WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

TYLER MOUA, *Applicant*

vs.

PORT OF STOCKTON, permissibly self-insured;
adjusted by YORK RISK SERVICES GROUP, *Defendants*

Adjudication Number: ADJ10930184, ADJ10910916
Stockton District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration on July 31, 2019 in order to further study the legal and factual issues raised therein, and to enable us to reach a just and reasoned decision. This is our Opinion and Decision after Reconsideration.

Applicant seeks reconsideration of the Opinion and Decision after Reconsideration (Decision) issued by the Workers' Compensation Appeals Board on May 14, 2019, which in pertinent part, rescinded the Findings of Fact, Award, Order (F&A) in ADJ10910916 (applicant's specific injury claim); substituted new findings of fact and orders that applicant's claim for an October 3, 2007 specific injury to his back is barred by the statute of limitations; and, ordered that applicant take nothing for his specific injury claim.[1]

Applicant contends that defendant failed to meet its burden of proving that applicant's specific injury claim is barred by the statute of limitations (Lab. Code, § 5405); that defendant misled applicant into believing that his remedy was to use his sick leave and seek state disability benefits; and, that applicant's claim was "tolled" pursuant to Labor Code[2] section 5405, subdivision (c), because defendant provided and/or paid for injury related medical treatment on March 1, 2017 (Lab. Code, § 5405(c)).

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[1] We note that the F&A was issued in both of applicant's claims, but the underlying Petition for Reconsideration filed by defendant only challenged the F&A with respect to applicant's specific injury (ADJ10910916). Therefore, the Decision addressed only that part of the F&A related to that injury.

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

Defendant filed an answer to applicant's Petition for Reconsideration.

We have reviewed the record in this case, the allegations of the Petition for Reconsideration and the Answer. It is our decision after reconsideration to rescind our prior Decision, and return this matter to the trial level for further proceedings and potentially, further development of the record consistent with this decision.

FACTS

Applicant claims two injuries while employed as a police officer by the Port of Stockton: a specific injury to his low back on October 3, 2007 (Application for Adjudication of Claim, filed June 26, 2017), and a cumulative trauma injury to his low back through January 19, 2017 (Application for Adjudication of Claim, filed July 6, 2017).[3]

Applicant started working for defendant Port of Stockton on January 24, 1999. (Minutes of Hearing and Summary of Evidence and Order of Consolidation (MOH), June 18, 2018, p. 7.)[4] Applicant testified at trial that he began experiencing pain and discomfort in his lower back after working for defendant for about one year, i.e., approximately 2000. (*Id.*, p. 6.) On October 3, 2007, applicant was on patrol (driving) when he felt a sharp pain in his left leg that went down to his toes. (MOH, p. 4.) He had been experiencing symptoms of numbness and pain in his buttock and left lower extremity, and left sided leg cramps since approximately July 2007. (*Id.*, p. 6.) These symptoms were aggravated by dressing and driving. (*Ibid.*)

Applicant sought treatment with his primary treating physician at Kaiser, who did not tell him that his injury was work-related. (*Ibid.*; see App. Exh. 1 and Def. Exh. A, Kaiser records.) Kaiser records indicate that he reported being unable to attend work since October 4, 2007. (App. Exh. 1 and Def. Exh. A, Kaiser records, pp. 9-10.) Applicant was taken off work for a herniated L4-5 disc from October 8, 2007 through December 15, 2007, and then released to "participate in a modified work program" between December 16, 2007 and February 15, 2008, including the use of "a support belt for the back to carry his gear." (*Id.*, p. 6.) This modification was continued

[3] Applicant states that his claims are not entitled to the rebuttable presumption of compensability under Labor Code section 3213.2 (the duty belt presumption). (Answer, filed July 30, 2018, p. 4.) However, defendant admitted that the Port of Stockton *is* covered by the duty belt presumption. (App. Exh. 3, December 13, 2016 letter to applicant from defendant's attorney.) Given this discrepancy in the record, and in light of our disposition, we make no legal or factual finding related to the "duty belt presumption."

[4] The WCJ found applicant to be a credible witness. (F&A, Opinion on Decision, p. 7.)

through August 17, 2010. (*Id.*, pp. 1-3.) There is no dispute that defendant received the off-work and modified return to work notices from Kaiser. (*Id.*; see MOH, pp. 4-5.)

Applicant still experiences left-sided tingling and numbness after several hours of performing his normal work duties. (MOH, pp. 5, 7.) If he does not wear the lumbar support brace, his pain is much worse. (*Ibid.*)

Applicant was not sure if there was a "correlation" between his back and leg pain and his work, and therefore did not tell his employer that his back injury was "directly related to his employment." (MOH, p. 7.) Applicant did however tell his employer that he hurt his back "and they told him to go see State Disability and use his sick leave." (*Id.*, p. 6.) Defendant did not provide applicant with a claim form. (*Id*., pp. 5, 7.)

Applicant first realized that his back injury could "give rise to an industrial injury but did confirm that it was probably in 2017." (MOH, p. 7.) The first doctor to tell applicant that his injury was work-related was either panel qualified medical evaluator (QME), Lawrence Weil, M.D., or defendant's physician, Brad Tourtlotte, M.D. (*Id.*, p. 5-6; see Joint Exhs. 1-2, reports of Lawrence Weil, M.D., June 9, 2017 and August 17, 2017.) Applicant first saw Dr. Tourtlotte on January 30, 2017 after reporting his cumulative injury in 2017; he first saw Dr. Weil on June 8, 2017, at which time he reported that he did not file a workers' compensation claim, was unfamiliar with the Workers' Compensation system, and did not recall if he reported the injury as work related. (Joint Exh. 1, p. 1.)

Applicant testified that his back got progressively better between 2007 and 2017, and that he was able to stop wearing the lumbar support belt after about four years; however, his back condition got worse again in 2017, and he started wearing the lumbar support belt again. (MOH, p. 7.) However, he was never without back pain during these years. (*Ibid.*) Applicant's treating physician told him that the 2017 injury was a recurrence of the 2007 injury. (MOH, p. 6.)

Applicant testified that although he wore a duty belt while on active duty as a military policeman between 2003 and 2009, he never had a back injury prior to 2007. (MOH, p. 5; Joint Exh. 1, pp. 2, 8 ["The patient denies any prior injury to his low back prior to 2007."].) In 2015, applicant experienced a minor heart attack at work, and was provided with a claim form for the heart injury. (MOH, p. 7; Joint Exh. 1, p. 3.) Applicant was unaware there were presumptions of compensability for heart and back injuries for police officers. (*Ibid.*)

On January 26, 2017, applicant submitted a DWC-1 Claim Form for the October 3, 2007 specific injury claim. (App. Exh. 4, DWC Claim Form, January 26, 2017.) The specific injury claim was filed on June 26, 2017. (Application for Adjudication of Claim, filed June 26, 2017.) Defendant denied the specific injury claim on February 8, 2017 based on the statute of limitations. (App. Exh. 2, Correspondence from York, February 8, 2017, p. 1.) We note that defendant accepted the cumulative injury claim. (See F&A, Opinion on Decision, p. 7.)

There are two reports from QME Dr. Weil in this record, dated June 9, 2017 and August 17, 2017. (Joint Exhs. 1-2.) Although neither party submitted the January 30, 2017 Doctor's First Report of Injury from Brad Tourtlotte, M.D. (related to the 2017 report of industrial back injury), Dr. Weil included a summary of the report, including the following:

> **He has been working for his employer for 18 years. He wears a duty belt 8-12 hours a day. He had back injury in 2007 but he treated with his PCP. He feels that his pain is due to repetitive use of duty belt.** June 2007, he was standing at work and experienced leg pain. He went to his own primary doctor, who obtained an MRI showing 14-5 herniated nucleus pulposus on left side. **He was treated conservatively and returned to work with an accommodation of allowing the use of suspender supports for his utility belt. He has had on and off low back pain for years. In last few weeks, he experienced more worsening left leg radicular pain.** He recently had a small myocardial infraction [*sic*] at work and he was treated for coronary artery disease as a presumptive industrial illness. **He is now wearing his suspender support and he has had very little low back pain or radicular pain**. Objective examination is unremarkable. He is diagnosed with lumbar radiculopathy. X-ray of the lumbar spine is recommended. **His injury/illness appears to be non-work related. Due to the radicular back pain originating from a non-occupational injury, until the facts of the previous 2007 injury can be reviewed, it will be difficulty to determine causation.** Dr. Tourtlotte is compelled to have the patient follow up with his primary care physician until causation is determined at the QME or administrative adjusted level. He is discharged on full duty. He should continue to use his suspenders. (Joint Exh. 1, pp. 3-4, emphasis added.)

