

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

LAURIANO AGUILAR, *Applicant*

vs.

**B&S PLASTICS dba WATERWAY PLASTICS; SAFETY NATIONAL CASUALTY
COMPANY, administered by TRISTAR RISK MANAGEMENT, *Defendants***

**Adjudication Number: ADJ16655371
Pomona District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
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 discussed below, we will grant reconsideration, amend the WCJ's decision to reflect that compensation is barred by Labor Code¹ section 3600(a)(10), and otherwise affirm the decision of December 21, 2023.

The WCJ's Findings and Order (F&O) determined that the testimony of defense witness Carlos Mora was more credible than that of the applicant, and based thereon, that applicant did not sustain injury arising out of and in the course of employment. (Finding of Fact No. 1.)

The WCJ's Report also discusses the bar to compensation found in Labor Code section 3600(a)(10), which provides in relevant part:

(10) Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid

¹ All further references are to the Labor Code unless otherwise noted.

unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:

(A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.

(B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.

(C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

(Lab. Code, § 3600(a)(10).)

The initial burden in asserting a post-termination bar to compensation rests with the defendant, who must establish that the claim for compensation was filed after a notice of termination or layoff, including voluntary layoff, and that the claim is for an injury occurring prior to the time of notice of termination or layoff. Here, applicant alleges a specific injury occurring on July 11, 2022. (Minutes of Hearing and Summary of Evidence, dated July 11, 2023, at p. 2:8.) Applicant further testified he was laid off the same month as the injury, and the employee separation form in evidence reflects a layoff date of July 22, 2022. (Ex. A, Employee Separation Form, dated July 22, 2022.) Applicant's DWC-1 claim is dated August 20, 2022, and was filed in the Electronic Adjudication Management System (EAMS) on September 7, 2022. Thus, defendant has established that there was an actual layoff, and that applicant's claim for a specific injury was filed after notice of termination or layoff.

Once the defendant has made the initial showing necessary to a post-termination defense, the burden shifts to applicant to establish one of the available exceptions listed in subdivisions (a)(10)(A) through (D).

Here, applicant asserts the exception of subdivision (a)(10)(A) applies because he reported the injury to supervisor Carlos Mora prior to his layoff. (Minutes of Hearing, dated July 11, 2023, at p. 4:17.) Therefore, applicant has the burden of demonstrating, by a preponderance of the evidence that the employer had notice of injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff. (Lab. Code, § 3202.5.)

In determining whether applicant met this burden, the WCJ relied on the testimony of Mr. Mora, who denied that applicant reported any injuries. (Minutes of Hearing, December 13,

2023, at p. 2:17.) The WCJ's Report observes that she found the testimony of Mr. Mora to be direct and credible, while the testimony of applicant was inconsistent and not credible. (Report, at p. 3.) The Report also notes that applicant has not offered other credible evidence to establish a report of injury prior to layoff. (*Ibid.*) Accordingly, the Report concludes that defendant made a prima facie showing of a claim filed after notice of termination or layoff, that applicant has not met his burden of establishing an exception to the post-termination bar, and that compensation is barred pursuant to section 3600(a). We accord to the WCJ's credibility determinations the great weight to which they are entitled. (*Garza v. Workmen's Comp. Appeals. Bd.* (1970) 3 Cal.3d 312 [90 Cal. Rptr. 355, 475 P.2d 451] [35 Cal.Comp.Cases 500].) Following our review of the record we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s).

We have also considered whether any of the other exceptions available under 3600(a)(10)(A)-(D) would be applicable herein. As is discussed above, the record does not establish that the claimed injury was reported to the employer prior to the notice of termination or layoff (subsection (a)(10)(A)). In addition, there is no evidence of medical records existing prior to notice of termination or layoff containing evidence of the injury (subsection (a) (10)(B)). Applicant's claimed specific date of injury pursuant to section 5411 was not made subsequent to the notice of termination or layoff but prior to the effective date of such termination or layoff (subsection (a)(10)(C)). Finally, applicant does not claim cumulative injury, obviating the exception for a date of injury pursuant to section 5412 occurring on or after the notice of termination or layoff (subsection (a)(10)(D)). Accordingly, applicant has not met the burden of establishing that any of the exceptions available under section 3600(a)(10)(A)-(D) are applicable.

Applicant's Petition also contends that Mr. Mora "could not have knowledge to perceive or to recollect the incident since he was not present in the plastic fabrication operation of the company where...Mr. Aguilar's claimed injury occurred." (Petition, at p. 3:12.) However, we find this argument unpersuasive because it was *applicant* who testified that he reported the injury to Mr. Mora, and on that basis asserted the exception to a post-termination filing available under subdivision (A). (Minutes of Hearing, dated July 11, 2023, at p. 4:17.)

Applicant also contends that the WCJ should have accorded less weight to Mr. Mora's testimony because the witness continued to work for the employer and "would fear losing his job with the employer's recent layoffs." (Petition, at 3:16.) However, applicant elicited no testimony

from the witness supporting this claim and offers no citation to the evidentiary record that would otherwise undermine the WCJ's credibility determination.

Accordingly, we concur with the WCJ's analysis as set forth in the Report that compensation herein is barred under section 3600(a)(10). Given the bar to compensation, we will amend the Findings of Fact to reflect that applicant claims injury to the face and right shoulder on July 11, 2022, and that compensation is barred by Labor Code section 3600(a)(10).

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of December 21, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision issued on December 21, 2023 is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. **LAURIANO AGUILAR**, born [], while employed on July 11, 2022, as an assembler, occupational group number 320, at Oxnard, California, by **B&S PLASTICS DBA WATERWAY PLASTICS**, claims to have sustained injury arising out of and in the course of employment to the face and right shoulder.
2. Compensation is barred by Labor Code section 3600(a)(10).

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 27, 2024

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

**LAURIANO AGUILAR
BLOMBERG BENSON AND GARRETT
TOBIN LUCKS**

SAR/abs

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