

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

MIGUEL SANDOVAL, *Applicant*

vs.

**KATSURA GARDEN LANDSCAPE;
TOKIO MARINE MANAGEMENT, INC.,
*Defendants***

**Adjudication Numbers: ADJ15567442, ADJ12230813
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 workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, we will grant reconsideration, and as our Decision After Reconsideration, we will affirm the Findings, Award and Order, except that we will amend to find that applicant sustained injury to the abdomen in the form of umbilical and inguinal hernia and to defer the issue of injury to any other body parts and to correct the award. Based on the medical record, including applicant's emergency room records and the reports of the qualified medical evaluators (QME), at this time substantial evidence only supports a finding that applicant sustained industrial injury to the abdomen in the form of umbilical and inguinal hernia. (Exhibit A, QME Report of Dr. Michael Fujinaka, M.D., dated May 4, 2022, p. 65; Exhibit C, QME Report of Rommel Hindocha, D.C., dated July 22, 2021, page 11; Exhibit I, Emergency Room visit San Mateo Medical (excerpted record) dated May 4, 2019, pp. 128 & 129.) Thus, we will grant reconsideration, amend Finding of Fact #1, Award #1, and the Amended Order.

Additionally, for the reasons stated in the WCJ's Report, which we adopt and incorporate, in part, we otherwise affirm the Findings and Award and Amended Order.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of February 13, 2023 is **AMENDED** as follows:

FINDINGS OF FACT

1. Miguel Sandoval was employed during the cumulative trauma period ending 4/26/2019, as a laborer, at San Francisco, California, by Nobuyuki Yoshimura dba Katsura Garden Landscape. Applicant has sustained an industrial cumulative trauma ending 4/26/2019 to his abdomen in the form of umbilical and inguinal hernia. The issue of injury to other claimed body parts is deferred. Applicant is entitled to medical treatment.

AWARD

1. In accordance with Findings of Fact #1, applicant is entitled to all workers' compensation benefits to which he is entitled as a result of this workers' compensation injury to his abdomen in the form of umbilical and inguinal hernia, including but not limited to medical treatment.

ORDER

It is ORDERED that the applicant's claim for industrial injury during the cumulative trauma period ending 4/26/2019, to applicant's abdomen in the form of umbilical and inguinal hernia is not barred by the statute of limitations or by the LC §4600(a)(1) "post-termination defense. Parties are to proceed in handling the remaining issues in this case accordingly.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 9, 2023

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

**MIGUEL SANDOVAL
NADEEM MAKADA
BRADFORD BARTHELL**

LN/pm

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

**REPORT AND RECOMMENDATION ON PETITION
FOR RECONSIDERATION**

[...]

[...]

OPINION ON DECISION ADJ15567442

This matter proceeded to trial on 1/28/2021 and was continued to 3/6/2021 for a second day of trial and additional testimony.

Facts of the Case:

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

A specific injury to the back, case ADJ12230813 which settled on 12/29/2021 for 33% permanent disability; and

The current CT injury in the form of a hernia in case ADJ15567442 which is the subject of this trial.

DATE	EVENT
4/1/2017	Date of hire as landscaper/laborer.
4/26/2019	CT end date for (ADJ15567442). alleged injury to hernia and GI
4/29/2019	Specific injury (ADJ12230813). to low back and hernia
4/29/2019	Applicant's last day of work for Katsura Garden Landscape. He was not terminated from employment but stopped work due to his industrial low back injury.
5/4/2019	Applicant presents to the emergency room in San Mateo with low back and abdominal pain. A CT scan of the abdomen and pelvis were taken that showed a small fat containing umbilical/periumbilical hernia and inguinal hernia. (Exhibit I). (ADJ15567442 and ADJ12230813).
5/20/2019	Specific injury admitted for the low back and hernia - Defendant paid retro TD from 4/30/2019, at the rate of \$466.67 a week. (ADJ12230813).
5/23/2019	Applicant filed claim form and Application for a specific injury dated 4/29/2019 to the hernia and back while carrying rocks at work. (ADJ12230813).
10/3/2019	In Applicant's deposition, he testified he first noticed the hernia in the middle of 2018, after lifting a rock at work. He did not report the hernia because he thought it would get better, but it did not. It got worse because he continued to lift things at work. (Exhibit G, page 26). He sought medical

treatment in 2018 for it at San Mateo County General Hospital, but was given pills only. (ADJ12230813).

10/21/2019 Defendant issues partial denial for the specific injury (ADJ12230813) denying the hernia, but admitting the low back as industrial. (In deposition testimony, applicant stated he did not sustain a hernia on 4/29/2019, but rather noticed its first appearance in 2018.) (ADJ12230813) - Served Certified Mail with return receipt + 5 days mailing = 10/26/2019.

6/26/2020 PQME Hindocha (**Exhibit E**) evaluation for the specific injury (ADJ12230813) found causation for lumbar spine on 4/29/2019. He mentioned that applicant testified at deposition that the hernia happened sometime in 2018 after lifting a heavy rock. AA contends causation was not found for the hernia for the 4/29/2019 date of injury.

Page 17 - "The patient also complains of what appears to be an umbilical hernia. According to the deposition of Miguel Sandoval, dated 10/03/2019, Mr. Sandoval stated that he sustained a hernia sometime in 2018 after lifting a heavy rock. The patient was subsequently seen at San Mateo Medical Center. This current evaluation is limited to the 4/29/2019 specific injury and it appears that the patient's hernia complaints were subsequent to the specific injury sustained on 4/29/2019. Therefore, I do not find any industrial causation of the patient's hernia complaints to the specific industrial injury dated 4/29/2019."

12/30/2020 Applicant was evaluated by Dr. Hindocha (**Exhibit D**) (ADJ12230813) who opined that the hernia was a separate CT injury because the applicant testified that it occurred at work sometime in 2018 after his hernia complaints had continued to worsen. Page 18 - "...this is a separate issue and, within all reasonable medical probability, is a separate CT injury as the applicant had testified that it had occurred at work sometime in 2018 after which his hernia complaints had continued to worsen." QME defers to appropriate QME, such as internal medicine. This report was served 1/11/2021.

7/22/2021 Dr. Hindocha (**Exhibit C**) (ADJ12230813) issued a report with permanent restrictions. A return-to-work offer was not made within 60 days following receipt. Applicant Attorney contends Dr. Hindocha (**Exhibit C**) indicates a CT issue for the hernia, page 11 - "...this is a separate issue and, within all reasonable medical probability, is a separate CT injury as the applicant had testified that it had occurred at work sometime in 2018 after which his hernia complaints had continued to worsen." QME defers to appropriate QME, such as internal medicine. This report was served 7/29/2021.

12/21/2021 Application's specific injury of April 29, 2019 (ADJ12230813) settled for Stipulations in the amount of 33% permanent disability for the lumbar spine only.

12/21/2021 Claim form and Application for CT claim filed for the period ending 4/26/2019 to the abdomen, hernia, and other body systems due to repetitive lifting. (ADJ15567442).

1/4/2022 Cumulative trauma claim was denied (**Exhibit B**) because: defendant claims post-termination pursuant to Labor Code section 3600(a)(10) and the statute of limitations per Labor Code section 5405.

5/4/2022 Applicant was evaluated by QME Dr. Michael Fujinaka for the CT claim, who found a CT injury through April 26, 2019. (**Exhibit A**).

7/20/2022 Cumulative trauma claim (ADJ15567442) and specific injury claim (ADJ12230813) were consolidated.

Issues To be Decided in this Case ADJ15567442:

The following issues are to be decided in this case:

- 1) Injury arising out of and in the course of employment to applicant's hernia, abdomen, and body systems (gastrointestinal).
- 2) Need for medical treatment for industrially injured body parts.
- 3) Is applicant's workers' comp claim barred by the statute of limitations?
- 4) Is applicant's workers' comp claim barred by the affirmative "post termination" claims of LC §4600(a)(10)?

Applicant's Burden of Proof

It is the applicant's burden to prove that he suffered an industrial injury in the form of a hernia during the cumulative trauma period ending 4/26/2023. (Case #ADJ15567442)

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 and the above stipulations of the parties, applicant has met his burden of proof in this regard. (See Exhibit C, page 11, report of Dr. Hindocha and Exhibit I pages 128 & 129, as set forth above in the stipulated chronology of the parties.) Thus, applicant is entitled to all workers' compensation benefits as a result of this workers' compensation injury including, but not limited to, medical treatment.

Defendant's Burden of Proof

Once applicant met his burden of proof as to the existence of an industrial injury in the form of a hernia, the burden shifts to defendant to prove an affirmative defense. In this case, defense claims applicant's workers' comp claim is barred by the statute of limitations and by the "post termination" defense set forth in of LC §4600(a)(10).

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?" Labor Code §5412 defines date of injury for cumulative trauma (CT) injuries, such as the claim of hernia, 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 has two components:

Applicant must have suffered disability from the CT injury in the form of a hernia; **AND**

Applicant must have known that the hernia injury was caused by his employment.

The 2nd 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 that date upon which the applicant was entitled to either compensable temporary disability or permanent disability because of the industrial injury in the form of a hernia.**” (Emphasis added.)

The DCA in *Rodarte* was very clear that medical treatment alone is not equivalent to either temporary or permanent disability. Defense has not presented any evidence in this case to establish that applicant’s hernia injury resulted in entitlement to either temporary disability or permanent disability on their claimed date of injury of 4/30/2019. Therefore, the first prong of Labor Code §5412 has not been met to establish that there was a date of injury of 4/30/2019 per Labor Code §5412 in this case. Therefore, defendant has not met their burden of proof on this issue.

With regard to the second prong of Labor Code §5412, **“Knowledge,”** applicant was evaluated by PQME Dr. Hindocha (**Ex D**) in applicant’s specific injury case ADJ12230813 on 12/30/2020. At page 18 of that report Dr. Hindocha stated, “...this is a separate issue and, within all reasonable medical probability, is a separate CT injury as the applicant had testified that it had occurred at work sometime in 2018 after which his hernia complaints had continued to worsen.” This report of PQME Dr. Hindocha (Exhibit D) which the parties stipulated was served on 1/11/2021, was applicant’s first notice that he had a cumulative trauma injury in the form of a hernia. He then filed a claim form and application for this CT claim ending 4/26/2019 to the abdomen, hernia and other body system on 12/21/2021, which was within the 1 year time period.

LC §3600(a)(10) Post Termination Defense

Next, defendant argues that the LC §3600(a)(10) Post Termination Defense applies to deny this claim of applicant. The purpose of this defense was to prohibit employees from claiming a bogus industrial injury in retaliation for being fired from their place of employment.

That purpose is not met here, since applicant was not terminated from his job, but was forced to quit as he was unable to perform his usual and customary job duties for medical reasons completely unrelated to the industrial hernia injury he is claiming in the instant case.

In addition, even if applicant had been terminated which he was not, LC §3600(a)(10) would not apply according to the strict construction of the wording of the statute. There are 3 conditions that have been met by applicant and that would apply and disallow defendant's affirmative defense. These are LC §3600 (a)(10)(A), (B) and (D) as follows:

LC §3600 (a)(10) "...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.

(D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination..."

Since applicant's injury in the form of a hernia, etc. is deemed industrial, he is entitled to all workers compensation benefits due to him according to law, including, but not limited to medical treatment.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the petition for reconsideration filed by defendant herein be **DENIED** on the merits.

DATED: March 14, 2023

COLLEEN S. CASEY
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE