 4, 10.)
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> That the record shows that the benefits were provided through an occupational accident insurance policy and not a workers' compensation policy has no bearing on the question of whether the benefits were employer-provided (and subject to the statute of limitations) because insurance coverage disputes must be determined by arbitration and workers' compensation benefits disputes must be determined by the WCJ—and the WCJ need not await the outcome of a coverage dispute before determining issues of workers' compensation benefits. (Lab. Code, §§ 5270, 5275(a).)
>
> It follows that adjudication of the employment issue is a necessary prerequisite to determination of the statute of limitations defense.
> (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, October 9, 2023, pp. 11-12

Because our decision returned the matter to the trial level for development of the issues of employment and the statute of limitations defense, defendant will not be denied an opportunity to present evidence to prove that applicant failed to timely seek to reopen his claim. It follows that our decision did not cause defendant substantial prejudice or irreparable harm. Accordingly, we conclude that defendant's contention that removal is warranted because we erroneously found that the statute of limitations did not expire until one year after March 27, 2018 is without merit.

We next address defendant's contention that we erroneously failed to find that applicant is precluded from reopening his claim. Specifically, defendant argues that it relied to its detriment on applicant's dismissal request and, therefore, applicant is estopped from reopening his claim.

Here we have explained that our decision made no findings on the merits of whether good cause exists to reopen applicant's claim, including as to defendant's argument that applicant should be estopped from asserting in the first instance that good cause for reopening his claim exists. We concluded that trial of the issue of employment is a necessary prerequisite to trial of the issue of defendant's statute of limitations defense. In addition, we note that if defendant's statute of limitations defense is successful, applicant would be precluded from asserting grounds to establish that good cause exists to reopen his claim. It follows that our decision did not cause defendant substantial prejudice or irreparable harm. Accordingly, we are unable to discern support for defendant's argument that removal is warranted on the grounds that we erroneously failed to find that it relied to its detriment on applicant's dismissal request.

Accordingly, we will deny the Petition for Removal.

Accordingly, we will dismiss the Petition for Reconsideration and treat it as one for removal and deny the Petition for Removal.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued on October 9, 2023 is **DISMISSED**.

IT IS FURTHER ORDERED that the Petition for Removal of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued on October 9, 2023 is **DENIED.**

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

JANUARY 2, 2024

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

ALFONSO GREEN
GOLDEN DROP, INC.
LAUGHLIN, FALBO, LEVY & MORESI
NITKA FIRM
VALLEY LAW GROUP

SRO/*cs*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued on September 13, 2021, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant's claim is barred by the statute of limitations provided by Labor Code section 5405; (2) defendant is not estopped from asserting the statute of limitations defense; and (3) there is no good cause to set aside the order dismissing applicant's claim.[3]

The WCJ ordered that applicant's petition to reopen his claim be denied.

Applicant contends that the WCJ erroneously failed to adjudicate the issue of employment. Applicant further contends that the WCJ erroneously failed to find defendant estopped from proceeding with the statute of limitations defense. Applicant also contends that the record establishes that good cause exists to set aside the order dismissing applicant's claim.

We received an Answer from defendant.

We received a Report and Recommendation on Petition for Reconsideration (Report) prepared by the Presiding WCJ due to the retirement of the trial judge. The Report recommends that the Petition be denied.

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

FACTUAL BACKGROUND

In the Opinion on Decision, the WCJ states:

> Applicant, Alfonso Green, claims to have sustained injury to multiple body parts arising out of and in the course of employment with Golden Drop, Inc. on March 27, 2015. Defendant denies injury AOE/COE on the basis that Applicant was an independent contractor at the time of injury. Defendant also contends Applicant's claim is barred by the statute of limitations. The issue of equitable estoppel has been raised by both parties.
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> This case proceeded to trial on the issues of jurisdiction, statute of limitations and equitable estoppel and/or laches. A Findings and Order issued on January 11, 2021,

[3] Commissioner Lowe and Commissioner Gaffney no longer serve on the Appeals Board. Commissioner Capurro and Commissioner Snellings have substituted in their places.

finding that Applicant's claim is barred by the statute of limitations, and that Defendant is not estopped from raising that defense.

