WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUAN GUZMAN, *Applicant*

vs.

**TASHA OFF PRICE, INC.;
OAK RIVER INSURANCE COMPANY DBA BERKSHIRE HATHAWAY HOMESTATE COMPANIES; TECHNOLOGY INSURANCE COMPANY ADMINISTERED BY AMTRUST, *Defendants***

Adjudication Number: ADJ12629307
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the November 22, 2021 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant, while employed by defendant from June 15, 2016 through October 10, 2019, did not sustain injury arising out of or in the course of employment (AOE/COE). The WCJ ordered that applicant take nothing.

Applicant contends that the F&O is incomplete, as it made no specific findings of fact regarding the adequacy of the medical-legal reporting in evidence, and made no specific finding on the defendant's affirmative defense of a post-termination filing. (Petition for Reconsideration (Petition), at 3:25; 5:7.) The Petition further contends the WCJ incorrectly interpreted the reporting of Qualified Medical Examiner (QME) Dr. Becker as inconsistent between the initial and supplemental reports.

We have received an Answer from defendant Berkshire Hathaway Homestate Companies (defendant). The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the November 22, 2021 F&O, and return this matter to trial level for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

FACTS

Applicant claimed injury to the bilateral arms, hands, right knee, back and head (headache/neurological) while employed as a warehouse worker by defendant Tasha Off Price, Inc., from June 15, 2016 to October 10, 2019.

Applicant was hired as a full-time warehouse worker by defendant in 2016, with job duties that included pulling orders and filling boxes, lifting and arranging the boxes of merchandise, and additional janitorial and handyman-type responsibilities in the warehouse. (July 21, 2021 Minutes of Hearing (Further) and Summary of Evidence (Minutes), at 2:19-3:14.)

On October 10, 2019, applicant's employment with defendant was terminated. (Ex. E, subpoenaed records of Tasha Off Price, Inc., dated October 10, 2019, p.5.) Applicant filed an application for adjudication on October 15, 2019, alleging injury sustained between June 15, 2016 and October 10, 2019. (Application for Adjudication of Claim, dated October 15, 2019.)

On October 25, 2019, applicant was evaluated by primary treating physician Michael Salomon, D.C., who described the injury as follows:

> The patient states that while performing his usual and customary work duties on the above-noted date, he was working as a packer and maintenance worker. He states that he had been preparing orders, collecting orders, pushing and pulling carts, packing boxes, receiving merchandise, checking orders, climbing on stairs, as well as other packer and maintenance duties. He states that due to his repetitive work, he developed injuries to his back, arms, hands with stress and headaches due to pressure and heavy workload. He states that he did not report his injury because he knows that they would [not] care and he is also afraid of losing his job. He also states that he did not go to the clinic or hospital because he has no medical insurance and currently, he is taking Tylenol to help him ease the pain. He states that he was doing his regular duties, until they fired him without telling him the reason. (Ex. 4, report of Michael Salomon, M.D., dated October 25, 2019, pp.1-2.)

Dr. Salomon identified a cumulative trauma injury, and further opined that based on the applicant's "history of injury, present complaints, mechanism of injury and today's clinical

findings, it is my opinion that the patient's current symptomatology is a result of the work-related injuries that occurred on CT: 06/15/2016 - 10/10/2019, during the course of his employment for Tasha Off Price, Inc. as a Packer and Maintenance worker." (*Id*., at p.5.) Dr. Salomon ordered a low back MRI and an EMG/NCV study, as well as various therapeutic modalities. (*Id*., at p.4.)

On December 13, 2019, Dr. Salomon reevaluated applicant, reviewed the results of applicant's EMG/NCV studies, ordered additional therapy, and requested authorization for a right knee MRI. (Ex. 3, report of Michael Salomon, M.D., dated December 13, 2019.)

On January 9, 2020, defendant denied the claim, asserting a lack of factual, legal or medical evidence to support the claim, and further averring no notice of the psychiatric claim prior to the date of termination, as required by Labor Code section 3208.3(b).[1,2] (Ex. B, Notice of Denial of Claim, dated January 9, 2020.)

Applicant continued to treat with Dr. Salomon through April, 2020, reporting ongoing pain and difficulty in the right knee and low back. (Ex. 2, report of Michael Salomon, M.D., dated February 7, 2020; Ex. 1, report of Michael Salomon, M.D., dated April 3, 2020.)

On June 4, 2020, QME Steven Becker, D.C. evaluated applicant, noting that his exam concerned a "reported specific date of injury on October 10, 2019." (Ex. C, report of QME Steven Becker, D.C., dated June 4, 2020, at p.1.) Therein, applicant reported the injury as follows:

> On the date of injury, Mr. Guzman noted that he was close to the end of his shift, when he inexplicably hurt his lower back. He did not report lifting anything unusual or too heavy but just noted a generalized onset of lower back pain. Mr. Guzman stated that he did not inform his employer as it was near the end of his shift and that he kept working, but when his shift ended, he was fired the same day, also being the end of his pay period. (Ex. C, report of QME Steven Becker, D.C., dated June 4, 2020, at pp.2-3.)

The QME noted that no medical records had been submitted for his review. (*Ibid.*) With respect to causation, Dr. Becker described a specific injury:

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[1] Labor Code section 3208.3(b) provides: (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury. (2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury. (3) For the purposes of this section, "substantial cause" means at least 35 to 40 percent of the causation from all sources combined.

[2] All further statutory references are to the Labor Code unless otherwise stated.

> Mr. Guzman reports having sustained a specific lumbar spine injury in the course and scope of his work as a warehouseman in a women's clothing distribution warehouse. He also described an onset of right knee pain after that time. Following my evaluation and pending the results of the MRI in this case, it is currently my opinion that on a reasonably medically probable basis that he sustained a specific lumbar disc injury with secondary and possible compensatory complaints and disability to his right knee as the result of that specific incident. (*Id*. at p.6.)

In reviewing the reported mechanism of injury, the QME further observed that applicant did not inform his employer of the alleged injury prior to his termination, and that "this may represent a post termination case and I would leave such a determination to the eventual trier-of-fact in this case." (*Id*. at p.5.)

The parties submitted additional records for review by the QME, who issued a supplemental report dated August 6, 2020. The QME reviewed primarily treatment records from PTP Dr. Salomon, as well as diagnostic studies. Following the review of records, the QME updated his diagnoses to reflect injury to the low back and right knee, and found applicant temporarily totally disabled and in need of further medical treatment. (Ex. D, report of QME Steven Becker, D.C., dated August 6, 2020, p.5.) With respect to the issue of causation, the QME reiterated:

> Following my evaluation and the new MRI in this case, it is currently my opinion that on a reasonably medically probable basis that he sustained a specific lumbar disc injury with secondary and possible compensatory complaints and disability to his right knee as the result of that specific incident. (*Id*., at p.6.)

The parties proceeded to trial February 10, 2021, and framed issues of injury AOE/COE, whether compensation was barred under section 3600(a)(10), and defendant's request for costs and sanctions against applicant. (February 10, 2021 Minutes, at 3:2.) The WCJ continued trial to July 21, 2021, at which time applicant testified to his job duties, and to the onset of back and knee pain in 2018. (July 21, 2021 Minutes, at 4:3.) Applicant also testified to only recalling some of the various written reprimands he received during his employment. (*Id*., at pp.5-7.) The WCJ continued trial to October 12, 2021, at which time Uziel Baruch and Jimmy Garcia testified, as well as applicant. Mr. Baruch testified that he was the owner of Tasha Off Price. Mr. Baruch testified to the specifics of applicant's job duties, and to a series of reprimands culminating in applicant's termination of employment on October 10, 2019. (October 12, 2021 Minutes, at pp.3-5.) Jimmy Garcia testified to his position as manager at Tasha Off Price, to applicant's job duties,

and to the series of reprimands culminating in applicant's termination. (*Id*., at pp.6-9.) Both witnesses denied applicant ever reported an injury during his employment. (*Id*. at 4:14; 6:22.)