Dr. Weil also summarized a February 2, 2017 correspondence from Elma Cara, M.D., which is also not in evidence, which stated that applicant "has chronic low back pain, which has been going on since 2007. The pain is exacerbated when he is wearing his duty belt and relieved with the use of the shoulder harness suspender." (Joint Exh. 1, p. 4.)

Applicant reported to Dr. Weil the following:

> **The patient explained that he was not familiar with Workmen's Compensation and saw his regular physician the day after the injury.** He then was given a note by the regular physicians who [*sic*] have time off from work for his low back/left lower extremity issue. The patient, however, did not report the injury as a Workmen's Compensation injury. **He explains that he was unfamiliar with the Workmen's Compensation system.** At that time, he does not recall if he told human resources that the injury was work related. He does not specifically recall reporting it to a supervisor**. He explained that he was in "so much pain that he just needed the injury treated" and he explained that he just needed time off. He was not clear on the legal formalities of reporting a Workmen's Compensation injury.**
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> The patient explains that he was treated at Kaiser. He received physical therapy. He received an MRI which showed a disc herniation at L4-LS which was left paracentral, and based on that he received an epidural steroid injection. Mr. Moua states that the epidural steroid injection helped quite significantly giving him approximately 80% relief. **Eventually, he was able to return to work with the accommodation of a suspender system, so that his duty belt would not weigh completely on his low back.** Since that time, the patient has not missed significant work.
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> **The patient describes a flare-up in his pain on January 19, 2017 while he was standing outside his patrol car while working as a police officer. He states at that time he did report the injury and went to an occupational medicine physician Brad Tourtlotte, M.D. who performed a Doctor's First Report of Injury. Dr. Tourtlotte, however, felt that the injury was not work related because of the previous issues that the patient had 10 years before. Mr. Moua contends, however, that the original injury was work related and he simply did not understand the Workers' Compensation system to report it, but states that all of his low back issues are directly related to his work as a police officer and wearing the equipment required.**
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> Dr. Tourtlotte indicated it will be difficult to determine causation and recommended a Qualified Medical Evaluation regarding this. **Dr. Tourtlotte did recommend that the patient continue using his suspender device for his duty belt.**
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> Since then, the patient has returned to Kaiser. He did receive a note to continue wearing the suspender device for his duty belt and continued on ibuprofen. Otherwise, no aggressive treatment took place. The patient states that he has improved with time, but is very concerned that his injury was not treated by the Workmen's Compensation doctor, as he strongly contends that the injury is related to his work. (Joint Exh. 1, pp. 1-2, emphasis added.)

In his Discussion, Dr. Weil states that in 2017, applicant had a "flare-up of a prior injury with low back pain and pain radiating down the left lower extremity," and that "the patient's issue in January is an aggravation of a preexisting lumbar radiculopathy issue." (Joint Exh. 1, pp. 5-6.) Dr. Weil also reiterates that it did not cross applicant's mind to report the October 3, 2007 "rapid onset of low back pain radiating down the left lower extremity" to his employer as an industrial injury. (*Ibid.*) At that time, he did not understand that he needed to report the injury as industrial. (*Ibid.*) Finally, Dr. Weil addressed causation and apportionment, and stated the following:

> **The key issue with regard to apportionment and causation is that the patient claims an injury in 2007 and took time off of work from October 2007. The patient explains that this was due to his job as a police officer where he was sitting in a patrol car wearing a duty belt and had a disc herniation.** Although he asked for time off and had treatment, it is unclear if there is a documented injury and the patient states that he did not report it under Workmen's Compensation, but instead treated on his own through his Kaiser physicians. **The patient states that the pain has waxed and waned since that time, although he was able to function as a police officer.** He has undergone two epidural steroid injections, a surgical consultation, and an MRI ln 2007 and again in 2011 for the injury. The patient states that he did not report the injury as Workmen's Compensation until the flare-up in January 2017.
> ...
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> Although **the patient's story does seem reasonable and credible, the defense point of view is also reasonable in this case, as the injury was not reported for approximately 10 years. It is certainly reasonable, however, that the patient's duties as a police officer and wearing a duty belt as well as chasing suspects, etc., would at least in part have a cumulative trauma effect on the low back, particularly if previously injured.** Thus regarding causation, the 2007 injury is counted as a preexisting pathology and the January 2017 date of injury recorded by Dr. Tourtlotte, whom the patient saw on January 30, 2017 and who provided a Doctors First Report of Occupational Injury, is an aggravation of the preexisting pathology.
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> Thus, **based upon the above, causation is industrial** and apportionment is 70% due to the patient's preexisting injury as well as preexisting military service.
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> **While I certainly understand that the patient denies any previous low back injuries except for his duties as a police officer, the reporting requirements are quite clear, and in this case, the patient certainly had adequate time. Again on the other hand, it is certainly reasonable that the patient had an aggravation in January 2017 because of the duties of a police officer, and as there is no clear specific injury other than the patient standing and having pain down his leg, that is essentially by a cumulative trauma mechanism.**

> In conclusion, Mr. Moua has a preexisting lumbar pathology. **The January 2017 injury is an aggravation by cumulative trauma of that preexisting pathology.** Causation is therefore in part industrial and apportionment is 70% to preexisting pathology and 30% to the current industrial injury/aggravation of January 2017. (Joint Exh. 1, pp. 8-9, emphasis added.)[5]

Dr. Weil later reviewed more than 1,000 pages of medical records. (Joint Exh. 2, p. 1.) Dr. Weil noted that the original injury of October 3, 2007 "**appeared to be a cumulative trauma** as opposed to a specific injury at that time. The patient indicated that he was not doing other activities other than driving his patrol car at the time he felt the low back pain on October 03, 2007." (*Ibid.,* emphasis added.)

> There was an L4-L5 focal disc herniation, left paracentral, and the patient received epidural steroid injections with significant relief. **The patient was able to return to work with a combination of suspender system, so that his duty belt would not weigh completely on his low back.** The patient indicated that he did well and was able to continue working. He did have a mild low back pain which waxed and waned. (Joint Exh. 2, p. 1, emphasis added.)

Dr. Weil noted, and the medical records he reviewed evidenced that that applicant's low back pain was treated in 2007, 2008, 2009, 2010, 2011, 2016 and 2017. (Joint Exh. 2, pp. 2-22.) He addressed what he considered the "key issue...with regards to apportionment and causation," i.e., "that the patient actually claimed the main injury was in 2007 and he took time off of work. **He noted that this injury in 2007 was due to his job as a police officer when he was also sitting in a patrol car wearing a duty belt and had a disc herniation**." (*Id.*, p. 23, emphasis added.) Dr. Weil reiterated that applicant's pain "waxed and waned," and that he had exacerbations over the years. (*Id.,* p. 24.) He also reiterated his prior opinion that applicant's reporting was "reasonable and credible," and that "'it is certainly reasonable, however, that **the patient's duties as a police officer and wearing a duty belt as well as chasing suspects, etc., would at least in part have a cumulative trauma effect on the low back**, particularly if previously injured.'" (*Ibid.*, emphasis added.) Dr. Weil stated that applicant's 2017 cumulative trauma back injury should be "apportioned 70% to preexisting injury and pathology and 20% to the current industrial injury of January 2017." (*Id.*, p. 24.)

[5] We note that the WCJ and/or the Appeals Board – and *not* Dr. Weil – are the fact finders as to whether applicant properly reported the 2007 back injury, or whether defendant provided proper notice of rights to applicant in 2007.

Both claims proceeded to trial on June 18, 2018, at which time the claims were consolidated for trial with ADJ10930184 designated as the master file. (MOH, June 18, 2018, p. 2.) The issues at trial included, in relevant part, temporary disability from October 11, 2007 through December 15, 2007 (all paid by EDD and subject to its lien), permanent disability, apportionment, the statute of limitations in ADJ10910916 and EDD's lien for the period October 11, 2007 through December 15, 2007. (*Id*. at pp. 2-3.)

The WCJ found that applicant sustained an industrial injury to his low back on October 3, 2007. (See F&A, pp. 2-4 related to applicant's specific injury claim, ADJ10910916.) The WCJ further found that applicant did not file an application for adjudication of claim within one year of the date of injury as required by Labor Code section 5405 (Lab. Code, § 5405), but that defendant had constructive notice of a potential injury at the time it occurred and failed to provide applicant with notice of rights and a claim form. (*Id.*) In the Opinion on Decision, the WCJ found applicant to be a credible witness, and clarified his findings related to defendant's knowledge that applicant sustained a potentially industrial injury:

> Labor Code, Section 5401(a), requires an employer to provide a claim form and notice of potential eligibility within one working day of receiving notice or knowledge of an injury under LC 5400 or LC 5402 that results in lost time beyond the employee's work shift or that results in medical treatment beyond first aid. In this case, the medical report indicated that surgery was pending. Additionally, the report took Applicant off work for one month. This was clearly medical treatment beyond first-aid and the applicant lost time beyond his work shift.
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> At this juncture, Employer knew or should have known that there may have been an industrial component to the low back injury based on the Labor Code, Section 3213.2 statutory presumption of compensability of low back claims for police officers wearing duty belts. This report, the applicant's job duties, and the statutory presumption of compensability were sufficient to put the employer on notice of a potential claim of injury. As such, the employer was required to provide Applicant with a claim from [*sic*]. The failure of the employer to provide Applicant with a claim form excuses Applicant's compliance with Labor Code, Section 5400. (F&A, Opinion on Decision, p. 6.)

The WCJ also clarified why it was not possible to determine a permanent disability rate for the October 3, 2007 specific injury: "[T]he record needs to be further developed as to what portion, if any, of the 80% apportionment attributed to the October 3, 2007 injury is attributable to non-industrial factors." (*Id.*, p. 9.)

DISCUSSION

I.

Applicant's primary contention is that defendant failed to meet its burden of proving that applicants' claim for an October 3, 2007 specific injury to his low back is barred by the statute of limitations (Lab. Code, § 5405). We agree that the burden of proof to establish a bar to applicant's claim based on the statute of limitations rests with defendant. (Lab. Code, §§ 5409, 5705; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 67, fn. 8 [50 Cal.Comp.Cases 411].) Defendant's burden is to show when the statute of limitations began to run, "starting from any and all three points designated [in Labor Code section 5405]." (*Colonial Ins. Co. v. Industrial Acc. Com. (Nickles)* (1945) 27 Cal.2d 437, 441 [10 Cal.Comp.Cases 321].) The three points designated in section 5405 are date of injury (Lab. Code, § 5405(a)); the last payment of disability indemnity (Lab. Code, § 5405 (b)); and the last date on which medical treatment benefits were furnished (Lab. Code, § 5405(c).) "If statutes of limitation are subject to conflicting interpretations, one beneficial and the other detrimental to the employee, section 3202 requires that they be construed favorably to the employee. (*Colonial Ins. Co. v. Ind. Acc. Com*. (1945) 27 Cal.2d 437 [164 P.2d 490].)" (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53].)

Here, there can be no dispute that applicant filed his claim for an October 3, 2007 specific injury on June 26, 2017, which is more than one year from any of the three points designated in section 5405. As an initial matter, applicant contends that the medical treatment defendant paid for in March 2017 revived applicant's claim pursuant to section 5405, subdivision (c). This contention is not supported by the evidence. "The purpose behind Labor Code sections 5405(b) and 5405(c) which extend the statute of limitations while defendant is providing benefits is to 'prevent a potential claimant from being misled by an employer's voluntary acts which reasonably indicate an acceptance of responsibility for the employee's injury.'" (*Khaimchaev v. L.A. County*, 2018 Cal. Wrk. Comp. P.D. LEXIS 557, quoting *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Webb)* (1977) 19 Cal.3d 329, 333 [42 Cal.Comp.Cases 302].)

Applicant filed his claim form with defendant on January 27, 2017 (see Lab. Code, § 5401(c)). (App. Exh. 4, employer receipt on January 27, 2017.) Defendant denied the claim in February 2017. (App. Exh. 2, p. 1.) On March 1, 2017, defendant issued payment to applicant's

treating physician for treatment provided to applicant in January 2017. (App. Exh. 2, p. 6.) These circumstances do not support a finding that applicant was misled by the payment into believing acceptance of the claim. Therefore, given that the March payment was made almost 10 years after the October 3, 2007 date of applicant's alleged specific injury, it cannot be relied on to revive a claim which was already time-barred. (*Khaimchaev, supra,* at *6-8, citing *Webb,* 19 Cal.3d at p. 333; *Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953; *Hartford Accident and Indemn. Co. v. Workmen's Comp. Appeals Bd.* (1971) 36 Cal.Comp.Cases 223 [writ den.]; *Records v. Waste Management* (2012) 2012 Cal.Wrk.Comp. P.D. LEXIS 96, *17.)

However, the statute of limitations may be tolled when a defendant breaches its duty to notify an injured worker of his or her workers' compensation rights. (See *Kaiser Found. Hosps. Permanente Medical Group v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57 [50 Cal.Comp.Cases 411]; *Reynolds v. Workmen's Comp. Appeals Bd. (Reynolds)* (1974) 12 Cal.3d 762 [39 Cal.Comp.Cases 768]; *California Insurance Guarantee Association v. Workers' Comp. Appeals. Bd. (Carls)* (2008) 163 Cal.App.4th 853 [73 Cal.Comp.Cases 771].)[6]

An employer is required to provide a claim form to an employee within one day of notice or knowledge of an alleged work injury. (Lab. Code, § 5401(a).) An employer can receive "notice or knowledge of an alleged work injury" via service by the injured worker or someone on his/her behalf. (Lab. Code, § 5400.) "Service" includes, "[k]nowledge of an injury, obtained from any source, on the part of an employer...or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts..." (Lab. Code, § 5402(a).) Thus, the duty of notification arises when the employer has "'...*actual or constructive knowledge* of any work-related injury...'" (*California Insurance Guarantee Association v. Workers' Comp. Appeals. Bd. (Carls)* (2008) 163 Cal.App.4th 853, 863-864, fn. 8 [73 Cal.Comp.Cases 771], quoting *Martin, supra,* 39 Cal.3d at p. 64, emphasis added in *Carls*.)

The Supreme Court summarized the employer's duty as follows: "When the employer receives either written notice or knowledge of an injury that has caused lost work time or required medical treatment, the employer is to provide the employee, within one working day, with a workers' compensation claim form and notice of potential eligibility for benefits. (§ 5401, subd. (a).)" (*Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24, 32 [70 Cal.Comp.Cases 97] (*Honeywell*).) The Supreme Court found in *Reynolds* that "when an employer

[6] The notice required is extensive and specific. (See Labor Code section 5401 and Cal. Code Regs., tit. 8, § 9767.12.)

fails to perform its statutory duty to notify an injured employee of his workers' compensation rights, and the injured employee is unaware of those rights from the date of injury through the date of the employer's breach, then the statute of limitations will be tolled until the employee receives actual knowledge that he may be entitled to benefits under the workers' compensation system." (*Martin, supra*, 39 Cal.3d at p. 63 citing to *Reynolds, supra,* 12 Cal.3d 762.) Thus, "...the remedy for breach of an employer's duty to notify is a tolling of the statute of limitation if the employee, without that tolling, is prejudiced by that breach." (*Martin, supra*, 39 Cal.3d at 64.) "An employee would be prejudiced without the tolling if he has no knowledge that his injury might be covered by workers' compensation before he receives notice from the employer." (*Ibid*.)

In the context of establishing an applicant's knowledge, "...prejudice means ignorance, and ignorance is presumed until the employee is given the requisite notice or otherwise gains actual knowledge that he [or she] may be entitled to workers' compensation." (*Carls, supra,* 163 Cal.App.4th at p. 860 citing *Martin, supra*, 39 Cal.3d at 65, 67, fn. 8.) Actual knowledge of the "...potential eligibility for a particular injury..." cannot be proven by showing an injured worker's "...general awareness of the existence of the workers' compensation system..." or "...past experience with workers' compensation..." (*Carls, supra*, 163 Cal.App.4th at 863 referencing *Reynolds, supra*, 12 Cal.3d at 729.)

Finally, "as a general rule, where a claimant asserts exemptions, exceptions, or other matters which will avoid the statute of limitations, the burden is on the claimant to produce evidence sufficient to prove such avoidance." (*Permanente Medical Group v. Workers' Comp. Appeals Bd. (Williams)* (1985) 171 Cal.App.3d 1171, 1184 [50 Cal.Comp.Cases 491].) Thus, in order to establish an equitable tolling under *Reynolds* and *Martin*, applicant had the initial, or threshold burden of proof to establish that defendant had knowledge of applicant's injury sufficient to trigger its duty of notification. If applicant succeeds, the burden of proof shifts back to defendant to establish that applicant had actual knowledge of his potential right to workers' compensation benefits more than one year prior to the filing of the application.

There is no dispute in this case that defendant never provided applicant with a claim form, and never apprised him of his workers' compensation rights following the claimed October 3, 2007 specific injury. Defendant's contention is that applicant never reported his back injury as work-related, and therefore, that applicant never served legal notice of a work injury pursuant to section 5400 and 5402. As a consequence, defendant contends that the duty to provide applicant with a

claim form and notice of his workers' compensation rights never arose. Defendant's contention lacks credibility under the circumstances of this case.

Here, applicant reported an injury on or about October 3, 2007, and defendant told him to seek state disability and use his sick leave. Defendant did not provide applicant with a claim form or any notice of his potential right to workers' compensation benefits. It is important to note that there is no requirement that an employee specifically state to an employer, "I have sustained a work-related injury." The statutory requirement is that the employee provide information of an injury "sufficient to afford opportunity to the employer to make an investigation into the facts..." (Lab. Code, § 5402(a).) In other words, and as expressed by the Supreme Court in *Carls* and *Martin*, an employer's duty of notification can arise when it receives *constructive* knowledge of a work-related injury. It is not up to the injured employee to request a claim form, or to understand his or her workers' compensation rights or benefits without notice. Instead, providing the claim form and giving the injured employee notice of his or her workers' compensation rights is the statutory duty of the employer.

In this case, and although there remains a dispute in this matter regarding whether police officers for the Port of Stockton are subject to the "duty-belt" presumption under section 3213.2, there can be no dispute that back injuries resulting from peace officers' use of a duty belt on the job are so prevalent that the legislature enacted a rebuttable presumption of compensability for designated peace officers who sustain such injuries. Applicant saw his primary care physician at Kaiser, who eventually returned him to work in December 2007 with the restriction that he wear a lumbar support belt. It is undisputed that defendant received the work restriction notices from Kaiser starting in December 2007, and that defendant was able to accommodate the use of a lumbar support belt for years. (See App. Exh. 1/Def. Exh. A, Kaiser records.)

Thus, it is not credible that defendant lacked sufficient knowledge to investigate whether applicant's back injury was a work-related injury, i.e., a duty-belt injury. Defendant had sufficient knowledge to investigate whether applicant's back injury was a work-related and/or duty-belt injury after receipt of the October 8, 2007 Kaiser notice that applicant had a herniated L4-5 disc injury, and the December 10, 2007 Kaiser notice that applicant required a "support belt for the back to carry his gear." (App. Exh. 1/Def. Exh. A, p. 6.) Defendant had a duty to provide applicant with a claim form and notice of his workers' compensation rights no later than December 2007. There is no dispute that defendant did not do so. Consequently, applicant's statute of limitations

was tolled until he received "actual knowledge that he may be entitled to benefits under the workers' compensation system." (*Martin, supra*, 39 Cal.3d at p. 63 citing to *Reynolds, supra,* 12 Cal.3d 762; see *Carls, supra,* 163 Cal.App.4th at p. 860 citing *Martin, supra*, 39 Cal.3d at 65, 67, fn. 8.).)

In this case, applicant credibly testified that he was not sure his injury was work-related, and also, that no doctor told him his injury was work-related until after he reported his cumulative trauma back injury in 2017. The first doctor to tell applicant that his injury was work-related was either Dr. Weil or defendant's physician, Dr. Tourtlotte. Applicant first saw Dr. Tourtlotte on January 30, 2017 after reporting his cumulative injury. He first saw Dr. Weil on June 8, 2017, at which time he told Dr. Weil that it did not occur to him to file a claim, and that he was unfamiliar with the Workers' Compensation system. Applicant reported that he sought treatment with his treating doctor because he "was in 'so much pain that he just needed the injury treated...'" (Joint Exh. 1, pp. 1-2.) Although the issue of the statute of limitations was expressly raised at trial, defendant failed to produce evidence or impeach applicant's credible testimony in order to rebut when applicant received actual knowledge that he might be entitled to workers' compensation benefits.

Applicant filed his Application for Adjudication of Claim for an October 3, 2007 specific injury on June 26, 2017. Given that applicant received actual knowledge that he might be entitled to workers' compensation benefits at the earliest on January 30, 2017, the June 26, 2017 Application for Adjudication was timely filed.

It is therefore our decision after reconsideration to rescind our May 14, 2019 decision, and to return this matter to the trial court for further proceedings consistent with this decision.

II.

The WCJ found that applicant sustained both a specific and a cumulative trauma injury to his lumbar spine. Of course, "[t]he number and nature of injuries suffered are questions of fact for the WCJ or the WCAB. (citations)" (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].) On the other hand, a decision of the Workers' Compensation Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274, 280-81 [39 Cal.Comp.Cases 310]; see *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)*

(2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-17, 419 [33 Cal.Comp.Cases 660].)

Here, the current record does not provide substantial evidence that applicant sustained a specific injury to his lumbar back on October 3, 2007. The record is consistent, though, that applicant experienced a "rapid onset of low back pain" on October 3, 2007 while he was on patrol; that the pain in his lumbar back has "waxed and waned" since 2007 with periodic flare-ups in 2008, 2009, 2010, 2011, 2016 and 2017 (Joint Exh. 2, pp. 2-22); that he continued to work as a police officer with the assistance of lumbar support to offset the weight of the duty belt; and, that applicant's duties as a police officer involved wearing a duty belt and chasing suspects. Indeed, Dr. Weil states that wearing a duty belt and chasing suspects would have a cumulative trauma effect on the low back.

In fact, there is no evidence in the record to explain the cause of applicant's "rapid onset of low back pain" on October 3, 2007 or the periodic flare-ups of pain *other than* the wearing of his duty belt and chasing suspects. Dr. Weil noted that the original injury of October 3, 2007 "**appeared to be a cumulative trauma as opposed to a specific injury at that time.** The patient indicated that he was not doing other activities other than driving his patrol car at the time he felt the low back pain on October 03, 2007." (Joint Exh. 2, p. 1, emphasis added.) Even so, Dr. Weil adopted the "defense point of view" that the 2007 injury was a separate, non-industrial injury because it "was not reported for approximately 10 years." (Joint Exh. 1, pp. 8-9.)

> **Although the patient's story does seem reasonable and credible, the defense point of view is also reasonable in this case, as the injury was not reported for approximately 10 years.** It is certainly reasonable, however, that the patient's duties as a police officer and wearing a duty belt as well as chasing suspects, etc., would at least in part have a cumulative trauma effect on the low back, particularly if previously injured**. Thus regarding causation, the 2007 injury is counted as a preexisting pathology and the January 2017 date of injury recorded by Dr. Tourtlotte, whom the patient saw on January 30, 2017 and who provided a Doctors First Report of Occupational Injury, is an aggravation of the preexisting pathology.**
> ...
>
> **While I certainly understand that the patient denies any previous low back injuries except for his duties as a police officer, the reporting requirements are quite clear, and in this case, the patient certainly had adequate time.** (*Ibid.*, emphasis added.)

Dr. Weil came to his conclusions *despite* applicant's "reasonable and credible" report that all his pain is associated with his job as a police officer for defendant, and that it did not cross his mind to report the October 3, 2007 "rapid onset of low back pain" to his employer as an industrial injury because he was unfamiliar with workers' compensation. In doing so, Dr. Weil exceeded his authority as a QME. This is especially poignant given that both the WCJ and this panel find that defendant *did* have sufficient knowledge to investigate whether applicant's back injury was an industrial injury as early as December 2007.

Thus, the current record does not support the findings of the WCJ that applicant sustained both a separate and a cumulative trauma injury to his lumbar back. It is therefore our decision after reconsideration to rescind the WCJ's July 6, 2018 F&A in its entirety to enable the parties to further develop the record regarding the "number and nature of injuries" sustained by applicant. (See *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 ["it is well established that the WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence"], citing *Garza v. Workmen's Comp. App. Bd*. (1970) 3 Cal.3d 312, 318; *Lundberg v. Workmen's Comp. App. Bd.* (1968) 69 Cal. 2d 436, 440.)

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Opinion and Decision after Reconsideration issued on May 14, 2019 by the Workers' Compensation Appeals Board is **RESCINDED**.

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award, Order issued by the WCJ on July 6, 2018 is **RESCINDED.**

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

DEIDRA E. LOWE, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 13, 2022

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

TYLER MOUA
LAW OFFICE OF SCOT SHOEMAKER
LAUGHLIN, FALBO, LEVY & MORESI

AJF/abs

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