

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

CARL HEIDEMANN, *Applicant*

vs.

COUNTY OF SAN DIEGO, *permissibly self-insured, Defendant*

**Adjudication Number: ADJ10767201
San Diego District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration.¹ Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Award (F&A) of July 15, 2019, finding that applicant sustained industrial injury arising out of and in the course of employment (AOE/COE) and that applicant was in need of further medical treatment and awarding the applicant further medical treatment. Defendant contends that applicant's claim was barred by the one year statute of limitations pursuant to Labor Code section 5405.²

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, for the reasons discussed below, it is our decision after reconsideration to affirm the July 15, 2019 F&A.

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 assigned in her place.

² All further statutory references are to the Labor Code unless otherwise noted.

FACTS

Applicant claimed industrial injury to his neck and head while employed as a senior probation officer by defendant on February 22, 2012. He was injured while teaching defensive tactics when a student in the training threw him to the ground and put his forearm on applicant's neck. (5/7/19 Minutes of Hearing/Statement of Evidence (MOH/SOE), pp. 4-5.) The following day, he spoke with his supervisor Marlon McBride but did not tell them about the incident during training because he hoped the neck pain would go away. (5/7/19 MOH/SOE, p. 5.) After approximately three weeks, the neck pain had not gone away so he saw a doctor and told the doctor that the neck pain was due to the incident during training. (5/7/19 MOH/SOE, p. 5; 6/20/19 Statement of Evidence (SOE), p. 2.) He told his supervisor that he needed time off to see the doctor due to his neck pain. (5/7/19 MOH/SOE, p. 5.) His supervisor did not give him the DWC-1 claim form and he did not ask for the claim form. (5/7/19 MOH/SOE, p. 5.)

Prior to going to the doctor in April 2012, applicant told supervisor McBride that he had injured his neck in training and he had to see a doctor for the injury. (5/7/19 MOH/SOE, p. 6.) In April or May 2012, applicant also told his direct supervisor Cesar Escuro that he had injured his neck in training and was receiving treatment from a doctor for the injury. (5/7/19 MOH/SOE, p. 6.) Neither supervisor gave applicant a claim form after he told them about the injury. (5/7/19 MOH/SOE, p. 6.) Applicant took time off work to receive treatment for the injury. (MOH/SOE p. 6.) He did not report the work injury though as he was still able to perform his job duties and was only taking a few hours off for treatment. (5/7/19 MOH/SOE, p. 6.) He did not file a claim in 2014 because there was nothing preventing him from doing any physical activity that he wished to do. (6/20/19 SOE, p. 3.)

Applicant received physical therapy and then chiropractic treatment in late 2012. (6/20/19 SOE, p. 2; see also Ex. 1, Dr. Robert Scott report of 9/11/12; Ex. 2, San Diego Sports Medicine report of 8/15/12; Ex. 3, Dr. Robert Scott report of 7/31/12; Ex. 4, San Diego Sports Medicine report of 4/4/12; Ex. 5, Elaine Borseth Chiropractic report of 4/20/12.) Applicant obtained neck surgery through his private insurance to treat the injury and had some out of pocket costs due to co-pays and other treatment not covered by his insurance. (5/7/19 MOH/SOE, p. 6.) He also suffered from migraines after strenuous exercise. (6/20/19 SOE, p. 2.)

In July or August 2016, applicant stated that his injury first caused disability. (6/20/19 SOE, p. 3.) The injury worsened in 2017, as he could no longer run or play golf, and he filed a

claim form on February 3, 2017. (5/7/19 MOH/SOE, p. 6; 6/20/19 SOE, pp. 2-3; Ex B., DWC-1 Claim Form of 2/3/17, p. 1.) His doctor advised him that his migraines and pain down his left arm were due to his neck injury. (6/20/19 SOE, p. 3.)

Applicant had received training on how to report a work injury because he was a supervisor. (5/7/19 MOH/SOE, p. 6; 6/20/19 SOE, p. 2.) He did not receive training on what constitutes a work injury. (6/20/19 SOE, p. 2.)

