WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ABRAHAM VELASQUEZ, *Applicant*

vs.

UPM; REPUBLIC INDEMNITY COMPANY OF CALIFORNIA, *Defendants*

Adjudication Numbers: ADJ13290788, ADJ13290786
Pomona 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) Joint Findings and Award of January 24, 2022 wherein it was found that applicant's claims of January 5, 2005 (ADJ13290788) and January 1, 2007 (ADJ32990786) injuries were not barred by the statute of limitations or the defense of laches. In both cases, applicant claims that he injured his back while employed as a sweeper.

Defendant contends that the WCJ erred in not barring the claims by operation of the statue of limitations, or alternatively the equitable defense of laches. We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will affirm the WCJ's finding that the claim for the January 5, 2005 injury (ADJ13290788) was not barred by the statute of limitations or laches. However, we will grant reconsideration and amend the WCJ's decision to find the claim for a January 1, 2007 injury (ADJ32990786) barred by the statute of limitations.

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 the January 5, 2005 case (ADJ13290788), the parties stipulated that applicant received medical treatment on January 19, 2005, so the relevant date for the running of the statute of limitations in that case is January 19, 2005. In the January 1, 2007 case (ADJ32990786) it appears that applicant was never provided with disability indemnity or medical treatment. Accordingly, the relevant date for the running of the statute of limitations is the date of injury. "The date of injury, except in cases of occupational disease or cumulative injury, is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed." (Lab. Code, § 5411.) In case ADJ32990786, as noted above, the alleged incident occurred on January 1, 2007.

"[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.)

Thus, when applicant asserts that the statute is tolled based on the breach of the duty to provide the employee with notice of potential right to benefits, applicant has the duty of showing that defendant had sufficient notice of industrial injury or claim of industrial injury to provide applicant with a claim form and notice of potential eligibility for benefits. Only after an applicant shows that defendant had the duty to provide a claim form and notice of potential eligibility for benefits does the burden then shift back 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].)

"The employer's duty under section 5401 [to provide a claim form and notice of eligibility of potential benefits] arises when it has been notified in writing of an injury by the employee (§ 5400) or has 'knowledge' of the injury or claim from another source (§ 5402, subd. (a)); it does not arise whenever the employer learns of facts that would 'lead a reasonable person to conclude

with some certainty that an industrial injury … has occurred or is being asserted' [citation]. The duty arises when the employer knows of an injury or claim, not when it should have known…." (*Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24, 38 [70 Cal.Comp.Cases 97].)

With regard to the January 5, 2005 injury (ADJ13290788), applicant reported the injury and was provided with a DWC-1 form in a single form containing both the notice of potential eligibility for workers' compensation benefits and the claim form required by Labor Code section 5401. Applicant completed the claim form and filed it with his employer on January 19, 2005. No evidence was provided that defendant ever denied the claim of gave the applicant any further notices. We affirm the WCJ's finding of tolling because even though defendant complied with its initial notice requirement, Administrative Rule 9812 contains subsequent notice requirements. In this case, it appears that applicant was provided medical treatment but was not provided temporary disability or permanent disability benefits. Even if defendant felt that no further benefits were necessary, Administrative Rule 9812(g)(3) as it existed at the time of the alleged January 5, 2005 injury required the claims administrator to provide Notice that No Permanent Disability Exists. Former Rule 9812(g)(3)[1] read:

> If the claims administrator alleges that the injury has caused no permanent disability, the claims administrator shall advise the employee that no permanent disability indemnity is payable. This notice shall be sent together with the last payment of temporary disability or within 14 days after the claims administrator determines that the injury has caused no permanent disability. The notice shall include the employee's remedies and:
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> (A) If the employee is unrepresented, the notice shall advise the worker that if he or she disagrees with the treating physician's report on which the claims administrator determination is made, he or she may request a comprehensive medical evaluation from a physician selected from a panel of Qualified Medical Evaluators supplied by the Industrial Medical Council. The notice shall also advise of the procedure for requesting the panel and shall be accompanied by the form prescribed by the Industrial Medical Council with which to request assignment of a panel of Qualified Medical Evaluators.

[1] We note that under current Administrative Rule 9812, notice that no permanent disability exists is only required when the injury has caused temporary disability or where the applicant affirmatively claims that the injury has caused permanent disability. (Cal. Code Regs., tit. 8, § 9812, subd. (e)(3).)

Here, there was no evidence that defendant provided the applicable notice required by Rule 9812. The statute of limitations is tolled not only when a defendant fails to comply with the initial obligation to provide a DWC-1 notice of potential eligibility and claim form, but also when subsequent notices are not provided. (*Galloway v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.App.4th 880 [63 Cal.Comp.Cases 532].) While applicant was provided a claim form, he was not apprised of his rights afterwards. Accordingly, the WCJ correctly found tolling with regard to the 2005 date of injury. With regard to the defense of laches, we agree with the WCJ's statement in the Report that, "defendant/petitioner failed to offer any evidence at trial of any attempt to obtain copies of notices issued to applicant through alternate sources such as the employer or former applicant's attorney." (Report at p. 14.)

