WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NOE MORALES, ***Applicant,*** **vs.** **FMF RACING; WESTLAND INSURANCE C/O GALLAGHER BASSETT,** ***Defendants.***	**Case Nos. ADJ7756578** **ADJ7757568** **(Los Angeles District Office)** **OPINION AND ORDERS DENYING RECONSIDERATION, GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Applicant, Noe Morales, and defendant, FMF Racing, by and through its insurer, Westland Insurance, seek reconsideration from the Joint Findings, Award and Order, issued October 25, 2012, in which a workers' compensation administrative law judge (WCJ) found applicant sustained an industrial injury on March 23, 2011 to his right arm, with other body parts deferred, but did not sustain a cumulative trauma injury through March 25, 2011, to multiple parts of his body. The WCJ found applicant's claim of a specific injury is not barred as a post-termination claim under Labor Code section 3600(a)(10).

Applicant contests the WCJ's finding that he did not sustain a cumulative trauma injury as alleged, arguing that the medical evidence shows applicant did sustain injury "irrespective of subjective credibility concerns . . ."

Defendant contends the WCJ erred in reversing his prior determination and finding applicant's claim of a specific injury on March 23, 2011 is not barred as a post-termination claim under Section 3600(a)(10). Defendant argues that applicant's failure to report his injury to a supervisor until after he was notified that he was being terminated while on probation for excessive absenteeism is a sufficient basis to bar his claim.

The WCJ has prepared a separate Report and Recommendation on Petition for Reconsideration for each petition.

I.

We have considered the allegations and arguments set forth in applicant's Petition for Reconsideration, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of November 27, 2012, which considers, and responds to, each of the applicant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's Findings and Award in ADJ7757568, and deny applicant's petition for reconsideration.

II.

With regard to defendant's petition for reconsideration, for the reasons set forth below, we shall grant the petition and amend the determination to find applicant's claim in ADJ7756578 for a specific injury on March 23, 2011, is barred as a post-termination claim under Section 3600(a)(10).

Applicant claims he sustained an injury to shoulder, arm, hand, back and neck on March 23, 2011, while employed by FMF Racing. Applicant testified that he hurt his elbow at work on March 23, 2011, when he was working with a hammer and missed hitting a part, but the hammer kept going and he felt his elbow pop. Though he acknowledged that he was aware of the company policy to report injuries immediately, he did not report his injury at work that day. Because his arm hurt and was swollen, he did not go to work on March 24, 2011. However, he did not seek medical treatment, testifying that he was waiting for his employer to check it out and send him to a clinic. He testified that he called into work at 5:30 in the morning on March 24, 2011, and left a message on an answering machine to report that he hurt his elbow and was not coming into work.

He returned to work around 6:00 am on March 25, 2011, still having pain in his right elbow. Though he testified that he did not seek medical treatment the previous day because he was waiting to inform his employer and be sent to a medical clinic, he did not tell his supervisor, Mr. Raul Ruiz, that he had injured his elbow on March 23, 2011. He did not tell anyone at the company why he missed work the day before, because he had already left the message. He did not confirm with anyone whether the message he left the day before had been received. He worked until 2:30 in the afternoon, when he was called into the office for a meeting with Mr. Beck, the Human Resource Manager, and Mr. Ruiz. Mr.

Beck told him that he was being terminated because he did not come into work on March 24, 2011. Applicant testified that he offered to show them his cell phone to show that he had called in on March 24, 2011, but they did not want to see it.

Mr. Beck gave him an accident report form to fill out and took applicant to a medical clinic, where he received medical treatment for an injury to his right elbow. The medical records prepared subsequent to applicant's termination demonstrate he sustained an injury to his elbow.

Applicant testified that when he worked on March 25, 2011, he used his left arm because he was favoring his right arm. He testified that a co-worker, Mauricio Hernandez, noticed that he was working with his left arm and applicant told him about his injury the previous day. Mr. Hernandez testified on applicant's behalf and corroborated applicant's testimony that he saw applicant working with his left arm and was told applicant injured his elbow on March 23, 2011. Mr. Hernandez also testified that he was not applicant's supervisor and he never witnessed applicant reporting his injury to a supervisor.

Applicant acknowledged that he had been repeatedly written up for being tardy or absent. He was given warnings and placed on probation in 2006, 2008 and 2010. He was suspended from work for one week on December 27, 2010, for chronic absenteeism. At trial he did not recall being placed on a 90-day probation at that time, though defendant's personnel records do show that applicant was informed that he was placed on probation for his chronic absenteeism

Mr. Beck testified that on March 23, 2011, he was not notified by anyone, including applicant, that applicant had been injured. On March 24, 2011, he was not notified that applicant had been injured or that he was not coming into work that day because of the injury. On March 25, 2011, prior to his meeting with applicant, no one told him that applicant had been injured at work. He checked the log of emails for March 24, 2011, to see if there were any absences for applicant listed. He did not see any.

Mr. Beck prepared a log sheet that memorialized applicant's history of absenteeism, as verified by the records in his personnel file which defendant entered into evidence. While Mr. Beck testified that he could not recall when he compiled the log, he did not prepare it for the trial or to justify applicant's termination. The log sheet shows applicant was subject to discipline for being tardy or absent from work on repeated occasions between 2005 and his termination in 2011. He was suspended from work for one

week on June 11, 2008, for being absent 13 times and tardy 10 times since his previous warning on February 7, 2008.

He was later placed on a 90-day probation on February 15, 2010 for being absent 19 times since May 1, 2009. He was again placed on a 90-day probation on August 2, 2010 for failing to call in when he was late for his shift. On December 27, 2010, he was suspended for one week for chronic absenteeism, and placed on a 90-day probation with a warning that his employment would be terminated if he missed one day of work. Applicant was absent on March 3, 2011, and on March 24, 2011.

Mr. Beck testified to meeting with applicant on March 25, 2011, at which time he informed applicant that he was being terminated. Applicant did not report his injury to Mr. Beck until after he had been informed of his termination. According to Mr. Beck, applicant begged for his job back and when told he could not have it back, applicant reported the injury to his right elbow. At that time, applicant did not report that he had sustained injury to any other part of his body.

III.

Labor Code section 3600(a)(10) provides, in relevant part:

> Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where 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:
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> **(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.
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> **(B)** The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.

Under this section, no compensation shall be paid for an injury that occurs prior to a notice of termination unless applicant establishes that the employer received notice of the injury prior to the notice of termination, or there are medical records that contain evidence of the injury prior to the notice of termination.

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The question here is whether the evidence demonstrates that the employer had knowledge of applicant's claim of injury prior to, or subsequent to, applicant's notice of termination. While initially concluding in a Findings and Order issued July 30, 2012, that applicant's claim is barred, the WCJ reversed himself and issued the instant determination in which he found the prior notice requirement was satisfied by the injured worker's report of his injury contemporaneously with the notice of termination. The WCJ relied upon the rationale in a panel decision, *Dover v. Fresh Start Bakeries, Inc.* (2006) Cal. Wkr. Comp. P.D. LEXIS 53, wherein the bar of Section 3600(a)(10) was held inapplicable where the injured worker gave notice of his injury at his first opportunity, which was contemporaneous with his notice of termination.

We find *Dover* is not controlling on its facts, and is not necessarily a correct statement of principle to control cases which have different fact situations. In that case, the injured worker sustained an injury to his back, which was witnessed by a co-worker. He was unable to report his injury to his supervisor because the supervisor had already left work for the day. He took his first opportunity to report his injury the following morning, while he was walking with his supervisor to the front office, to a meeting with the office manager, at which time he was notified that he was being terminated. The Appeals Board panel concluded that where it is evident that the claim of injury was not made in retaliation for the termination of employment, the bar in Section 3600(a)(10) should not apply where there was contemporaneous delivery of the notices of injury and termination.

Here, in contrast to *Dover*, applicant's delay in notifying his supervisor of his injury was not caused by his supervisor's absence from work. There is no evidence that applicant was incapable of reporting his injury on March 23, 2011. In fact, he testified that he was aware of his employer's policy that he should report his injury immediately. Applicant has offered no reason for his failure to comply with this policy on March 23, 2011.

Applicant claims he gave notice of his injury and his absence from work when he telephoned his employer at 5:30 in the morning on March 24, 2011, and left a message on an answering machine. There is conflicting evidence as to whether applicant did in fact inform his employer as he testified. Mr. Beck testified that he received no messages from applicant on March 24, 2011. Applicant testified that he

offered to show his cell phone to his supervisor to verify he made the call. His supervisor did not corroborate that testimony. Applicant did not offer any records from his cell phone provider to establish he made the phone call.

On March 25, 2011, applicant worked from 6:00 am to 2:30 pm without giving notice of his injury to his supervisor. Applicant's only stated reason for not giving notice was his assumption that he gave sufficient notice in his phone message the prior morning. However, applicant had testified that he did not seek medical treatment on March 24, 2011, because he was waiting to report it at work so he could be sent to a medical clinic. When he came to work on March 25, 2011, applicant did not avail himself of the opportunity to report his injury in order to obtain medical treatment. He chose instead to continue to work, until he was informed that he was being terminated for his absenteeism.

