

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

ELLIOTT BARNARD, *Applicant*

vs.

**COUNTY OF SACRAMENTO;
permissibly self-insured, adjusted by
COUNTY OF SACRAMENTO, *Defendants***

**Adjudication Numbers: ADJ19531062
Sacramento District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the “Findings of Fact, Award, and Opinion on Decision” (F&A) that was issued by the workers’ compensation administrative law judge (WCJ) on March 3, 2026.

The WCJ found, in relevant part, that the applicant sustained injury arising out of and in the course of employment (AOE/COE) to his right shoulder, the injury caused permanent disability of 7%, and applicant is in need of further medical treatment. The WCJ also found defendant did not meet its burden to establish any apportionment to non-industrial factors and is estopped from raising the statute of limitations defense.

Defendant contends, in pertinent part, that applicant’s claim should be barred under Labor Code sections 5405 and 5410¹ and that the statute of limitations was not tolled because its benefit notices complied with the regulations by the Administrative Director that were in place in 2019 and the legal holdings in *Reynolds v. Workmen’s Comp. Appeals Bd.* (1974) 12 Cal.3d 726 [39 Cal.Comp.Cases 768] and *Kaiser Found. Hosps. Permanente Medical Group v. Workers’ Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 63 [50 Cal.Comp.Cases 411].

We have received an Answer from applicant

¹ All section references are to the Labor Code, unless otherwise indicated.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition and the Answer, and the contents of the WCJ's Report. Based on our review of the record, and for the reasons discussed below, we will deny reconsideration.

FACTS

Per the WCJ's Report:

Applicant Elliot Barnard was employed by the County of Sacramento, permissibly self-insured, as a Deputy Sheriff. On April 24, 2019, the Applicant sustained an industrial injury to the right shoulder during the course and scope of employment. The claim was accepted, and benefits were provided, including medical treatment and temporary disability from April 28, 2019 through May 2, 2019 (*JOINT EXHIBIT 2, EAMS DOC ID # 61567874*).

On September 12, 2019, the Defendant issued a benefit notice: Notice Regarding Permanent Disability Benefits Denial to the Applicant (*JOINT EXHIBIT 1, EAMS DOC ID # 61567873*). Per the Applicant's primary treating physician, Dr. Michael Cohen, the Applicant was released to return to work and was discharged from medical care with respect to his right shoulder. This benefit notice included language that the Applicant could seek an evaluation by a Qualified Medical Evaluator, and that he needed to notify the adjuster of such an objection within 30 days of the date of receiving the treating doctor's report.

No benefits were provided with respect to the Applicant's right shoulder after May 2, 2019. On July 11, 2024, the Applicant filed an Application for Adjudication of Claim for his April 24, 2019 right shoulder injury (*JOINT EXHIBIT 3, EAMS DOC ID # 79962429*). Workers' Compensation benefits were denied pursuant to the Statute of Limitations. The Applicant was evaluated by AME Dr. Patrick McGahan on May 6, 2024, who found 4% whole person impairment and a need for future medical treatment to cure the effects of the injury (*JOINT EXHIBIT 4, EAMS DOC ID # 61567876*).

The case proceeded to Trial on January 14, 2026 on the issues of permanent disability/apportionment, need for future medical treatment, attorney's fees and the Defendant's assertion that the State of Limitations as to the Applicant being filed more than 5 years from the date of injury or from the last furnishing of benefits. On March 3, 2026, a Findings of Fact, Award and Opinion on Decision was issued, where the Court found that the "Defendant is estopped from raising the statute of limitations defense." Defendant filed a timely Petition for Reconsideration, challenging this Finding of Fact.

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on April 8, 2026, and 60 days from the date of transmission is Sunday, June 7, 2026. The next business day that is 60 days from the date of transmission is Monday, June 8, 2026. (See Cal. Code. Regs., tit. 8, § 10600(b).² This decision is issued by or on Monday, June 8, 2026, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on April 8, 2026, and the case was transmitted to the Appeals Board on April 8, 2026. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on April 8, 2026.

II.

Defendant asserts that since it complied with all the applicable regulatory notice requirements, the evidence does not support an equitable tolling of the statute of limitations. (Petition, at p. 2.)

The statute of limitations is tolled not only when a defendant fails to comply with the initial obligation to provide a DWC-1 notice of potential eligibility and claim form, but also when subsequent notices are not provided. (*Galloway v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.App.4th 880 [63 Cal.Comp.Cases 532].)

We observe that current AD Rule 9812 (Cal. Code. Regs., tit. 8, § 9812) was also in effect in 2019 when defendant served applicant, who was then unrepresented, with the Notice Regarding Permanent Disability Benefits Denial (Notice) on September 12, 2019. AD Rule 9812, subdivision (e)(3), requires that a defendant claiming that no permanent disability exists must provide applicant with the following notice:

(3) Notice That No Permanent Disability Exists. In cases where the employee has sustained compensable lost time from work, if the claims administrator alleges that the injury has caused no permanent disability in a case where either the employee has received payment of temporary disability indemnity or the employee claims permanent disability, the claims administrator shall advise the employee that no permanent disability indemnity is payable. This notice shall be sent at the same time as the last payment of temporary disability indemnity or within 14 days after the claims administrator determines that the injury has caused no permanent disability. If the claims administrator's determination is based on a medical report, a copy of the medical report(s) shall be provided with the notice, except for psychiatric reports that the psychiatrist has recommended not be provided to the employee.

(A) Where the employee is not represented by an attorney, the notice shall advise the employee of one of the following:

1. If the determination is based on a comprehensive medical evaluation, the injured employee may file an Application for Adjudication of Claim with the WCAB.
2. If the claims administrator's determination is based on an evaluation by a treating physician, the notice shall inform the employee whether or not the claims administrator is requesting a rating from the Disability Evaluation Unit. If the claims administrator is not requesting a rating from the Disability Evaluation Unit, the notice shall advise the employee that he or she may contact an Information and Assistance office to have the treating physician's evaluation reviewed and rated by the Disability Evaluation Unit. The notice shall also advise the employee that if he or she disagrees with the results of the evaluation, the employee must either:
 - a. contact the claims administrator within the time limit prescribed by Labor Code section 4062(a) to obtain the form prescribed by the DWC Medical Unit to request assignment of a panel of Qualified Medical Evaluators, or
 - b. within the applicable time limit prescribed in Labor Code section 4062(a), download the form to request assignment of a panel of Qualified Medical Evaluators from the DWC website. (Note: the notice shall provide the employee with the url to enable the employee to download the applicable form.)

However, if the employee has already received a comprehensive medical evaluation, the notice may instead advise the employee to contact the claims administrator to arrange for the employee to return to that same medical evaluator for a new evaluation if possible.

(Cal. Code Regs., tit. 8, § 9812, subd. (e), emphasis added.)

It is well established that the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289].

Here, the statute of limitations is an affirmative defense and defendant, as the party asserting the defense, has the burden of proof. (§ 5705.) As defendant determined that no permanent disability existed pursuant to the treating physician's report, it was defendant's duty to provide applicant with a Notice that complied with AD Rule 9812(e)(3)(A)(2).

In the Notice sent to applicant, defendant *checked off* the box next to the following language:

The determination of permanent disability is based on the evaluation of treating physician Dr. Michael Cohen dated 5/14/2019. I agree disagree with the results of the evaluation. If you disagree with the results of the evaluation of the treating physician, you may obtain an evaluation by a Qualified Medical Evaluator (QME). You must notify me in writing of your objection to the determination of the treating physician within thirty (30) days of the date you received the treating physician's report.

(Joint Exhibit #1, at p. 2.)

However, in the next paragraph, defendant *did not* check off the box next to the following language which is required to comply with Rule 9812(e)(3)(A)(2):

To request a QME you must either contact Karen Burney to request the form to submit to the state Division of Workers' Compensation (DWC) to request a panel of three Qualified Medical Evaluators (QMEs), or you may download the form from the DWC website:

<http://www.dir.ca.gov/dwc/FORMS/QMEForms/QMEForm105.pdf>.

(*Id.*)

Although defendant's Notice did include the proper language required by AD Rule 9812, as defendant failed to check off the box next to the language, we agree with the WCJ that defendant failed to meet its burden of proof as to the application of the statute of limitations. By checking off the boxes of some language but not others, applicant was not properly and clearly made aware of how to obtain an evaluation by a qualified medical evaluator (QME) as required by AD Rule 9812 and as a result, the statute of limitations was tolled.

"Limitations provisions in the [workers'] compensation law must be liberally construed in favor of the employee unless otherwise compelled by the language of the statute, and such enactments should not be interpreted in a manner which will result in a loss of compensation." (*Blanchard v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590, 595 [40 Cal. Comp. Cases 784] (internal citations omitted).) It is well settled that where the employer has a statutory or regulatory duty to provide notice to the injured worker of a right and fails to do so, the employer is estopped from raising the statute of limitations as a bar to the claim. (*Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726.)

Accordingly, we deny defendant's Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact, Award, and Opinion on Decision issued by the WCJ on March 3, 2026 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 8, 2026

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

**ELLIOTT BARNARD
MASTAGNI HOLSTEDT
LAUGHLIN, FALBO, LEVY & MORESI**

JL/abs

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