The WCJ issued the F&O on November 22, 2021. Therein, the WCJ found, in relevant part, that applicant had not sustained injury AOE/COE. (F&O, Finding of Fact No.1.) The Opinion on Decision (Opinion) explained that the WCJ found defense witnesses Baruch and Garcia to be "truthful and honest and confirming there was no report of injury prior to termination." (F&O, Opinion on Decision, p.2.) The Opinion noted that the treatment reporting of Dr. Salomon contained no record review, and that both the lumbar spine MRI of November 17, 2019 as well as the right knee MRI of January 20, 2020 were "fairly normal for [applicant's] age." (*Id.*, at p.3.) The WCJ observed that applicant described no complaints to any body parts except the low back and right knee. The Opinion also reviewed the reporting of QME Dr. Becker, asserting that the QME "could not state what the mechanism of injury is or why he is now saying AOE/COE." (*Id*., at p.4.) The WCJ asserted that the QME "forgot what he said in his June 2020 report where he left it to the trier of fact about the alleged injury reporting, and indeed all treatment did come after applicant was terminated." (*Ibid.*) The WCJ noted that the employment records substantiated the defense witness accounts of multiple "write-ups" and verbal warnings. The WCJ's Opinion concluded:

> While I recognize applicant does have a positive knee and/or low back condition which may both require treatment, I did not find his claims to be related to work and there is no credible evidence, medical or otherwise, to establish credibility or support to applicant's claim post-termination that he was injured at work or that his current conditions are associated with work. It appeared to the trier of fact this was a retaliatory filing made purely after the termination. Therefore, based on my review of the entire record, including the witness testimonies, noting the credibility of the defense witnesses over the applicant's and the lack of substantial medical evidence to support a finding of injury arising out of or in the course of employment, under *Garza*, it is hereby found that applicant has not established his burden of proof for establishing injury AOE/COE, that the treating chiropractor's reporting is not as substantial as that of the PQME, that the claim is barred post-termination per LC Section 3600(a)(l0), and that applicant shall take nothing on his Application for Adjudication of Claim. (F&O, Opinion on Decision, at p.5.)

Applicant's Petition asserts the F&O is incomplete and unsupported, as it did not enter findings of fact that the otherwise compensable QME reporting was not substantial medical evidence. (Petition, at 3:25.) Applicant contends the only assessment of the sufficiency of the

reporting is contained in the Opinion on Decision, wherein the WCJ stated the PTP reporting is "not as substantial as that of the PQME." (Petition, at 3:25.) Applicant asserts that both the initial and the supplemental reports of QME Becker found applicant sustained a specific injury, and that there has been no unexplained change in the QME's assessment of causation. (*Id*., at 4:12.) Applicant also contends the Opinion on Decision addresses the post-termination filing defense, without entering a corresponding order, and that the Opinion failed to address the exceptions to section 3600(a)(10) available where the date of injury occurs after the date of termination or notice of layoff, which in turn requires an analysis of the date of injury under section 5412. (*Id*., at 5:6; Lab. Code § 3600(a)(10)(D).)

In the Report, the WCJ explained the take nothing order as follows:

> Neither medical (PTP or PQME) talks about this security job [applicant] had on the side, and the PTP did not review any records at all. He simply took applicant's word for it. On the other hand, we had PQME Becker who did review records but then seems to have forgotten what he'd said between his first report and second report, because in his second report, he seemed to find a specific injury. Applicant claimed a CT. He did not testify about a specific injury. So in effect, I had no substantial medical evidence to rely upon, and since applicant has the burden of proof per LC Section 3202.5, coupled with my finding the defense witnesses more honest and forthright than he was, I was left with no choice but to find no injury. And as the defendant pointed out in the Answer, even if I had found a CT injury (or a specific, for that matter), it was barred by LC Section 3600(a) (10) because none of the exceptions apply. (Report, at pp.2-3.)

