WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GLENN FOLEY, *Applicant*

vs.

NEW YORK JETS; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION FOR RELIANCE INSURANCE COMPANY, in liquidation; SAN DIEGO CHARGERS; TRAVELERS; SEATTLE SEAHAWKS, self-insured, administered by CCSMI, *Defendants*

Adjudication Number: ADJ8786469
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate except as noted below, and for the reasons discussed below, we will deny reconsideration.

We do not adopt or incorporate the report to the extent that it relies on the holding in *Reynolds v. Workers' Comp. Appeals Bd*. (1974) 12 Cal.3d 726 [39 Cal.Comp.Cases 768] which we do not find relevant given the WCJ's finding that the Labor Code[1] section 5412 date of injury was on February 27, 2013, the same date applicant retained an attorney and filed an Application for Adjudication of Claim. In addition, we do not adopt or incorporate the statement that "An injured worker is not charged with knowledge that his or her disability is job-related without medical advice to that effect." While medical advice is perhaps a common source of knowledge regarding industrial causation, in certain situations such as this case, the injured worker gains the requisite knowledge from an attorney after having spoken to a colleague.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

The issue of how many cumulative injuries an employee sustained is a question of fact for the Workers' Compensation Appeals Board. (See *Aetna Casualty & Surety Co. v. Workmen's Comp. Appeals Bd.* (1973) 35 Cal.App.3d 329, 341 [38 Cal.Comp.Cases 720] (*Coltharp*) [Applicant sustained two separate cumulative injuries, one before and one after the initial period of disability and need for treatment; to conclude otherwise would violate the anti-merger provisions of sections 3208.2 and 5303]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323] (*Austin*) [Applicant sustained one continuous compensable injury because, unlike *Coltharp*, his two periods of temporary disability were linked by the continued need for medical treatment and the two periods were not "distinct."].)

When *Austin* is read in conjunction with section 3208.1 definition of "cumulative injury," the anti-merger provisions of sections 3208.2 and 5303, and the holding of *Coltharp*, the following principles offer general guidance in determining whether there is one or more than one cumulative trauma injury: (1) if, after returning to work from a period of temporary disability and a need for medical treatment, the employee's repetitive work activities again result in injurious trauma (i.e., if the employee's occupational activities after returning to work from a period of temporary disability cause or contribute to a new period of temporary disability, to a new or an increased level of permanent disability, or to a new or increased need for medical treatment), then there may be two cumulative injuries that cannot be merged into a single injury (Lab. Code, §§ 3208.1, 3208.2, 5303; *Coltharp, supra*, 35 Cal.App.3d at p. 342); and (2) if the employee's occupational activities after returning to work from a period of industrial temporary disability are not injurious (i.e., if any new period of temporary disability, new or increased level of permanent disability, or new or increased need for medical treatment result solely from an exacerbation of the original injury), then there may be only a single cumulative injury and no impermissible merger occurs. (Lab. Code, §§ 3208.1, 3208.2, 5303; *Austin, supra*, 16 Cal.App.4th at p. 235.)

For the reasons discussed in the Report, we agree that the WCJ properly relied on the opinion of qualified medical examiner (QME) Michael Einbund, M.D., to find a single cumulative trauma injury. It is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

Moreover, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 23, 2021

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

GLENN FOLEY
PRO ATHLETE LAW
BOBER PETERSON & KOBY
HANNA BROPHY MACLEAN MCALEER & JENSEN
DIMACULANGAN AND ASSOCIATES

PAG/abs

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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1.

APPLICANT'S OCCUPATION:	Professional Football Player
MANNER INJURY ALLEGED:	Work as a Professional Football Player
BODY PARTS ALLEGED:	Head, neck, back, arms, shoulders, elbows, wrists, hands, fingers, legs, hips, knees, ankles, feet, toes, neuro, internal, sleep, and chronic pain

2.

PETITIONER:	Co-Defendant the San Diego Chargers
PETITION FILED TIMELY:	Yes, filed timely on 5/24/2021
PETITION VERIFIED:	Yes, the petition was verified

3.

FINDINGS AND ORDER DATE:	4/29/2021
PORTIONS APPEALED:	Petitioner appeals Findings of Fact # 7. The date of injury per California Labor Code Section 5412[1] was 2/27/2013 when the applicant retained an attorney and filed an Application for Adjudication of Claim. Petitioner appeals Findings of Fact # 8 that liability for the cumulative trauma injury under Section 5500.5 falls on the San Diego Chargers, who last employed the applicant on 9/24/2002. Petitioner appeals Findings of Fact # 9 that the applicant's employment with the Seattle Seahawks and New York Jets falls outside the last year of injurious exposure.

