

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

**JESSE KNOTT, *Applicant***

**vs.**

**SCHUFF STEEL COMPANY; OLD REPUBLIC  
GENERAL INSURANCE CORPORATION, administered by  
GALLAGHER BASSETT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ16041647  
San Francisco 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 Presiding Judge<sup>1</sup> as well as and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, rescind the July 31, 2023 Findings of Fact and Award, substitute it with a new Findings and Award, finding that applicant sustained cumulative injury arising out of and occurring in the course of employment (AOE/COE) to the right shoulder during the period ending February 26, 2020, that the date of injury pursuant to Labor Code<sup>2</sup> section 5412 is March 21, 2022, and, consistent with the parties' stipulation at the June 19, 2023 trial, that at the time of the injury, the employer's workers' compensation carrier was Old Republic General Insurance Corporation. For the reasons stated in the WCJ's Report and Opinion on Decision, both of which we adopt and incorporate, except as noted below, we will restate the WCJ's finding that applicant's claim is not barred by the statute of limitation.

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<sup>1</sup> California Code of Regulations 10962(c).

<sup>2</sup> All further statutory references are to the Labor Code, unless otherwise noted.

We do not adopt and incorporate the WCJ's reference to applicant's "left" shoulder in the last full paragraph of page five (5) of the Opinion on Decision. We correct this clerical error and clarify that the injury herein is to the applicant's "right" shoulder.

The WCJ's decision contained another clerical error in Findings of Fact number one (1), where the WCJ stated that applicant "claims" to have sustained industrial injury to the right shoulder. This finding of "claimed" injury is inconsistent with the WCJ's award of medical treatment and the statement in the Opinion on Decision that "[b]ased on the medical exhibits entered into evidence applicant has met his burden of proof." In his October 21, 2022 panel qualified medical examination (PQME) report, Michael Hebrard, M.D., found that applicant's right shoulder injury was industrially caused. (Dr. Hebrard's 10/21/22 report, at p. 13, Joint Exhibit D.) Therefore, we amend Findings of Fact number one (1) to find that applicant sustained injury AOE/COE to the right shoulder.

In addition, we add a finding of date of injury pursuant to section 5412 consistent with the discussion in the WCJ's Opinion on Decision. We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

Finally, we note that defendant's Petition for Reconsideration fails to cite to the record with any specificity, which is a basis for denial. WCAB Rule 10945(a) provides, in relevant part:

(a) Every petition for reconsideration, removal or disqualification shall fairly state all of the material evidence relative to the point or points at issue. Each contention shall be separately stated and clearly set forth. ***A failure to fairly state all of the material evidence may be a basis for denying the petition.***

(b) Every petition and answer shall support its evidentiary statements by specific references to the record.

(1) References to any stipulations, issues or testimony contained in any Minutes of Hearing, Summary of Evidence or hearing transcript shall specify:

(A) The date and time of the hearing; and

(B) If available, the page(s) and line number(s) of the Minutes, Summary, or transcript to which the evidentiary statement relates (e.g., "Summary of Evidence, 5/1/08 trial, 1:30pm session, at 6:11-6:15").

(2) References to any documentary evidence shall specify:

- (A) The exhibit number or letter of the document;
  - (B) Where applicable, the author(s) of the document;
  - (C) Where applicable, the date(s) of the document; and
  - (D) The relevant page number(s) (e.g., "Exhibit M, Report of John A. Jones, M.D., 6/16/08 at p. 7").
- (3) References to any deposition transcript shall specify:
- (A) The exhibit number or letter of the document;
  - (B) The name of the person deposed;
  - (C) The date of the deposition; and
  - (D) The relevant page number(s) and line(s) (e.g., "Exh. 3, 6/20/08 depo of William A. Smith, M.D., at 21:20-22:5]").

(Cal. Code Regs., tit. 8, § 10945(a)-(b).)

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the July 31, 2023 Findings of Fact and Award is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the July 31, 2023 Findings of Fact and Award is **RESCINDED** and **SUBSTITUTED** with a new Findings and Award, as provided below:

#### **FINDINGS OF FACT**

1. Jesse Knott, while employed during the cumulative trauma period ending February 26, 2020, as an ironworker at San Jose, California, by Schuff Steel Company, sustained injury arising out of and in the course of employment to his right shoulder.
2. At the time of the injury herein, the employer's workers' compensation carrier was Old Republic General Insurance Corporation.
3. The Labor Code section 5412 date of injury is March 21, 2022.
4. Applicant's claim is not barred by the statute of limitations.
5. Applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein.
6. All other issues are deferred, including the issue of compensable injury to the left shoulder pursuant to Dr. Hebrard's opinion.

**AWARD**

**AWARD IS MADE** in favor of applicant **JESSE KNOTT** and against defendant **OLD REPUBLIC GENERAL INSURANCE CORPORATION**, as follows:

- A. All further medical treatment reasonably required to cure or relieve from the effects of the injury herein.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ NATALIE PALUGYAI, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**October 9, 2023**

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

**JESSE KNOTT  
ARNS DAVIS LAW  
KARLIN, HIURA & LaSOTA**

**PAG/abs**

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

**Presiding Judge's Report and Recommendation on  
Petition for Reconsideration**

**INTRODUCTION**

Defendant Bitco Insurance Company seeks reconsideration of the July 31, 2023, Findings of Fact and Award (hereinafter “the F&A”) issued herein by The Honorable Colleen S. Casey. Due to Judge Casey’s unavailability, I submit the following report as this district office’s presiding judge. In her F&A, the trial judge awarded applicant compensation benefits after finding that his claim of an industrial cumulative trauma (CT) to the right shoulder is not barred by the statute of limitations. As grounds for reconsideration, petitioner contends that the trial evidence does not justify Judge Casey’s findings of fact and that, in turn, those findings do not support the award. The petition is timely and verified. I am not aware of an answer having been filed to date.

**FACTS**

*1. Procedural background.*

According to the June 19, 2023, minutes of the first day of trial, applicant claimed an industrial CT involving his right shoulder during the period ending February 26, 2020, while working as an ironworker. Defendants denied the claim as untimely.

*2. Evidence at trial and decision.*

On day 1 of trial, the parties stipulated to a timeline of relevant developments (see 6/19/23 Minutes of Hearing at p.2). According to that chronology, applicant worked for the defendant employer for three months, ending on February 26, 2020. Both the claim form and the application for adjudication were submitted over two years later, in April 2022. In the interim, applicant had right shoulder surgery twice: first in June 2021 and again in March 2022. In addition to these stipulated facts and several exhibits that support them, the trial judge admitted a Qualified Medical Evaluation report from Dr. Michael Hebrard dated October 21, 2022 (joint exhibit D), as well as a transcript of applicant’s deposition testimony (joint exhibit F) and medical records obtained via subpoena from Contra Costa Regional Medical Center (joint exhibit E). When trial resumed on the following day, Judge Casey heard testimony from applicant (6/20/23 Minutes of Hearing at pp.2-4) and a defense witness (*id.* at pp.5-6).

As explained in her Opinion on Decision, after analyzing the evidence, Judge Casey was not persuaded that applicant suffered any disability on February 26, 2020, as claimed by the defense. In addition, she found that, irrespective of when the disability arose, applicant’s first knowledge of it being industrial was around March 2022, when his surgeon told him that his right shoulder may have been injured at work. On this basis, the trial judge rejected defendants’ limitations argument and found that the application was timely (see Labor Code §§ 5405, 5412), awarded him benefits, and reserved jurisdiction as to all other issues in the.

3. Contentions on reconsideration.

Petitioner asserts that there was, in fact, sufficient evidence of disability in February 2020 because (a) the trial judge found that the injurious exposure ended then and (b) applicant stopped working at that time, as a result of which “he would have been entitled to temporary disability or permanent disability....” Petitioner also challenges the trial judge’s finding regarding applicant’s lack of knowledge by characterizing his trial testimony as not credible and contrary to other evidence in the case, though the petition lacks any specific examples or citations to the record.

**DISCUSSION**

*The trial judge was justified in rejecting the defense of limitations.*

Contrary to its assertions, petitioner has failed to point to any evidence that contradicts Judge Casey’s findings of fact. With respect to the “disability” prong of Labor Code section 5412, neither the fact that the F&A identifies February 26, 2020, as the end of the CT period nor the parties’ stipulation that applicant did, in fact, stop working for the defendant employer on that day constitute evidence of disability. Petitioner seems to conflate the notion of the “legal” date of injury with the real-world end of the CT to which applicant was indisputably exposed until he stopped working for its insured. And, with respect to that separation from employment, petitioner presumes that it necessarily constitutes disability, without showing why, from a medical standpoint, applicant would have been entitled to indemnity at the time. It was incumbent on defendants to prove at trial the occurrence of disability over a year before the filing of the application. Here, the trial judge concluded that they did not meet their burden of proof.

Turning to the “knowledge” element of the CT date-of-injury analysis prescribed by Labor Code section 5412, petitioner challenges the trial judge’s assessment of applicant’s credibility without citing any specific basis for doing so. In actuality, the trial judge is empowered to consider a witness’ credibility after observing him on the stand, as she did here. Moreover, petitioner has not pointed to any evidence that contradicts Judge Casey’s finding that applicant did not form the requisite level of knowledge regarding the industrial nature of his condition until the information was conveyed to him by a physician in 2022.

Thus, the evidence here, including the stipulated chronology, does justify the specific conclusions that gave rise to Judge Casey’s ultimate finding that defendants failed to prove that the application was untimely. The judge’s findings are fully supportive of the resulting award of benefits.

**RECOMMENDATION**

For the foregoing reasons, I recommend that defendant's Petition for Reconsideration, filed herein on August 10, 2023, be denied.

DATED: August 21, 2023

**Eugene Gogerman**  
Presiding Workers' Compensation Judge  
Workers' Compensation Appeals Board

## OPINION ON DECISION

This matter proceeded to trial on 6/19/2023 and was continued to 6/20/2023 for a second day of trial and additional testimony.

### **I. Facts of the Case:**

Jesse Knott, born [], while employed during the cumulative trauma period ending 2/26/2020 as an ironworker at San Jose, California, by Schuff Steel Company, claims to have sustained injury arising out of and in the course of employment to his right shoulder.

The parties have stipulated to the chronology set forth below which deal with two industrial injuries of applicant:

### **STIPULATED CHRONOLOGY OF EVENTS:**

<u>DATE</u>	<u>DESCRIPTION OF EVENT</u>
12/20/2019	Applicant is hired at Schuff Steel as an ironworker and he signed the safety training checklists.
2/26/2020	Applicant had worked for three months for Schuff and this was his last date of work as he alleges a cumulative trauma injury ending this date.
06/09/2021	Applicant has right shoulder surgery.
3/21/2022	Applicant has second right shoulder surgery. Dr. Jaison James is the primary treating surgeon for both surgeries.
4/8/2022	A DWC-1 claim form is signed for a cumulative trauma ending 2/26/2020.
4/13/2022	An Application for Adjudication is filed.
5/16/2022	Denial issued by carrier, Old Republic/Gallagher Bassett.
9/13/2022	Deposition of applicant Jesse Knott.
10/21/22	QME Dr. Michael Hebrard evaluation.

### **II. Issues To be Decided in this Case:**

The following issues are to be decided in this case:

1. Applicant claims a cumulative trauma injury ending 2/26/2020 to the right shoulder.
2. Defendant claims the application was untimely since it was filed on 4/13/2022, with a DWC-1 date of 4/8/2022. Since a claim for collection of benefits for the CT injury ending 2/26/2020 was filed well after the one year statute of limitations period of §5405(a), defendant contends the statute of limitations should bar applicant's claim for any related workers' compensation benefits.



## A. Applicant's Burden of Proof

It is the applicant's burden to prove that he suffered an industrial injury to the right shoulder during the cumulative trauma period ending 2/26/2020 as an ironworker.

LC §3208.1(b) defines an industrial cumulative trauma as: "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."

Based on the medical exhibits entered into evidence applicant has met his burden of proof.

## B. Defendant's Burden of Proof

Once applicant met his burden of proof as to the existence of an industrial injury to the right shoulder, the burden shifts to defendant to prove an affirmative defense. In this case, as stated above, defense claims applicant's workers' comp claim is barred by the statute of limitations.

### 1) Statute of limitations

California Labor Code §5405(a) mandates that the period within which proceedings must be commenced for the collection of benefits is one year from the date of injury. The next question is, "What is the date of injury?" Date of injury can often be a moving target when it comes to cumulative traumas.

Labor Code §5412 defines date of injury for cumulative trauma (CT) injuries, such as the claim of injury to the right shoulder, in the instant case as follows:

"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."

Thus, the date of injury per Labor Code §5412 has two components:

- Applicant must have suffered **disability** from the CT injury in the form of a right shoulder injury beyond basic first aid for the injury; **AND**
- Applicant must have **knowledge** that his right shoulder injury was caused by his employment.

### "Disability Defined"

The 2<sup>nd</sup> District Court of Appeal in the case of *State Comp Ins Fund v. WCAB (Rodarte)* (2004) 69 Cal Comp Cases 579 clarified that "**date of injury**" in cases such as this means the date upon which the applicant suffered "disability," ie. that he was entitled to either compensable temporary disability or sustained permanent disability because of the industrial injury.

Defense has not presented any evidence in this case to establish that applicant's [right] shoulder injury resulted in entitlement to either temporary disability or permanent disability on their claimed date of injury of 2/26/2020. Therefore, the first prong of Labor Code §5412 has not been met and defendant has not met their burden of proof on this prong of the issue.

**“Knowledge Defined”**

With regard to the second prong of Labor Code §5412, “**knowledge**,” applicant credibly testified that he remembered his shoulder surgeon, Dr. Jason James, told him sometime around the time of his 2nd shoulder surgery which was on 3/21/2022 that his shoulder was potentially work-related injury. This was applicant’s first notice that he had a cumulative trauma injury in the form of an injury to his right shoulder. He then filed a claim form on 4/8/2022 and application for this CT claim ending 2/26/2020 to his right shoulder which was within the 1 year time period of learning that he had an industrial injury to his right shoulder. Therefore his workers’ compensation claim is not barred by the statute of limitations.

All other issues are deferred at this time, with WCAB jurisdiction reserved.

DATE: July 31, 2023

**Colleen S. Casey**  
WORKERS' COMPENSATION JUDGE