After Applicant filed a petition for reconsideration, the F&O was rescinded pursuant to Title 8, California Code of Regulations, § 10961. Subsequent conferences have been held and additional briefing filed, and the matter has now been re-submitted for decision.

. . .

Applicant is a truck driver who contracted with Golden Drop, Inc. (a California company) to make deliveries to the company's customers. The contract, titled Sub-lease Purchase Program - Independent Contractor Agreement ("Agreement"), provides for Applicant to sub-lease a truck from Golden Drop, which the company leased from a third party, and to perform delivery services as an independent contractor. Notwithstanding the language in the Agreement, Applicant contends he was in fact an employee of Golden Drop while making the deliveries.

The Agreement contains terms relating to the delivery services, maintenance of the truck, compensation, and other matters. It states that Golden Drop does not provide workers' compensation coverage for the independent contractors, and that Applicant is required to obtain occupational accident insurance and non-occupational accident insurance, for which the company can refer Applicant to a third party agency. Applicant did obtain such coverage from Transguard Insurance Company of America, Inc. ("Transguard"). Transguard is also Golden Drop's workers· compensation carrier. In his application for the occupational accident insurance, Applicant acknowledged that he was, or would become, a member of the National Association of Independent Truckers ("NAIT") and he agreed he is not an employee of any motor carrier.

Applicant alleges that he fell while making a delivery for Golden Drop in Buffalo, New York on March 27, 2015. A claim form for the alleged injury was prepared and signed by Applicant on July 24, 2015. Applicant retained an attorney, Kenneth Fram, who sent the claim form to Golden Drop on July 30, 2015.

On August 17, 2015, a claims specialist from Transguard, Brent Piersma, sent a letter to Mr. Fram stating that on the date of the alleged injury Applicant had in effect an occupational accident policy, not a workers' compensation policy. The letter states that in the event Applicant files a workers' compensation claim his benefits under the occupational accident policy will be subject to immediate termination. It further states that if Applicant desires benefits under that policy, Mr. Fram should take action to timely and voluntarily dismiss the workers' compensation claim, and that a copy of a signed order dismissing the workers' compensation case with prejudice will allow Transguard to review Applicant"s claim for benefits under the occupational accident policy.

On September 10, 2015, Mr. Fram faxed a letter to Mr. Piersma stating that Applicant wishes to dismiss Mr. Fram as his attorney and drop his workers'

compensation case. It states an application for adjudication of claim was never filed with the Workers" Compensation Appeals Board by Mr. Fram's office. It states Applicant would like his benefits under the occupational accident policy (OCAC) to resume immediately from the date they were terminated.

On March 26, 2016, Applicant retained a second workers' compensation law firm, Telleria, Telleria & Levy. A new claim form for the alleged March 27, 2015 injury and an application for adjudication of claim were served on Golden Drop on April 1. 20 I 6 and were filed with the WCAB on April 6, 2016.

On July 28, 2016, Mr. Piersma sent a letter to the Telleria firm which is essentially a copy of the letter he sent earlier to Mr. Fram.

On August 24, 2016, Applicant dismissed the Telleria firm as his attorney and prepared a petition to dismiss his case. The petition states that Applicant is requesting the petition be granted because he is an independent contractor and workers compensation "does not follow under independent contractor". The petition was filed with the WCAB that day.

On August 31, 2016, Mr. Piersma sent a letter to Applicant stating that in order to provide benefits under the occupational accident policy. Transguard must receive an order dismissing his case signed by a WCAB judge.

It appears that on September 1, 2016, Applicant met with an information and assistance officer at the WCAB. The I&A officer sent an E-mail to Mr. Piersma asking why Applicant was required to dismiss his workers' compensation claim before Transguard will resume payment of his benefits. Mr. Piersma responded that the policy for Applicant is not a workers' compensation policy but an occupational accident policy since the company regards Applicant as an independent contractor not an employee. His E-mail says that when an IK [i.e. independent contractor] files for workers' compensation the benefits under the policy cease, but if they voluntarily dismiss the workers compensation case and obtain an order of dismissal, benefits can be resumed.

