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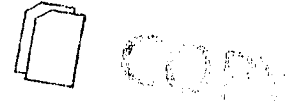

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 8

NU SQUARE CORPORATION DBA HAR LAM KEE RESTAURANT AND TRUCK INSURANCE EXCHANGE,
Petitioners,

v.

THE WORKERS' COMPENSATION APPEALS BOARD,
Respondent,

NG FUNG KWOK,
Real Party in Interest.

WORKERS' COMPENSATION APPEALS BOARD CASE NO. ADJ8464986

ANSWER TO PETITION FOR WRIT OF REVIEW OR, IN THE ALTERNATIVE, MANDATE, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 8

Court of Appeal Case Number: B268231

Superior Court Case Number: ADJ8464986

FOR COURT USE ONLY

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RESPONDENT/REAL PARTY IN INTEREST: Ng Fung Kwok; Workers' Compensation Appeals Board

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (name): Ng Fung Kwok

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

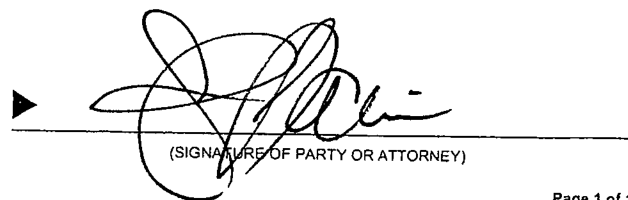
	Full name of interested entity or person	Nature of interest (Explain):
(1)	Nu Square Corporation	is a dissolved coporation
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 11, 2015

Steven C. Louie
(TYPE OR PRINT NAME)


(SIGNATURE OF PARTY OR ATTORNEY)

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ANSWER TO PETITION FOR WRIT OF REVIEW OR, IN THE ALTERNATIVE, MANDATE, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF

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INTRODUCTION:
WHY A WRIT SHOULD BE DENIED

Real party in interest Ng Fung Kwok (Mr. Kwok or applicant) submits this answer explaining why the petition for writ of review or, in the alternative, mandate and/or prohibition or other appropriate relief[1] should be denied.

Petitioner Truck Insurance Exchange's (Truck) writ petition advances the same allegations and laches arguments[2] that were rejected in its petition for reconsideration that was summarily denied by the Workers' Compensation Appeals Board (WCAB) on October 2, 2015. The WCAB considered Truck's same allegations in the reconsideration petition and then adopted the workers' compensation judge's (WCJ) reasoning in her report and recommendation to deny Truck's reconsideration petition. The WCAB concluded that "there is no evidence of considerable substantiality that warrant rejecting the WCJ's credibility determinations." (Petitioner's Exhibits, (PE) Vol. 2, exh. 8, p. 255.)

Additionally, at the trial level, *Truck stipulated to the fact that Mr. Kwok was an employee* on the date of injury. (PE, Vol. 1, exh. 1, p. 9.) Thus, Truck's assertions in the writ petition that Mr. Kwok's claim is

---

1 Labor Code section 5950 permits a party aggrieved by the orders of the Workers' Compensation Appeals Board to petition this court for a writ of review. Petitioner's alternative petition for writ of mandate, and/or prohibition or other alternative review is not a form of relief permitted by the statute.

2 See Petitioner's Exhibits, (PE) Vol. 2, exh. 5, pp. 212-224.)

questionable because he was an owner of the restaurant where he was injured (and not an employee covered by workers' compensation) (PWR, pp. 7-9, 16, 18, 22, 32, 34-37) is therefore wrong and disingenuous. Truck's admission of employment invalidates its entire argument.

For these reasons and the reasons set forth below, the writ should be denied because the WCJ was correct to conclude that the facts and circumstances surrounding the time delay in filing Mr. Kwok's workers' compensation claim and the equities -- Mr. Kwok's permanent total disability from the date of the accident on January 10, 2005 to the present, and ignorance of workers' compensation rights, among other things, did not warrant an application of laches.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE WCAB'S AWARD SHOULD BE UPHELD BECAUSE THE WCAB AND WCJ CORRECTLY CONCLUDED THAT THE APPLICATION OF LACHES WAS NOT WARRANTED.

Truck only challenges the WCAB's decision regarding laches. Truck raises no dispute with the WCAB's adoption of the WCJ's ruling that Mr. Kwok's claim was not barred by the statute of limitations because of the employer's failure to provide him statutory notice of workers' compensation rights. Additionally, Truck does not dispute the WCAB's adoption of the WCJ's determination that Mr. Kwok's injuries arose out of his employment and in the course of his employment. In

other words, Truck admits that the statute of limitations[3] does not bar Mr. Kwok's claim and concedes that he suffered compensable injuries arising out of his employment and in the course of his employment.[4]

---

[3] Sufficient evidence supports the WCJ's ruling that the statute of limitations was tolled. At trial, it was uncontradicted that the restaurant owner, King Tak Cheung, was notified of the accident the day after the accident. The WCJ determined from the evidence that Mr. Kwok never received notification of his rights to workers' compensation benefits and thus was entitled to tolling of the statute of limitations. (PE, Vol. 1, exh. 4, pp. 186, 189.) The WCJ's decision is well supported by the Supreme Court's rule in *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal. 3d 726 [statute of limitations had not commenced to run at the time employee filed his claim and employer could not raise the technical defense of the statute to defeat the claim when the employer failed to notify the employee that there was a possibility he would be entitled to workers' compensation benefits]. Moreover, there is a rebuttable presumption that an employee is ignorant of his rights to workers' compensation benefits. (*California Ins. Guarantee Ass'n. v. Workers' Comp. Appeals Bd.* (2008) 163 Cal. App. 4th 853, 862.) Evidence of general awareness of workers' compensation and past experience with workers' compensation is insufficient to overcome the presumption that the employee was ignorant of his compensation rights for a particular injury. (*Id.,* at p. 863.)

[4] Substantial evidence supports the WCJ's determination that Mr. Kwok's injury arose out of the course of his employment and in the course of his employment. The WCJ concluded that "[b]ased upon the credible testimony of the witnesses, and the documentary evidence submitted, including the records of USC hospital, and the medical report of Robert Chan, M.D., dated 5/1/14, which are persuasive, it is found that applicant sustained injury to his head arising out of and occurring in the course of employment on 1/10/05." (PE, Vol. 1, exh. 4, pp. 186, 189.)

A. The doctrine of laches.

The doctrine of laches ". . . is not designed to punish a plaintiff but is invoked [only] where a refusal would be to permit an unwarranted injustice." (*Jordan v. Warnke* (1962) 205 Cal. App. 2d 621, 632 (internal quotations omitted); see also *Berniker v. Berniker* (1947) 30 Cal. 2d 439, 449.) ***"[U]nreasonable delay by the plaintiff is not sufficient to establish laches.*** There must also be prejudice to the defendant resulting from the delay or acquiescence by the plaintiff. Prejudice is not presumed, it must be affirmatively demonstrated. [Citations.]" (*Piscioneri v. City of Ontario* (2002) 95 Cal. App. 4th 1037, 1049 (italics and emphasis added) (citing *Ragan v. City of Hawthorne* (1989) 212 Cal. App. 3d 1361, 1368 (fn. omitted).) "Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. [Citation.]" (*Piscioneri v. City of Ontario*, *supra*, at p. 1050.)

B. The application of laches is not warranted because the evidence demonstrated that there was no unreasonable conduct in the delay filing the claim.

As noted by Truck, the application of laches to bar a particular claim is a question primarily for the lower court's discretion. (PWR, pp. 28-29.) "In considering a petition for writ of review of a decision of the WCAB, this court's authority is limited. This court must determine

whether the evidence, when viewed in light of the entire record, supports the award of the WCAB. This court may not reweigh the evidence or decide disputed questions of fact." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal. App. 4th 227, 233. See Labor Code § 5952.)

In the present case, Mr. Kwok's accident and injuries left him a total quadriplegic requiring ventilation for life support, with severe dementia, inability to speak or swallow, no bowel or bladder function, requiring a gastric tube to feed, and the need for total care. (PE, Vol. 2, exh. 20, p. 303.) Since his accident on January 10, 2005, Mr. Kwok has never been released from the hospital. (PE, Vol. 2, exh. 2, p. 65.) These facts are not in dispute.

During the three days of witness testimony from both sides at trial, the WCJ observed the demeanor of the witnesses and weighed their statements surrounding the circumstances of Mr. Kwok's accident and subsequent filing of the claim with the WCAB. Based on the evidence, the WCJ concluded that the employer failed to notify Mr. Kwok of his rights to workers' compensation benefits and that the breach of statutory duty should not be allowed to prevent Mr. Kwok from obtaining benefits. (PE, Vol. 2, exh. 6, p. 233.) The WCJ went on to address Truck's assertion that the filing of the claim was suspect. (PE, Vol. 2, exh. 6, pp. 234-235.) The WCJ rejected Truck's argument stating: "the undersigned did not find that theory persuasive after hearing the testimony of the witnesses. If this applicant, or his family, had intended to file a fraudulent claim, they could have done it at the time of this accident. There was no reason presented as to why they would have

waited so long, much to their detriment." (PE, Vol. 2, exh. 6, pp. 234-235.) "The WCJ's findings on credibility are entitled to great weight because the WCJ has the opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand." (*Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal. App. 3d 246, 256.)

Indeed, Mr. Kwok could not file his claim for himself nor could he protect his own rights given his permanent total disability. The circumstances and facts of this case are akin to the circumstances and result reached in *Tzolov v. International Jet Leasing, Inc.* (1991) 232 Cal. App. 3d 117. The court ruled that the tolling statute in Code of Civil Procedure section 352 operated to suspend the running of a limitation period against an incompetent plaintiff even if the plaintiff had a general guardian or a guardian ad litem. The court said:

> ***"The cause of action does belong to the plaintiff.*** [Citation]. The guardian ad litem is obliged to protect the plaintiff's cause of action [citation], but to start the limitation period upon the assumption that the guardian ad litem will discharge this duty would leave the incompetent plaintiff wholly at the mercy of the possibility the guardian ad litem will not do so. It appears to be the general rule nationally that a guardian ad litem's failure to bring a minor's action within the applicable limitation period will not prejudice the minor's right to do so after he or she becomes of age. [Citation.] We are satisfied that this should be the California rule, applicable to minors and mentally incompetent persons alike. The possibility that in a case such as this a limitation period may remain open for the lifetime of the plaintiff does not dictate a different result: The tolling statute reflects a considered legislative judgment that in enumerated circumstances ***the strong policy in favor of prompt disposition of disputes must give way to the need to protect***

> ***a plaintiff who is unable to protect himself or herself.*** That need will continue so long as the plaintiff remains incompetent."

(*Id.* at p. 120 (italics and emphasis added).)

Inasmuch as laches and the delay in filing the claim was an issue at trial, the credibility of Mr. Kwok's wife, Yuk Lin Cheung,[5] (Yuk Lin) was in issue, too, with regard to the laches question. Contrary to Truck's claim that the WCJ ignored the delay in connection with the laches defense, the WCJ did in fact address the credibility of the witnesses who testified about the filing of the claim. The WCJ deemed the applicant's witnesses' testimony credible and found no unreasonable conduct to attribute to Mr. Kwok, or Yuk Lin, or Tammy Wai Lin Cheung[6] (Tammy) regarding the delay in filing the claim. Considering the equities under these facts and circumstances, the WCAB and WCJ properly rejected the laches defense to prevent a manifest injustice to Mr. Kwok because ***his right*** to file a claim would be lost as he could not act for himself due to his grave injuries and permanent total disability.

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[5] Yuk Lin was appointed Mr. Kwok's guardian ad litem on January 19, 2015. (See PE, Vol. 2, exh. 7, p. 249.)

[6] Tammy Wai Lin Cheung is Yuk Lin's sister.

C. The WCAB's award should be upheld because Truck failed to affirmatively demonstrate prejudice resulting from the delay.

Truck claims that the WCJ and WCAB did not dispute that the seven and one-half year delay was prejudicial. (PWR, p. 33.) Truck would have the court believe that this length of delay alone creates a presumption of prejudice. As stated, unreasonable delay by the plaintiff is not sufficient to establish laches. There must also be prejudice to the defendant resulting from the delay. Prejudice is not presumed, it must be affirmatively demonstrated. (*Piscioneri v. City of Ontario, supra,* at p. 1049.) Truck further suggests that a long delay is prejudicial, when as a result of lost evidence and missing witnesses, its is easier for the claimant to commit perjury or fabricate evidence. (PWR, pp. 33-34.) As mentioned, the WCJ specifically rejected Truck's assertion of fabrication by the applicant's witnesses. (*Ante*, pp. 10-11.)