4.

PETITIONER'S CONTENTIONS:	1) The applicant was not a credible historian. 2) The applicant's claim against the San Diego Chargers is barred by the statute of limitations defense. There was no tolling under the Reynolds decision because the San Diego Chargers were not obligated to provide the applicant with a claim form.

[1] All further statutory references are to the California Labor Code, unless specified otherwise.

3) The applicant's exposure while working for the San Diego Chargers was not sufficient to rise to an injury level. If it was an injury, it was separate and distinct from the cumulative trauma injury.

4) San Diego Chargers' head trainer's testimony establishes that all persons attending tryouts signed a liability waiver.

II.
FACTS

1. The applicant, Glenn Foley, played professional football as a quarterback for the New York Jets from 8/1/1994 to 3/19/1999 and the Seattle Seahawks from 3/19/1999 to 8/28/2000. In 2002 he played in the Arena Football League for the New Jersey Gladiators, and on 9/24/2002, he attended a quarterback tryout for the San Diego Chargers.

2. The applicant sustained numerous injuries playing professional football to his cervical spine, lumbar spine, shoulders, left knee, posttraumatic head syndrome, headaches, sleep, arousal disorder, left carpal tunnel syndrome, hypertension, psychiatric and gastroesophageal reflux disease (reports of Michael Einbund, M.D. 10/29/2013 [Applicant's Exh. 2], Kenneth Nudleman, M.D. 6/8/14 [Applicant's Exh. 9], Ted Greenzang, M.D., 4/5/16 [Applicant's Exh. 19], and Mark Hyman, M.D. 9/17/2015 [Defense Exh. C]).

3. During his employment in the Arena Football League with the New Jersey Gladiators, the applicant believed he was able to compete as a quarterback in the NFL. He received a call from the San Diego Chargers organization asking him to come out for a quarterback tryout. The applicant recalled working out and preparing for his tryout with the San Diego Chargers, who paid for his plane ticket to attend the tryout session in San Diego. The applicant performed timed, full-speed drops at the tryout, and his body felt awful during the workout. His neck and shoulders problems worsened while he played (Trial Transcript 10/22/2019, 53: 25 – 54: 4). In addition, he was very sore after the tryout (Trial Transcript 10/22/2019, 54: 16 – 19). After the tryout, he met with the coach of the San Diego Chargers to discuss strategy against a future opponent.

4. None of the applicant's employers, including the New York Jets, Seattle Seahawks, New Jersey Gladiators, or the San Diego Chargers, informed the applicant about a right to file for workers' compensation benefits for his injuries, and no doctor or trainer for the teams told him that he had a permanent disability. The applicant first learned about his right to file a workers' compensation claim in 2012 when he spoke with a colleague who advised the applicant to file a workers' compensation claim in California for his work injuries. (Trial Transcript 10/22/2019, pg. 65: 3 – 11)

III.
DISCUSSION

CREDIBILITY OF THE APPLICANT'S TESTIMONY

The WCJ agrees with Petitioner that the overwhelming medical evidence and applicant's testimony establishes that the applicant has significant orthopedic, cognitive, and psychological disability related to work-related injuries sustained throughout his professional football career. However, the applicant's challenges do not affect the WCJ's determination that the applicant provided truthful and accurate testimony to the best of his ability. For the salient issues raised on appeal, the applicant's testimony was consistent with the information he provided to the examining physicians and prior depositions. Moreover, the applicant's cognitive problems did not impede the WCJ's determination of the questions of law raised by the Petitioner.

HEAD TRAINER'S TESTIMONY

Damon Mitchell testified that on 9/24/2002, he was an assistant athletic trainer for the San Diego Chargers, but he did not observe the applicant perform his quarterback tryout. Instead, he reviewed blank forms titled "Los Angeles Chargers Free Agent Physical Summary" and "Los Angeles Chargers Free Agent Waiver" forms (Defense Exhibits L and T, respectively). To his knowledge, the team always requires players to sign similar waiver forms before stepping onto their practice field (Trial Transcript, 10/26/2020, 49: 17 – 20). However, Mr. Mitchell did not have a copy of any similar waiver documents signed by the applicant, and he did not know whether the applicant signed the waiver form when he did his tryout (Trial Transcript, 10/26/2020, 50: 8 – 22).

