

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. LAO 763476**

5 **WILLIAM WAGNER,**

6 *Applicant,*

7 **vs.**

8 **ALLIED SIGNAL AEROSPACE;**
9 **ZURICH AMERICAN INSURANCE CO.,**

10 *Defendant(s).*

**OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)**

11
12 The Workers' Compensation Appeals Board (Board) granted defendant's
13 Petition for Reconsideration of the Findings of Fact issued by a workers' compensation
14 administrative law judge (WCJ) finding that applicant's claim of cumulative injury
15 during the period of 1995 to October 16, 1998 was presumed compensable under Labor
16 Code section 5402¹ based on defendant's failure to timely deny his claim. The WCJ
17 further found that this failure was caused by the employer's breach of its duty to
18 provide applicant with an Employee's Claim for Workers' Compensation Benefits
19 (DWC Form 1, hereinafter claim form). Defendant contends that the WCJ erred in
20 finding that applicant's claim is presumed compensable, asserting (1) that the statutory
21 90-day period allowed to investigate and deny a workers' compensation claim cannot
22 commence earlier than the date when the claim form is filed with the employer, and (2)
23 that applicant has failed to demonstrate the appropriate circumstances for an earlier
24 commencement of the running of the 90-day period.

25 Because of the important and novel issue presented, and in order to secure
26 uniformity of decision in the future, the Chairman of the Board, upon a majority vote of

27 ¹ All further statutory references are to the Labor Code.

1 its members, has reassigned this case to the Board as a whole for an en banc decision.
2 (Lab. Code, §115.)

3 Based on the Board's review of the relevant statutory and case law, the Board
4 concludes that (1) the 90-day period under section 5402 begins to run when the claim
5 form is filed by serving it on the employer (i.e., personally delivered to the employer or
6 received by the employer by first-class or certified mail pursuant to section 5401(b)),
7 and (2) the 90-day period may, however, begin to run prior to receipt of the claim form
8 where the employer breaches its duty to provide the form to the injured employee
9 within one working day of receiving notice or knowledge of an injury, which injury
10 results in lost time beyond the date of injury or which results in medical treatment
11 beyond first aid. We hold that the employer breaches its duty to provide the claim form
12 when the employer is reasonably certain either that the employee suffered an industrial
13 injury or that the employee is claiming such an injury as defined in section 5401(a), and
14 fails to provide the claim form.

15 I. INTRODUCTION

16 This matter was submitted on the record, without oral testimony, on the issue of
17 applicant's claim that the injury was presumed compensable under section 5402. A
18 review of the record reveals that applicant was employed by defendant Allied Signal
19 Aerospace from 1982 through 1999. Applicant's personnel file contains a notation under
20 "Employee's Medical Record," dated July 20, 1998, where applicant complains of, and
21 states that he is taking multiple medications to deal with, work stress. The July 20, 1998
22 notation states, in pertinent part, as follows:

23 "... Has tried many times to deal with this industrial stress
24 reduction in various forms. Feels Mike Rawlings is
25 prejudiced against him and has hampered [his]
26 opportunities for promotion and transfer. Has talked to
27 Susan Mattich but feels she is prejudiced and prefers to talk
to Jess Jimenez. States wife wants him to quit due to stress -
anxious - agitated [illegible]. EE [employee] spoke with Jess.

1 Explained his concerns to Jess. EE [employee] feels like he
2 'can't take it anymore.' Feels like it is affecting him
3 physically and emotionally. MD [physician] ha[s] EE
4 [employee] on multiple [medications] to deal with work
5 stress: Trazadone for sleep, Paxil for anxiety/stress, Norco
6 for pain, Lotensin/HCT2 (recently [discontinued] from
7 Vasotec to be able to [increase] the dose) for [hypertension];
also take Lopid and Albuterol for pneumonia. Jess will talk
with Susan Maddock about the situation. EE [employee]
admits to losing 30 pounds because of problems over past 3
yrs...." (Applicant's Exhibit 1)

8 On October 16, 1998, applicant was admitted into Canyon Ridge Psychiatric
9 Hospital. Applicant's personnel file contains an entry, dated the same day, that
10 applicant's wife called defendant, and left the message that applicant was admitted into
11 the hospital, and requested disability forms. The October 16, 1998 message was placed
12 in applicant's personnel file, and reads as follows:

13 "Received an audix message from William Wagner's wife,
14 Linda. Linda states that Bill was admitted into the hospital
15 that day. The doctor diagnosed the problem as a complete
16 nervous breakdown [emphasis in original]. She was unsure
17 where to go from that point. Bill was very upset. He kept
18 saying he was going to loose [sic] his job and this is it. She
19 feels that Mike Rawlings, Luke and Frank and their
continual [sic] head games, wouldn't stop until they got
their wish of pushing Bill over-the-edge. And that these
picked-up where they left off upon Bill's return to work last
week.

