

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD  
P O Box 944275  
SACRAMENTO CA 94244-2750

MICHAEL E CECIL  
Claimant-Appellant

Precedent Benefit  
Decision No. P-D-509

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

ROBERT DRESSER

ELLEN CORBETT

MICHAEL ALLEN

Pursuant to section 409 of the California Unemployment Insurance Code, AO-374577 (D) is hereby designated as Precedent Decision No. P-D-509.

Adopted as Precedent: December 15, 2015

**Case No.:** AO-374577  
**Claimant:** MICHAEL E CECIL

---

The claimant appealed from that portion of the decision of the administrative law judge that disallowed the claimant disability benefits under section 2776 of the Unemployment Insurance Code beginning January 13, 2013.

### ISSUE STATEMENT

The issue in this case is whether the claimant's claim for disability benefits is disallowed.

### FINDINGS OF FACT

The claimant sustained an industrial injury on January 13, 2013 while performing his most recent, regular and customary work as a truck driver and deliveryman. The claimant's industrial injury occurred in Colorado. He waited there for over two days for his employer to send a replacement driver, and then had to drive himself back to California. The claimant never saw his employer again. His employer never provided him a Department of Industrial Relations (DIR) form "DWC-1," which advises injured workers to file a claim for disability benefits immediately.

Shortly after sustaining his industrial injury, the claimant filed for and began to receive workers' compensation temporary total disability benefits for the period beginning January 18, 2013 at a weekly rate of \$658.69. When he filed the worker's compensation claim, the claimant's attorney told him he could not receive disability benefits at the same time he was receiving worker's compensation benefits. As the claimant had never filed a claim for disability benefits before, he relied on his attorney's statement and did not file for disability benefits at that time.

The claimant exhausted his worker's compensation benefits on January 15, 2015, at which time the claimant had received the maximum worker's compensation benefits allowed by law. Because the claimant was still unable to perform his regular and customary work at the time he exhausted his worker's compensation benefits, he filed a claim for disability benefits. That claim, supported by a physician's certification, was signed on February 3, 2015 with a requested claim effective date of January 13, 2013.

On February 18, 2015 the Employment Development Department (hereinafter EDD) issued a determination denying the claimant disability benefits beginning January 13, 2013 under Unemployment Insurance Code section 2776, stating:

“Your claim for Disability Insurance Benefits as an ‘Industrially Disabled Person’ has been disallowed because you failed to file your claim within 2 years of the commencement of your industrial disability, and you received or are entitled to receive Workers Compensation benefits under Division 4 (commencing With Section 3201) of the Labor Code.”

The administrative law judge who heard the case issued a decision affirming the EDD determination.

### REASONS FOR DECISION

Unemployment Insurance Code section 2776<sup>1</sup> is contained in Part 2, Chapter 2, and Article 7 (titled “Rights of Industrially Disabled Persons”) of the Unemployment Insurance Code (hereinafter code) and provides as follows:

As used in this article:

(a) "Industrially disabled person" means an individual who has received or is entitled to receive benefits under Division 4 (commencing with Section 3201) of the Labor Code, and who is unable to perform his regular or customary work for 60 consecutive days or more, but not to exceed two calendar years from the date of commencement of his industrial disability.

(b) "Industrial disability" means a disability compensable under Division 4 (commencing with Section 3201) of the Labor Code.

The only proper determination which may be made under section 2776 is that an individual is or is not an “industrially disabled person” as defined by that section. Disallowing the individual’s claim for disability benefits solely because he or she is not an “industrially disabled person” as of the date the claim is filed is a misapplication of section 2776. A claimant who is not an “industrially disabled person” may still be eligible for disability benefits based on other relevant, applicable provisions of Chapter 2.

As reflected in the legislative history, Article 7 was enacted in 1973 to enable an “industrially disabled person” to establish a claim for disability benefits when otherwise unable to do so because his or her prior period of industrial disability left him or her with insufficient wage credits in the usual base period. Under such circumstances, the base period is adjusted by excluding quarters from the base period and substituting earlier ones, such that the “industrially disabled person”

---

<sup>1</sup> All references to statutes are references to the Unemployment Insurance Code, unless otherwise noted.

can establish a valid disability claim. This right afforded to “industrially disabled persons” by Article 7 is set forth in section 2777:

Except as provided in subdivision (b) of Section 2611, in determining the benefit rights of any industrially disabled person the disability base period shall exclude those quarters during which such person was industrially disabled for 60 days or more. For all quarters so excluded there shall be substituted an equal number of quarters immediately preceding the commencement of his or her industrial disability. In the event the base period so determined includes wages in calendar quarters for which the records have been destroyed under proper approval, a claimant may establish the amount of wages by affidavit in accordance with authorized regulations. The quarter of commencement of an industrial disability shall be counted as a completed quarter if the director finds that the inclusion thereof would be more equitable to the industrially disabled person.

In the present case, the claimant did receive worker’s compensation benefits under the applicable division of the Labor Code but has remained unable to perform his regular and customary work for over two years and thus does not meet section 2776’s definition of “industrially disabled person.” The inquiry as to whether the claimant might be entitled to disability benefits does not, however, end there.

