WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DERRELL BRACY, *Applicant*

vs.

STATE OF CALIFORNIA, Legally Uninsured, *Defendant*

Adjudication Number: ADJ18306857
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of July 25, 2024, wherein it was found that while employed during a cumulative period ending March 8, 2022, applicant sustained industrial injury to his psyche. It was found that applicant's claim is not barred by the statute of limitations.

Defendant contends that the WCJ erred in finding compensable industrial injury, arguing that applicant's claim is barred by the statute of limitations, and arguing that there is no substantial medical evidence of industrial injury. We have not received an answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will deny the defendant's Petition.

Preliminarily, we note that former Labor Code 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, Labor Code 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.

Under Labor Code 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 August 16, 2024, and 60 days from the date of transmission is October 15, 2024. This decision is issued by or on October 15, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on August 16, 2024, and the case was transmitted to the Appeals Board on August 16, 2024. 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 16, 2024.

Turning to the merits on the issue of statute of limitations, applicant was taken off work by his physician on March 8, 2022 and immediately reported his absence as work related. A March 22, 2022 letter from employer documents, "In your recent communication with the [CHP] you indicated your current work status and time off is due to a work-related illness or injury" and a DWC-1 form is enclosed. On March 31, 2022, applicant actually filed a DWC-1 claim form with the employer in which he claimed industrial injury.

The date of injury in cumulative injury cases 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." (Lab. Code, § 5412.) By March 31, 2022, applicant had sustained disability and, by actually claiming an industrial injury, knew or should have known that the disability was work related.[1]

The running of the statute of limitations is an affirmative defense, and the burden of proving it is on the party opposing the claim. (Lab. Code, § 5409; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 67, fn. 8 [50 Cal.Comp.Cases 411].) The burden is on defendant to show when the statute of limitations began to run, "starting from any and all three points designated [in Labor Code section 5405]." (*Colonial Ins. Co. v. Industrial Acc. Com. (Nickles)* (1945) 27 Cal.2d 437, 441 [10 Cal.Comp.Cases 321].) The three points designated in section 5405 are date of injury (Lab. Code, § 5405, subd. (a)); the last payment of disability indemnity (Lab. Code, § 5405, subd. (b)); and the last date on which medical treatment benefits were furnished (Lab. Code, § 5405, subd. (c).)

However, regardless of when the statute of limitations starts to run, when a DWC-1 claim form is filed, the statute is tolled until the employer or insurer unequivocally denies the claim. "Filing of the claim form with the employer shall toll, for injuries occurring on or after January 1, 1994, the time limitations set forth in Sections 5405 and 5406 until the claim is denied by the employer or the injury becomes presumptively compensable pursuant to Section 5402." (Lab. Code, § 5401, subd. (d).)

Here, the defendant did issue a denial letter on June 7, 2022, but the denial was too equivocal to stop the tolling of the limitations period. The letter states that the defendant is "denying all liability" but the very next paragraph says, "**A Panel list of 3 doctors has been requested. Once the Panel QME list is obtained, please select one of the doctors on that list and schedule an appointment. The Panel QME will issue a report(s), and you will be notified of a decision regarding liability of your claim.**" (Emphasis added.)

[1] Defendant incorrectly claims that the applicant stipulated to a March 8, 2022 date of injury. Stipulations to period of exposure are not tantamount to stipulations to legal dates of injury for purposes of Labor Code section 5412. (*Palmer v. Workers' Comp. Appeals Bd.* (1987) 192 Cal.App.3d 1241, 1250 [52 Cal.Comp.Cases 298].) However, whether applicant's Labor Code section 5412 date of injury was March 8, 2022 or March 31, 2022 does not alter the analysis of this case.

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. The *McDaniel* court explained the purpose of the rule as follows:

> The legislative purpose behind the tolling provision of section 5410 "is to prevent a potential claimant from being misled by an employer's voluntary acts which reasonably indicate an acceptance of responsibility for the employee's injury." [Citation.] As long as the employer's conduct reasonably suggests that the filing of a claim is unnecessary, the tolling of the statutory time period is entirely proper and in accord with the benefit extension principles of section 5410 and section 5405, subdivisions (b) and (c). [Citation.]

Under *McDaniel*, only once the "potential claimant has been **fully informed** that the employer and its carrier disclaim compensation liability for an industrial injury" does the statute revert to one year, running from the date of the denial. (*McDaniel*, supra, 218 Cal.App.3d at p. 1017 [emphasis added].) *McDaniel* follows a long line of cases standing for the proposition that an employer and its insurer are estopped to plead the statute of limitations when the actions or misrepresentations of either induce the employee to refrain from filing a claim until after the statute of limitations has run." (*McGee Street Productions v. Workers' Comp. Appeals Bd. (Peterson)* (2003) 108 Cal.App.4th 717, 726 [68 Cal.Comp.Cases 708].) As the Supreme Court explained in *Benner v. Industrial Acc. Comm.* (1945) 26 Cal.2d 346, 349-350 [10 Cal.Comp.Cases 110], "An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped."

We believe that section 5401(d) evinces the same purpose as 5410 discussed in *McDaniel*. Although *McDaniel* presents a different factual scenario and discusses a different statute, by suggesting in the "denial" letter that the issue of liability remained open pending a panel QME evaluation (which defendant apparently initiated) applicant could reasonably be led to believe that no action was necessary on his part pending the QME evaluation.[2]

[2] We need not decide whether the June 7, 2022 denial was sufficient for purposes of the Labor Code section 5402(b) presumption. The issue is not before us, and we express no opinion on the issue.

Later, on October 7, 2022, defendant issued a second denial letter where it finally completely disclaimed liability. We find that the one-year statute of limitations began to run from this date. Applicant did file an Application for Adjudication on October 6, 2023, within one year of the final, unequivocal denial, making the claim timely.

Defendant also halfheartedly argues that the reporting of QME psychologist Margaret Jones, Psy.D. does not constitute substantial medical evidence because she did not review the applicant's personnel file. Defendant does not identify anything in the personnel file that reasonably could have caused Dr. Jones to change her opinion on industrial causation. A petitioner must make a reasonable effort to include specific citations to the record. The petitioner cannot evade this responsibility and place the burden on the Appeals Board to discover where the evidence supporting a petitioner's contentions can be found in the record. (See *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923 [50 Cal.Comp.Cases 104]; see also, e.g., *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 & fn. 14 ["if a party fails to support an argument with the necessary citations to the record … the argument [will be] deemed to have been waived"]; *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113-114 ["a busy court … cannot be expected to search through a voluminous record" and it is not "obligated to perform the duty resting on counsel"].)

The WCJ correctly relied upon Dr. Jones's opinion, which was based on clinical findings and her expert knowledge. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 930 [71 Cal.Comp.Cases 1687].) If the defendant desired further clarification, it should have sought a deposition or supplemental reporting from Dr. Jones. (*Foremost Dairies, Inc. v. Industrial Acc. Com.* (*McDannald*) (1965) 237 Cal.App.2d 560, 572 [30 Cal.Comp.Cases 320].)

We therefore deny the defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of July 25, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 15, 2024

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

DERRELL BRACY
ALEXANDER BONILLA
STATE COMPENSATION INSURANCE FUND

DW/oo

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