

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

RAUL CHAVEZ, *Applicant*

vs.

**BOB BAFFERT RACING STABLE, INC., permissibly self-insured, administered by
POST TIME SELF INSURANCE GROUP, *Defendants***

Adjudication Number: ADJ13947726

Pomona District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Findings, Award and Orders (F&A) issued by the workers' compensation administrative law judge (WCJ) on September 28, 2023, wherein the WCJ found in pertinent part that regarding the injury claim in case number ADJ13947726, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his left knee; the WCJ ordered that “the application is timely filed and not be barred by the statute of limitations” and the WCJ awarded applicant “retroactive temporary disability in the sum of \$19,421.26.” (F&A, pp. 3 – 5.)

Defendant contends that applicant’s July 8, 2019 left leg/left knee injury claim is barred by the statute of limitations because the Application for Adjudication of Claim (application) was filed on December 4, 2020; and that there is no medical evidence indicating applicant was temporarily totally disabled as a result of the claimed left leg/left knee injury.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied; or in the alternative that the Petition be granted “as to the issue of temporary disability” and that it be returned for further development of the record on that issue. (Report, p. 5.) We did not receive an Answer from applicant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will grant reconsideration, and affirm the F&A except that we will amend the F&A to find the Labor Code section 5412 date of injury is July 13, 2021 (Finding of Fact #1); that the Application for Adjudication of Claim in case number ADJ13947726, was timely filed and is not barred by the statute of limitations (Finding of Fact #7); and to defer the issues of applicant's temporary disability caused by his left knee injury (Finding of Fact #6); the Award will be amended based thereon, and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his left leg and left knee while employed by defendant as a hot walker on July 8, 2019 (ADJ13947726) . He had previously claimed injury to his right knee on February 16, 2015 (ADJ10710310), and to his lumbar spine on February 23, 2015 (ADJ13947727).

Orthopedic agreed medical examiner (AME) Jeffrey A. Berman, M.D., evaluated applicant on July 13, 2021. Dr. Berman examined applicant, took a history, and reviewed the medical record. As to the cause of applicant's left knee condition, Dr. Berman explained:

With regards to the left knee, this would relate essentially to work activities after resuming work. There was some compensation from the right knee as he describes. He had undergone surgery. ¶ He describes having to overcompensate when he was provided further work activities upon returning to work. ¶ As it relates to the left knee, I would, therefore, apportion 20% to factors that are independent of any injury and work activities. Twenty percent would be a compensable consequence from the right knee and the remaining 60% to complaints that worsened because of continued work activities. ¶ This is complicated, and I hope this is clear. If the parties need me to address anything else, then please advise.

(Joint Exh. 2, Jeffrey A. Berman, M.D., July 13, 2021, pp. 43 – 44.)

In his September 23, 2022 supplemental report, Dr. Berman reiterated his opinions regarding the cause of applicant's left knee injury. (See Joint Exh. 1, Jeffrey A. Berman, M.D., September 23, 2022, p. 2.)

The parties proceeded to trial on September 13, 2023. In regard to the injury claim in case number ADJ13947726, the issues submitted for decision included injury AOE/COE; applicant's claim for temporary disability indemnity benefits for the period from July 9, 2019, through July 13, 2021; and the Labor Code section 5405 statute of limitations. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 13, 2023, p. 5.)

DISCUSSION

In order to determine whether applicant's injury claim is barred by the statute of limitations, it is first necessary to determine the actual date of injury. In the Opinion on Decision, the WCJ stated:

While applicant's application plead this injury as a specific injury on 7/8/19, in light of testimony that applicant had returned to work for 2 to 3 weeks, that the medical records reflect applicant's return to work for a duration of time, and that the court finds applicant was tasked to work outside of his work restrictions, this injury is more akin to a cumulative trauma.
(Opinion on Decision, p. 6.)

In his Report, the WCJ again explained that he “ ... did not see this injury as a specific injury because it occurred over a period of time. The mechanism of injury described was not one injurious incident, rather it was applicant having returned to work for a period time and during said period of time was injured by employer's failure to comply with work restrictions.” (Report, pp. 2 – 3.) Having reviewed the trial record, it is clear that the WCJ's conclusion is consistent with Dr. Berman's opinions pertaining to applicant's left knee injury. (Joint Exh. 2, pp. 43 – 44; Joint Exh. 1, p. 2.) A WCJ's statements in an Opinion on Decision or Report are not findings of fact. (See *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988, 996 [42 Cal.Comp.Cases 114].) However, workers' compensation pleadings may be amended by the Appeals Board to conform to proof, based on evidence submitted at trial. (Cal. Code Regs., tit. 8, § 10517; *Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 199-200 [50 Cal.Comp.Cases 160].) Although applicant alleged a July 8, 2019 specific injury, Dr. Berman's reports, which are the only medical evidence in the trial record, are substantial evidence that applicant sustained a cumulative injury to his left knee, AOE/COE.

Labor Code section 3208.1 states in part, “The date of a cumulative injury shall be the date determined under Section 5412.” (Lab. Code, § 3208.1.) Pursuant to Labor Code section 5412:

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.
(Lab. Code, § 5412.)

For purposes of determining the date of a cumulative injury, it is not assumed that a worker has knowledge that the disability is job-related without medical confirmation, unless the nature of the disability and the worker’s qualifications are such that he or she should have recognized the relationship (*City of Fresno v. Workers’ Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 473 [50 Cal.Comp.Cases 53].) Here, the reports from Dr. Berman are the only evidence that applicant sustained a cumulative injury, as opposed to a specific injury. The medical evidence indicates that the earliest date applicant would have been aware that his left knee disability was result of a cumulative injury was July 13, 2021, the day he was examined by Dr. Berman. Thus, the earliest Labor Code section 5412 date of injury is July 13, 2021. “[T]he purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury.” (*J. T. Thorp v. Workers’ Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 340 - 341 [49 Cal. Comp. Cases 224].) We therefore agree with the WCJ’s conclusion that applicant’s injury claim is not barred by the statute of limitations.

As to the issue of temporary disability, we note that the treatment notes (subsequent to the injury claim in this matter), as summarized by Dr. Berman, primarily address applicant’s right knee injury, including a September 30, 2019 surgery. (See Joint Exh. 2, pp. 28 – 33.) Although the treatment notes do indicate that applicant was temporarily totally disabled for various periods, it is not clear if his temporary disability status was the result of his right knee or left knee injuries, or both. Thus, we agree with the WCJ that under these circumstances, “... the record regarding the issue of temporarily disability due to the left knee should be developed.” (Report, p. 5.)

Accordingly, we grant reconsideration, and affirm the F&A except that we amend the F&A to find the Labor Code section 5412 date of injury is July 13, 2021; that the Application for Adjudication of Claim in case number ADJ13947726, was timely filed and is not barred by the statute of limitations; and to defer the issues of applicant's temporary disability caused by his left knee injury; the Award is amended based thereon, and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings, Award and Orders issued by the WCJ on September 28, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 28, 2023 Findings, Award and Orders is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

1. In case number ADJ13947726, applicant Raul Chavez, while employed during the period ending July 8, 2019, as a hot walker, Occupational Group Number 390, by Bob Baffert Racing Stable, Incorporated, sustained injury arising out of and in the course of employment to his left knee; the Labor Code section 5412 date of injury is July 13, 2021.

* * *

6. The issue of applicant's temporary disability caused by his left knee injury is deferred pending development of the record.

7. The Application for Adjudication of Claim in case number ADJ13947726, was timely filed and is not barred by the statute of limitations.

AWARD

* * *

3. The award of temporary disability indemnity, and attorney fees based thereon, in case number ADJ13947726 is deferred pending development of the record.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 11, 2023

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

**RAUL CHAVEZ
LAW OFFICES OF ARTHUR B. HAMPTON
MICHAEL SULLIVAN & ASSOCIATES LLP**

TLH/mc

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

REPORT AND RECOMMENDATION ON RECONSIDERATION

Applicant's Date of Injury: Filed as 7/8/19 specific injury

Alleged Body Parts Injured: Left Leg

Identity of Petitioner: Bob Baffert Racing Stable Inc. administered by Post Time Self Insurance.

Timeliness: Petition is timely

Verification: Petition is verified

Dates of Issuance of Orders: Issued on 9/26/23. Served on 9/28/23.

INTRODUCTION

Raul Chavez, while working as a hot walker, aged 57 during the alleged date of injury of 7/8/19, injured his left leg when he returned to work for employer and was tasked with duties beyond the prescribed work limitations.

Defendant, Bob Baffert Racing Stable Inc. administered by Post Time Self Insurance, herein after referred to as petitioner, timely filed and verified a petition for reconsideration.

Petitioner contends that 1) with respect to the issue of statute of limitations, the evidence did not justify the findings of fact and 2) that with respect to temporary disability for the left knee, the findings of fact do not support the award.

FACTS

Applicant alleged 3 specific dates of injuries. The present petition for ADJ13947726 involves the 3rd and last line of injuries. While this particular injury was plead as a specific, the court ultimately found that it was more akin to a cumulative trauma due to the injurious exposure having occurred over a period of time. The parties disputed whether such an injury had even factually occurred, specifically whether or not applicant had returned to work, was tasked to work outside his work restrictions and was thus injured in the process. After receiving and reviewing testimony and medical evidence, the court ultimately did find that the injury did in fact occur, was not barred by the statute of limitations, and awarded temporarily disability to that effect.

DISCUSSION

With respect to ADJ13947726, defendant contends that the statute of limitations should apply in this case, specifically noting that applicant had reported the left knee injury on 7/8/19 (the application having been filed on 12/4/2020, over one year later) and knew how to report a

specific injury, having previously done so. This WCJ respectfully disagrees that, in the context of statute of limitations, the evidence did not justify the findings of fact.

Firstly, the court did not see this injury as a specific injury because it occurred over a period of time. The mechanism of injury described was not one injurious incident, rather it was applicant having returned to work for a period time and during said period of time was injured by employer's failure to comply with work restrictions.

Secondly, as it pertains to the element of knowledge in assessing a cumulative date of injury, the court noted a few things. Firstly, the court doubted applicant had actual knowledge given the applicant initially forgot about this date of injury entirely during testimony. While applicant recalled the two prior specifics, he had to be reminded by his counsel about the third date of injury. Absent actual knowledge, the court pondered whether applicant perhaps "should have known" about his cumulative trauma injury. While defendant is correct that applicant had reported an injury and knew how to report injuries, these factors alone were not dispositive of knowledge. The court also looked at applicant's training, intelligence and qualifications. In this case, applicant had a 5th grade level of education and did not describe any work or life experience suggesting greater knowledge or training in the area of workers' compensation and/or industrial injurious exposure over time. In fact, this WCJ would contend that it was not so obvious that applicant had sustained a cumulative trauma given the attorneys themselves disputed that very issue, never mind a mere layman being deemed to have known better. As such, the most persuasive factor, though not a required factor, for the court was whether applicant could be charged with knowledge based on medical advice. In this case, it wasn't until Dr. Berman's 7/13/21 report (Joint Exhibit 1) when there was medical clarification that there could be a 3rd injury. Absent any additional reports reflecting an earlier date of medical advice, this WCJ did not believe knowledge could be imputed upon applicant for this date of injury until Dr. Berman's 7/13/21 medical reporting reflected the existence of such an injury.

As such, since the element of knowledge was not met until 7/13/21 (disability having been found earlier), this WCJ found that applicant's 12/4/2020 application filing was not barred by the statute of limitations.

With respect to ADJ13947726, defendant's petition also argues that the findings of fact do not support an award of temporary disability because there was no medical report which

specifically found applicant temporarily disabled for his left knee, rather the medical reporting only reflected the right knee.

Temporary disability is a question of fact whose burden lies with applicant. In this present case, we have Dr. Berman's 7/13/21 AME report which summarized various PTP progress reports that placed applicant on temporary total disability. This is evidence of medical disability that precluded applicant from work. The disability was temporary and found by the court to be the result of a compensable industrial injury. Applicant testified that after his brief return to work, he remained unemployed afterwards and thus suffered wage loss. There was no indication modified work was offered after applicant left his return to work trial. This coupled with Dr. Berman's 7/13/21 AME report indicating that, with regard for the left knee, 20% was apportioned to independent of any injury or work, 20% as a compensable consequence from the right knee and the 60% due to continued work activities, caused this WCJ to draw the reasonable inference that applicant was temporarily disabled to both knees during the time he was placed on temporary disability after his return to work injury.

However, the court does note that given the prior PTP did not necessarily arrive at the same conclusion regarding the existence of the 3rd (and presently discussed) injury and limited their discussion primarily to the right knee, defendant is correct in arguing no temporary disability status was explicitly stated for the left knee. However, as discussed above, the court found temporary disability not in the vacuum of individual status reports but based on the cumulative circumstances and reasonable inferences drawn from Dr. Berman's 7/13/21 AME report. In this sense, the court recommends the petition be denied. However, if the appeals board does not draw similar inferences, then the petition should be granted on this sole issue and the record regarding the issue of temporary disability due to the left knee should be developed.

RECOMMENDATIONS

This WCJ recommends that the petition be denied. In the alternative, this WCJ recommends the petition be granted as to the issue of temporary disability in ADJ13947726 and that the record in the case be further developed on that sole issue.

DATE: 10/20/23

Frank Hsu Yen
WORKERS' COMPENSATION
LAW JUDGE