Had applicant not been called into the meeting with Mr. Beck and Mr. Ruiz, when he received his notice of termination, there is no reason to believe from applicant's evidence that he intended to give notice of his injury. In contrast to the injured worker in *Dover*, applicant did not take his first opportunity to report his injury to his employer. Rather, he delayed two days before giving notice, and then gave notice only after his plea not to be fired for his chronic absenteeism was denied.

On these facts, we find the employer's affirmative defense of a post-termination claim should be sustained. Accordingly, we shall grant defendant's petition for reconsideration and will amend the Joint Findings and Award to find applicant's claim of injury on March 23, 2011 is barred under Labor Code section 3600(a)(10).

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For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration, filed November 13, 2012, is **DENIED**.

IT IS FURTHER ORDERED that Defendant's Petition for Reconsideration, filed November 13, 2012 be, and hereby is, **GRANTED**, and as our Decision After Reconsideration, the Joint Findings, Award and Order, issued October 25, 2012, is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, NOE MORALES, born while employed on March 23, 2011, at Rancho Dominguez, California, by FMF RACING, insured for workers' compensation by WESTLAND INSURANCE c/o GALLAGHER BASSETT, claims to have sustained injury arising out of and occurring in the course of employment to the right shoulder, arm, hand, back and neck. (ADJ7756578)
2. Applicant, while employed during the period September 29, 1993 through March 25, 2011, at Rancho Dominguez, California, by FMF RACING, insured for workers' compensation by WESTLAND INSURANCE c/o GALLAGHER BASSETT, did not sustain injury arising out of and occurring in the course of employment to the right shoulder, arm and hand, back, neck, wrist, nervous system, eye, ear, psyche, respiratory system, throat and ankle. (ADJ7757568)
3. The post-termination defense of Labor Code Section 3600(a)(10) does apply to the March 23, 2011 claim.
4 The post-termination defenses of Labor Code Sections 3600(a)(10) and 3208.3 are moot with regard to the cumulative trauma claim

ORDER (ADJ7756578)

IT IS ORDERED that Applicant take nothing by the filing of his application for adjudication of claim, dated April 5, 2011, for an injury occurring March 23, 2011.

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ORDER (ADJ7757568)

IT IS ORDERED that Applicant take nothing by the filing of his application for adjudication of claim, dated April 5, 2011, for an injury during the period September 29, 1993 through March 25, 2011.

WORKERS' COMPENSATION APPEALS BOARD

ALFONSO J. MORESI

I CONCUR,

DEIDRA E. LOWE

I CONCUR AND DISSENT (*See Concurring and Dissenting Opinion*),

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 14 2013

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

NOE MORALES
TELLERIA, TELLERIA & LEVY
GRAHAM & GRAHAM

SV/jp

CONCURRING AND DISSENTING OPINION

I concur in the majority opinion to deny applicant's petition for reconsideration and affirm the workers' compensation administrative law judge's (WCJ) conclusion that applicant did not establish he sustained a cumulative trauma injury, as alleged. However, I dissent from the decision to grant defendant's petition, as I do not agree that applicant's claim that he sustained a specific injury on March 23, 2003, is barred under Labor Code section 3600(a)(10). I would affirm the WCJ's determination that the post-termination bar does not apply to applicant's claim under the circumstances presented here.

There is conflicting evidence as to whether the employer had notice of applicant's injury prior to his termination. First, it should be noted that the medical evidence establishes an injury to applicant's right elbow, and the testimony of Mauricio Hernandez corroborates applicant's claim that he injured his elbow on March 23, 2011. Applicant testified that he did report his injury when he telephoned his employer on March 24, 2011. He also testified that he offered to prove he made the telephone call by showing Mr. Beck and Mr. Ruiz his call log on his cell phone. While defendant claims the employer did not receive a telephone message from applicant, there was no testimony from anyone responsible for reviewing the messages left on the answering machine on March 24, 2011. The only evidence provided was Mr. Beck's testimony that he checked email logs, but there was no evidence of the relationship between the answering machine message and email logs. Thus, Mr. Beck's testimony does not rebut applicant's testimony that he called and left a message that he sustained an injury.

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As the determination here turns on the weight to be accorded applicant's testimony, I would resolve the conflict in the evidence in applicant's favor, and would find his claim is not barred under Labor Code section 3600(a)(10). (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].)

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 14 2013

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

NOE MORALES
TELLERIA, TELLERIA & LEVY
GRAHAM & GRAHAM

SV/jp