

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **TERESA GODINEZ,**

Case No. SJO 0225696

5 ***Applicant,***

6 **vs.**

**OPINION AND DECISION
AFTER RECONSIDERATION**

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8 **BUFFETS, INC., permissibly self-**
9 **insured and SPECIALTY RISK**
10 **SERVICES, adjusting agent,**

11 ***Defendant(s).***

12 On August 6, 2004, the Appeals Board granted reconsideration to further study the
13 factual and legal issues in this case. We have completed our deliberations, and the following is
14 our decision after reconsideration.

15 In the Findings and Order (Amended) of May 25, 2004, the workers' compensation
16 administrative law judge (WCJ) found that defendant's vocational rehabilitation appeal filed on
17 August 5, 2003 was filed with the Rehabilitation Unit (RU), not with the Appeals Board, that
18 there was no timely appeal of the RU's determination of July 17, 2003, and that defendant must
19 comply with said determination.

20 Defendant sought reconsideration of the WCJ's decision, contending that the repeal of
21 Labor Code section 4645(d) in 2003 applies retroactively because the statute was procedural,
22 that there is no longer any requirement to file a rehabilitation appeal with the Appeals Board,
23 that the WCJ erred in relying on *Cabrera v. Intercell Industries* (1980) 45 Cal.Comp.Cases 3
24 [Appeals Board en banc], and that under WCAB Rule 10390 the WCJ should have excused
25 defendant's alleged mistake and proceeded on the merits.

26 Applicant filed an answer.

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1 In issuing his decision, the WCJ relied on Labor Code section 4645(d), which provided
2 (before its repeal in 2003) that an appeal of a decision of the RU must be filed with the Appeals
3 Board within 20 days of the date of the determination.

4 Based upon our review of the record and applicable law, we conclude that the timeliness
5 of an appeal from any determination or recommendation of the Administrative Director's
6 vocational rehabilitation unit with reference to an injury occurring before January 1, 2004, is
7 controlled by former Labor Code section 4645(d), and that defendant's appeal in this case was
8 filed timely. The date of injury in this case is June 18, 2000. Accordingly, as our decision after
9 reconsideration, we will reverse the WCJ's decision and return this matter to the trial level for
10 further proceedings and new decision on the merits of defendant's rehabilitation appeal.

11 As noted above, the RU issued its determination on July 17, 2003. Defendant filed an
12 appeal (which was served on applicant's attorney) at the District Office that was stamped:
13 "DWC/WCAB-RECD/Filed Aug 05 2003-San Jose." However, due to the address on the cover
14 letter, the document appears to have been forwarded by a clerk, incorrectly, to the Rehabilitation
15 Unit. In dismissing defendant's appeal, the WCJ found that it was filed improperly with the
16 RU, that by the time it found its way to the Appeals Board the time limit in section 4645(d) had
17 expired, and that it was therefore untimely. However, the date stamp shows that the incorrect
18 forwarding must have happened only after it was received at the District Office of the WCAB
19 on August 5, 2003. For this reason, and cognizant of public policy in favor of hearing cases on
20 their merits (*Litzmann v. Workers' Comp. Appeals Bd.* (1968) 266 Cal.App.2d 203 [33 Cal.
21 Comp. Cases 584]), we hold that the appeal was filed on August 5, 2003.

22 Nevertheless, there remains a question as to what "timely" means when the statutory
23 definition of "timely" has been repealed.

24 When we discussed timeliness of an appeal from the decision of the Rehabilitation
25 Bureau in *Cabrera v. Intercell Industries* (1980) 45 Cal.Comp.Cases 3 [Appeals Board en
26 banc], timeliness was governed by Administrative Director Rule 10014. (See 45
27 Cal.Comp.Cases at 7). That Rule was codified by Labor Code section 4645(d), first enacted in

1 1989 (1989 ch. 892, §33) and amended in 1993 (1993 ch. 121 [AB 110], §52). Administrative
2 Director Rule 10014 was repealed in 1996 as superfluous.

3 Before 2003, section 4645(d) provided:

4 “Any determination or recommendation of the administrative director’s vocational
5 rehabilitation unit or by the arbitrator shall be binding unless a petition is filed with the appeals
6 board within 20 days after service of the determination or recommendation. Nothing in this
7 section shall affect an employee’s rights pursuant to Sections 5405.5, 5410, and 5803.”

8 However, section 4645 was itself repealed in 2003 (2003 ch. 635 [AB 227]), together
9 with the rest of Division 4, Chapter 2, Article 2.6. Section 139.5 was also repealed and replaced
10 by a new section that applies to injuries occurring on or after January 1, 2004. In 2004, former
11 section 139.5 was re-enacted, with modifications, to apply to injuries occurring before January
12 1, 2004 (2004 ch. 34 [SB 899], §5). But the vocational rehabilitation sections of Article 2.6
13 were not re-enacted.

14 We note that the version of section 139.5(c) now operative refers to “former Section
15 4642” and “subdivision (d) or (e) of former Section 4644.” Thus, even though these sections
16 were repealed in 2003 and not reenacted in 2004, they still have a shadowy existence for injuries
17 prior to January 1, 2004.¹ Like ghosts “doomed for a certain term to walk the night” (*Hamlet I,*
18 *v*), these statutes have no material existence but linger until their work is done. Because there is
19 no other operative law, we hold that former section 4645 is a similar “ghost statute” that
20 continues to govern the timeliness of appeals from decisions of the Rehabilitation Unit.²

21 In this case, the appeal was filed on August 5, 2003, within 19 days of the Rehabilitation
22 Unit’s determination. Under former section 4645, it was timely.

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26 ¹ As a former U.S. President stated in a different context, “that depends on what the meaning of is is.”

27 ² See also *Pebworth v. Workers’ Comp. Appeals Bd.* (2004) 116 Cal. App. 4th 913 [69 Cal. Comp. Cases 199, 200 (fn. 2)].

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For the foregoing reasons,

IT IS ORDERED, that it is the Appeals Board’s decision after reconsideration that the Findings and Order (Amended) of May 25, 2004 is **RESCINDED**, and the following Finding is hereby **SUBSTITUTED** in its place:

FINDING

1. Defendant filed a timely appeal of the determination of the Rehabilitation Unit and is entitled to a hearing on the merits before the WCJ.

IT IS FURTHER ORDERED as the Appeals Board’s decision after reconsideration, that this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ on the merits of defendant’s rehabilitation appeal, consistent with this opinion.

WORKERS’ COMPENSATION APPEALS BOARD

I CONCUR,

DATED AND FILED AT SAN FRANCISCO, CA

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

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