WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

STEVEN GARCIA, ***Applicant***

vs.

ATLANTA BRAVES; LONG BEACH ARMADA, ***Defendants***

Adjudication Number: ADJ8854627
Van Nuys 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, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 13, 2021

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

STEVEN GARCIA
LAW OFFICES OF MARK SLIPOCK, P.C.
STATE COMPENSATION INSURANCE FUND
HANNA BROPHY

PAG/ara

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 ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Defendant State Compensation Insurance Fund ("SCIF") is an elected-against co- defendant with coverage for the professional baseball team the "Long Beach Armada," for whom the applicant played at the end of a seven year professional baseball career. In a February 8, 2012 Findings of Fact an Award, the court found the date of injury per Labor Code § 5412 to be March 23, 2013, the date of concurrence of preexisting permanent disability and knowledge, imputed to the March 23, 2013 meeting between the applicant and his attorney. The applicant's last day of injurious exposure was June 8, 2012, while playing for the Long Beach Armada, as insured by defendant SCIF. Pursuant to Labor Code § 5500.5, the earlier of the date of injury or the last date of injurious exposure places the one year liability period within defendant's coverage.

Aggrieved by this finding, defendant has filed a timely, verified Petition for Reconsideration. Defendant avers the appropriate date was in 2007 or in 2008, years during which the applicant testified he sustained various injuries to the upper extremities, and during which time the applicant was playing for other baseball teams.

This report recommends that the petition be denied, as the defendant has failed to identify evidence establishing the applicant had sufficient training, background or expertise to establish actual or imputed knowledge that his claimed cumulative trauma arose out of industrial exposures until he met with his attorney in 2013, and because the nature of the instant claimed cumulative trauma injury is not conducive to lay attribution. The matter is not on calendar.

II. FACTS

Steven Garcia, while employed during the period of June 24, 2005, through June 8, 2012, as a Professional Baseball Player, occupational group No. 590, at various locations in and out of California, by the Atlanta Braves, the Long Beach Armada, the Chilicothe Paints, Na Koa Ikaika Maui, and Evansville Otters, claims to have sustained injury arising out of and in the course of employment to the neck, back, bilateral hips, bilateral knees, bilateral elbows, bilateral ankles, bilateral wrists, bilateral shoulders, and left thumb.

The applicant's baseball career encompassed multiple teams, staring with the Atlanta Braves, and spanned the period of 2005 through 2012. The last team the applicant played for was the Long Beach Armada, then insured by State Compensation Insurance Fund ("SCIF"). The Long Beach Armada was a California-based team, and no jurisdictional questions are presented herein. The applicant has elected against the Long Beach Armada pursuant to Labor Code§ 5500.5. Also present but not participating in these proceedings pursuant to the election has been elected-out carrier ACE American Insurance for the Atlanta Braves.

An application for adjudication for the instant cumulative trauma was filed shortly after the applicant met with his attorney for the first time on March 23, 2013. The parties selected Alan Strizak, M.D. to act as the orthopedic Qualified Medical Examiner. The applicant was evaluated by the QME and a January 12, 2017 report issued. The matter was initially heard at trial before the undersigned on July 12, 2018. The issues identified for decision included injury AOE/COE, parts of body, earnings, the permanent and stationary date, permanent disability, apportionment, the need for future medical treatment, the period of liability under Labor Code§ 5500.5, and whether the QME report of Dr. Strizak constituted substantial medical evidence . The applicant's testimony was adduced under direct and cross-examination. The matter was submitted for decision on July 12, 2018.

The submission was vacated, however, after a determination that the QME reporting of Dr. Strizak did not constitute substantial medical evidence. Development of the record was ordered pursuant to *McDuffie v. Los Angeles County Metropolitan Authority*, and supplemental reporting from the QME obtained and submitted.[1] When the supplemental reporting of the panel QME did not cure the evident defects, the parties were encouraged to select an Agreed Medical Examiner. When the parties reported they were unable to do so, the court appointed Mitchel U. Silverman, M.D. to act as the regular physician pursuant to Labor Code § 5701.[2] Dr. Silverman has evaluated the applicant, issued medical-legal reporting, and has further provided deposition testimony, all of which has been moved into evidence.

