

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

DANIEL NAKAGAWA, *Applicant*

vs.

CITY AND COUNTY OF SAN FRANCISCO, permissibly self-insured, *Defendants*

**Adjudication Number: ADJ10964062
San Francisco District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.¹ We now issue our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact issued by the workers' compensation administrative law judge (WCJ) on November 19, 2020, wherein the WCJ found in pertinent part that defendant did not meet its burden of proof with respect to the statute of limitations defense.

Defendant contends that a "notice regarding permanent disability benefits denial" issued by defendant was sufficient notice that applicant would be time-barred from pursuing further benefits at the WCAB if applicant did not take action within a year from the notice of permanent disability benefits denial.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto. Based on our review of the record, and as discussed below, we will affirm the WCJ's November 19, 2020 Findings of Fact.

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¹ Commissioner Sweeney, who was on the panel that granted reconsideration to study this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

BACKGROUND

We will briefly review the relevant facts. Applicant, while employed as a firefighter and paramedic on November 12, 2013, sustained injury to his back.

The parties stipulated that applicant's injury arose out of and in the course of employment (AOE/COE). (Pre-trial conference statement, p. 2; Minutes of Hearing and Summary of Evidence, August 19, 2020 trial (MOH/SOE), p. 2.)

Defendant provided benefits in the form of medical treatment and payment for loss of salary, in lieu of temporary disability payments pursuant to Labor Code section 4850.² (Medical report by Thomas Marsella, M.D., Applicant's Ex. 2, dated November 12, 2013, pp. 1-2; medical report by Dr. Lisa Zacharewicz, dated January 27, 2014, applicant's Ex. 1, p. 1; printout of benefits, dated April 21, 2020, Joint Ex. 2, p. 2.)

On November 21, 2013, defendant issued a letter titled "notice regarding permanent disability benefits" "monitor for disability status." (Benefit notices, Applicant's Ex. 3, pp. 3-4.)

On January 28, 2014, defendant issued a further letter titled "notice regarding permanent disability" "denial," which states in pertinent part as follows:

Labor Code Section 5405 states that an injured worker has **one (1) year** from the date of either last payment of temporary disability benefits or last furnishing of medical benefits to commence proceeding with the Workers' Compensation Appeals Board for the collection of benefits. Labor Code Section 5410 states that an injured worker shall have **five (5) years** from the date of injury to commence proceedings to collect benefits for new and further disability for temporary disability, permanent disability, vocational rehabilitation services or medical treatment.

To resolve a dispute, you may apply to the Workers' Compensation Appeals Board.

(Benefit denial notice, dated January 28, 2014, Joint Ex. 1, pp. 1-2, emphasis added.)

Applicant filed an Application for Adjudication on August 2, 2017, claiming injury to his back while employed by defendant as a firefighter/EMT on November 12, 2013.

On August 19, 2020, the matter proceeded to trial on the following issue:

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

Limitations, with defendant asserting that the Application for Adjudication filed herein on August 2, 2017, was untimely within the meaning of Labor Code section 5405.

(MOH/SOE, p. 2.)

At trial, the WCJ admitted exhibits into evidence, applicant made an offer of proof in lieu of live testimony, defendant waived cross-examination, and no other witnesses were called to testify. Applicant's offer of proof is as follows:

1. Applicant received the 1/28/2014 letter from City and County of San Francisco entitled "Notice Regarding Permanent Disability Benefits Denial."
2. Following receipt of this letter, applicant did not understand the letter to mean that he had one year from the last provision of benefits to file an Application at the WCAB, or his future benefits would be barred. If he had known that, he would have filed an Application within one year of the last provision of benefits.

(Offer of proof, MOH, p. 4.)

At the parties' request, the WCJ permitted each party to file and serve a post-trial brief, and the matter was submitted thereafter.

DISCUSSION

An injured worker who previously received workers' compensation benefits, whether voluntarily paid by the employer or pursuant to an award, is entitled to claim benefits for "new and further disability" within five years of the date of injury. (Lab. Code, § 5410; *Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 925 [72 Cal.Comp.Cases 778].)

Section 5410 states:

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.)