On September 1, 2016 Applicant prepared a handwritten note stating he made a mistake in filing the workers' compensation claim since he is an independent contractor, and by filing the claim his benefits were stopped in June 2016. The note says Applicant cannot now pay his rent and he has received a 3-day notice to move. It also says Applicant has custody of his 2 year old son but he cannot provide for him because of this matter. Applicant requests that his case be dismissed without a hearing. An order dismissing his case without prejudice was issued by a workers· compensation judge that day.

On June 28, 2018, Applicant sent an E-mail to Heather Reese at Transguard requesting a notation that his case wasn't a workers' compensation case but was an occupational claim because the Social Security Administration needs that

information. Mr. Piersma replied that the benefits he received were occupational accident benefits, not workers' compensation benefits, and he has so notified the Social Security Administration.

On August 20, 2018 Applicant hired his current attorney - Valley Law Group. An amendment to the application for adjudication of claim was filed on August 22, 2018, adding additional body parts to the claim.

On October 5, 2018, Applicant filed a petition to reopen his workers' compensation case along with a petition to transfer venue to the Fresno WCAB district office. The venue petition was denied on October 25, 2018 for lack of proof of Applicant's residency. It was refiled on November 1, 2018.

Defendant filed an answer to the petition to reopen on November 7. 2018, asserting that since Applicant voluntarily dismissed his case any new claim now is barred by Labor Code sections 5405 and 5803. Defendant also contends the petition should be dismissed on the grounds of equitable estoppel and laches. It was noted that in reliance on Applicant's representation that he was an independent contractor, Transguard has paid in excess of $70,000.00 in medical benefits and $42,000.00 in temporary disability benefits under the occupational accident policy.

. . .

A mandatory settlement conference was held before this WCJ on Apri1 24, 2019. The matter was referred to the presiding judge to address the venue issue. The parties stipulated that Transguard accepts indemnification and defense of Golden Drop for workers' compensation benefits owed, if any. It was further stipulated that Transguard and Golden Drop contend Applicant was not an employee of Golden Drop, and that jurisdiction is open on that issue. The presiding judge issued an order approving the stipulations.

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On October 9, 2019, Applicant filed another declaration of readiness to proceed on the issues of employment and discovery. At the MSC on January 16, 2020, Defendant was ordered to serve additional documents on Applicant's attorney. Applicant withdrew his request for change of venue, reserving the right to refile it later. The hearing was continued to a status conference on April 21, 2020, where Defendant was again ordered to serve documents and the hearing was continued to an MSC.

At the next MSC on July 28, 2020, the parties appeared before this WCJ and the case was set for trial. Defendant sought to set trial solely on the issues of jurisdiction and the statute of limitations. Applicant argued that the statute of limitations was tolled by laches and equitable estoppel, and requested that employment be included as an issue because it is connected to the other issues. Applicant's request was denied. The employment issue was bifurcated and the trial was set on the threshold issues of jurisdiction and statute of limitations (including laches and estoppel) only.

This matter proceeded to trial on October 5, 2020. Applicant was the only witness. He testified that when he signed the Agreement he was not familiar with what makes a person an independent contractor. He said he just knew that he wanted to work for Golden Drop and to drive a truck for them. He said that after the accident he returned to California and Golden Drop told him to come to the office. He said they told him to report the injury to his personal physician. He said they did not have him fill out any paperwork at the time.

Applicant testified that he was told by his general manager (Mark) at the employer to tell the insurance company that the accident occurred in Santa Fe Springs, California on April 3rd not in Buffalo, New York on March 27, 2015. He said he was told to do that for insurance purposes.

(Applicant submitted what are purported to be claims notes (Applicant's Exhibit 3) which contain several entries dated April 13, 2015. One is based on a conversation with Applicant which states that "MC" asked him to lie about the date and location of the accident. A second entry states that MC is reporting that the injury occurred on March 27, 2015 but Applicant is trying to say it happened on April 2. 2015. That entry says MC sent a request for coverage on March 27, 2015, requesting it be back-dated to February 11, 2015. Another entry states the claim was reported by Arthur at MC, and that the FROI states Applicant was injured on April 2, 2015 in California. Finally, there is an entry stating that after discussion with the claims manager it was agreed that Applicant did not lie, and the issue was with MC and the broker.)

