**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**ANABEL DIAZ, *Applicant***

**vs.**

**SAN BERNARDINO COUNTY AGING SERVICES; COUNTY OF SAN BERNARDINO, *Defendants***

**Adjudication Number: ADJ11237937**
**Riverside District Office**

# OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Order Dismissing Petition to Reopen, issued on November 9, 2023, wherein the workers' compensation administrative law judge (WCJ) dismissed applicant's Petition to Reopen, based on the lack of timely objection filed in response to a Notice of Intention (NIT) issued October 13, 2023. The NIT reflected defendant's objection to the Petition to Reopen on the grounds that the petition was filed one day late, but that an amended application was timely filed.

Applicant contends that proper service was made despite the time and date stamp in the Electronic Adjudication Management System (EAMS), and that new medical reports included with the Petition to Reopen document applicant's increased complaints.

We have received an Answer from defendant County of San Bernardino (defendant). The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will rescind the

November 9, 2023 Order Dismissing Petition to Reopen, and return this matter to the trial level for further proceedings consistent with this opinion.

**FACTS**

Applicant claimed injury to her low back while employed as a social worker by defendant County of San Bernardino on February 1, 2018. The parties stipulated to the injury, and the WCJ issued an Award on September 27, 2022, with provision for further medical treatment.

On February 1, 2023, applicant filed an amended application claiming multiple additional body parts. (Application for Adjudication of Claim, February 1, 2023.)

On February 1, 2023, at 5:00:03 PM, applicant filed a Petition to Reopen, averring the need for new medical treatment arising out of her original injury, as well as increased complaints, including diagnostic studies, and new recommended treatment modalities. (Petition to Reopen, signed January 13, 2023, at p. 1.)

On February 7, 2023, defendant objected to the Petition to Reopen, on the grounds that the petition was not filed until February 2, 2023, and that no substantial evidence supported the reopening of the claim. (Defendant's Answer to Petition to Reopen, February 7, 2023, at p. 1:20.)

On October 11, 2023, defendant filed a petition seeking the dismissal of applicant's Amended Application and Petition to Reopen on the grounds that the Petition to Reopen was untimely and unsupported by substantial medical evidence. (Defendant's Petition to Dismiss Untimely Amended Application and Petitions to Reopen, October 11, 2023, at p. 1:24.)

On October 12, 2023, the WCJ issued a Notice of Intention to Dismiss Petition to Reopen, noting that applicant's Petition to Reopen was filed on February 2, 2023, but that an amended application was filed on February 1, 2023. (Notice of Intention to Dismiss Petition to Reopen, October 13, 2023.) The WCJ provided ten days for any party to file an objection, and served the NIT on applicant, applicant's counsel, and defendant.

On November 9, 2023, the WCJ issued an Order Dismissing Petition to Reopen, noting that no timely objection had been received. (Order Dismissing Petition to Reopen, November 9, 2023, at p. 1.)

Applicant's Petition for Reconsideration contends that notwithstanding the time and date indicated in EAMS, the Petition to Reopen was properly served. Applicant asserts, "[i]tems are routinely served, date stamped by a postage machine, placed in the US Mail for processing and

sent to be delivered … [t]he sender has no further control over the item in the mail system at that point; likewise, on the uploading and filing into EAMS." (Petition, at p. 1.) Applicant further asserts that new medical reports filed with the Petition to Reopen demonstrate an increase in applicant's complaints, and diagnostic studies reflect new medical developments related to her original injury. (*Id.* at p. 2.)

Defendant's Petition avers applicant failed to file a timely petition to reopen within five years of the date of injury, and that the timely filing of a petition to reopen is jurisdictional. Defendant avers there is no evidence of new and further disability, and that applicant's records, at most, point to a need for different treatment modalities. (Answer, at 4:20.) Defendant also asserts that any new diagnostic studies filed by applicant fail to explain why there is new disability, or why it is industrially related. (*Id.* at p. 5:5.)

The WCJ's Report observes that pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10615, a document is deemed received the same day it is filed so long as it is filed before 5:00 PM on a court day. However, if the document is filed after 5:00 PM, the document shall be deemed filed as of the next court day. Here, the Petition to Reopen was filed after 5:00 PM on the last day to timely file, and was thus deemed filed the next day, which was one day late. (Report, at pp. 3-4.) The WCJ further notes that applicant failed to object to the WCJ's October 12, 2023 NIT to Dismiss the Petition to Reopen. (Report, at pp. 2-3.)