To claim benefits for new and further disability under section 5410, the injured worker must have been furnished workers' compensation benefits, either voluntarily or pursuant to an award. The furnishing of medical treatment for an industrial injury constitutes such a benefit. (Lab.

Code, § 4600; *Standard Rectifier Corp. v. Workers' Comp. Appeals Bd. (Whiddon)* (1966) 65 Cal. 2d 287, 291 [31 Cal.Comp.Cases 340].) "The rationale of this rule is that the 'new and further disability' to which section 5410 refers is a disability in addition to that for which the employer previously provided benefits as required by the statute." (*Whiddon, supra*, at 290-291.)

Pursuant to WCAB Rule 10536, the jurisdiction of the WCAB under section 5410 shall be invoked by a petition for new and further disability or, if no prior Application for Adjudication of Claim has been filed, jurisdiction shall be invoked by the filing of an original Application for Adjudication of Claim. (Cal. Code Regs., tit. 8, § 10536.) Here, applicant's date of injury was November 12, 2013, applicant received workers' compensation benefits in 2013-2014, and applicant's first Application for Adjudication of Claim was filed in August 2017, less than five years from the date of injury. Thus, applicant timely invoked WCAB jurisdiction.

Defendant's reliance on *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726 is misplaced as the cases are factually and procedurally distinguishable. The issue in *Reynolds* was whether the injured worker's initial claim was timely, whereas here the issue is whether applicant's petition for new and further disability was filed was timely, i.e., filed within five years of the date of injury.

Although *Reynolds* is distinguishable, the analysis regarding the purpose of the notice requirement is instructive. In *Reynolds*, the court held the employer was precluded from raising a statute of limitations defense where the worker suffered a heart attack at work and the employer did not provide notice of workers' compensation benefits. The court explained that:

The clear purpose of these rules is to protect and preserve the rights of an injured employee who may be ignorant of the procedures or, indeed, the very existence of the work[ers]' compensation law. Since the employer is generally in a better position to be aware of the employee's rights, it is proper that he should be charged with the responsibility of notifying the employee, under circumstances such as those existing here, that there is a possibility he may have a claim for work[ers]' compensation benefits.

(*Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726, 729 [39 Cal.Comp.Cases 768].)

Here, defendant contends that its notice was proper and legally sufficient and applicant was placed on notice of the time limits in which to commence proceedings with the WCAB. (Petition, p. 6.) To the contrary, the notice provides two different code sections, with two different time limits, and does not advise applicant which code section/time limit is applicable to his situation:

one (1) year or five (5) years.³ In essence, defendant’s notice requires applicant to reach a legal conclusion, which is at odds with the court’s holding in *Reynolds*. (*Reynolds, supra*, at 730 [“The clear purpose of these rules is to protect and preserve the rights of an injured employee” who may be ignorant of workers’ compensation law].) Because we affirm the WCJ’s decision on other grounds, we need not perform a detailed analysis of whether defendant’s notice complied with the requirements set forth in the Administrative Rules. However, to the extent that the issue before us was whether defendant’s notice was adequate, it is not readily apparent that the notice complies with the requirements set forth in section 4062(a) or Administrative Director (AD) Rule 9812(e)(3)(A). (Lab. Code, § 4062(a); Cal. Code Regs., tit. 8, § 9812(e)(3)(A).)

Based on the record, applicant timely invoked WCAB jurisdiction. Accordingly, we affirm the WCJ’s November 19, 2020 Findings of Fact.

³ **Labor Code section 5405** states that an injured worker has **one (1) year** from the date of either last payment of temporary disability benefits or last furnishing of medical benefits to commence proceeding with the Workers’ Compensation Appeals Board for the collection of benefits. **Labor Code section 5410** states that an injured worker shall have **five (5) years** from the date of injury to commence proceedings to collect benefits for new and further disability for temporary disability, permanent disability, vocational rehabilitation services or medical treatment. (Benefit denial notice, dated January 28 , 2014, Joint Ex. 1, pp. 1-2, emphasis added.)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact issued by the WCJ on November 19, 2020 are **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 30, 2024

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

**DANIEL NAKAGAWA
DURARD, MCKENNA & BORG
OFFICE OF THE CITY ATTORNEY**

JB/pm

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