

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

JULIAN CARILLO, *Applicant*

vs.

**HP HOOD, LLC, NEW HAMPSHIRE INSURANCE COMPANY;
adjusted by ESIS WEST WC CLAIMS, *Defendants***

**Adjudication Number: ADJ9838694
Stockton District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to further study the factual and legal issues in this case. This is our Decision After Reconsideration.

Applicant seeks reconsideration of the June 16, 2021 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that the WCAB did not have jurisdiction to award new and further disability because applicant's Petition to Reopen was not timely filed and there is no good cause to allow tolling of the statute of limitations.

Applicant contends the Findings of Fact should be rescinded because the WCJ failed to explain the basis for the decision and failed to issue a decision within 30 days of submission. Applicant also contends that the WCAB has jurisdiction to determine whether the applicant has additional disability because defendant did not file a timely objection to the Petition to Reopen and, therefore, waived any objection to the timeliness of the Petition.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied. We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the Findings of Fact.

We will briefly review the relevant facts. Applicant, while employed on December 5, 2014 as a warehouse worker, sustained an industrial injury to his back and psyche. A stipulated award of 18% permanent partial disability was approved on April 10, 2019. On August 4, 2019, the parties agreed to resolve a dispute over medical treatment and mileage after an expedited hearing.

The agreement was memorialized in a Stipulation and Order approved by the WCJ. On December 13, 2019, Applicant filed a Petition for Penalties claiming that defendant failed to pay mileage and authorize a gym membership.

On December 16, 2019, applicant filed a Petition to Reopen, dated December 12, 2019. On January 7, 2020, defendant filed an “Objection to Petition to Reopen” in response to the Petition to Reopen.

After several continuances, a trial was held on April 21, 2021. The parties listed numerous issues, including whether the Petition to Reopen is barred by the statute of limitations and “if the Petition to Reopen is barred by the Statute of Limitations as untimely, is there a reason to throw out the Statute of Limitations to allow the petition to go forward.” (April 21, 2021, Minutes of Hearing and Summary of Evidence, p. 2.) Issues also included whether applicant was entitled to equitable relief of estoppel and tolling on the basis of “Scrivener’s error and excusable neglect.” The matter was submitted for decision. Thereafter, the WCJ issued the June 16, 2021 Findings of Fact which is the subject of applicant’s Petition for Reconsideration.

From our review of the record, it appears that the issues should have been framed more precisely. The primary issue is whether the WCAB has continuing jurisdiction to grant applicant’s Petition to Reopen and amend or alter the Stipulated Award.

"The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of [Division 4] ... At any time, upon notice and after the opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor." (Lab. Code, § 5803.)

Labor Code section 5804 provides that “[n]o award of compensation shall be rescinded, altered, or amended after five years from the date of injury except upon a petition by a party in interest filed within such five years...”

Additionally, Labor Code section 5410 provides that,

[n]othing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period. This section does not extend the limitation provided in Section 5407. (Lab. Code § 5410.)

An appropriate pleading must be filed with the Appeals Board within five years of the date of injury to invoke the Appeals Board's continuing jurisdiction under these statutes. (Lab. Code §§ 5410, 5804; *Bland v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 324, 329, fn. 3 [35 Cal.Comp.Cases 513].) If no petition is filed, the WCAB lacks jurisdiction to amend an award. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 300 [56 Cal.Comp.Cases 476].) The five year limitations period in section 5804 is jurisdictional and is not subject to waiver or estoppel.¹ (*Sutton v. IAC* (1956) 46 Cal.2d 791 [21 Cal.Comp.Cases 205]; *Selden v. Workers' Comp. Appeals Bd.* (1986) 176 Cal.App.3d 877 [51 Cal.Comp.Cases 28].)

In determining whether the WCAB has continuing jurisdiction, pleadings filed prior to the expiration of the five year time limitation are liberally construed. (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920 [72 Cal.Comp.Cases 778].) In one case, even though applicant did not file a petition, the Court of Appeal construed a Notice of Hearing issued by a WCJ within five years of applicant's date of injury as a petition because the notice indicated that the hearing would address increased benefits. (*Zurich Ins. Co. v. Workers' Comp. Appeals Bd. (Cairo)* (1973) 9 Cal. 3d. 848 [38 Cal.Comp.Cases 500].) Pleadings that merely request enforcement of an award are not construed as a Petition to Reopen. (*Granite Construction Co. v. Workers' Comp. Appeals Bd. (McRynolds)* (2003) 112 Cal.App.4th 1453 [68 Cal.Comp.Cases 1548].)

In this case, applicant's injury occurred on December 5, 2014, but he filed his Petition to Reopen on December 16, 2019, five years and eleven days after his injury. In his trial brief, applicant appeared to contend that the other pleadings wherein he sought to enforce his award of medical treatment and obtain penalties related to enforcement of the award could be construed as a Petition to Reopen within five years of the date of injury. However, none of the documents

¹ In *Sutton v. Industrial Acc. Com.* (1956) 46 Cal.2d 791, 793-794, the Supreme Court held that upon the passage of five years from the date of an industrial injury the board lost jurisdiction to act upon a petition for reopening under Labor Code section 5803, even if the petition had been filed prior to the expiration of the five-year period. Prior to 1963 Labor Code section 5804 read in pertinent part: "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury." However, the Legislature amended the statute in 1963 to add the words "except upon a petition by a party in interest filed within such five years."

reference a potential increase in disability or allege that applicant experienced new and further disability. Even if we construed the Petition for Penalties filed on December 13, 2019 as a Petition to Reopen pursuant to Labor Code sections 5804 and 5410, the Petition for Penalties was not filed “within [such] five years” as both statutes require. At the time the December 12, 2019 Petition to Reopen was filed on December 16, 2019, the WCAB no longer had continuing jurisdiction to alter the April 10, 2019 Award.

Furthermore, a petitioner for reconsideration forever waives issues that are not set forth specifically and in full detail in its petition. (Lab. Code, §§5902, 5904; *Cedillo v. Workmen's Comp. Appeals Bd.* (1971) 5 Cal.3d 450, 455–456 [36 Cal. Comp. Cases 497, 501]; *U.S. Auto Stores v. Workmen's Comp. Appeals Bd. (Brenner)* (1971) 4 Cal.3d 469, 476 [36 Cal. Comp. Cases 173, 177–178].) Here, applicant's petition fails to make specific and detailed allegations upon which it might be concluded that the time limitation of Labor Code section 5410 was waived or tolled, or that defendant is estopped from raising it. Applicant has not alleged any action by defendant that applicant relied upon to his detriment. Moreover, applicant has not explained how the doctrine of “Scrivener’s Error” could be applied in this case, and if applicant intended to seek relief based on a claim of mistake, he was required to set forth specific and detailed allegations in that instance as well. Accordingly, based on the record before us, we are unable to provide applicant any relief from the untimely filing.

Finally, we reject Applicant’s argument that the Findings of Fact must be rescinded because the WCJ did not comply with Section 5800.5. Failure to issue a decision within 30 days after submission, as required by Sections 5313 and 5800.5, does not deprive the WCAB of jurisdiction. (*Janet v. Industrial Accident Com.* (1965) 238 Cal.App.2d 491, 497 [30 Cal.Comp.Cases 411]; *Liberty Mut. Ins. Co. v. Industrial Acc. Com. (Walden)* (1964) 231 Cal.App.2d 501, 509–510 [29 Cal.Comp.Cases 293].)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Appeals Board that the June 16, 2021 Findings of Fact is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 29, 2021

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

**JULIAN CARILLO
LAW OFFICES OF JUAN VERA
MULLEN & FILIPPI**

MWH/oo

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