20 "Wife is concerned that she does everything necessary to
21 protect Bill's employment with Allied Signal. Whether that
22 means FMLA [Family and Medical Leave Act] or Disability,
23 whatever it takes. At request, the wife will fax over the
admitting papers or the necessary documents to confirm
leave." (Applicant's Exhibit 1.)

24
25 Applicant's personnel file contains a further entry dated October 20, 1998. The
26 entry reflects that defendant's representative called applicant's wife to confirm
27 disability leave, and to advise that the disability forms requested would be mailed. The

1 October 20, 1998 personnel file entry states as follows:

2 "Phoned Linda this morning to confirm receipt of Dr.'s note
3 verifying disability leave for Bill. Also want to let her know
4 that I would be sending medical leave request and SDI [State
5 Disability Indemnity] form in the mail to their home."
(Applicant's Exhibit 1.)

6 Although applicant's personnel records reflect that applicant was in the hospital
7 and that his wife requested and was provided with a state disability form, defendant
8 did not provide applicant with a workers' compensation claim form. It is not clear from
9 the record whether applicant specifically requested a workers' compensation claim
10 form. After applicant obtained legal representation, he completed a claim form which
11 was served by mail on defendant on January 13, 1999. Defendant received applicant's
12 claim form on January 15, 1999, and denied the claim on March 31, 1999. Thus,
13 defendant denied applicant's claim within the 90-day period after receipt of the claim
14 form on January 15, 1999. However, the claim was not denied until more than 90 days
15 after applicant communicated his stress complaints as recorded in applicant's personnel
16 file on July 20, 1998 and more than 90 days after applicant's wife's October 16, 1998
17 audix message reporting applicant's hospitalization and requesting disability forms.

18 II. DISCUSSION

19 Section 5400 provides, in relevant part:

20 "Except as provided by sections 5402 and 5403, no claim to
21 recover compensation under this division shall be
22 maintained unless within thirty days after the occurrence of
23 the injury which is claimed to have caused the disability or
death, there is served upon the employer notice in writing,
signed by the person injured"

24 Section 5401, subsections (a), (b) and (c) state, in relevant part:

25 "(a) Within one working day of receiving notice or
26 knowledge of injury under Section 5400 or 5402, which
27 injury results in lost time beyond the date of injury or which
results in medical treatment beyond first aid, the employer

1 shall provide, personally or by first-class mail, a claim form
2 and a notice of potential eligibility for benefits under this
division to the injured employee

3 "(b) The completed claim form shall be filed with the
4 employer by the injured employee [A] claim form is
5 deemed filed when it is personally delivered to the employer
or received by the employer by first-class or certified mail
6"

7 Section 5402, provides:

8 "Knowledge of an injury, obtained from any source, on the
9 part of an employer, his or her managing agent,
superintendent, foreman, or other person in authority, or
10 knowledge of the assertion of a claim of injury sufficient to
afford opportunity to the employer to make an investigation
11 into the facts, is equivalent to service under Section 5400. If
liability is not rejected within 90 days after the date the claim
12 form is filed under Section 5401, the injury shall be
presumed compensable under this division. The
13 presumption of this subdivision is rebuttable only by
evidence discovered subsequent to the 90-day period."²
14

15 The above sections establish the general rule that the 90-day period under section
16 5402 begins to run when the claim form is filed by serving it on the employer (i.e.,
17 personally delivered to the employer or received by the employer by first-class or
18 certified mail pursuant to section 5401(b)). The injury is presumed compensable if
19 liability is not rejected within 90 days after receipt of the claim form by the employer.
20 (*Williams v. Workers' Comp. Appeals Board* (1999) 74 Cal.App.4th 1260 [64 Cal.Comp.Cases
21 995]; *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Welcher)* (1995) 37
22 Cal.App.4th 675 [60 Cal.Comp.Cases 717]; *Shoai-Ahari v. Zenith Ins. Co.* (1992) 21 Cal.
23 Workers' Comp. Rptr. 14.)

