

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JOSE JUAN BARAJAS CONTRERAS, *Applicant*

vs.

SABOR FARMS; ZURICH AMERICAN INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ11558403
Salinas District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact of November 9, 2020, wherein it was found that while employed as a seasonal tractor driver on May 14, 2017, applicant sustained industrial injury to his neck. In finding an industrial injury, the WCJ found that applicant's claim was not barred by the statute of limitations. Additionally, the WCJ found a specific injury despite the fact that applicant alleged a cumulative injury in his Application for Adjudication of Claim.

Defendant contends that the WCJ erred in (1) not finding that applicant's claim was barred by the statute of limitations and in (2) finding a specific injury, despite the fact that applicant's Application for Adjudication of Claim alleged a cumulative injury. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, we will deny the defendant's Petition. As noted by the WCJ, the defendant incorrectly cites *Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102 [53 Cal.Comp.Cases 502]) and *Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196 [50 Cal.Comp.Cases 160].) Both cases stand for the proposition that pleading defects are not jurisdictional, that amendment to pleadings is liberally allowed, and that an amended pleading "relates back" to the originally filed pleading for statute of limitations purposes. (*Bassett-McGregor*, 205 Cal.App.3d at p. 1116; *Rubio*, 165 Cal.App.3d at p. 200.) In *Bassett-McGregor*, the court allowed amendment of a specific injury claim to state a cumulative injury claim, flatly holding "substituting a claim for cumulative rather than specific injury does

not constitute a new and different cause of action” (*Bassett-McGregor*, 205 Cal.App.3d at p. 1116) so long as the operative facts are not completely different.

As noted in *Western Growers Ins. Co. v. Workers’ Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323], “In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events. [Citations.] The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB. [Citations.]” Here, qualified medical evaluator orthopedist Keith A. Robertson, M.D. was given a history and set of medical records and asked to determine whether the unified set of facts constituted a specific or cumulative injury. The operative facts underlying the potential specific or cumulative injury were identical. Additionally, as noted by the WCJ, defendant was alerted early in the litigation, at applicant’s deposition on April 23, 2019¹, that applicant was asserting a specific rather than cumulative injury. (April 23, 2019 report at p. 10.)² Defendant was not surprised or prejudiced by the allegation and finding of a specific injury.

Turning to the issue of statute of limitations, the running of the statute of limitations is an affirmative defense, and the burden of proving it is on the party opposing the claim. (Lab. Code, § 5409; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 67, fn. 8 [50 Cal.Comp.Cases 411].) The burden is on defendant to show when the statute of limitations began to run, “starting from any and all three points designated [in Labor Code section 5405].” (*Colonial Ins. Co. v. Industrial Acc. Com. (Nickles)* (1945) 27 Cal.2d 437, 441 [10 Cal.Comp.Cases 321].) The three points designated in section 5405 are date of injury (Lab. Code, § 5405, subd. (a)); the last payment of disability indemnity (Lab. Code, § 5405, subd. (b)); and the last date on which medical treatment benefits were furnished (Lab. Code, § 5405, subd. (c).) In this case, it appears that applicant was never provided with disability indemnity or medical treatment. Accordingly, absent any tolling, the relevant date for the running of the statute of limitations is the May 14, 2017 date of injury.

“[A]s a general rule, where a claimant asserts exemptions, exceptions, or other matters which will avoid the statute of limitations, the burden is on the claimant to produce evidence

¹ As explained later in this Opinion, the one-year statute of limitations began to run on August 1, 2018. Thus, prior to the expiration of the statute of limitations, defendant was made aware that applicant was alleging a specific injury.

² Although applicant’s deposition was not admitted into the evidentiary record, a long summary of the deposition was included in Dr. Robertson’s April 23, 2019 report which was admitted. Thus, the WCJ properly cited to Dr. Robertson’s summary of the deposition.

sufficient to prove such avoidance.” (*Permanente Medical Group v. Workers’ Comp. Appeals Bd. (Williams)* (1985) 171 Cal.App.3d 1171, 1184 [50 Cal.Comp.Cases 491].) One such exemption or exception is that the statute is tolled by an employer’s failure to notify an injured employee of a potential right to benefits, as required by Labor Code section 5401(a). (*Martin, supra*, 39 Cal.3d at p. 60.) Pursuant to Labor Code section 5401, within one day of receiving notice of the applicant’s injury, defendant was required to send the applicant a DWC-1 form which apprises the injured worker of his or her potential eligibility for workers’ compensation benefits under California law. (Labor Code, § 5401, subd. (a).) The Supreme Court has held that “the remedy for breach of an employer’s duty to notify is a tolling of the statute of limitations if the employee, without that tolling, is prejudiced by the breach.” (*Martin, supra*, 39 Cal.3d at p. 64.)

Thus, when applicant asserts that the statute is tolled based on the breach of the duty to provide the employee with a DWC-1 form, applicant has the duty of showing that defendant had sufficient notice of injury to provide applicant with a claim form. The duty then shifts to defendant to show that the claim form was sent to the applicant or that applicant had actual knowledge of his workers’ compensation rights. (*Martin, supra*, 39 Cal.3d at pp. 60, 65; *Sidders v. Workers’ Comp. Appeals Bd.* (1988) 205 Cal.App.3d 613, 622 [53 Cal.Comp.Cases 445].) Once the employer has provided the applicant with a claim form, or applicant gains the requisite actual knowledge of his rights, the tolling period ends. (*Martin, supra*, 39 Cal.3d at p. 65.)

In this case, the WCJ believed the applicant’s testimony that he reported his injury to his supervisor, and disbelieved the defendant’s witnesses’ testimony to the contrary. A WCJ’s credibility determinations are “entitled to great weight.” (*Garza v. Workmen’s Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) The defendant thus had the duty pursuant to Labor Code section 5401 to give applicant the DWC-1 form containing notice of his workers’ compensation rights, and the statute of limitations was tolled until he was given the form or otherwise obtained actual knowledge of his rights. Defendant asserts that applicant obtained knowledge of his workers’ compensation rights in August of 2018. Given that applicant signed a DWC-1 form on August 1, 2018, we agree that the tolling period ended on that date. However, applicant filed his Application for Adjudication just two months later on October 1, 2018, well within the one-year period from when the tolling ceased. As noted above, even though applicant’s Application alleged a cumulative injury, his claim of specific injury related back to his timely October 1, 2018 filing.

Accordingly, we will deny the defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact of November 9, 2020 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 1, 2021

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

**JOSE JUAN BARAJAS CONTRERAS
THE LAW GUY
HAWORTH, BRADSHAW, STALLKNECHT & BARBER**

DW/oo

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o