WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FREDERICK WILLIAMS, ***Applicant***

vs.

LEPRINO FOODS, Permissibly Self-Insured, Administered By MATRIX ABSENCE FOOD MANAGEMENT, INC., ***Defendant***

Adjudication Numbers: ADJ10625118, ADJ10625119
Fresno District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Award of June 17, 2021, wherein it was found that while employed on September 1, 2015 (ADJ10625118) and during a cumulative period ending on September 24, 2015 (ADJ10625119), applicant sustained industrial injury to unspecified body parts. Applicant claims injury to the right upper extremity, back, neck, lower extremities, jaw, teeth, psyche, and in the form of a hernia. In finding industrial injury, the WCJ also found that applicant's claims are not barred by the statute of limitations.

Defendant contends that the WCJ erred in finding industrial injury in both cases, arguing that (1) substantial medical evidence does not support either claim of injury, and (2) both claims are barred by the statute of limitations. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will affirm the WCJ's finding that applicant's claims are not barred by the statute of limitations, and affirm the finding of industrial injury in the specific injury case (ADJ10625118). However, we agree that there is not substantial medical evidence of a cumulative industrial injury, as the reports and deposition testimony of panel qualified medical evaluator chiropractor Lonnie R. Powell, D.C. never explained how any cumulative injury contributed to a need for medical treatment or disability. We will therefore grant reconsideration and amend the WCJ's decision to defer the issue of industrial injury in the cumulative injury case (ADJ10625119) so that the record may be more fully developed on that issue.

On September 1, 2015, applicant hit a pole while driving a forklift seven miles per hour. Applicant testified that he experienced immediate pain in his abdomen and back. (Minutes of Hearing and Summary of Evidence of February 23, 2021 trial at p. 6.) Applicant testified that immediately after the incident, he told foreman Ruben Hernandez that he had tingling down his legs and asked for medical treatment. Applicant testified that Mr. Hernandez told applicant to go back to work while he awaited instructions from his supervisors. (Minutes of Hearing and Summary of Evidence of February 23, 2021 trial at p. 7.)

Applicant testified that the next day applicant informed his supervisor Lee that he was in pain and required medical treatment. He testified that he also informed foreman Shad Goodwin that he needed to see a doctor because of the previous day's incident. (Minutes of Hearing and Summary of Evidence of February 23, 2021 trial at p. 7.)

On September 3, 2021, applicant was called into an office with several supervisors who gave him a written reprimand for hitting the pole with the forklift. Applicant told these managers that he had sustained injury and was in need of medical treatment, but was told that he would not be sent to a doctor because applicant "had caused $1,000 worth of damage." (Minutes of Hearing and Summary of Evidence of February 23, 2021 trial at p. 8.)

Applicant testified that he continued working until September 24, when he stopped working due to pain in his back, abdomen, and left hamstring. He was off for three days because of this pain, and then took a two-week vacation. (Minutes of Hearing and Summary of Evidence of February 23, 2021 trial at p. 8.) Applicant testified that he again requested "workers' compensation papers" before leaving work on September 24, 2015 and before surgery in December of 2015. (Minutes of Hearing and Summary of Evidence of February 23, 2021 trial at p. 9.) He called again in January of 2016, February or March of 2016, and June or July of 2016 to request workers' compensation papers. He testified that he did not receive the paperwork until October 11, 2016. (Minutes of Hearing and Summary of Evidence of February 23, 2021 trial at p. 9.)

Several of the co-workers that applicant identified in his testimony as supervisors and foremen to whom injury was reported testified that applicant did not report the injury. (Minutes of Hearing and Summary of Evidence of February 23, 2021 trial at pp. 10-13; Minutes of Hearing and Summary of Evidence of April 22, 20121 trial at pp. 2-7.)

Regarding the issue of statute of limitations with regard to the September 1, 2015 specific injury, we will affirm the WCJ's finding that the claim is not barred because the statute of limitations was tolled by virtue of the defendant's failure to provide applicant with a DWC-1 claim form after he reported the injury.

The running of the statute of limitations is an affirmative defense, and the burden of proving it is on the party opposing the claim. (Lab. Code, § 5409; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 67, fn. 8 [50 Cal.Comp.Cases 411].) The burden is on defendant to show when the statute of limitations began to run, "starting from any and all three points designated [in Labor Code section 5405]." (*Colonial Ins. Co. v. Industrial Acc. Com. (Nickles)* (1945) 27 Cal.2d 437, 441 [10 Cal.Comp.Cases 321].) The three points designated in section 5405 are date of injury (Lab. Code, § 5405, subd. (a)); the last payment of disability indemnity (Lab. Code, § 5405, subd. (b)); and the last date on which medical treatment benefits were furnished (Lab. Code, § 5405, subd. (c).) In this case, it appears that applicant was never provided with disability indemnity or medical treatment. Accordingly, absent any tolling, the relevant date for the running of the statute of limitations is the September 1, 2015 date of injury.

"[A]s a general rule, where a claimant asserts exemptions, exceptions, or other matters which will avoid the statute of limitations, the burden is on the claimant to produce evidence sufficient to prove such avoidance." *(Permanente Medical Group v. Workers' Comp. Appeals Bd. (Williams)* (1985) 171 Cal.App.3d 1171, 1184 [50 Cal.Comp.Cases 491].) One such exemption or exception is that the statute is tolled by an employer's failure to notify an injured employee of a potential right to benefits, as required by Labor Code section 5401(a). (*Martin*, supra, 39 Cal.3d at p. 60.) Pursuant to Labor Code section 5401, within one day of receiving notice of the applicant's injury, defendant was required to send the applicant a DWC-1 form which apprises the injured worker of his or her potential eligibility for workers' compensation benefits under California law. (Labor Code, § 5401, subd. (a).) The Supreme Court has held that "the remedy for breach of an employer's duty to notify is a tolling of the statute of limitations if the employee, without that tolling, is prejudiced by the breach." (*Martin, supra,* 39 Cal.3d at p. 64.)

Thus, when applicant asserts that the statute is tolled based on the breach of the duty to provide the employee with a DWC-1 form, applicant has the duty of showing that defendant had sufficient notice of injury to provide applicant with a claim form. The duty then shifts to defendant to show that the claim form was sent to the applicant or that applicant had actual knowledge of his

workers' compensation rights. (*Martin, supra*, 39 Cal.3d at pp. 60, 65; *Sidders v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 613, 622 [53 Cal.Comp.Cases 445].) Once the employer has provided the applicant with a claim form, or applicant gains the requisite actual knowledge of his rights, the tolling period ends. (*Martin, supra*, 39 Cal.3d at p. 65.)

In this case, the WCJ believed the applicant's testimony that he reported his injury to his supervisors, and disbelieved the defendant's witnesses' testimony to the contrary. (Report at p. 4.) A WCJ's credibility determinations are "entitled to great weight." (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) The defendant thus had the duty pursuant to Labor Code section 5401 to give applicant the DWC-1 form containing notice of his workers' compensation rights, and the statute of limitations was tolled until he was given the form or otherwise obtained actual knowledge of his rights. Applicant did not receive notice of his workers' compensation rights until October 11, 2016. Thus, the filing of his Application for Adjudication in the specific injury case on October 27, 2016, less than three weeks after obtaining the required notices, was timely.

In the Opinion on Decision, the WCJ states that she found that defendant had notice of injury by the mere fact that applicant was involved in the forklift incident. The WCJ notes, "due to the nature and extent of the accident, which was of sufficient force that it caused damage to the structure, and was deemed to be substantial enough that the employer sought to reprimand (and/or discipline) Applicant, the employer should have inquired whether Applicant sustained injury and/or needed medical attention." (Opinion on Decision at p. 5.) However, the Supreme Court has rejected the notion of inquiry notice to provide a DWC-1 claim form. Rather, to trigger the obligation to provide a claim form, the employer must have actual knowledge of injury or the assertion of an injury. (*Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24, 34 [70 Cal.Comp.Cases 97].) As explained in the Report, the WCJ found applicant's testimony that he claimed injury to the employer credible, thus employer had knowledge of a claim of injury triggering its obligation to provide a claim form.

Turning to the issue of statute of limitations on the cumulative injury claim, we reiterate that it is defendant's burden to show when the statute of limitations began to run, "starting from any and all three points designated [in Labor Code section 5405]." (*Nickles, supra,* 27 Cal.2d at p. 441.) The date of injury in cumulative injury cases is "that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should

have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.)

Even though it was its burden to do so, defendant does not even argue in its Petition when applicant first sustained disability, or should have known when this disability was industrial, let alone cite to any evidence. A petitioner for reconsideration cannot evade or shift its responsibility by attempting to place upon the Appeals Board the burden of discovering—without assistance from the petitioner—evidence in the record that supports its position. (See *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923-924 [50 Cal.Comp.Cases 104]; *cf., Provost v. Regents of University of Cal.* (2011) 201 Cal.App.4th 1289, 1304-1305 [a party is "required to support evidentiary claims with accurate record references" and a court is "not required to comb the record to locate evidence substantiating" a party's factual claims]; *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 ["[i]t is the duty of a party to support the arguments in its briefs by appropriate reference to the record" and "[t]here is no duty on this court to search the record for evidence"]; *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113-114 ["a busy court…cannot be expected to search through a voluminous record" and it is "not obliged to perform the duty resting on counsel"].)

Since defendant has not even attempted to explain when applicant first sustained disability because of his industrial injury, and when he reasonably should have known that the disability was industrially caused, despite that it was its clear duty to do so, we have no occasion to disturb the WCJ's determination that applicant's Application in the cumulative injury case was filed within the limitations period.

Regarding the findings of industrial injury, the WCJ relied upon the reporting and deposition testimony of chiropractor Dr. Powell. Dr. Powell issued reports on June 23, 2017, October 16, 2017, January 4, 2018, and April 20, 2018. Additionally, Dr. Powell's deposition was taken on June 12, 2019. Although Dr. Powell attributed permanent disability to a cumulative injury, Dr. Powell never explains in any of his reports or deposition testimony how applicant's cumulative job duties caused disability or the need for medical treatment. All findings of the WCAB must be based on substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].) As the Court of Appeal wrote in *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71

Cal.Comp.Cases 1687], a "medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citation.]." Accordingly, we will grant reconsideration and defer the issue of cumulative industrial injury so that the reporting physician can explain the mechanism of injury and how it caused a need for medical treatment or disability.

We affirm the finding of industrial injury, since the WCJ believed applicant's testimony that he was involved in the work incident which produced immediate pain causing applicant to request medical treatment several times in the aftermath of the incident. Unlike the claim of cumulative injury, a specific incident that causes immediate symptoms is not as complex an analysis, especially given that only whether the injury caused any disability or need for medical treatment was at issue. (*Peter Kiewit Sons v. Ind. Acc. Comm. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188].) The issue of permanent disability caused by either of the injuries claims has not yet been determined. Accordingly, any deficiencies in Dr. Powell's apportionment analysis are not relevant to any issues before us.

We will also amend the WCJ's decision to delete the "Award," since no benefits were actually awarded.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact and Award of June 17, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Award of June 17, 2021 is **AFFIRMED** except that is **AMENDED** as follows:

STIPULATED FACTS

1 Frederick Williams, Applicant, while employed on September 1, 2015 (ADJ10625118), and during the cumulative period between September 24, 2014, and September 24, 2015 (ADJ10625119), as a forklift driver/slice runner, in Lemoore, for Leprino Foods, claims to have sustained an injury arising out of and occurring in the course of employment to the right upper extremity, back, neck, bilateral lower extremities, jaw, teeth, and psyche, and in the form of a hernia.

2. At the time of the alleged injury the employer was permissibly self-insured, with workers' compensation benefits administered by Matrix.

3. Applicant's specific date of injury was originally pled as September 3, 2015. By stipulation, the date of injury is corrected to September 1, 2015.

FINDINGS OF FACT

1. The stipulations of the parties are accepted as fact.

2. Applicant sustained injury arising out of and occurring in the course of employment on September 1,2015 in case ADJ10625118.

3. The issue of whether applicant sustained cumulative injury as alleged in case ADJ10625119 is deferred, with jurisdiction reserved.

4. Applicant's claims are not barred from recovery of workers' compensation benefits pursuant to Labor Code §3600(a)(10).

5. Applicant timely commenced his claims for workers' compensation, as required by Labor Code §5405.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSE H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 3, 2021

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

FREDERICK WILLIAMS
GROSSMAN LAW OFFICES
STANDER REUBENS THOMAS KINSEY

DW/oo

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