

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

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JOSEPH BRAMER,

*Applicant,*

vs.

DELUXE LABORATORIES, INC.;  
FIREMAN'S FUND INSURANCE CO.;  
FRED S. JAMES & COMPANY,

*Defendants,*

Case No. 84 VNO 139595  
86 VNO 158025

OPINION AND DECISION AFTER RECONSIDERATION

On May 24, 1991, the Board granted reconsideration of the decisions filed in each of the above-entitled matters on March 5, 1991. Reconsideration was granted for further study of the record, and after such study the Board issues this decision finding both cases barred by the statute of limitations.

In 84 VNO 139595 (the Findings and Award erroneously cites "86 VNO 139595"), it was found that the applicant, while employed by the self-insured as a film printer from 1967 through October 19, 1983, sustained industrial injury to his "cardiovascular system and hypertensive state" causing temporary disability for six months after October 1983, 8-1/2% permanent disability and a need for medical treatment. In 86 VNO 158025, it was found that the applicant, while employed by the insured employer as a film printer from September 1, 1972 through May 16, 1975, sustained industrial injury to his heart causing temporary disability from May 17, 1975 through June 24, 1975, 17% permanent disability, and a need for medical treatment. The parties had previously stipulated that Fireman's Fund insured the employer through May 1, 1974, and that the employer was self-insured from July 1, 1975 through October 1983. Applicant elected against the

1 self-insured in VNO 139595 and against Fireman's Fund in VNO 158025. In both  
2 cases, Fireman's Fund was ordered to pay the award subject to contribution.

3 Co-defendant Fireman's Fund and the self-insured employer, Deluxe  
4 Laboratories (Deluxe) each petitioned for reconsideration.

5 The self-insured contends in 84 VNO 139595, (1) that the claim is barred by  
6 the statute of limitations, asserting the application was filed more than one year  
7 after the injury, the employer had no knowledge of the injury and thus no  
8 obligation to provide a Reynolds notice, medical treatment was not provided by the  
9 employer, and the employee had reason to know of the potential industrial  
10 relationship when his doctor took him off work in October 1983 and told him that  
11 his heart problems might be work-related, (2) that the Workers' Compensation  
12 Judge (WCJ) erred in failing to make provision for the allowance of the  
13 Employment Development Department lien against the finding of temporary  
14 disability, and (3) that there may be no funds against which to pay applicant's  
15 attorney's fee in that the defendant, with applicant's consent, advanced  
16 permanent disability indemnity up to the amount subsequently awarded by the  
17 WCJ.

18 Fireman's Fund contends (1) that the applicant elected against the self-  
19 insured in 84 VNO 139595 and therefore Fireman's Fund could not participate in  
20 it and cannot be required either to pay or administer it, (2) that Fireman's Fund  
21 insured only through May 1, 1974 and therefore should be dismissed from 84 VNO  
22 139595 which, under Labor Code section 5500.5, concerns the period from October  
23 19, 1982 through October 19, 1983, (3) that Fireman's Fund should also be  
24 dismissed from 86 VNO 158025 because its coverage ended on May 1, 1974 and the  
25 claim is limited under Labor Code section 5500.5 to the one year period from May  
26 16, 1974 through May 16, 1975, (4) that the claims in both cases are barred by the  
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1 statute of limitations as asserted by co-defendant, and (5) that the findings of  
2 permanent disability are excessive and not justified by the evidence.

3 The statute of limitations for filing an application for workers'  
4 compensation benefits (for pre-1/1/90 injuries) is set forth in Labor Code section  
5 5405. It provides that workers' compensation proceedings must be commenced  
6 within one year from the date of injury, one year from the last payment of  
7 temporary disability or permanent disability indemnity, or one year from the last  
8 furnishing of any medical or hospital benefits. Where benefits have been  
9 provided, the time allowed for an original proceeding may be extended up to five  
10 years from the date of injury. (Lab. Code, §5410; McDaniel v. Workers' Comp.  
11 Appeals Bd. (1990) [55 Cal. Comp. Cases 72, 75-76].)

