

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

JESUS AMEZCUA, *Applicant*

vs.

**DESERT COASTAL TRANSPORT, INC. / PEOPLEASE CORPORATION and
NATIONAL INTERSTATE INSURANCE COMPANY, *Defendants***

Adjudication Number: ADJ11997202

Santa Ana District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Opinion and Decision After Reconsideration (Opinion) issued by the Workers' Compensation Appeals Board (Appeals Board) on January 31, 2022, wherein the Appeals Board found in pertinent part that applicant's injury claim was not barred by the statute of limitations and that the Appeals Board retained jurisdiction as to applicant's injury claim; we also issued an Order based thereon.¹

Defendant contends that the Labor Code section 5405 one-year statute of limitations is not applicable in this matter,² that applicant's injury claim is barred by the section 5410 statute of limitations, and that there was no finding that applicant was prejudiced by defendant's failure to provide notice of his workers' compensation rights.

We have considered the allegations in the Petition and the contents of our Opinion. Based on our review of the record, for the reasons we stated in our Opinion, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to his right leg and ankle while employed by defendant as a driver on December 30, 2013. He received a claim form that he signed and returned to the employer (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 10, 2020, p.4.) Applicant

¹ Commissioner Lowe, who was previously a panelist in this matter, has retired and no longer serves on the Appeals Board. Another panel member has been assigned in her place.

² All further statutory references are to the Labor Code unless otherwise noted.

received medical treatment from Kamran Aflatoon, D.O. / Concentra Medical Group, including a right tibia metal rod implant surgery. (See Joint Exh. D, Concentra Medical Group.) Defendant paid applicant temporary disability indemnity during the period from January 1, 2014, through October 20, 2014. (Joint Exh. G, Notice Regarding Temporary Disability Benefits.) On November 7, 2014, Dr. Aflatoon found applicant's condition to be permanent and stationary and he discharged applicant to "regular activities." (Joint Exh. D, p. 5 [EAMS p. 12].) Based on Dr. Aflatoon's statement that applicant had no permanent disability, applicant was not paid permanent disability indemnity benefits. (Joint Exh. F, Notice Regarding Permanent Disability Benefits, November 13, 2014.)

Defendant filed a declaration of readiness to proceed stating that the parties "have reached an impasse." The parties proceeded to trial on December 10, 2020. The issue submitted for decision was, "The defendant's assertion of the statute of limitations defense." (MOH/SOE, p. 2.) The WCJ found that applicant's claim was barred by the section 5410 five-year limitations period and by our Opinion we reversed that finding.

DISCUSSION

As a preliminary matter, defendant's Petition is timely. Defendant filed the Petition on February 25, 2022. However, the Petition was filed at the Santa Ana District Office, and it did not come to the attention of the Appeals Board until February 4, 2023. Defendant's Petition was not timely acted upon by the Appeals Board, which has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.) Here, through no fault of defendant, the timely-filed Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process, and in keeping with common sensibilities, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board's actual notice of the Petition, which occurred on February 4, 2023. (See *Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felis)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622, 624].)

Defendant argues that the section 5405 one-year statute of limitations does not apply where the defendant voluntarily furnished benefits and where there was no showing that the injured worker was prejudiced by the defendant's failure to provide appropriate notice regarding his or her benefits.

We first note that there is no statutory or case law that supports defendant's argument regarding voluntarily furnished benefits. In fact, section 5405 specifically identifies the expiration date of section 4650 indemnity payments and section 4600 (et sec.) medical benefits as the start date for the one-year limitations period. Defendant's argument is inconsistent with the language of section 5405. Also, defendant cites the *Kaiser* decision as support for its argument that there was no showing of prejudice to applicant. However, in *Kaiser* the Supreme Court stated:

If the employee remains ignorant of his rights past the time the employer breaches its duty to notify, the employee *will be prejudiced* from the date of breach until the employee gains actual knowledge that he may be entitled to benefits under the workers' compensation system. By promoting the purpose of the notice statute in this manner, we accord weight to the Legislature's choice following *Reynolds* to modify the Labor Code's notice requirements rather than to alter the statute of limitations.
(*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1985) 39 Cal.3rd 57, 65 [50 Cal.Comp.Cases 411], emphasis added.)

As the WCJ noted in his January 20, 2021, Report and Recommendation on Petition for Reconsideration (Report), "Although a claim form was provided, Defendant did not offer proof of the notices (in Spanish) that would have accompanied the claim form." (Report, p. 3.) Based thereon, it is clear that defendant's failure to provide applicant with the notice to which he was entitled constitutes "prejudice" that applicant encountered.

Finally, regarding defendant's argument that applicant's injury claim is barred by section 5410, the language of that section specifically states that an injured worker may "...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.*" (Lab. Code, § 5410, emphasis added.) In this matter, the injury claim was not previously resolved in any manner and a Petition to Reopen has not been filed. Thus, the provisions of section 5410 are not applicable, and that section has no impact on applicant's claim.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Opinion and Decision After Reconsideration issued by the Workers' Compensation Appeals Board on January 31, 2022, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 6, 2023

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

**JESUS AMEZCUA
LAW OFFICES OF JESSE MARINO, APC
PEARLAMN, BROWN & WAX**

TLH/mc

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

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

JESUS AMEZCUA, *Applicant*

vs.

**DESERT COASTAL TRANSPORT, INC. / PEOPLEASE CORPORATION and
NATIONAL INTERSTATE INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ11997202
Santa Ana District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on December 23, 2020, wherein the WCJ found in pertinent part that the Application for Adjudication of Claim (Application) was filed on January 9, 2019, more than five years after the date of injury, and that applicant's claim is barred by the five-year limitations period defined in Labor Code section 5410.³

Applicant contends that the application was timely filed, and that applicant's injury claim is not barred by the section 5410 five-year limitation period.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the Findings of Fact except that we will amend the Findings of Fact to find that the Application was timely filed within the previously tolled section 5405 one-year limitations period. Therefore, we will rescind the Order and substitute a new Order, ordering that applicant's injury claim is not barred by the statute of limitations and that the Appeals Board retains jurisdiction as to applicant's injury claim; and we will return the matter to the WCJ for further proceedings consistent with this

³ All further statutory references are to the Labor Code unless otherwise noted.

opinion.

BACKGROUND

Applicant claimed injury to his right leg and ankle while employed by defendant as a driver on December 30, 2013. He received a claim form that he signed and returned to the employer (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 10, 2020, p.4.) Applicant received medical treatment from Kamran Aflatoon, D.O. / Concentra Medical Group, including a right tibia metal rod implant surgery. (See Joint Exh. D, Concentra Medical Group.) Defendant paid applicant temporary disability indemnity during the period from January 1, 2014, through October 20, 2014. (Joint Exh. G, Notice Regarding Temporary Disability Benefits.) On November 7, 2014, Dr. Aflatoon found applicant's condition to be permanent and stationary and he discharged applicant to "regular activities." (Joint Exh. D, p. 5 [EAMS p. 12].) Based on Dr. Aflatoon's statement that applicant had no permanent disability, applicant was not paid permanent disability indemnity benefits. (Joint Exh. F, Notice Regarding Permanent Disability Benefits, November 13, 2014.)

Defendant filed a declaration of readiness to proceed stating that the parties "have reached an impasse." The parties proceeded to trial on December 10, 2020. The issue submitted for decision was, "The defendant's assertion of the statute of limitations defense." (MOH/SOE, p. 2.)

DISCUSSION

Pursuant to section 5405:

The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:

- (a) The date of injury.
 - (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
 - (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.
- (Lab. Code, § 5405.)

The California Supreme Court has held that where an employer fails to provide the employee the statutorily required notice regarding an injury claim, the statute of limitations is tolled until the employer demonstrated that the employee had "actual knowledge" of his or her

rights regarding an injury claim. (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1985) 39 Cal.3rd 57, 64–65, 67 including fn. 8 [50 Cal.Comp.Cases 411].)

In the Report, the WCJ explained:

Although a claim form was provided, Defendant did not offer proof of the notices (in Spanish) that would have accompanied the claim form. ¶ Failure to advise an injured worker of his rights under the Labor Code, including time limits for filing a claim, tolls the statute of limitations until the worker becomes aware of such rights [*Galloway v WCAB*, 63 CCC 532 (1998)]. In *Honeywell v. Workers' Comp. Appeals Bd. (Wagner)*, 70 CCC 97 at 104 (2005), the Supreme Court stated that the tolling of the limitation period lasts *only* until a worker learns of his potential rights. ¶ Therefore, where an employee gains knowledge of his workers' compensation rights, the statute of limitations should not be tolled even if, as is claimed here, an employer breaches its duty to provide required notices because when Applicant gains knowledge of his workers' compensation rights he is not prejudiced by the employer's breach. ¶ Mr. Amezcua appears to have learned of those rights in September 2018, if not earlier.

(Report, pp. 3 – 4.)

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]; *Bolanos v. Workers' Comp. Appeals Bd.* (2014 W/D) 79 Cal.Comp.Cases 1531.) The burden of proving the employee's knowledge of his or her rights is on the employer. (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd., supra.*) Having reviewed the trial record, we agree with the WCJ that applicant appears to have learned of his rights in September 2018, when he obtained legal representation. There is no evidence in the record to the contrary. Thus, the section 5405 one year limitations period was tolled until September 2018.⁴

There is clearly a dispute and disagreement as to when the Application was filed. Applicant contends that it was filed on September 13, 2018, and review of the Electronic Adjudication Management System (EAMS) ADJ file indicates it was actually filed/received on January 9, 2019. However, as discussed above the section 5405 one year limitations period was tolled until

⁴ The specific date that applicant learned of his rights, within the month of September 2018, is not clear. For the purpose of clarifying the commencement of the limitations period we will assume the actual date was September 1, 2018.

September 1, 2018, so either date (September 13, 2018, or January 9, 2019) is within the one year limitations period. Based thereon the Application was timely filed and applicant's claim is not barred by the statute of limitations.

Accordingly, we affirm the Findings of Fact except that we amend the Findings of Fact to find that the Application was timely filed within the previously tolled section 5405 one year limitations period. Based thereon, we rescind the Order and substitute a new Order, ordering that applicant's injury claim is not barred by the statute of limitations and that the Appeals Board retains jurisdiction as to applicant's injury claim; and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 23, 2020 Findings and Order, is **AFFIRMED**, except that the Findings Of Fact is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. The Application for Adjudication of Claim invoking the original jurisdiction of the Appeals Board was filed on January 9, 2019, a date within the previously tolled Labor Code section 5405 one-year limitations period.

IT IS FURTHER ORDERED that the Order is **RESCINDED**, and the following is substituted therefore:

ORDER

Applicant's injury claim is not barred by the applicable limitations period and the Appeals Board retains jurisdiction as to the injury claim at issue herein.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 31, 2022

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

**JESUS AMEZCUA
LAW OFFICES OF JESSE MARINO, APC
PEARLAMN, BROWN & WAX**

TLH/pc

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