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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DELORES PUGH, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and COUNTY OF LOS ANGELES, Respondents.	B201677 (WCAB No. MON 0307954)

ORIGINAL PROCEEDING. Petition for Writ of Review. Writ granted; order annulled.

Law Offices of Edward J. Singer and Edward J. Singer for Petitioner.

Pierce & Weiss, Jeffry M. Karls and Martha Contreras for Respondents.

Delores Pugh petitioned for review of a decision by the Workers' Compensation Appeals Board (WCAB) finding that her claim for benefits is barred by the one-year statute of limitations. We hold that if an employer fails to post the notice of employees' workers' compensation rights required by Labor Code section 3550 and the employee is otherwise unaware of her rights, then the statute of limitations is tolled until the employee gains actual knowledge that she may be entitled to benefits.

FACTS AND PROCEEDINGS BELOW

The facts are not in dispute.

In 1997, Pugh consulted an internist, Dr. Joseph Geare, complaining of an "internal condition." Geare diagnosed Pugh as suffering from stress that was work related. He referred Pugh to a psychiatrist, Dr. Edison Houpt. Houpt confirmed the diagnosis of stress and also found it to be work related. He referred Pugh to another psychiatrist, Dr. Ronald Gutierrez. Pugh began treatment with Gutierrez at the end of 1997 or the beginning of 1998. Gutierrez told Pugh that in his opinion her stress was connected to her job. In July 1999, Pugh took a medical leave of absence from her employment with the County of Los Angeles and never returned to work. The County granted her disability retirement in 2005.

In August 2003, Pugh filed a claim with the WCAB alleging that she suffered cumulative psychological and physical injuries while employed by the County during the period April 1972 through July 1999.

The County disputed Pugh's claim on the ground, among others, that Pugh failed to file her claim within one year from the date of injury (which was, at the latest, 1999) as defined by Labor Code section 5412[1] and, therefore, the claim is barred under section 5405.[2] Pugh testified, however, that although all of the doctors she consulted diagnosed

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[1] All statutory references are to the Labor Code unless otherwise noted. Section 5412 states: "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

[2] Section 5405 states in relevant part: "The period within which proceedings may be commenced for the collection of [workers' compensation benefits] is one year from . . . [¶] . . . the date of injury"

her stress as job related, none of them suggested that she consider filing a workers' compensation claim. She admitted that she never told anyone at work that a doctor said she was suffering from work-related stress. Pugh further testified that she never saw any signs posted at the facility where she worked advising employees of their workers' compensation rights, no one in management ever informed her of her workers' compensation rights and she never received any literature on the subject. She did not know anyone at work who was injured on the job. In 2003, Pugh talked to her brother about the problems she had experienced at work and he suggested that she see a lawyer and file a workers' compensation claim. Pugh testified that she waited until 2003 to file a claim because she was unaware of her rights and did not know that her problems were covered.

Although the County did not make an outright admission that it failed to post the notice of workers' compensation rights at Pugh's workplace, it produced no evidence that it did post such a notice, nor did it produce any evidence that it provided Pugh with an individual notice of her rights.[3]

The workers' compensation judge found that Pugh's claim was not barred by the statute of limitations. The judge awarded Pugh temporary disability payments for the period September 1999 to August 2004 in the amount of $490 per week, permanent disability indemnity of 76 percent retroactive to August 2004 in the amount of $110,515 and a life pension thereafter of $25.20 a week.

The WCAB granted the County's petition for reconsideration and overruled the judge's decision on the statute of limitations issue. The WCAB did not reject the judge's factual findings that the County had not posted the statutory notice and that Pugh was

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[3] In a letter brief the County argued for the first time that Pugh failed to prove the County did not post the statutorily required notice. We disregard that argument because it comes too late. (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879.) In any event, assuming Pugh had the burden of proof on this issue, (but see *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th 853, 861), the workers' compensation judge made a factual finding, based on Pugh's testimony that she never saw the notice and that the County did not post the notice.

unaware of her rights. Rather, the WCAB concluded that Pugh knew in 1998, or at the latest 1999, that her stress was work related and such knowledge was sufficient to trigger the one-year period for filing a claim under sections 5405 and 5412. The WCAB did not address the County's arguments relating to the merits of Pugh's disability award, finding those issues moot.

Pugh filed a timely petition for review in this court.

DISCUSSION

Under section 3550, every employer subject to the workers' compensation law is required to post a notice advising employees of their rights under that law. The notice must be posted "in a conspicuous location frequented by employees" (subd. (a)) and "shall include . . . [¶] [t]he existence of time limits for the employer to be notified of an occupational injury." (Subd. (d)(7).) "Failure to keep any notice required by this section conspicuously posted shall constitute a misdemeanor, and shall be prima facie evidence of noninsurance." (Subd. (b).) In addition to the criminal penalty, "[a]ny employer . . . who fails to post any notice required by section 3550, shall be assessed a civil penalty of up to seven thousand dollars ($7,000) for each violation." (§ 6431.) Pugh contends that an employer who fails to post the notice required by section 3550 should also be precluded from raising the statute of limitations as a defense to an employee's claim for benefits.

Our Supreme Court addressed a similar issue in *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726 (*Reynolds*). Reynolds, an employee of Pacific Gas & Electric (PG&E) suffered a heart attack while on the job in 1968. He did not work for approximately a year afterward. During that time, he received unemployment disability compensation under a private voluntary plan for employees of PG&E. In 1970, nearly three years after his heart attack, one of Reynolds's relatives suggested that he might be entitled to workers' compensation benefits. Reynolds consulted an attorney and filed a claim in 1971. The WCAB denied Reynolds's claim on the ground that it was barred by the statute of limitations. (*Id*. at p. 728.) At no time between the date of Reynolds's heart

attack in 1968 and the filing of his claim in 1971 did PG&E comply with a Department of Industrial Relations regulation that provided that "'[i]n every case of which the employer has notice or knowledge of an injury'" the employer must send the employee a notice of payment or nonpayment of workers' compensation benefits and, in the case of denial of benefits, notice of the employee's right to appeal to the WCAB. (*Id*. at p. 729.)

The Supreme Court "annulled" the WCAB's decision. It held that because the employer "was obligated to give the notices prescribed by the administrative rules and failed to do so, it may not raise the technical defense of the statute of limitations to defeat petitioner's claim." (*Reynolds*, *supra,* 12 Cal.3d at p. 730.) The court reasoned: "The clear purpose of these rules is to protect and preserve the rights of the injured employee who may be ignorant of the procedures or, indeed, the very existence of the workmen's compensation law. Since the employer is generally in a better position to be aware of the employee's rights, it is proper that he should be charged with the responsibility of notifying the employee, under circumstances such as those existing here, that there is a possibility he may have a claim for workmen's compensation benefits." (*Id*. at p. 729.) The Supreme Court noted that although the WCAB concluded that Reynolds should have known of the relationship of his heart attack to his employment, the workers' compensation judge found that Reynolds did not realize the relationship until some time in December 1970 and that his failure to realize the relationship was due to a lack of sophistication. The employer, on the other hand, "undoubtedly had the experience to recognize that there could be a basis for a claim that petitioner's heart attack was industrially caused." (*Ibid.*)

In *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1985) 39 Cal.3d 57, 63 (*Kaiser*), the court explained its holding in *Reynolds* as follows: "*Reynolds* stands for the proposition that when an employer fails to perform its statutory duty to notify an injured employee of his workers' compensation rights, *and* the injured employee is unaware of those rights from the date of injury through the date of the employer's breach, then the statute of limitations will be tolled until the employee receives actual knowledge that he may be entitled to benefits under the workers' compensation system." (Italics in

original; fn. omitted.) The case before us fits within the rule announced in *Reynolds* and summarized in *Kaiser*. Here, the workers' compensation judge found that the County failed to perform its statutory duty to notify Pugh of her workers' compensation rights by posting a notice of those rights and that Pugh was unaware of those rights until 2003.

The County argues we should not apply the ruling in *Reynolds* to the present case because the facts regarding the parties' knowledge are reversed. In *Reynolds*, the petitioner was unaware that his heart attack might be related to his job but the employer "undoubtedly had the experience to recognize" the connection. (*Reynolds*, *supra,* 12 Cal.3d at p. 729.) The court stated that given the disparity in knowledge between the employee and the employer, it was proper to charge the employer with the responsibility of notifying the employee of his workers' compensation rights. (*Ibid.*) In contrast, Pugh knew at least by 1999 that a connection existed between her injuries and her employment because her doctors told her so. Pugh, however, never told anyone at work that a doctor had said that her stress was work related. Moreover, the record contains no evidence from which it could be inferred that the County should have recognized that Pugh's injuries were job related. Therefore, the County concludes, the circumstances existing in the present case do not warrant applying the *Reynolds* rationale to Pugh.

We disagree. This case, no less than the *Reynolds* and *Kaiser* cases, demonstrates the need for posted notices to protect employees' rights under the workers' compensation law. Pugh testified without contradiction that she did not file a claim until 2003 because until then she did not know that her injury might be covered and was unaware of her rights. The notice that the County failed to post informs the employee, among other things, that "[w]orkers' compensation covers most *work-related* physical or *mental injuries and illnesses*," and that the employee should "[r]eport the injury immediately" because "*[t]here are time limits*" and "[i]f you wait too long you may lose your right to benefits." (Cal. Code Reg., tit. 8, § 9881.1; italics added.)

