WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VENITA DAVISON, *Applicant*

vs.

UNIVERSITY OF CALIFORNIA LOS ANGELES (UCLA) HEALTH, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ10826263

Marina Del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Defendant seeks reconsideration of the Findings of Fact, Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on September 21, 2020, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her bilateral knees, low back, and upper extremities/hands and elbows; that applicant was temporarily totally disabled for the period from December 2, 2015, through August 8, 2018; and that applicant's injury claim was not barred by the statute of limitations.

Defendant contends that applicant's injury claim is barred by the statute of limitations; that the medical reporting of treating physician Behnam Sam Tabibian, M.D., is not substantial medical evidence; and that applicant is not entitled to temporary disability indemnity benefits.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be granted and that a decision be issued finding that applicant's claim is barred by the Labor Code section 5405 limitations period. We did not receive an Answer from applicant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her upper extremities, low back, and bilateral knees, while employed by defendant as an Administrative Specialist, during the period from February 1, 2011, through December 2, 2015. The Application for Adjudication of Claim was filed on April 12, 2017, and it was amended on May 8, 2017.

Orthopedic qualified medical examiner (QME) Lincoln S. Yee, M.D., evaluated applicant on March 29, 2018. Dr. Yee examined applicant, took a history, and reviewed the extensive medical record (approximately 10,900 pages). (See Def. Exh. G, Lincoln S. Yee, M.D., March 29, 2018, p. 2; pp. 13 - 86.) Regarding the cause of applicant's orthopedic condition, Dr. Yee explained:

> It is within a reasonable degree of medical probability that the work cumulative trauma caused/aggravated the patient's condition(s)/impairment with respect to her hands/elbows; however, there is not sufficient evidence that patient has exceeded the threshold of injury for her cervical, lumbar spine, shoulders, nor knees from her work as an administrative assistant. Patient had history of motor vehicle accident in October 2007, which had resulted in low back and right knee symptoms. Radiographic study taken [sic] on November 2, 2007, had demonstrated severe degenerative disease to both knees. Dr. Flanagan, an orthopedist, had diagnosed the knee osteoarthritis on December 19, 2008. Dr. Jeffrey Wang had diagnosed lumbar L5-S1 disc with referral to pain management on April 28, 2009, which followed with multiple lumbar epidural injections. These diagnoses [sic] and treatment pre-dates patient's employment of February 1, 2011. Job analysis would be helpful if [sic] there is further controversy of this issue.
> (Def. Exh. G, p. 89.)

The parties proceeded to trial on April 30, 2019; their stipulations included, "The employer has furnished some medical treatment. The primary treating physician is Dr. Behnam Sam Tabibian," and the matter was continued. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 30, 2019., p. 2) Applicant testified at the June 26, 2019, trial and the matter was continued for further testimony. The WCJ's summary of applicant's testimony, relevant to the issues addressed herein, indicates applicant testified that:

> Her last day of work was in November of 2015. She did have a pre-employment physical when she was hired in December 2010. Her limitations at that time were no bending, no crawling, no kneeling, no lifting over 25 pounds, no stairs, and no carrying heavy weights due to problems with her back and knees. She passed the pre-employment examination.
> (MOH/SOE, June 26, 2019, p. 3.)

> At the time she began her employment, she did not have any problems with her knees. She later developed symptoms in her left knee. She believes that her duties caused the symptoms that she experienced … She did not have any symptoms in her right knee when she began her employment with UCLA. The right knee symptoms began after her employment.
> (MOH/SOE, June 26, 2019, p. 5.)

> She did not have any back pain prior to her employment with UCLA. Afterward she had back pain which was caused by the physical demands of her job and the constant exacerbation and stress and strain. … Her hands and wrists, she did not have any prior symptoms before working for UCLA. After she began working for UCLA, she did have symptoms in her hands and wrists.
> (MOH/SOE, June 26, 2019, p. 6.)

At the October 15, 2019, trial applicant testified, and the summary of her testimony includes:

> The Applicant testified that she reported the injury to the following people, Tiesha Booker, who was her supervisor, and she believed she was the administrative manager or some other type of manager role. She also complained to Diane Carter, who was the director of administration and financial services. She also complained to Ellen Polack, who later became the director of administrative and financial services or staff. Heather Whorley replaced Tiesha Booker and became her direct supervisor. She reported her complaints to her, as well. Audrey Latera was Human Resources director. She reported her complaints to her. She doesn't know Margaret Heath. She also reported her complaints to Rhonda Williams, who was in employee relations. She reported her complaints to Ariel, who took over from Mark Briskie in employee relations.
> (MOH/SOE, October 15, 2019, p. 2.)

> She also went to a pre-employment physical. At the time of the physical, she did not have any back complaints. ¶ … She had a prior motor vehicle accident in either 2006 or 2007. At that time, she believes she injured her back and her right knee. She's not sure it was the right knee. The treatment for her back and right knee was extensive, pretty much the same as her back. ¶ … She was taken off work by a doctor at UCLA Medical Group whose name she believes is Dr. Bindra. This was in 2015. ¶ She received some documentation, which she gave to her employer, but she was not provided with a claim form when she gave them the documentation. She was not informed that she had workers' compensation rights when she provided them with the documentation. When she complained to other people, they did not advise her of her workers' compensation benefits. She was never advised of workers' compensation benefits.
> (MOH/SOE, October 15, 2019, p. 3.)

> Liberty Mutual sent her to a doctor, and a doctor told her it was related to her employment. She saw several doctors, and more than one told her that it was work related, but she doesn't remember the doctors' names. ¶ When she reported her complaints to the various people, she did not tell them it was work related. It was hard to say when she figured out that she had a work-related injury. She said at UCLA Medical, she was informed that it was work related, but she's not sure when, because it has been a while. It could have been in June or July of 2015. ¶ In November 2015, she went off work. In response to why she waited until 2017, she said that the doctors never said it was work related. They said it was an exacerbation. That's why she was using her own resources and her time to get better.
> (MOH/SOE, October 15, 2019, p. 4)

> Applicant testified that several doctors at UCLA Medical Group told her she may have a work-related condition. … ¶ She was involved in a motor vehicle accident in 2006 or 2007. … ¶ She believes she injured her right knee and also her upper back. She stated it was her back, period. Then she went on to say that it was the low spine and mid spine. She also injured her neck, shoulders, right side, and right knee as a result of an auto accident. She doesn't recall if the left knee was injured because of the auto accident. …
> (MOH/SOE, October 15, 2019, p. 5.)

After applicant's testimony was concluded the matter was submitted for decision. The issues submitted for decision included injury AOE/COE, temporary disability/permanent and stationary date, permanent disability/apportionment, and the statute of limitations. (MOH/SOE, April 30, 2019, pp. 2 – 3.)

DISCUSSION

Pursuant to Labor Code section 5405:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
> (a) The date of injury.
> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.
> (Lab. Code, § 5405.)[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.)

"[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].

Section 5401(a) states in part:

> (a) Within one working day of receiving notice or knowledge of injury under Section 5400 or 5402, which injury results in lost time beyond the employee's work shift at the time of injury or which results in medical treatment beyond first aid, the employer shall provide, personally or by first-class mail, a claim form and a notice of potential eligibility for benefits under this division to the injured employee, or in the case of death, to his or her dependents. …
> (Lab. Code, § 5401.)

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

If an employer does not provide the required claim form, the applicable statute of limitations is tolled. (*Reynolds v. Workmen's Comp. Appeals Bd.*, (1974) 12 Cal. 3d 726, 730 [39 Cal.Comp.Cases 768.)

Based on the provisions of section 5405, relevant to this matter, the one-year limitations period starts on the date of injury or the last date that any benefits were provided. Our review of the trial record indicates that applicant's testimony pertaining to the section 5412 date of injury is inconsistent. She testified that her doctors told her that her symptoms were caused by her work, and she testified that the doctors never said her condition was work related. (MOH/SOE, October 15, 2019, p. 4.) Also, applicant testified that she did not have any problems with her back or knees at the time she started her employment with defendant and she testified that she injured her back and right knee in a motor vehicle accident in 2006 or 2007 causing limitations, at the time she started her employment with defendant, of no bending, no crawling, no kneeling, no lifting over 25 pounds, no stairs, and no carrying heavy weights due to problems with her back and knees. (MOH/SOE, June 26, 2019, p. 3 and pp. 5 - 6.) Due to these inconsistencies, we are not able determine the actual date of injury as defined by section 5412; and in turn we cannot determine the beginning of the section 5405 one-year limitations period. Additionally, we note the parties stipulated that, "The employer has furnished some medical treatment," (MOH/SOE, April 30, 2019., p. 2), but there is no evidence stating the last date on which those medical benefits were provided. It is also important to note that the stipulation is inconsistent with applicant's testimony that, "She was never provided or offered medical treatment." (MOH/SOE, June 26, 2019, p. 5.) Again, there is no factual basis for determining the start date of the section 5405 limitations period.

Regarding the issue of whether the statute of limitations was tolled because the employer failed to provide applicant a claim form (*Reynolds v. Workmen's Comp. Appeals Bd.*, *supra*) applicant testified that when she reported her complaints to the various people as noted above, she did not tell them it was work related. (MOH/SOE, October 15, 2019, pp. 2 and 4.) Further, although applicant testified that she gave the employer some documentation that she received from the UCLA Medical Group, there is no evidence as to what the UCLA Medical Group documents were, whether they indicated applicant had an industrial injury, or when they were given to the employer. Therefore, we do not know if or when defendant was required to provide applicant a claim form so we cannot determine if the limitations period was tolled. (Lab. Code, § 5401.)

Since the trial record does not contain substantial evidence pertaining to the issue of whether applicant's injury claim is barred by the statute of limitations, at this time any additional issues are moot and will not be addressed. It has long been established that 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 submitted for decision. (Lab. Code §§ 5701, 5906; *Kuykendall v. Workers' Comp. Appeals Bd.,* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264] *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].) Under the circumstances of this matter, we recommend that the WCJ schedule a status conference in order to help the parties determine how best to further develop the record. Also, it appears to be in the parties' interest, and we recommend, that the parties have applicant evaluated by an agreed medical examiner or in the alternative, to request that the WCJ appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 21, 2020, Findings of Fact, Award and Order is **RESCINDED,** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 7, 2023

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

VENITA DAVIDSON
JIN LAW FIRM
WAI & CONNOR

TLH/mc

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