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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

T AND T CONSTRUCTION,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD and
CURTIS RAY HILLMAN, Deceased, etc.,

Respondents.

C067171

(WCAB No. ADJ6530698)

Respondent Curtis Ray Hillman was injured while working as a road grader for petitioner T and T Construction (T and T) and subsequently died.¹ In this review of a Workers' Compensation Appeals Board (Board) decision denying T and T's petition for reconsideration, we must determine whether the workers' compensation judge (WCJ) properly construed Labor Code section 5407 to permit Hillman's surviving beneficiary to pursue

¹ Petitioner's name appears throughout the record in many variations, including T&T Construction, TT Construction, and T and T Construction. We have elected to use the name as it appears on the order denying reconsideration, T and T Construction.

a petition for serious and willful misconduct filed within 12 months of the date of injury but not served until two and one-half months later. We agree with the WCJ's construction of the statute and shall deny the petition for review.

FACTUAL AND PROCEDURAL BACKGROUND

On August 25, 2008, Hillman sustained a serious injury while on the job. Hillman died on September 11, 2008.

On September 10, 2008, Hillman's counsel filed an application for adjudication of claim with the Board and served T and T with a copy of the application.

Hillman's counsel filed a petition for serious and willful misconduct with the Board on August 20, 2009. The petition was never served on T and T. On November 6, 2009, counsel filed with the Board an amended petition for serious and willful misconduct. That same day, counsel served T and T with a copy of the amended petition.

T and T submitted briefs, arguing that because Hillman failed to file and serve the petition for serious and willful misconduct within the 12-month limitations period, the proceeding is barred.

The parties submitted the matter to the WCJ on the proper interpretation of the limitations period set forth in Labor Code section 5407.² Specifically, the parties asked the WCJ to consider whether an applicant must commence a serious and

² All further statutory references are to the Labor Code unless otherwise designated.

willful misconduct proceeding by filing the claim and giving notice to the employer, or whether filing the claim without employer notice is sufficient. The WCJ found Hillman's claim for increased benefits was not barred by the statute of limitations in section 5407.

T and T filed a petition for reconsideration. The WCJ filed a report recommending denial of the petition, noting, "[T]he determination regarding whether the case could go forward was not based only on the meaning of one word. The intent of the statute and the impact on the employer were both considered. [¶] . . . [¶] The purpose of the Statute of Limitations is to allow the employer sufficient notice to prepare a defense in close proximity to the event. The service of the original claim for increased benefits was late by 2[-]1/2 months. This delay did not seem sufficiently egregious to warrant barring the applicant the right to pursue her claim when the jurisdictional threshold of filing with the WCAB was made within the statutory time limits." The Board denied T and T's petition for reconsideration, adopting the WCJ's reasoning.

T and T filed a timely petition for writ of review. T and T asks us to find that Hillman's petition for serious and willful misconduct was untimely under section 5407 because it was not served on T and T within the limitations period.

DISCUSSION

I.

We are not bound by the conclusions of the Board on questions of law, such as the interpretation of a statute.

(*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233.) Therefore, we interpret section 5407 de novo. (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1290.) However, the Board's construction is entitled to great weight unless clearly erroneous. (*McGee Street Productions v. Workers' Comp. Appeals Bd.* (2003) 108 Cal.App.4th 717, 722-723 (*McGee*).)

We begin by construing the actual language of the statute to determine the legislative intent. If we find ambiguity in the statutory language, we refer to extrinsic sources to ascertain legislative intent. (*Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 825.)

"The statute should be interpreted consistently with its intended purpose, and harmonized within the statutory framework as a whole." (*McGee, supra*, 108 Cal.App.4th at p. 723.) In addition, section 3202 provides that statutes contained in divisions 4 and 5 of the Labor Code, which include section 5407, "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

II.

Section 5407 states: "The period within which may be commenced proceedings for the collection of compensation on the ground of serious and willful misconduct of the employer, under provisions of Section 4553, is as follows: [¶] Twelve months from the date of injury. This period shall not be extended by

payment of compensation, agreement therefor, or the filing of application for compensation benefits under other provisions of this division."

T and T argues that "commenced" as used in section 5407 plainly "means and refers to filing and serving" a serious and willful misconduct petition. T and T contends such a reading comports with other sections of the Labor Code.

Specifically, T and T cites section 5400, which provides that "no claim to recover compensation under [division 4 of the Labor Code] shall be maintained unless . . . there is served upon the employer notice in writing" T and T also references the California Code of Regulations, which discusses the filing and service of applications and provides that proceedings before the Board shall be initiated by filing an application for adjudication. (Cal. Code Regs., tit. 8, § 10400, subd. (a).) The applicant shall "concurrently serve a copy of the application and any accompanying documents on all other parties and lien claimants." (Cal. Code Regs., tit. 8, § 10400, subd. (e).) Therefore, T and T argues, the "usual, ordinary, commonsense meaning of 'commence' as used in Section 5407 means file and serve when read in harmony with other limitations periods and administrative construction applicable to workers' compensation claims."

We begin, however, with the plain meaning of the statutory language. Section 5407 states: "The period within which may be *commenced* proceedings for the collection of compensation on the ground of serious and willful misconduct of the employer, under

provisions of Section 4553, is as follows: [¶] Twelve months from the date of injury. . . ." (Italics added.)

The Supreme Court in *Cuadra v. Millan* (1998) 17 Cal.4th 855 (*Cuadra*) discussed the concept of "filing" as commencing an action: "Although some judicial opinions—including the decision under review—speak of the filing of a complaint as 'tolling the statute of limitations,' the usage is imprecise and potentially misleading. More accurately, the plaintiff's act of filing the complaint fixes the date on which the 'action is commenced' [citation], thus allowing the defendant and the court to determine whether the action is 'commenced within the period[] prescribed' by the applicable statute of limitations [citation], and hence is timely." (*Id.* at p. 864.)

At least one appellate court has construed section 5407 to require only filing: "Section 5407 provides that a claim for serious and willful misconduct must be *filed* within one year of the date of injury." (*McGee, supra*, 108 Cal.App.4th at p. 723, italics added.) In *McGee*, the appellate court found a claimant could not add a new *party* after the statute of limitations, based on the date of filing, had run.

As illustrated by the *Cuadra* and *McGee* cases, the term "commenced," when used in conjunction with a statute of limitations, connotes filing of the application, not both filing and service. If the Legislature intended to deviate from this common meaning to include service, it would have included service in the language of section 5407.

T and T argues such an interpretation runs afoul of the Legislature's intention that employers receive adequate notice of serious and willful misconduct claims by requiring employees to commence proceedings by both filing and serving the petition within 12 months. According to T and T, this allows the employer an opportunity to promptly obtain counsel and investigate the claim within a time frame reasonably close to the death or injury.

However, we must interpret section 5407 "consistently with its intended purpose, and harmonized within the statutory framework as a whole." (*McGee, supra*, 108 Cal.App.4th at p. 723.) In that respect, T and T points to the requirements of section 5400 that "no claim to recover compensation under [division 4 of the Labor Code] shall be maintained unless . . . there is served upon the employer notice in writing" as support for its argument that "commenced," as used in section 5407, means filed and served. Section 5400 does not advance T and T's argument, but runs counter to it. As noted by Hillman's counsel at oral argument, section 5403 provides that "The failure to give notice under section 5400, or any defect or inaccuracy in a notice is not a bar to recovery . . . if it is found as a fact in the proceedings for the collection of the claim that the employer was not in fact misled or prejudiced by such failure." This suggests that whatever consequences might attach to defective service of notice, it is not essential to the commencement of an action. Rather, the adequacy of notice is measured by whether the employer was misled or prejudiced by

failures or defects in service. Here, the WCJ found that T and T was not aggrieved by the belated service of notice, and T and T makes no claim to the contrary.

Finally, section 3202 instructs us that section 5407 must be liberally construed with the purpose of extending its benefits for the protection of injured employees. Reading "commence" to require both filing and service runs afoul of this mandate.

DISPOSITION

The petition for writ of review is denied.

_____ RAYE _____, P. J.

We concur:

_____ NICHOLSON _____, J.

_____ DUARTE _____, J.