

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

IRENE MURRIETA (RUEBEN MURRIETA (Deceased)), *Applicant*

vs.

VENTURA COUNTY FIRE DEPARTMENT, *Permissibly Self-Insured, Defendant*

**Adjudication Number: ADJ12504069
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION¹**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.²

In the Findings and Order of September 9, 2021, the workers' compensation administrative law judge ("WCJ") found that the decedent (Rueben Murrieta), while employed on October 18, 2018 as a Firefighter by the County of Ventura Fire Department, succumbed to the effects of cancer arising out of and in the course of employment, pursuant to a Stipulated Award in case number ADJ11532712. In addition, the WCJ also found that Rueben Murrieta's widow, Irene Murrieta ("applicant"), is a total dependent, and that Anthony and Alejandro, the adult children of Irene and Rueben Murrieta, are not total or partial dependents.

Applicant filed a timely Petition for Reconsideration of the WCJ's decision. Applicant contends that Anthony established his total dependency by his credible testimony and documentary evidence showing he had no earnings in 2015 and 2016, and that the possibility Anthony lived in other locations for short periods, amidst speculation that he had unreported earnings living

¹ The caption of the Appeals Board's Opinion and Order Granting Petition for Reconsideration dated November 23, 2021 incorrectly named "Irene Murrieta Rueben (deceased)" as the applicant in this case. The caption of the Minutes of Hearing of March 22, 2021 correctly names "Irene Murrieta, (Rueben Murrieta (Deceased)) as the applicant herein. The caption of the instant Opinion and Decision After Reconsideration has been corrected to match the Minutes of Hearing of March 22, 2021.

² Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated November 23, 2021. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

elsewhere, is irrelevant. Applicant further contends that the WCJ erred in determining the issue of dependency based on evidence pertaining to the year 2015, whereas the WCJ should have addressed the issue based upon evidence pertaining to the decedent's date of injury, in late 2016.

Applicant also contends that under Labor Code section 3202, the dependents' trial testimony is sufficient to establish that Alejandro was a partial dependent, that "substantial proof of an actual dollar amount devoted to [Alejandro's] support does not foreclose credible, un rebutted estimates offered by the applicant," that "Alejandro's and Irene's testimony established persistent financial need despite regular earnings," that Alejandro used funds received from the decedent for customary day-to-day living expenses, and that "the 'situational expense' of covering rent qualifies as maintenance and support contemplated by [Labor Code section 3502]."

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we conclude that the WCJ must revisit and clearly determine the date of the cumulative trauma injury in this case, and then revisit and redetermine the issue of dependency as of the date of that injury. Therefore, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ.

Although we do not adopt or incorporate the WCJ's Report, we note that it provides a brief overview of the relevant facts as understood by the WCJ:

Rueben Murrieta...while employed as a Firefighter, at Ventura, California, by the County of Ventura Fire Department, succumbed to the effects of lung cancer [on] October 18, 2018. Just prior to his death, the applicant entered into [a] Stipulated Award [in] ADJ11532712, approved October 9, 2018 by The Honorable Judge Robert Hjelle, awarding him 84% permanent disability for injury sustained September 19, 1997 through October 26, 2016 to the lungs, with future medical care for "lung cancer."

At issue for trial [in the instant case] was the dependency of Irene and Rueben Murrieta's adult sons, Anthony and Alejandro Murrieta. The parties stipulated Irene Murrieta, the widow of Rueben Murrieta, to be a total dependent.

We note at the outset that the description of facts outlined by the WCJ creates confusion about the date of injury. In the instant case pertaining to dependency, the WCJ followed the trial stipulation of the parties and seems to have made a finding that the decedent suffered a specific

injury on October 18, 2018. At the same time, the WCJ's finding of injury seems to adopt the date of injury included in the Stipulated Award in ADJ11532712, wherein the parties stipulated to a cumulative trauma injury during the period September 19, 1997 through October 26, 2016. As discussed below, however, the date of injury needs to be clearly ascertained because the issue of dependency is determined as of the "time of injury."

The issue in this case is the dependency of Anthony and Alejandro, the adult sons of Irene and Rueben Murrieta. The governing statute is Labor Code section 3502. The statute provides, in relevant part, that "questions of entire or partial dependency and questions as to who are dependents and the extent of their dependency shall be determined *in accordance with the facts as they exist at the time of the injury* of the employee." (Italics added.)

Where, as here, a dependency case involves a cumulative trauma injury resulting in death, the "time of the injury of the [deceased] employee" is the same as the date of the cumulative trauma injury determined pursuant to Labor Code section 5412. (*Department of Highway Patrol v. Workers' Comp. Appeals Bd. (Sills)* (1995) 33 Cal.App.4th 1828, 1836 (60 Cal.Comp.Cases 308) ["time of injury" under section 3502 and "date of injury" under section 5412 are the same thing].)

We already noted above that it is uncertain whether the WCJ addressed the issue of dependency based upon a specific injury date of October 18, 2018 or based upon a cumulative trauma injury ending on October 26, 2016. Although the decedent died on October 18, 2018, it appears his death was not due to a specific injury but due to the culmination of the industrial lung cancer that developed as a result of his firefighting career.

Further, in reviewing the WCJ's Opinion on Decision, we are uncertain whether the WCJ took a consistent approach even if she was addressing the issue of dependency based upon the date of the decedent's cumulative trauma injury. Referring to the cumulative trauma during the period September 19, 1997 through October 26, 2016 (as stipulated in ADJ1153712), the WCJ first states in her Opinion on Decision that the relevant year to establish dependency is October 2015 through October 2016. In the next paragraph of her Opinion, however, the WCJ states that because the decedent's death certificate shows he was treated for lung cancer from December 27, 2016 through September 26, 2018, "the period of dependency can arguably be December 2015 through December 2016."

Then again, in assessing Alejandro's dependency, the WCJ's Opinion indicates that she considered "the facts as they exist[ed]" per section 3502 during the period October 2015 through

October 2016, as well as “the [unspecified] years prior to Rueben Murrieta’s diagnosis.” The WCJ also considered tax returns filed by Alejandro for the years 2014 through 2018, as well as money wired to Alejandro by his mother early in 2019, several months after the decedent died. In assessing Anthony’s dependency, the WCJ stated in her Opinion on Decision that she could not “find a clear timeline through testimony and documentary as to when the elder son, Anthony Murrieta, actually consistently relied entirely on his parents for food, shelter and other necessities.” However, the Opinion on Decision also indicates that the WCJ apparently considered the “facts as they existed” in 2014, 2015, 2016, and 2017, as well as the periods 2009 through 2016 and/or 2015 through 2018.

Based upon our review of the WCJ’s Opinion on Decision, we conclude that the WCJ erred in neglecting to establish a clear date of the decedent’s cumulative trauma injury under section 5412, which is a necessary precondition to determining the dependency of Alejandro and Anthony under “the facts as they exist[ed] at the time” of injury. Therefore, we will rescind the WCJ’s decision and return this matter to the WCJ for further proceedings and new determination of the date of cumulative trauma injury under section 5412. Then the WCJ must revisit and redetermine the issue of dependency of the decedent’s two adult sons based on the facts as they existed at the time of the cumulative trauma injury.

In order to facilitate the WCJ’s inquiry into the correct date of injury under section 5412, we offer the following guidance. The WCJ is not necessarily bound by the parties’ stipulation (in ADJ1153712) that the decedent’s date of injury is September 19, 1997 through October 26, 2016, provided there is substantial evidence supporting a different date of cumulative trauma injury. (See, e.g., *Baez v. Excelsior Farming, LLC* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 250, citing Lab. Code, § 5702 and *Turner Gas Co. v. Workers’ Comp. Appeals Bd. (Kinney)* (1975) 47 Cal.App.3d 286 [40 Cal.Comp.Cases 253].)

We further note that under Labor Code section 5412, “[t]he date of injury in cases of...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.”

Section 5412 requires a convergence of two elements: (1) the date when the employee first suffers disability; and (2) the employee’s acquisition of knowledge that such disability was caused by the employee’s present or prior employment.

As for the first element, there is no “disability” within the meaning of section 5412 until there has been either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd.* (2004) 119 Cal.App.4th 998, 1003 [69 Cal.Comp.Cases 579] (“*Rodarte*”); *Chavira v. Workers’ Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].)

In connection with the second element, it is settled law that “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.” (*County of Riverside v. Workers’ Comp. Appeals Bd. (Sylves)* (2017) 10 Cal.App.5th 119, 124-125 [82 Cal.Comp.Cases 301] (“*Sylves*”), quoting *City of Fresno v. Workers’ Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 473.)

In this case, the WCJ may further develop the record as she deems necessary or appropriate, in order to make a sound determination of the date of the decedent’s cumulative trauma injury under section 5412, and to revisit and redetermine the issue of dependency of the decedent’s two adult sons according to the “facts as they existed” on the date of the cumulative trauma injury. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [Appeals Board en banc].)

We express no final opinion on the date of the decedent’s cumulative trauma injury under section 5412 or on the dependency of Anthony and Alejandro Murrieta under section 3502. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided by Labor Code sections 5900 *et seq.*

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of September 9, 2021 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 19, 2023

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

**IRENE MURRIETA
STRAUSSNER SHERMAN, ATTORNEYS AT LAW
LAW OFFICES OF BRADFORD & BARTHEL**

JTL/ara

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