However, we will grant reconsideration and amend the WCJ's decision to reflect that the claimed 2007 injury (ADJ32990786) was barred by the statute of limitations. The WCJ found that, "Applicant's testimony that he reported a January 1, 2007 injury to the employer is not credible. During the March 9, 2021 trial, applicant testified that he did not report the January 1, 2007 injury. During the November 9, 2021 trial, applicant initially testified that he reported the January 1, 2007 injury but subsequently admitted that he was confused about whether he reported any injury in 2007." (Finding No. 3.) As noted above, an employer is only required to provide a DWC-1 form including a notice of potential eligibility for benefits when it has knowledge of an injury or claim of an injury. Since the employer had no obligation to provide the applicant with a notice of potential eligibility, there is no tolling of the statute of limitations with regard to the claimed January 1, 2007 injury. The WCJ apparently found that defendant's breach of its obligations for the 2005 somehow carried over to the subsequent injury. There is no legal support for this proposition, and, in any case, defendant did fulfill its initial obligations with regard to the 2005 injury by providing the DWC-1 form. Any subsequent obligations are triggered by the actual filing of the DWC-1 form. While the WCJ makes a finding that applicant did not have actual knowledge of his workers' compensation rights with regard to the January 1, 2007 injury, as noted above, defendant is only required to prove actual knowledge when it has breached its notice obligations.

Accordingly, we will grant reconsideration and amend the WCJ's decision to reflect that the claim for a January 1, 2007 injury in case ADJ32990786 is barred by the statute of limitations.

We will affirm the WCJ's findings with regard to the claim of a January 5, 2005 injury in case ADJ13290788.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Joint Findings and Award of January 24, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Award of January 24, 2022 is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant reported a January 5, 2005 injury to the employer. Applicant was provided a DWC-1 form and subsequently filed the DWC-1 form. There is no evidence that applicant was provided with notice of his workers' compensation rights then required by Administrative Rule 9812.

2. Defendant failed to show that applicant gained actual knowledge of his workers' compensation rights and responsibilities regarding the January 5, 2005 injury prior to filing an application for adjudication of claim on June 5, 2020.

3. Applicant's testimony that he reported a January 1, 2007 injury to the employer is not credible. During the March 9, 2021 trial, applicant testified that he did not report the January 1, 2007 injury. During the November 9, 2021 trial, applicant initially testified that he reported the January 1, 2007 injury but subsequently admitted that he was confused about whether he reported any injury in 2007.

4. Defendant offered into evidence the October 28, 2017 report of PQME Luis A. Gonzalez, D.C. "to show notice and knowledge." (See Defendant's Petition for Reconsideration at page 3, lines 9 through 12.) Although it was previously found that this report evidenced notice to and knowledge by the employer of the alleged January 1, 2007 date of injury, it now appears that the history in said report is clearly erroneous given, among other things, the applicant's denials of being x-rayed in 2007, being seen by a chiropractor in 2007 and being seen by Dr. Aun in 2007. Further, applicant initially testified during the November 9, 2021 trial that he was unsure whether he reported injury to a risk manager named Janet in 2007 or 2017. He subsequently testified that he believed he reported injury to the employer's risk manager in 2017 rather than in 2007 as erroneously indicated in the PQME report.

5. Whereas applicant did not report the alleged 2007 injury prior to filing an application for adjudication of claim on June 5, 2020, the statute of limitations found in Labor Code section 5405 was not tolled as to this date of injury. Since applicant's application for adjudication of claim in case ADJ32990786 was filed more than a year after the claimed injury, and there is no basis for tolling, this claim is barred by the statute of limitations.

6. Evidence that one of the applicant's attorneys was served with the October 28, 2017 report of PQME Luis A. Gonzalez, D.C. does not establish that applicant had "actual knowledge" of the report or of his workers' compensation rights regarding the 2005 date of injury.

7. Defendant's election to destroy its file without fully resolving the 2005 date of injury does not excuse defendant from the burden to show that applicant was provided notice of his workers' compensation rights. While this might have been established through evidence and/or testimony from the employer, no such evidence or testimony was offered at trial.

8. Given that the employer was aware of the January 5, 2005 date of injury and failed to produce evidence that it provided applicant with the notice required by former Administrative Rule 9812, the doctrine of laches cannot be applied to this date of injury.

9. Although defendant was entitled to destroy its file following a reasonable retention period, it did so at its own peril having closed its file without fully and finally resolving the January 5, 2005 date of injury.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ AMBER INGELS, DEPUTY COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 15, 2022

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

ABRAHAM VELASQUEZ
DENNIS R. FUSI
DAVIDSON, CZULEGER & BLALOCK

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