

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

**KELBY DOWNING, *Applicant***

**vs.**

**BODEGA BAY FIRE PROTECTION DISTRICT, Permissibly Self-Insured; COUNTY OF  
MARIN, Permissibly Self-Insured, *Defendants***

**Adjudication Number: ADJ15918599  
Santa Rosa District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award and Order of December 29, 2025, wherein it was found that while employed during a cumulative period ending January 24, 2022 as a firefighter/volunteer firefighter, applicant sustained industrial injury in the form of kidney cancer causing compensable permanent disability of 22%. As relevant to the instant Petition, it was found that "The factors set forth in *Ruffin v. Olson Glass Co.*, 52 Cal. Comp. Cases 335 concerning assessment of a progressive, insidious disease are met in this case" (Finding No. 10) and "The court may extend jurisdiction to award permanent disability beyond the 5-year statute of limitations set forth in Labor Code § 5410."

Defendant contends that the WCJ erred in finding that applicant's kidney cancer constituted a "progressive, insidious disease" sufficient to suspend the time limitations of Labor Code section 5410. We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we hereby adopt and incorporate, and the additional reasons stated 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 February 6, 2026 and 60 days from the date of transmission is April 7, 2026. This decision is issued by or on April 7, 2026, so 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 February 6, 2026, and the case was transmitted to the Appeals Board on February 6, 2026. 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 February 6, 2026.

Turning to the merits, we will deny the defendant’s Petition for the reasons stated by the WCJ in the Report, which we quote below. Although defendant has cited various interpretations

of what constitutes a progressive, insidious disease for the purposes of *General Foundry Service v. Workers' Comp. Appeals Bd. (Jackson)* (1986) 42 Cal.3d 331 [51 Cal.Comp.Cases 375] and *Ruffin v. Olson Glass Co.* (1987) 52 Cal.Comp.Cases 335, 343 [Appeals Bd. en banc], more recent cases have extended the doctrine to situations in which there is a strong potential for a condition to recur. As an Appeals Board panel wrote recently in *Montierth v. City of San Diego* (2023) 2023 Cal. Wrk. Comp. P.D. LEXIS 115, \*12-15 (Appeals Bd. panel):

[W]e do not conclude that it is necessary for the medical evidence to show with 100% certainty that applicant's cancer will worsen in order to support a reservation of jurisdiction over permanent disability; instead, the potential for such worsening as described by [a reporting physician] is sufficient.

Moreover, in *Piedemonte [v. Western Asbestos]* (1981) 46 Cal.Comp.Cases 475 (Appeals Bd. en banc), cited by the court in *Jackson, supra*, the Appeals Board en banc determined that although applicant had sustained an industrial injury while working as an asbestos worker in the form of "pleural asbestosis," the injury was not yet permanent and stationary and had not yet caused any temporary or permanent disability. (*Id.*, p. 478.) In discussing the evidence in the case, the Appeals Board stated:

We do not disagree that there is supporting evidence of no permanent disability. There is also, however, evidence on the progressive nature of applicant's industrial condition. Dr. Levine, on whom the trier of fact relied, and Dr. Cosentino, the other reporting medical specialist herein, both agree that applicant's asbestosis condition may progress to either a carcinoma or pleural asbestosis. Dr. Levine, in fact, already finds pleural asbestosis. On the issue of the potential progression of the disease, the evidence is not only substantial but in concurrence, albeit to varying degrees. Based on the above, and for the reasons hereinafter discussed, the Board agrees with the applicant's position that the issue of permanent disability can and should be deferred. (*Id.*; italics added.)

Noting that there was the potential for applicant's condition to progress to disabling diseases, including mesothelioma, a form of cancer, the Appeals Board concluded that the applicant's condition was not yet permanent and stationary, and that the medical evidence "indicates the condition is potentially progressive and may yet result in significant permanent disability." The Appeals Board determined that since the issue of permanent disability remained unresolved, it may be determined at any time in the future when applicant's condition warranted, and the parties could then present evidence and move to a hearing. The Appeals Board further held that the five year limitation period in section 5804 would not preclude determination of the issue at a later time because there was no decision to be altered or amended, and under section 5410, the proceedings had been instituted within the five years from the date of injury.

Therefore, the Appeals Board found that applicant's condition was not yet permanent and stationary, applicant was awarded medical treatment, and the issue of permanent disability was deferred. (*Piedemonte*, supra, 46 Cal.Comp.Cases 475, pp. 482-483.)

We find the analyses in *Jackson* and *Piedemonte* to be particularly instructive to the present case, since reservation of jurisdiction was found to be justified in those cases based on medical evidence that indicated applicant's condition— asbestosis in both cases-- could *potentially* progress to a more serious disabling condition, including cancer. In the present case, applicant has already been diagnosed with skin cancer, and his condition may recur, requiring lifetime monitoring and potentially causing increased disability.

With regard to the defendant's arguments about this interpretation of *Jackson* being unduly burdensome, although we sympathize with defendant's argument, we note that defendant has been found liable for further medical care (Award, subparagraph B) and that this liability has no time limitation. Accordingly, defendant already has the responsibility to monitor applicant's condition regardless of whether applicant's condition is deemed progressive and insidious. With regard to any future permanent disability, defendant would have further liability only if applicant's condition actually recurs.

We will otherwise deny reconsideration for the reasons stated by the WCJ in his Report, which we quote below:

## **REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

### **I INTRODUCTION**

1. Applicant's occupation: Firefighter.
2. Age at time of injury: 49 years.
3. Date of injury: CT ending January 24, 2022.
4. Part of body injured: Kidney cancer.
5. Manner of injury: Toxic exposure/presumption
6. Identity of Petitioner: Defendant. The Petition was timely and properly verified.

7. Decision from which Reconsideration is sought: 12/29/2025 Findings Award and Order. The case was submitted for decision on the single issue of whether the applicant's kidney cancer is a progressive, insidious disease warranting application of *Ruffin v. Olson Glass Co.*, 52 Cal. Comp. Cases 335 to extend the Board's jurisdiction. The court found that it is; defendant disagrees.

## II FACTS

Applicant Kelby Downing has been employed as a firefighter since the 1990's and has worked at the Marin County Fire Department, the Sonoma County Fire District and the Bodega Bay Fire Protection District. After he sustained a non-industrial injury to his back, he underwent diagnostic testing for a vertebral compression fracture which, serendipitously, revealed a tumor in applicant's right kidney.

At the time it was discovered, the applicant's tumor was asymptomatic.

Ultimately, the kidney was removed with the doctors noting complete removal of the tumor with "clean margins." (See Joint Exhibit J2 pg. 19 ("Diagnostic imaging and surgical pathology analysis were consistent with right kidney cancer (clear renal cell carcinoma Grade 2 (PT1b) with clear surgical margins) removed in toto by right total nephrectomy without evidence of local, regional, or distant cancer spread (to the present no need for adjuvant therapy nor evidence of any metastases.))) There has been no recurrence of cancer since the tumor was removed February 22, 2022. Notwithstanding, Applicant continues to undergo regular CT scans of the abdomen to monitor for any recurrence of cancer. (See, e.g., Exhibit J1, at pg. 6 ("To the present, the applicant has been having an abdominal CT scan every six months and there has been no evidence of tumor recurrence."))

Applicant was seen by Dr. Fishman who acted as an Agreed Medical Evaluator in the case in the specialty of internal medicine/oncology. Doctor Fishman addressed all issues, took a thorough history, reviewed extensive medical records and issued both an initial report, and two supplemental reports. The initial report found that applicant had reached MMI status and assigned permanent disability. (Exhibit J1 at pg. 54 ("The applicant reached MMI effective the date of return to work at full duty on 05/06/22."))