The matter was returned to this court's calendar on January 7, 2021, and was submitted for decision without additional testimony the same day. A decision issued February 8, 2021, finding injury AOE/COE to the neck, back, bilateral knees, bilateral elbows, bilateral ankles, bilateral wrists, bilateral shoulders, and left thumb, but not to the bilateral hips. The applicant testified that he sustained a number of injuries during the course of his career, but that he first received knowledge of a potential cumulative trauma type injury when he met with his attorney in 2013. Given the existence of prior disability, and knowledge imputed to that meeting in 2013, the date of injury for the cumulative trauma as fixed at March 23, 2013, that when the applicant met with his attorney for the first time. The period of liability per Labor Code § 5500.05 is the earlier of the last date of injurious exposure and the date of injury. The applicant's last day of professional baseball was June 8, 2012. Thus, the one year period prior to the earlier of the two dates, June 8, 2012, was identified as the period of liability under § 5500.5.

Defendant is aggrieved by this finding, averring on Petition for Reconsideration that the applicant obtained the requisite knowledge of industrial causation of his cumulative trauma injury when he sustained an elbow injury on an unknown date in 2007 or subsequent "throwing arm" injury on an unknown date in 2008.[3] Defendant avers the date of injury should be fixed at an unspecified date in 2007, thus placing liability for this matter with a previous baseball team pursuant to Labor Code § 5500.5.

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[1] *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal. Comp. Cases 138 (Appeals Board en banc opinion); January 29, 2019 Minutes of Hearing at p.2.

[2] March 7, 2019 Order Appointing Regular Physician.

[3] February 10, 2021 Petition for Reconsideration at 4:15.

III.
DISCUSSION

The issue raised in the defendant's Petition for Reconsideration concerns the date of injury per Labor Code § 5412. The statute provides:

> 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.

The statute thus fixes the date of injury in a cumulative trauma injury as the date of concurrence of disability and knowledge of its industrial attribution. Disability is defined as compensable temporary or permanent disability, and although medical treatment alone is insufficient to establish disability, it may be evidence of compensable permanent disability.[4] An injured worker will typically "not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability."[5]

Moreover, it is worth observing that public policy considerations underlie the application of the statute herein:

> The 'date of injury' is a statutory construct which has no bearing on the fundamental issue of whether a worker has, in fact, suffered an industrial injury...[T]he 'date of injury' in latent disease cases 'must refer to a period of time rather than to a point in time.' (citation.) The employee is, in fact, being injured prior to the manifestation of disability...[T]he purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury."[6]

The jurisprudence in this regard has historically been grounded in basic principles of fairness and due process - an injured work will not lose benefits to the statute of limitations prior to knowledge that the injury sustained may have been caused in full or in part by industrial exposures.[7]

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[4] *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998, 1005 [59 Cal. Comp. Cases 579].)

[5] *City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 471 [50 Cal. Comp. Cases 53].)

[6] *J.T. Thorp v. Workers' Comp Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327,341 [49 Cal. Comp. Cases 224].

[7] These principles have guided California workers' compensation law for nearly 100 years, dating back at least to the 1933 decision in *Marsh v. IAC* (1933) 217 Cal. 338, 19 IAC 159, when the California Supreme Court has held that knowledge would not be imputed until the "time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment."

