

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

CAROL DONEY, *Applicant*

vs.

**BURBANK HOUSING DEVELOPMENT CORPORATION and STATE
COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ5736169
Santa Rosa District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
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 8, 2021, wherein the WCJ found in pertinent part that applicant's Application for Adjudication of Claim (Application) was not timely filed and her injury claim is barred by the statute of limitations.

Applicant contends that defendant did not comply with the requirements of Administrative Director (AD) Rule 9812 (Cal. Code Regs., tit. 8, § 9812), that the Application for Adjudication of Claim (Application) was timely filed, and that applicant's injury claim is not barred by the statute of limitations.

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 for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, we will grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her left knee and left ankle while employed by defendant as a self-help homeowner on November 4, 2002. Applicant was paid permanent disability indemnity

benefits, and the last payment was made on June 1, 2011. The Notice Regarding Permanent Disability Benefits states:

The final permanent disability payment in the amount of \$15,968.57 was sent separately. These benefits are ending because your permanent disability benefit has been paid in full. ... ¶ You have a right to disagree with decisions affecting your claim. ... ¶ The law limits the time period within which you may collect benefits. Should you disagree with any action taken by State Fund, in order to protect your rights, you must commence proceedings before the Workers' Compensation Appeals Board by filing an Application for Adjudication of Claim within one year of the date of your injury, or one year from the last furnishing of indemnity or medical treatment benefits by your employer or State Fund. If you do not do so, your right to benefits may be lost.
(Joint Exh. B.)¹

In the Corrected Notice Regarding Permanent Disability Benefits, defendant told applicant that the permanent disability benefits were ending, and explained that, “These benefits are ending because you are able to return to full duty without any restrictions or permanent impairment according to QME, Michael Ciepiela MD in his report of March 23, 2012.” (Joint Exh. E.)

In the July 16, 2021 Partial Denial of Liability, defendant stated:

Although we have accepted liability for your claim of injury to your left ankle and left knee, we are now denying liability for your claim of injury to lumbar spine because there is no medical evidence received to substantiate your alleged lumbar spine injury was caused or aggravated by your original injury of 11/4/2002 and/or employment @ Burbank Housing Development.
(Joint Exh. C.)

The Application was filed on July 15, 2021. Defendant filed its Answer, asserting the statute of limitations defense, on July 29, 2021.

The parties proceeded to trial on October 5, 2021, and the issue submitted for decision was whether applicant’s claim was barred by the statute of limitations. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 5, 2021.) Applicant testified; defendant did not present any witness testimony.

DISCUSSION

Pursuant to Labor Code section 5405:

¹ The September 16, 2013 Corrected Notice Regarding Permanent Disability Benefits contains the same information regarding the one year limitations period. (Joint Exh. E.)

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.)

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.)

Here, defendant had the burden of proof on the affirmative defense of statute of limitations, yet the only evidence it submitted with respect to the issue of the last date on which any benefits, including medical treatment, were provided, is the Benefits Paid Report. (Joint Exh. F.) Additionally, it appears from the document that the last benefits defendant provided to applicant were in 2014, however the document was printed on September 14, 2021. The document was not verified or signed, and it does not identify the person responsible for determining the accuracy of the document. Moreover, defendant did not offer any witness testimony as to the accuracy of the Benefits Paid Report or any other testimony about when benefits were provided. The exhibit, in and of itself, does not constitute substantial evidence and thus, cannot be the basis for a decision in this matter. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) Based thereon, defendant did not meet its burden of proof as to when the one year statute of limitations commenced.

Also, applicant asserts that defendant did not comply with the requirements of AD Rule 9812, and in the Answer defendant argues that:

In accord with 8 CCR § 9812(d), State Fund sent the required benefit notice to Ms. Doney on June 1, 2011. That notice contained the language mandated by the regulations, specifically informing Ms. Doney of the one-year statute of limitations.

(Answer, p. 3.)

AD Rule 9812(d) states in part:

(d) Notice that Benefits Are Ending (TD), (PD). At the same time as the last payment of temporary disability indemnity or permanent disability indemnity, the claims administrator shall advise the employee of the ending of indemnity payments and the reason ...

(1) Where the determination is related to a medical issue and the employee is not represented by an attorney, the notice shall advise the employee of one of the following:

(A) If the termination of benefits is based on a comprehensive medical evaluation ... the employee may file an Application for Adjudication of Claim with the WCAB.

(B) If the termination of benefits is based on the treating physician's evaluation of the employee's temporary or permanent disability status ... the employee must either:

1. contact the claims administrator ... to obtain the form prescribed by the DWC Medical Unit to request assignment of a panel of Qualified Medical Evaluators, or

2. ... download the form to request assignment of a panel of Qualified Medical Evaluators from the DWC website.

(Cal. Code Regs., tit. 8, § 9812.)

We first note that AD Rule 9812(d) states that the required Notice applies to temporary disability and/or permanent disability benefits that are ending. Further, there is no evidence in the record before us to indicate that applicant was given notice that her medical treatment benefits would be limited or denied at any time before the July 16, 2021 Partial Denial of Liability. (See Joint Exh. C, p. 2.) In turn, she was not made aware of “any action taken by State Fund” regarding her medical treatment that she could then respond to or disagree with. In the event that the employer fails to give adequate notice, the one-year statute of limitations is tolled until the employee has such notice. (*Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd.* (1985) 39 Cal.3d 57 [50 Cal. Comp. Cases 411]; *Reynolds v. Workmen’s Comp. Appeals Bd.*, (1974) 12 Cal. 3d 726, 730 [39 Cal.Comp.Cases 726; *Galloway v. Workers’ Comp. Appeals Bd.*, (1998) 63 Cal.App.4th 880 [63 Cal.Comp.Cases 532].) Under these circumstances, the statute of limitations would have been tolled until applicant received the July 16, 2021 correspondence whereby she was told that a portion of the medical treatment she requested was being denied.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on December 8, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 8, 2021 Findings and Order **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 28, 2022

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

**CAROL DONEY
MEECHAN ROSENTHAL & KARPILOW
STATE COMPENSATION INSURANCE FUND**

TLH/pc

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

CS