WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANA MARROQUIN, *Applicant*

vs.

CHIPTON-ROSS STAFFING, INC.; ZURICH NORTH AMERICA, *Defendants*

Adjudication Number: ADJ11599995
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

In order to further study the factual and legal issues in this case, on February 1, 2021, we granted Defendant Petition for Reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of November 18, 2020, wherein it was found that "while employed during the period 1/1/2006 though 6/11/2018, as a maintenance worker … [applicant] presumptively sustained injury arising out of and in the course of employment to her back, shoulder, knees, ankles, feet and hands." In finding that applicant "presumptively sustained injury," the WCJ was purportedly applying Lab. Code section 5402(b) which states, "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."

Defendant contends that the WCJ erred in finding industrial injury, arguing that there was no substantial evidence of industrial injury, and that it rebutted the section 5402(b) presumption. Defendant's Petition is not a model of clarity, given that the WCJ found injury based on the presumption and therefore did not reach the issue of whether the claim of injury is supported by substantial evidence. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will rescind the WCJ's decision and return this matter to the trial level for decision and analysis on all outstanding issues because the WCJ misapplied the section 5402(b) presumption.

In the Report, the WCJ explains his decision to apply the section 5402(b) presumption as follows:

> It was specifically found she did not file it after, but had made a claim to management (Wanke) during her employment, prior to her last day of work. No claim form was offered to the applicant and knowledge from any source imputes knowledge upon the employer at time of reporting per LC §5402, hence, the claim was not timely denied within 90 days from time of reporting and is presumed compensable. [The injury was reported prior to the last day of work of 6/11/18 and denied 10/30/18 based on employer investigation and post-termination, per Ex. A".)

(Report at p. 2.)

The WCJ is correct that, pursuant to Labor Code section 5401, an employer has the obligation to give a worker a DWC-1 claim form apprising the worker of his or her potential eligibility for workers' compensation benefits within one day of obtaining knowledge of an injury or claim of injury. However, the Labor Code section 5402(b) presumption of compensability arises only if "liability is not rejected within 90 days after the date *the claim form is filed* under Section 5401…." (Emphasis added.) In *Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24 [70 Cal.Comp.Cases 97], the California Supreme Court expressly rejected the argument that the 90-day period to accept or deny liability runs from the employer's breach of its duty to provide a claim form. Rather, the Supreme Court held that the 90-day period runs from the date that an injured worker files his or her claim form, regardless of whether the employer complied with its statutory duty, unless the applicant can show the following elements of estoppel:

> (1) the employer, knowing the employee had suffered or was asserting an industrial injury, refused to provide a claim form, or misrepresented the availability of or the need for the employee to file a claim form; (2) the employee was actually misled into believing that no claim form was available or necessary and failed to file one for that reason; and (3) because of this reliance, the employee suffered some loss of benefits or setback as to the claim.

(*Wagner*, supra, 35 Cal.4th at p. 37.)

In this case, the WCJ erroneously applied the Labor Code section 5402 presumption from the date of employer's alleged breach of its duty to supply a claim form, without analyzing the elements of estoppel. We thus rescind the WCJ's decision, and return this matter to the trial level for analysis of whether defendant had knowledge of injury or a claim of injury giving rise to a duty to provide a claim form and whether the elements of estoppel listed in *Wagner* were met. To the extent that the presumption applies, the WCJ should determine whether it was properly rebutted with evidence that could not have reasonably been obtained within the 90-day period. (See

generally *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Welcher)* (1995) 37 Cal.App.4th 675, 683-684 [60 Cal.Comp.Cases 717].) To the extent that the WCJ determines that the section 5402 presumption is not applicable, the WCJ should determine whether substantial evidence supports the applicant's claim of injury. We express no opinion on any of these issues. However, we note that the WCJ is incorrect to the extent he suggests in his Report that he must accept unrebutted testimony, even if not credible. "The trial judge may believe or disbelieve uncontradicted witnesses if there is any rational ground for doing so." (*Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 582.)

We therefore rescind the WCJ's decision and return this matter to the trial level for further proceedings and decision. While our dissenting colleague is correct that the defendant did not specifically raise the issue of the applicability of Labor Code section 5402(b) in its Petition, "it is settled law that a grant of reconsideration has the effect of causing 'the whole subject matter [to be] reopened for further consideration and determination' (*Great Western Power Co. v. Industrial Acc. Com. (Savercool) (1923)* 191 Cal. 724, 729 [10 I.A.C. 322]) and of '[throwing] the entire record open for review.' (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. [Citations.]" (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7[Appeals Bd. en banc].)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of November 18, 2020 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT,

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 26, 2021

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

ANA MARROQUIN
NORDANYAN LAW
MAVREDAKIS, PHILLIPS CRANERT

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*

DISSENTING OPINION OF COMMISSIONER MARGUERITE SWEENEY

I respectfully dissent. I would have affirmed the WCJ's decision. Defendant's contention regarding the lack of medical evidence supporting the claim of injury is irrelevant, given that the WCJ found injury pursuant to the Labor Code section 5402 presumption. Defendant did not raise the issue of whether the Labor Code section 5402(b) presumption properly arose. The only issue related to the presumption raised by the defendant was that it was rebutted. Rather than raising the issue of whether the presumption arose, defendant conceded the issue. Defendant was incorrect on the only relevant issue raised in its Petition, whether the presumption was rebutted. As explained below, the presumption was not properly rebutted.

