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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARCOS BOLANOS,

Petitioner,

v.

WORKERS' COMPENSATION
APPEALS BOARD and RAMIRO
ZAPATA JIMENEZ et al.,

Respondents.

DIRECTOR OF INDUSTRIAL
RELATIONS AS
ADMINISTRATOR OF THE
UNINSURED EMPLOYERS
BENEFITS TRUST FUND,

Real Parties in Interest.

B276784

(W.C.A.B. Case
No. ADJ587312)

ORIGINAL PROCEEDINGS to review a decision of the
Workers' Compensation Appeals Board. Reversed and remanded
with directions.

Law Offices of Mark B. Simpkins and Mark B. Simpkins for
Petitioner.

Law Offices of Richard A. Torres and Richard A. Torres for
Respondent Ramiro Zapata Jimenez.

No appearance for Respondent Workers' Compensation
Appeals Board.

Christopher G. Jagard, Chief Counsel, Steven A. McGinty,
Assistant Chief Counsel, Dora M. Linzan, Staff Counsel and
Christopher Conte for Real Parties in Interest.

An employee of an uninsured contractor was injured at
work and filed a timely workers' compensation claim, naming
the uninsured contractor as the employer. The employee joined
the Uninsured Employers Benefits Trust Fund (UEBTF) as a
party defendant.

Six years after the injury occurred, the UEBTF joined the
property owner as a party defendant. The Workers'
Compensation Appeal Board (appeals board), in a split decision,
held that the statute of limitations was tolled.

We hold that the statute of limitations was not tolled.
Accordingly, we annul the decision of the appeals board and
remand with directions to dismiss the proceedings as to the
property owner.

FACTUAL AND PROCEDURAL SUMMARY

A. Accident and Injury

The applicant, Ramiro Zapata Jimenez (Zapata), was hit by
a car driven by Jose Martin Arreola Mejia (Mejia). The accident

took place on May 19, 2003 in Long Beach where Zapata and Mejia were working.

As a result of the accident, Zapata sustained injury to his head, brain, right knee, internal system, and urinary tract. There is no dispute that Zapata is totally and permanently disabled.

B. *The Employers, Luis Aragon and Marco Bolanos*
Mejia and Zapata worked for Luis Aragon (Aragon). Antonio Lopez (Lopez) was the supervisor or foreman. Aragon was refurbishing an apartment complex located at 1617 Sherman Place in Long Beach for the owner of the complex, petitioner Marco Bolanos (Bolanos).

Aragon was a licensed contractor but his workers' compensation insurance had lapsed on April 9, 2002. Aragon filed for bankruptcy in 2011.

Bolanos did not recall whether he asked Aragon if he had workers' compensation insurance when Bolanos hired Aragon to refurbish the apartment complex on Sherman Place. Bolanos did not inquire with the Contractors State License Board about the status of Aragon's license.

On August 26, 2003, Zapata's counsel sent a letter to Bolanos notifying him of Zapata's injury.¹ This letter was

¹ The letter advised Bolanos that the attorney represented Zapata in his claims for personal injuries and related damages arising out of the accident while Zapata was working on Bolanos's property. The letter requested all copies of contracts related to the construction at the property. In addition, the letter

Bolanos' first notice of Zapata's accident and injury. Bolanos did not reply to the letter and did not at any time after the accident provide a claim form to Zapata ²

Zapata sued Bolanos in 2011, represented by the same attorney who represented him in the workers' compensation proceeding. The court sustained Bolanos's demurrer without leave to amend in 2012 based on the statute of limitations.

C. *The Workers' Compensation Claim and its Parties*

Zapata filed a timely workers' compensation claim on August 1, 2003 identifying Aragon as his employer.

Upon confirming Aragon's uninsured status from the Workers' Compensation Insurance Rating Bureau on August 28, 2003, Zapata joined the UEBTF as a defendant on February 26, 2004.

The workers' compensation judge (WCJ), on the UEBTF's motion, joined Bolanos as a party defendant on June 17, 2009.

Bolanos raised the statute of limitations and laches as defenses. In addition, Bolanos objected to the prior 2007 testimony of Mejia, who was no longer available as a witness,

requested that Bolanos forward the letter to his legal representative and/or liability insurance carrier.

² Labor Code section 5401 requires an employer to provide an injured employee with a workers' compensation claim form and notice of potential eligibility for workers' compensation benefits. (Lab. Code, § 5401, subd. (a).) Further statutory references are to the Labor Code unless indicated otherwise.

because Bolanos did not have an opportunity to cross-examine Mejia.

D. *Ruling of the WCJ*

The WCJ issued findings and an award on July 31, 2015. The WCJ found Bolanos to be the ultimate employer of Zapata because Aragon was both uninsured and unlicensed by operation of law. The WCJ rejected the statute of limitations defense, finding Zapata's attorney's knowledge that Bolanos was the property owner did not demonstrate knowledge by Zapata that Bolanos was a "derivative employer" and therefore a defendant in the case.

