WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KENNETH HICKS, *Applicant*

vs.

LOCKHEED MARTIN, permissibly self-insured, adjusted by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ2115288; ADJ3000064; ADJ3571777

Santa Barbara District Office

OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact (Findings) issued on August 13, 2024, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained injury to the low back on October 3, 1998, and that applicant's petition to reopen for new and further disability was not barred by the statute of limitations.

Defendant argues that applicant did not timely file a petition to reopen in this matter because defendant rebutted the proof of service attached to the petition to reopen and showed that the petition was not actually served.

We have received an answer from applicant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, Petition for Disqualification, the Answers, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, we will deny reconsideration.

FACTS

Per the WCJ's Report:

> The applicant sustained an injury to her lower back on October 3, 1998, while working as a Missile Mechanic at Vandenberg Air Force Base, California, by the Lockheed Martin**.**
>
> The underlying case was settled by Stipulated Award issued March 19, 2001.
>
> The applicant then allegedly filed a Petition to Reopen for New and Further disability (PTR) (Exhibit 1 EAMS ID# 52830631) dated June 17, 2003, accompanied by a Proof of Service (POS) for the same date. Listed on the POS was the WCAB in Goleta, Griffin & Griffin the defense attorney, and ESIS the claims administrator.
>
> The case proceeded to Trial on the issue of Statute of Limitations (SOL) as to the Petition to Reopen.
>
> This WCJ requested a copy of the Board's paper file existing prior to EAMS implementation. The State Records center (SRC) advised that the case file requested has been destroyed.
>
> A Finding of Fact and Opinion on Decision was issued August 13, 2024, stating in part:
>
> "4. Defendant has failed to meet their burden of proof, and the claim is not barred by the statute of limitations."
>
> Defendant has now filed a Petition for Reconsideration of that finding.

(WCJ's Report, p. 2.)

DISCUSSION

I.

Former 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. (Lab. Code, § 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.

> (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.

(§ 5909.)

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 September 17, 2024, and 60 days from the date of transmission is Saturday, November 16, 2024, which by operation of law means that this decision is due by Monday, November 18, 2024. (Cal. Code Regs., tit. 8, § 10600.) This decision is issued by or on November 18, 2024, 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.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on September 17, 2024, and the case was transmitted to the Appeals Board on September 17, 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 September 17, 2024.

II.

The statute of limitations is an affirmative defense and defendant, as the party asserting the defense, has the burden of proof. (Lab. Code[1], § 5705.)

"Limitations provisions in the workmen's compensation law must be liberally construed in favor of the employee unless otherwise compelled by the language of the statute, and such enactments should not be interpreted in a manner which will result in a loss of compensation." (*Blanchard v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590, 595, 40 Cal. Comp. Cases 784, 787 (internal citations omitted).) Section 5410 limits the time period "*to institute proceedings* for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability." "In light of these principles of liberal construction, we note that the language of section 5804 – 'No award shall be . . . amended . . . except upon a petition by a party . . . filed within such five years' -- does not limit relief to the prayer of the petition. Hence, in a petition to reopen, the injured employee need not request any particular classification of compensation in order to vest the board with jurisdiction to reconsider the entire case." (*Bland v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 324, 331.)

We addressed the presumption of Evidence Code section 641 in our en banc decision in *Suon*:

> A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. (Evid. Code, § 641; see also *AO Alfa-Bank v. Yakovlev* (2018) 21 Cal. App. 5th 189, 212 [230 Cal. Rptr. 3d 214]; *Hagner v. United States* (1932) 285 U.S. 427, 430 [76 L. Ed. 861, 52 S. Ct. 417] ["[t]he rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed"]; *Minniear v. Mt. San Antonio Community College District* (1996) 61 Cal. Comp. Cases 1055, 1059 (Appeals Board en banc) [typical presumption affecting the burden of producing evidence "is the presumption that a mailed letter was received"].)
>
> If the opposing party alleges that the information was not received, the WCJ may separately consider lack of receipt of the information [. . .]. The presumption that a letter mailed was received is rebuttable. (*People v. Smith* (2004) 32 Cal. 4th 792, 799 [11 Cal. Rptr. 3d 290, 86 P.3d 348].) However, the trier of fact is obligated to "assume the existence of the presumed fact unless and until evidence is introduced to support a finding of its nonexistence." (*Craig v. Brown*

[1] All future references are to the Labor Code unless noted.

> *& Root* (2000) 84 Cal. App. 4th 416, 421 [100 Cal. Rptr. 2d 818].) A mere allegation that the recipient did not receive the mailed document has been found to be insufficient to rebut the presumption. (See *Alvarado v. Workmen's Comp. Appeals Bd*. (1970) 35 Cal. Comp. Cases 370 (writ den.) and *Castro v. Workers' Comp. Appeals Bd*. (1996) 61 Cal. Comp. Cases 1460 (writ den.).) If the sending party thus produces evidence that a document was mailed, the burden shifts to the recipient to produce "believable contrary evidence" that it was not received. (*Craig, supra*, at pp. 421-422, citing *Slater v. Kehoe* (1974) 38 Cal. App. 3d 819, 832, fn. 12 [113 Cal. Rptr. 790].) Once the recipient produces sufficient evidence showing non-receipt of the mailed item, "the presumption disappears" and the "trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received.

(*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1817 [2018 Cal. Wrk. Comp. LEXIS 100] (Appeals Board en banc).)

As noted in the WCJ's Report, this case involves a petition for new and further disability, which, according to its proof of service, was timely filed with the Appeals Board in 2003. Since that time, the Appeals Board destroyed its file. Applicant provided a copy of the petition, which includes a proof of service showing service upon the Appeals Board and defendant's attorneys and defendant's adjuster.

Defendant denies having received the petition to reopen and provided testimony from defendant's attorney and the current adjuster to that effect. Defendant's attorney testified that he was the handling attorney. He further testified that:

> After the stipulation, the file was maintained in his office. He maintained the physical file at his office because it settled by way of award. They keep it on the premises to monitor for five years and to address future medical as its issues arise to C & R.

(Minutes of Hearing and Summary of Evidence, July 15, 2024, p. 4, lines 10-13.)

Defendant's adjuster testified that the case was "administratively closed as there was no medical treatment and the case in chief had been settled." She further testified that:

> She was not with ESIS in 1998 when the injury occurred. She was not with ESIS in 2001 when the case settled. She was not with ESIS in 2003 when the petition was filed. She does not know if the legal procedures of marking documents with a one or two for priority was the same procedure in 2001 or 2003. She does not think they were in 2001. They were receiving paper mail. It is not the same procedure as it is now. She was not with ESIS in 2003. Her testimony was that the petition to reopen was not received, but she was not with ESIS in 2003. She meant the petition was not in the file.

(Minutes of Hearing and Summary of Evidence, July 15, 2024, p. 6, lines 2-7.)

Defendant's attorney testified that he held the file in his office for five years after the award, but provided no evidence as to how documents were received and handled in his offices in 2003. Defendant's adjuster testified that the file does not currently have a copy of the petition to reopen, but again there was no testimony as to how documents were received and handled in the office in 2003. Thus, defendant did not successfully rebut the presumption of mailing as set forth in *Suon*, *supra*.

According to applicant's proof of service, applicant's petition to reopen was timely filed and proceedings for new and further disability were instituted within five years of the date of injury. Defendant cites *Wolstoncroft v. County of Yolo*, (2021) 68 Cal. App. 5th 327, as authority that denying receipt of a document is sufficient to overcome the presumption of receipt when a document is mailed. However, in *Wolstoncroft* the government agency itself denied receipt of the mailing. Unlike *Wolstoncroft*, the Appeals Board does not deny receiving the petition for new and further. The Appeals Board destroyed its file, and thus, it can neither confirm nor deny receipt of the petition. Thus, the presumption of receipt following mailing remains in effect. Defendant's argument focuses solely upon the issue of whether defendant received the petition. It overlooks the fact that defendant must also show that the Appeals Board did not receive the petition. No evidence was produced on that issue, and thus defendant failed to meet its burden of proof on its affirmative defense.

Once applicant timely filed his petition to reopen, the Appeals Board gained jurisdiction to reconsider the entire case. However, the question presented is only one of jurisdiction of the appeals board. Applicant still bears the burden of proving that either good cause exists to reopen

the prior award, or that new and further disability has occurred. (§§ 5410, 5803.) That issue is deferred pending development of the record.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact issued on August 13, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING, NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 18, 2024

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

KENNETH HICKS
STOUT, KAUFMAN, HOLZMAN & SPRAGUE, APLC
GRIFFIN LOTZ & HOLZMAN

EDL/mc

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