WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JANETH RODRIGUEZ, ***Applicant***

vs.

K&N ENGINEERING; ARCH INDEMNITY,
administered by GALLAGHER BASSETT SERVICES, ***Defendants***

Adjudication Number: ADJ17812320
Riverside District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER 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, except as noted below, and the reasons stated below, we will grant reconsideration, amend the WCJ's decision in order to properly note the jurisdictional findings in Finding of Fact number 1, including injury arising out of and occurring in the course of employment (AOE/COE) to the cervical spine and left shoulder. We otherwise affirm the January 19, 2024 Findings and Award. Pursuant to our authority, we accept defendant's supplemental pleading. (Cal. Code Regs., tit. 8, § 10964.)

Because we are granting to amend Findings of Fact number 1, we do not adopt or incorporate the Report to the extent that it recommends denial of reconsideration.

Defendant does not dispute the WCJ's finding of industrial cumulative injury in its Petition for Reconsideration. The panel qualified medical examiner (PQME), Kelly Keough, D.C., found injury to the cervical spine and left shoulder (Joint Exhibit 2, at pp. 3-4) and recommended further medical work up for additional body parts. (Joint Exhibit 1, at p. 2.) Therefore, we will amend

Findings of Fact number 1 to include the jurisdictional stipulations entered into at trial, to find industrial injury to the cervical spine and left shoulder, and to defer all other body parts.

As relevant here, Labor Code[1] section 3600(a)(10) states, that:

> Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
> (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
> (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
> (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
> (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.
>
> (Lab. Code, § 3600(a)(10).)

Despite defendant's apparent attempt to shift the burden of proof (Petition for Reconsideration, at p. 5:19), the initial burden in asserting a post-termination bar to compensation, an affirmative defense, rests with the defendant, who must establish that the claim for compensation was filed after a notice of termination or layoff, including voluntary layoff, and that the claim is for an injury occurring prior to the time of notice of termination or layoff. (Lab. Code, § 5705.) Defendant must meet this burden by preponderance of the evidence, and this requires "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code, § 3202.5.)

In this case, applicant claims a cumulative injury. Section 5412 sets the date of injury for cumulative injury and occupational disease cases, as "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.) Thus, to determine the date of applicant's cumulative injury, there must exist a concurrence of disability and knowledge that it was caused by employment. Disability means either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers'*

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

Comp. Appeals Bd. (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579] (*Rodarte*).) Knowledge requires more than an uninformed belief. "Whether an employee knew or should have known his disability was industrially caused is a question of fact." (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53] (*Johnson*).) While an employer's burden of proving the statute of limitations has run can be met by presenting medical evidence that an injured worker was informed a disability was industrially caused, "[t]his burden is not sustained merely by a showing that the employee knew he had some symptoms." (*Id.* at p. 55.) The fact that a worker had knowledge of disease pathology does not necessarily mean that they knew, or should have known, that they had disability caused by the employment. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631]; *Rodarte, supra,* 119 Cal.App.4th at p. 998.) An injured worker's suspicion that an injury is work-related is not sufficient to establish the date of injury on a cumulative injury. An injured worker will not be charged with knowledge that a disability is job-related without medical advice to that effect, unless given "the nature of the disability and the applicant's training, intelligence and qualifications," he or she should have recognized the relationship. (*Johnson, supra*, 163 Cal.App.3d at p. 473.) This is because "the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acc. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].) Moreover, it is employer's burden of proof that the employee knew or should have known their disability was industrially caused. (*Johnson, supra*, at p. 471, citing C*hambers v. Workers' Comp. Appeals Bd., supra*, 69 Cal. 2d at p. 559.) That burden is not sustained merely by a showing that the employee knew they had symptoms. (*Johnson, supra*, at p. 471, citing *Chambers, supra*, at p. 559.)

The December 21, 2023 Minutes of Hearing and Summary of Evidence (MOH/SOE) summarize the totality of applicant's trial testimony as follows:

> DIRECT EXAMINATION BY MR. BARONIAN:
>
> She was hired by K&N Engineering on September 19, 2005, and started as a receiving and shipping clerk for about three years. Her shift then changed, and she went to the packaging of kits, and she did that for almost four years.
>
> Applicant became pregnant and went off work and returned as a receiving clerk until the end of her employment.

Applicant did experience pain that developed while working for this employer.

Her job duties as a receiving clerk included unloading UPS and FedEx boxes by hand with only the help of the driver. These boxes weighed from 10 to 20 lbs all the way to 40, 50 and 20 up to 60 lbs. Applicant would load a pallet and then move the pallet to her area and check the products and verified them with her computer.

Applicant would pick up these boxes from the floor to the pallet. These boxes contained metal products consisting of washers, nuts, bolts, and brackets. Other equipment that she used included driving the forklift, and she would steer with her left hand and would have to rotate her hand rapidly in a circular motion in order to turn the forklift left or right.

This caused pain to her outer wrist, and it traveled to her inner forearm. She also experienced pain to the left shoulder and neck.

She also experienced pain in the right arm, fingers and her wrist. She noticed that her grip in her right hand was weak.

Applicant did not report to management, but she told Teresa Louch that she had lots of work. She experienced pain in her arm and was tired, but did not report this. Applicant was not offered a claim form when she said that. The employer mentioned that she should just work slower.

Applicant mentioned that she reported her pain to her "TC" which stood for Team Coordinator. This person was Rosa Gonzalez, and applicant told her about the pain. She did not receive a claim form."

Applicant was concerned that if she reported an injury, that she would not work and would be sent home, because there was no modified duties, and that she needed to pay her bills.

Applicant worked until the end which was on February 7, [2023][2]. Applicant was called to the front and received a check, and she was advised there was no longer a position available.

Applicant did see the state panel qualified medical examiner by the name of Dr. Keough. Applicant described her condition and her problems. She acknowledged that was the first time she was advised that the injury was work related.

[2] We correct the clerical error in the WCJ's summary of evidence (MOH/SOE, 4/21/23, at p. 5:13-14), noting the date applicant was laid off was February 7, 20**23** not February 7, 20**03**. This is consistent with defendant's statement of facts (Petition for Reconsideration, at p. 3:21-22) and the WCJ's Findings of Fact number 3.

CROSS-EXAMINATION BY MS. HUNBERGER:

Applicant recalled having her deposition taken.

Defense counsel asked questions regarding Rosa Gonzalez and about the pain that she experienced and referenced Pages 43 and 44. Defense counsel highlighted that in the depo, she did not advise Ms. Gonzalez about the pain. The witness clarified that she did not make a report, but merely stated she was having pain and needed help.

Defense counsel inquired about time off due to pain. Applicant said the form does not state a reason, but that she did use PTO as well as non paid time because of the pain that she experienced from work.

She did not tell management that she was off due to pain when she used PTO. Defense counsel inquired about training pertaining to work injuries, and applicant acknowledged receiving paperwork pertaining to that training. She received it monthly and was advised to read those documents on her own time. Applicant acknowledged receipt of the handbook with updates and was aware of the contents, and she was advised again to read it on her own time.

Defense counsel inquired about her signature and signing receipt for the training documents about reporting claims, and applicant stated that she did receive the documents, but she had to review them by herself.

Defense counsel referenced Exhibit B, Page 47, regarding the onset of pain in her left arm that happened more than a year ago and could be as far as five years old. This occurred after she started working in the receiving department and when she was lifting boxes.

Regarding the right arm, the onset was approximately four to five years ago. And again, it was from lifting boxes as well as driving the forklift.

The applicant confirmed making the connection between the left arm pain and work, as well as the right arm connection between the pain and work.

Applicant's left finger began five years ago, and she believes it was from fixing pallets that were eight feet in size. She would push the boxes with her fingers to the top and that caused the pain. She does experience pain in the right fingers, and it is painful, but she is unable to recall if it's work related.

Regarding the neck, she felt it beginning six years ago when she first started using the computer at work, and she would have to glare down at the screen. She made a connection that the neck was related to work. She said her company had group stretching sessions, and that she did the stretching by herself.

Applicant has left finger pain, and she changed her technique at work because of the pain. Defense counsel made reference to the deposition regarding her lifting boxes of 50 lbs causing pain, and the applicant agreed that the boxes did cause left finger pain.

Applicant would try different techniques to do her work, which included pushing the boxes without the use of her fingers.

Regarding her neck, she changed the way she used the computer by placing a box underneath the screen to raise the screen up.

Applicant confirmed that the right elbow was painful, and she felt it was due to the forklift driving. The onset of her elbow issues was years before she was laid off.

The right fingers began more than a year prior to the layoff. She felt it was due to lifting boxes. She changed her duties slightly and asked for help.

Applicant confirmed using PTO and unpaid time for all of the body parts mentioned which were the neck, left arm, right arm, right shoulder, right fingers, and left fingers.

Defense counsel inquired about the termination and asked if her resignation was voluntary. Applicant confirmed that she did not go into the office to resign. She was called into the office and advised that there was no more work. Applicant received a check and was told that there was no longer a position available. Applicant did not want to leave work. Applicant confirmed receiving severance pay for the years of service, and not because she voluntarily quit.

REDIRECT EXAMINATION BY MR. BARONIAN:

Applicant confirmed Spanish is her first language, and that English is her second language. She prefers reading documents in Spanish. She confirmed the handbook received from the employer is only in English.

(MOH/SOE, 4/21/23, at pp. 4:12 -7:20.)

Defendant relies heavily on applicant's trial testimony that she made a "connection" between her symptoms and work. However, it was defendant's burden to establish that applicant's training, intelligence and qualifications were sufficient to foster the requisite knowledge pursuant to section 5412. Defendant did not meet that burden. During her deposition, applicant testified that she had never filed a workers' compensation claim and that no one from management discuss with her how to file a workers' compensation claim or tell her how to report an injury. (Deposition of applicant, 9/27/23, at pp. 44:24 - 45:8, defendant's Exhibit F.) Despite evidence that she signed

employer training material in English, she testified at trial that Spanish was her first language. (MOH/SOE, 4/21/23, at p. 7:18-19.) On the other hand, applicant reported pain to a team coordinator and did not receive a claim form. (MOH/SOE, 4/21/23, at p. 5:8-10.) Based on this record, we do not find the requisite knowledge pursuant to section 5412. Likewise, we do not find applicant suffered compensable temporary disability prior to that found by the WCJ. While there is trial testimony that applicant used PTO and unpaid time due to her pain, there is no evidence in the record as to when this occurred.

Finally, we address the assertion defendant makes in its supplemental pleading that the WCJ made a "new" finding that applicant was not temporarily disabled. The WCJ addressed the issue of disability in Findings of Fact number 5 and in the Opinion on Decision. The issue of compensable disability is a component of a section 5412 analysis, which in turn is a component of the post-termination defense, pursuant to section 3600(a)(10), an raised by defendant. Therefore, there was no "new" finding made by the WCJ in the Report.

Accordingly, we agree with the WCJ that applicant's claim is not barred under sections 3600(a)(10) or 5405. However, as noted above, we will grant reconsideration, amend the WCJ's decision in order to include the jurisdictional findings and to find industrial injury to the cervical spine and left shoulder. We otherwise affirm the January 19, 2024 Findings and Award and return this matter to the trial level for further development of the record.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of January 19, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the January 19, 2024 Findings and Award is **AFFIRMED, EXCEPT** that it is **AMENDED,** as provided below, and that this matter is **RETURNED** to the trial level.

FINDINGS OF FACT

1. Janeth Rodriguez, born [], while employed during the period of September 19, 2005 through the February 7, 2023, as a receiver, at Riverside, California, by K&N Engineering, sustained injury arising out of and occurring in the course of employment (AOE/COE) to the cervical spine and left shoulder. The issue of causation for all other body parts claimed is deferred.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 8, 2024

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

JANETH RODRIGUEZ
KJT LAW GROUP, LLC
SION & ASSOCIATES

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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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REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Date of Injury:	9/19/2005-2/7/2023
Age on DOI:	41
Occupation:	Receiver
Parts of Body Injured:	Hands, Wrists, Left Shoulder and Neck
Identity of Petitioner:	Defendant
Timeliness:	The petition was timely filed on 2/7/2024
Verification:	The petition was verified
Date of Findings & Award:	January 19, 2024
Petitioner's Contentions:	Petitioner contends the A. The award was without or in excess of its powers because the judge misinterpreted the law and misapplied the law; B. The evidence does not justify the Findings of Fact.

Petitioner, defendant, by and through its attorney of record, has filed a timely verified Petition for Reconsideration on February 7, 2024, challenging the decision issued on January 19, 2024.

Applicant, the Respondent, has not filed an Answer at the time this report was filed.

In its Petition for Reconsideration, Petitioner argues the decision was based on erroneous interpretation of the law, misapplication of the law, and the evidence did not justify the Findings of Fact. Petitioner asserts the claim should have been barred by the post-termination and statute of limitation defenses.

It is recommended that reconsideration be denied.

II
FACTS AND PROCEDURAL HISTORY

The facts as stated in Petitioner's Statement of Facts (Petition for Reconsideration dated 2/7/24, pp. 3-4) are accurate and undisputed. Janeth Rodriguez ("applicant") was hired by K&N Engineering on September 19, 2005, in the position of a shipping and receiving clerk. On February 7, 2023 the applicant was laid off. On June 13, 2023, she filed the subject claim. On September 6, 2023, defendant denied the claim.

On September 20, 2023, the applicant was evaluated by PQME D.C. Kelly Keough. She told the panel evaluator that her job duties started causing her pain in 2015, gradually worsened and in 2019 she told her team coordinator that it was hard for her to lift packages because she was experiencing pain, so the company provided her with help and modified her job duties. The PQME

opined that the injury was compensable but deferred to the trier-of-fact as to the final acceptance of causation because of the post-termination defense.

Trial was held on December 19, 2023, and based on the evidence and applicant's credible testimony, the court found applicant's cumulative trauma injury was compensable.

III
DISCUSSION

A. Case is not barred by the affirmative defenses because applicant did not have a disability as defined by Labor Code section 5412.

There is no disagreement as to the applicable law which Defendant has correctly stated starting on page 5 of the Statement of the Law within the Petition for Reconsideration. Petitioner is aggrieved of how the court decided in favor of the applicant after applying the facts and evidence to the law. Petitioner asserts applicant knew or should have known that her pain and condition were due to work but never notified a supervisor or filed a claim until after she was laid off.

The court highlights that defendant failed to prove all elements of the affirmative defense; that is, applicant's claim should not be barred because applicant must have both disability and knowledge. There was no evidence that the applicant sustained a disability for the claimed injury as required in Labor Code section 5412. There was no evidence that applicant sustained a disability as either temporary disability or permanent disability while she worked for this employer.

In *State Compensation Ins. Fund v. WCAB (Monica Rodarte)*, (2004) 69 C.C.C. 579 at 584, the court concluded:

> Either compensable temporary disability or permanent disability is required to satisfy section 5412. Medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion.

In the recent case of *Chamorro v. Saputo Cheese United States, Inc.*, 2022 Cal. Wrk. Comp. P.D. LEXIS 135, the WCAB expanded the definition of disability to mean "new or increased medical treatment." And in this case, there was no evidence to support that applicant had such medical treatment.

Petitioner's asserts that the court misinterpreted the California Supreme Court's case of *Freuhauf Corp. v. Workmen's Comp. Appeals Bd. (Stansbury)* (1968) 68 Cal.3d 569 [33 Cal. Comp. Cases 300, 306. The undersigned cited this case to illustrate that the applicant may have had a belief that work contributed to her disability, but her belief was not confirmed until after she was laid off and obtained a medical evaluation by the panel QME doctor, Dr. Keough on September 27, 2023. The submitted evidence supports that the applicant did not receive medical treatment prior to the February 7, 2023 lay off.

Petitioner's second argument is that the court omitted and misapplied the law. (Petition for Reconsideration, pp. 8-9.) Petitioner states the correct analysis is to first determine the nature of the disability and then consider applicant's training, intelligence, and qualification. (*Id*., at 9:4-8.) The applicant did not have a disability according to Labor Code section 5412 as discussed above, and the court determined the cumulative trauma was compensable as supported by Dr. Keough. (Opinion on Decision dated 1/19/24, p. 2.) Applicant's knowledge occurred when applicant was examined by Dr. Keough on September 27, 2023. And before the applicant filed her claim for workers' compensation in June of 2023, she did not have any particular specialized training in workers' compensation. In fact, applicant's knowledge of workers' compensation was limited. Applicant testified that her native language was Spanish, and she preferred reading in Spanish; however, K&N Engineering's employment forms, notices and documents were in English, and she was told to review the documents on her own time. (MOH/SOE Trial, 12/21/2023, p. 6:2-9; p. 7:18-20.)

IV
RECOMMENDATION

It is respectfully recommended that Defendant's Petition for Reconsideration be denied.

DATE: February 20, 2024

Respectfully submitted,

Eric Yee
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE