WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LE SWANSEN, *Applicant*

vs.

STATE OF CALIFORNIA, DEPARTMENT OF SOCIAL SERVICES, legally uninsured, adjusted by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ18188574
Redding District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Le Swansen seeks reconsideration of the October 15, 2024 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant's workers' compensation claim is barred by the statute of limitations.

Applicant contends that development of the record is needed by a medical legal evaluator to help decipher when applicant was put on notice with respect to the statute of limitations and to evaluate all potential dates of injury. Applicant further contends that the statute of limitations does not apply to cumulative trauma injuries filed after applicant was represented by counsel.

We received an answer from defendant State of California, Department of Social Services, adjusted by State Compensation Insurance Fund. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration, rescind the October 15, 2024 Findings and Order, and return this matter to the trial level for further proceedings.

FACTS

As stated in the Report:

> Applicant filed a claim form dated 8/1/2020 which was received by the employer on 8/13/2020 and by SCIF on 8/14/2020 as noted on the date stamp on the DWC-1 claim form (Defense Exhibit A, DWC-1 form dated 8/1/2020). On 8/18/2020, Applicant requested by email to "cancel" her claim because she was pursuing EDD benefits instead which had been her doctor's suggestion (See Defense Exhibit D, E-mail from Applicant dated 8/18/2020). On 8/20/2020 Defendant denied Applicant's injury claim and, in the denial letter to Applicant, advised that because she chose to cancel her claim, defendant was unable to investigate to determine compensability. Defendant also provided notice that Applicant had one year from the date of injury or date of last furnishing of indemnity or medical treatment to commence proceedings before the WCAB by filing an Application for Adjudication of Claim or her rights to benefits maybe lost (See Joint Exhibit 1, SCIF denial letter claim notice of date of injury 7/6/2020, dated 8/20/2020).
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> On 9/7/2023, Applicant, by and through her attorney, filed an Application for Adjudication of Claim, listing the date of injury as 7/6/2020 resulting in injury to the psyche and stress, and stating that the injury occurred "during the employment."
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> On 6/13/2024, Applicant amended the date of injury to reflect cumulative trauma during the period 7/6/2020-11/16/2020.
>
> This matter proceeded to trial on 10/15/2024 on the issues of statute of limitations and injury AOE/COE.
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> On 10/15/2024 a Findings and Order issued, holding Applicant was barred from pursuing workers' compensation benefits by the statute of limitations set forth in Labor Code §5405. A decision on injury AOE/COE was found moot as Applicant did not prevail on the threshold issue of the statute of limitations.
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> Applicant filed a timely, verified Petition for Reconsideration of the Finding and Order on 11/4/2024. (Report, pp. 1-2.)

DISCUSSION

I.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

[1] All statutory references are the Labor Code unless otherwise indicated.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 15, 2024, and 60 days from the date of transmission is January 14, 2025. This decision is issued by or on January 14, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 15, 2024, and the case was transmitted to the Appeals Board on November 15, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 15, 2024.

II.

Section 5405 provides:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
>
> (a) The date of injury.
>
> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
>
> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished. (§ 5405.)

Here, no indemnity or medical treatment was provided so the statute of limitations is one year from the date of injury. (Report, p. 2:22-23.)

Applicant amended her Application for Adjudication to reflect a cumulative trauma injury from July 6, 2020 to November 16, 2020. Section 5412 defines the date of injury for cumulative injuries as "the date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (§ 5412.) The "date of injury" under section 5412 is a statutory construct for purposes of the statute of limitations and the post-termination defense. Section 5412 requires a twofold analysis: (1) the existence of disability, and (2) knowledge that such disability was industrial.

Disability for the purposes of section 5412 is *compensable* temporary disability *or compensable* permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal. App. 4th 998, 1002-1003 [69 Cal.Comp.Cases 579].) "Although there is no compensable temporary disability until the worker suffers wage loss (citations), wage loss is not required for an injured worker to be entitled to permanent disability compensation (citations)," and "ratable permanent disability" is compensable permanent disability. (*Id.*, at p. 1004.) "Because actual wage loss is required for temporary disability, modified work alone is not a sufficient basis for compensable temporary disability. But, a modification may indicate a permanent impairment of earning capacity, especially if the worker is never able to return to the original job duties. (Citations.)" (*Id.* at p. 1005.)

"The burden of proving that the employee knew or should have known rests with the

employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms." (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53].) Generally, "an applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*Id.* at p. 473.) In *Johnson,* the court held that applicant's *belief* that his employment caused his disability does not charge him with knowledge that his disability was work related because applicant did not have the training or qualifications to make that determination. (*Id.* at p. 473.) "Applicant's mere correlation of her psychiatric injury with work was not sufficient to establish the knowledge required under Labor Code § 5412." (*County of San Bernardino v. Workers' Comp. Appeals Bd.* (*Turner*) (2018) 83 Cal.Comp.Cases 1282, 1284 [2018 Cal. Wrk. Comp. LEXIS 46].)

Here, there are no medical records to indicate that applicant suffered a *compensable* disability or to establish knowledge that such disability was caused by applicant's employment. All we have are allegations that applicant's work caused psychiatric injury. Although we are sympathetic to defendant's laches argument, there are no findings of fact regarding this affirmative defense. (*Vasquez v. Pers. Plus, Inc.* (April 17, 2018, ADJ8239530 and ADJ481462) [2018 Cal. Wrk. Comp. P.D. LEXIS 15] ["Laches is a question of fact to be determined by the trier of fact. (citation omitted.) 'The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.' (citations omitted.) Once an *unreasonable* delay has been found, there must also be evidence of prejudice to the defendant caused by that unreasonable delay. (citation omitted.) Prejudice is never presumed; rather it must be affirmatively demonstrated by the party asserting the defense in order to sustain its burden of proof. (citation omitted.)"])

Accordingly, we grant reconsideration and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant Le Swansen's Petition for Reconsideration of the October 15, 2024 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 15, 2024 Findings and Order is **RESCINDED** and the matter is **RETURNED** to the trial level.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 14, 2025

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

LE SWANSEN
THE FLETCHER BROWN LAW FIRM
STATE COMPENSATION INSURANCE FUND

LSM/oo

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