Supervisor McBride testified that he supervised applicant during 2012, and did not remember applicant reporting an injury due to the training session to him nor did he recall the applicant telling him that his neck hurt during the time he supervised him. (6/20/19 SOE, p. 4.) McBride knew the applicant on and off of work for over 20 years and had never known him to be dishonest. (6/20/19 SOE, p. 4.)

DISCUSSION

Defendant contends that applicant's claim was barred by the one year statute of limitations to apply for workers' compensation benefits pursuant to Labor Code section 5405. The three points designated in section 5405 as the start of the one year period are: date of injury; the last payment of disability indemnity; and the last date on which medical treatment benefits were furnished. (Lab. Code, § 5405(a)-(c).) The statute of limitations is an affirmative defense, and therefore, the burden of proof rests with defendant. (Lab. Code, §§ 5409, 5705.) According to defendant, applicant filed his claim form beyond the one year statute of limitations and therefore his claim is barred. (Petition, p. 4.)

An employer shall provide a claim form and a notice of potential eligibility for benefits to an injured employee within one working day of receiving notice or knowledge of injury, 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. (Lab. Code, § 5401(a).) An employer can receive "notice or knowledge" via service by the injured worker or someone on the worker's behalf. (Lab. Code, § 5400.) Service includes "[k]nowledge of an injury, obtained from any source, on the part of an employer, the employer's managing agent, superintendent, foreman, or other person in authority, 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).)

The statute of limitations may be tolled when a defendant breaches its duty to notify an injured worker of his or her workers' compensation rights. (See *Kaiser Found. Hosps. Permanente Medical Group v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 64-65 [50 Cal.Comp.Cases 411]; *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 762 [39 Cal.Comp.Cases 768]; *California Insurance Guarantee Association v. Workers' Comp. Appeals Bd. (Carls)* (2008) 163 Cal.App.4th 853, 859-865 [73 Cal.Comp.Cases 771].) The Supreme Court found 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 p. 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." (*Id.*)

Here, it is undisputed that defendant did not provide applicant with a claim form and did not apprise him of his workers' compensation rights following the claimed specific injury in February 2012. Applicant did not complete the claim form until February 3, 2017, after his injury worsened. (5/7/19 MOH/SOE, p. 6; 6/20/19 SOE, pp. 2-3; Ex B., DWC-1 Claim Form of 2/3/17, p. 1.) However, defendant had knowledge of the injury sufficient to afford opportunity to the employer to make an investigation into the facts pursuant to section 5402(a) shortly after the injury occurred in February 2012. Prior to going to the doctor in April 2012, applicant told supervisor McBride that he had injured his neck in training and he had to see a doctor for the injury. (5/7/19 MOH/SOE, p. 6.) In April or May 2012, applicant also told supervisor Escuro that he had injured his neck in training and was receiving treatment from a doctor for the injury. (5/7/19 MOH/SOE, p. 6.) A few weeks after the injury, applicant told supervisor McBride that he needed time off to see the doctor due to his neck pain. (5/7/19 MOH/SOE, p. 5.)

The WCJ stated that applicant credibly testified that prior to going to the doctor in April 2012, he told his supervisors, Marlon McBride and Cesar Escuro, that he had injured his neck in training and needed to see a doctor. (Report, p. 2.) We will not disturb the WCJ's credibility

determination as the WCJ had the opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand. (*Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].) Accordingly, the statute of limitations was tolled as the defendant breached its duty to notify applicant of his workers' compensation rights. Therefore, we affirm the F&A of July 15, 2019, finding that applicant sustained industrial injury AOE/COE and that applicant was in need of further medical treatment and awarding the applicant further medical treatment.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 15, 2019 Findings and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR /

/s/ CRAIG SNELLINGS, COMMISSIONER /



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 1, 2023

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

**CARL HEIDEMANN
HOPKINS LAW
COUNTY COUNSEL OF SAN DIEGO
BOEHM**

JMR/ara

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