WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WILLIAM WAGNER, *Applicant,* vs. ALLIED SIGNAL AEROSPACE; ZURICH AMERICAN INSURANCE CO., *Defendant(s).*	Case No. LAO 763476 OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)

The Workers' Compensation Appeals Board (Board) granted defendant's Petition for Reconsideration of the Findings of Fact issued by a workers' compensation administrative law judge (WCJ) finding that applicant's claim of cumulative injury during the period of 1995 to October 16, 1998 was presumed compensable under Labor Code section 5402[1] based on defendant's failure to timely deny his claim. The WCJ further found that this failure was caused by the employer's breach of its duty to provide applicant with an Employee's Claim for Workers' Compensation Benefits (DWC Form 1, hereinafter claim form). Defendant contends that the WCJ erred in finding that applicant's claim is presumed compensable, asserting (1) that the statutory 90-day period allowed to investigate and deny a workers' compensation claim cannot commence earlier than the date when the claim form is filed with the employer, and (2) that applicant has failed to demonstrate the appropriate circumstances for an earlier commencement of the running of the 90-day period.

Because of the important and novel issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of

[1] All further statutory references are to the Labor Code.

its members, has reassigned this case to the Board as a whole for an en banc decision. (Lab. Code, §115.)

Based on the Board's review of the relevant statutory and case law, the Board concludes that (1) the 90-day period under section 5402 begins to run when the claim form is filed by serving it on the employer (i.e., personally delivered to the employer or received by the employer by first-class or certified mail pursuant to section 5401(b)), and (2) the 90-day period may, however, begin to run prior to receipt of the claim form where the employer breaches its duty to provide the form to the injured employee within one working day of receiving notice or knowledge of an injury, which injury results in lost time beyond the date of injury or which results in medical treatment beyond first aid. We hold that the employer breaches its duty to provide the claim form when the employer is reasonably certain either that the employee suffered an industrial injury or that the employee is claiming such an injury as defined in section 5401(a), and fails to provide the claim form.

I. INTRODUCTION

This matter was submitted on the record, without oral testimony, on the issue of applicant's claim that the injury was presumed compensable under section 5402. A review of the record reveals that applicant was employed by defendant Allied Signal Aerospace from 1982 through 1999. Applicant's personnel file contains a notation under "Employee's Medical Record," dated July 20, 1998, where applicant complains of, and states that he is taking multiple medications to deal with, work stress. The July 20, 1998 notation states, in pertinent part, as follows:

> "... Has tried many times to deal with this industrial stress reduction in various forms. Feels Mike Rawlings is prejudiced against him and has hampered [his] opportunities for promotion and transfer. Has talked to Susan Mattich but feels she is prejudiced and prefers to talk to Jess Jimenez. States wife wants him to quit due to stress - anxious - agitated [illegible]. EE [employee] spoke with Jess.

> Explained his concerns to Jess. EE [employee] feels like he 'can't take it anymore.' Feels like it is affecting him physically and emotionally. MD [physician] ha[s] EE [employee] on multiple [medications] to deal with work stress: Trazadone for sleep, Paxil for anxiety/stress, Norco for pain, Lotensin/HCT2 (recently [discontinued] from Vasotec to be able to [increase] the dose) for [hypertension]; also take Lopid and Albuterol for pneumonia. Jess will talk with Susan Maddock about the situation. EE [employee] admits to losing 30 pounds because of problems over past 3 yrs...." (Applicant's Exhibit 1)

On October 16, 1998, applicant was admitted into Canyon Ridge Psychiatric Hospital. Applicant's personnel file contains an entry, dated the same day, that applicant's wife called defendant, and left the message that applicant was admitted into the hospital, and requested disability forms. The October 16, 1998 message was placed in applicant's personnel file, and reads as follows:

> "Received an audix message from William Wagner's wife, Linda. Linda states that Bill was admitted into the hospital that day. The doctor diagnosed the problem as a complete nervous breakdown [emphasis in original]. She was unsure where to go from that point. Bill was very upset. He kept saying he was going to loose [sic] his job and this is it. She feels that Mike Rawlings, Luke and Frank and their continual [sic] head games, wouldn't stop until they got their wish of pushing Bill over-the-edge. And that these picked-up where they left off upon Bill's return to work last week.
>
> "Wife is concerned that she does everything necessary to protect Bill's employment with Allied Signal. Whether that means FMLA [Family and Medical Leave Act] or Disability, whatever it takes. At request, the wife will fax over the admitting papers or the necessary documents to confirm leave." (Applicant's Exhibit 1.)

Applicant's personnel file contains a further entry dated October 20, 1998. The entry reflects that defendant's representative called applicant's wife to confirm disability leave, and to advise that the disability forms requested would be mailed. The

October 20, 1998 personnel file entry states as follows:

> "Phoned Linda this morning to confirm receipt of Dr.'s note verifying disability leave for Bill. Also want to let her know that I would be sending medical leave request and SDI [State Disability Indemnity] form in the mail to their home." (Applicant's Exhibit 1.)