12 Under Labor Code section 5412, the date of injury in cases of occupational  
13 disease or cumulative injury, such as in the heart claims in this case, is the date  
14 upon which the employee first suffered disability therefrom and either knew, or in  
15 the exercise of reasonable diligence should have known, that such disability was  
16 caused by his present or prior employment. Disability as used in section 5412  
17 means either temporary or permanent disability. (Chavira v. Workers' Comp.  
18 Appeals Bd. (1991) [56 Cal. Comp. Cases 631, 639].)

19 When an employer receives knowledge of an injury, it must notify the  
20 injured worker of his or her rights to workers' compensation. (Lab. Code, §§5402,  
21 138.3, 138.4; Administrative Director's Rules 9880-9884.) When an employer fails  
22 to perform its statutory duty to notify an injured employee of the right to workers'  
23 compensation benefits, and the injured employee is unaware of those rights from  
24 the date of injury through the date of the employer's breach, the statute of  
25 limitations will be tolled until the injured worker receives actual knowledge of the  
26 right to benefits. (Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.  
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1 (Martin) (1985) [50 Cal. Comp. Cases 411]; Reynolds v. Workers' Comp. Appeals  
2 Bd. (1974) [39 Cal. Comp. Cases 768].)

3       However, tolling of the statute or being estopped to raise it, is only relevant if  
4 the defendant breached a duty to inform the applicant of his possible workers'  
5 compensation rights. That is, the statute of limitations for the filing of an  
6 application is tolled while the employee is unaware of his possible workers'  
7 compensation rights only if the employer had notice or knowledge of the  
8 industrial injury and breached its duty to inform the employee of his possible  
9 workers' compensation rights. (Kaiser Foundation Hospitals v. Workers' Comp.  
10 Appeals Bd. (Martin) (1985) 39 Cal.3d 57 [50 Cal. Comp. Cases 411]; Reynolds v.  
11 Workers' Comp. Appeals Bd. (1974) 12 Cal.3d 726 [39 Cal. Comp. Cases 768];  
12 Hurwitz v. Workers' Comp. Appeals Bd. (Esposito) (1979) 97 Cal.App.3d 854 [44  
13 Cal. Comp. Cases 983]; Buena Vista Gardens v. Workers' Comp. Appeals Bd.  
14 (Novak) (1975) 49 Cal.App.3d 410 [40 Cal. Comp. Cases 734]; Doerr v. Workers'  
15 Comp. Appeals Bd. (1982) [47 Cal. Comp. Cases 1230], writ denied.)

16       In this case, applicant's claim of cumulative industrial injury through May  
17 16, 1975 was filed on May 2, 1986. His claim of cumulative industrial injury  
18 through October 19, 1983, was filed on November 30, 1984. He testified, however,  
19 that in 1983 his physician took him off work and advised that his heart problems  
20 might be work-related:

21                "In May 1975 he had a heart attack and he lost a  
22 week from work. He went back to work and worked  
23 until his heart attack in 1983. He was able to work on a  
24 full time basis without any limitations. No doctor ever  
25 told him to restrict his activities. After the 1983 heart  
26 attack the doctor at Kaiser told him not to work or else he  
27 would have more heart attacks. He never knew he had a  
right to file a workers' compensation claim until he  
went to see his attorney." (Summary of Evidence,  
March 12, 1990, Page 6, lines 17 through 20.)

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1 "The treating doctor after his May 1975 heart  
2 attack did say he was under strain at work and not to do  
3 anything stressful. He was able to continue working  
4 until 1983 when Dr. Kristopaitis of Kaiser Permanente  
5 toll him off work and said his heart problems might be  
6 work related.

7 "REDIRECT EXAMINATION:

8 "In 1983 Dr. Kristopaitis said his heart condition  
9 could be due to work. He didn't know he could file a  
10 workers' compensation claim. Deluxe Lab nor it's  
11 carrier Fireman's Fund, ever contacted him and gave  
12 him information of his right to file a workers'  
13 compensation claim. After his first heart attack he was  
14 told he could continue working without restriction.

15 "EXAMINATION by Defendant THOMPSON:

16 "When he was hired no one discussed workers'  
17 compensation benefits, and he didn't see any notices at  
18 the firm regarding his right to file a workers'  
19 compensation claim." (7:1-12.)

20 From the applicant's testimony it appears that he was told by his treating  
21 doctor in October 1983 that he should stop work and his heart problems might be  
22 related to his employment. Accordingly, it appears that at that point the applicant  
23 knew or should have known that his condition was caused by his employment. He  
24 had suffered disability from the 1975 injury by being off work and he was also or  
25 again suffering disability in 1983. Assuming the dates of injury in both cases  
26 under Labor Code section 5412 were therefore no later than October 1983, both  
27 applications were filed more than one year from the date of injury. Furthermore,  
there is no evidence that the applicant ever conveyed this information or provided  
notice to his employer that he may have an industrial injury. Therefore, the  
employer's duty to inform the applicant of the potential workers' compensation  
rights never arose, and accordingly, the statute of limitations was not tolled. The  
applications were filed more than one year after the applicant knew or should

1 have known of the industrial relationship, the statute of limitations was not tolled,  
2 and therefore the claims are barred.

3 Additionally, the Board believes that Fireman's Fund should have been  
4 dismissed from both cases. As argued by Fireman's Fund, its stipulated coverage  
5 ended on May 1, 1974, and the claims are limited under Labor Code section 5500.5  
6 to one year from the end of the cumulative injury date. In VNO 158025 the date of  
7 liability would be from May 16, 1974 through May 16, 1975, thus not including  
8 Fireman's Fund's coverage. Furthermore, Fireman's Fund similarly had no  
9 exposure in VNO 139595, was not elected against in that case in any event, and  
10 therefore should not have been ordered to pay benefits therein.

11 In conclusion, the Board will dismissed Fireman's Fund in both cases, find  
12 that the applicant failed to notify the employer of his injuries, and dismiss both  
13 cases as barred by the statute of limitations.

14 For the foregoing reasons,

15 IT IS ORDERED that as the Decision After Reconsideration of the Workers'  
16 Compensation Appeals Board, the Findings and Awards of March 5, 1991, filed in  
17 each of the above entitled matters, be, and the same hereby are, RESCINDED, and  
18 following SUBSTITUTED in lieu thereof:

19 86 VNO 139595

20 F I N D I N G S O F F A C T

21 1. Joseph Bramer, born December 19, 1913, while employed during the  
22 period from 1967 to October 19, 1983 as a film printer at Los Angeles, California, by  
23 Deluxe Laboratories, permissibly self-insured, for workers' compensation from  
24 July 1, 1975 through October 19, 1983, claims to have sustained an industrial  
25 injury to his cardiovascular system and hypertensive state.

26 2. The applicant failed to notify his employer of his claimed industrial  
27 injury at any time prior to filing his application.



O R D E R

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2 IT IS ORDERED that Fireman's Fund Insurance Companies, be, and the  
3 same hereby is, DISMISSED in 86 VNO 158025 and 84 VNO 139595.

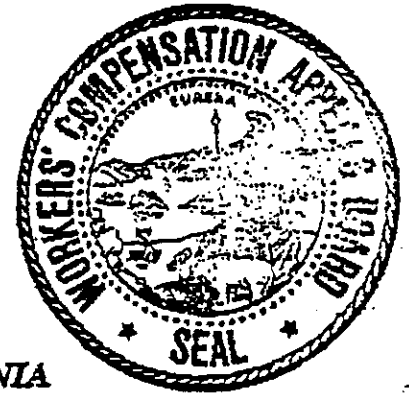
4 IT IS FURTHER ORDERED that applicant take nothing further by reason  
5 of the applications and claims filed herein.  
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8 **WORKERS' COMPENSATION APPEALS BOARD**

9  
10 *Diana Marsh*  
11

12 I CONCUR,

13  
14 *Jack Margison*  
15 NOT PARTICIPATING  
16 Richard W. Younkin DEPUTY



17 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

18 MAR 16 1992

19 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES

20 LISTED ON THE OFFICIAL ADDRESS RECORD.

21 *Aunie J. Glanville*  
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BRAMER, J.