DISCUSSION

Applicant contends that the F&O failed to enter all of the necessary factual determinations required to conclude that applicant did not sustain injury AOE/COE, or that compensation was barred by section 3600(a)(10). (Petition, at 3:20-25.)

Labor Code section 5313 provides that:

> 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. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313.)

In our decision in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Bd. en banc), we stated that:

> [A] proper record enables any reviewing tribunal…to understand the basis for the decision. As discussed below, the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.
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> When a decision is reached, the WCJ must make and file findings upon all facts involved in the controversy and issue an award, order, or decision stating the determination as to the rights of the parties. The findings and the decision must be served upon all the parties together with a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made. (Lab. Code, § 5313.) The WCJ is also required to prepare an opinion on decision, setting forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on. (Lab. Code, § 5313.) The opinion enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful. (See *Evans v. Worker's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755, 68 Cal.Rptr. 825, 826, 333 Cal.Comp.Cases 350, 351 [441 P.2d 633].) For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record. (*Hamilton v. Lockheed Corporation,* supra, 66 Cal.Comp.Cases at pp. 475-476.)

In this matter, the F&O determined applicant did not sustain injury AOE/COE, and ordered that applicant take nothing. However, pursuant to *Hamilton* and section 5313, the WCJ must make findings on all disputed legal issues.

Here, both the reports of the primary treating physician (PTP) and the QME conclude that applicant sustained an industrial injury. In his report of October 25, 2019, PTP Dr. Salomon finds that applicant's symptoms are "a result of the work-related injuries that occurred on CT: 06/15/2016-10/10/2019." (Ex. 4, report of Michael Salomon, M.D., dated October 25, 2019, at p.5.) In a report of June 4, 2020, QME Dr. Becker finds applicant "sustained a specific lumbar disc injury with secondary and possible compensatory complaints and disability to his right knee as the result of that specific incident." (Ex. C, report of QME Steven Becker, D.C., dated June 4, 2020, p.6.) In a supplemental report of August 6, 2020, Dr. Becker reiterates his opinion that "on a reasonably medically probable basis [applicant] sustained a specific lumbar disc injury with secondary and possible compensatory complaints and disability to his right knee as the result of that specific incident." (Ex. D, report of QME Steven Becker, D.C., dated August 6, 2020, p.6.)

However, it is unclear from the Opinion whether the WCJ found any of these reports to constitute substantial medical evidence.

The WCJ identifies multiple issues in the reporting of both physicians. The WCJ notes that the applicant did not advise PTP Dr. Salomon as to his concurrent employment as a security guard or his regular marijuana use, and that the PTP reviewed no medical records. (F&O, Opinion on Decision at pp. 2-3.) It is not clear from the Opinion on Decision what specific records the WCJ believes were not reviewed by the PTP, or their relevance to the issue of injury AOE/COE. The WCJ observes that the PTP reporting forms the majority of the records reviewed by the QME, and that the mechanism of injury described in the QME report is different from that of the PTP, and also different from applicant's testimony at trial. (*Id*., at p.4.) However, the Opinion also concludes "that the treating chiropractor's reporting is not as substantial as that of the PQME." (*Id*., at p.5.). It is thus unclear which, if any, reports constitute substantial medical evidence. In order to facilitate meaningful review of the decision, the corresponding opinion on decision should describe, in detail, the evidence and legal principles used to arrive at the findings of fact.

To constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (en banc); *McAllister v. Workmen's Comp. Appeals Bd.*, supra, 69 Cal.2d 408, 413, 416-417; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [58 Cal.Comp.Cases 313].) "A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363].) A medical opinion may not be based on surmise, speculation, conjecture, or guess, and it is not substantial evidence if it is based on facts no longer germane, based on an incorrect legal theory, or based on an inadequate medical history and examination (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 (36 Cal.Comp.Cases 93, 97); *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 (35 Cal.Comp.Cases 525, 529).) On the other hand, there must be some solid basis in the medical report for the doctor's ultimate opinion; the Board may not blindly accept a medical opinion which lacks a solid underlying basis, and must carefully judge its weight and credibility; the evidence must have some degree of probative force. (*National Convenience Stores v. Workers' Comp. Appeals Bd. (Kesser)* (1981) 121 Cal.App.3d 420, 426 (46 Cal.Comp.Cases 783).) In other words,

the Board must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence, and accordingly, the expert's opinion is no better than the facts on which it is based. (*Turner v. Workers' Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1044 [39 Cal.Comp.Cases 780].)

Our decision in *Hamilton* further held that, "for the opinion on decision to be meaningful, the WCJ must refer with specificity to an *adequate and completely developed* record." (*Hamilton v. Lockheed Corporation, supra*, 66 Cal.Comp.Cases at p. 476, *emphasis added*.) The WCJ or the WCAB, "may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based." (*San Bernardino Community Hospital v. Workers. Comp. Appeals Bd. (McKernan)* 74 Cal.App.4th 928 (64 Cal. Comp. Cases 986); see also *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 (63 Cal.Comp.Cases 261) [lack of substantial medical evidence on issue in dispute supported development of record]; *M/A Com-Phi v. Workers' Comp, Appeals Bd. (Sevadjian)* (1998) 65 Cal.App.4th 1020 [63 Cal.Comp.Cases 821] [appropriate to develop record lacking competent medical evidence].)

In the event that the WCJ identifies "deficiencies, inaccuracies or lack of completeness," in the medical record, and where the record contains no substantial evidence, "Labor Code sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings." (*McDuffie v. Los Angeles County Metro. Transit Auth.*, (2002) 67 Cal. Comp. Cases 138, 141 [2002 Cal. Wrk. Comp. LEXIS 1218] (WCAB en banc).) "'[A]llowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims' and militates in favor of our presuming the continued vitality of sections 5701 and 5906, absent a clear legislative intention to the contrary. (*Tyler v. Workers, Comp. Appeals Bd.*, (1997), 56 Cal.App.4th 389, 394.) Thus, where *neither* report in evidence constitutes substantial medical evidence, the medical reporting should be developed to reflect a complete understanding of applicant's medical and work history. (*San Bernardino Community Hospital v. Workers. Comp. Appeals Bd. (McKernan), supra,* 74 Cal.App.4th 928.) An adequately developed record affords all parties due process of law, and further provides for meaningful review of the WCJ's decision.

Here, to the extent that the medical-legal reporting is inconsistent with respect to the nature of the injury (e.g. specific versus cumulative trauma), the reporting physicians should be provided

with any evidence relevant to the issue, and directed to provide supplemental reporting detailing their opinions. Once the supplemental reporting has been received, the WCJ should enter specific findings of fact as to all disputed issues, based on a complete and adequate record. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525, 529]; *Hamilton v. Lockheed Corporation, supra*, 66 Cal.Comp.Cases at p. 476.)