Although applicant's personnel records reflect that applicant was in the hospital and that his wife requested and was provided with a state disability form, defendant did not provide applicant with a workers' compensation claim form. It is not clear from the record whether applicant specifically requested a workers' compensation claim form. After applicant obtained legal representation, he completed a claim form which was served by mail on defendant on January 13, 1999. Defendant received applicant's claim form on January 15, 1999, and denied the claim on March 31, 1999. Thus, defendant denied applicant's claim within the 90-day period after receipt of the claim form on January 15, 1999. However, the claim was not denied until more than 90 days after applicant communicated his stress complaints as recorded in applicant's personnel file on July 20, 1998 and more than 90 days after applicant's wife's October 16, 1998 audix message reporting applicant's hospitalization and requesting disability forms.

II. DISCUSSION

Section 5400 provides, in relevant part:

> "Except as provided by sections 5402 and 5403, no claim to recover compensation under this division shall be maintained unless within thirty days after the occurrence of the injury which is claimed to have caused the disability or death, there is served upon the employer notice in writing, signed by the person injured ...."

Section 5401, subsections (a), (b) and (c) state, in relevant part:

> "(a) Within one working day of receiving notice or knowledge of injury under Section 5400 or 5402, which injury results in lost time beyond the date of injury or which results in medical treatment beyond first aid, the employer

> shall provide, personally or by first-class mail, a claim form and a notice of potential eligibility for benefits under this division to the injured employee ....
>
> "(b) The completed claim form shall be filed with the employer by the injured employee .... [A] claim form is deemed filed when it is personally delivered to the employer or received by the employer by first-class or certified mail ...."

Section 5402, provides:

> "Knowledge of an injury, obtained from any source, on the part of an employer, his or her 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, is equivalent to service under Section 5400. If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period."[2]

The above sections establish the general rule that the 90-day period under section 5402 begins to run when the claim form is filed by serving it on the employer (i.e., personally delivered to the employer or received by the employer by first-class or certified mail pursuant to section 5401(b)). The injury is presumed compensable if liability is not rejected within 90 days after receipt of the claim form by the employer. (*Williams v. Workers' Comp. Appeals Board* (1999) 74 Cal.App.4th 1260 [64 Cal.Comp.Cases 995]; *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Welcher)* (1995) 37 Cal.App.4th 675 [60 Cal.Comp.Cases 717]; *Shoai-Ahari v. Zenith Ins. Co.* (1992) 21 Cal. Workers' Comp. Rptr. 14.)

. . . .

---

[2] Section 5402 was amended in 2000 to separate the contents of that section into paragraphs (a) and (b), but with no substantive changes to the text.

The 90-day period may, however, begin to run prior to receipt of the claim form where the employer breaches its duty to provide the claim form to the injured employee. Section 5401(a) requires that the employer provide an employee with a claim form within one working day of receiving notice or knowledge of an injury.

In *Janke v. State of California, Department of Justice* (1991) 19 Cal. Workers' Comp. Rptr. 310, a panel of the Board held that an employer breached its duty to provide an employee with a claim form by refusing to provide the form after applicant's request, and that the 90-day period must accordingly be reduced by the length of time of the employer's breach. In other words, the 90-day period would begin to run from the date of the employer's refusal to provide the claim form.[3] The panel noted that the 1989 amendments to sections 5401 and 5402 were intended "to expedite claims by encouraging employers to either provide benefits or to promptly investigate and discover evidence to justify rejection within 90-days of a claim." That decision also stated that "[t]he Board cannot and will not allow the claim procedure to be manipulated either intentionally or negligently to extend the period of time during which the employer must accept or reject the claim."

In *Thompson v. County of Stanislaus* (1997) 25 Cal. Workers' Comp. Rptr. 24, the injured employee (Thompson), worked as a deputy sheriff for several years prior to the alleged industrial injury. On July 8, 1993, Thompson attempted to commit suicide. While Thompson was in the hospital recovering from his suicide attempt, a superior and friend Captain Clark visited him. At that time, Thompson told Captain Clark that his suicide attempt was the result of problems at work, problems with his health and problems with his family. In addition, on July 14, 1993, five days after his suicide attempt, the Tuolumne County Sheriff's Office (TCSO) sent defendant a document

---

[3] Where the 90-day period commences to run prior to the filing of the claim form, the running of the 90-day period is tolled from the date the employer belatedly provides the injured employee with the claim form until the completed claim form is filed by the injured employee. Upon that filing, the remaining portion of the 90-day period again begins to run.

stating that Thompson had been placed in 72-hour psychiatric detention because of his suicide attempt. The document stated that Thompson's problems were related to health, work and family -- the same three areas Thompson told Captain Clark were the basis for his suicide attempt.

In that case, defendant also denied the claim within 90 days after receiving the claim form, but the WCJ found that defendant had both oral and written notice of Thompson's injury which gave "rise to both a duty and a responsibility to provide a DWC-1 [claim form] and to investigate." Finding that defendant had breached its duty to provide a claim form, the WCJ concluded that the claim had not been denied within 90 days, so the injury was presumed compensable.

A panel of the Board disagreed with the WCJ's decision. The panel stated in its decision that:

> "The finding of a breach of duty can result in serious consequences to the employer, possibly creating liability for paying benefits where a claim is not meritorious. Because the consequences are so serious, and language contained in section 5400 is so specific, [the panel] concluded that, to be found to have breached its duty to provide the claim form, the employer must have been ***reasonably certain*** that the employee suffered an industrial injury or that the employee was claiming such an injury. Mere supposition or possibility of such knowledge is not sufficient to trigger a duty to provide a claim form." (Emphasis added.)

The panel found that the record did not establish a basis to conclude that defendant was reasonably certain that Thompson suffered an industrial injury or was making a claim of industrial injury prior to receipt of the claim form. As no duty to provide a claim form arose, defendant did not breach its duty to provide a claim form and the section 5402 presumption of injury did not arise.

Thus, in order to have "knowledge" of an injury or claim of injury sufficient to require defendant to provide a claim form under section 5401(a), the employer must have been reasonably certain, under the particular facts of the case, that the employee

suffered or claimed to have suffered an industrial injury. Mere supposition or possibility of such knowledge is not sufficient to trigger a duty to provide a claim form. (*Scott v. Workers' Comp. Appeals Bd.* (2000) 65 Cal.Comp.Cases 1340 (writ denied); *Thompson v. County of Stanislaus, supra,* 25 Cal. Workers' Comp. Rptr. 24; *Paula Insurance Company v. Workers' Comp. Appeals Bd. (Hernandez)* (1995) 60 Cal.Comp.Cases 356 (writ denied); *Shoai-Ahari v. Zenith Ins. Co., supra,* 21 Cal. Workers' Comp. Rptr. 14; *Janke v. State of California, Department of Justice, supra,* 19 Cal. Workers' Comp. Rptr. 310.)

In the determination of whether the reasonable certainty standard has been met, an employer will not be required to guess or speculate as to an employee's unannounced intentions or nebulous, ambiguous comments that only remotely imply a possibility of injury or claim thereof. Nor does this standard require substantiation of industrial causation through a medical-legal report. The reasonable certainty standard is meant to impose on the employer a duty to investigate when he or she has been made aware of facts which would lead a reasonable person to conclude with some certainty that an industrial injury as defined in section 5401(a), has occurred or is being asserted. (Lab. Code, §5402.)

In the present matter, defendant denied applicant's claim within the 90-day period after receipt of the claim form. The WCJ found, however, that because defendant breached its duty to provide a claim form, the time within which to deny the claim began on October 16, 1998 and expired on January 15, 1999. Thus, the March 31, 1999 notice of denial was not made within the 90-day period, and the injury was presumed compensable under section 5402.

The WCJ did not have an opportunity to examine this case under the reasonable certainty standard which we announce today. The Board will, therefore, rescind the WCJ's Finding of Fact, and return this matter to him to determine based on the events of July 20, 1998 or on the events of October 16, 1998, or any other evidence contained in the record, whether defendant was reasonably certain either that the applicant suffered

an industrial injury, or that he was claiming such an injury, sufficient to trigger the duty to provide a claim form under Section 5401(a). In determining whether the reasonable certainty standard has been met, the WCJ may, among other things, develop the record to identify the employees who made the July 20, 1998 and October 16, 1998 entries in applicant's personnel record, and further determine whether their knowledge of applicant's alleged industrial injury can be imputed to the defendant under section 5402. After the record has been properly developed, the WCJ may issue a determination on whether applicant's claim is presumed compensable under section 5402.

Accordingly, this case is ordered returned to the WCJ for any further proceedings deemed appropriate and consistent with the Board's opinion, and new decision at the trial level.

The Board notes in passing that this reasonable certainty standard is not the same as the standard used in determining statute of limitations issues. (E.g., *Kaiser Foundation Hospital v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d. 57 [50 Cal.Comp.Cases 411]; *Reynolds v. Workers' Comp. Appeals Bd.* (1974) 12 Cal.3d 726 [39 Cal.Comp.Cases 768]; *Galloway v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.App.4th 880 [63 Cal.Comp.Cases 532].)

For the foregoing reasons,

. . . .

. . . .

. . . .

. . . .

. . . .

. . . .

. . . .

. . . .

. . . .

IT IS ORDERED as the Decision After Reconsideration of the Board (En Banc) that, consistent with this opinion, the Findings of Fact dated August 22, 2000 be, and it hereby is, **RESCINDED**, and the matter be **RETURNED** to the workers' compensation administrative law judge for further proceedings and new decision.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

MERLE C. RABINE, Chairman

ROBERT N. RUGGLES, Commissioner

COLLEEN S. CASEY, Commissioner

WILLIAM K. O'BRIEN, Commissioner

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

APR 2 0 2001

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS.

mk/tab