## DISCUSSION

Labor Code[1] section 5410 confers on the Workers' Compensation Appeals Board continuing jurisdiction over a prior award when a timely petition is filed within five years of the date of injury. The section provides:

> Nothing 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.)

[1] All further references are to the Labor Code unless otherwise noted.

However, for an applicant to recover additional temporary or permanent disability benefits, the petition must be filed within five years from the date of injury, and applicant must have suffered a "new and further disability" within that five-year period, unless there is otherwise good cause to reopen the prior award. An injured worker therefore cannot confer jurisdiction on the Board by filing a petition to reopen an award before the five-year period has expired for anticipated new and further disability to occur thereafter. (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 926, [72 Cal.Comp.Cases 778] (*Sarabi*); *Nicky Blair's Rest. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 941 [45 Cal.Comp.Cases 876].)

In *Sarabi, supra*, applicant sustained right shoulder injury on August 28, 1999, resulting in findings and award issuing December 15, 2000. Applicant underwent an additional right shoulder surgery on January 18, 2002, and filed a November 15, 2002 petition to reopen alleging a "change in condition had resulted in further periods of temporary disability." (*Id*. at p. 922.) On May 26, 2004, applicant's orthopedic surgeon stated applicant was temporarily disabled and needed further right shoulder surgery, and that the physician had repeatedly requested that this surgery take place. On August 17, 2004, the orthopedic agreed medical examiner reported applicant required right shoulder surgery and temporary total disability. The disability was postponed several times to allow applicant to treat for nonindustrial conditions before he could be medically cleared for surgery. (*Id*. at p. 923.) A subsequent dispute arose as to whether the continuing jurisdiction of the Appeals Board was timely invoked. The Court of Appeal held that applicant's timely filing of a petition to reopen, along with the need for additional surgery in 2004 was sufficient to invoke the Board's continuing jurisdiction. The court held:

> """[N]ew and further disability" has been defined to mean disability… result[ing] from some demonstrable change in an employee's condition…' [citation]," including a "'gradual increase in disability.'" (Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd. (1980) 109 Cal.App.3d 941, 955 [167 Cal. Rptr. 516].) """Historically, a change in physical condition necessitating further medical treatment ha[s] been considered new and further disability…[Citation.]" Thus, "[c]ommonly, new and further disability refers to a recurrence of temporary disability, a new need for medical treatment, or the change of a temporary disability into a permanent disability." [Citation.]'"
> …
> [T]he need for surgery was clear as early as May 26, 2004, when Dr. McCarthy made his recommendation for right shoulder surgery, or at the latest by August 17, 2004, when Dr. Edington opined that Sarabi had a TTD and needed right shoulder surgery. Because Sarabi's disability worsened and further medical

> treatment in the form of right shoulder surgery became necessary within the five-year period, Sarabi suffered "new and further disability" within the meaning of section 5410 and the Board had jurisdiction to award him additional TTD benefits.
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> (*Sarabi, supra*, at p. 926.)

More recently, the Court of Appeal in *Applied Materials v. Workers' Comp. Appeals Bd.* (*Chadburn*) (2021) 64 Cal.App.5th 1042 [86 Cal.Comp.Cases 331] (*Applied Materials*), defined new and further disability as "disability resulting from some demonstrable change in the employee's condition, including a gradual increase in disability, a recurrence of TD, a new need for medical treatment, or the change of a temporary disability into a permanent disability." (*Id.* at p. 1080.) In *Applied Materials, supra*, the applicant sustained injury to her neck and right arm on November 27, 2001. The applicant settled her claim in 2005 by way of stipulated Award. (*Id.* at p. 1054.) Applicant then filed a timely petition to reopen for new and further disability in October, 2006. When the parties eventually appeared for trial in 2017, defendant contended that the applicant had not suffered new and further disability "because her alleged new and further disability arose more than five years after November 27, 2001, the date of injury for its claim." (*Id.* at p. 1080.) Defendant asserted the reports of the orthopedic AME and QME found no evidence of any new and further disability due to applicant's 2001 injury. However, the Court of Appeal rejected this argument, noting that the applicant's treatment for injury to her psyche, including evaluations with at least eight doctors between May, 2005 and November, 2006 "satisfied the definition of new and further disability in Sarabi." (*Id*. at p. 1081.)

Here, applicant's original date of injury was February 1, 2018. The parties resolved applicant's claim by way of Stipulations with Request for Award, approved by the WCJ on September 27, 2022. Pursuant to section 5410, the last day in which applicant could file a petition for new and further disability was February 1, 2023, or five years from February 1, 2018.

Applicant's Petition to Reopen was filed in EAMS at 5:00:03 PM on February 1, 2023. WCAB Rule 10615(b) provides:

> A document is deemed filed on the date it is received, if received prior to 5:00 p.m. on a court day. A document received after 5:00 p.m. on a court day shall be deemed filed as of the next court day.
>
> (Cal. Code Regs., tit. 8, § 10615(b).)

Applying Rule 10615 to the present matter, any document filed in EAMS after 5:00 PM on February 1, 2023, "*shall* be deemed filed as of the next court day," or February 2, 2023. Thus, the Petition to Reopen was filed on February 2, 2023, and was therefore untimely. (Lab. Code, § 5410.)

Applicant's Petition avers the petition was "served to the parties at 4:49 pm and 5:01 pm, respectively," and that "proper service was made, in spite of the time and date stamp of the EAMS Filenet uploading." (Petition, at p. 1.) However, the salient question here is not when the petition was served on the parties, but rather, the date of the filing of the petition with the Appeals Board. (*Newton v. Workers Comp. Appeals Bd.* (1993) 17 Cal.App.4th 147 [58 Cal.Comp.Cases 395] ["[t]o invoke the Board's continuing jurisdiction, an appropriate pleading must be filed with the Board within five years from the date of injury"].) We also observe that applicant offers no assertion that the petition was filed before 5:00 PM on February 1, 2023, nor does applicant offer any explanation for the failure to object to the WCJ's NIT. Accordingly, we discern no error in the WCJ's analysis that with respect to the Petition to Reopen, the filing was untimely.

However, we also observe that the applicant filed an Amended Application for Adjudication of Claim on February 1, 2023. The document amended applicant's claim of injury on February 1, 2018, averring applicant had developed injury to multiple body parts beyond those original claimed. The Amended Application also posits a dispute regarding liability with respect to temporary and permanent disability indemnity in addition to medical treatment and compensation. (Application for Adjudication, February 1, 2023, para. 9.)

In *Bland v. Workmen's Comp. Appeals* (1970) 3 Cal.3d 324 [35 Cal.Comp.Cases 513]), the California Supreme Court discussed the requirements necessary to a timely petition to reopen a prior award of disability. Therein, applicant sustained injury on December 16, 1963, resulting in an award of temporary and permanent disability. In January, 1968, applicant suffered pain in the left knee and an evaluating physician found additional disability, resulting in applicant's request that "the Appeals Board take such steps as may be necessary to a redetermination of this matter and for an increase in the benefits payable to petition on account of said permanent disability." (*Id.* at pp. 326-327.) A new award for increased permanent disability issued on January 6, 1969. However, applicant's condition was worsening during this period, and in a January 22, 1969 petition seeking reconsideration, applicant observed that his condition had continued to worsen to the point where surgery was now indicated. (*Id.* at p. 327.) The Appeals Board granted the petition,

awarded further temporary disability, and reserved jurisdiction over issues of permanent disability. However, defendant sought reconsideration on the grounds that the applicant's petition to reopen did not raise issues of temporary disability with particularity, divesting the Appeals Board of jurisdiction over the issue. (*Id.* at p. 328.) The Board agreed with defendant and reversed the award of temporary disability. In evaluating the issue of whether the Appeals Board retained jurisdiction to award temporary disability, the California Supreme Court observed that the Board is not bound by the common law or rules of statutory evidence, and from its earliest days, "has been allowed to receive hearsay evidence and to proceed informally…." (*Id.* at p. 330.) The Supreme Court further observed that:

> The board has appropriately enforced the legislative mandate regarding informality of pleading, as the following instances exemplify: by prohibiting demurrers to workmen's compensation claims, by permitting any party in interest to file an application, by not dismissing incomplete applications but rather attempting to obtain the necessary information on its own motion, by treating a new application for benefits filed more than five years after the date of injury as a valid petition to reopen because an earlier application relating to the same injury had been improperly dismissed, by interpreting a reasonably detailed letter from an injured workman as an application, by waiving the requirement of separate applications for separate injuries in the interests of justice, and by liberally permitting amendment to applications to conform to proof.
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> (*Bland, supra*, at p. 330.)

Based on these principles and on the Appeals Board's mandate to accomplish substantial justice, the Supreme Court reiterated that "[l]imitations provisions in the workmen's 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." (*Ibid.*) The Court concluded, "we do not believe that awkwardness in allegation should constrict a worker's right to compensation. In many cases before the [board], applicants are not represented by counsel and lack advice as to procedural niceties. The applicant's claim is entitled to adjudication upon substance rather than upon formality of statement." (*Id.* at p. 333, quoting *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598 [346 P.2d 545].)

Similarly, in *Blanchard v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590 [40 Cal.Comp.Cases 784], the Court of Appeal reversed the Appeals Board's determination that a petition to reopen was insufficiently specific as to the basis for reopening. Applicant's Petition to

Reopen generally alleged a change in his condition but did not set forth the evidence in support of the petition. (*Id.* at p. 593.) However, the Court of Appeal noted that "[t]he statute of limitations will not bar amendment of an application where the original application was timely and the amendment does not present a different legal theory or set of facts constituting a separate cause of action." (*Id.* at p. 595.) Accordingly, the Appeals Board retained the authority to head and evaluate the Petition to Reopen, notwithstanding its failure to specify the facts relied upon in reopening. (*Id.* at p. 594.)

Moreover, in *Beaida v. Workmen's Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204 [33 Cal.Comp.Cases], the Court of Appeal determined that a letter from applicant's treating physician discussing the physician's opinion that applicant's current award did not reflect his overall disability was a sufficient basis to invoke the Board's continuing jurisdiction under section 5410. The Court in *Beaida* noted that the physician's letter "claimed pain and disability for which the compensation provided by the original award now turned out to be inadequate," and that the public policy required that the letter be construed as a pleading. (*Id.* at p. 210.)

The workers' compensation system "was intended to afford a *simple and nontechnical path* to relief. (Italics added.)" (*Elkins v. Derby* (1974) 12 Cal.3d 410, 419 [39 Cal.Comp.Cases 624] citing 1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1973) § 4.01[1], pp. 4-2 to 4-3. Cf. Cal. Const., art. XX, § 21; § 3201.) Generally, "the informality of pleadings in workers' compensation proceedings before the Board has been recognized. (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500, 512]; *Bland v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 324, 328–334 [35 Cal.Comp.Cases 513].) "[I]t is an often-stated principle that the Act disfavors application of formalistic rules of procedure that would defeat an employee's entitlement to rehabilitation benefits. (*Martino v. Workers' Comp. Appeals Bd.*, (2002) 103 Cal.App.4th 485, 490 [67 Cal.Comp.Cases 1273].) Informality of pleading in proceedings before the Board is recognized and courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. (*Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200-01 [50 Cal.Comp.Cases 160]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866].) Moreover, section 5709 states that "[n]o informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division…" (Lab. Code, § 5709.) "Necessarily, failure to comply with the

rules as to details is not jurisdictional." (*Rubio, supra,* at 200–201; see Cal. Code Regs., tit. 8, § 10517.)

Additionally, it is the policy of the law to favor, whenever possible, a hearing on the merits. (*Fox v. Workers' Comp. Appeals Bd.*, (1992) 4 Cal.App.4th 1196, 1205; see also *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478, "when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default.") This is particularly true in workers' compensation cases, where there is a constitutional mandate "to accomplish substantial justice in all cases." (Cal. Const., art. XIV, § 4.) Therefore, in workers' compensation proceedings, it is settled law that: (1) pleadings may be informal (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd. (Cairo)* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500]; *Bland, supra, at pp.* 328–334; *Martino v. Workers' Comp. Appeals, supra,* 103 Cal.App.4th 485, 491; *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 1452, 1456 [52 Cal.Comp.Cases 151]; *Liberty Mutual Ins. Co v. Workers' Comp. Appeals Bd. (Aprahamian)* (1980) 109 Cal.App.3d 148, 152–153 [45 Cal.Comp.Cases 866]; *Blanchard, supra, at pp.* 594–595 [40 Cal.Comp.Cases 784]; *Beaida v. Workmen's Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 207–210 [35 Cal.Comp.Cases 245]); (2) claims should be adjudicated based on substance rather than form (*Bland, supra,* at pp. 328–334; *Martino v. Workers' Comp. Appeals, supra,* 103 Cal.App.4th 485, 491; *Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116 [53 Cal.Comp.Cases 502]; *Rivera*, *supra,* 190 Cal.App.3d at p. 1456; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598 [24 Cal.Comp.Cases 274]); (3) pleadings should liberally construed so as not to defeat or undermine an injured employee's right to make a claim (*Sarabi v. Workers' Comp. Appeals Bd. (2007)* 151 Cal.App.4th 920, at pp. 925–926 [72 Cal.Comp.Cases 778]); *Martino v. Workers' Comp. Appeals, supra,* 103 Cal.App.4th 485, 490; *Rubio v. Workers' Comp. Appeals Bd.*, *supra,* 165 Cal.App.3d 196, 199–201; *Aprahamian*, *supra,* 109 Cal.App.3d at pp.152–153; *Blanchard, supra,* 53 Cal.App.3d at pp. 594–595; *Beaida*, *supra,* 263 Cal.App.2d at pp. 208–209); and (4) technically deficient pleadings, if they give notice and are timely, normally do not deprive the Board of jurisdiction. (*Bland, supra, at pp.* 331–332 & see fn. 13; *Rivera*, *supra,* 190 Cal.App.3d at p. 1456; *Aprahamian*, 109 Cal.App.3d at pp. 152–153; *Blanchard*, *supra,* at pp. 594–595; *Beaida*, *supra,* 263 Cal.App.2d at pp. 208–210).)

Reflecting these principles, WCAB Rule 10617 of the WCAB's Rules of Practice and Procedure provides:

> (a) An Application for Adjudication of Claim, a petition for reconsideration, a petition to reopen or any other petition or other document that is subject to a statute of limitations or a jurisdictional time limitation shall not be rejected for filing solely on the basis that:
>
> (1) The document is not filed in the proper office of the Workers' Compensation Appeals Board;
>
> (2) The document has been submitted without the proper form, or it has been submitted with a form that is either incomplete or contains inaccurate information; or
>
> (3) The document has not been submitted with the required document cover sheet and/or document separator sheet(s), or it has been submitted with a document cover sheet and/or document separator sheet(s) not containing all of the required information.
>
> (Cal. Code Regs., tit. 8, § 10617(a).)

The rule thus provides for considerable latitude in accepting nonstandard pleadings, so long as the pleadings contain "a combination of information sufficient to establish the case or cases to which the document relates or, if it is a case opening document, sufficient information to open an adjudication file." (Cal. Code Regs., tit. 8, §10617(b).) Similarly, WCAB Rule 10517 specifies that pleadings are deemed amended to conform to the stipulations agreed to by the parties on the record or may be amended by the Appeals Board to conform to proof. (Cal. Code Regs., tit. 8, §10517.) These rules represent the application of California's public policy in favor of adjudication of claims on their merits, rather than on the technical sufficiency of the pleadings.

Applying these principles to the matter at bar, we are persuaded that applicant's February 1, 2023 Amended Application for Adjudication, filed before the expiration of the five year limit set forth in section 5410, is appropriately deemed a timely petition for new and further disability. The Amended Application lists a multitude of body parts beyond the low back, which was the only body part listed in applicant's September 27, 2022 Award. Moreover, applicant has indicated that in addition to newly claimed body parts, there is a dispute as to both temporary and permanent disability. (Amended Application for Adjudication of Claim, February 1, 2023, at para. 9.) Thus, the application does not merely set forth a request for additional medical treatment. (cf. *Granite Constr. Co. v. Workers' Comp. Appeals Bd.* (*McReynolds*) 112 Cal.App.4th 1453 [68 Cal.Comp.Cases 1548] [request for medical treatment insufficient basis to reopen Award].) Rather,

the amended application indicates a dispute regarding body parts, and both temporary and permanent disability. Pursuant to the reasoning in *Bland, supra*, and in accordance with the Appeals Board's policy of liberal pleadings, and the well-established public policy in favor of adjudication of claims based on their merits, we are persuaded that applicant's February 1, 2023 Amended Application provides a sufficient basis upon which to confer the continuing jurisdiction granted under section 5410.

In summary, we agree with the WCJ's analysis with respect to the timeliness of applicant's February 2, 2023 Petition to Reopen. However, because we are persuaded that applicant's timely filing of an Amended Application is sufficient to confer the Appeals Board's continuing jurisdiction pursuant to section 5410, we will grant applicant's Petition, rescind the November 9, 2023 Order Dismissing Petition to Reopen, and return this matter to the trial level for proceedings consistent with this opinion.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the decision of November 9, 2023 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Order Dismissing Petition to Reopen, issued on November 9, 2023, is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I DISSENT *(See Dissenting Opinion),***

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**January 29, 2024**

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

**ANABEL DIAZ**
**RJ LAW GROUP**
**COUNTY COUNSEL SAN BERNARDINO**

**SAR/abs**

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

**DISSENTING OPINION OF COMMISSIONER RAZO**

I respectfully dissent**.** While I agree with my colleagues that applicant's Petition to Reopen was not timely filed, the Amended Application for Adjudication does not adequately set forth the facts and allegations necessary to be construed as a petition to reopen.

The purpose of limitations periods in the Labor Code is "to foster both certainty and finality in the law." (*Barnes v. Workers' Comp. Appeals Bd.* (2000) 23 Cal.4th 679, 686 [65 Cal.Comp.Cases 780].) The continuing jurisdiction of the Appeals Board pursuant to section 5410 may only be invoked upon the timely filing of a timely petition alleging new and further disability. (Lab. Code, § 5410.)

In proceedings initiated under the Board's continuing jurisdiction, it is the applicant that bears the burden of establishing that their disability is both "new" and "further." (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 926 [72 Cal.Comp.Cases 778].) In *Al Gene Sportswear v. Indus. Acc. Comm.* (*Porter*) (1961) 196 Cal.App.2d 709 [26 Cal.Comp.Cases 217], the court of appeal determined that applicant's allegation that her complaints had recurred and that her pain had returned was an insufficient basis upon which to confer the Board's continuing jurisdiction. This was because, "not a word was said about any new or further disability." (*Id.* at p. 219.) The court in *Porter* also observed that, "[w]hile a liberal construction should be given to such a petition, this does not mean that allegations can be read into a petition which do not appear therein and which cannot be implied under any reasonable construction." (*Id.* at p. 220.)

Here, the Amended Application offers no narrative allegation of a change in circumstance, need for medical treatment, additional periods of temporary disability, or increased permanent disability. Nor does the Amended Application reflect any assertion that applicant has sustained disability that is "new" and "further." The Amended Application references no medical evidence in support of applicant's claim, only a series of newly pleaded body parts without any explanation of the relationship between body part and industrial injury. Moreover, the Amended Application references a panoply of collateral body parts without ever referencing a change in condition to the only body part covered by applicant's existing award, the low back.

And while the Amended Application indicates a dispute regarding permanent disability, applicant has also checked the box for *every type of possible dispute* including an oblique reference to a dispute regarding "all benefits under the Labor Code." (Amended Application, at para. 9.) An

assertion of entitlement to an ambiguous array of benefits, without more, is an insufficient basis for the invocation of the Board's continuing jurisdiction under section 5410. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 [56 Cal. Comp. Cases 476] [the rule of liberal construction "should not be used to defeat the overall statutory framework and fundamental rules of statutory construction"].)

Finally, I note that applicant failed to timely object to the WCJ's Notice of Intention to Dismiss, which would have afforded applicant the opportunity to be heard and to present argument on the sufficiency of the pleadings. Moreover, applicant's current Petition for Reconsideration offers no compelling reason for why the Petition to Reopen was not timely filed, especially in light of the fact the several of the medical reports referenced in the Petition to Reopen were adduced many months previously. (Petition to Reopen, January 13, 2023, at p. 1.)

Based on the above, I agree with my colleagues that the Petition to Reopen was untimely, but I do not believe that the Amended Application is sufficient to invoke the continuing jurisdiction of the Appeals Board. I would affirm the WCJ's dismissal of the Petition to Reopen, accordingly.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**January 29, 2024**

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

**ANABEL DIAZ**
**RJ LAW GROUP**
**COUNTY COUNSEL SAN BERNARDINO**

**SAR/abs**

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