. . .

Applicant testified that Transguard agreed to pay benefits under the occupational accident insurance policy, and that he didn't know the difference between a workers' comp injury and an occupational accident. He said that after he retained his original attorney and filed his workers' compensation claim the benefits from Transguard stopped. He was told by Transguard that he could restart his occupational accident benefits by dismissing his workers' compensation claim. He said that at the time he was the sole provider of his one year old son, and he was at risk of being evicted from his apartment. He said it was important that he have income because if he could not feed his son he was in danger of having his son taken away from him. Applicant obtained the dismissal and provided it to Transguard, after which time his benefits resumed.

Applicant testified that Transguard terminated his benefits two years after his injury. He said he subsequently retained another attorney and it was only then that he found out he was entitled to workers' compensation benefits. That is when he re-filed his claim.

After trial a Findings and Order issued finding that Applicant" s claim is barred by the statute of limitations. It was further found that Defendant was not estopped from raising the statute of limitations defense.

Applicant filed a petition for reconsideration arguing therein that the estoppel issue cannot be resolved without a determination on the employment issue, and this WCJ's refusal to hear the employment issue violated his due process rights. The petition states that had this WCJ allowed the employment issue to be heard, Applicant would have presented additional documentary and testimonial evidence to prove employment. It was also argued that this WCJ applied the wrong standard for estoppel.

The Finding and Order was rescinded pursuant to Title 8, California Code of Regulations, § 10961. A status conference was held on April 21, 2021 to discuss the estoppel issues with the parties, including whether it is necessary to try the employment issue. . . . The matter was re-submitted for decision.

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In this case, Applicant did not file an application for workers' compensation benefits within one year of the date of injury. His injury occurred on March 27, 2015, so the one year period expired on March 27, 2016. He filed his initial application on April 6, 2016.

Applicant received medical treatment through Transguard after his injury, so he may have initially assumed his employer was furnishing treatment for an industrial injury. It is unclear from the record whether Applicant was told by Transguard at that time that the medical treatment was being provided under his occupational accident policy. However, as of August 17, 2015, when Transguard notified Mr. Fram that Applicant's benefits were being provided under that policy, not under a workers' compensation policy, because the company considered Applicant an independent contractor, there could no longer be any doubt the employer was disclaiming liability for an industrial injury. Arguably, under *McDaniel* the statute of limitations could have begun to run from that date, in which case Applicant's initial application would have been filed timely.

Applicant later dismissed his case, stating in his request for dismissal that he mistakenly filed the workers' compensation case because he was an independent contractor. The order dismissing his case without prejudice issued on September 1, 2016. Nearly two years later, he retained a new attorney and has been attempting to reopen his case. Defendant contends he is barred from doing so by the statute of limitations.

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In this case, Applicant received no award of benefits, nor did Defendant pay any benefits under the workers' compensation policy. Thus, Applicant's petition to reopen his claim is construed as an attempt to adjudicate his original claim. Since the one year period to file his claim expired no later than August 17, 2016 (assuming the period to file the claim was tolled through August 17, 2015 per *McDaniel*, as discussed above), and Applicant's claim was dismissed on September 1, 2016, he would be barred under Section 5405 from re-filing his claim. The question, though, is whether Defendant is estopped from asserting the statute of limitations defense.

. . .

Transguard has never represented to Applicant that he was entitled to workers' compensation benefits, and in fact, has steadfastly denied liability for such benefits. Applicant's estoppel argument is based on his allegation that Transguard falsely represented to him that he was an independent contractor in order to induce him to drop his claim. However, at no time has a determination been made as to whether Applicant was an employee or an independent contractor. In fact, Transguard had a colorable legal argument that Applicant was an independent contractor at the time the representations were made. . .

. . .

Thus, Applicant argues, it is not necessary that Defendant acted in bad faith or intended to mislead Applicant for estoppel to apply. He argues it would apply even if Defendant made representations in good faith which ultimately proved to be untrue. That is why, continuing the argument, it is necessary to try the employment issue because if Applicant was induced to drop his workers' compensation claim and not refile it timely based on the representations by Defendant that he was an independent contractor, and a determination is later made that he was in fact an employee. Defendant should be estopped from raising the statute of limitations defense.

. . .

The Appeals Board has continuing jurisdiction over all its orders, decisions, and awards, and may, at any time, upon notice and after an opportunity to be heard is given to the parties in interest, rescind, alter, or amend any order, decision or award upon a showing of good cause. (*Labor Code Section 5803*.)

Notwithstanding Applicant's inability to reactivate his claim on his own, the Appeals Board has the power under Section 5803 to rescind the order dismissing his case upon a showing of good cause. The undersigned does not find good cause to rescind the order.

The fact that Applicant was represented by two different workers· compensation law firms shows he was aware he had a potential claim for workers' compensation benefits. In fact, he did file a claim form four months after his accident. He was also aware his claim was denied by Transguard. Applicant had a choice - either proceed with his workers' compensation claim, which may provide him more benefits in the long run, but he wouldn't have started receiving those benefits unless, and until, he prevailed on his claim, or disclaim workers' compensation benefits and get benefits immediately under his occupational accident policy. There was no guarantee he would have prevailed on his workers' compensation claim. Applicant opted to avoid the risks and delays of litigating his workers' compensation claim and receive benefits under his occupational accident policy. Doing so required him to accept Defendant's position that he was an independent contractor, not an employee. Having made that choice, Applicant received over $112,000 in medical and disability benefits under the occupational accident policy according to Defendant's answer to the petition to reopen. It was only after he exhausted all his benefits under that policy that Applicant decided to reverse course and attempt to litigate his workers' compensation claim. Applicant wants to have it both ways. He

> wants to have been able to receive benefits quickly under the occupational accident policy rather than face the risks and delays of litigating his workers' compensation claim, and now claim he really wasn't entitled to the occupational accident benefits all along but he should have been getting benefits under workers' compensation. In that sense, it is Defendant, not Applicant, that has the more credible equitable estoppel argument.
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> Based on the foregoing, this WCJ sees no good cause to set aside the order dismissing Applicant's claim.
> (Opinion on Decision, pp. 3-15.)

DISCUSSION

Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within sixty days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice. . . ." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [9 Cal. Rptr. 2d 345, 57 Cal.Comp.Cases 493]; see *Rea v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 625, 635 fn. 22 [25 Cal. Rptr. 3d 828, 70 Cal.Comp.Cases 312].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits. (*Shipley*, *supra*, 7 Cal.App.4th at p. 1106.) The Appeals Board had not acted on applicant's petition because, through no fault of the parties, it had misplaced the file. (*Id*.)

The Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced. (*Shipley*, *supra*, 7 Cal.App.4th at p. 1107.) The Court emphasized that "Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shipley*, *supra*, 7 Cal.App.4th at p. 1107.) "Shipley's right to reconsideration by the board is likewise statutorily provided and cannot be denied him without due process. Any other result offends not only elementary due process principles but common sensibilities." (*Id*., at p. 1108.)

Applicant's Petition was filed on October 8, 2021 and was timely. However, due to an internal processing error related to the Electronic Adjudication Management System (EAMS) used in the workers' compensation system, which was not the fault of any party in this matter, the Appeals Board failed to act within sixty days of its filing. As a result of this error, the Appeals Board did not receive notice of the Petition until August 8, 2023.

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley*, *supra*, 7 Cal.App.4th at p. 1108.) Thus, the time within which the Appeals Board has to act on the Petition was tolled until October 9, 2023, and we therefore may adjudicate the Petition within sixty days of that date. Accordingly, we address the merits of the Petition.

We turn first to applicant's contention that the WCJ erroneously failed to adjudicate the issue of employment.

California has a no-fault workers' compensation system. With few exceptions, all California employers are liable for the compensation provided by the system to employees injured or disabled in the course of and arising out of their employment, "irrespective of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" (Lab. Code, §§ 3351, 5705(a); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [256 Cal. Rptr. 543, 769 P.2d 399, 54 Cal.Comp.Cases 80].)

An "employee" is defined as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." (Lab. Code, § 3351.) Further, any person rendering service for another, other than as an independent contractor or other excluded classification, is presumed to be an employee. (See Lab. Code, § 3357.) Once the person rendering service establishes a prima facie case of "employee" status, the burden shifts to the hirer to affirmatively prove that the worker is an independent contractor. (*Cristler v. Express Messenger Sys., Inc.* (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167] (*Cristler*); *Narayan v. EGL, Inc.* (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724] *(Narayan)*.) Consequently, unless the hirer can demonstrate that the worker meets specific criteria to be considered an independent contractor, all workers are presumed to be employees.

Here, applicant requested trial of the issue of employment on the grounds that it was connected to other issues framed for trial and defendant requested trial only of the issues of jurisdiction and the statute of limitations. (Opinion on Decision, p. 6.) The WCJ denied applicant's request and proceeded to trial on the other issues. (*Id*.)

However, the denial of trial on the issue of employment effectively precluded applicant from establishing the legal presumption of employment and shifting the burden to defendant to prove that applicant did not work "under any appointment or contract of hire or apprenticeship." (See Lab. Code, § 3351; *Parsons v. Workers' Comp. Appeals Bd*. (1981) 126 Cal.App.3d 629, 638 [46 Cal.Comp.Cases 1304].)

Consequently, defendant was not required to prove—and not found to have proven—that applicant was an independent contractor. Nonetheless, the WCJ deemed defendant's argument that applicant was an independent contractor as "colorable"; and, as such, grounds for finding defendant not estopped from asserting the statute of limitations defense. (Opinion on Decision, pp. 11-12.) It is thus clear the denial of the request for trial of the issue of employment also denied applicant a fair hearing on the merits of his estoppel defense.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158 [97 Cal. Rptr. 2d 852, 65 Cal.Comp.Cases 805].) A fair hearing is "... one of 'the rudiments of fair play' assured to every litigant ..." (*Id.* at 158.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [108 Cal. Rptr. 2d 1, 66 Cal. Comp. Cases 584]; *Rucker*, *supra*, 82 Cal.App.4th at 157-158 citing *Kaiser Co. v. Industrial Acci. Com*. (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [240 P.2d 57, 17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4th 703, 710 [7 Cal. Rptr. 2d 66, 57 Cal.Comp.Cases 230].) Due process requires "a 'hearing appropriate to the nature of the case.'" (*In re James Q.* (2000) 81 Cal.App.4th 255, 265, 96 Cal. Rptr. 2d 595, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865.) Although due process is "a flexible concept which depends upon the circumstances and a balancing of various factors," it generally requires the right to present relevant evidence. (*In re Jeanette V*. (1998) 68 Cal.App.4th 811, 817, 80 Cal. Rptr. 2d 534.)

Accordingly, we conclude that the denial of applicant's request for trial of the issue of employment violated applicant's right of due process.

The Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See

San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].)

Accordingly, we will rescind the F&O and return the matter to the trial level for development of the record of the issues of employment and the statute of limitations, including the parties' respective defenses thereto.

Although we have determined that the F&O should be rescinded and that the matter returned to the trial level for development of the issue of employment, we also conclude that adjudication of the employment issue is a necessary prerequisite to determination of defendant's prima facie statute of limitations defense.

Labor Code section 5405 provides:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 . . . 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) of Chapter 2 of Part 2.
>
> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.
> (Lab. Code, § 5405.)

As the party holding the affirmative of the issue, defendant holds the burden of proof as to the statute of limitations issue. (Lab. Code, § 5705*; Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal. App. 4th 298, 313 [79 Cal. Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (*Obernier*) (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289]; *Bolanos v. Workers' Comp. Appeals Bd.* (2014) 79 Cal.Comp.Cases 1531.)

Here it is undisputed that applicant received medical treatment and temporary disability benefits through an insurance policy he obtained at defendant's instruction—and applicant testified that these benefits continued until two years after his date of injury, or approximately March 27, 2017. (Opinion on Decision, pp. 3, 7.) Since the statute of limitations runs through the last date on which any employer-provided benefits were furnished, and since defendant presented no evidence to suggest that the benefits were not employer-provided to meet the burden of proving

its statute of limitations defense, it appears that the statute of limitations did not expire until one year after the last date on which benefits were furnished, or March 27, 2018, leaving the WCJ's conclusion that the statute of limitations expired no later than August 17, 2016 without support. (Opinion on Decision, pp. 4, 10.)

That the record shows that the benefits were provided through an occupational accident insurance policy and not a workers' compensation policy has no bearing on the question of whether the benefits were employer-provided (and subject to the statute of limitations) because insurance coverage disputes must be determined by arbitration and workers' compensation benefits disputes must be determined by the WCJ—and the WCJ need not await the outcome of a coverage dispute before determining issues of workers' compensation benefits. (Lab. Code, §§ 5270, 5275(a).)

It follows that adjudication of the employment issue is a necessary prerequisite to determination of the statute of limitations defense.

Accordingly, we conclude that the F&O should be rescinded and the matter returned to the trial level for development of the issue of employment on the separate ground that adjudication of the employment issue is a necessary prerequisite to determination of defendant's prima facie statute of limitations defense.

Lastly, we evaluate applicant's contention that the record establishes that good cause exists to set aside the order dismissing applicant's claim.

The Appeals Board has continuing jurisdiction to "rescind, alter, or amend any order, decision, or award," if a petition is filed within five years of the date of injury and "good cause" to reopen is alleged and shown. (Lab. Code, §§ 5803, 5804.) An order approving compromise and release is an order that may be reopened for "good cause" under section 5803. "Good cause" to set aside an order or stipulations depends upon the facts and circumstances of each case. "Good cause" includes mutual mistake of fact, duress, fraud, undue influence, and procedural irregularities. (*Johnson v. Workmen's Comp. Appeals Bd*. (1970) 2 Cal.3d 964, 975 [88 Cal. Rptr. 202, 471 P.2d 1002, 35 Cal.Comp.Cases 362]; *Santa Maria Bonita School District v. Workers' Comp. Appeals Bd*. (2002) 67 Cal.Comp.Cases 848, 850 (writ den.).)

In this case, the WCJ determined that no good cause exists to reopen the claim on the following grounds:

> Applicant had a choice - either proceed with his workers' compensation claim, which may provide him more benefits in the long run, but he wouldn't have started receiving those benefits unless, and until he prevailed on his claim, or disclaim

> workers' compensation benefits and get benefits immediately under his occupational accident policy. . . . Applicant opted to avoid the risks and delays of litigating his workers' compensation claim and receive benefits under his occupational accident policy. Doing so required him to accept Defendant's position that he was an independent contractor, not an employee. Having made that choice, Applicant received over $112,000 in medical and disability benefits under the occupational accident policy according to Defendant's answer to the petition to reopen.
> (Opinion on Decision, p. 14.)

On this record, we are unable to determine how, if at all, the WCJ considered whether the documentary and testimonial evidence that defendant falsely represented to applicant that he was not entitled to workers' compensation benefits because he was an independent contractor constitutes fraud or mutual mistake which caused applicant to dismiss his workers' compensation claim. Nor are we able to discern how, if at all, the WCJ considered whether the documentary and testimonial evidence that defendant threatened applicant with termination of benefits under the occupational accident policy—and the consequent threat of losing his residence and custody of his child—unless he dismissed his workers' compensation claim created circumstances of duress or undue influence which caused him to dismiss his claim.

Labor Code section 5313 requires the WCJ to state the "reasons or grounds upon which the [court's] determination was made." (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIS 74].) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." *(Hamilton*, *supra*, at p. 475.)

We conclude that the record is insufficient to ascertain the WCJ's reasons or grounds for finding that no good cause exists to reopen the claim. Accordingly, we conclude that the finding should be rescinded and the matter returned to the trial level for development of the record as to the issue of whether good cause exists to reopen the claim.

Accordingly, we will grant reconsideration and, as the Decision After Reconsideration, we will rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued on September 13, 2021 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the matter is **RETURNED** to the trial court for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWKSI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 9, 2023

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

ALFONSO GREEN
GOLDEN DROP, INC.
KARASOFF & ASSOCIATES
LAUGHLIN, FALBO, LEVY & MORESI
NITKA FIRM
VALLEY LAW GROUP

SRO/*cs*

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