WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARIE GUTIERREZ, *Applicant*

vs.

THE VONS COMPANIES, INC., Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ4503477 (LAO 0874037)
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of September 7, 2021, wherein it was found that, while employed as a claims examiner during a cumulative period ending on December 31, 2006, applicant sustained industrial injury to the spine, upper extremities, lower extremities, psyche and internal system. It was also found that the "date of injury for applicant's cumulative trauma under Labor Code section 5412 is December 31, 2006," and that "The statute of limitations does not apply." All other issues were deferred.

Defendant contends that the WCJ erred in finding that the Labor Code section 5412 date of injury was December 31, 2006, and that applicant's claim was not barred by the statute of limitations. Defendant argues that deposition testimony from 2008 shows that applicant knew that her disability was industrial prior to December 31, 2006, warranting an earlier Labor Code section 5412 date of injury and rendering her claim time barred. We have received an Answer from the applicant. The WCJ who issued the Findings and Order has retired and was thus unable to complete the report contemplated by Appeals Board Rule 10962 (Cal. Code Regs., tit. 9, § 10962.) We have received a Report and Recommendation on Petition for Reconsideration by the presiding judge (PWCJ) of the district office pursuant to Rule 10962, which states, "If the workers' compensation judge assigned to the case is unavailable, the presiding workers' compensation judge shall prepare and serve the report." In the Report, the PWCJ recommends that we grant

reconsideration, rescind the WCJ's decision and return this matter to the trial level for proceedings and decision by a new WCJ.

We agree with the PWCJ's recommendation and will thus grant reconsideration, rescind the WCJ's decision and return this matter to the trial level for further proceedings and reanalysis on all outstanding issues.

Preliminarily, we note that the Appeals Board has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.) Defendant's Petition was timely filed on September 24, 2021. However, the Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process, therefore, and in keeping with common sensibilities, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board's actual notice of the petition for reconsideration. (See *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felts)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622].) In this case, the Appeals Board received actual notice of the Petition for Reconsideration on December 27, 2021 making this decision timely.

Turning to the merits of defendant's Petition, applicant testified at trial that she was not aware in late 2004 and early 2005 that her temporary disability at the time was work related because she was told by her treating physicians that industrial causes were not the predominant cause of her psychiatric disability. (Minutes of Hearing and Summary of Evidence of October 29, 2018 hearing at p. 6.) However, it appears that applicant previously testified at a 2008 deposition that she had some level of knowledge that her disability may have been industrial. Although it appears that the deposition transcript is not in the evidentiary record, panel qualified medical evaluator psychiatrist Raymond J. Friedman summarized her deposition testimony in a report, "Additionally, the patient acknowledged on page 413 of her deposition that when she filed her claim for state disability she reported her injuries as nonindustrial even though she believed they were industrial. The patient testified in her deposition that on several occasions she either did not tell her treating doctors her injuries were work related or told them but asked them not to report the injury as industrial because she feared that if she reported an industrial injury or was given work restrictions she would be terminated." (February 3, 2014 report at p. 57.)

Similarly, internist QME Anthony G. Rodas wrote in a December 13, 2013 report:

> According to a deposition testimony, the patient did not say that her condition was industrially related to Dr. Nazari. She stated that she was going to Dr. Nosratian when she had those problems at work and then she had elevated high blood pressure. She had told Dr. Nosratian that she had lots of bad situations in her work, so her blood pressure was elevated and she did not want to make the industrial claim because she did not want to be terminated. She felt that they would give her work restrictions to not work in a stressful environment and her job was dealing with stress and she needed that job.
>
> According to her deposition testimony, she only told Dr. Tabassian and Dr. Nosratian that her symptoms were work-related, but she did not want to make a claim because she did not want to lose her job. According to the deposition testimony, it was between 2002 and 2004 that she started telling him that her symptoms were work-related. Dr. Nazari had indicated in one of his reports that her depression, anxiety, headaches and chest pain were all non-industrial. She reiterated that she did not want to claim a work-related injury because she did not want to lose her job. She was afraid that Dr. Nazari would report her condition as industrial and that was why she told him that it was non-industrial.

(December 13, 2013 report at p. 4.)

At trial, defendant attempted to impeach applicant's trial testimony with her prior deposition testimony. It appears that applicant admitted that her deposition testimony differed from the trial testimony. (Minutes of Hearing and Summary of Evidence of October 29, 2018 hearing at pp. 6-7.)

In his Opinion on Decision, the WCJ states, "Based on Applicant's testimony and the records from Dr. Nazari and Dr. Tabassian, it is found that Applicant did not have the requisite knowledge in March 2004 that she had suffered from disability due to a compensable CT work injury. Thus, the date of injury under Section 5412 is not March 2004, but is December 31, 2006 as pled, and Applicant's claim is not barred by the statute of limitations." However, the Opinion on Decision did not discuss the impeachment evidence or explicitly discuss the credibility of her trial testimony.

Labor Code section 5313 mandates that a WCJ specify "the reasons or grounds upon which the determination was made." As explained in our en banc decision in *Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), "The WCJ is … 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 [Appeals] Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful. (See *Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal. Comp. Cases 350].) For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record."

Here, because the WCJ did not discuss the impeachment evidence or explicitly discuss the applicant's credibility, he did not sufficiently give the grounds upon which his decision was made. A WCJ may cure the failure to provide the grounds for a decision by subsequently specifying the grounds in the report contemplated by Appeals Board Rule 10962. (*Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026, 1027 [writ den.]; *Hoag Memorial Hospital Presbyterian v. Workers' Comp. Appeals Bd. (Giannini)* (1997) 62 Cal.Comp.Cases 1720, 1721 [writ den.].) However, as noted *ante*, the trial WCJ was not able to file a Report in this case.

Accordingly, pursuant to Labor Code section 5906, we will rescind the decision rendered in this case, and return this case to the trial level for further proceedings and decision by a WCJ on all outstanding issues. The foregoing recitation of the issues in this case should not be interpreted as a finding that any admissions in applicant's deposition testimony, even if credited, are tantamount to knowledge of an industrial injury for purposes of Labor Code section 5412. Rather, the record must be further developed, and the issues must be reanalyzed by a new WCJ, who must then explain the basis behind their decision, including any issues regarding the credibility of applicant's trial testimony. We express no opinion on the ultimate resolution of any issue.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Order of September 7, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of September 7, 2021 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 25, 2022

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

MARIE GUTIERREZ
CHARLES EDWARD CLARK
D'ANDRE LAW LLP

DW/oo

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