WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARIA GARCIA, *Applicant*

vs.

PAE APPLIED TECHNOLOGIES LLC; ACE AMERICAN INSURANCE COMPANY, administered by ESIS, *Defendants*

Adjudication Numbers: ADJ11380772, ADJ12825012
Santa Ana 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, and for the reason stated below, we will deny reconsideration.

We agree with the WCJ that the WCAB rules permit pleadings to be amended to conform to proof. (See Cal. Code Regs., tit. 8, former § 10492, now § 10517 (eff. Jan. 1, 2020).) Moreover, the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 27, 2021

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

MARIA GARCIA
BENSON LAW
BERNAL & ROBBINS

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 OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1.

APPLICANT'S OCCUPATION:	Packing
MANNER INJURY ALLEGED:	(1) CT injury: Repetitive and continuous movements. (2) Specific injury: Struck by a forklift/falling pallets.
BODY PARTS ALLEGED:	Back, shoulders, eye vision, forearms, wrists, elbows, hands, fingers

2.

PETITIONER:	Defendant
PETITION FILED TIMELY:	Yes, on May 28, 2021
PETITION VERIFIED:	Yes
ANSWER FILED:	No

3.

FINDINGS AND ORDER DATE:	May 5, 2021
PORTIONS APPEALED:	Findings of Fact #4 that the current medical record requires further development Findings of Fact #5 that the statute of limitations tolled and it is not a bar to the claim for a specific injury

4.

PETITIONER'S CONTENTIONS:	Petitioner contends that by the Order, decision, or Award the Board acted without or in excess of its powers, the evidence does not justify the findings of fact, the findings of fact do not support the order, decision, or Award, and the Opinion and findings of fact do not support the order, decision or Award.

II.

FACTS

The applicant alleged she sustained a cumulative trauma injury from May 1, 2017 to July 3, 2018 working for PAE Applied Technologies, LLC[1] due to performing her repetitive job duties as a packer. She gradually developed mid-back, lower back, bilateral shoulder, bilateral forearms, wrists, and irritation to her eyes while performing her job duties. She reported her injury to the employer on July 12, 2018, and the employer referred her to Care First Medical

[1] The cumulative trauma injury is ADJ11380772, and the specific injury is ADJ12825012

Group[2].

The applicant selected Michael Salomon, D.C. as her primary treating physician. Dr. Salomon's initial report dated July 27, 2018, states that the applicant's job duties as a packer were to label and organize cartons, separate trash inside cartons, put trash in bags, and stack boxes on pallets. The physical demands of her job required lifting to 25 pounds, carrying, pushing, pulling, bending at the neck, prolonged standing, constant walking, bending, kneeling, stooping, squatting, twisting, turning, hand manipulation, and gasping[3]. Dr. Salomon performed a physical examination of the applicant and referred her for physical therapy. Based on the applicant's history of injury, present complaints, mechanism of injury, and clinical findings, the applicant sustained a cumulative trauma work-related injury from May 1, 2017 to July 3, 2018[4].

Despite the treating doctor's report dated July 27, 2018, the defendant denied the claim on October 10, 2018, based on a lack of substantial medical evidence.[5] The applicant's counsel then wrote to the defense counsel stating that the denial of the claim was untimely because the applicant served her claim form on ESIS on July 6, 2018, and the denial letter was dated October 10, 2018, beyond the 90 days allowed under Labor Code § 5402[6].

The parties selected QME, Dr. Leisure Yu, to examine the applicant on April 2, 2019. The report's caption lists the date of injury as "CT May 1, 2017 to July 3, 2018." Dr. Yu's report states the applicant sustained a specific injury on July 3, 2018 to her shoulders, right elbow and arm, bilateral hands and wrists, and lower back. He does not discuss the cumulative trauma injury. The applicant sustained an injury when a coworker came driving a forklift, hit pallets next to her, and hit the applicant's back[7]. The applicant reported her injury to the supervisor and went to the company office to file an injury report, but the Human Resources person was not there. The applicant continued her shift and took over-the-counter pain medication that evening and treatment with Dr. Salomon[8]. When he was deposed, Dr. Yu confirmed that, per the history, the applicant sustained a specific injury on July 3, 2018[9]. Shortly after Dr. Leisure Yu's deposition, the applicant's attorney filed a second application for adjudication of claim (ADJ12825012). The applicant's attorney used the exact date of injury that Dr. Yu referenced, July 3, 2018.

