WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DENNIS LEMON, *Applicant*

vs.

CONSOLIDATED FREIGHTWAYS, in liquidation;
CIGA for RELIANCE INS. CO., in liquidation;
US FIDELITY AND GUARANTY INSURANCE CO.,
administered by ZENITH, *Defendants*

Adjudication Number: ADJ1058134 (LAO 0885992)
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the "Findings and Order" (F&O) issued on June 10, 2025, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant did not meet his burden of proving that he timely filed his claim, and thus barred the claim per the statute of limitations in Labor Code[1] section 5405.

Applicant contends, in pertinent part, that the WCJ misapplied the burden of proof as the statute of limitations is defendant's burden and that the statute of limitations was tolled in this case pursuant to the holding in *Reynolds* because defendant failed to adequately notify applicant of his right to file a workers' compensation claim. (*Reynolds v. Workmen's Comp. Appeals Bd*. (1974) 12 Cal.3d 726 [39 Cal.Comp.Cases 768].)

We have received an answer from defendant Zenith. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we grant reconsideration to amend the F&O to clarify that defendant met its burden of proof, but otherwise deny reconsideration on the merits.

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

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record we will grant applicant's Petition for Reconsideration and as our Decision After Reconsideration, we will rescind the June 10, 2025 F&O and substitute a new Finding of Fact that defendant failed to meet its burden of proving the statute of limitations and return this matter to the trial level for further proceedings.

FACTS

Per the WCJ's Opinion on Decision:

> The Applicant has filed three Applications for three separate injuries in the course and scope of his employment at Consolidated Freight Ways.
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> On July 15, 1997, Applicant filed for a specific date of injury that occurred on 12/28/1996 (ADJ3563078) to his bilateral upper extremities, head, back, left lower extremity, psyche, nervous system.
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> Subsequently, on December 29, 1999, Applicant filed a continuous trauma claim (CT) from 12/28/1996 to 07/15/1998 (ADJ2923317) to his bilateral upper extremities, head, back, left lower extremity, psyche, nervous system.
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> The specific injury claim of 12/28/1996 (ADJ3563078) and the CT claim from 12/28/1996 to 07/15/1998 (ADJ2923317) were resolved by a Joint Stipulated Award on November 27, 2002, at 34.25% permanent disability (PD) to his left upper extremity, left knee, neck and back. The settlement was based on the Agreed Medical Examiner (AME) reports of Dr. Angerman. Future medical care was needed and pursuant the AME reports of Dr. Angerman. CIGA for Reliance Insurance Company, in liquidation, is the carrier on these two prior claims. (Judicial Notice is taken of the Stipulated Award dated 11/27/2002 (EAMS ID #34831712).
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> Dr. Angerman was the Agreed Medical Examiner between Applicant Attorney and CIGA for Reliance Insurance Company, in liquidation.
>
> Applicant filed a timely Petition to Reopen for New and Further Disability on June 23, 2003, on those two prior claims and CIGA for Reliance Insurance Company, in liquidation, continues to be the administrator on those claims (ADJ3563078 and (ADJ2923317).
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> Per the WCIRB record search ran by CIGA on August 26, 2006, the carrier who provided coverage for Consolidated Freightways during the period in question, the applicant's return to work period, October 1, 2000 to October 1, 2002, is USF&G. (Defendant Zenith Exhibit I).

On September 3, 2002, Consolidated Freightways Corporation filed for bankruptcy and closed its doors. (Defendant Zenith Exhibit O and Pat p. 11; Applicant Exhibits 1-6). . .

There is an alleged first amended application for cumulative trauma: 2/2000 to 9/2002 (ADJ1058134) dated December 27, 2007, but it lacks a conformed copy and proof of service. It was filed in EAMS on October 18, 2017, with no Proof of Service (Fully Joint Exhibit FF).

There is another alleged Application for cumulative trauma up to 2002 (ADJ1058134) that is dated March 19, 2008, but it also lacks a conformed copy and proof of service. This application was filed in EAMS on October 18, 2017 (Fully Joint Exhibit GG).

Defendant U.S. Fidelity and Guaranty Insurance Company (USF&G), administered by Zenith (collectively referred to as "Zenith") has denied this subsequent cumulative trauma claim (ADJ1058134) and has paid no benefits. They denied this claim because they claim they had no knowledge of this claim until after they received a Notice of Conference for a hearing on October 27, 2008. This is evidenced by a letter Defense Counsel for Zenith wrote to Applicant's counsel Hinden & Breslavsky asking for information regarding this claim and service of documents. Specifically, on October 18, 2008, Defense Counsel for Zenith sent a letter to Hinden Breslavsky's office, acknowledging notice of hearing scheduled for October 27, 2008, but indicating they have no other information and requested for service of records. (Defendant Zenith Exhibit H).

This lack of knowledge on the part of Zenith is confirmed by the initial claim notes from Zenith dated 10/2/2008, which indicate that a new assignment was created on 10/2/2008 and assigned to a claim examiner named Steve for handling. (Defendant Zenith Exhibit Q).

As further evidence of the lack of service, Defendant Zenith points our attention to the Minutes of Hearing from 1/7/2021 where Applicant Attorney was ordered by the Trial Judge at the time (Judge Landman) to upload evidence of proof of service of the 2002 CT application and correspondence dated 4/12/2021 from Defense counsel for Zenith asking for same. (Defendant Zenith Exhibit R).

Applicant Attorney confirmed this in their trial brief when they indicated that on April 23, 2018, when the prior Applicant Attorney (Eric Almenito) reviewed the LAO board file and was not able to locate a copy of the alleged February 23, 2003 filing of the CT claim: 2/2000 to 9/2002 (ADJ1058134). (Applicant's Trial Brief dated 4/24/2018 p. 3, line 12, EAMS ID# 26108790.)

Judicial notice is taken that per EAMS, this case (ADJ1058134) started on April 1, 2008. Per Applicant Attorney, there is a Notice of Application dated April 9, 2008 for this case. (Applicant's Trial Brief dated 4/24/2018 p. 3, line 7-11, EAMS ID# 26108790.)

At trial on March 6, 2023, Applicant testified that he stopped working for the employer in September 2002. During his last year of work, he was confined to work restrictions, where he was limited to office work which consisted of answering phones and filing papers. During this time, he worked primarily in a sedentary position. When he returned back to work in August of 2000, he was on work restrictions of no lifting greater than 40 pounds, and not to sit or stand for more than 30 minutes. (MOH and SOE, 3/6/2023, p. 3). Applicant testified that he worked for Consolidated Freight in 1976 until 1996. He was terminated in 1996 because they could not accommodate his work restrictions. The union then brought him back in 1997. From January 1997 to December 2000, he was put on modified duties where he performed office work. From. January 2001 to September 2002, he was put on modified duties as a dock person. At trial, he said he was supposed to be on modified duties. At first, he was on modified/light duties, but over time it became regular work because he didn't want to lose his job. He shared this history with Dr. Angerman. (MOH and SOE, 3/6/2023, p. 8). However, at his deposition taken on August 1_1,2010, he testified that when he returned back to work in 1997, until his last day worked in 2002, he continued working with the work restrictions the entire time after reinstatement until his last day of work. (Defendant's Exhibit J, p. 36). This Court finds his deposition testimony is more credible since his memory was fresher to the actual events since the deposition took place in 2010. Additionally, at trial, Applicant testified that he worked for Consolidated Freight for 26 years, if he wanted to contact someone at Consolidated Freight after they went bankrupt, he could have, but he didn't try to contact anyone after they went bankrupt. (MOH and SOE, 3/6/2023, p. 7, lines 7-9).

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on July 14, 2025, and 60 days from the date of transmission is Friday, September 12, 2025, which by operation of law means this decision is due by Friday, September 12, 2025 (Cal. Code Regs., tit. 8, § 10600.). This decision is issued by or on September 12, 2025, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on July 14, 2025, and the case was transmitted to the Appeals Board on July 14, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 14, 2025.

II.

The statute of limitations is an affirmative defense and defendant, as the party asserting the defense, has the burden of proof. (§ 5705.) The limitations period for which a claim must be filed is the later of (1) one year from the date of injury, (2) one year from the last provision of disability payments per sections 4650 et seq., or (3) one year from the last provision of medical benefits. (*Ibid*.)

"Limitations provisions in the [workers'] 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." (*Blanchard v. Workers' Comp. Appeals Bd*. (1975) 53 Cal.App.3d 590, 595 [40 Cal.Comp.Cases 784] (internal citations omitted).)

Establishing a date of injury is imperative to establishing the running of the statute of limitations. Date of injury for cumulative injury claims is established under section 5412, which states: "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (§ 5412.)

As used in section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavira v. Workers' Comp. Appeals Bd*. (1991) 235 Cal.App.3d 463 [56 Cal.Comp.Cases 631]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte) (2004)* 119 Cal.App.4th 998[69 Cal.Comp.Cases 579].) Medical treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to section 5412, but it may be evidence of compensable permanent disability. (*Rodarte*, *supra*, 119 Cal. App. 4th at p. 1005.) Likewise, modified work is not a sufficient basis for finding compensable temporary disability, but it may be indicative of a compensable permanent disability, especially if the worker is permanently precluded from returning to their usual and customary job duties. (*Id*.)

The existence of disability is a medical question beyond the bounds of ordinary knowledge, and, as such, will typically require medical evidence. (*City & County of San Francisco v. Industrial Acc. Com*. (*Murdock*) (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd*. (1977) 68 Cal. App. 3d 988 [42 Cal.Comp.Cases 114].) Knowledge requires more than an uninformed belief. Because the existence of disability typically requires medical

evidence, an "applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 473 [50 Cal.Comp.Cases 53].)

It is well settled that where the employer has a statutory or regulatory duty to provide notice to the injured worker of a right and fails to do so, the employer is estopped from raising the statute of limitations as a bar to the claim. (*Reynolds*, *supra*, 12 Cal.3d 726.)

> 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 workmen's 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 workmen's compensation benefits.
>
> Although, as hereinabove pointed out, the board concluded that petitioner either knew or should have known of the relationship of his heart attack to his employment, the referee had found that petitioner did not realize the relationship until sometime in December 1970 and that his failure to realize the relationship was due to a lack of sophistication. The supervisory personnel of PG&E, on the other hand, undoubtedly had the experience to recognize that there could be a basis for a claim that petitioner's heart attack was industrially caused.
>
> Since PG&E was obligated to give the notices prescribed by the administrative rules and failed to do so, it may not raise the technical defense of the statute of limitations to defeat petitioner's claim. (See Mihesuah v. Workmen's Comp. Appeals Bd., 29 Cal.App.3d 337, 340-341 [105 Cal.Rptr. 561].)

(*Id*. at pp. 729-730.)

Administrative Director Rule 9812 requires the employer to send notices regarding whether there exists a need for future medical care and whether indemnity payments are terminated. (Cal. Code Regs., tit. 8., § 9812(e)(2).) In the Report, the WCJ suggests that knowledge of injury cannot be imputed upon a bankrupt employer. However, nothing in Rule 9812 relieves an employer from its requirement to provide notice to injured workers due to bankruptcy proceedings. Indeed, the requirements to provide notice to injured workers is significantly more important when an employer is undergoing bankruptcy as such proceedings could have a chilling effect upon the filing

of workers' compensation claims, particularly in cases where an injured worker may errantly believe that no recovery is available following an employer's bankruptcy.

Furthermore, it is also well established that where an employer is insured for workers' compensation liability, the insurer stands in the shoes of the employer. (§ 3755.) The Labor Code expressly requires that a claims administrator give notice when the employer fails to do so:

> (b) With respect to injuries resulting in lost time beyond the employee's work shift at the time of injury or medical treatment beyond first aid:
>
> (1) If the claims administrator obtains knowledge that the employer has not provided a claim form or a notice of potential eligibility for benefits to the employee, it shall provide the form and notice to the employee within three working days of its knowledge that the form or notice was not provided.
>
> (2) If the claims administrator cannot determine if the employer has provided a claim form and notice of potential eligibility for benefits to the employee, the claims administrator shall provide the form and notice to the employee within 30 days of the administrator's date of knowledge of the claim.

(§ 138.4)

Thus, in those rare cases where it may not be possible for the employer to provide notice of benefits following an injury, the legal duty to provide notice does not end. Instead, it becomes the duty of the claims administrator, who is estopped from establishing a statute of limitations defense until it provides applicant the legally required notice.

In sum, in order for defendant to prove the running of the statute of limitations with regard to a cumulative injury claim, defendant must establish the following facts:

1) The date of injury pursuant to section 5412.
2) The date that applicant was provided a notice of benefits.
3) The date upon which the application for adjudication was filed.

Here, the date of injury pursuant to section 5412 was never found. This is a common error made on all sides of statute of limitations disputes. **In order to determine when a statute of limitations runs, the date of injury must first be decided**. Here the WCJ made no findings of fact as to the date of injury. Another common error is to mistake the date of injury under section 5412 as synonymous with the dates of liability under section 5500.5. Sometimes these dates will coincide. Oftentimes, these dates are disparate. The parties and the WCJ must be cognizant that a date of injury under section 5412 must be found in order to determine whether the statute of

limitations has run. Ordinarily, we would return this matter to the trial level to establish the date of injury; however, for the reasons discussed below, defendant failed its burden of proof notwithstanding this error.

We are bound to follow the holdings of the Supreme Court, and the holding of *Reynolds* precludes application of the statute of limitations in cases where the employer has not provided statutory notice. There is no dispute in this case that the employer did not provide statutory notices of applicant's right to file a claim. Thus, per the Labor Code it was incumbent upon the claims administrator to provide statutory notices. Here, there is not *any* evidence at all establishing when a notice of benefits issued. Accordingly, defendant has not met its burden of proof as to the running of the statute of limitations.

Applicant raises another issue in the petition for reconsideration, which is that applicant sustained industrial injury. While the issue of injury was raised at trial, it was not decided by the WCJ, and thus it is not ripe for adjudication at this time. We will return that issue to the trial level for the WCJ to determine in the first instance.

Accordingly, we grant applicant's Petition for Reconsideration and as our Decision After Reconsideration, we rescind the June 10, 2025 F&O and substitute a new Finding of Fact that defendant failed to meet its burden of proving the statute of limitations and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that applicant's petition for reconsideration of the Findings and Order issued on June 10, 2025, by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on June 10, 2025, by the WCJ is **RESCINDED** with the following **SUBSTITUTED** in its place.

FINDINGS OF FACT

1. Dennis Lemon, while employed during the period of February 2000 to September 2002, as a steward/dock person, occupational group number deferred, by Consolidated Freightways in Los Angeles, California, claims to have sustained injury arising out of and in the course of employment bilateral shoulders, bilateral knees, internal, psyche, bilateral upper extremities, and back.

2. At the time of injury, the employer's workers' compensation carriers were:

a) CIGA for Reliance in liquidation: October 1, 1997 to October 1, 2000;

b) USF&G Insurance Company, administered by Zenith Insurance: October 1, 2000 to October 1, 2002.

3. On September 3, 2002, Consolidated Freightways Corporation filed for bankruptcy

4. Defendant failed to meet its burden to establish that applicant's claim is barred by the statute of limitations.

5. All other issues are deferred.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

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

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 4, 2025

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

DENNIS LEMON
HINDEN & BRESLAVSKY, APC
ROSENBERG YUDIN LLP
SHAW, JACOBSMEYER, CRAIN & CLAFFEY, LLP

EDL/mc

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 JOSÉ RAZO

I respectfully dissent. Applicant filed his claim six years after the end of the cumulative trauma period and four years after being given notice by an agreed medical evaluator that a portion of his disability was caused by subsequent cumulative trauma. For the reasons stated in the WCJ's Report, which I would adopt and incorporate, I would affirm the June 10, 2025 F&O.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 4, 2025

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

DENNIS LEMON
HINDEN & BRESLAVSKY, APC
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HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP
SHAW, JACOBSMEYER, CRAIN & CLAFFEY, LLP

EDL/mc

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