As such, even where an injured worker suspects that their disability may have an industrial component (as was the case in *Johnson*, supra), they will typically not be charged with that knowledge until so advised by a medical professional, unless their training, intelligence and qualifications would otherwise allow the injured worker to recognize the relationship between industrial factors and the emergence of a cumulative injury. As our Appeals Board has observed previously:

> In many cases applying section 5412, knowledge of industrial causation is not found until the applicant receives medical opinion expressly stating so, even where the applicant has indicated his or her belief that the disability is due to employment. (E.g. *Johnson*, supra, 50 Cal.Comp.Cases 53 (applicant believed heart problems were work related, but doctor said they were not); *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33 Cal.Comp.Cases 722] (despite applicant's testimony that work tired him, the Court reversed Appeals Board's determination that applicant failed to exercise reason able diligence to ascertain that disability originated with work); *Gleason v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 1049 (writ den.) (no evidence that applicant, a nurse who believed she contracted cirrhosis of the liver from needle stick, knew about latency period of hepatitis C, so she was not charged with knowledge); *Modesto City Schools v. Workers' Comp. Appeals Bd.* (*Finch*) (2002) 67 Cal.Comp.Cases 1647 (writ den.) (doctor's report represents earliest knowledge, even though application was filed before the report). See also *Hughes Aircraft Co. v. Workers' Comp. Appeals Bd.* (*Zimmerman*) (1993) 58 Cal.Comp.Cases (writ den.) (statement by doctor that stress at work was depleting her immune system insufficient to find that applicant should have recognized the relationship between employment and disability), and *Kaiser Foundation Health Plan v. Workers' Comp. Appeals Bd.* (*Bradford*) (1986) 51 Cal.Comp.Cases 355 (writ den.) (statement by doctor that back condition was aggravated by work not sufficient to charge applicant with knowledge).)[8]

The applicant testified, in pertinent part, as follows:

> The applicant played for the Danville Braves in 2007. The applicant sustained injuries while playing for the Danville Braves, including an elbow injury. The injury also affected applicant's throwing ability. This was the year that began the downfall of the applicant's career. The applicant did not play many games for the Danville Braves. At page 25 of the July 24, 2013, deposition, at line 8, the applicant testified to playing close to 30 games continuously, because he was the only catcher left in Spring training. The applicant injured his right arm, which was his throwing arm. The applicant did not see a doctor for this condition. The applicant was out for essentially half the season due to the elbow injury. The applicant was on the disabled list during that time. The applicant feels his worst year in terms of injuries was not 2007, but a later year, perhaps 2009 or 2010.[9]

[8] *Weibl v. St. Louis Cardinals*, 2012 Cal. Work. Comp. P.D. LEXIS 107 (2012 WCAB panel decision).
[9] July 12, 2018 MOH/SOE at 6:13.

Defendant argues an elbow injury in 2007 or a right "throwing arm" injury in 2008 were sufficient to impute knowledge to the applicant of the industrial nature of his cumulative trauma injury ending in 2012. Defendant argues that "[a]pplicant reasonably knew that he suffered a disability from work, because he injured his throwing arm and did not play for 'essentially half the season,' which was the beginning of the 'downfall' of his career."[10] However, the applicant continued to play professional baseball for five years thereafter. Moreover, the assessment that the 2007 injury began the downfall of his career was made by the applicant in testimony in 2018, five years after receiving advice from his attorney as to the possible existence of a cumulative trauma, and was necessarily retrospective in nature. The applicant testified that he received no medical treatment for his throwing arm injury, thus obviating any medical advice of the existence of cumulative trauma, or describing the relationship between work exposure and injury.

Defendant seeks to identify the 2007 elbow injury and 2008 right "throwing arm" injury in isolation. However, the record provides needed context, and demonstrates that the nature of the applicant's profession resulted in numerous ongoing microtraumas. The applicant provided a history of the injury to regular physician Dr. Silverman in 2017, noting a history of:

> The claimant indicates that during the course of his seven year career as a professional baseball player, he sustained multiple injuries to his neck, right shoulder, elbows, wrists, ribs, back, hips, pelvis, right knee, and left ankle as a result of collisions with other players as they ran into home plate, being hit by baseballs, training, running, and from the daily heavy physical activity including frequent squatting. He recalls multiple occasions of being knocked unconscious due to the force of the some of the collisions. He recalls a pulled hamstring that kept him out of playing for approximately two months, and an injury to his right arm due to a collision at home plate that kept him out of playing for approximately two months. The claimant does not recall the specific details of each incident. He states he was never seen by a licensed physician for any of the injuries; all were treated by a trainer or kinesiologist that worked for the team. Since he stopped playing baseball in 2012, he has not undergone any diagnostic studies or received any treatment for his injuries.[11]

The applicant's description is that of a long series of microtraumas, only recognized as a cumulative injury with the benefit of legal, and later, medical, advice. Following a detailed review of the medical record, and a comprehensive discussion of the various injuries documented through the clinical exam, the regular physician identified the sum total of these microtraumas as being consistent with an overarching cumulative trauma:

> In consideration of a cumulative trauma from 2005 through 2012 when playing professionally, I would indicate that with reasonable medical probability the claimant had injuries to the bilateral hamstrings, bilateral ankles, both shoulders, both elbows and the right wrist, as well as transient sprains of the cervical and lumbar spine.[12]

[10] February 10, 2021 Petition for Reconsideration at 4:10.
[11] Ex. 4, September 23, 2017 report of regular physician (orthopedics) Mitchel U. Silverman, M.D. at pp.2-3.
[12] Id.at p.24.

Defendant offers no evidence that the applicant, a professional athlete for the entirety of his career through 2012, had any particular background or training in identifying the industrial nature of his developing injuries. Defendant elicited no testimony on cross-examination that the applicant knew his cumulative injury was work-related in either 2007 or in 2008. Indeed, there is no evidence that the applicant knew what a cumulative trauma was until so advised by his attorney in 2013.

Defendant avers that "medical evidence (or lack thereof) should not be a factor in determining the Applicant's awareness of an industrial injury," and that "[a]pplicant's own actual and/or reasonable basis for knowledge should determine whether he knew of an industrial injury."[13] However, the only evidence for applicant's knowledge of industrial attribution to the CT claim is the applicant's retrospective assessment in 2018, five years after having been advised he may have sustained a CT injury by his attorney, and a full year after receiving medical advice to that effect from QME Strizak. Defendant cites to no other evidence in the record for contemporaneous knowledge in 2007, 2008, or indeed, at any point prior to first meeting with his attorney in 2013. The first evidence of medical advice to the applicant of the existence of a cumulative trauma is the January 12, 2017 report of QME Dr. Strizak.

It is acknowledged that the first medical evidence in the record of industrial attribution was provided in the 2017 reporting of then QME Dr. Strizak. However, imputed knowledge here is appropriate, as the applicant met with his attorney in 2013 and caused the instant cumulative trauma claim to be filed.[14] There is no dispute among the parties that the applicant had disability prior to the filing of the claim in 2013. That the applicant met with his attorney, and caused the instant cumulative trauma application to be filed is sufficient to impute knowledge of the possible relationship between industrial exposure and disability to the applicant. The date of injury was thus appropriately fixed as the date of that meeting, March 23, 2013.

Having had the opportunity review the evidentiary record, and after consideration of the arguments advanced in the Petition for Reconsideration, it remains the respectful opinion of the undersigned that the applicant was not of the appropriate training or background to identify the industrial cause of his cumulative trauma claim, that the nature of the injury was not conducive to lay attribution, and as such, the appropriate date of injury is March 23, 2013, which was the date the applicant first met with his attorney and was advised as to the possible existence of a cumulative trauma.

IV.
RECOMMENDATION

It is respectfully recommended that the defendant's February 10, 2021 Petition for Reconsideration be denied.

Dated: ·February 22, 2021

SHILO ANDREW RASMUSSON
Workers' Compensation Administrative Law Judge

[13] February 10, 2021 Petition for Reconsideration at 4:15.
[14] *Bassett McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1109-1110 [53 Cal. Comp. Cases 502].)