The WCJ concluded that the medical record required further development to allow the QME and the PTP to address both injuries. The WCJ also decided the statute of limitations did not bar the specific injury claim. It is to these findings that the Petitioner appeals.

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[2] Michael Salmon, D.C., July 27, 2018, pg. 2 [Applicant's Exh. 4]
[3] Michael Salmon, D.C., July 27, 2018, pg. 2 [Applicant's Exh. 4]
[4] Michael Salmon, D.C., July 27, 2018, Causation, pg. 7 [Applicant's Exh. 4]
[5] ESIS denial letter, October 10, 2018 [Defense Exh. B]
[6] Correspondence from applicant's attorney to defense counsel, October 25, 2018 [Applicant's Exh. 2]
[7] Leisure Yu, M.D., April 2, 2019, History of Injury as Related by the Subject, pg. 2 [Defense Exh. C]
[8] Leisure Yu, M.D., April 2, 2019 [Defense Exh. C]
[9] Deposition of Leisure Yu, M.D., December 3, 2019, pgs. 6 – 7 [Defense Exh. D]

III.

DISCUSSION

FURTHER DEVELOPMENT OF THE MEDICAL RECORD

According to PTP Dr. Michael Salomon's initial report of July 27, 2018, the applicant's injury was caused by cumulative trauma in the performance of her job duties as a packer from May 1, 2017 to July 3, 2018[10]. Dr. Salomon did not address the specific forklift injury claim. The QME Dr. Leisure Yu's reporting states that the applicant's complaints of pain were due to the particular forklift injury. Still, he did not comment on whether the applicant also sustained a cumulative trauma injury[11]. The discrepancy in the trial record regarding the date of injury thus requires further development. Neither of the medical reports constitutes substantial medical evidence in light of the omission dealing with the date(s) of injury[12]. Therefore, the WCJ ordered the parties to seek supplemental opinions from the two physicians who reported in the case consistent with the procedure for developing the record[13].

THE DATE OF SPECIFIC INJURY CLAIM

The applicant's attorney initially pled the applicant's injury as a cumulative trauma injury (ADJ11380772). The applicant's PTP, Dr. Salomon, found causation to the cumulative trauma date of injury due to the applicant's performance of her job duties. However, the QME, Dr. Yu, indicated the applicant sustained a specific injury involving the forklift. Shortly after the doctor's deposition, the applicant's attorney filed a new application for adjudication of claim for the specific injury (ADJ12825012).

The applicant's testimony at trial about the mechanics of her injury is similar to the history of the injury she described to Dr. Leisure Yu. However, the applicant's testimony at trial was that the forklift injury did not occur on July 3, 2018, as Dr. Yu reported. July 3, 2018 was merely the date when the applicant was in the most pain. It was when she was in so much pain that she could not stand it anymore[14]. Her symptoms had gotten worse, and she began medical treatment with Dr. Salomon.

The applicant testified that the forklift injury occurred on August 6, 2017[15]. She was sweeping her area and putting together the pallets when a coworker driving a forklift struck the pallets, hit the applicant, and caused her to fall to the ground on her left side. She put out her left arm to break her fall and injured her shoulder, back, and hand in the process of so doing. She reported the injury to her supervisor, Juan Gonzalez, but nobody was present from Human Resources to give her a claim form. At no time did the employer, Human Resources, or a supervisor refer her out for treatment[16]

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[10] Michael Salomon, D.C. dated July 27, 2018, pg. 2 [Applicant's Exh. 4]
[11] Leisure Yu, M.D. April 2, 2019, Causation, pg. 10 [Joint Exh. C]
[12] Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (1983) 34 Cal.3d 159, 164.
[13] McDuffie v. Los Angeles County Metro. Transit Auth., 67 Cal. Comp. Cases 138, 2002 Cal. Wrk. Comp. LEXIS 1218 (Cal. App. February 25, 2002)
[14] MOH/SOE, January 25, 2021,
[15] MOH/SOE, January 25, 2021,
[16] MOH/SOE, January 25, 2021, 3: 1 – 3

Based on the applicant's trial testimony, it is clear the specific forklift injury occurred on or about August 6, 2017, rather than July 3, 2018, as pled in case ADJ12825012. The application for adjudication is required to be amended to conform to the proof. Per 8 CCR 10517, "Pleadings may be amended by the Workers' Compensation Appeals Board to conform to proof." The applicant does not allege a new set of facts constituting a new date of injury. There was a simple misunderstanding about the forklift injury date, and the court can amend the date of injury to conform to proof. For example, in Bassett-McGregor v. WCAB, the court allowed the applicant to amend a claim initially pled as a specific injury to one alleging a CT injury, even though more than a year had passed between the date of injury and the date of the amended application. The rationale was that the disability alleged in the amended application arose from the same set of facts and did not allege a new and different cause of action.

To be clear, the applicant herein alleges only one specific injury date. The specific injury involved the forklift and the fallen pallets. "She was only hit by a forklift while working at PAE one time.[17]" Thus, when an application for adjudication of claim is incorrect, the law mandates that the defect be corrected so long as the fault does not prejudice the parties[18]. The original claim of specific injury gave the defendants notice of the nature of the applicant's and the extent of the claim. Dr. Yu's report details how the injury occurred, even if the date of injury is incorrect. Petitioner could not but know that there was only one injury wherein the applicant claimed to have been hit by a forklift and falling pallets.

The failure of the applicant's attorney to move to amend to conform to proof does not invalidate the applicant's entitlement to an award of workers' compensation benefits[19]. As stated in Smith v. Johns-Manville Products Corp.,[29] "[a]n incorrect allegation of injury may not constrict an injured worker's right to compensation, and the worker is entitled to adjudication upon substance rather than upon formality of statements."

STATUTE OF LIMITATIONS

On December 17, 2019, the applicant filed the second application for adjudication of claim alleging a specific injury on July 3, 2018. The applicant testified the forklift injury occurred on August 6, 2017, not July 3, 2018, since the latter date was when she was in much more pain and "couldn't stand it anymore." (MOH January 25, 20121, 4: 15 – 16.) The applicant's credible and unrebutted testimony was that at the time of injury, she reported the injury to her supervisor, Juan Gonzalez (MOH January 25, 2021, 3: 8 – 9). Neither the employer, Human Resources, nor the supervisor offered the applicant a claim form nor referred her out for medical treatment. Instead, the applicant sought treatment with Dr. Salomon through her attorney's referral (MOH January 25, 2021, 3: 2 – 5). The doctrine of equitable estoppel prevents the defendant from raising the statute of limitations defense because it knew of the applicant's injury but failed to provide the applicant with the required notices. Here, the defendant's conduct ultimately contributed to the delay in filing the application

[17] MOH/SOE, January 25, 2021, 4: 6.5 – 7
[18] SOC §15.3
[19] *See* A. & C. Ins. Co.: "Although it would have been better practice to have moved to amend to conform to proof, the failure to do so was a mere informality which does not invalidate the award. (Lab. Code § 5709.)" A. & C. Ins. Co. v. Industrial Accident Commission, 95 Cal. App. 2d 10, 14 [212 P. 2d 1, 14 Cal. Comp. Cases 262].

for adjudication of claim.

The court must liberally construe the statute of limitations to provide workers' compensation benefits to an injured worker. Labor Code Section 3202 provides, "This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Theliberal construction applies to the statute of limitations. "At the outset, it must be remembered that the provisions of the workers' compensation law dealing with the limitation of time within which proceedings for compensation may be commenced, like other parts of the law, are to be liberally construed to the end that the beneficent features thereof shall not be lost to employees, and where provisions are susceptible of an interpretation either beneficial or detrimental to an injured employee, they must be construed favorably to the employee.[20]" Based on the applicant's testimony and applying Labor Code Sections 3202 and 5405 to the present matter, the defendant did not sustain its burden of proving that the statute of limitations bars the applicant's specific injury claim.

IV.

RECOMMENDATION

Because of the foregoing, it is respectfully requested that the Petition for Reconsideration filed by Bernal and Robbins on behalf of the defendants be denied.

DATE: June 18, 2021

Richard P Brennen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

[20] Colonial Insurance Company v. Industrial Accident Commission (1945 en banc) 27 Cal. 2d 437; 10 Cal. Comp. Cas. 321; 1945 Cal LEXIS 249