As Labor Code section 5904 makes clear, "The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration." (See also *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"].)

Having waived the issue of whether the presumption arose, the defendant also did not rebut the presumption. Labor Code section 5402(b) states, "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."

The Labor Code section 5402(b) presumption was discussed at length in *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Welcher)* (1995) 37 Cal.App.4th 675 [60 Cal.Comp.Cases 717]. In *Welcher*, the court explained that the primary purpose of the statute was "to expedite the entire claims process in workers' compensation by limiting the time during which investigation by the employer of a claim by an injured worker could be undertaken—90 days—without being penalized for delay. The 'penalty' provided for delay was that a rebuttable presumption of compensability would attach to the claim." (*Welcher*, 37 Cal.App.4th at p. 682.)

The *Welcher* court explained that the section 5402(b) presumption affected the burden of proof, and "[a]s such, once the underlying facts have been established its effect in workers' compensation litigation is to place upon the defendant employer/carrier the burden of proving the

employee/applicant does not have a compensable injury; in the absence of such proof, the consequences are adverse to the employer/carrier." (*Id.* at pp. 682-683.)

With regard to the second sentence of Labor Code § 5402(b), which states that the presumption is "rebuttable only by evidence discovered subsequent to the 90-day period," the *Welcher* court adopted the Appeals Board's previous construction of section 5402(b) and held that the defendant could rebut the presumption only with evidence that could not have been obtained with the exercise of reasonable diligence within the initial 90-day period. (*Id.* at pp. 683-684.)

The *Welcher* court's holding with regard to which evidence may rebut a section 5402(b) presumption was summarized in *Williams v. Workers' Comp. Appeals Bd.* (1998) 74 Cal.App.4th 1260, 1265 [64 Cal.Comp.Cases 995] as follows:

> The presumption of compensability is rebuttable only by evidence discovered subsequent to the 90-day period. [*Welcher*] is one of the few published appellate decisions interpreting section 5402. In *Welcher* an employee suffering from numerous medical problems filed a claim for workers' compensation benefits. The employer failed to deny the claim until after 90 days. (37 Cal. App. 4th at p. 678.) The Court of Appeal held that the section 5402 presumption applied and the employer failed to rebut the presumption because all of its evidence could reasonably have been obtained during the 90-day period. (37 Cal. App. 4th at p. 684.)
>
> Obviously the facts in *Welcher* differ from ours; in *Welcher* the employer never paid benefits on the claim. However, the court did discuss the type of evidence which can be used to rebut the presumption of compensability. Finding no published appellate decisions on this issue, the court reviewed WCAB panel decisions and concluded section 5402 operates to bar evidence which "could have been obtained with the exercise of reasonable diligence …." (37 Cal. App. 4th at p. 684.)

A number of our decisions have held that a section 5402(b) presumption is properly rebutted when applicant's own evidence proves that applicant's injury is not compensable. This rule has been applied in instances in which testimony from the applicant or witnesses testifying on the applicant's behalf undermines the applicant's claim. Such testimony, which is generally available only at trial, could not reasonably have been discovered in the initial 90-day period. (*Welcher*, 37 Cal.App.4th at p. 684.)

We have used the same reasoning to hold that when applicant's own medical evidence proves that the injury is not compensable, the section 5402(b) presumption is properly rebutted. This rule is predicated on the reality that, although a defendant may generally procure a qualified

medical evaluation within 90-days of the applicant's filing of a claim form, it may not force an applicant to be evaluated by his own primary treating physician within that time frame. Accordingly, in both *Witherall v. Workers' Comp. Appeals Bd.* (1994) 59 Cal.Comp.Cases 1128 (writ den.) and *Bowles v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 874 (writ den.), we held that a Labor Code section 5402(b) presumption was properly rebutted when applicant's own medical evidence showed that the injury claimed was not compensable, even when applicant's medical evidence was obtained after the initial 90-day period after the applicant's filing of a claim form.

Defendant tries to fit the instant case into the above authorities by stating that the panel qualified medical report of chiropractor Robert A. Andrade, D.C. was applicant's "own evidence" because applicant initiated the panel qualified medical evaluator process. However, either party may request a qualified medical evaluation to determine compensability. (Lab. Code, §§ 4060, subd. (d), 4062.2, subd. (b).) Thus defendant could have initiated the panel qualified medical evaluator process during the 90-day period outlined in Labor Code section 5402, and it did not act with reasonable diligence in failing to do so. Defendant cites *Pinson v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 141 (writ den.) in support of its position. In *Pinson*, the WCJ allowed the section 5402(b) presumption to be rebutted by a deposition of the treating physician as well as reports of qualified medical evaluator obtained after the 90-day period. *Pinson* was decided prior to the issuance of the in-depth discussion by the Court of Appeal of rebuttal of the presumption in *Welcher* and *Williams*. In any case, a California Compensation Cases digest of a "writ denied" case is not binding precedent on the Appeals Board. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 [Appeals Bd. en banc].) To the extent that *Pinson* stands for the proposition that a defendant may rely upon a panel qualified medical evaluator's report obtained after the 90-day period, I decline to follow it.

Accordingly, I would have affirmed the WCJ's decision. Defendant waived any argument regarding whether the section 5402(b) presumption arose, and defendant did not produce any evidence in rebuttal to the presumption that was not obtainable in the 90-day period. I therefore respectfully dissent.

/s/ MARGUERITE SWEENEY, COMMISSIONER

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