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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SALVADOR CONTRERAS,

Petitioner,

v.

WORKERS' COMPENSATION
APPEALS BOARD; CALIFORNIA
INSURANCE GUARANTEE
ASSOCIATION et al.,

Respondents.

2d Civil No. B233103

(W.C.A.B. No. ADJ1622633)

Proceeding to review a decision of the Workers' Compensation Appeals Board. Annulled and remanded with directions.

Robert L. Pearman, the Pearman Law Corporation, for Petitioner Salvador Contreras.

Frank E. Carbonara, Guilford, Steiner, Sarvas & Carbonara, Cheryl E. Tober, Grancell, Lebovitz, Stander, Reubens & Thomas, for respondent California Insurance Guarantee Association.

No appearance for Respondent Workers' Compensation Appeals Board.

In 2004, petitioner Salvador Contreras timely filed a petition to reopen his industrial claim at the Los Angeles district office of the Workers' Compensation Appeals Board (WCAB). His petition was date-stamped and he was not notified it was rejected. In 2010, the WCAB dismissed his petition for lack of jurisdiction because it had been filed in the wrong venue. Two years earlier, however, in 2008, the venue regulations had been amended to provide that a petition to reopen shall not be rejected for filing "solely on the basis that . . . the document is not filed in the proper office of the [WCAB.]" (Cal. Code Regs., tit. 8, § 10397)¹ We conclude the WCAB erred by failing to apply the current venue regulation to Contreras's petition or to grant relief based on mistake, inadvertence, or excusable neglect pursuant to former section 10390. We annul the WCAB's decision and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On August 24, 1999, Contreras, a farm worker, fell seven feet while pruning a tree for his employer, M & C Farm Labor Contractors. He sustained injuries to his neck, back, and chest, and filed a worker's compensation claim. Because his employer's insurance carrier was insolvent, California Insurance Guarantee Association (CIGA) undertook the handling of his claim. (Cal. Ins. Code, §§ 1063 et seq.)

Contreras's claim was heard at the Ventura district office of the WCAB. In June of 2001, the WCAB ruled in favor of Contreras, awarding him a 27 percent permanent partial disability.

On August 24, 2004, within five years from the date of his 1999 injury, Contreras timely filed a petition to reopen his claim on the grounds that he had sustained additional disability arising from his original injury. (Lab. Code, § 5410.) Contreras filed his petition in propria persona and attached a copy of the

¹ All statutory references are to the California Code of Regulations, Title 8, unless otherwise stated.

medical opinion of Dr. Brown. Although Contreras's case was originally tried in Ventura, he filed his petition to reopen at the WCAB's district office in Los Angeles. Under the regulations in effect at that time (former § 10390), his petition should have been filed at the district office of the WCAB where his case had been heard.²

In 2005, Contreras retained counsel. In March of 2007, Contreras requested an expedited hearing and decision, stating that his treating physician, Dr. Uwayday, had recommended that he undergo a lumbar fusion surgery, but that CIGA had refused to authorize the procedure. On March 28, 2007, the WCAB held an expedited hearing and the parties agreed to utilize Dr. Tauber as an Agreed Medical Examiner (AME) in orthopedics to resolve issues of past and future medical treatment recommendations. Specifically, Dr. Tauber's opinion was sought on the subject of the reasonableness and necessity of a prior, unauthorized lumbar fusion and the reasonableness and necessity of the recommended 4-level cervical fusion.

According to Contreras, on September 5, 2007, Dr. Tauber issued a final report, concluding that Contreras's condition had substantially deteriorated and he had sustained new and further disability. Dr. Tauber concluded that Contreras was temporarily totally disabled from May of 2004 through September 5, 2007, and that he should receive additional disability payments for that three- and one-half-year period. CIGA did not make any payments during those three years.

On July 14, 2010, a mandatory settlement conference was held. The matter was continued for trial on the issue of good cause to grant or dismiss Contreras's petition to reopen.

² Although not determinative to our decision, the parties do not dispute that in 2004, the Ventura district office of the WCAB had relocated to Oxnard, California.

On September 22, 2010, a trial was held at the Oxnard district office of the WCAB. The sole issue for determination was whether the WCAB had jurisdiction over the petition to reopen because it had not been filed in the proper venue. Contreras, the only witness, testified that he received an award for his industrial injury in 1999, he did not remember filing a petition to reopen but the signature on the petition was his, he went to Los Angeles to file the petition, he did not have an attorney at that time, and no one told him *not to file* the petition at the Los Angeles office. The case number written on his petition was "VEN 115623," the same case number as his original 1999 case, designating it as a Ventura case.

On November 9, 2010, the workers' compensation judge (WCJ) ruled that the WCAB lacked jurisdiction to hear the petition to reopen. The WCJ reasoned that former section 10390 required that all documents requesting action by the WCAB be filed with the district office where the case is pending, and if filed in the wrong district office "shall not be accepted for filing or deemed filed." Because Contreras filed his petition to reopen in Los Angeles, the WCJ concluded it was "deemed" not filed, the five-year statute of limitation for reopening the claim had expired (Lab. Code, § 5410), and no case law or statute permitted a different result.