The WCJ also notes in her Report that QME Dr. Becker identifies a specific injury, while applicant alleges a cumulative trauma. (Report, at p.3.) Section 5702 provides that the appeals board may enter findings on stipulated facts, but notwithstanding the stipulation of the parties, the appeals board may also set the matter for hearing, take further testimony, or make further investigation as is necessary to determine the matter. (Lab. Code § 5702.) Additionally, Board Rule 10517 states that "pleadings may be amended by the Workers' Compensation Appeals Board to conform to proof." (Cal. Code Regs., Title 8, § 10517.) Thus, where the pleadings are incompatible with the evidence, the WCJ has the discretion to make inquiry into the basis of the stipulation, and to conform the pleadings to proof. (*Memorex Corp. v. Workers' Comp. Appeals Bd. (Kraten)* (1977) 42 Cal.Comp.Cases 458 [1977 Cal.Wrk.Comp.LEXIS 2713], writ denied [WCAB properly found cumulative trauma based on evidence, despite pleaded specific injury] (writ denied); *Salvation Army v. Workers' Comp. Appeals Bd.* (Noel) (1996) 61 Cal.Comp.Cases 732 [1996 Cal.Wrk.Comp.LEXIS 3240] [same]; *cf. Crawford v. Workers' Comp. Appeals Bd.* (1989) 54 Cal.Comp.Cases 411 [1989 Cal.Wrk.Comp.LEXIS 2532] (writ denied) [No abuse of discretion where WCJ declined to allow amendment to pleadings more than 16 months after notice of change in medical opinion].) Upon return of the matter to trial level, and following development of the record, the WCJ should determine whether any amendment to the pleadings is appropriate and warranted based on the developed medical record.

Finally, we note the WCJ's assertion in the Report that the claim is "barred by LC Section 3600(a)(10) because none of the exceptions apply." (Report, at p.3.) Section 3600(a)(10) bars compensation for a claim of physical injuries filed after the employee received a notice of termination or layoff unless the employee demonstrates by a preponderance of the evidence at least one of the following circumstances: (1) the employer had notice of the injury prior to the notice of termination or layoff; (2) the employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury; (3) the date of the specific injury is subsequent to the date of notice or termination of layoff, but prior to the effective date of the

termination or layoff; or (4) the injury is a cumulative trauma and the date of injury is subsequent to the date of notice of termination or layoff. If it is determined that applicant sustained a cumulative trauma injury, the WCJ must analyze whether the date of injury as described in section 5412 is subsequent to the date of notice of termination or layoff per section 3600(a)(10).

Section 5412 specifies 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.) Section 5412 requires both disability and knowledge that the disability was caused by the employment. Disability for the purposes of section 5412 is compensable temporary disability or compensable permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [69 Cal.Comp.Cases 579].) The term "disability," as used in section 5412, refers to "an impairment of bodily functions which results in the impairment of earnings capacity." (*Permanente Med. Grp. v. Workers' Comp. Appeals Bd.* (1985) 171 Cal. App. 3d 1171, 1179-80 [50 Cal.Comp.Cases 491].) "Because actual wage loss is required for temporary disability, modified work alone is not a sufficient basis for compensable temporary disability. But, a modification may indicate a permanent impairment of earning capacity, especially if the worker is never able to return to the original job duties. (Citations.)" (*Rodarte, supra*, at p. 1005.) The date of injury for a cumulative trauma claim may be months or years before the employee's last day worked or years after the employee stops working. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 239 [58 Cal.Comp.Cases 323].)

Furthermore, the "burden of proving that the employee knew or should have known [their disability was industrially caused] 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].) Generally, "an applicant will 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." (*Id.*, at p. 473.) Following development of the record and a return to trial, the WCJ should enter *specific findings of fact* with respect to any affirmative defenses raised, and any claimed exceptions thereto.

Accordingly, we rescind the F&O and return the matter to the trial level for further proceedings and for development of the record. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Worker' Compensation Appeals Board, that the November 22, 2021 Findings and Order is **RESCINDED**, and that the matter is **RETURNED** to the trial level for further proceedings and a decision by the workers' compensation administrative law judge in accordance with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 4, 2022

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

JUAN GUZMAN
LAW OFFICES OF LEVIN NALBANDYAN
LAW OFFICES OF HARRIGAN POLAN KAPLAN AND BOLDY
LLARENA MURDOCK LOPEZ & AZIZAD

SAR/abs

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