WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HUGO ARRIAZA ZUNIGA, *Applicant*

vs.

CRH AMERICAS, INC., dba C.R. LAURENCE CO., INC. and LIBERTY MUTUAL INSURANCE COMPANY, administered by LIBERTY INSURANCE CORP., *Defendants*

Adjudication Number: ADJ13190803
Marina Del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the First Amended Findings & Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on March 8, 2021, wherein the WCJ found that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his neck, shoulders, wrists, back, and hips.

Defendant contends that applicant's injury claim is barred by the Labor Code section 3600(a)(10) post termination defense, and that the F&A does not address the issues of the Labor Code section 3600(a)(10) post termination defense or the exceptions thereto.[1]

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ. We did not receive an Answer from applicant. The WCJ recommended the Petition for Reconsideration (Petition) be granted for the limited purpose of amending the F&A as follows:

> 1. It is found that Applicant sustained a continuous trauma injury while employed at CRH Americas, Inc., dba C.R. Laurence Company, Inc. arising out of and in the course of employment to his neck, back, hips, bilateral shoulders and wrists.
> 2. The post-termination affirmative defense does not apply in this case.
> 3. All other issues deferred.

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

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, and for the reasons discussed below, we will grant reconsideration, and we will affirm the F&A, except that we will amend the F&A to include a finding that the post-termination affirmative defense does not apply in this case (Finding of Fact 2).

BACKGROUND

Applicant claimed injury to his neck, shoulders, wrists, back, and hips, while employed by defendant as a forklift driver/material handler during the period from January 1, 2006, through December 20, 2019. Applicant resigned from his employment with defendant on December 20, 2019. (see Def. Exh. C, pp. 4 – 8.)

Applicant initially received treatment from his primary treating physician Waleed Jean Kattar, D.C., on May 14, 2020. (App. Exh. 2, Dr. Katter, May 14, 2020.)

On August 17, 2020, applicant was evaluated by orthopedic qualified medical examiner Arthur S. Harris, M.D. Dr. Harris examined applicant, and took a history. He concluded that applicant's condition had not reached maximum medical improvement. He requested authorization for MRIs of applicant's cervical and lumbar spine and bilateral shoulders, as well as electrodiagnostic studies of his upper and lower extremities. (Joint Exh. Y1, Dr. Harris, August 17, 2020, p. 7.)

The parties proceeded to trial on December 28, 2020. They stipulated that, "[A]pplicant did not advise the supervisors of his alleged injury during the time of his employment." (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 28, 2020, p. 5.) The issues submitted for decision were injury AOE/COE and the post termination defense. (MOH/SOE, p. 2.) On February 17, 2021, the WCJ issued a Findings & Award/Opinion on Decision and on March 8, 2021, the WCJ issued the amended F&A, correcting a clerical error.

DISCUSSION

Section 3600 states in part:

> (a)(10) Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid

> unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
>
> (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
> (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
> (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
> (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff. … ¶ A notice of termination or layoff that is not followed within 60 days by that termination or layoff shall not be subject to the provisions of this paragraph, and this paragraph shall not apply until receipt of a later notice of termination or layoff.
> (Lab. Code, § 3600.)

First, it must be noted that applicant resigned from his employment with defendant. His employment was not terminated by defendant. In turn, there was no notice of termination or layoff. As quoted above, section 3600 states that a psychiatric injury claim that is filed after a notice of termination or layoff is issued is not compensable subject to the exceptions in subsections 3600(a)(10)(A) – (D). Here, since applicant's employment was not terminated by defendant a notice of termination was not served, the provisions of section 3600 do not pertain to applicant's injury claim, and the injury claim is not barred by the post termination defense.

For the purpose of clarifying when the exceptions stated in section 3600(a)(10)(A) – (D) are applicable, we note that if applicant's employment had been terminated, and a notice of termination had been issued, the date of injury is a critical factor in determining whether the claim is compensable. Section 5412 states that:

> 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.
> (Lab. Code, § 5412.)

Having reviewed the trial record, we see no evidence that applicant suffered any disability prior to his last date of employment with defendant. Moreover, "[t]he burden of proving that the employee knew or should have known rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms." (*City of Fresno v. Workers' Comp.*

Appeals Bd. (Johnson) (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53].) It has long been the law that to determine whether an applicant sustained a cumulative injury, a WCJ must rely on an expert medical opinion. (see *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) It would be inappropriate to infer that applicant knew or should have known that he sustained a cumulative injury prior to being told by a physician that he had a cumulative injury. Thus, it appears that if applicant's employment had been terminated, there is no evidence in the record that applicant knew or should have known that he had sustained a cumulative injury prior to his employment being terminated, and the injury claim would be compensable.

Finally, section 5313 states:

> The appeals board or the workers compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties.
> (Lab. Code, § 5313.)

Defendant argues that the F&A does not include a finding that defendant did or did not meet its burden of proof as to the post termination defense. In the Report, the WCJ explains in detail the basis for her conclusion that applicant's claim is not barred by the section 3600(a)(10) post termination defense and, as noted above, the WCJ recommended that we amend the F&A to include a finding that, "The post-termination affirmative defense does not apply in this case." (Report, p. 8.) If a decision does not comply with the requirements of section 5313, the WCJ's report may cure the deficiency or defect. (*City of Maywood v. Workers' Comp. Appeals Bd. (Smith)* (1991 W/D) 56 Cal.Comp.Cases 704; *City of San Diego v. Workers' Comp. Appeals Bd. (Rutherford)* (1989 W/D) 54 Cal.Comp.Cases 57; *Smales v. Workers' Comp. Appeals Bd.* (1980 W/D) 45 Cal.Comp.Cases 1026.) Here, the WCJ's Report clearly "cures" the F&A's deficiency.

Accordingly, we affirm the F&A, except that we amend the F&A to include a finding that the post-termination affirmative defense does not apply in this case (Finding of Fact 2).

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the First Amended Findings & Award issued by the WCJ on March 8, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 8, 2021 First Amended Findings & Award, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

*** * ***

2. The post-termination affirmative defense does not apply in this case.

*** * ***

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 10, 2021

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

HUGO ARRIAZA ZUNIGA
WACHTEL LAW
COLEMAN, CHAVEZ & ASSOCIATES

TLH/*pc*

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