On December 2, 2010, Contreras sought reconsideration before the WCAB. Contreras contended that Labor Code section 5410 provided statutory authority for proceeding with his timely filed petition to reopen.³ Second, Contreras contended the WCJ failed to consider the current venue regulation (§ 10397), which provides that a petition to reopen shall not be rejected for filing solely on the basis that the document was not filed in the proper office of the WCAB. Third, Contreras contended the WCJ erred by failing to liberally construe the venue regulations.

³ Labor Code section 5410 provides: "Nothing in this chapter shall bar the right of any injured worker 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 The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period."

(See Lab. Code, § 3202 [workers' compensation statutes should be liberally construed by the courts with the purpose of extending benefits for the protection of persons injured in the course of employment].) Finally, Contreras contended that CIGA waived any statute of limitations defense by stipulating to the AME (Dr. Tauber).

CIGA opposed Contreras's petition for reconsideration. CIGA contended that it could not have waived the jurisdictional defect because it was never served with the petition to reopen in 2004, and agreed in 2007 to utilize the AME on a treatment issue, i.e., on the reasonableness and necessity of a surgery that had been recommended. CIGA argued the regulations in effect in 2004 required the petition to reopen be filed in the district office where the case had been tried, and documents filed in any other district are "deemed not filed." CIGA argued the "law was not ambiguous but is jurisdictional, and not subject to liberal interpretation of Labor Code section 3202."

On December 15, 2010, the WCJ recommended that the WCAB deny the petition for reconsideration. The WCJ concluded that the current venue regulation (§ 10397) "did not exist at the time [Contreras] attempted to file his petition to reopen so it would have been impossible to apply the regulation at that time."

On April 4, 2011, the WCAB, in a 2 to 1 decision, denied Contreras's petition for reconsideration. The majority concluded that former sections 10390 and 10450 required the petition to reopen to be filed in the district office with venue of the matter. Noting that former section 10390 authorized the WCAB to excuse a failure to comply based on mistake, inadvertence, surprise, or excusable neglect, the majority found that Contreras had waived this issue by not submitting any evidence of such at trial or in his petition for reconsideration. The majority concluded the WCJ had followed the applicable regulations and properly concluded the petition to reopen was time-barred.

Judge Caplane dissented, concluding that "[b]y its plain language, Former Rule 10390 gives us the power to excuse a minor breach of the rules regarding filing of papers . . . *sua sponte*, regardless of whether the applicant raised the issue." Judge Caplane concluded that Contreras had amply shown mistake and excusable neglect. Judge Caplane reasoned that although Contreras had not used the words "mistake, inadvertence, surprise, or excusable neglect" in his petition, he essentially made the same argument when he stated that he made an affirmative effort to go to the Los Angeles WCAB district office, have a document date stamped and submitted timely, and included Dr. Brown's medical report with the petition to reopen. Judge Caplane stated: "He was in pro per, and he had not participated in a hearing in his case for over three years. Given his layman's experience and the time that had elapsed, noncompliance with filing technicalities should be excused. '[I]t is the policy of the law to favor . . . a hearing on the merits.' [Citations.]"

DISCUSSION

Contreras contends the WCJ and WCAB erred by failing to apply the current venue regulation set forth in section 10397, or grant relief under former section 10390 based on mistake, excusable neglect, or inadvertence. We agree.

Whether the WCAB properly construed and applied the venue regulations is a question of law we review de novo. Although our interpretation of the applicable statutes is decided de novo, "the WCAB's construction is entitled to great weight unless clearly erroneous. [Citations.]" (*Rivera v. WCAB* (2003) 112 Cal.App.4th 1124, 1133; *Boehm & Associates v. WCAB* (1999) 76 Cal.App.4th 513, 515-516.)

The Labor Code is silent as to the procedures for filing a petition to reopen. The WCAB is authorized to promulgate regulations to provide for the place and time for filing documents. (Labor Code, § 5307.) In 2004, when Contreras filed his petition, section 10390 provided: "After the filing and processing of the application for adjudication, all papers and documents . . . which request action by

the [WCAB] shall be filed with the office of the [WCAB] district office where the case has been assigned for hearing [¶] Documents received in any other district office . . . *shall not be accepted for filing or deemed filed and shall not be acknowledged or returned to the filing party and may be discarded. . . . The [WCAB], in any proceeding, may excuse a failure to comply with this rule resulting from mistake, inadvertence, surprise, or excusable neglect.*" (Former § 10390, as amended by Register 2002, No. 51 (Jan. 1, 2003), and repealed by Register 2008, No. 47 (Nov. 17, 2008); see Workers Comp. Laws of California, LexisNexis (2004 ed.) pp. 968-969; italics added.) Similarly, in 2004, former section 10450 provided that "[a] request for action by the [WCAB] . . . shall be made by petition filed at the district office of the [WCAB] with venue. . . ." (Former § 10450, *supra*, at p. 975.)

