WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AUDRIANNA MARGARITA FREGOSO, *Applicant*

vs.

LOMA LINDA UNIVERSITY HEALTH CARE; LOMA LINDA UNIVERSITY, PSI and Self-Administered through RISK MANAGEMENT, *Defendants*

Adjudication Numbers: ADJ16181022
San Bernardino 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, we will grant the petition and amend the findings to include a finding of injury arising out of and in the course of employment (AOE/COE) to the left shoulder and cervical spine. For the reasons stated in the WCJ's Report, which we adopt and incorporate in part (as stated below), we otherwise affirm the Findings of Fact.

First, we agree that defendant failed to submit any evidence of a timely denial of claim pursuant Labor code section 5402. We add that Labor Code section 5402(b) provides that the presumption of compensability arises if "liability is not rejected within 90 days after the date the claim form is filed under Section 5401…." (*Honeywell v. Workers' Comp. Appeals Bd. (Wagner*) (2005) 35 Cal.4th 24 [70 Cal.Comp.Cases 97].) Here, we take judicial notice that applicant's DWC-1 form dated May 6, 2022[1] has been filed in EAMS[2]. See *Faulkner v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 1161 (writ den.) [the Court of Appeal found that the

[1] The DWC-1 was entered into the EAMS system on May 16, 2022.

[2] We also note that the testimony of the practice administrator for defendant, Cherl Tidwell stated that she "might have seen the DWC-1 claim form in this case" although she wasn't certain. (October 25, 2022, Minutes of Hearing and Summary of Evidence, page 11:ln 3-4.)

WCAB may take judicial notice of the DWC-1 claim form even if it has not been admitted into evidence]. Thus, we agree with the WCJ's determination of a presumption of compensability under Labor Code section 5402.

Additionally, based on our review of the medical evidence provided by applicant's primary treating provider, Michele H. Van Dyke, D.C., QME, we will amend the findings to include a finding of injury AOE/COE to the left shoulder and cervical spine. Dr. Van Dyke provides a diagnoses of a left shoulder contusion and cervical sprain/strain and determined that both were industrial injuries sustained on March 30, 2022. (Exhibit 1, Initial Primary Treating Physician Chiropractic Report of Michele H. Van Dyke, D.C., QME dated June 20, 2022, pg.8.) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) We find Dr. Van Dyke's report based on the treatment of applicant, well-reasoned. Thus, we find substantial medical evidence supports a finding of injury AOE/COE to the left shoulder and cervical spine.

We also agree that defendant's evidence fails to support the contention that the post termination defense bars applicant's claim. The Court of Appeal has observed in *North County Transit District v. Workers' Comp. Appeals Bd. (Lerma)* (1996) 61 Cal. Comp. Cases 727, 732 [1996 Cal. Wrk. Comp. LEXIS 3239] (writ denied), that the post-termination defense requires an actual notice of termination or layoff, not just "an 'expectation' or 'likelihood' of termination arising from evidence derived from an ongoing investigation." We agree with the WCJ that the verbal exchange between Ms. Tidwell and applicant did not serve as actual notice of termination. We will also note defendant's internal e-mail with the subject line "[t]ransfer employee to Float/Hiring Pool- Audrianna Fregoso (scribe)" does not serve as notice of termination. Rather, the e-mail reveals that defendants were seeking potential transfers for applicant within the organization to avoid terminating applicant. (Exhibit B, April 25, 2022 e-mail exchange between Kristin Rainville and Cherl Tidwell.) Thus, we find that Labor Code section 3600(a)(10) does not bar applicant's claim.

Finally, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

Thus, for the reasons stated in the WCJ's Report, which we adopt and incorporate in part (as stated below), we will grant reconsideration, amend finding of fact 1, and otherwise affirm the Findings of Fact.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of February 2, 2023 is **AMENDED** as follows:

FINDINGS OF FACT

1. The Applicant, Audrianna Margarita Fregoso, sustained a specific injury on March 30, 2022 to her left shoulder and cervical spine while working as a medical assistant/scribe for Loma Linda University Medical Center in Loma Linda, California. The nature and extent of said injury is deferred pending further development of the record.
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WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 18, 2023

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

AUDRIANNA MARGARITA FREGOSO
ROSE, KLEIN & MARIAS
LAW OFFICE OF DONALD GABRIEL

LN/pm

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified Petition for Reconsideration, filed 2/17/2023, Petitioner, Loma Linda University (hereafter defendant), by and through their attorney of record, Donald Gabriel, seeks reconsideration of the Findings of Fact issued herein on 2/1/2023, filed and served on 2/2/2023.

Respondent, Audrianna Margarita Fregoso (hereafter applicant), by and through her attorney of record Angelina Romano of Rose, Klein and Marias, filed a timely and verified Answer to the Petition for Reconsideration on 2/23/2023.

ISSUES PRESENTED

1.
Was it error to determine that applicant's claim was not timely denied and thus presumed compensable?

2.
Was it error to determine that applicant's claim was not barred by LC 3600(a)(10)?

INTRODUCTION

In the decision complained of, pertaining to the issues raised on reconsideration, the undersigned Workers' Compensation Administrative Law Judge found as follows:

"It is specifically noted that defendant did not list as a potential exhibit in the Pretrial Conference Statement or offer into evidence any denial of claim notice. While defendant asserts that applicant's claim is denied on the basis of being a post-termination claim, there is no documentary or testimonial evidence of claim denial on a timely basis per LC 5402. There being no proof of timely or appropriate denial of claim, I must find that the claim is presumed compensable and that defendant has failed to sustain its burden of proof to the contrary. All remaining issues relating to whether the claim is barred or compensable per LC Section 3600(a)(10) (and the exceptions) are moot.

However, even if applicant's claim was timely denied (and there is no proof of that), applicant's testimony and the fact that no formal notice of termination from her employment with LLUMC was provided to her in writing until May [sic – should be June] 6, I still find applicant's claim is not barred by LC 3600(a)(10). Defense Exhibit A is not proof of notice of applicant's termination from her employment with LLUMC – it merely references elimination of her

current position and the hope that applicant could be transferred into another position with LLUMC.

I will further point out that even defendant's Exhibit B states, at Page 6 under Subsection 23, states, "…History and physical exam are c/w impaction injury to the acromioclavicular joint…" The undersigned WCALJ interprets "c/w" as "consistent with."

In conclusion, I find that applicant has sustained her burden of proof that she sustained an industrial injury on 3/30/2020, and the nature and extent of said injury[…], is deferred pending further development of the record."

DISCUSSION

1.
Was it error to determine that applicant's claim was not timely denied and thus presumed compensable?

The pretrial conference statement prepared for the 7/25/2022 settlement conference clearly notes on Page 3 under "Other Issues" clearly states, "Applicant asserts claim, is presumed compensable per LC 5402(a) as well as LC 3600(a)(10) exceptions." Since there is a clear assertion in the PTCS that the claim was asserted to be "presumed compensable," and LC 5402 discusses that a claim is presumed compensable if liability is not rejected within 90 days after the date the claim form is filed under Section 5401, it would have been a simple thing to include as a defense exhibit a copy of the claim denial with proof of service if, in fact, the claim had been denied timely. Unfortunately, the attorney firm that participated in the preparation of the PTCS on behalf of applicant is not the same attorney firm that represented applicant at trial, as a dismissal and substitution of attorney was filed after the matter was set for trial.

Even so, the parties, at trial, as indicated in the Minutes of Hearing and Summary of Evidence of 10/25/2022, at Page 2, Lines 20 – 22, clearly confirmed that the Stipulations and Issues, as set forth in the Minutes of Hearing, were read correctly. Thus there was no surprise to anyone that applicant was asserting the claim was presumed compensable under LC 5402 and per the exceptions to 3600(a)(10). Applicant is not required to submit as evidence at trial a claim denial that was not listed as evidence in the PTCS and which was not provided to applicant's current attorney per their Answer. Had applicant's attorney been provided proof of a timely denial of claim prior to the trial, it would have been bad faith for this issue to have been raised at trial.

Since defendant did not rebut the assertion of untimely denial of claim, the claim was found to be presumed compensable. This decision was not made in error.

2.
Was it error to determine that applicant's claim was not barred by LC 3600(a)(10)?

Applicant sustained injury on March 30, 2022. She sought treatment in the ER on May 4, 2022 and reported her injury on May 5, 2022. She was definitively notified of the elimination of her position and termination from her employment on June 6, 2022. While defendant asserts that applicant was verbally notified of the elimination of her position on April 25, 2022, I did not find this verbal communication, as described by defense witness Cherl Tidwell, to constitute an actual notice of lay-off, formal or otherwise, insofar as she did not notify applicant when it would take place and she further suggested to applicant that there were other positions at Loma Linda available that applicant could pursue. Additionally, it wasn't understood by the applicant, as set forth in her credible testimony, to be notice of lay-off either. Applicant understood that conversation with Ms. Tidwell to mean that while her current position was being eliminated due to the loss of several doctors in that department, she was not specifically told that her employment with Loma Linda would be ending with the elimination of her current position. Applicant was under the impression that she could be moved into another position in another department and she was encouraged to look for other positions within Loma Linda.

As noted above, Defense Exhibit A is not proof of notice of termination, it merely references elimination of applicant's current position and the hope that applicant could be transferred into another position with LLUMC. I did not find Cherl Tidwell's testimony to be persuasive that her conversation with applicant on 4/25/2022 regarding the elimination of applicant's current position was definitive notice of applicant's termination and lay-off, because her actions and comments to applicant about other positions being available certainly could lead one to believe that while their current position might be eliminated, their employment with Loma Linda could continue. The prudent employer would put such notice in writing, so there would be no misunderstanding or ambiguity.

Insofar as applicant reported her injury on May 5, 2022 and she was not definitively notified of her termination until the written letter dated June 6, 2022, applicant's situation falls squarely into the exception that the employer had notice of the injury prior to the notice of termination or layoff and the existence of medical records to document the injury prior to the notice of termination or layoff. It was not error to determine that applicant claim was not barred by LC 3600(a)(10).

RECOMMENDATION

I recommend the Petition for Reconsideration, filed by defendant on 2/17/2023 be *DENIED* on the merits.

Date: February 23, 2023

MYRLE R. PETTY
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE