WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHRIS HALE, *Applicant*

vs.

BUFFALO BILLS; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION for RELIANCE INSURANCE in liquidation; HOUSTON OILERS; TRAVELERS INSURANCE, successor to GULF INSURANCE COMPANY, *Defendants,*

Adjudication Number: ADJ11219024
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's and defendant's Petitions for Reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant and Houston Oilers/Travelers Indemnity Company (defendant) seek reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on December 31 , 2021, wherein the WCJ found in pertinent part that the Appeals Board has personal jurisdiction over the Houston Oilers and Travelers Insurance; that the Appeals Board has subject matter jurisdiction over applicant's claim for workers' compensation benefits; and that the reports from applicant's neuropsychology qualified medical examiner (QME) Barry A. Halote, Ph.D., dated December 26, 2018, and applicant's neurology QME Kenneth L. Nudleman, M.D., dated September 12, 2018, were obtained in violation of Labor Code section 4062.2 so they were not admitted into evidence.[1]

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

Applicant contends that the circumstances of this matter require two dates of injury, one pertaining to the statute of limitations and one for determining liability; that the medical-legal provisions of section 4062.2 are not applicable in this matter; and that the section 5412 date of injury is the proper date of injury for determining indemnity rates.

Defendant contends that the Appeals Board does not have "subject matter jurisdiction over the Houston Oilers," that applicant's injury claim is barred by the statute of limitations, and that the report from neurology QME Dr. Nudleman, was not admitted into evidence so it cannot be the basis for determining the date of injury.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that reconsideration be granted for the limited purpose of amending Findings of Fact number 4 to find that the "date of injury is no earlier than September 12, 2018," and that otherwise, both Petitions be denied. We did not receive an Answer from applicant or from defendant.

We have considered the allegations in the Petitions, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&O except that we will amend the F&O to defer the issues of injury arising out of and occurring in the course of employment, the section 5412 date of injury (Finding of Fact 4), and the admissibility of the reports from Dr. Nudleman and Dr. Halote (Finding of Fact 6); based thereon we will amend the Order and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his brain, nervous system, and psyche while employed by the Buffalo Bills, Denver Broncos, and Houston Oilers, as a professional football player during the period from May 1, 1989, through August 21, 1994. Applicant filed an Application for Adjudication of Claim (Application) on March 1, 2018, and the California Insurance Guarantee Association (CIGA) filed its Answer on August 29, 2018. Defendant (Houston Oilers/Travelers Indemnity Company) was joined as a party on December 28, 2018, and applicant filed an Amended Application on September 24, 2019.

The parties proceeded to trial on January 8, 2020. The matter was continued and at the October 15, 2020 trial the issues submitted for decision included: injury arising out of and in the course of employment (AOE/COE); California contract of hire formation pursuant to section 5305;

the section 5412 date of injury; whether the injury claim was barred by the section 5405 statute of limitations; whether pursuant to section 4062.2 the reports from Dr. Nudleman and Dr. Halote were invalid medical-legal evaluations; employer liability pursuant to section 5500.5; whether there was other viable insurance coverage under Insurance Code section 1063.1; and whether the State of California has jurisdiction regarding applicant's injury claim pursuant to section 3600.5(c) and (d). (See Minutes of Hearing and Summary of Evidence, October 15, 2020, pp. 3 – 4.)

DISCUSSION

Regarding defendant's argument that the Appeals Board does not have "subject matter jurisdiction over the Houston Oilers" in the Opinion on Decision, the WCJ explained:

> Applicant provided credible and unrebutted testimony that he agreed to all of his Buffalo Bills' employment contracts in California. (01/08/2020, MOE/SOE page 8, lines 10-12) … When referred to Exhibit 2, pages 9 and 10, while on cross examination, applicant testified that he signed the 1991 contract in California and was not at training camp because had torn his Achilles tendon and had surgery for it and was in California for 8 months. (01/08/2020, MOE/SOE page 12, lines 21-13). Applicant also testified that when he signed his contract with the Oilers, he signed it in Irvine, California where his agent was located. (01/08/2020, MOE/SOE page 13, lines 1-2). On the second day of trial, applicant further testified that he signed his 1991 and 1992 contracts with the Buffalo Bills in California. (10/05/2020 MOE/SOE page 5 lines 9-11).
> (F&O, pp. 6 – 7, Opinion on Decision.)

In the Report, the WCJ furthered explained:

> In *Pierce v. Washington Redskins, ACE American Insurance and Travelers*, it was determined that applicant, a professional football player, was hired in California when he agreed to employment while he and his agent were physically present in California. (*Pierce v. Washington Redskins, ACE American Insurance and Travelers* 2017 Cal.Wrk.Comp. P. D. LEXIS 244) (WCAB panel decision.) ¶ As noted in *Penrose v. Denver Gold, North Insurance Company*, applicant's hiring in California was a sufficient connection standing alone to support WCAB subject matter jurisdiction pursuant to Labor Code sections 3600.5(a) and 5305. (*Penrose v. Denver Gold, North River Insurance Company*, et al. 2018 Cal.Wrk.Comp. P.D. Lexis 290 (WCAB Panel Decision.) ¶ Defendant argues that this court does not have subject matter jurisdiction over the Houston Oilers and Travelers Insurance. However, defendant did not dispute the court's finding of subject matter jurisdiction over applicant's claim based on his contract formation with the Buffalo Bills. (Defendant's Petition for Reconsideration page 4, lines 27-28, page 5, line 1.) Defendant is under the impression that subject matter jurisdiction applies as to specific defendants. To the contrary, subject matter applies as to applicant's claim. Finding that applicant has subject matter jurisdiction based on his contract formation with the Buffalo Bills, results in subject matter jurisdiction over applicant's entire claim,

> including subsequent employers. This is consistent with the *Macklin* case where the court found subject matter jurisdiction over applicant's entire claim. (*New York Knickerbockers v. WCAB* (*Macklin*) (2015) 240 Cal.App. 4th 1229; 193 Cal. Rptr. 3d 287; 80 Cal.Comp.Cases 1141).
> (Report, p. 4.)

Based on our review of the entire record, including the Electronic Adjudication Management System (EAMS) ADJ file, we agree with the WCJ's conclusion that the Appeals Board has subject matter jurisdiction over applicant's entire claim, including "subject matter jurisdiction over the Houston Oilers."

As to the issues regarding the date of injury and the statute of limitations, pursuant to section 3208.1:

> An injury may be either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury shall be the date determined under Section 5412.
> (Lab. Code, § 3208.1.)

Section 5412 states 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 5500.5 states in part that liability for cumulative injury claims filed or asserted after January 1, 1981, shall be limited to those employers who employed the injured worker during a period of one year immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the injured worker was employed in an occupation exposing him or her to the hazards of the cumulative injury, whichever occurs first. (Lab. Code, § 5500.5(a).)

There are factual scenarios where an injured worker's last date of exposure, resulting in a cumulative injury, is before the date the worker first suffered disability and knew that the disability was caused by his or her employment under section 5412, so the last date of employment with the liable employer based on section 5500.5, would not be the same date as the date of injury under section 5412. In short, section 5500.5 is the statutory basis for determining employer liability for cumulative injuries whereas section 5412 is used for establishing the date of injury.

Based on section 5412, the statute of limitations on a cumulative injury claim does not begin to run until the worker suffers disability and has knowledge that the disability was caused by his or her employment. (*Lozano v. Workers' Comp. Appeals Bd*., (2015) 236 Cal. App. 4th 992, fn. 5 [Cal.Comp.Cases 407]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (1993) 16 Cal. App. 4th 227 [58 Cal.Comp.Cases 323]; see also *Hamilton v. Asbestos Corp*., (2000) 22 Cal.4th 1127, fn. 9.) Otherwise stated, the section 5412 date of injury is the date that the injured worker had disability and knew or should have known that the disability was caused by an industrial injury.

> [T]he 'date of injury' in latent disease cases 'must refer to a period of time rather than to 'a point in time.' (citation.) The employee is, in fact, being injured prior to the manifestation of disability...[T]he purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury.
> (*J. T. Thorp v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327, 340 - 341 [49 Cal. Comp. Cases 224].)

Further, it must be noted that before determining the proper date of injury a finding of injury AOE/COE must be made and when deciding a medical issue, such as whether the applicant sustained a cumulative injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) However, in this matter, the only medical evidence addressing the issue of whether applicant sustained a cumulative injury are the reports from applicant's QMEs Dr. Halote and Dr. Nudleman. Applicant obtained QMEs Dr. Halote and Dr. Nudleman without obtaining a panel list from the medical unit pursuant to section 4062.2 and he argues that the medical-legal provisions of section 4062.2 are not applicable in this matter. The provisions of section 4060 apply to "disputes over the compensability of any injury." Subsection (c) of section 4060 provides as follows:

> If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2
> (Lab. Code, § 4060.)

In turn, section 4062.2(a), states:

> Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.
> (Lab. Code, § 4062.)

The Appeals Board has previously held that:

> [D]isputes regarding the compensability of the alleged industrial injury must be resolved, pursuant to section 4060(c), by the procedure provided in section 4062.2 and that an evaluation regarding compensability may not be obtained pursuant to section 4064—and, if a report is obtained, it is not admissible.
> (*Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313, (panel decision); see also *Batten v. Workers' Comp. Appeals Bd*., (2015) 241 Cal. App. 4th 1009 [80 Cal. Comp. Cases 1256].)

Based thereon, we agree with the WCJ that since the claimed date of injury is September 12, 2018, the proper way to obtain a QME was to comply with sections 4060 and 4062.2. As noted above, the only medical evidence addressing the issue of whether applicant sustained a cumulative injury are the reports from Dr. Halote and Dr. Nudleman. Since, as discussed below, we are deferring the issue of admissibility of the reports, the record does not contain substantial evidence upon which a determination can be made as to whether applicant sustained a cumulative injury as claimed. However, we note that pursuant to section 4605:

> Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.
> (Lab. Code, § 4605.)

The Second District Court of Appeals has explained that:

> We agree with the Board. Section 4605 provides that an employee may "provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires." When an employee consults with a doctor at his or her own expense, in the course of seeking medical treatment, the resulting report is admissible. ¶ … Section 4605 permits the admission of a report by a consulting or attending physician, and section 4061, subdivision (i) permits the admission of an evaluation prepared by a treating physician. Neither section permits the

> admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion. (*Batten v. Workers' Comp. Appeals Bd*. (2015) 241 Cal.App.4th 1009, 1016 [80 Cal.Comp.Cases 1256, 1261].)

Here, as discussed above, the parties have not yet participated in the proper QME process so it is premature to make a final determination regarding the admissibility of the reports from Dr. Halote and Dr. Nudleman.

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Upon return of this matter, if the parties are unable to have applicant evaluated by an agreed medical examiner, then it will be appropriate to have applicant evaluated by a QME per sections 4060 and 4062.2, as discussed above, or in the alternative, the parties may request that the WCJ appoint a regular physician. (Lab. Code § 5701.)

Finally, we agree with the WCJ that, applicant's argument as to what date of injury should be used to determine the proper compensability rate, "is premature at this time as compensability has not been found." (Report, p. 9.)

Accordingly, we affirm the F&O except that we amend the F&O to defer the issues of injury arising out of and occurring in the course of employment, the section 5412 date of injury, and the admissibility of the reports from Dr. Nudleman and Dr. Halote; based thereon we amend the Order, and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of December 26, 2018, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

> 4. The issues of injury arising out of and occurring in the course of employment and the Labor Code section 5412 date of injury are deferred.

6. The admissibility of applicant's Exhibits 5 and 6 is deferred.

* * *

ORDER

* * *

b. The issue of admitting applicant's Exhibits 5 and 6 into the record is deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 16, 2022

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

CHRIS HALE
MIX & NAMMANY
GUILFORD SARVAS & CARBONARA
DIMACULANGAN & ASSOCIATES

TLH/mc

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