Even if Mr. Foley signed a waiver, it would not dismiss the San Diego Chargers' liability for workers' compensation benefits because an otherwise eligible employee for California benefits cannot waive those benefits. Moreover, an otherwise liable employer for California benefits cannot evade liability through contract (Matthews v. National Football League Management Council (9th Cir. 2012) 688 F.3d 1107.) Thus, Mr. Mitchell's testimony does not alter the findings of the WCJ.

STATUTE OF LIMITATIONS TOLLED

For statute of limitations purposes, Section 5412 provides as follows.

"The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

None of Mr. Foley's employers, including the New York Jets, Seattle Seahawks, New Jersey Gladiators, or the San Diego Chargers, informed him about his right to file for workers' compensation benefits for his injuries. None of the employers advised the applicant he had a potential right to file workers' compensation for specific and cumulative trauma claims in California. None of the team doctors or trainers said that he might have a permanent disability since, the applicant testified, "The doctor's job was to make sure that you got back on the field, not to pull you off the field." (Trial Transcript 10/22/2019, pg. 63: 13 – 14). None of the applicant's employers provided him with a claim form or provided him with notice of his potential eligibility

for workers' compensation benefits for cumulative trauma in California (Trial Transcript 10/22/2019, pgs. 62 - 65).

Section 5412 refers to the date the employee first suffered disability and knew or should have known the injury caused the disability. The applicant lacked such knowledge. Section 5412 discusses the employee's state of knowledge rather than the employer's state of knowledge. The applicant first learned about his right to file a workers' compensation claim in 2012, when he spoke with a colleague named Greg Buttle, who told him he might be able to obtain workers' compensation benefits in California (Trial Transcript 10/22/2019, pg. 65: 3 – 11). The applicant contacted his present attorney in February 2013, and his attorney filed an Application for Adjudication of Claim on the applicant's behalf on 2/27/2013, alleging a cumulative trauma injury. Thus, the date of injury under Section 5412 was 2/27/2013, when the applicant retained an attorney and filed an Application for Adjudication of Claim.

As the Court stated in Reynolds v. WCAB (1974) 12 Cal.3d 726; 117 Cal.Rptr. 79; 39 CCC 768, the purpose of the statute of limitation is to "protect and preserve the rights of an injured employee who may be ignorant of the procedures or, indeed, of the very existence of the workmen's law." The applicant testified that before he spoke with Mr. Buttle, he had no idea that he could file a workers' compensation case for a cumulative trauma injury in California (Trial Transcript 10/22/2019, 65: 13 – 16). The applicant was ignorant of the potential right to file a workers' claim existed, much less that he had a specified time frame in which to file his claim. Had he known of the right to file a claim, he stated he would have filed one. For example, the applicant said the following:

"Q. When you were with Seattle, did anyone in the organization give you any indication or notice that you were entitled to workers' comp for any of the injuries that you suffered in Seattle?

A. No. I would have done it." (Trial Transcript, 10/22/2019, 64: 1 – 5).

There was no evidence that the applicant had actual knowledge under Section 5412 that he sustained a permanent disability and a compensable cumulative trauma injury or that he could file a workers' compensation claim in California for cumulative trauma injury before 2012. When he worked for the New York Jets, the Seattle Seahawks, the Arena Football, and the San Diego Chargers, no doctor told the applicant that he had a permanent disability (Trial Transcript, 10/26/2020, pg. 6). Although he had developed physical symptoms related to his employment as a professional football player, he had no knowledge concerning his actual or potential rights vis-à-vis the obtainment of workers' compensation benefits. He did not learn about his possible rights until he spoke with a colleague, then contacted legal counsel, and was evaluated by the qualified medical evaluator, Dr. Michael Einbund, on October 29, 2013. The applicant testified:

"Q. When was the first time that you found out that you had a permanent disability in the body parts in which you're claiming in your case today?

A. I believe that would be 2013. When I saw – I believe the first doctor I saw up there was Einbund or 'Einbund' or whatever." (Trial Transcript, 10/26/2020, 7: 17 – 25).

An injured worker is not charged with knowledge that his or her disability is job-related without medical advice to that effect.

Section 3202 provides, "This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Liberal construction applies to the statute of limitations. Using Sections 3202 and 5412, and based upon the date of knowledge and filing date, the statute of limitations does not bar the claim because the applicant applied within one year from the date of injury under Section 5412.

