DAVID H. PARKER, 155526
PARKER, KERN, NARD & WENZEL
1111 E. Herndon, Suite 202
Fresno, California 93720
Telephone: (559) 449-2558
Facsimile: (559) 449-2564

Attorneys for: Defendants, [redacted]

BEFORE THE WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

[redacted] Applicant, vs. [redacted] Defendants.	WCAB Case No.: [redacted] (DOI: [redacted]) [redacted] (DOI: [redacted]) **DEFENDANT'S TRIAL BRIEF**

COMES NOW, Defendant [redacted] by and through its attorney of record and presents this Trial Brief on the issues Jurisdiction and application of the Statute of Limitations to bar the above-captioned claim as follows:

ISSUES PRESENTED

I. **DOES THE WCAB HAVE JURISDICTION WHERE APPLICANT'S APPLICATION FOR ADJUDICATION OF CLAIM WAS FILED MORE THAN 5 YEARS AFTER THE DATE OF INJURY?**

II. **IS APPLICANT'S CLAIM TIMELY FILED WHERE THE EMPLOYER NOTIFIED APPLICANT OF HIS RIGHTS PURSUANT TO REYNOLDS V. WCAB (1974) 39 CCC 768; 12 C3d 726 BUT HE FAILED TO FILE AN APPLICATION FOR ADJUDICATION OF CLAIM WITHIN 5 YEARS FROM THE DATE OF INJURY?**

A. **IS THE STATUTE OF LIMITATIONS TOLLED WHERE DEFENDANT PROVIDED NO INDUSTRIAL BENEFIT WITHIN THE ONE-YEAR IMMEDIATELY PRECEDING THE FILING OF AN APPLICATION FOR ADJUDICATION OF CLAIM?**

III. CAN TREATMENT WHICH IS NEITHER REASONABLE, NECESSARY NOR REQUIRED TO CURE OR RELIEVE FROM THE EFFECTS OF AN INDUSTRIAL INCIDENT RESULT IN ANY LIABILITY?

A. IS APPLICANT ESTOPPED FROM ASSERTING CARE IS REASONABLE BEFORE THE WCAB WHERE HE HAS FILED A CIVIL SUIT ASSERTING THAT THE CARE WAS NOT REASONABLE?

STATEMENT OF RELEVANT FACTS

Applicant [redacted] (hereinafter "APPLICANT") was employed by the [redacted] as a Sheriff's Sergeant on December 20, 2001 when he was in a motor vehicle accident. On the same day of the incident applicant signed an acknowledgment that he had received a claim form.

Applicant was transported by hospital to [redacted] and was checked, assessed and released that night. Deposition of Applicant (August 14, 2007) 20:12-19. He recalls losing no time from work as a result of that incident. Id. at 24:2-4. He does not recall filling out a claim form or other documentation as it related to that accident. Id. at lines 23-25. The next and first time he saw a doctor for the continuing pain was in March of 2007 when he met with [redacted] and told her about his neck pain. Id. 26:8-12.

Applicant received a Claim Form (DWC-1) on December 20, 2001. It is undisputed that a Claim Form (DWC-1) was filed by applicant on December 20, 2001. Applicant was sent a "Reynolds" letter on January 8, 2002. The only Applications for Adjudication of Claim (WCAB-1) were filed on or after April 30, 2007 alleging both a specific injury on December 20, 2001 and a cumulative trauma through March 21, 2007.

On March 19, 2007 applicant sought treatment from Chiropractor [redacted] who manipulated Applicant's neck. Applicant suffered a stroke immediately following the cervical manipulation provided by Chiropractor [redacted].

Applicant proceeded to see PQME Dr. [redacted] (hereinafter "PQME") pursuant to Labor Code sections 4060, 4061, 4062 and 4062.2. Dr. [redacted] confirmed Applicant suffered a stroke as a result of the cervical manipulation provided by Chiropractor [redacted]. See PQME report dated February 6, 2008 at pages 2 and 9. The PQME concluded as follows:

///

1. The stroke suffered by applicant on March 21, 2007 was a direct consequence of the cervical manipulation by Dr. [redacted]

2. Chiropractic cervical manipulation is never reasonable or necessary in spite of such a maneuver being widely practiced in the community;

3. It is likely that the December 20, 2001 specific incident likely caused the facet joint injury that has produced persistent waxing and waning neck discomfort;

4. He does not endorse the notion of ongoing continuing trauma.

All of the above conclusions are discussed and supported by the PQME's reporting in accordance with Escobedo v. Marshals and CNA Insurance Company (2005) 70 CCC 604. Id. at pgs. 8-11. There is no evidence that any chiropractic or other care following the initial hospitalization was paid as an industrial benefit. The evidence reflects that all treatment but for the one visit to [redacted] was paid through Applicant's group health insurance [redacted]

The claims could not be resolved informally due to jurisdiction, statute of limitations and causation disputes, thus the claim proceed to a Mandatory Settlement Conference on September 29, 2008 whereat discovery closed, the Pre-Trial Conference Statement was completed and the matter was set for trial. Defendant enters its appearance at this time and presents this Trial Brief ready, willing and able to proceed to trial.

ARGUMENT

I.

THE WORKERS COMPENSATION APPEALS BOARD DOES NOT HAVE JURISDICTION WHERE APPLICANT'S APPLICATION FOR ADJUDICATION OF CLAIM WAS FILED MORE THAN 5 YEARS AFTER THE DATE OF INJURY.

The period within which proceedings may be commenced for the collection of benefits is one year from the date of injury or the last date on which any benefits were provided. Labor Code section 5405(a)-(c). The timely filing of an application with the Appeals Board by any party renders this statute of limitation inoperative. Labor Code section 5404.

Applicant was in a motor vehicle accident on December 20, 2001. Applicant lost no time from work, was provided with one-time care at [redacted] was released to return

to work and did not seek treatment again until March 2007. Applicant was provided with a "Reynolds" letter on or about January 8, 2002. No Application for Adjudication of Claim was filed until on or after April 30, 2007 well over 5 years from the date of the incident.

The facts of this case reflect a failure to timely file an Application for Adjudication of Claim within 1 year of the date of the motor vehicle accident or 5 years from the last date that a workers' compensation benefit was paid. Therefore the Workers' Compensation Appeals Board lacks jurisdiction to award benefits.

II.

APPLICANT'S CLAIM IS NOT TIMELY FILED WHERE THE EMPLOYER NOTIFIED APPLICANT OF HIS RIGHTS PURSUANT TO REYNOLDS V. WCAB (1974) 39 CCC 768; 12 C3d 726 BUT HE FAILED TO FILE AN APPLICATION FOR ADJUDICATION OF CLAIM WITHIN 5 YEARS FROM THE DATE OF INJURY.

Jurisdiction is conferred on the Workers' Compensation Appeals Board by the filing of an Application for Adjudication of Claim. Labor Code section 5404. The right to maintain workers' compensation proceedings is barred unless compensation is paid within 5 years from the date of a specific injury. Id. The statute of limitation may also be extended to 5 years or later assuming the employer is estopped from asserting a limit based on failure to notify applicant of his her rights. Reynolds v. WCAB (1974) 39 CCC 768; 12 C3d 726. The statute of limitations is tolled until the worker learns of his or her rights. Kaiser Foundation Hospitals v. WCAB (1985) 39 Cal. 3d 57 64-5 and Reynolds Id. at 729-30.

Applicant was involved in a motor vehicle incident on December 21, 2001. He was taken to the hospital and released on the same day to his usual and customary occupation. He was provided a notice of his rights on January 8, 2002. He did not seek any further treatment or file an Application for Adjudication of Claim until on or after March 2007.

Applicant's Application for Adjudication of Claim is untimely. It was not filed until well after 5 years had passed from the date of the motor vehicle incident. It was not filed within 1 year of the last workers' compensation benefit paid. Thus the Applicant is barred from pursuing any claim for benefits.

A.

THE STATUTE OF LIMITATIONS IS NOT TOLLED WHERE DEFENDANT PROVIDED NO INDUSTRIAL BENEFIT WITHIN THE ONE-YEAR IMMEDIATELY PRECEDING THE FILING OF AN APPLICATION FOR ADJUDICATION OF CLAIM?

Applicant may attempt to argue the Statute of Limitations is tolled relying upon Mihelsuah v. WCAB (1972) 29 Cal. App. 3d 337, 340-341 to assert that defendant is estopped from asserting the affirmative defense. Applicant may argue that the health care paid for through Applicant's non-industrial [redacted] group health policy extends the statute of limitations.

However, the facts of Mihelsuah are distinguishable from the instant case on two critical issues: the injured worker Mihelsuah lacked actual notice of injury or rights related thereto and the claim was denied. Applicant in this case clearly had knowledge of his injury as well as his rights, evidenced by his personal filing of a Claim Form (DWC-1). Furthermore COF accepted his claim and sent him his "Reynolds" letter. The fact the claim was accepted and Applicant knew his rights, filed a Claim Form but failed to file a timely Application is therefore analogous not to Mihelsuah but Keeten v WCAB (1979) 94 Cal.App.3rd 307.

Applicant in Keeten was a sheriff [redacted] who suffered a left knee injury on the job in 1971. The injury was denied as industrial. Applicant received surgery on the knee through his insurance plan, but never filed a claim. Applicant had to undergo additional surgeries in 1975, 1976 and 1977. He alleged original injury dating back to 1971.

The Keeten court found applicant's original injury dating back to 1971 was barred by the statute of limitations in spite of applicant having sought and received care provided by the employer's Group Health insurance. The Keeten court held the Group Health care provided insufficient to toll the statute of limitations. It is important to note that Keeten is a Fifth District Court case that upheld applicability of the statute of limitations under facts similar to this case.

Applicant should not recover benefits where substantial evidence establishes that Applicant's claim is not timely filed and there is no tolling of the statute of limitations.

///

III.

INJURY DUE TO TREATMENT PROVIDED TO APPLICANT THAT IS NOT REASONABLY REQUIRED TO CURE OR RELIEVE FROM THE EFFECTS OF AN INDUSTRIAL INCIDENT CANNOT RESULT IN WORKERS' COMPENSATION LIABILITY.

Applicant must suffer an injury arising out of and during the course of employment as an essential prerequisite for the recovery of compensation benefits. Labor Code section 3600. This does not mean, however, that the employer is the insurer of the employee at all times during the employment relationship. The employee must sustain an industrially related injury that results in a need for medical treatment or a disability that diminishes his or her ability to work before an employer is require to furnish any benefit. See Hanna, California Law of Employee Injuries and Workers' Compensation (2008) 1-4, § 4.01, citing Labor Code § 3600, Kimbol v. I.A.C. (Douglas) (1916) 173 Cal. 351, 355; 160 P. 150; Ocean Acc. Etc. Co. V. I.A.C. (Slattery) (1916) 173 Cal. 313, 322, 159 P. 1041; Pacific Ind. Co. V. I.A.C. (Kendall) (1938) 3 Cal. Comp. Cases 98; 27 Cal. App. 2d 499; Lumberman's Mutual Company v. I.A.C. (Wilson) (1933) 134 Cal. App. 131, 133; 25 P.2d 22.

An employer is liable for all legitimate consequences from medical care that is reasonably required to cure or relieve from the effects of an industrial injury including negligent care of a physician provided by an employer. Labor Code section 4600; Heaton v. Kerlan (1946) 11 Cal. Comp. Cas. 78; 27 Cal. 2d 716; 166 P. 2d 857. It is axiomatic that an employer is not liable for care or after effects of unreasonable and unnecessary care.

Applicant in the present case self-procured medical care with Chiropractor [redacted] over 5 years from his date of injury and over 5 years from the last date he was provided industrial medical care. The care sought over 5 years after the injury was paid for entirely through [redacted] group health insurance. The bills were never presented to Defendant for payment, were never paid for by the employer and no bills are currently pending nor liens filed by [redacted] against Defendant.

///

///

The PQME [redacted] renders the opinion that the care provided by Chiropractor [redacted] is "never reasonable or necessary." His opinion is binding regarding the medical issues in this case. Furthermore even Applicant is specifically alleging the care provided by Chiropractor [redacted] was not reasonable in a Superior Court action currently pending.

The treatment provided Applicant by Chiropractor [redacted] in this case was neither paid for, authorized nor known to the employer as industrial in nature. Furthermore such care is "never" reasonable according to the PQME and was not according to Applicant's Superior Court complaint. Therefore any injury resulting from care not required for the industrial injury should not result in liability to the Defendant.

A.

IS APPLICANT ESTOPPED FROM ASSERTING CARE IS REASONABLE BEFORE THE WCAB WHERE HE HAS FILED A CIVIL SUIT ASSERTING THAT THE CARE WAS NOT REASONABLE?

An Applicant should not be permitted to assert a position in a Superior Court action that is totally inconsistent with a position being pursued in a workers' compensation proceeding. Eddie Jackson v. County of Los Angeles (1997) 62 Cal. Comp. Cas 1670; Cal. Rptr. 2d. 96.

Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." (Cleveland v. Policy Management Systems Corp. (5th Cir. 1997) 120 F.3d 513, 517, fn. omitted.) "This obviously contemplates something other than the permissible practice . . . of simultaneously advancing in the same action inconsistent claims or defenses which can then, under appropriate judicial control, be evaluated as such by the same tribunal, thus allowing an internally consistent final decision to be reached." (Allen v. Zurich Ins. Co. (4th Cir. 1982) 667 F.2d 1162, 1167; see Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 29 [223 Cal. Rptr. 806].

Applicant is asserting that care provided by Chiropractor [redacted] was unreasonable in a Superior Court action. The PQME [redacted] agrees the care provided by the Chiropractor was unreasonable and unnecessary to cure or relieve from the effects of the industrial injury. None of

the Chiropractors bills were tendered to, paid by nor the subject of a lien against Defendant. Labor Code section 4600 is clear that the employer is not liable for care that is not reasonably required to cure or relieve from the effects of an industrial injury.

Defendant argues that the condition precedent to recovery in this case is a stroke resulting from "care that is reasonably required to cure or relieve the injured worker from the effect of the industrial injury." Applicant himself takes the position before Superior Court that the care provided by Chiropractor [redacted] was not reasonable. Defendant agrees before the WCAB. Given applicant is asserting the care of Chiropractor [redacted] was not reasonable before another forum he should be estopped from asserting the care was reasonable or reasonably required before the WCAB in its forum.

CONCLUSION

The trial record will reflect that applicant suffered a motor vehicle incident on December 21, 2001 after which he was seen one time then returned to his usual and customary occupation. He did not file an Application for Adjudication of Claim within 1 year from the date of the incident in spite of having been informed of his duty to do so. He sought no additional care beyond the date of the incident until over 5 years later when visited Chiropractor [redacted] whose manipulation caused Applicant to suffer a stroke.

The PQME reporting of Dr. [redacted] reflects the Chiropractic care was not reasonably required to cure or relieve from the effects of an industrial injury. Defendant has not paid any bills related thereto, having made its last payment on the case to the first and only provider on the date of the incident. Applicant was returned to his usual and customary occupation with no lost time until his visit with Huljev over 5 years later.

Applicant subsequently filed a Superior Court action against the Chiropractor alleging the care provided him was not reasonable. No bills related to the [redacted] manipulation were paid by Defendant and no lien is pending from [redacted], the entity that did make those payments.

///

///

///

WHEREFORE, based on substantial evidence in this case, the arguments above and good cause appearing therefore it is respectfully requested that applicant take-nothing by way of his Applications for Adjudication of Claim.

DATED: _____, 2009

Respectfully Submitted,

PARKER, KERN, NARD & WENZEL
Professional Corporation

By: DAVID H. PARKER

[redacted]
Attorney at Law
[redacted]
Fresno, CA 93711
(559) [redacted]
FAX (559) [redacted]
California State Bar [redacted]

Attorney for Applicant, [redacted]

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

-ooOoo-

[redacted] Applicant. v. [redacted] Defendants.	WCAB NO.: [redacted] (DOI: [redacted]); [redacted] (DOI: [redacted]) APPLICANT'S POST TRIAL BRIEF

Applicant, [redacted] presents the following post trial brief for consideration in the determination of the pending issue.

I. ISSUE

This matter has been bifurcated so that the following threshold issue can be determined first. Once that issue is resolved, the parties may be able to address the remaining benefit issues which will either be resolved by agreement or further litigation.

The threshold issue to be resolved is as follows:

> Does the statute of limitations bar the applicant from the receipt of workers' compensation benefits for the December 20, 2001 industrial injury?

II. STATEMENT OF UNDISPUTED FACTS

The following facts are undisputed or they are facts for which there is no substantial evidence to contradict them.

Applicant was on duty as a sheriff's deputy when he was in a motor vehicle accident on December 20, 2001. (Joint Exhibit D and applicant's Exhibit 8)

In the motor vehicle accident of December 20, 2001, the applicant sustained injuries that included an injury to his neck. (Joint Exhibit D page "5"; applicant's Exhibit 8 page 2; and applicant's Exhibit 9, second to the last paragraph)

The applicant reported the injury to his employer (applicant's Exhibit 9) and received emergency medical treatment at [redacted] (applicant's Exhibit 10).

On the same day as the December 20, 2001 motor vehicle accident, applicant prepared and submitted an Employee's Claim for Workers' Compensation Benefits on the DWC-1 claim form. (Joint Exhibit C) Defendant acknowledged the claim by letter of January 8, 2002 (joint Exhibit B) which also advised applicant, "Please forward to [redacted] any medical bills relating to this injury that you received."

There is no evidence in this case that the applicant was ever notified following the date of the December 20, 2001 motor vehicle accident or up to the date of trial that the defendant had a Medical Provider Network and that the applicant was restricted to treatment by MPN doctors.

On December 15, 2004 applicant completed an Employee's Designation of Personal Physician on a County of Fresno form pursuant to Labor Code §4600. (Applicant's Exhibit 7) This form designated [redacted] M.D. as his primary treating physician for any

industrial injury sustained by the applicant.

Applicant sought and received treatment from Dr. [redacted] on March 2, 2007. The handwritten progress note (applicant's Exhibit 2) was dictated and typed in a report dated June 19, 2008 (applicant's Exhibit 1). As clearly shown in the dictated version, the applicant went to Dr. [redacted] on March 2, 2007 for "neck pain."

This treatment was paid by applicant's group insurance plan through his employment with the [redacted] according to his testimony and the financial records of Dr. [redacted] (applicant's Exhibit 3).

The next treatment sought by the applicant for his neck was at [redacted] where he received chiropractic treatment on March 19, 2007 and on March 21, 2007 (applicant Exhibit 4). Following the visit on March 21, 2007, the applicant suffered a stroke.

The panel QME. [redacted], M.D., provided the following three conclusions in his February 6, 2008 report (joint Exhibit A):

> A. Chronic neck pain following motor vehicle accident most likely due to facet-generated pain. This is an industrially-related condition.
>
> B. Brainstem strokes caused by chiropractic manipulation undertaken in an effort to treat neck pain, described in A.
>
> C. Question of post-traumatic stress disorder as evident by tearfulness and difficulty discussing the subject manipulation. This flows from B.

Regarding causation, Dr. [redacted] states at page 10 of his report (joint Exhibit A):

> Currently, I apportion his stroke-related syndrome and PTSD to the motor vehicle accident and no other factor.

Regarding notifications to the applicant of any time limitation to pursue his workers' compensation claim. the following notifications were given:

1. The brochure known as Facts for Injured Workers states: "If it's necessary to go to the Appeals Board to resolve your claim, be sure to do it within one year from the date of the injury *or one year from the date of your last medical treatment*. Waiting longer could mean losing your right to benefits." (Italics added for emphasis)

2. Letter from Pegasus Risk Management dated February 7, 2002 (joint Exhibit E) states, " Under California law, you have *one (1) year from the date of last treatment* to pursue Workers' Compensation benefits." (Italics added for emphasis)

There is no evidence in this record that the applicant was ever notified that there was an outside limit of five years from the date of the injury to file an Application with the Workers' Compensation Appeals Board.

III. ARGUMENT AND AUTHORITY

A. Did the applicant file an Application for Adjudication of Claim within one year of the date of last furnishing of any medical treatment?

Labor Code §5405 provides the basic statute of limitations. It provides:

> The period within which maybe commenced proceedings for the collection of the benefits provided by Articles 2 or 3, or both, of Chapter 2 of Part 2 of this division is one year from:
>
> (a) The date of injury; or
>
> (b) The expiration of any period covered by payment under Article 3 of Chapter 2 of Part 2 of this division; or
>
> (c) *The date of last furnishing of any benefits provided for in Article 2 of Chapter 2 of Part 2 of this division.* (Italics added for emphasis)

Of course, Labor Code §5405 is within division 4. Therefore, if we go to Part 2 of that division, Chapter 2, and Article 2, we find that it relates to "medical and hospital treatment." Accordingly, **the statute of limitations is a one year period of time from the last furnishing of medical and hospital treatment.**

Therefore, the key term to be defined and understood is what constitutes "furnishing" medical treatment? We are attaching to this brief a copy of §§12.35, 12.36 and 12.37 of California Workers' Compensation Practice, 4th Edition, of the Continuing Education of the Bar, California, as an unbiased and authoritative source in understanding and answering that question.

Without reiterating each of the cases cited in these sections of California Workers' Compensation Practice, we point out that in none of these cases was it stated that "furnishing" of the medical treatment required that *payment* actually had to be made by the employer, its workers' compensation carrier, or its workers' compensation third party administrator. It was the receipt of the *treatment* rather than the payment to the doctor that was the key element of each holding as to whether the treatment was furnished for the purpose of determining whether the statute of limitations barred the claim.

When defendant's trial brief references this requirement, it correctly paraphrases the requirement when it starts its discussion on page 3:

> The period within which proceedings maybe commenced for the collection of benefits is one year from the date of injury or the last date on which any benefits were provided. [Page 3 lines 23-24].

However, later in its brief, it strays from the correct statement by making the

following statements:

> "The facts of this case reflect a failure to timely file an Application for Adjudication of Claim within 1 year of the date of the motor vehicle accident or 5 years from the last date that a workers' compensation benefit was *paid*." (Italics added for emphasis) [Page 4 lines 4-6]
>
> "It was not filed within 1 year of the last workers' compensation benefit *paid*." (Italics added for emphasis) [Page 4 lines 26-27]

Note that the defendant never provides any case citation to support its interpretation that the "furnishing" of medical treatment means that the treatment must be *paid* by the employer.

Here it is important to explain what medical treatment we are referencing regarding the statute of limitations. Because of the disastrous consequences of the chiropractic treatment received in March 2007, it is natural to have one's attention drawn to that treatment. However, this is not the treatment that we are relying upon regarding the defeat of the statute of limitations defense. Rather, it is the treatment received by the applicant from Dr. [redacted] on March 2, 2007 that is the more relevant focus of the analysis.

Remember that on December 15, 2004 applicant designated Dr. [redacted] as his primary treating physician. This was done on a [redacted] form pursuant to Labor Code §4600. Therefore, treatment provided by Dr. [redacted] constitutes treatment "furnished" by the employer. It is does not matter that the treatment was billed to the group health insurance rather than to workers' compensation (we will discuss the group health insurance issue later). The important fact is that Dr. [redacted] was an authorized primary treating physician to provide workers' compensation benefits to the applicant and the applicant saw her for his neck

problems on March 2, 2007. The panel QME, Dr. [redacted] confirms that the neck problems suffered by the applicant continue to relate to the motor vehicle accident of December 20, 2001.

The Application for Adjudication of Claim was filed on May 2, 2007. This was exactly two months after the applicant was furnished medical treatment through Dr. [redacted] for his industrial injury. Accordingly, this is within Labor Code §5405(c) and prevents the running of the statute of limitations.

One of the cases cited in California Workers' Compensation Practice is *Zorn v. Hastings* (1940) 5 CCC 37, where the employee was instructed by the employer's physician to return if he had any further trouble. The applicant did return to defendant's doctor and received further medical treatment more than 245 weeks after the date of injury. He filed an Application within 10 days of that treatment. It was held that Labor Code §5405(a) (which at that time had a six month requirement rather than a one year requirement) did not bar the claim.

In the case at bar, the emergency room physician at [redacted] told the applicant to follow up with his own doctor. This was confirmed with the applicant's testimony. As indicated above, he did follow up with his own doctor (who was a designated primary treating physician for workers' compensation injuries). Therefore, this case also comes within the *Zorn* doctrine and prevents the running of the statute of limitations.

It is important to recognize that the five year jurisdictional limit of the WCAB regarding "new and further" is not applicable to this discussion. If the last furnishing of benefits is beyond five years from the date of injury, the applicant is still within the statute

of limitations. It is only when the applicant has failed to file an Application for Adjudication of Claim within one year of the last furnishing of benefits that he would then to have to rely on the five year statute of limitations.

B. **The holding in *Keeton v. WCAB* (1979) 94 CA 3d 307 is not applicable to this case.**

Defendant relies on the holding in *Keeton v. WCAB* (1979) 94 CA 3d 307 in support of its assertion that the statute of limitations has run. However, in *Keeton*, the defendant had sent a clear notice to the employee that his claim was **denied**. The Court held that this put him on notice that he had to do something if he was going to perfect his claim.

In contrast, in the case at bar, the defendant sent a letter to the applicant (joint Exhibit B) that it was accepting the claim and intended to provide all benefits. Even the February 7, 2002 letter (joint Exhibit E) was nothing more than a letter stating that they were putting the file in inactive status and would close the file if they did not hear from the applicant within thirty (30) days. This was not a "denial" of the claim.

C. **Is the defendant responsible for the worsening of applicant's condition following the chiropractic treatment in March 2007?**

Defendant has used tortured logic in arguing that because the chiropractic treatment may have been negligently provided, it was therefore unreasonable for the applicant to seek chiropractic treatment.

We recognize that the PQME, Dr. [redacted] does not believe that cervical manipulation is ever reasonable or necessary. Nevertheless, even Dr. [redacted] acknowledges that it is "widely undertaken in the community."

In fact Labor Code §4600 specifically references "chiropractic" treatment as one type of treatment that an injured worker is entitled to receive.

The question of whether cervical manipulation was appropriate is a separate and distinct issue from whether it was reasonable for the applicant to seek chiropractic treatment.

Whether or not treatment is negligently provided is also a separate issue. For instance, well accepted procedures, such as a cervical laminectomy, can be negligently performed and leave disastrous results. Nevertheless, it would be acknowledged by even the defendant that the treatment itself, together with its consequences, would be a part of the industrial injury.

Defendant asserts that the applicant is taking inconsistent positions by asserting in the workers' compensation case and the civil case. However, applicant does need to assert inconsistent positions. Rather, applicant is stating that it was reasonable for him to seek chiropractic treatment pursuant to Labor Code §4600 even though the chiropractic treatment itself may not have been administered within a standard of care.

All of this misses the point of the current litigation. The current litigation relates to whether the applicant's claim is barred by the statute of limitations. As discussed above, the medical treatment which was last furnished by Dr. [redacted], the primary treating physician for industrial injuries, was in March of 2007 and the Application for Adjudication of Claim was filed within two months of that treatment. As to whether the defendant is responsible for the consequences of the chiropractic treatment that occurred later in March of 2007, it is not of concern regarding this bifurcated determination.

///

///

D. **Is the defendant responsible for the disability that may have resulted from the chiropractic treatment?**

Dr. [redacted] explains the causative link between the industrial injury of December 20, 2001 and the stroke. Had it not been for the motor vehicle accident, the applicant would not have had neck problems. If he had not had neck problems, he would not have seen the chiropractor. If he had not seen the chiropractor, he would not have had the stroke. Therefore, is there a break in the causation because of alleged negligent treatment?

The easiest way to understand the issue is to look at a standard set of circumstances which create a "compensable consequence of the industrial injury." Consider the following scenario:

> As a result of the industrial injury, the applicant is a qualified injured worker, and as a result of being a qualified injured worker he is attending a class at Fresno City College, and as a result of attending the class at Fresno City College he is sitting at a desk that collapses, and as a result of the desk collapsing, he sustains an injury to his back whereas the original injury was to his foot, the back injury becomes a part of the industrial injury. *Rogers v. WCAB* (1985) 168 CA 3d 567. It does not matter that Fresno City College was negligent in maintaining the chair. The chain of causation is not broken by any independent negligence.

As long as the industrial injury continues to play a role in the chain of events, injuries that occur within the chain of events become compensable consequences of the industrial

injury.

Another example is when there is an injury sustained in a motor vehicle accident on the way to treatment for the industrial injury. *Laines v. WCAB* (1975) 48 CA 3d 872. Note that it does not even matter whether the applicant was negligent in causing the motor vehicle accident. This is a "no fault" system that does not penalize the applicant for his ordinary negligence. Likewise, even if the applicant was negligent in selecting a chiropractor, or if the chiropractor was negligent in providing treatment, these allegations of negligence do not defeat the causation link to make the stroke a compensable consequence of the industrial injury.

There is nothing new or novel about applicant's argument that the consequences of the chiropractic treatment in this case become the responsibility of the defendant as part of the industrial injury. This issue was raised and decided in the 1936 California Supreme Court case of *Fitzpatrick v. Fidelity & Casualty Company* (1936) 7 C.2d 230, 233, where the Court stated:

> In the development of our system of workmen's compensation, it has become settled, as already indicated, that an employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury, whether the doctor was furnished by the employer, his insurance carrier, **or was selected by the employee**. [citations omitted].

The Court went on to reference case authority supporting the following proposition which was also adopted by the Court:

> . . .under the great weight of authority the employer is liable for all legitimate consequences following an accident, **including unskillfulness or error of judgment of the physician** . . ."

IV. CONCLUSION

The causative link between the accepted industrial motor vehicle accident of December 20, 2001, and the stoke on March 21, 2007, is supported by substantial evidence, including the opinion of the PQME. There is no evidence to the contrary.

The consequence of the treatment on March 21, 2007 is part of the industrial injury. This has been the law since 1936.

The defendant was properly notified of the December 20, 2001 industrial injury, and defendant told the applicant that if he needed to resolve his claim, he had until one year following the last treatment to go to the WCAB. This is in conformity with the provisions of Labor Code §5405. Applicant did file his application within a year of the last treatment by the doctor who he previously designated as his industrial primary treating physician.

Applicant's claim is not barred by a time limitation. Applicant is entitled to workers' compensation benefits relating to the December 20, 2001 injury, and relating to the consequences of that injury.

Respectfully submitted.

Date: July 29, 2009

Attorney for Applicant,

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

[redacted]
APPLICANT

v.

[redacted]
DEFENDANTS

CASE NUMBER(S) [redacted]

MINUTES OF HEARING/ORDER/ORDER AND DECISION ON REQUEST FOR CONTINUANCE/ ORDER TAKING OFF CALENDAR/ NOTICE OF HEARING

☐ BEFORE ☒ AT
☐ TRIAL ☒ MSC
☐ CONF ☐ EXP HEARING ☐ LIEN

DATE OF: HEARING 5/13/2009 REQUEST Applicant

APPEARANCES

APPLICANT ☐ PRESENT ☒ NOT PRESENT

APPLICANT REPRESENTED BY [redacted] ☒ ATTORNEY ☐ HEARING REP.

DEFENDANT REPRESENTED BY David H. Packer (FRESNO) ☒ ATTORNEY ☐ HEARING REP.

OTHERS APPEARING _____ ☐ ATTORNEY ☐ HEARING REP.

INTERPRETER _____ CERTIFICATION NO. _____

PARTY MAKING REQUEST ☐ JOINT ☐ APPLICANT ☐ DEFENDANT ☐ OTHER _____

REQUEST FOR: ☐ CONTINUANCE ☐ OTOC REQUEST BY: ☐ LETTER ☐ TELEPHONE

POSITION OF OPPOSING PARTY ☐ AGREE ☐ OPPOSE ☐ UNREACHABLE ☐ UNKNOWN

REASON FOR REQUEST

☐ FURTHER DISCOVERY: ☐ APP MED ☐ DEF MED ☐ AME ☐ DEPO
☐ CALENDAR CONFLICT: ☐ APPLICANT ☐ DEFENSE ☐ L.C.
☐ SETTLEMENT PENDING
☐ IMPROPER/INSUFFICIENT NOTICE BY PARTY
☐ IMPROPER DECLARATION OF READINESS/VALID OBJECTION
☐ NON APPEARANCE ☐ APP ☐ DEF ☐ LIEN CLAIMANT ☐ WITNESS
☐ APPLICANT ☐ DEF COUNSEL ☐ VACATION ☐ ILLNESS
☐ UNAVAILABILITY OF WITNESSES ☐ APP ☐ DEFENSE
☐ DISPUTE RESOLVED BY AGREEMENT ☐ NO ISSUES PENDING
☐ JOINDER ☐ CONSOLIDATION ☐ VENUE ☐ NEW APPLICATION
☐ AUTO REASSIGN ☐ DISQUALIFY ☐ APP ☐ DEFENDANT
☐ APPLICANT NOW REPRESENTED ☐ REQUESTS REPRESENTATION
☐ CHANGE OF CIRCUMSTANCES

BOARD REASON

☐ INSUFFICIENT TIME ☐ TO START ☐ TO FINISH
☐ REASSIGNMENT: ☐ REFUSED ☐ NOT AVAILABLE
☐ REPORTER ☐ INTERPRETER ☐ NOT AVAILABLE
☐ WCJ NOT AVAILABLE ☐ RECUSAL
☐ UEF ISSUES ☐ SERVICE DEFECTIVE ☐ BANKRUPTCY PENDING
☐ DEFECTIVE WCAB NOTICE
☐ ARBITRATION

OTHER/COMMENTS _____

GOOD CAUSE APPEARING, IT IS ORDERED THAT THE REQUEST FOR ☐ CONT ☐ OTOC IS ☐ GRANTED ☐ DENIED

_____ DAYS FOR ☐ C&R ☐ STIPS, OTHERWISE: ☐ OTOC ☐ RESET _____

☐ OTOC ☐ C&R/STIPS SUBMITTED FOR APPROVAL ☐ C&R/STIPS APPROVED
☐ LIEN STIPS AND ORDER APPROVED ☐ N.O.I. TO ALLOW/DISALLOW ISSUED
☐ SET FOR ☐ MSC ☐ CONF ☐ TRIAL ☐ LIEN TRIAL ☐ CONTD TESTIMONY TIME ☐ 1 HR ☐ 2 HRS ☐ 4 HRS ☒ 1/2 DAY

SET ON 7-9-09 AT 8:30 LOCATION FRESNO BEFORE JUDGE [signature]

(Rev. 10/05)

CALENDARED
MARI OLVERA

SECOND PAGE TO BE COMPLETED
AND SIGNED FOR SERVICE.

CASE TITLE [redacted] v. [redacted]

CASE NUMBER(S) [redacted]

SUPPLEMENT TO MINUTES OF HEARING/ORDER/ORDER AND DECISION ON REQUEST FOR CONTINUANCE/ORDER TAKING OFF CALENDAR/NOTICE OF HEARING

HEARING DATE 5/13/2009

COMMENT/DISCUSSION/MOTION

NOTICE TO PARTIES: Disability accommodation is available upon request. Any person with a disability requiring an accommodation, auxiliary aid or service, or a modification of policies or procedures to ensure effective communication and access to the programs of the Division of Workers' Compensation should contact the Disability Accommodation Coordinator at the local District Office of the WCAB, or the state-wide Disability Accommodation Coordinator at 1-866-681-1459 (toll free). The state-wide coordinator can also be reached through the California Relay Service, by dialing 711 or 1-800-735-2929 (TTY) or 1-800-855-3000 (TTY-Spanish). Accommodations can include modification of policies or procedures or provision of auxiliary aids or services. Accommodations include, but are not limited to, an Assistive Listening System (ALS), a Computer-Aided Transcription System or Communication Access Realtime Translation (CART), a sign language interpreter, documents in Braille, large print or on computer disk, and audio cassette recording. Accommodation requests should be made as soon as possible. Requests for an ALS or CART should be made no later than five (5) days before the hearing.

ORDER(S)

Served with the Minutes of Hearing.

J.A. Eckl 5-13-09

J.A. Eckl

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

NOTICE TO David H. Packer, Esq.

Document(s) on all parties as shown on the Official Address Record. Pursuant to Rule 10500 you are designated to serve this/these

Date _____ By _____ Served on designated server with a copy of the Official Address Record.

Served on parties and lien claimants present

rev. 10/05)

TO BE ATTACHED WITH FRONT PAGE OF

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
WORKERS' COMPENSATION APPEALS BOARD

[redacted]
APPLICANT
V
[redacted]
DEFENDANT(S)

CASE NO. [redacted]

PRE-TRIAL CONFERENCE STATEMENT §5502 (d) (3)
☐ NOTICE OF HEARING

LOCATION: 3th Floor DATE: 5/13/2009 TIME: 8:30

SETTLEMENT CONFERENCE JUDGE: J.A. Eckl

APPEARANCES:

☐ INJURED WORKER

☒ INJURED WORKER'S ATTORNEY [redacted] ☐ ATTY ☐ HRG REP

(FIRM NAME AND PERSON APPEARING)

☒ DEFENDANT'S ATTORNEY David H. Parker Pierce [redacted] ☒ ATTY ☐ HRG REP

☐ ATTY ☐ HRG REP

☐ ATTY ☐ HRG REP

☐ ATTY ☐ HRG REP

(FIRM NAME AND PERSON APPEARING) (DEFENDANT)

☐ OTHERS APPEARING: (L.C., INTERPRETERS, ETC.)

☐ ADDRESS RECORD CHANGES:

BOX BELOW TO BE COMPLETED ONLY BY WORKERS' COMPENSATION JUDGE

DISPOSITION: SET FOR REGULAR HEARING: ☐ WCAB NOTICE ☐ NOTICE WAIVED

☐ 1 HOUR ☐ 2 HOURS ☐ ½DAY ☐ ALL DAY

☐ BEFORE ANY WCJ ☒ BEFORE WCJ Eckl ☐ BEFORE ANY WCJ OTHER THAN _____

☐ CASE(S) SET ON _____ (DATE) AT _____ (TIME) WCJ _____ IN _____ (LOCATION)

☐ OTHER DISPOSITION AND ORDERS:

SERVICE AS ORDERED ON PAGE 4

J. A. Eckl 5-13-09

J. A. ECKL
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

PRE-TRIAL CONFERENCE STATEMENT

CASE NO. [redacted]

STIPULATIONS

THE FOLLOWING FACTS ARE ADMITTED:

1. [redacted], BORN [redacted]

WHILE ☑ EMPLOYED ☐ ALLEGEDLY EMPLOYED

☑ ON "on or about 12/15/01," 12/20/01 and 3/21/07

☑ DURING THE PERIOD(S) ~~"on or about 12/15/01" CT 12/20/01 and~~ CT-3/21/07

AS A(N) LAW ENFORCEMENT SEARGENT, OCCUPATIONAL GROUP NUMBER 490

AT FRESNO, CALIFORNIA

BY [redacted]

☐ SUSTAINED INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT TO

☑ CLAIMS TO HAVE SUSTAINED INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT TO CERVICAL SPINE AND STROKES

2. AT THE TIME OF INJURY THE EMPLOYER'S WORKERS' COMPENSATION CARRIER WAS

☑ THE EMPLOYER WAS ☑ PERMISSIBLY SELF-INSURED ☐ UNINSURED ☐ LEGALLY UNINSURED

3. AT THE TIME OF INJURY, THE EMPLOYEE'S EARNINGS WERE $ ~~[illegible]~~ PER WEEK, WARRANTING INDEMNITY RATES OF $ ~~[illegible]~~ FOR TEMPORARY DISABILITY AND $ ~~[illegible]~~ FOR PERMANENT DISABILITY.

4. THE CARRIER/EMPLOYER HAS PAID COMPENSATION AS FOLLOWS: (TD/PD/VRMA)

TYPE	WEEKLY RATE	PERIOD	TYPE	WEEKLY RATE	PERIOD
N/A					

☐ THE EMPLOYEE HAS BEEN ADEQUATELY COMPENSATED FOR ALL PERIODS OF T/D CLAIMED THROUGH

5. THE EMPLOYER HAS FURNISHED ☐ ALL ☐ SOME ☑ NO MEDICAL TREATMENT.
THE PRIMARY TREATING PHYSICIAN IS IN DISPUTE. LAST TREATED BY MARY SADLEK PERSONAL PHYSICIAN

6. ☑ NO ATTORNEY FEES HAVE BEEN PAID AND NO ATTORNEY FEE ARRANGEMENTS HAVE BEEN MADE.

7. ☑ OTHER STIPULATIONS The parties will adjust self procured medical and TTD/$24850 if there is a finding of a compensable industrial injury. Jurisdiction is reserved to resolve any disputes regarding self-procured medical and TD/$24850 benefits. Defendant to designate QME Records, file/serve WCAB 10 days or less before trial (Received 5/12/09

[redacted]
APPLICANT

DEFENDANT

LIEN CLAIMANT/OTHER

PRE-TRIAL CONFERENCE STATEMENT

CASE NO. [redacted]

ISSUES

- ☐ EMPLOYMENT
- ☐ INSURANCE COVERAGE
- ☑ INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT DEFENDANT RAISES STATUTE OF LIMITATIONS DEFENSE
- ☐ PARTS OF BODY INJURED:
- ☐ EARNINGS: EMPLOYEE CLAIMS _____ PER WEEK, BASED ON
  EMPLOYER/CARRIER CLAIMS _____ PER WEEK, BASED ON
- ☒ TEMPORARY DISABILITY, EMPLOYEE CLAIMING THE FOLLOWING PERIOD(S): ~~DEFENDANT DENIES TTD AND ALL BASED ON STATUTE OF LIMITATIONS AND JURISDICTIONAL DEFENSES~~
- ☐ PERMANENT AND STATIONARY DATE:
  EMPLOYEE CLAIMS ___/___/___, BASED ON
  EMPLOYER/CARRIER CLAIMS ___/___/___, BASED ON
- ☐ PERMANENT DISABILITY ☑ APPORTIONMENT
- ☐ OCCUPATION AND GROUP NUMBER CLAIMED: BY EMPLOYEE
  BY EMPLOYER/CARRIER
- ☐ NEED FOR FURTHER MEDICAL TREATMENT
- ☒ LIABILITY FOR SELF-PROCURED MEDICAL TREATMENT
- ☑ LIENS:

LIEN CLAIMANT	TYPE OF LIEN	AMOUNT AND PERIODS PAID

- ☑ ATTORNEY FEES
- ☑ OTHER ISSUES: 1) JURISDICTION: DEFENDANT ASSERTS NO TIMELY APPLICATION FILED. 2) STATUTE OF LIMITATIONS. DEFENDANT ASSERTS APPLICANT FILED APPLICATION BEYOND FIVE-YEAR STATUTE OF LIMITATIONS - LABOR CODE SECTIONS 5400, 5401(c)(d), 5404, 5405, 5406, 5409, 5410, 5804. 3) DEFENDANT ASSERTS LACK OF "ESTOPPEL" RAISING KEETEN V. WCAB (Court of Appeal, Fifth Appellate District) 44 Cal. Comp. Cas 547 4) INJURY AOE/COE: DEFENDANT ASSERTS THAT CARE ALLEGEDLY CAUSING INJURY AOE/COE WAS NOT REASONABLY REQUIRED TO CURE OR RELIEVE FROM THE EFFECTS OF AN INDUSTRIAL INJURY (LABOR CODE SECTION 4600 BASED ON POME MILLER'S REPORTING) 5) Applicant raises issue of estoppel 6) Applicant objects to relevance of records of [redacted]

[redacted]
APPLICANT

DEFENDANT

LIEN CLAIMANT/OTHER

PRE-TRIAL CONFERENCE STATEMENT CASE NO. [redacted]

THIS PAGE FOR JUDGE'S USE ONLY

JUDGE'S CONFERENCE NOTES: _____

ORDERS

☐ IT IS ORDERED PURSUANT TO WCAB RULE 10500, THAT ☐ DEFENDANT ☐ APPLICANT ☐ LIEN CLAIMANT SERVE FORTHWITH THIS ☐ PRE-TRIAL CONFERENCE STATEMENT ☐ NOTICE OF HEARING ON ALL PARTIES OR THEIR REPRESENTATIVE SHOWN ON THE OFFICIAL ADDRESS RECORD AND ANY ADDITIONAL LIEN CLAIMANTS WHOSE LIENS ARE SHOWN UNDER ISSUES (PAGE 3)

☐ IT IS FURTHER ORDERED THAT ☐ DEFENDANT ☐ APPLICANT ☐ LIEN CLAIMANT SERVE TIMELY NOTICE OF THE TIME AND PLACE OF ALL REGULAR HEARING SESSIONS ON ALL LIEN CLAIMANTS WHOSE LIENS ARE SHOWN UNDER ISSUES, TOGETHER WITH THE FOLLOWING NOTICE: YOUR LIEN IS AT ISSUE AND WILL BE ADJUDICATED AT REGULAR HEARING.

IT IS FURTHER ORDERED THAT THE PROOF OF SERVICE ORDERED ABOVE BE FILED WITH THE WCAB ONLY ON REQUEST OF THE ASSIGNED WORKERS' COMPENSATION JUDGE.

OTHER DISPOSITION AND ORDERS

_____

SERVICE OF THIS DOCUMENT WAS MADE PERSONALLY UPON _____ BY WCJ.

DATE ____/____/____

J. A. ECKL
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

PRE-TRIAL CONFERENCE STATEMENT

CASE NO. [redacted]

☐ APPLICANT
☑ DEFENDANT
☐ LIEN CLAIMANT
☐ APPEALS BOARD

EXHIBITS

	DESCRIPTION	DATE
J	POME [redacted]	
	DESIGNATED SUBPOENAED RECORDS OF [redacted]	2/6/08
	Volume three: Page 702: Documentation of applicant's ADL's and improvements in same	VARIOUS
	Page 784-785: Documentation of applicant's ADL's and improvements in same.	
	Page 927: 12/21/01 doctor's report with no mention of vehicle accident or neck pain	
	Volume five: Page 1501: Letter from applicant's attorney (DOR OBJECTION)	
	Volume seven: Page 2132-2146	
	Volume eight: Page 2388:	
	Applicant's signed receipt of claim form for accident on 12-20-01. Form signed on 12-20-01.	S
J	LETTER FROM [redacted] S 1/8/02	
	EMPLOYERS' FIRST REPORT 12/20/01	1/8/02
J	APPLICANT'S DWC-1 12/20/01	12/20/01
	DELAY NOTICE	12/20/01
	DENIAL NOTICE 6/12/07	~~6/13/07~~ 4/4/07
	DENIAL NOTICE 8/1/07	6/12/07
	DENIAL NOTICE 12/13/07	8/1/07
	5020 3/28/07	12/13/07
	APPLICANT'S DEPOSITION: DEFENDANT RESERVES THE RIGHT TO USE AND DESIGNATE	3/28/07
	PORITIONS OF APPLICANT'S DEPOSITION NECESSARY BASED ON IMPEACHMENT	
	ISSUES IF AND AS THEY ARISE AT TRIAL	
	Facts for Limited Liens	
	Records of Mark Mich	

WITNESSES

[redacted]

ABOVE LISTINGS OF EXHIBITS AND WITNESSES REVIEWED BY ALL PARTIES.

[redacted]
APPLICANT

DEFENDANT

LIEN CLAIMANT/OTHER

NAME: [redacted]
FILE NO: 8285
CASE NO: 07CECG03673 DRF
CAPTION: [redacted]
COURT: Fresno [redacted]

PLEADING INDEX. VOL I

NO:	DATE: (F,S,I,D)*	DESCRIPTION OF DOCUMENT:	AUTHOR:
1.	F: 11/01/07	Complaint	MEM
2.	F: 11/01/07	Summons	MEM
3.	F: 11/01/07	ADR Rule: Fresno Superior Court	Court
4.	F: 11/01/07	Notice of CMC and Assignment of Judge	Court
5.	F: 11/01/07	Civil Case Cover Sheet	Court
6.	D: 11/15/07	POS: Complaint on [redacted]	MEM
7.	D: 11/15/07	POS: Complaint on Palm Medical	MEM
8.	S: 12/03/07	Demurrer to Complaint	Salinas
9.	F: 12/14/07	First Amended Complaint	MEM
10.	S: 12/27/07	Answer to First Amended Complaint	Salinas
11.	F: 02/15/08	Case Mgmt Stmt	MEM
12.	F: 3/03/08	CMC Minutes/Order to Show Cause	Court
13.	D: 03/5/08	Demand for Exchange of Expert Witness Info.	Salinas
14.	D: 3/06/08	CMC Minutes/Order to Show Cause	Court
15.	D: 4/08/08	Order	Court
16.	F: 4/25/08	Stip Re: ADR	MEM

F = Filed, S = Served, I = Issued, D = Dated
S:\WPWORK\INDEX.PLD\RAMIREZ, HANK VOL I.WPD

EXHIBITS

x Applicant [redacted]

	DESCRIPTION	DATE
1.	[redacted] M.D.	02/06/2008
2.	[redacted] M.D.	06/19/2008
3.	Dr [redacted] Progress Notes	03/02/2007
4.	[redacted] (Dr [redacted]) Patient Financial History	03/02/2007
5.	[redacted] records (pages 04 and 05 of subpoened records)	03/19/2007
6.	Supervisor's Investigation Report	03/27/2007
7.	Workers' Compensation Claim Form (DWC-1)	03/27/2007
8.	Employee's Designation of Personal Physician	12/15/2004
9.	Letter from [redacted] to [redacted]	01/08/2002
10.	Employee's Claim for Workers' Compensation Benefits (DWC-1)	12/20/2001
11.	Motor Vehicle Accident/Property Damage Report	02/08/2002
12.	Incident Report Narrative prepared by Sgt. Henry Ramirez	12/20/2001
13.	Traffic Collision Report 2001-12-291 of 12/20/2001 MVA (pages 1 and 5)	01/08/2002
14.	[redacted] Emergency Room record	12/20/2001
15.	Photograph of Sheriff's patrol car	12/20/2001
16.	Medical-Legal Invoice and attached Invoice from [redacted] and response to Fax Cover Sheet	07/07/2008
17.	Letter from [redacted] to [redacted]	02/07/2002

PRE-TRIAL CONFERENCE STATEMENT CASE NOS. [redacted]

x Applicant

WITNESSES

Applicant

[redacted]

ABOVE LISTINGS OF EXHIBITS AND WITNESSES REVIEWED BY ALL PARTIES

Applicant Defendant Lien claimant/Other

[redacted]
Attorney at Law
[redacted]
Fresno, CA 93711
(559) [redacted]
FAX (559) [redacted]
California State Bar [redacted]

Attorney for Applicant, [redacted]

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

-oo0oo-

[redacted] Applicant, v. [redacted] Defendants.	WCAB NO.: [redacted] (DOI: [redacted]); [redacted] (DOI: [redacted]) **PETITION FOR RECONSIDERATION**

Applicant, [redacted] petitions for reconsideration of the Findings and Order issued herein on October 26, 2009, and in support thereof, asserts as follows:

I. PRELIMINARY STATEMENT

The trial of this matter was bifurcated so that the following threshold issue of the statute of limitations could be determined first. Depending on the determination of that defense, the parties will address the remaining benefit issues in a later proceeding.

The threshold issue to be resolved is as follows:

> Does the statute of limitations bar the applicant from the receipt of workers' compensation benefits for the December 20, 2001 industrial injury?

The Findings and Order, from which applicants seeks reconsideration, determined that the case was barred by the statute of limitations as stated in Labor Code Sections 5404, 5405, and 5804.

II. GROUNDS

The grounds for reconsideration asserted by applicant are:

The evidence does not justify the findings of fact.

The findings of fact do not support the decision.

III. STATEMENT OF FACTS

Applicant was on duty as a [redacted] when he was in a motor vehicle accident on December 20, 2001. (Joint Exhibit D and applicant's Exhibit 8) In the motor vehicle accident applicant sustained an injury to his neck. (Joint Exhibit D page "5"; applicant's Exhibit 8 page 2; and applicant's Exhibit 9, second to the last paragraph)

The applicant reported the industrial injury to his employer (applicant's Exhibit 9) and received emergency medical treatment at [redacted] (applicant's Exhibit 10).

On the same day as the December 20, 2001 motor vehicle accident, applicant prepared and submitted an Employee's Claim for Workers' Compensation Benefits on the DWC-1 claim form. (Joint Exhibit C) Defendant acknowledged the claim by letter of January 8, 2002 (joint Exhibit B) which also advised applicant, "Please forward to [redacted] any medical bills relating to this injury that you received."

There is no evidence in this case that the applicant was ever notified following the date of the December 20, 2001 motor vehicle accident or up to the date of trial that the defendant had a Medical Provider Network or that the applicant was restricted to treatment

by MPN doctors.

On December 15, 2004 applicant completed an Employee's Designation of Personal Physician on a [redacted] form pursuant to Labor Code §4600. (applicant's Exhibit 7) This form designated [redacted] M.D. as his primary treating physician for any industrial injury sustained by the applicant.

Applicant sought and received treatment from Dr. [redacted] on March 2, 2007. Her handwritten progress note (applicant's Exhibit 2) was dictated and typed in a report dated June 19, 2008 (applicant's Exhibit 1). As clearly shown in the dictated version, the applicant went to Dr. [redacted] on March 2, 2007 for "neck pain."

Dr. [redacted] treatment was paid by applicant's group insurance plan provided by his employer, the [redacted], according to his testimony and the financial records of Dr. [redacted] (applicant's Exhibit 3).

The next treatment sought by the applicant for his neck was at [redacted] where he received chiropractic treatments on March 19, 2007 and on March 21, 2007 (applicant Exhibit 4). Following the visit on March 21, 2007, the applicant suffered a stroke.

The panel QME, [redacted], M.D., provided the following three conclusions in his February 6, 2008 report (joint Exhibit A):

A. Chronic neck pain following motor vehicle accident most likely due to facet-generated pain. This is an industrially-related condition.

B. Brainstem strokes caused by chiropractic manipulation undertaken in an effort to treat neck pain, described in A.

C. Question of post-traumatic stress disorder as evident by

> tearfulness and difficulty discussing the subject manipulation. This flows from B.

Regarding causation, Dr. [redacted] states at page 10 of his report (joint Exhibit A):

> Currently, I apportion his stroke-related syndrome and PTSD to the motor vehicle accident and no other factor.

Regarding notifications to the applicant of any time limitation to pursue his workers' compensation claim, the following notifications were given:

1. The brochure known as Facts for Injured Workers states: "If it's necessary to go to the Appeals Board to resolve your claim, be sure to do it within one year from the date of the injury *or one year from the date of your last medical treatment*. Waiting longer could mean losing your right to benefits." (Italics added for emphasis)

2. Letter from Pegasus Risk Management dated February 7, 2002 (joint Exhibit E) states, " Under California law, you have *one (1) year from the date of last treatment* to pursue Workers' Compensation benefits." (Italics added for emphasis)

There is no evidence in this record that the applicant was ever notified that there was an outside limit of five years from the date of the injury to file an Application with the Workers' Compensation Appeals Board.

III. ARGUMENT AND AUTHORITY

A. Did the applicant file an Application for Adjudication of Claim within one year of the date of last furnishing of any medical treatment?

Labor Code §5405 provides the basic statute of limitations. It provides:

> The period within which maybe commenced proceedings for the collection of the benefits provided by Articles 2 or 3, or both, of Chapter 2 of Part 2 of this division is one year from:

(a) The date of injury; or

(b) The expiration of any period covered by payment under Article 3 of Chapter 2 of Part 2 of this division; or

(c) *The date of last furnishing of any benefits provided for in Article 2 of Chapter 2 of Part 2 of this division.* (Italics added for emphasis)

Of course, Labor Code §5405 is within division 4. Therefore, if we go to Part 2 of that division, Chapter 2, and Article 2, we find that it relates to "medical and hospital treatment." Accordingly, **the statute of limitations is a one year period of time from the last furnishing of medical and hospital treatment.**

Therefore, the key term to be defined and understood is what constitutes "furnishing" medical treatment? Attached to applicant's post-trial brief were copies of §§12.35, 12.36 and 12.37 of California Workers' Compensation Practice, 4th Edition, of the Continuing Education of the Bar, California, as an unbiased and authoritative source in understanding and answering that question. In none of the cases cited in these sections of California Workers' Compensation Practice was it stated that "furnishing" of the medical treatment required that *payment* actually had to be made by the employer, its workers' compensation carrier, or its workers' compensation third party administrator. It was the receipt of the *treatment* rather than the payment to the doctor that was the key element of each holding as to whether the treatment was furnished for the purpose of determining whether the statute of limitations barred the claim.

In its post-trial brief, defendant characterized furnishing of treatment as the treatment being *paid* by the employer. However, defendant did not provide any citation to case or

statutory authority that recites the requirement of *payment.* The WCJ did not adopt the reasoning presented by the defendant is this regard. If *payment* is a requirement, the doctrine stated in *Mihesuah v. WCAB*, (1972) 29 CA3d 337 (discussed below) allows applicant to satisfy that requirement.

Here it is important to explain what medical treatment we are referencing regarding the statute of limitations. Because of the disastrous consequences of the chiropractic treatment received in March 2007, it is natural to have one's attention drawn to that treatment. However, this is <u>not</u> the treatment that we are relying upon regarding the defeat of the statute of limitations defense. Rather, it is the treatment received by the applicant from Dr. [redacted] on March 2, 2007 that is the more relevant focus of the analysis. The WCJ's opinion references the fact that Dr. [redacted] had not referred the applicant to the chiropractor. That is true. But it is not the chiropractic treatment that serves as the basis for the *last furnishing of treatment* exception. Rather, it was the treatment by Dr. [redacted] that is the basis for that assertion.

Remember that on December 15, 2004, applicant designated Dr. [redacted] as his primary treating physician. This was done on a [redacted] form pursuant to Labor Code §4600. Therefore, treatment provided by Dr. [redacted] constitutes treatment "furnished" by the employer. It is does not matter that the treatment was billed to the group health insurance rather than to workers' compensation (we will discuss the group health insurance issue later). The important fact is that Dr. [redacted] was an authorized primary treating physician to provide workers' compensation benefits to the applicant and the applicant saw her for his neck problems on March 2, 2007. The panel QME, Dr. [redacted], confirms that the neck problems

suffered by the applicant continue to relate to the motor vehicle accident of December 20, 2001.

The Application for Adjudication of Claim was filed on May 2, 2007. This was exactly two months after the applicant was furnished medical treatment through Dr. [redacted] for his industrial injury. Accordingly, this is within Labor Code §5405(c) and prevents the running of the statute of limitations.

The WCJ points out that Dr. [redacted] was the designated treating physician in 2004 (which is after the industrial injury). Accordingly, the WCJ asserts that such a designation was only for future injuries. Even if this argument is valid, it does not change the fact that applicant had the right to choose his treating physician more than 30 days after the date of injury pursuant to the provisions of Labor Code §4600 as that statute read in 2001 when this injury occurred. Subsequent changes to §4600 added the provision that gave the employer control of treatment by providing a Medical Provider Network (MPN), but this provision was only operable if the defendant provided notice of the MPN to the employee. As stated in the Statement of Facts, there is no evidence in this case that the employer provided the applicant with notification of a MPN. Therefore, applicant did have the right to choose his own treating physicians. This would included both Dr. [redacted] and the chiropractor.

The WCJ references that fact that the defendant did not *know* that applicant was seeking treatment when he saw Dr. [redacted] and the chiropractor. However, no case or statutory authority is cited as to the "knowledge" requirement.

In the case of *Zorn v. Hastings* (1940) 5 CCC 37, the employee was instructed by the employer's physician to return if he had any further trouble, and the applicant did return to

that doctor and received further medical treatment more than 245 weeks after the date of injury. his application within 10 days of that treatment was found to be timely according to Labor Code §5405(a) (which at that time had a six month requirement rather than a one year requirement). No pre-requisite of knowledge by the employer was discussed in that case. The case is not distinguishable from the case at bar, since the choice of physicians in the case at bar was not restricted to "the employer's physicians."

In the case at bar, the emergency room physician at [redacted] told the applicant to follow up with his own doctor. This was confirmed with the applicant's testimony. As indicated above, he did follow up with his own doctor (who was a designated primary treating physician for workers' compensation injuries). Therefore, this case also comes within the *Zorn* doctrine and prevents the running of the statute of limitations.

It is important to recognize that the five year jurisdictional limit of the WCAB regarding "new and further" is not applicable to this discussion. If the last furnishing of benefits is beyond five years from the date of injury, the applicant is still within the statute of limitations. It is only when the applicant has failed to file an Application for Adjudication of Claim within one year of the last furnishing of benefits that he would then to have to rely on the five year statute of limitations.

B. Furnishing the health insurance which paid for the treatment of the industrial injury extends the statute of limitations to one year from the last treatment paid for by that insurance coverage.

It is undisputed that the defendant knew of the applicant's industrial injury and accepted the claim. It is undisputed that applicant had health insurance provided by his

employer, and that this health insurance paid for the treatment by Dr. [redacted] on March 2, 2007. It is also undisputed that Dr [redacted] treated applicant for neck pain that the PQME, Dr. [redacted], has related to the industrial injury.

Mihesuah, supra, held that when the employer is aware of the industrial injury and treatment for the injury is provided by means of an employer paid health plan, then the statute of limitations is extended to a period of one year from the date such treatment was last provided.

This doctrine was later limited by the holding in *Kaiser Foundation Hospital v. WCAB* (Webb) (1977) 19 C3d 329, 335, when the employee had been fully informed that liability was being denied. However, in the case at bar, applicant was notified the case was accepted. Therefore, the holding in *Webb* does not apply to the case at bar.

C. **Was it necessary for Dr. [redacted] to mention the MVA in her treatment note?**

The WCJ correctly states that Dr. [redacted] treatment note on December 5, 2004 does not mention the industrial motor vehicle accident. However, no authority is discussed which requires the treatment note to mention the industrial injury in order for the requirements of the treatment exception to the time limitations to apply.

As to whether the treatment by Dr. [redacted] related to the industrial motor vehicle accident, we do have the opinion of the PQME, Dr. [redacted] which states the continuing neck paid suffered by applicant is related to the industrial motor vehicle accident. Dr. [redacted] note clearly states she saw applicant for "neck pain."

///

D. The worsening of applicant's condition following the chiropractic treatment in March 2007 is not relevant to the statute of limitations issue.

Defendant argued that because the chiropractic treatment may have been negligently provided, it was therefore unreasonable for the applicant to seek chiropractic treatment and defendant should not be held responsible for the consequences.

This misses the point of the current litigation. The current litigation relates to whether the applicant's claim is barred by the statute of limitations. As discussed above, the medical treatment which was last furnished by Dr. [redacted] the primary treating physician for industrial injuries, was in March of 2007 and the Application for Adjudication of Claim was filed within two months of that treatment. As to whether the defendant is responsible for the consequences of the chiropractic treatment that occurred later in March of 2007, it is not of concern regarding this bifurcated determination.

The WCJ did not adopt defendant's argument regarding the chiropractic treatment. Therefore, we will limit our discussion regarding this point. Applicant's post-trial brief has a more extensive discussion regarding that argument.

IV. CONCLUSION

The causative link between the accepted industrial motor vehicle accident of December 20, 2001, and the treatment by Dr. [redacted] and by the chiropractor is supported by substantial evidence, including the opinion of the PQME. There is no evidence to the contrary.

The defendant was properly notified of the December 20, 2001 industrial injury, and defendant told the applicant that if he needed to resolve his claim, he had until one year

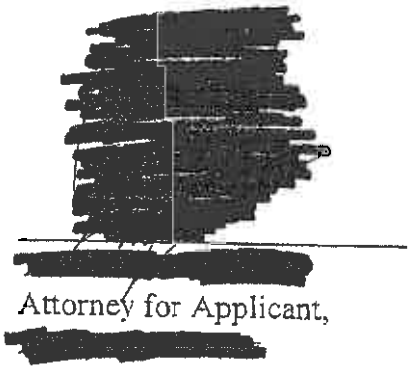
following the last treatment to go to the WCAB. This is in conformity with the provisions of Labor Code §5405. Applicant did file his application within a year of the last treatment by the doctor who he had chose to treat his industrial. When he had been released by the emergency room doctor immediately following the MVA, he was told so seek further treatment from his personal physician if treatment was needed. He did so.

Neither case nor statutory authority has imposed a requirement that the treatment within on year of filing the application must be *paid* by the employer as an industrial benefit, or that the employer must *know* the treatment was being provided prior to the provision of treatment. Instead, the holding in *Mihesuah, supra,* supports a finding that applicant's filing of an Application within a year of the provision of medical treatment through an employer provided health plan is timely.

Applicant's claim is not barred by a time limitation. Applicant is entitled to workers' compensation benefits relating to the December 20, 2001 injury, and relating to the consequences of that injury.

Respectfully submitted.

Date: November 18, 2009



Attorney for Applicant,

VERIFICATION

I, [redacted], declare:

I have read the foregoing Petition for Reconsideration and know the contents thereof. The same is true of my own knowledge.

I make this verification because the facts set forth in said Petition for Reconsideration are within my knowledge and I am more familiar with such facts than is the petitioner.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 18, 2009, at Fresno, California.

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

[redacted]

Applicant,

vs.

[redacted];

Defendants.

Case No. [redacted]

FINDINGS AND ORDER

The above entitled matter having been heard and regularly submitted, the Honorable John Eckl, Workers' Compensation Administrative Law Judge, now decides as follows:

FINDINGS OF FACT

1. The injured worker has not proven by a preponderance of evidence that any exception or excuse exists for his failure to file for benefits within the limitations set forth in Labor Code Section 5404, 5405 and 5804.

ORDER

1. The injured worker shall take nothing.

A PETITION FOR RECONSIDERATION FROM THIS DECISION MUST BE FILED ONLY AT THE FRESNO DISTRICT OFFICE OF THE WORKERS' COMPENSATION APPEALS BOARD IN FRESNO, CALIFORNIA.

DATE: October 26, 2009

J. A. Eckl

John Eckl
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the
Official Address record on the above date.
BY: M. Castillo

Document ID:-6558806143534104576

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: [redacted] / [redacted]

[redacted]

-vs.-

[redacted]

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: John Eckl

DATE: October 26, 2009

OPINION ON DECISION

The injured worker was involved in an auto accident while on duty as a deputy sheriff on December 20, 2001. He was transported to [redacted] assessed and released that night. He lost no time from work thereafter because of this injury.

On December 20, 2001 the worker prepared a claim from DWC-1 (Exhibit C). Defendant acknowledged the claim by letter dated January 8, 2002. (Exhibit B)

No treatment (besides to ER visit at [redacted]) was paid for directly by defendant. He first saw Dr. [redacted] on March 2, 2007. Dr. [redacted] had been designated as the potential primary treating physician on the event of injury on December 15, 2004. (Exhibit 7) Dr. [redacted] was paid through the group insurance plan provided by the employer.

The worker was treated by Dr. [redacted], of [redacted] on March 21, 2007. The worker suffered a stroke following a manipulation of the cervical spine.

An application for Adjudication of Claim was filed on April 30, 2007.

The application was filed five years and four months after the date of injury, i.e., December 20, 2001 to April 30, 2007.

The claim was accepted as shown in Exhibits B and E. Exhibit E is a letter dated February 7, 2002 from the claims adjuster to the injured worker which informs him that he has one year from the

last date of treatment to pursue benefits. Pointedly, it states that defendant had not received any information since the injury.

Defendant argues that it supplied a Reynolds warning. However, the tolling of the statute in Reynolds was triggered by certain notices required in the event the worker was hospitalized or lost seven days of work. (The rule was later amended to three days.) Neither of these events occurred in this case. Furthermore, the applicant is not arguing that point.

The worker argues only that the application was filed within one year of benefits being provided under Labor Code, Section 5405 (c).

The worker then proceeds with the argument that benefits were provided, as follows:

1. The worker designated Dr. [redacted] as his treating doctor (Exhibit 7) on December 5, 2004. However, this is the form for pre-designating a treating doctor in the event of a future injury. There is not even the allegation that defendant was notified that the worker was seeking treatment with Dr. [redacted] in the present case.
2. The worker saw Dr. [redacted] on March 2, 2007 per notes (Exhibit 2). The chart notes were prepared in typed format (Exhibit 1) on June 19, 2008. This visit was paid for by the group medical insurance. There is no mention of the December 20, 2001 auto accident.
3. He then visited Dr. [redacted], of [redacted] on March 19, 2007 and March 21, 2007 where his neck was adjusted. Following the visit on March 21, 2007, the worker suffered a stroke which Dr. [redacted], the Panel Qualified Medical Evaluator, concludes was caused by the adjustment. (Exhibit A).

After attempting to establish that Dr. [redacted] is the treating doctor, there is no evidence that the worker was referred to the chiropractor by Dr. [redacted]

In other words, the contention is that the defendants furnished benefits to the worker without any knowledge that they were doing so. Also, the doctors who saw the worker did not know that they were seeing the worker for his December 20, 2001 industrial accident.

/

/

/

[redacted]

[redacted]

Needless to say, the injured worker has not persuaded this trier of fact that he received benefits under any known exception to the limitations for filing actions set forth in Labor Code, Section 5404, 5405 and 5804.

A PETITION FOR RECONSIDERATION FROM THIS DECISION MUST BE FILED ONLY AT THE FRESNO DISTRICT OFFICE OF THE WORKERS' COMPENSATION APPEALS BOARD IN FRESNO, CALIFORNIA.

DATE: October 26, 2009

J. A. Eckl

John Eckl
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the
Official Address Record on the above date
By: [redacted]

[redacted]

[redacted]

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ1029008 / ADJ2617152

[redacted] -vs.- [redacted]

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: John Eckl

DATE: December 9, 2009

REPORT AND RECOMMENDATION

[redacted], born [redacted], while employed on December 20, 2001, as a law enforcement sergeant, at Fresno, California by the [redacted], sustained injury arising out of and in the course of employment to his cervical spine.

A claim form (DWC-1) was filed the same day.

An application For Adjudication of Claim was filed May 2, 2007.

Defendant contends that the claim is barred by the five year statute of limitations.

Applicant contends that treatment through the group medical provider on March 2, 2007 extends the statute for one year after the furnishing of treatment.

This issue was bifurcated for Trial on July 9, 2009.

A Findings and Order was filed October 26, 2009.

Applicant filed a Petition for Reconsideration on November 19, 2009 which is timely.

DISCUSSION

On December 20, 2001, the injured worker was involved in a motor vehicle accident while on the job as a deputy sheriff. He was taken to [redacted] for treatment. After a few hours he was released with instructions to follow-up with his personal physician as needed. He lost no

[redacted]

except this argument. Under these facts, the connection is too remote and there is nothing that occurred before the statute ran to extend it beyond.

RECOMMENDATION

I recommend that the Petition for Reconsideration be DENIED.

J. A. Eckl

DATE: December 9, 2009

John Eckl
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Filed and Served by mail on all parties
listed on the Official Address Record
on the above date.
By: [redacted]

[redacted]

[redacted]