In 2008, the Department of Industrial Relations implemented the Electronic Adjudication Management System ("EAMS") which permits the filing of documents electronically and functions as a centralized electronic data repository. With the adoption of this system, the WCAB repealed section 10390 in its entirety and amended section 10450 to eliminate the requirement that petitions to reopen be filed at the district office of the WCAB with venue over the matter. Section 10397, adopted in 2008, provides: "An application for adjudication of a claim, a petition for reconsideration, a petition to reopen, or any other petition or other document that is subject to the statute of limitations or a jurisdictional time limitation *shall not be rejected for filing solely on the basis that: [¶] (1) the document is not filed in the proper office of the [WCAB]. . . .*" (Italics added.)

"New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise. [Citations.]" (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Administrative regulations are subject to the same treatment as statutes. (*McKeon v. Hastings Coll. of Law* (1986) 185 Cal.App.3d 877, 887.) The general presumption of prospectivity does not preclude the application of new procedural or evidentiary statutes to cases pending after enactment. "A statute affecting procedure or providing a new remedy for the

enforcement of existing rights is properly applicable to actions pending when the statute becomes effective, provided that vested rights are not [affected]." (*Dept. of Alcoholic Bev. Control v. Superior Court* (1968) 268 Cal.App.2d 67, 76.) "[T]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future. . . ." [Citation.]" (*Elsner, supra*, at p. 936; *Pebworth v. WCAB* (2004) 116 Cal.App.4th 913, 917.)

"In deciding whether the application of a law is prospective or retroactive, we look to function, not form. [Citations.] We consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies." (*Elsner v. Uveges, supra*, 34 Cal.4th at pp. 936-937.) If the law changes the legal consequences of past conduct by imposing new or additional liability, or substantially affects existing vested or contractual rights, application of the law to an existing action "is forbidden, absent an express legislative intent to permit such retroactive application." (*Id.* at p. 937.) If the law does not have either effect, then its application is permitted. (*Ibid.*; see, e.g., *Pebworth v. WCAB, supra*, 116 Cal.App.4th at pp. 917-918 [amendments to Labor Code applied retroactively to permit employee and employer to settle prospective vocational rehabilitation services for a lump sum not to exceed \$10,000].)

Here, the new venue provision in section 10397 is a procedural change that may be applied to a pending action. It is not a rule that speaks to the rights and liabilities of the parties, but rather to the power of the court to act.

We reject CIGA's contention that application of the new venue regulation has a substantive effect because it revives a time-barred claim and, in effect, creates a new cause of action against CIGA. It is undisputed that Contreras's petition to reopen was timely filed under Labor Code section 5410. Further, the venue regulation set forth in former section 10390 was not jurisdictional. Indeed, section 10390 gave the WCAB discretion to grant relief based on mistake, excusable neglect, or inadvertence. Applying the current venue regulation set forth in section 10397 does not change the legal consequences of past conduct by

imposing a new or additional liability on CIGA, or deprive CIGA of a defense on the merits. (*Elsner v. Uveges, supra*, 34 Cal.4th at p. 937.) Consequently, the WCAB erred by not applying the current venue regulation (§ 10397) to Contreras's petition to reopen.

Even if we held that the current venue regulation (§ 10397) does not apply to Contreras's petition, the WCJ and WCAB erred by concluding that relief under former section 10390 was unavailable. We agree with Judge Caplane that section 10390 gave the WCAB the power to excuse a minor breach of the rules regarding the filing of papers, *sua sponte*, regardless of whether the applicant has raised the issue. As a matter of law, Contreras established adequate grounds for granting relief based on mistake, inadvertence, or excusable neglect. He testified that he personally went to the Los Angeles district office to file his petition. The petition was timely filed and supported by a physician's report. It was date stamped and not rejected by the WCAB district office at that time.⁴ Judge Caplane aptly observed that "neither the majority nor CIGA have offered sufficient reason to ignore the overriding policy in favor of a hearing on the merits in this case, despite former Rule 10390 plainly allowing us to forgive non-compliance with filing technicalities." The result reached by the WCAB is particularly harsh in this case where the filing technicality was raised six years after the petition to reopen was filed, medical treatment and evaluations have continued, and the employee set forth a prima facie claim for relief.

Application of the current venue regulation (§ 10397) in this case effectuates the legislative policy set forth in Labor Code section 3202 to construe workers' compensation provisions liberally in favor of extending benefits to injured

⁴ Pursuant to CIGA's request, we have taken judicial notice of the EAMS printout for this case. The document establishes only that Contreras's petition to reopen was not listed on the printout, not that the petition to reopen was rejected in 2004 by the WCAB district office.

workers. It also effectuates the policy of the law favoring trial and disposition of cases on their merits. (*Fox v. WCAB* (2002) 4 Cal.App.4th 1196, 1205.)

Phelps v. Worker's Compensation Appeals Board (1997) 62 Cal. Comp. Cases 377, and *City of San Bernardino v. Worker's Compensation Appeals Board* (1997) 62 Cal. Comp. Cases 798, cited by CIGA and the WCAB, are inapposite. Those cases predate the adoption of the current venue regulation set forth in section 10397.

We annul the WCAB's order denying Contreras's petition for reconsideration. We remand the matter to the WCAB with instructions to grant the petition for reconsideration and return the case to the WCJ for resolution of the petition to reopen on the merits.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.