CUMULATIVE TRAUMA INJURY ENDING WITH THE SAN DIEGO CHARGERS

After working for the Seattle Seahawks until 2000, the applicant attempted to make a comeback working in the Arena Football League in 2001 and 2002. He practiced with the team and played in one game with the New Jersey Gladiators (Trial Transcript 10/22/2019 43: 15 – 22; 44: 19). He ran full speed, threw the ball, and got run over (Trial Transcript 10/22/2019 47:4 – 11). After working for the New Jersey Gladiators, the San Diego Chargers contacted the applicant and flew him to San Diego for a tryout. The applicant was still with the Arena Football League and thought he was in reasonably good shape.

According to the applicant's QME, Dr. Michael Einbund, the applicant's injurious exposure with the San Diego Chargers was part and parcel of the cumulative trauma injury, and his overall impairment and disability related to working as a professional football player (Deposition of Michael J. Einbund, M.D, 5/26/2016, p.11 [Defense Exh. M]). On the other hand, the defendant's QME, Dr. Woods, states there was no extension of the cumulative trauma to work with the San Diego Chargers because the level of play during the workout was not in the same "scope" as when he was actively playing football with teams in regular practice and game times. As a result, he did not report an injury at the time, and he did not seek immediate treatment for his neck (Richard Woods, M.D., 12/8/2017, Discussion/Comments, pg. 28 [Defense Exh. U]).

The WCJ found Dr. Einbund's conclusion more credible because although the level of play in the tryout was not the same as in "normal" practice and game times, the applicant performed many of the same duties of a professional football player, including passing the ball, running play-action rollouts, and timed full-speed drops during the quarterback tryout. The applicant describes football in general as a full-speed sport, requiring running, sprinting, and throwing. During the tryout, the applicant ran the drills and directed the running backs and wide receivers on what to do.

Even if the applicant was not wearing a helmet or pads, he noted that many injuries occur during no-pad practices due to the quick movements on the turf and grass. The activities at the tryout representing the injurious exposure included preparing for the tryout and throwing the football, according to Dr. Einbund. The tryout exacerbated his medical condition in his neck and shoulders (Deposition of Michael J. Einbund, M.D, 5/26/2016, 13: 13 – 16 [Defense Exh. M]). The applicant put forth his maximum effort to impress the coach because he was the team to hire him (Deposition of Michael J Einbund, M.D. 7/7/2017, 8:12 – 13). The applicant testified that he pushed himself to make the team (MOH/SOE 10/26/2020, 6: 22 – 25). According to Dr. Einbund, "I think just by virtue of the fact that he's working and tried out, that's injurious exposure, whether

it's a short time or a longer time." (Deposition of Michael J Einbund, M.D. 7/7/2017, 18: 15 – 18). The applicant did not report an injury, as he was still hopeful that the team would hire him.

Dr. Einbund's medical opinion is that the applicant sustained one cumulative trauma playing professional football through September 24, 2002 (Deposition of Michael J Einbund, M.D. 7/7/2017, 33: 22 – 23). Dr. Woods does not suggest that the applicant has sustained a specific injury or separate cumulative trauma injury while working for the San Diego Chargers. However, given the injurious exposure trying out for the San Diego Chargers, the most reasonable conclusion is that there was one prolonged cumulative trauma.

Liability must be affixed applying Section 5500.5, which provides that liability for cumulative trauma injury claims shall be limited to one year immediately preceding either the date of injury, as determined according to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the cumulative injury, whichever occurs first. The applicant worked only for the San Diego Chargers during the last year of injurious exposure of the named defendants herein. The previous employers, the New York Jets and the Seattle Seahawks, fall outside of the last year of employment.

Based on the hiring in California, liability can be allocated to a different employer during the period of injurious exposure without violating due process (New York Knickerbockers v. WCAB (Macklin) (2015) 240 Cal.App.4th 1229 [80 Cal.Comp.Cases 1141]). Therefore, the last date of injurious exposure in California extends to the date of the tryout with the San Diego Chargers. Thus, the liability for the applicant's cumulative trauma claim must fall on the San Diego Chargers.

IV.
RECOMMENDATION

Because of the preceding, it is respectfully requested that the Petition for Reconsideration filed by Defendant Travelers on behalf of the San Diego Chargers be denied.

DATE: June 7, 2021

Richard Brennen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE