WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANDRES HERNANDEZ, *Applicant*

vs.

PEARCE SERVICES, INC.; SPARTA INSURANCE COMPANY, Adjusted By GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ9972218
San Luis Obispo District Office

OPINION AND DECISION
AFTER RECONSIDERATION

In order to further study the factual and legal issues in this case, we[1] granted applicant's Petition for Reconsideration of a workers' compensation administrative law judge's Findings of Fact of December 23, 2019 wherein it was found that applicant's Petition to Reopen was barred by the five-year statute of limitations contained in Labor Code section 5410. In this matter, in a stipulated Award of May 27, 2015 it was found that while employed on December 19, 2013 as a tower technician, applicant sustained industrial injury to the left knee causing temporary disability from June 23, 2014 to July 6, 2014, permanent disability of 14%, and the need for further medical treatment. On February 19, 2019, applicant filed a Petition to Reopen alleging that applicant underwent surgery of his left knee in October of 2018 and that his condition had significantly worsened since the issuance of the stipulated Award.

Applicant contends that the WCJ erred in finding that his claim for new and further permanent disability was barred by the Labor Code section 5410 statute of limitations. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will affirm the WCJ's decision.

As noted above, a stipulated Award with regard to the December 19, 2013 injury was issued on May 27, 2015. On August 13, 2015, defendant sent applicant a notice that permanent disability

[1] Commissioner Marguerite Sweeney, who was on the panel in this case when the Order Granting Reconsideration was issued, no longer serves on the Appeals Board. Commissioner Joseph V. Capurro has been substituted in her place.

payments were ending because the full amount of the stipulated Award had been paid. The notice sent contained all the information required by Administrative Rule 9812(d). (Cal. Code Regs., tit. 8, § 9812, subd. (d).)

Applicant apparently continued to be provided medical care for his injury on an industrial basis and underwent surgery on October 30, 2018. Defendant reinitiated temporary disability benefits commencing November 3, 2018. On November 14, 2018, defendant sent a notice of resumed temporary disability benefit payments pursuant to Administrative Rule 9812(b) (Cal. Code Regs., tit. 8, § 9812, subd. (b)). Defendant then determined that applicant was entitled to temporary disability benefits at a higher rate pursuant to Labor Code section 4661.5 and sent the appropriate notice on November 28, 2018 pursuant to Administrative Rule 9812(c) (Cal. Code Regs., tit. 8, § 9812, subd. (c).)

On December 17, 2018, defendant sent applicant a notice that temporary disability benefits were ending pursuant to Labor Code section 4656(c)(2) which states that, save exceptions not applicable to the current case, temporary disability indemnity is payable only within five years of the date of injury. Defendant sent applicant a notice that complied with Administrative Rule 9812(d) (Cal. Code Regs., tit. 8, § 9812, subd. (d).) Additionally, along with the notice that temporary disability was ending, defendant sent a notice pursuant to Administrative Rule 9812(e) (Cal. Code Regs., tit. 8, § 9812, subd. (e)) that applicant's condition was not yet permanent and stationary and that:

> [I]t is too soon to tell if you will have any permanent disability from your injury. I will be checking with your doctor until your condition is permanent and stationary. At that time, your doctor will determine whether you have any permanent disability and if there will be a need for future medical care. I expect to have my information by 3/16/19. I will notify you of the status of permanent disability at that time.

Applicant's wife testified that the notice regarding permanent disability was not received "any earlier than December 19th." (Minutes of Hearing and Summary of Evidence of December 16, 2019 trial at p. 5.)

Applicant sought legal representation and filed a Petition to Reopen on February 19, 2019. The WCJ found that the claim was time-barred under the provisions of Labor Code section 5410 which 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.

Applicant argues that that the statute of limitations should be tolled because he was "misled" by defendant's claims examiner into not timely filing a petition to reopen. In other contexts, the mere furnishing of benefits without an unequivocal denial in and of itself tolls the statute of limitations. For instance in *McDaniel v. Workers' Comp. Appeals Bd.* (1990) 218 Cal.App.3d 1011 [55 Cal.Comp.Cases 72], the Court of Appeal held that when a defendant provides medical treatment benefits knowing of a potential claim for workers' compensation benefits, the provision of treatment tolls the one-year limitation period of Labor Code section 5405(c) and triggers the five year period of Labor Code section 5410, running from the date of injury. Only after an explicit unequivocal denial of liability does the statute revert to one year from the denial.

However, while *McDaniel* and similar cases find that the mere furnishing of benefits tolls the one-year statute of limitations found in Labor Code section 5405 for the initial claim of benefits, these claims still remain subject to the five-year statute found in section 5410. While the liberal rules of pleading and construction of the workers' compensation system militate in favor of tolling of the one-year statute, once five years from the date of injury has elapsed the initial interest favoring an injured worker's right to present their case on the merits must also be balanced against the interest in finality. As the Supreme Court explained in *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 299 [56 Cal.Comp.Cases 476], section 5410 does "not express a mere concern for barring stale claims. The statute[] express[es] legislative concern for certainty and finality in the determination of compensation benefit obligations."

Thus, while the section 5410 limitations period is subject to tolling in the proper case, tolling or estoppel in the section 5410 context must be based on an affirmative statement or breach of an express legal obligation relied upon to the detriment of the injured worker. Here, there was no legal obligation to inform applicant of the upcoming five-year statute, and, in any case, there was no evidence that the claims representative intentionally withheld this information. Defendant merely paid the legally required benefits and provided the legally required notices.

While the statement in the permanent disability notice that it was too soon to tell if applicant had permanent disability and that the claims examiner would contact the applicant after March 16, 2019 is an affirmative statement that could form the basis for tolling, it appears that applicant did not receive this notice until after the limitations period had ended, and thus applicant could not have relied upon this statement to his detriment. (See *McGee Street Productions v. Workers' Comp. Appeals Bd. (Peterson)* (2003) 108 Cal.App.4th 717, 726 [68 Cal.Comp.Cases 708]; *Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 602 [in determining whether conduct tolls the statute of limitations, only conduct before the running of the statute should be considered].) Applicant's wife testified that the earliest she could have received the notice regarding permanent disability was December 19, 2018, the very day the limitations period expired. Even generously assuming that applicant or his wife reviewed the notice on that date, there was no testimony or evidence that they delayed filing a petition to reopen based on the content of the notice. While a defendant has the initial burden of proof that a claim was filed outside the limitations period, "as a general rule, where a claimant asserts exemptions, exceptions, or other matters which will avoid the statute of limitations, the burden is on the claimant to produce evidence sufficient to prove such avoidance." *(Permanente Medical Group v. Workers' Comp. Appeals Bd. (Williams)* (1985) 171 Cal.App.3d 1171, 1184 [50 Cal.Comp.Cases 491].) Here, no evidence was presented that the notice was actually received on or before December 19, 2018 or relied upon by applicant to delay filing a petition to reopen.

We therefore affirm the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact of December 23, 2019 is hereby **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 30, 2025

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

ANDRES HERNANDEZ
JOSEPH E. LOUNSBURY
TOBIN LUCKS

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