Truck asserts it was prejudiced for these reasons:

1. Truck states that due to the passage of time, it could not locate the insurance policy to assess whether Mr. Kwok was the restaurant's owner, and if he was the owner, "the workers' compensation policy almost certainly would have excluded him from coverage." (PWR, pp. 34-35.) As mentioned, Truck stipulated to the fact that Mr. Kwok was an employee on the date of injury. (*Ante*, pp. 5-6.) Truck's admission that Mr. Kwok was an employee on the date of injury renders nugatory Truck's allegations that he was the owner and not covered by the workers' compensation policy. The admission negates Truck's argument that it was prejudiced.

2. Truck argues that the delay prevented it from investigating Mr. Kwok's lost wages claim. Truck misstates the facts about the payroll records (PE, Vol. 2, exh. 9, pp. 258-269) produced to Truck. (PWR, p. 19, 36.) Truck states that these records were produced after discovery had closed. In fact, these records were provided to Truck's counsel before discovery had closed and before a trial date was set. (See PE, Vol. 2, exh. 7, pp. 244-245.) Nonetheless, Truck did not request more time for discovery, and instead insisted on setting a trial date.

At trial, Truck cross-examined applicant's witnesses, Yuk Lin and Tammy, on the payroll records in front of the trier-of-fact. Indeed, the WCJ assessed the credibility of the witnesses and the reliability of the payroll records. After receiving all the evidence, the WCJ deemed the applicant's contention of earnings more believable than Truck's claim of earnings. (PE, Vol. 1, exh. 4, p. 187.) As Truck actively participated in contested hearings where the trier-of-fact heard testimonial evidence, evaluated the applicant's earnings evidence, and gave the appropriate weight to that evidence, Truck's argument that the delay caused prejudice is incomprehensible.

3. Truck asserts that the delay prejudiced Truck's ability to investigate and pursue subrogation rights against other potentially responsible parties. (PWR, p. 37.) It is a fundamental principle of workers' compensation law that liability for compensation benefits, without regard to negligence, will exist against an employer when an employee's injury arises out of and in the course of the employment when the conditions of compensation concur as set forth in Labor Code section 3600. Nothing in section 3600 suggests that an insurer's or

employer's liability for benefits to an employee is connected in some manner to subrogation rights. In other words, an investigation of potential third-party liability is irrelevant to an insurer's or employer's liability and first obligation to furnish benefits to an employee injured in the course and scope of employment. As such, Truck's claim of prejudice is baseless.

Because Truck failed to affirmatively demonstrate prejudice due to an unreasonable delay, laches was not established.

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CONCLUSION

For the reasons stated above, this court should deny Truck's petition.

Dated: December 11, 2015

LAW OFFICES OF
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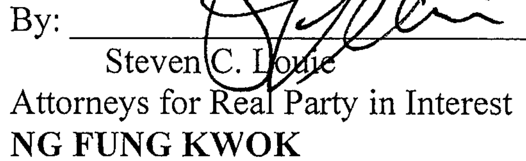


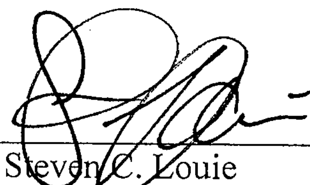
By: ______________________
Steven C. Louie
Attorneys for Real Party in Interest
NG FUNG KWOK

VERIFICATION

I, Steven C. Louie, declare as follows:

I am one of the attorneys representing Ng Fung Kwok. I have read the foregoing Answer to Petition for Writ of Review or, in the Alternative, Mandate, Prohibition and/other Other Relief and know its contents. The facts alleged in the Answer are personally known to me, and I know these facts as stated therein to be true. Because of my familiarity with the records, files, and proceedings described herein, I, rather than my client, verify this answer.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on December 11, 2015, at Rosemead, California.

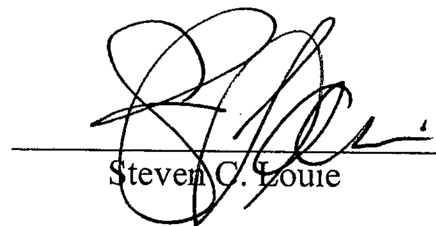


Steven C. Louie

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 2,727 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: December 11, 2015



Steven C. Louie

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 8728 Valley Boulevard, Suite 209, Rosemead, CA 91770-1776.

On December 11, 2015, I served true copies of the following document(s) described as:

ANSWER TO PETITION FOR WRIT OF REVIEW OR, IN THE ALTERNATIVE, MANDATE, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF

On the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Law Offices of Williams O. Owuor's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the Untied States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 11, 2015, at Rosemead, California.

Baoyi Huang

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