The WCJ also rejected Bolanos' assertion of due process issues based on his inability to cross-examine Mejia, concluding it had been Bolanos' duty to subpoena Mejia and cross-examine him, if necessary.

Bolanos petitioned for reconsideration.

E. *Rulings of the Appeals Board*

A majority of the appeals board, adopting and incorporating the WCJ's report, affirmed the WCJ's findings and award. The majority found the statute of limitations had been tolled because Bolanos failed to give Zapata notice of his workers' compensation rights. ³The majority also concluded that the letter requesting

³ At oral argument, counsel for the Appeals Board argued that the statute of limitations does not apply to claims by the UEBTF, because such a claim is in the nature of an indemnity action. Because the appeals board did not rely on that ground, we will not address it here.

information from Bolanos by Zapata's attorney did not establish that Zapata knew that Bolanos was the ultimate hirer, i.e., the employer, and that, in any event, knowledge on the part of the attorney could not be imputed to the injured employee.

The dissent asserted that Zapata's claim should be barred by the statute of limitations, relying on the August 26, 2003 letter from Zapata's attorney as evidence of Zapata's knowledge of his rights against Bolanos within a few months of the industrial injury. The dissent also referred to the policy of avoiding the presentation of stale claims, finding that Zapata's claim against Bolanos violated this policy. The dissent concluded that tolling was appropriate only where the injured employee was unaware of his rights to file a workers' compensation claim, where the employer caused the ignorance, and where the employee filed a late claim as a consequence.⁴

We granted Bolanos' petition for a writ of review.⁵

⁴ Despite the disagreement regarding the statute of limitations issues, the WCJ and appeals board concurred regarding the claimed due process issues regarding Bolanos' inability to cross-examine Mejia.

⁵ We directed the parties to respond to the question whether a person can be held to the duty of notifying an employee of his or her rights under workers' compensation law when there is no evidence that that person knew that he or she was in fact an employer.

DISCUSSION

A. *Bolanos Is Properly Treated as an Employer*

To maintain a valid license issued by the California Contractors State Licensing Board, the contractor must maintain workers' compensation insurance. (Bus. & Prof. Code, § 7125, subd. (a); Lab. Code, § 3700 [requiring every employer to secure the payment of compensation by obtaining workers' compensation insurance or obtaining a certification of consent to self-insure].)

In workers' compensation proceedings, "[t]here is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor." (§ 2750.5.) "For workers' compensation purposes, under section 2750.5, the hirer of a contractor for a job requiring a license is the statutory employer of the unlicensed contractor. In addition, the hirer is the statutory employer of those workers employed by the unlicensed contractor." (*Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal.App.4th 227, 233, citations omitted.) The presumption that the person who employs the unlicensed contractor is the employer is conclusive. (*Ibid.*)

On April 9, 2002, the date that Aragon's coverage lapsed, Business and Professions Code section 7125.2 provided for an automatic suspension of a contractor's license by operation of law for failure to maintain workers' compensation insurance. (Bus. & Prof. Code, § 7125.2, subd. (a), effective to December 31, 2002.)

In 2002, the registrar of contractors⁶ was required to notify any licensee who failed to maintain workers' compensation insurance that the license was to be automatically suspended 30 days from the date of the notice. (*Ibid.*) The record presented in this case does not include evidence of such a notice from the registrar to Aragon in 2002; the parties dispute whether Aragon's license was suspended in 2002.

However, effective January 1, 2003, Business and Professions Code section 7125.2 was amended to eliminate the provision requiring notice. As amended, the statute provides that the license suspension is effective upon the earlier of "the date that the relevant workers' compensation insurance lapses" (Bus. & Prof. Code, § 7125.2, subd. (a)(1)) or "the date that workers' compensation coverage is required to be obtained." (Bus. & Prof. Code, § 7125.2, subd. (a)(2), effective January 1, 2003.) Thus, Aragon's license was suspended by operation of law on January 1, 2003. The presumption that Bolanos was the statutory employer of Zapata is conclusive. (*Cedillo v. Workers' Comp. Appeals Bd.*, *supra*, 106 Cal.App.4th at p. 233, citations omitted.)

B. *The Applicable Statute of Limitations Is One Year From the Date of Injury*

Section 5405 provides that a workers' compensation claim must be filed one year after the date of injury. "The purpose of

⁶ Business & Profession Code section 7011, requires the Contractor's State License Board to appoint a registrar of contractors to serve as the executive officer of the Board and to carry out various administrative functions.

any limitations statute is to require ‘diligent prosecution of known claims thereby providing necessary finality and predictability in legal affairs, and ensuring that claims will be resolved while the evidence bearing on the issues is reasonably available and fresh.’” (*Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd.* (1985) 39 Cal.3d 57, 62, citations omitted.)

A new defendant cannot be added after the statute of limitations has run. (*McGee Street Productions v. Workers’ Comp. Appeals Bd.* (2003) 108 Cal.App.4th 717, 724-725 (*McGee*)). “The general rule is well settled that, when new parties are brought in by amendment, the statute of limitations continues to run in their favor until thus made parties. The suit cannot be considered as having been commenced against them until they are made parties.” (*Ingram v. Department of Industrial Relations* (1930) 208 Cal. 633, 643; see also *McGee, supra*, 108 Cal.App.4th at pp. 724-726.)

Zapata did not file a claim against Bolanos within one year of the injury. Bolanos became a party to the workers’ compensation proceedings only after he was joined as a defendant on the UEBTF’s motion in 2009.

C. *The Statute of Limitations Is Not Tolled*

The statute of limitations is tolled if the employee is unaware of his right to file a workers’ compensation claim:

“An employee would be prejudiced without the tolling if he has no knowledge that his injury might be covered by workers’ compensation before he receives notice from the employer. Requiring prejudice to toll the limitations period promotes the

policy behind the notification statutes: to protect those unaware of their rights. If between the date of injury and the date the employer breaches, an employee gains the requisite actual knowledge of his workers' compensation rights, he will not be prejudiced by failure of his employer to notify him of those rights, and there is no reason to toll the statute of limitations even if his employer never advises him of his workers' compensation rights. If the employee remains ignorant of his rights past the time the employer breaches its duty to notify, the employee will be prejudiced from the date of breach until the employee gains actual knowledge that he may be entitled to benefits under the workers' compensation system." (*Kaiser Foundation Hospitals, supra*, 39 Cal.3d 57, 64-65.)

"The clear purpose of these rules is to protect and preserve the rights of an injured employee who may be ignorant of the procedures or, indeed, the very existence of the workmen's compensation law." (*Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726, 729.) The knowledge that is required is of the worker's compensation system, that is of the potential eligibility to file a worker's compensation claim. (*Kaiser Foundation Hospitals, supra*, 39 Cal.3d at pp. 64-65.)

Zapata was not ignorant of his right to apply for benefits under the workers' compensation laws for this injury, as demonstrated by his filing a workers' compensation claim on August 1, 2003. After that date, there was no need for a claim form and "notice of potential eligibility for benefits." (*Kaiser Foundation Hospitals, supra*, 39 Cal.3d at pp. 64-65, § 5401.) Nor was there any reason for tolling the statute of limitations after that date. After August 1, 2003, the only

arguable basis for tolling the statute of limitations would be Bolanos's failure to inform Zapata that Bolanos was Zapata's statutory employer.

Bolanos, however, had no legal duty to inform Zapata that Bolanos was Zapata's employer for the purposes of workers' compensation laws. Neither section 5401, nor any other law or regulation, imposes any such duty on Bolanos.

Moreover, Zapata was on notice that Bolanos could well be liable for Zapata's injuries. As of August 26, 2003, Zapata's lawyer had filed a worker's compensation claim and knew that both Aragon and Bolanos had potential liability. By February 24, 2004 when the UEBTF was joined as a defendant, Zapata's lawyer knew Aragon was uninsured. This knowledge was obtained well before the statute of limitations expired.⁷

⁷ The UEBTF asserted at oral argument that Zapata's counsel's knowledge was not properly imputed to Zapata, relying on *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th 853. In that case, arising in the context of a single employer situation, the employer took the position that the injury was not industrial; the court concluded that the statute was tolled until the injured employee determined his injury was work related. Knowledge was not inferred from the employer's retention of counsel in relation to an earlier injury. The court's rejection of the general rule of imputation, relying on *Kaiser Foundation Hospitals, supra*, 39 Cal.3d 57, a conclusion challenged by the dissent in that case does not resolve the issue here. Zapata was aware of his injury and far from having only general knowledge of the existence of the system, retained counsel and filed a claim for the injury. We agree with the dissent's conclusion in *Carls* that it is "difficult to conclude that

The UEBTF contends that Bolanos was under a duty to comply with section 5401 and provide Zapata with a claim form and notice of potential eligibility for workers' compensation benefits. However, as explained above, this is only relevant where the employee does not know of his right to file a claim: if the employer does not comply with section 5401, and the employee remains ignorant of his or her rights, the statute of limitations is tolled. Here, although Bolanos never complied with section 5401, Zapata's filing of a timely workers compensation claim demonstrates he was not ignorant of his rights.

This record demonstrates no grounds for tolling the statute of limitations.

the Supreme Court intended that the tolling rule it announced in *Kaiser* would continue to apply once the applicant's retained attorney appears in workers' compensation proceedings on his behalf and takes action with respect to the particular injury." (*California Ins. Guarantee Assn.*, *supra*, 163 Cal.App.4th at p. 869.)

DISPOSITION

The decision of the Workers' Compensation Appeals Board is annulled and the case is remanded with directions to dismiss the proceedings as to Marco Bolanos.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.