Doctor Fishman also stated his opinion that applicant's cancer was a "insidious, progressive disease" warranting the extension of the Board's jurisdiction beyond the 5-year statute of limitations set forth in Labor Code § 5410 pursuant to *General Foundry Service v. WCAB (Jackson)*, (1986) 42 C3d 331. He states:

Because there is a chance of renal cancer recurrence that cannot be

prospectively ruled out (10% or more of such cases given the size of the tumor albeit confined to, the kidney and surgically removed with clear surgical margins), I conclude with reasonable medical probability that General Foundry case law applies. Renal cancer can be characterized as a chronic, insidious disease process, or at least such a process cannot be ruled out at this time. In addition, the applicant faces an increased risk of a second, metachronous RCC occurring in the remaining left kidney because he has already been treated for one renal cancer.

Exhibit J1 at pg. 56.

The issue of whether the kidney cancer was a progressive, insidious disease was submitted to the court for decision.

### **III DISCUSSION**

The court, in formulating its decision, held as follows:

In *General Foundry Service v. WCAB (Jackson)*, the California Supreme Court recognized that in cases of an insidious, progressive disease, the Board may reserve jurisdiction and award permanent disability benefits after expiration of the 5-year statute of limitations. This is because in certain cases, such as asbestosis, the applicant's condition may continue to deteriorate many years after the date of injury. The Supreme Court stated:

We conclude that the Board's reservation of jurisdiction on the issue of permanent disability in the case of insidious, progressive diseases serves to further the compensatory goals of the workers' compensation system. On remand, the Board may tentatively rate Jackson's known permanent disability and order advances based on that tentative rating. It may then reserve its jurisdiction for a final determination of permanent disability when either: (1) his condition becomes permanent and stationary, or (2) his permanent disability is total (100 percent) and further deterioration would be irrelevant for rating purposes.

*General Foundry Serv. v. Workers' Comp. Appeals Bd.*, 42 Cal. 3d 331, 338

The Appeals Board issued an en banc decision providing guidance in determining whether a medical condition is insidious and progressive. In *Ruffin v. Olson Glass Co., Inc.* the court held:

We conclude from the Court's opinion that the characteristics of the "insidious, progressive disease" to which the court refers are (1) that it is caused by a "remote" and "undramatic" work exposure—one that is likely

to be undetected at the time, or if detected, the significance is likely to be unappreciated (2) that the disease worsens over time, but at a rate so gradual that it is well established before becoming apparent and, (3) that it has a “long latency period” between exposure to the risk and the onset of symptomatology. The court cites as an illustration, mesothelioma, a cancer of the lining of the lung

*Ruffin v. Olson Glass Co.*, 52 Cal. Comp. Cases 335, 341-342

In the present case, the applicant’s cancer was caused by remote and undramatic causes, likely by exposure to toxins in smoke over many years. It was asymptomatic at the time it was discovered, and it appears to have developed undetected until by happenstance it was revealed in diagnosing an unrelated back injury. It appears that there is a slight risk that it will progress, although only around 10%. The cancer was characterized as having a minimum ten-year latency period (Exhibit J1 at pg. 37), and as long as 24 years (*Id.*). So the *Ruffin* factors appear to largely be met. The court acknowledges that the “progressive” nature of the renal cancer is the issue the court has primarily wrestled with.

The court’s decision was motivated largely by analogy to *Sandoval v. California Highway Patrol*, 2015 Cal. Wrk. Comp. P.D. LEXIS 404. In that case the applicant suffered from bladder cancer which needed to be monitored for recurrence. In that case, however, the rates of recurrence were found to be higher than in the instant case.

The court additionally was motivated by the fact that in the current case, recurrence of the cancer could result in removal of applicant’s second kidney. Doctor Fishman states:

I discussed with him the future medical care needs in such a case to include periodic visits with the physician, periodic diagnostic imaging, and laboratory testing. If there is the unfortunate occurrence of cancer recurrence then additional cancer treatment will be required which could include but is not limited to biopsy, additional surgery, chemotherapy and/or radiation therapy. I discussed with the applicant concepts regarding cancer is a chronic insidious disease process.”)

Exhibit J1 at pg. 6

Although applicant is currently functioning well with one kidney, a recurrence of cancer in the second kidney could be catastrophic. This factored in favor of finding that the statute of limitations on filing a petition to reopen should be extended.

