

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

MANUEL AZEVEDO, *Applicant*

vs.

**INVERSE SOLUTIONS, INC.;
PREFERRED EMPLOYERS INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13449484
Stockton District Office**

**OPINION AND ORDER GRANTING RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of the September 29, 2022, Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant claims that, while employed at Inverse Solutions, Inc., he sustained an industrial injury arising out of and in the course of his employment to his low back and spine. The WCJ also found that defendant did not deny applicant's claim within 90 days and that the claim is presumed compensable pursuant to Labor Code section 5402.¹

Defendant contends that the WCJ erred in finding that the claim is presumed compensable because the employer rejected the claim within 90 days and Section 5402 does not require that the employer's rejection be communicated to the applicant within 90 days.

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. For the reasons discussed below, we will grant reconsideration and find that applicant's injury is not presumed compensable.

We will briefly summarize the relevant facts. Applicant served a claim form on his employer, Inverse Solutions, Inc., on July 27, 2020. Applicant also filed an application on July 29, 2020 and served the application on Inverse Solutions. On August 5, 2020, Josh Jorden, applicant's supervisor at Inverse Solutions notified his broker, One Point Insurance, that a claim had been

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

filed. On August 11, 2020, Mr. Jordan completed a form in response to a request from the Employment Development Department (EDD). In the EDD document (Exhibit I), the employer completed a box "Workers' Compensation benefits have been denied because" and wrote:

[handwritten] We did not file a claim because employer reported first that he re-injured himself at home and the initial injury occurred 20 years ago at a different employer/ location[.] As of 8/5/20 a claim has been filed with our W/C carrier[.]

At trial, Mr. Jordan testified that this was a denial because it was in the denied box on the EDD form and, when asked whether it was his intent to deny the claim, he said "Yes." (March 2, 2022, Transcript of Proceedings, p. 31, 32.)

The application was amended on March 31, 2021, to add Preferred Employers Insurance Company as a defendant. Preferred Employers Insurance issued a denial letter on July 7, 2021.

A trial commenced on October 14, 2021, was continued to allow for testimony on March 21, 2022. The issues submitted for decision were:

1. Whether the Defendant denied the Applicant's claim of injury prior to the 90-day presumption period provided in Labor Code Section 5402.
2. Whether the Defendant complied with all of the provisions provided for in Labor Code Section 5402. (October 14, 2021, Minutes of Hearing and Summary of Record, p. 2.)

Turning to the merits of defendant's petition, we begin with Section 5402 which provides in relevant part as follows:

- (a) 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.
- (b) 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.

Section 5402(b) creates an evidentiary presumption and limits the evidence that can be used to dispute a claim. Evidentiary rules, including presumptions, are generally considered procedural rather than substantive. (See generally *Lozano v. Workers' Comp. Appeals Bd.* (2015) 236 Cal. App. 4th 992 {80 Cal. Comp. Cases 407}.)

The 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 [43 Cal. Rptr. 2d 660, 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.)

Given this context, it follows that, unlike other provisions of the Labor Code, such as statutes of limitations, notice of rejection is not required for a defendant to effectively "reject" the claim within the meaning of the statute. ". . . it is the rejection [of liability] which must occur within the 90-day period, not the receipt of notice of that rejection." (*Rodriguez v. Workers' Comp. Appeals Bd.* (1994) 30 Cal.App.4th 1425, 1433 [59 Cal.Comp.Cases 857].) In *Rodriguez*, the Court of Appeal relied on evidence from within the 90-day period, including letters and pleadings, to find that the employer made a determination to deny the claim within 90 days.

In this case, Inverse Solutions did not successfully contact their insurer prior to the expiration of the 90-day period from the time the claim form was filed. Inverse Solutions was the sole defendant named on the initial application. There is evidence that Inverse Solutions rejected the claim within 90 days. Josh Jordan's completion of the EDD form indicating that the claim had been denied together with his testimony that he believed that he denied the claim is sufficient to find that the employer rejected the claim within the 90-day period.

Therefore, we will grant reconsideration and find that applicant's claimed injury is not presumed compensable. We will defer all other issues to the trial level, including the issue of whether applicant sustained an injury arising out of and in the course of employment.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 22, 2022, Finding and Order is **RESCINDED**, and the following is **SUBSTITUTED** in its place:

FINDINGS AND ORDER

FINDINGS OF FACT

1. By stipulation of the parties, Manuel Azevedo, while employed during the period of December 2, 2019, through May 29, 2020, at Pleasanton, California by Inverse Solutions, Inc., claims to have sustained injury arising out of and in the course of employment.
2. By stipulation of the parties, at the time of injury, the employer was insured for purposes of workers' compensation by Preferred Employers Insurance Company.
3. By stipulation of the parties, no attorney fees have been paid and no attorney fee arrangements have been made.
4. By stipulation of the parties, all issues, including attorneys' fees, penalties, and sanctions are deferred with jurisdiction reserved at the Workers' Compensation Appeals Board ("WCAB")
5. Defendant timely denied applicant's claim within the time required by Labor Code section 5402.
6. Applicant's claim is not presumed compensable.

ORDER

IT IS **ORDERED** all other issues, other than the issue of whether applicant's claim is presumed compensable, are deferred with jurisdiction reserved at the trial level.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 14, 2022

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

**MANUEL AZEVEDO
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC, INC.
MICHAEL SULLIVAN & ASSOCIATES LLP**

MWH/mc

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