24

25
26 ² Section 5402 was amended in 2000 to separate the contents of that section into paragraphs (a) and (b),
27 but with no substantive changes to the text.

1 The 90-day period may, however, begin to run prior to receipt of the claim form
2 where the employer breaches its duty to provide the claim form to the injured
3 employee. Section 5401(a) requires that the employer provide an employee with a claim
4 form within one working day of receiving notice or knowledge of an injury.

5 In *Janke v. State of California, Department of Justice* (1991) 19 Cal. Workers' Comp.
6 Rptr. 310, a panel of the Board held that an employer breached its duty to provide an
7 employee with a claim form by refusing to provide the form after applicant's request,
8 and that the 90-day period must accordingly be reduced by the length of time of the
9 employer's breach. In other words, the 90-day period would begin to run from the date
10 of the employer's refusal to provide the claim form.³ The panel noted that the 1989
11 amendments to sections 5401 and 5402 were intended "to expedite claims by
12 encouraging employers to either provide benefits or to promptly investigate and
13 discover evidence to justify rejection within 90-days of a claim." That decision also
14 stated that "[t]he Board cannot and will not allow the claim procedure to be
15 manipulated either intentionally or negligently to extend the period of time during
16 which the employer must accept or reject the claim."

17 In *Thompson v. County of Stanislaus* (1997) 25 Cal. Workers' Comp. Rptr. 24, the
18 injured employee (Thompson), worked as a deputy sheriff for several years prior to the
19 alleged industrial injury. On July 8, 1993, Thompson attempted to commit suicide.
20 While Thompson was in the hospital recovering from his suicide attempt, a superior
21 and friend Captain Clark visited him. At that time, Thompson told Captain Clark that
22 his suicide attempt was the result of problems at work, problems with his health and
23 problems with his family. In addition, on July 14, 1993, five days after his suicide
24 attempt, the Tuolumne County Sheriff's Office (TCSO) sent defendant a document

25 ³ Where the 90-day period commences to run prior to the filing of the claim form, the running of the 90-
26 day period is tolled from the date the employer belatedly provides the injured employee with the claim
27 form until the completed claim form is filed by the injured employee. Upon that filing, the remaining
portion of the 90-day period again begins to run.

1 stating that Thompson had been placed in 72-hour psychiatric detention because of his
2 suicide attempt. The document stated that Thompson's problems were related to health,
3 work and family -- the same three areas Thompson told Captain Clark were the basis
4 for his suicide attempt.

5 In that case, defendant also denied the claim within 90 days after receiving the
6 claim form, but the WCJ found that defendant had both oral and written notice of
7 Thompson's injury which gave "rise to both a duty and a responsibility to provide a
8 DWC-1 [claim form] and to investigate." Finding that defendant had breached its duty
9 to provide a claim form, the WCJ concluded that the claim had not been denied within
10 90 days, so the injury was presumed compensable.

11 A panel of the Board disagreed with the WCJ's decision. The panel stated in its
12 decision that:

13 "The finding of a breach of duty can result in serious
14 consequences to the employer, possibly creating liability for
15 paying benefits where a claim is not meritorious. Because the
16 consequences are so serious, and language contained in
17 section 5400 is so specific, [the panel] concluded that, to be
18 found to have breached its duty to provide the claim form,
19 the employer must have been *reasonably certain* that the
employee suffered an industrial injury or that the employee
was claiming such an injury. Mere supposition or possibility
of such knowledge is not sufficient to trigger a duty to
provide a claim form." (Emphasis added.)

20 The panel found that the record did not establish a basis to conclude that
21 defendant was reasonably certain that Thompson suffered an industrial injury or was
22 making a claim of industrial injury prior to receipt of the claim form. As no duty to
23 provide a claim form arose, defendant did not breach its duty to provide a claim form
24 and the section 5402 presumption of injury did not arise.

25 Thus, in order to have "knowledge" of an injury or claim of injury sufficient to
26 require defendant to provide a claim form under section 5401(a), the employer must
27 have been reasonably certain, under the particular facts of the case, that the employee

1 suffered or claimed to have suffered an industrial injury. Mere supposition or
2 possibility of such knowledge is not sufficient to trigger a duty to provide a claim form.
3 (*Scott v. Workers' Comp. Appeals Bd.* (2000) 65 Cal.Comp.Cases 1340 (writ denied);
4 *Thompson v. County of Stanislaus, supra*, 25 Cal. Workers' Comp. Rptr. 24; *Paula Insurance*
5 *Company v. Workers' Comp. Appeals Bd. (Hernandez)* (1995) 60 Cal.Comp.Cases 356 (writ
6 denied); *Shoai-Ahari v. Zenith Ins. Co., supra*, 21 Cal. Workers' Comp. Rptr. 14; *Janke v.*
7 *State of California, Department of Justice, supra*, 19 Cal. Workers' Comp. Rptr. 310.)

8 In the determination of whether the reasonable certainty standard has been met,
9 an employer will not be required to guess or speculate as to an employee's
10 unannounced intentions or nebulous, ambiguous comments that only remotely imply a
11 possibility of injury or claim thereof. Nor does this standard require substantiation of
12 industrial causation through a medical-legal report. The reasonable certainty standard
13 is meant to impose on the employer a duty to investigate when he or she has been made
14 aware of facts which would lead a reasonable person to conclude with some certainty
15 that an industrial injury as defined in section 5401(a), has occurred or is being asserted.
16 (Lab. Code, §5402.)

17 In the present matter, defendant denied applicant's claim within the 90-day
18 period after receipt of the claim form. The WCJ found, however, that because defendant
19 breached its duty to provide a claim form, the time within which to deny the claim
20 began on October 16, 1998 and expired on January 15, 1999. Thus, the March 31, 1999
21 notice of denial was not made within the 90-day period, and the injury was presumed
22 compensable under section 5402.

23 The WCJ did not have an opportunity to examine this case under the reasonable
24 certainty standard which we announce today. The Board will, therefore, rescind the
25 WCJ's Finding of Fact, and return this matter to him to determine based on the events
26 of July 20, 1998 or on the events of October 16, 1998, or any other evidence contained in
27 the record, whether defendant was reasonably certain either that the applicant suffered

1 an industrial injury, or that he was claiming such an injury, sufficient to trigger the duty
2 to provide a claim form under Section 5401(a). In determining whether the reasonable
3 certainty standard has been met, the WCJ may, among other things, develop the record
4 to identify the employees who made the July 20, 1998 and October 16, 1998 entries in
5 applicant's personnel record, and further determine whether their knowledge of
6 applicant's alleged industrial injury can be imputed to the defendant under section
7 5402. After the record has been properly developed, the WCJ may issue a determination
8 on whether applicant's claim is presumed compensable under section 5402.

9 Accordingly, this case is ordered returned to the WCJ for any further
10 proceedings deemed appropriate and consistent with the Board's opinion, and new
11 decision at the trial level.

12 The Board notes in passing that this reasonable certainty standard is not the same
13 as the standard used in determining statute of limitations issues. (E.g., *Kaiser Foundation*
14 *Hospital v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57 [50 Cal.Comp.Cases
15 411]; *Reynolds v. Workers' Comp. Appeals Bd.* (1974) 12 Cal.3d 726 [39 Cal.Comp.Cases
16 768]; *Galloway v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.App.4th 880 [63
17 Cal.Comp.Cases 532].)

18 For the foregoing reasons,

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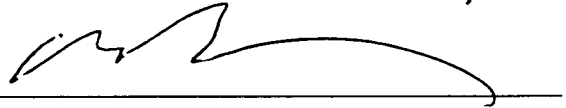
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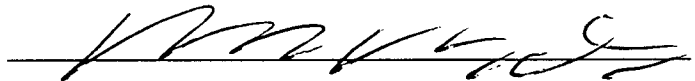
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1 IT IS ORDERED as the Decision After Reconsideration of the Board (En Banc)
2 that, consistent with this opinion, the Findings of Fact dated August 22, 2000 be, and it
3 hereby is, **RESCINDED**, and the matter be **RETURNED** to the workers' compensation
4 administrative law judge for further proceedings and new decision.

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6 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

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9 **MERLE C. RABINE, Chairman**

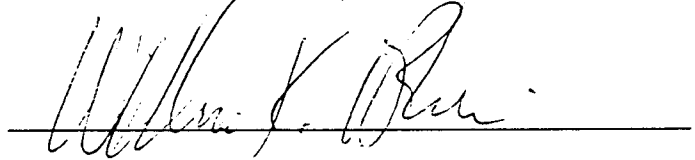
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12 **ROBERT N. RUGGLES, Commissioner**



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23 **COLLEEN S. CASEY, Commissioner**

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26 **WILLIAM K. O'BRIEN, Commissioner**

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DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

APR 20 2001

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD
EXCEPT LIEN CLAIMANTS.



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