WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DAMON ROBERTSON, ***Applicant***

vs.

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

Adjudication Number: ADJ16340745
San Francisco District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant City and County of San Francisco seeks reconsideration of the Findings of Fact, Order and Award (F, O and A) filed by a workers' compensation arbitrator (WCA) on April 22, 2022. In that decision, the WCA found that applicant's claim for worker's compensation benefits is not barred by the one-year statute of limitations of Labor Code section[1] 5405 because the five-year statute of limitations of section 5410 applies to the facts of applicant's case. The WCA thereby made a finding, order, and award that applicant's claim was timely and allowed.

Defendant contends that the WCA erred in his findings and in doing so has created an impermissibly high standard of notice required by an employer to an injured worker than is legally required under the Labor Code.

Applicant filed an Answer to the petition. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCA recommending that the petition be denied.

We have considered the allegations in the Petition for Reconsideration, the Answer, and the contents of the report of the arbitrator with respect thereto. Based on our review of the record, and for the reasons stated in the arbitrator's Report, which we adopt and incorporate, and for the reasons stated below, we will affirm the April 22, 2022 F, O and A.

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[1] All further references are to the Labor Code unless otherwise stated.

The facts of this case as stipulated to by the parties, and set forth in relevant part, by the WCA in his Opinion, are that:

> 1. Damon Robertson, while employed as a firefighter for the City and County of San Francisco, sustained an industrial injury to his low back on August 14, 2017.
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> 2. On October 19, 2017, Damon Robertson submitted a DWC Form-1 alleged (*sic*) industrial injury to the low back on August 14, 2017 arising out of and occurring in the course of his employment with the City and County of San Francisco.
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> ` 3. Defendant accepted the claim and paid benefits.
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> 4. Applicant was off work and paid full salary from August 21, 2017 through March 12, 2018.
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> 5. Applicant was provided medical treatment by the primary treating physician, Monte Bible, M.D., which treatment was paid for and authorized by the City and County of San Francisco.
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> 6. On April 2, 2018, the applicant was discharged from care by the primary treating physician and, according to his medical report, there was no permanent disability and no need for medical treatment.
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> 7. On April 3, 2018, defendant issued a notice entitled Notice Regarding Denial of Permanent Disability Benefits.
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> 8. In March 2019, the applicant had lumbar disc replacement surgery in Germany, which he paid for. Applicant returned to full duty smartly (*sic*) after the surgery.
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> 9. On October 14, 2019, Damon Robertson filed an Application for Adjudication of Claim with the Workers' Compensation Appeals Board alleging an industrial injury to the low back, while employed by the City and County of San Francisco on August 14, 2017.
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> (Opinion, April 22, 2022, pp.1-2.)

In *Sanchez v. Workers' Comp. App. Bd.* (1990) 217 Cal.App.3d 346, 352-353 [55 Cal.Comp.Cases 179]., the Court of Appeals stated:

> In California, the statutes of limitation consist of several provisions with varying limits of time depending on the particular situation. (§§ 5404-5412.) Section 5405 sets forth the basic time limitation for filing an application for workers' compensation benefits and invoking the Board's original jurisdiction. It provides that the limitation period for normal benefits (medical and disability) is one year from whichever of the following results in the longest period: (a) the date of the injury; (b) the date of the last indemnity payment for temporary or permanent disability; or (c) the date of the last furnishing of any medical or hospital benefits. (2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d rev. ed. 1988) § 18.03[1], pp. 18-12-18-13.)

> **(1)** When section 5405, subdivision (a), is tolled by the voluntary furnishing of benefits, the five-year rule of section 5410 is in turn triggered. (*Standard Rectifier Corp.* v. *Workmen's Comp. App. Bd*. (1966) 65 Cal.2d 287, 290 [54 Cal.Rptr. 100, 419 P.2d 164].) In other words, after the voluntary furnishing of benefits, section 5410 extends the period within which an original proceeding may be instituted from one to five years on the ground that the injury has resulted in further disability or a need for vocational rehabilitation. (*Id*., at pp. 290-291; *Pizza Hut of San Diego Inc.* v. *Workers' Comp. Appeals Bd*. (1978) 76 Cal.App.3d 818, 822-824 [143 Cal.Rptr. 131].)
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> Subdivisions (b) and (c) of section 5405 operate to extend the time for filing original claims beyond the five-year limitation of section 5410 when benefits continue to be paid voluntarily, without award, beyond that five-year period. (*State of California* v. *Ind. Acc. Com*. (*Busch*) (1962) 198 Cal.App.2d 818, 827 [18 Cal.Rptr. 458]; *Subsequent Injuries Fund* v. *Industrial Acc. Com*. (*Ferguson*) (1960) 178 Cal.App.2d 55, 59-61 [2 Cal.Rptr. 646].)
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> The filing of an initial application for adjudication of claim institutes proceedings for workers' compensation benefits before the Board. (§ 5500.) The timely filing of an application with the Board for any part of the compensation defined in section 3207, including vocational rehabilitation, renders the statutes of limitation inoperative as to any subsequent proceedings for benefits referable to the same injury. (§ 5404; *Bekins Moving & Storage Co.* v. *Workers' Comp. Appeals Bd*. (1982) 137 Cal.App.3d 665, 668 [187 Cal.Rptr. 226]. All further proceedings are governed by the five-year limitation provided in sections 5410 and 5804. Section 5410 and sections 5803 through 5805, read together**,** cover the entire spectrum of the Board's continuing jurisdiction. (1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d rev. ed. 1988) § 9.01[2], pp. 9-5-9-6.)

(Sanchez, at p. 352-353.)

Here, the employer voluntarily furnished benefits, and applicant filed an original Application for Adjudication within 5 years, which invoked section 5410.

Accordingly, we affirm the April 22, 2022 F, O and A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration that the Findings, Order and Award issued by the WCA on April 22, 2022 is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 3, 2025

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

DAMON ROBERTSON
SAN FRANCISCO CITY ATTORNEY
BROWN & DELZELL
MARK L. KAHN, ARBITRATOR

LAS/abs

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

ARBITRATOR'S REPORT AND RECOMMENDATION ON RECONSIDERATION

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III.

DISCUSSION

A.

BASIS FOR ARBITRATOR'S DECISION

The Arbitrator found that the applicant's claim was not barred by Statute of Limitations of Labor Code §5405(one-year Statute of Limitations) and applicant's claim was timely filed, pursuant to Labor Code §5410, which allows the applicant to commence proceedings within five years of the date of injury for new and further disability.

The law on the Statue of Limitations, pursuant to Labor Code §5405, (one-year Statute of Limitations) and 5410 (five-year Statute of Limitations) is as follows:

The Statute of Limitations, pursuant to Labor Code §5405, establishes that the time limit for commencing proceedings for normal benefits (medical and disability) is one year from the longest of (1) the date of injury; (2) the date of last indemnity payment for temporary or permanent disability; or (3) the date of last furnishing of any hospital and medical benefits.

Labor Code §5410 provides for a five-year Statute of Limitations in workers' compensation. The section provides that 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.

Case law requires that the one-year and five-year Statutes of Limitations of Labor Code §§5405 and 5410 be read together. The five-year statute can have an effect on the one-year statute.

The one-year Statute of Limitations of Labor Code §5405(a) is tolled by the voluntary furnishing of benefits and triggers the five-year Statute of Limitations of Labor Code §5410.

Labor Code §5410 extends the period within which an original proceeding may be instituted from one year to five years after the date of injury on the grounds of new and further disability, if the employer furnishes workers' compensation benefits either voluntarily or pursuant to an Award.

The reasoning in the case law is that the new and further disability referred to in Labor Code §5410 is a disability *in addition* to which the employer previously provided benefits. (Emphasis added)

In addition, as discussed below, permanent disability is new and further disability.

In the case of *McDaniel v. Workers ' Comp. Appeals Bd.* (218 Cal. App. 3d 1011), it was held that if an employer or its insurance carrier, knowing of a potential claim, furnishes medical treatment or advances sums for a purpose bearing a clear relationship to an industrial injury, the one-year limitation under section 5405, subdivision (a), is tolled. (*Kaiser Foundation Hospitals v. Worker' Comp. Appeals Bd. (Webb)* (1977) 19 Cal.3d 329, 333; *City of San Francisco v. Workmen's Comp. App. Bd.* (1970) 2 Cal.3d 1001, 1011)

Once the one-year limitation is tolled by the voluntary furnishing of benefits, the five-year rule of section 5410 is in tum triggered. *(Standard Rectifier Corp.* v. *Workmen's Comp. App. Bd.* (1966) 65 Cal.2d 287, 290

In other words, after the voluntary furnishing of benefits, including medical treatment, section 5410 extends the period within which an original proceeding may be instituted from one year to five years. *(JT. Thorp, Inc.* v. *Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 327, 33 *Pizza Hut of San Diego, Inc.* v. *Workers' Comp. Appeals Bd.* (1978) 76 Cal.App.3d 818, 822-824)

The cases law regarding Statute of Limitations and Labor Code §5410 defines permanent disability as new and further disability within the meaning of that section. (*Gobel v. Industrial Acc. Com. (1934) 1 Cal.2d 100; Henry Cowell L. & C. Co. v. Industrial Acc. Com.* (1930) 211 Cal. 154)

The rule established by the cases is that an employee is entitled to the advantage of the five-year period for claiming benefits for new and further disability under section 5410, when the employee has been furnished workers' compensation benefits by the employer either voluntarily or pursuant to a commission award. *(Westvaco etc. Corp.* v. *Industrial Acc. Com.* (1955) 136 Cal.App.2d 60, 671)

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. The furnishing of medical treatment for an industrial injury constitutes such a benefit. (Emphasis added)

Therefore, if defendants accepted the claim and pays benefits, applicant has five years from the date of injury to file the claim for new and further disability. New and further disability is defined as any benefit *in addition* to which the employer previously provided benefits. Permanent disability is defined as new and further disability. (Emphasis added)

The only exception to this rule, pursuant to case law, that once the injury is accepted and benefits provided the Statute of Limitations is extended to five years from the date of injury, occurs when the defendant, based on newly discovered evidence, changes the acceptance of injury to a denial of injury in its entirety and provides the applicant proper and legal notice.

Based on this fact only, the case reverts to one-year Statute of Limitations. (*Kaiser Foundation Hospitals/Permanente Medical Group v. WCAB (Webb),)* 42 CCC 302, 307 and *McDaniel v. WCAB* (1990) 55 CCC 72.

Applying the law to facts of this case, the Arbitrator found as follows:

Based on the facts of this case, as set forth above, that the defendants accepted the claim and provided benefits.

The actions of defendant in this case of accepting the case and paying benefits tolled the one-year Statute of Limitations of Labor Code §5405.

The applicant filed an Application for Adjudication of Claim within five years of the date of injury.

The applicant was never paid any permanent disability benefits and is now claiming his entitlement to permanent disability, which pursuant to case law, is new and further disability.

In addition, the applicant is claiming the surgery performed in Germany is related to this industrial injury and is claiming a change in condition as new and further disability.

The applicant is claiming he is entitled to benefits in addition to those already paid by defendant.

Therefore, the Arbitrator found that applicant's claim was not barred by the one-year Statute of Limitations of Labor Code §5405 and was timely commended based on the five-year Statute of Limitations, pursuant to Labor Code §5410.

The applicant has new and further disability in that he never received any permanent disability benefits and permanent disability is new and further disability and, in addition, the applicant had back surgery over one year from the date of injury.

Defendants argued the after the one-year statute was tolled by the acceptance of the claim and paying benefits and that the five-year Statute of Limitations and jurisdiction of the Appeals Board reverted back to a one-year Statute of Limitations because they issued a Notice of Denial as to Permanent Disability.

The Arbitrator found that the issue of a Notice of Denial as to Permanent Disability only did not revert the case to the one-year Statute of Limitations because the case law discussed above only allows that reversion from the five-year Statute of Limitations to the one-year Statute of Limitations when the defendant's denial is based on newly discovered evidence and changes the case from an accepted case to a denied case in its entirety and defendant gives the proper legal notice. The case law requires that the defendant issue a Notice of Denial of injury to revert from the five-year Statute of Limitations to the one-year Statute of Limitations.

The case law does not allow a Notice of Denial of Permanent Disability issue by defendant to revert the case back to the one-year Statute of Limitations from the five-year Statute of Limitations and allow defendant the right to end applicant's right to seek new and further and additional benefits, pursuant to Labor Code §5410.

The law does allow the reversion back to a one-year Statute of Limitations and the lack of application of the five-year Statute of Limitations only in the situation where the defendant, after discovery of new evidence, issues a denial notice of injury after originally giving notice of accepting the injury and providing benefits.

That is not what happened in this case as defendants accepted the claim and has never denied injury in this claim.

The denial notice that defendant issued was only as to permanent disability, based on the final report of Dr. Bible dated April 2, 2018, which found no permanent disability at that time of his evaluation.

Therefore, the Arbitrator found the applicant timely commenced proceedings for the commencement of benefits within five years of the date of injury, pursuant to Labor Code §5410 and based on the facts and case law, applicant's claim is not barred by the one-year Statute of Limitations of Labor Code §5405.

B.

The defendant, City and County of San Francisco, Permissibly Self Insured, now Petitions for Reconsideration on the following grounds: (1) Applicant's claim is barred by the Statute of Limitations, pursuant to Labor Code §5405, as well as under the *Reynolds* case and its progeny.

In addition, defendants appear to argue that when an applicant is released from care by the treating doctor with no disability and no need for further medical treatment, defendant then can issue a Notice of Denial of Permanent Disability, as they did in this case, that there is no permanent disability and no need for further medical treatment at this time and, therefore, the applicant has and jurisdiction of the Appeals Board would be ended by the notice and applicant's right to new and further permanent disability and additional benefits would be ended.

Such an interpretation would basically end the five-year jurisdiction to the Appeals Board for new and further disability in all these types of cases.

The facts of this case are undisputed, the defendants accepted the injury and paid benefits.

The only denial notice defendant issued was that the applicant was not entitled to permanent disability because of a medical report that found no permanent disability and need for medical treatment.

The law allows the applicant five years to file a Petition to Reopen for New and Further Disability.

New and further disability is defined as permanent disability which the applicant has never received and or additional benefits for which the applicant is entitled that were not previously paid or awarded.

Defendant's interpretation would basically cut off the five-year jurisdiction of the Appeals Board where notices are given of no permanent disability. Such an interpretation is contrary to the case law and interpretation of the statute.

This interpretation would reverse all the case law on the five-year Statute of Limitations and allow defendants by a notice to end the rights of the applicant to new and further disability and end the five-year judication of the Appeals Board by issuing a Notice of Denial of Permanent Disability.

The Arbitrator found no case law or legal interpretation that supports defendant's interpretation of the law and Labor Code §5405 and Labor Code §5410 and the interplay between the two sections.

Defendant's interpretation of the five-year statute is contrary to additional interpretation of Labor Code §5410 and the legislative intent of that section.

In the opinion of the Arbitrator, Labor Code §5410 and the case law gives the Appeals Board continuing jurisdiction for five years from the date of injury in an admitted injury case where benefits are paid and allows for five years for a filing of a Petition to Reopen for New and Further Disability from the date of injury.

New and further disability is defined per case law as permanent disability and or any additional benefits claimed by the applicant.

In this case, in the opinion of the Arbitrator, the Appeals Board has continuing jurisdiction over the issues of permanent disability and additional benefits being claimed by the applicant as he filed an Application within five years of the date of injury, which is treated as a Petition to Reopen and the applicant is claiming new and further disability in that the applicant has never received permanent disability and permanent disability is new and further disability and applicant had a back surgery following the notice and is claiming additional benefits.

In this case, the applicant is claiming permanent disability and additional disability and medical benefits, based on the fact he had back surgery following the issuance of the Notice by defendant.

Therefore, the Arbitrator found that the applicant filed a timely Application, pursuant to Labor Code §5410, and defendant s notice regarding pem1anent disability cannot reduce the five-year limit to a one-year limit for filing, as the case law only allows that reduction when the case is accepted and later injury is denied, based on new evidence.

IV.

RECOMMENDATION

For the foregoing reasons, it is recommended that reconsideration be denied.

DATED: May 25, 2022

Respectfully submitted,

ALTMAN & BLITSTEIN

By: MARK L. KAHN,
ARBITRATOR