WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

YVETTE DANIELS, ***Applicant***

vs.

LOIS FREEMAN LIVING TRUST;
STATE FARM FIRE AND CASUALTY COMPANY,
administered by SEDGWICK CLAIMS MANAGEMENT,
Defendants

Adjudication Number: ADJ11199891
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR 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, and for the reasons stated in the WCJ's report, which we adopt and incorporate as quoted in the attachment below, we will deny reconsideration.

Preliminarily, we note that 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. (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.

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

> (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 August 8, 2024, and 60 days from the date of transmission is October 7, 2024. This decision is issued by or on October 7, 2024, so that we have timely acted on the petition as required by Labor Code 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. Labor Code 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 August 8, 2024, and the case was transmitted to the Appeals Board on August 8, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 8, 2024.

We now turn to the merits and begin by noting that the WCJ found all the witnesses to be credible. 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*.)

The employee bears the initial burden of proving injury arising out of and in the course of employment (AOE/COE) by a preponderance of the evidence. (Lab. Code, § 5705; *South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3202.5, 3600(a).) Applicant did this by credibly testifying that she fell while going down the stairs while taking out the trash around 4:00 o'clock in the afternoon. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 12/6/22, at p. 4:1-7.)

The next questions is whether compensability of that injury is barred by the post termination defense. Defendant bears the burden of proving that it not compensable because applicant filed his claim after defendant terminated his employment. (Lab. Code, § 5705.) Defendant must meet this burden by preponderance of the evidence, and this requires "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code, § 3202.5)

In relevant part, section 3600 provides that,

> ...[W]here the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
>
> (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
>
> (Lab. Code, § 3600(a)(10).)

Here, defendant established that applicant was terminated on December 9, 2016 (*id*., at p. 4:18-20; 38) and that she did not file her claim until February 7, 2018. The burden then shifted back to applicant to prove that the employer had notice of the injury prior to notice of termination. In this regard, applicant testified that she reported her injury to Ms. Duncan who was her supervisor and the house manager. (*Id*., at p. 4:9-11.) However, applicant also testified that Mr. Freeman was her boss (*Id*. at p. 5:3) and that she had no communication whatsoever with Mr. Freeman regarding her injury. (*id*. at p. 5:5-7.) Ms. Duncan testified that she made sure the "household was running smoothly" (MOH/SOE, 7/23/24, at p. 2:67-68) but did not testify that she supervised applicant. Mr. Freeman testified that he was the employer, that Ms. Duncan was not applicant's supervisor

but just the night shift home care provider; and that he managed the household. (MOH/SOE, 12/6/22, at pp. 6:7-14; 7:6.)

Given the testimony of all the witness, which the WCJ found credible, we are persuaded that applicant did not prove that the employer had notice of the injury prior to notice of termination.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 7, 2024

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

YVETTE DANIELS
THE FLETCHER B BROWN LAW FIRM
ALBERT & MACKENZIE

PAG/abs

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

Applicant filed a timely, verified, petition for reconsideration from my order denying her claim for workers' compensation benefits.

INTRODUCTION

Applicant, Yvette Daniels, was employed as a caretaker for Lois Freemen. Her employer was Lance Freeman, Mrs. Freeman's son.

Ms. Daniels was hired in the middle of January of 2016. She was terminated from her employment by Mr. Freeman on December 9, 2016.

On or around February 14, 2018, two years after her termination from employment, applicant filed an application for adjudication of claim in which she alleged injury to her back, shoulder and knee because of a slip and fall. The application for adjudication of claim filed in 2018 listed the date of injury as March 11, 2017.

On September 14, 2020, four years after the alleged date of injury, the application for adjudication of claim was amended, changing the date of injury to March 11, 2016.

When this case was set for trial, the parties stipulated on the pretrial conference statement that the correct date of injury is March 11, 2016. The Minutes of Hearing/Summary of Evidence states that the parties stipulate that the date of injury is March 11, 2016. No one asked for the Minutes of Hearing/Summary of Evidence to be corrected to reflect a different date of injury.

On the day of trial, applicant however testified that she was injured in August of 2016.

Applicant alleged that on her date of injury she advised her daughter, Ms. Duncan, who also worked for Mr. Freeman, that she sustained an injury. Ms. Daniels asked Ms. Duncan to report the injury to Mr. Freeman.

According to Ms. Daniels, Ms. Duncan was the house manager while Mr. Freeman was her boss.

Ms. Daniels asked Ms. Duncan to advise Mr. Freeman of her injury. Ms. Duncan testified that the day after the injury she advised Mr. Freeman that Ms. Daniels sustained an injury.

Mr. Freeman has testified that he was not aware of any injuries sustained by Ms. Daniels until the 2018 application for adjudication of claim was filed.

The general rule is that an injury is not compensable if a claim is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff. See Labor Code Section 3600(a)(10).

In order for Ms. Daniels to be eligible to receive workers' compensation benefits because of her 2016 injury, I would have to find that Ms. Daniels filed/reported a claim for worker's compensation benefits prior to the time of her termination.

I have been provided with conflicting testimony as to whether the injury sustained by Ms. Daniels was reported to Mr. Freeman prior to Ms. Daniel's termination from employment. Ms. Daniels admits she did not report the injury to Mr. Freeman but Ms. Duncan testified that she reported the injury the day after it occurred. Mr. Freeman however testified that he knew nothing about the injury until the application for adjudication of claim was filed in 2018.

In order to decide which witness to believe in, when all witnesses come across as credible caring human beings, one must turn to the evidentiary record.

In this particular case the evidentiary record is rather muddy.

To begin with, the claim is initially filed with a date of injury of March 11, 2017, a date which falls outside of applicant's employment period. It takes applicant's counsel two years to change the date of injury to March 11, 2016.

Based on applicant's testimony at trial as well as during her deposition. It appears that the actual date of injury is probably in August of 2016.

Not knowing what the date of injury is makes the trier of fact question whether applicant correctly recalls events surrounding her injury. If applicant cannot correctly recall the exact date of injury is she able to correctly recall reporting of the injury.

I do believe applicant when she says she injured herself while working for Mr. Freeman. I suspect applicant does not recall the exact date of injury hence the confusion is created. I however do not believe that Mr. Freeman was advised of the injury prior to 2018.

The reason I do not believe that Mr. Freeman was advised of the injury prior to termination is because at no point in time did either Ms. Duncan or Ms. Daniels followed up with Mr. Freeman about the injury. They did not ask him about seeing a doctor nor did they seek to complete any paperwork to properly report the injury.

Even after seeing the doctor on [December 14, 2016], no contact was made with Mr. Freeman regarding the injury such as getting the treatment paid for.

Since Mr. Freeman had regular contact with applicant, based on applicant's testimony, she should have reported the injury directly to him. Ms. Duncan, the daughter, might have managed the way the house ran but there was no credible evidence presented that she was applicant's supervisor. Applicant herself testified to the fact that Mr. Freeman was her boss.

Triers of fact sometimes just need to make a judgment call in order to reach a decision. Although each witness in this case came across as credible I have to choose a side.

With the lack of accuracy on the date of injury, the delay of obtaining treatment, the failure to report directly to the supervisor about the injury and the delay in filing of an application of

adjudication of claim, I can only conclude that applicant failed to file her claim prior to her termination hence her claim for benefits is barred.

DISCUSSION

Applicant's rather skeletal petition for reconsideration has not caused me to change my mind.

This case is a he said/she said case. Applicant testified that she did not tell Mr. Freeman she sustained an injury at work. Rather applicant told her daughter who from what I gather was simply just another employee at the household. Applicant did testify that she asked her daughter to tell Mr. Freeman and according to the daughter's testimony, she told Mr. Freeman that applicant sustained an injury.

Mr. Freeman testified that he was not told about applicant's injury until he received the application for adjudication of claim.

Applicant during trial testified that she had regular direct contact with Mr. Freeman. When asked why she did not tell Mr. Freeman about her injury, applicant could not provide an answer other than that she just did not tell him.

For someone to have been as injured as applicant claims to have been, I do not understand why she had absolutely no contact with Mr. Freeman where she discussed her injury or mentioned any limitations she might have in performing her job because of the injury.

Applicant is terminated at the end of 2016. Applicant visits a physician after her termination. At no point in time between her time of termination and her filing of the application for adjudication of claim in 2018 does applicant request medical treatment or paid time off for her injuries.

Applicant in its petition for reconsideration blames Mr. Freeman for the confusion of properly filing her claim with the correct date of injury. I am not sure why applicant believes it is Mr. Freeman's obligation to correctly identify a date of injury that applicant should be aware if specifically since it is she who was injured.

Applicant testified that she did not report her injury. Applicant then offered her daughter to testify on her behalf that the injury was reported. Applicant however testified that her daughter and Mr. Freeman did not get along and that her daughter was terminated from her employment by Mr. Freeman.

As stated in my decision, I had to make a hard choice as to whose testimony I believed in. I chose Mr. Freeman over the applicant because of the inconsistencies in the record.

RECOMMENDATION

I recommend the Petition for Reconsideration filed by applicant be *DENIED*.

DATE: 08/08/2024

Lilla J. Szelenyi
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE