WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

THOMAS DOUGHERTY, *Applicant*

vs.

H.L. MOE CO., INC.; AIG, adjusted by GALLAGHER BASSETT; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA; *Defendants*

Adjudication Number: ADJ11248992
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact, Order & Award ("F&A") issued on February 7, 2024, wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained a compensable, work-related cumulative trauma injury with a February 18, 2020 date of injury. Applicant contends the WCJ erred in determining the date of injury, and that the correct date of injury was instead July 18, 2017.

We did not receive an Answer. We did receive a Report and Recommendation on Petition for Reconsideration from the WCJ, recommending that reconsideration be denied.

We have reviewed the Petition and the Report, as well as the record. For the reasons discussed below, we will grant reconsideration and amend the F&A to reflect a July 18, 2017 date of injury.

FACTUAL BACKGROUND

Applicant Thomas Dougherty filed an Application for Adjudication, alleging a cumulative trauma injury to the hand and wrist sustained from July 1, 1990 to July 18, 2017, while employed by defendant as a plumber.

The matter proceeded to trial on June 15, 2023, on the issues of (1) whether the injury arose out of and in the course of employment (AOE/COE) and (2) the date of injury pursuant to Labor

Code[1] sections 5412 and 5500.5. (Minutes of Hearing / Summary of Evidence (MOH/SOE), at p. 2.) A joint exhibit list was submitted, and the matter was submitted without testimony. (*Id.* at pp. 2–3.)

On September 20, 2023, the WCJ issued his first Findings of Fact, Order and Award ("Original F&A"), finding that applicant sustained a work-related cumulative trauma injury, with an injury date of February 18, 2020. (Original F&A, at p. 2.) The attached Opinion on Decision makes clear that the WCJ made his conclusion regarding the date of injury based upon section 5500.5. (Opinion on Decision, at pp. 2–3.)

Applicant filed a Petition for Reconsideration, asserting that the WCJ erred and that the correct date of injury was July 18, 2017, the date of the first QME Report in the case, based upon section 5412. In response, the WCJ rescinded the Original F&A, and set the matter for a further hearing on November 14, 2023. (Order Rescinding Decision, Vacating Submission and Notice of Hearing (Rule 10961), at p. 1.)

After soliciting further argument at the November 14, 2023 hearing, the WCJ took the matter under submission again, ultimately issuing the instant F&A on February 7, 2024. The F&A leaves unchanged the WCJ's prior determination that the date of injury was February 18, 2020. (F&A, at p. 2.)

The instant Petition for Reconsideration followed.

DISCUSSION

For cumulative trauma injures, section 5412 sets the date of injury 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." Whether an employee knew or should have known the employee's disability was industrially related is generally a question of fact to be determined by the trier of fact, i.e., the WCJ. (*Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33 Cal.Comp.Cases 722]; *City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53]; *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104].) If the WCJ's findings are supported by substantial evidence, including reasonable inferences from

[1] Further references are to the Labor Code unless otherwise specified.

the evidence, the decision will be upheld. (*Alford v. Industrial Accident Com.* (1946) 28 Cal.2d 198 [11 Cal.Comp.Cases 127].)

Knowledge of industrial origin may constitute either actual knowledge or reasonably inferred knowledge. *(Johnson, supra,* 163 Cal.App.3d at 473 [holding that knowledge of industrial origin generally requires medical advice unless case specific facts indicate otherwise].) As regards applicant's knowledge that his injury was work-related, "[t]he burden of proving that the employee knew or should have known rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms." (*Id.*, at p. 471.) Generally, "an applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*Id.*, at p. 473.)

Section 5500.5, subdivision (a), meanwhile, limits *liability* for cumulative trauma injury claims filed after January 1, 1981 to "those employers who employed the employee 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 employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first." (§ 5550.5(a) (emphasis added).)

Here, we agree with applicant that the WCJ erred in finding the date of injury to be February 18, 2020. Section 5412 requires proof of two elements: disability, and the injured worker's knowledge that the disability was related to the injury. The QME Report of July 18, 2017 finds that applicant sustained a "5% whole person impairment to the left wrist." (Ex. 1, at p. 22.) With regard to causation, the same report states: "Regarding his bilateral hands and wrists . . . it is my opinion, with reasonable medical probability, that Mr. Dougherty's duties as a plumber were sufficient repetitive . . . to have caused an injury arising out of and in the course of his employment[.]" (*Id.*, at p. 21.) In our view, these findings are sufficient to establish a July 18, 2017 date of injury pursuant to section 5412.

It is not entirely clear why the WCJ instead fixed the date of injury as February 18, 2020. From the Report, it appears that the WCJ believed that the date of injury was more appropriately fixed at that date because the QME testified at deposition that the cumulative trauma injury continued to progress until February 18, 2020. (See Report, at p. 2.) The Report also notes that

in a later report, dated July 16, 2019, the QME expressed the need for further evaluation of applicant in order to clarify whether applicant had a single cumulative trauma injury period, or multiple periods, in light of the possible influence of a specific injury applicant sustained on January 8, 2013.[2] (See Report, at p. 3; J. Ex. 2, at p. 2.) The Report goes on to state: "It was not until the February 2020 report that there is substantial medical evidence for any disability as resulting from cumulative trauma, since this report stated a definitive medical diagnosis and causation for the right hand/wrist and cleared up ambiguities regarding the left hand and wrist." (Report, at p. 3.)

Section 5412, however, does not require a "definitive medical diagnosis" to fix the date of injury; it requires only evidence of disability and knowledge. Nor do the facts that applicant's injurious exposure continued past July 18, 2017, or that his condition worsened after July 18, 2017, change the date of injury for purposes of section 5412.

Here, the QME's July 18, 2017 report establishes that applicant sustained disability at least as of that date, and, by stating that applicant's injuries were work-related and caused by cumulative trauma, the July 18, 2017 report itself gave applicant knowledge of industrial causation. That subsequent QME reports and examinations may have been necessary to fix the precise extent and nature of the injury does not negate the fact that the July 18, 2017 report was sufficient to set the section 5412 date of injury.

More broadly, we observe that section 5412 governs the date of injury; section 5500.5, by contrast, governs *liability* for injury, and has no direct impact on the date of injury.

Accordingly, we will grant the petition for reconsideration, and amend the F&A to reflect a July 18, 2017 date of injury. The F&A is otherwise affirmed.

[2] The QME ultimately determined that applicant sustained only a single cumulative trauma injury. (See J. Ex. 3, at p. 29.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the February 7, 2024 Findings of Fact, Order & Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 7, 2024 Findings of Fact, Order & Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

2. The date of injury pursuant to Labor Code section 5412 is July 18, 2017.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 29, 2024

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

THOMAS DOUGHERTY
WILLIAM KROPACH ENCINO
STOCKWELL HARRIS LOS ANGELES
WOOLFORD ASSOCIATES GLENDALE

AW/*pm*

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