EDD cited only section 2776 as the basis for disallowing the claimant’s benefits. Although EDD’s narrative in its determination did implicate two other relevant sections of the code, that determination did not explicitly address the issues under those other sections. By failing to adjudicate those additional issues, EDD’s analysis as to whether the claimant might be entitled to any disability benefits is incomplete.

First, EDD’s determination indicated that this claimant’s benefits were disallowed because the claimant failed to file his claim within two years of the commencement of his industrial disability. A “claim effective date” (CED) is based on when the claimant filed a first claim for disability benefits relative to the first compensable day of unemployment and disability with respect to which the claim is made. Whether a claimant, an “industrially disabled person” (under section 2776) or otherwise, has timely filed an application for disability benefits, or has good cause for failing to do so such that an extension of time is allowed, is determined properly under code section 2706.1:

A first claim, accompanied by a certificate on a form furnished by the department to the claimant, shall be filed not later than the 41st consecutive day following the first compensable day of unemployment and disability with respect to which the claim is made for benefits, which time shall be extended by the department upon a showing of good cause. If a first claim is not complete, the claim form shall be returned to the claimant for completion and it shall be completed and returned not later than the 10th consecutive day after the date it was mailed by the department to the claimant, except that such time shall be extended by the department upon a showing of good cause.

Good cause includes mistake, inadvertence, surprise, or excusable neglect, but not negligence, carelessness, or procrastination. (California Code of Regulations, title 22, section 1326-10(a)(7).)

While EDD denied claimant's benefits "beginning January 13, 2013" (underline added for emphasis), EDD did not address whether the claimant established good cause for backdating his claim. If, in fact, the claimant establishes good cause for backdating, the issue of whether the claimant is an "industrially disabled person" under section 2776 would be irrelevant. The claimant would have sufficient base period wages and would not need the provisions of section 2777 in order to establish a disability claim.

Second, EDD's determination stated that the claimant's disability benefits were disallowed because the claimant received or was entitled to receive Workers' Compensation benefits. The effect of receipt of other benefits on a claimant's disability claim, whether the claimant is an "industrially disabled person" or otherwise, is properly determined under code section 2629:

Eligibility while receiving specified "other benefits"

(a) Except as provided in this section, an individual is not eligible for disability benefits under this part for any day of unemployment and disability for which he or she has received, or is entitled to receive, "other benefits" in the form of cash payments.

(b) "Other benefits," as used in this section and Section 2629.1, means any of the following:

- (1) Temporary disability indemnity under a workers' compensation law of this state or of any other state or of the federal government.
- (2) Temporary disability benefits under any employer's liability law of this state or of any other state or of the federal government.

(3) Permanent disability benefits for the same injury or illness under the workers' compensation law of this state, any other state, or the federal government.

(c) If these "other benefits" are less than the amount an individual would otherwise receive as disability benefits under this part, he or she shall be entitled to receive, for that day, if otherwise eligible, disability benefits under this part reduced by the amount of these "other benefits."

(d) An individual shall be entitled to receive, for any day, if otherwise eligible, disability benefits under this part reduced by the amount of the permanent disability indemnity if the permanent disability indemnity is less than the amount an individual would otherwise receive as disability benefits under this part.

We note that both code sections 2706.1 and 2629 apply to any claimant regardless of whether he or she is deemed an "industrially disabled person" under section 2776. Other than as codified in Article 7, the disability benefit rights of "industrially disabled persons" are to be determined in the same manner as for all other claimants, in accordance with all of the provisions of Part 2, as specified by section 2775:

Notwithstanding any inconsistent provisions of this part, the benefit rights of industrially disabled persons shall be determined in accordance with the provisions of this article for the period and with respect to the matters specified in this article. Except as otherwise provided in this article, all of the provisions of this part shall continue to be applicable in connection with such benefits.

Despite its references to the language of different code sections in its determination, EDD failed to adjudicate the claimant's eligibility for disability benefits beyond concluding his claim was disallowed under section 2776 based on the fact that he did not meet the definition of "industrially disabled person." As such, no other legal issues were noticed on appeal.

The administrative law judge correctly did not consider any legal issues not adjudicated by EDD and not noticed for the hearing, as he had no jurisdiction to do so. We are also precluded from doing so. (California Code of Regulations, title 22, section 5101.)

The Board may refer to the Employment Development Department or remand to an administrative law judge for appropriate action any issues raised for the first time in the appeal. (California Code of Regulations, title 22, section 5101.)

As EDD's determination and the decision of the administrative law judge erroneously disallowed the claimant's claim for disability benefits under code section 2776, we set both aside.

Because EDD failed to adjudicate legal issues under relevant, applicable code sections to determine the claimant's eligibility for disability benefits, we do not have jurisdiction to consider the legal issues raised by those code sections. We therefore refer the case back to the EDD for proper determination of the claimant's eligibility for benefits based on applicable code sections including, but not limited to, sections 2706.1 and 2629.

### DECISION

The appealed portion of the decision of the administrative law judge is set aside. The notice of determination is also set aside. The case is referred to EDD for further consideration and determination of the claimant's claim for disability benefits consistent with this decision.