In a case directly on point, *Parrott v. HQ, Inc.* (Mo.App. 1995) 907 S.W.2d 236, 242, the court held that an employer who failed to post a notice informing its employees of their workers' compensation rights, including the time limit for filing a claim, as

required by Missouri law, may not assert the statute of limitations as a defense to a late claim unless the employee had actual knowledge of the information required to be in the notice. The Missouri statute required the notice to state, among other things, "'That employees must report all injuries immediately to the employer . . . and that the employee may lose the right to receive compensation if the injury . . . is not reported within thirty days . . . .'" (*Id*. at p. 239, italics omitted.) Parrott admitted he did not file a claim with his employer within 30 days of injuring his back on the job. He argued, however, he was excused from doing so because his employer did not post the required notice. The court found the "clear purpose" of the law "is to benefit Missouri workers' by placing on employers a duty to post or otherwise give notices designed to inform employees of (1) what they must do to ensure the preservation of a valuable right, and (2) the statutory deadline within which they must act." (*Id*. at p. 240.) In order to give the law "meaningful effect," the court concluded, employers who do not substantially comply with the notice-posting requirement "may lose the defense that might otherwise have been available to them under [the statute of limitations]." (*Id*. at pp. 241-242.)[4]

We are not unsympathetic to the County's argument that tolling the one-year claim filing period for failing to post the notice of rights may in some cases frustrate the policy supporting the statute of limitations because memories may fade, witnesses may no longer be available and evidence may be lost. We acknowledge that it may be difficult in some cases for an employer to produce evidence that notice was posted at the time of the claimant's injury, especially if the injury occurred many years before the claim is filed. Nonetheless, our Supreme Court in *Reynolds* and *Kaiser* determined that other principles overrode statute of limitations considerations. The same is true in this case. We also

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4 The court stated its holding did not apply to employees who have actual knowledge of the information required to be included in the posted notice and cannot show prejudice as a result of their employers' failure to post or otherwise give notice. (*Parrott v. HQ, Inc.*, *supra*, 907 S.W.2d at p. 242.) In our case, it is undisputed that Pugh did not know about her rights under the workers' compensation law, including the time for filing a claim, until more than three years after her date of injury. She filed her claim within one year of learning of her rights.

acknowledge that proof of individual notice to an employee, the *Reynolds* and *Kaiser* situation, is likely easier to establish than proof of posted notice after a number of years have passed. Written correspondence of individual notice is likely to be found in the employer's files whereas finding a witness who saw the posted notice in years past may be more difficult. But even in those cases where no individual can testify to seeing the posted notice, the employer may be able to establish posting by other evidence including evidence of habit and custom. (See *Lucas v. Hesperia Golf & Country Club* (1967) 255 Cal.App.2d 241, 247.)[5] We also note that the difficulty of proof caused by delay falls not only on the employer, but also on the employee who bears the burden of proving entitlement to benefits. (Pullman Kellog v. Workers' Comp. Appeals Bd. (1980) 26 Cal.3d 450, 455 ["employee has the duty of proving that his disability is work-related".)

There is one significant difference between the regulation that the employer violated in *Reynolds* and *Kaiser* and the statute that the County violated in this case. So far as we can tell from the *Reynolds* opinion, and as noted by the court in *Kaiser*, *supra,* 39 Cal.3d at page 64, no penalty for failing to give the required notice existed in either case. The statute at issue in our case, however, provides that failure to conspicuously post the notice required by the statute "shall constitute a misdemeanor, and shall be prima facie evidence of noninsurance." (§ 3550, subd. (b).) The statute also provides that the employer's failure to provide the notice permits the employee to be treated by his or her own personal physician with respect to an injury occurring during that failure. In addition, section 6431 states that any employer who fails to post the notice required by section 3550 "shall be assessed a civil penalty of up to seven thousand dollars ($7,000) for each violation."

The County argues that the penalties contained in the statute should be deemed the only consequences for an employer's failure to post the required notice. The County cites no authority or cogent argument for its contention nor are we aware of any authority

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[5] Evidence Code section 1105 states: "Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specific occasion in conformity with the habit or custom."

precluding a court from providing an equitable remedy to a person who is injured as a consequence of a statutory violation, simply because criminal or civil penalties for violation of the same statute exist. Indeed, in *People v. Truckee Lumber Co.* (1897) 116 Cal. 397, the court held that although dumping toxic waste in California rivers was a crime, a court could nonetheless provide an equitable remedy on behalf of the People by enjoining the defendant from "polluting and poisoning the waters of the [Truckee] river, and thereby killing and destroying the fish therein." (*Id*. at p. 399.)

DISPOSITION

The WCAB's Opinion and Order Granting Reconsideration and Decision After Reconsideration are annulled and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.