WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAYMOND PENROSE, *Applicant*

vs.

DENVER GOLD, NORTH RIVER INSURANCE COMPANY, ADMINISTERED BY CRUM AND FORSTER; NEW YORK JETS, ARMOUR RISK MANAGEMENT (C/O ONE BEACON); DENVER GOLD, CALIFORNIA INSURANCE GUARANTEE ASSOCIATION FOR HOME INSURANCE, IN LIQUIDATION; DENVER BRONCOS, TRAVELERS INSURANCE; DENVER BRONCOS, SELF-INSURED, *Defendants*

Adjudication Number: ADJ7912629
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

On January 20, 2023, we issued a Notice of Intention (NIT) to amend our June 12, 2018 Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration to defer the issues of the permanent and stationary date, permanent disability, apportionment, the correct rating schedule, and attorney's fees. We further provided notice of our intention to rescind the April 12, 2019 Findings and Award (F&A), and to substitute Findings of Fact that (1) the date of injury pursuant to Labor Code section 5412 was March 20, 2014; (2) based on the date of injury under section 5412, section 4660.1 requires that applicant's impairment be assessed under the AMA Guides, 5th Edition, and the impairment rated pursuant to the 2005 Permanent Disability Rating Schedule (PDRS); (3) applicant's earnings warranted the maximum 2014 permanent disability indemnity rates; (4) applicant would not be entitled to the 15 percent increase; (5) applicant was permanent and stationary on March 20, 2014; (6) deferring the issues of permanent disability and the COLA adjustment pursuant to Labor Code section 4659(c); (7) deferring the issue of attorney fees. We received timely responses to the NIT from both applicant and defendant. Having considered those responses, and having completed our review of the record, we now issue our Decision After Reconsideration.

BACKGROUND

We adopt and incorporate the Background discussion from our January 20, 2023 NIT. Briefly, the workers' compensation administrative law judge (WCJ) issued an initial decision in this matter on March 20, 2018, finding that applicant, while employed as a professional athlete from April 8, 1976 to February 1, 1985, sustained industrial injury to his neck, back, upper extremities, lower extremities, head, and in the form of a sleep disorder. The WCJ determined that compensation was not barred by the running of the statute of limitations; that applicant became permanent and stationary on December 31, 1986; and that applicant sustained 83.25 percent disability as rated under the 1997 Permanent Disability Rating Schedule (PDRS).

We granted defendant's Petition for Reconsideration on June 12, 2018, and affirmed the WCJ's findings regarding the statute of limitations, the permanent and stationary date, and permanent disability as rated under the 1997 PDRS. We returned the matter to the trial level for further decision on the issue of the date of injury pursuant to Labor Code section 5412, the commencement date of COLA adjustments under Labor Code section 4659(c), and attorney fees.

The WCJ issued Findings and Award (F&A) on April 12, 2019, determining in relevant part that applicant's Labor Code section 5412 date of injury ended in 2014, that applicant was entitled to permanent disability at 2014 rates, and that the cost of living adjustment of Labor Code section 4659(c) applied commencing January 1, 2004, with a concomitant award of permanent disability and adjusted attorney fees.

Defendant North River Insurance Company (defendant) seeks reconsideration of the April 12, 2019 F&A, contending that the section 5412 date of injury is in 2011; that the indemnity rates applicable when applicant first sustained compensability disability are appropriate, rather than the rates as of the 5412 date of injury; that the cost of living adjustment (COLA) benefits of section 4659(c) are inapplicable; and that the attorney fees were calculated in error. (Petition for Reconsideration (Petition), May 6, 2019, at p. 2.)

On January 20, 2023, following a complete review of the record, we served the parties with notice of our intention to amend our prior decisions. The NIT initially noted our ongoing original jurisdiction in this matter, and concluded that it was error to affirm the permanent and stationary date, and that applicant's injury was subject to the 2005 Permanent Disability Rating Schedule (PDRS). We provided notice of our intention to amend our June 12, 2018 Opinion and Order Granting Petitions for Reconsideration and Decision after Reconsideration to rescind and

substitute a new March 20, 2018 Findings and Award deferring the issues of applicant's Permanent and Stationary date (Findings of Fact No. 5), permanent disability (Findings of Fact No. 6), apportionment (Findings of Fact No. 7), and attorney fees (Findings of Fact No. 15), and further deferring the issue of the applicable rating schedule (Findings of Fact No. 10).

We further provided notice of our intention to rescind the WCJ's April 12, 2019 Findings and Award, and substitute a new Findings and Award in order to reflect that applicant's date of injury was March 20, 2014 (Finding of Fact No. 1); that applicant's disability must be rated using the AMA Guides, pursuant to section 4660.1 (Finding of Fact No. 2); that applicant's Permanent and Stationary date is March 20, 2014 (Finding of Fact No. 5); and that the issues of permanent disability, COLA adjustment, and attorney fees are deferred (Findings of Fact Nos. 6 &7).

Pursuant to the issuance of the NIT, we also provided the parties with the opportunity to respond. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].) On February 9, 2023, defendant filed its Response to Notice of Intent to Submit for Decision by WCAB (Defendant's Response), averring the medical-legal dispute resolution procedures set forth in section 4062.2 apply herein, and requesting the issuance of QME panels in orthopedics and neurology. (Defendant's Response, February 9, 2023, at p. 2:7.) Defendant further asserts that applicable compensation rates are set on the first date of "compensable disability," and that any disability should be awarded at the rates applicable in 1985. (*Id*. at p. 2:14.)

On February 14, 2023, applicant filed a Petition in Response to Notice of Intent (Applicant's Response), averring that pursuant to Labor Code sections 5803 and 5804, the Workers' Compensation Appeals Board (WCAB) is without jurisdiction to rescind, alter or amend a prior decision more than five years from the date of injury.[1] (Applicant's Response, February 14, 2023, at p. 5:2.) Applicant specifically contends we lack the jurisdiction to make changes to the June 12, 2018 Findings of Fact, including the permanent and stationary date, and percentage of disability as rated under the 1997 PDRS. Applicant asserts that we previously affirmed the applicability of the 1997 PDRS, and that defendant's failure to challenge that determination resulted in a waiver of the issue. (*Id*. at p. 7:24.) Applicant also avers that section 4660.1, which requires that injuries occurring on or after January 1, 2013 be rated under the 2005 PDRS, is inapplicable, because it specifies when the injury "occurs" rather than the date of injury under

[1] All further statutory references are to the Labor Code unless otherwise stated.

section 5412. (*Id*. at p. 8:18.) Finally, applicant asserts the deposition testimony of Dr. Einbund is not substantial evidence of the permanent and stationary date. (*Id*. at p. 9:24.)

DISCUSSION

I.

We first address the threshold issue of our continuing jurisdiction. Our January 20, 2023 NIT explained that pursuant to *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 [2006 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), once reconsideration has been granted, the Appeals Board has the power under Labor Code sections 5906 and 5908 to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]; *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases. 98]; *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Sowell)* (1943) 58 Cal.App.2d 262, 266–267 [8 Cal.Comp.Cases 79].)

We further noted that the WCAB continues to maintain original jurisdiction in this matter. (Lab. Code, § 5300.) In the exercise of this jurisdictional authority, we provided notice to the parties of our intention to rescind and replace the March 29, 2018 Findings of Fact with respect to the permanent and stationary date and the applicability of the 1997 permanent disability ratings schedule (PDRS), as well as the April 12, 2019 Findings of Fact in its entirety. (January 20, 2023 NIT, p. 15.)

Applicant's Response contends that pursuant to section 5804, we no longer have the jurisdiction to alter or amend a prior award of compensation. (Applicant's Response, at 4:2.) Applicant specifically avers that we are without jurisdiction to amend the previously identified permanent and stationary date, the application of the 1997 PDRS, or the finding of 83.25 percent permanent disability. (*Id.* at p. 5:16; 6:20.)

Labor Code section 5804 provides, in relevant part, that "[n]o award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years and any counterpetition seeking other relief filed by the adverse party within 30 days of the original petition raising issues in addition to those raised

by such original petition." (Lab. Code, § 5804.) Thus, an award of compensation may not be disturbed beyond five years from the date of injury. However, the operation of section 5804 is *predicated on a final award of compensation*. The Court of Appeal has explained:

> Labor Code, section 5803, provides in essence that the commission has continuing jurisdiction over its awards; and section 5804 of said code provides that no award of compensation shall be rescinded, altered, or amended after five years from the date of the injury.
>
> It is settled that the jurisdiction of the commission to rescind, alter or amend an award under Labor Code, sections 5803 and 5804, is not affected or destroyed, provided such award is rescinded, amended or altered within five years from the date of injury (*Sutton v. Industrial Acc. Com.*, 46 Cal.2d 791, 795-797 [298 P.2d 857]); and the commission's jurisdiction to make an award for new and further disability under Labor Code, section 5410, is not impaired, provided application thereof has been filed with the commission within five years from the date of injury. (*Gobel v. Industrial Acc. Com.*, 1 Cal.2d 100 [33 P.2d 413]; *Westvaco etc. Corp. v. Industrial Acc. Com.*, 136 Cal.App.2d 60 [288 P.2d 300].) We are not confronted herein, however, with either an attempt or proceeding to rescind, alter or amend any award under section 5803, or with an attempt or proceeding to collect compensation for new and further disability under section 5410. On the contrary, we are simply confronted with the question of whether the commission can make a first award more than five years after the date of injury where application therefor has been timely filed and where the commission has failed to find on a tendered issue. (*Douglas Aircraft Co. v. Industrial Acc. Com.*, 31 Cal.2d 853, 855-856 [193 P.2d 468]; see also *Sprague v. Industrial Acc. Com.*, 46 Cal.2d 414, 417 [296 P.2d 548].)
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> *Douglas Aircraft Co. v. Industrial Acc. Com.*, *supra*, further makes it clear that, where the commission fails to find on an issue raised as to permanent disability, said issue remains open and undetermined; and that under such circumstances, the subsequent award, even though made more than five years after the date of the injury, constitutes the first decision of the commission upon such issue and is, therefore, jurisdictionally justified by the rule of the *Gobel* case.
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> (*Lockheed Aircraft Corp. v. Industrial Acci. Com. (Vacho)* (1960) 183 Cal.App.2d 361, 363-364, [25 Cal.Comp.Cases 155, 156-157] (*Vacho*).)

The Court of Appeal in *State of California, Subsequent Injuries Fund v. Industrial Acci. Com. (Busch)* (1962) 198 Cal.App.2d 818, 827 [27 Cal.Comp.Cases 14], has further observed:

> The power of original decision invested in the [WCAB] is unrestricted by any limitations of time other than that set forth by sections 5400-5412 of the Labor Code. The [WCAB] therefore can make a valid decision on an original claim any number of years after the injury if the original proceedings are commenced within the time prescribed by section 5405, and quite apart from a consideration of a waiver of the statute."
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> (*Id.* at p. 827.)

Hence, we maintain the "power of original decision" because there has been no prior award of compensation that has become final. While the March 20, 2018 F&A was an initial Award, our June 12, 2018 Opinion and Order rescinded the WCJ's findings on the issues of the date of injury, indemnity due, and COLA, and deferred those issues to additional proceedings. (Opinion and Order, dated June 12, 2018, at 15:8.) The WCJ's April 12, 2019 F&A, which entered findings of fact pursuant to our return of the matter to the trial level, was accomplished pursuant to the Board's ongoing original jurisdiction. We now exercise that same jurisdiction based on defendant's timely petition for reconsideration of the April 12, 2019 F&A, and our subsequent grant of reconsideration on May 30, 2019. (Lab. Code, § 5903; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182 [260 Cal.Rptr. 76]; see also *Gonzales v. Industrial Acc. Com.* (1958) 50 Cal.2d 360, 363–364 [23 Cal.Comp.Cases 91].)

Additionally, we note that the cases cited in Applicant's Response for the proposition that we lack jurisdiction at this juncture all involve *finalized awards*, not subject to timely appeal or reopening. In *Dept. of Education v. Workers' Comp. Appeals Bd. (Gill)* (1993) 14 Cal.App.4th 1348 [18 Cal.Rptr.2d 900], section 5804 precluded amendment or alteration in 1991 of a final award of compensation for a 1970 injury that became final on June 27, 1975. (*Id*. at p. 1351.) Similarly in *Harold v. Workers' Comp. Appeals Bd. (1980)* 100 Cal.App.3d 772 [45 Cal.Comp.Cases 77], the WCAB lacked jurisdiction in 1977 to alter an award for a 1971 injury award that was timely reopened with a final award of compensation issuing in 1975. Here, there has been no final award of compensation made.

Applicant further cites to *Westvaco Chlorine Products Corp. v. Industrial Acci. Com. (Johnson)* (1955) 136 Cal.App.2d 60, 63 [288 P.2d 300, 302] (*Johnson*), as prohibiting rescission,

alteration or amendment of an award more than five years from the date of injury. Applicant contends that under *Johnson*, the WCAB has no jurisdiction to address issues previously decided within five years of the date of injury. (Applicant's Response, at p. 4:4.) However, *Johnson* is also instructive for its discussion of the Board's jurisdiction as it relates to the issuance of an *original* award of compensation. In *Johnson*, applicant sustained injury on March 25, 1946, for which an award of 36 percent issued on May 25, 1948. On November 14, 1949, applicant timely petitioned for new and further disability, and on June 5, 1950, the Industrial Accident Commissioner (IAC) issued findings that applicant's condition was not stationary, deferring a findings of both temporary and permanent disability. (*Id*. at p. 61.) Applicant subsequently filed another Petition for New and Further Disability in 1953, and after various hearings, the IAC issued its final determination as to permanent disability and related issues on February 1, 1955. In evaluating the issue of whether the IAC maintained jurisdiction to act on applicant's claim more than five years from the date of injury, the Court of Appeal noted that the IAC's deferral of disability issues in its June 5, 1950, left the question of permanent disability "open and undetermined." (*Id*. at p. 68.) The IAC maintained its jurisdiction to decide the question of disability more than five years from the date of injury, because applicant's petition for new and further disability was filed prior to the expiration of the statutory period, but also because "the action of the commission in impliedly setting aside its original order left in existence *no order* of permanent disability which could bar the commission from considering the petition for new and further disability filed within the statutory period." (*Id*. at p. 68, italics added.) In *Johnson*, as here, integral components of a final award of compensation remained outstanding and undecided, allowing the IAC to continue to exercise its original jurisdiction and to decide the case more than five years from the date of injury.

Applicant contends the individual Findings of Fact with respect to the permanent and stationary date, percentage of disability, and the applicable PDRS are no longer subject to alteration or amendment pursuant to section 5804. (Applicant's Response, at 5:15; 6:20.) However, we are not persuaded that these individual findings of fact can, either individually or in the aggregate, be reasonably characterized as a final award of compensation subject to section 5804 because of the inherent interdependencies between the legal issues that were deferred and those that we affirmed. Our June 12, 2018 Opinion on Decision deferred the issue of the correct date of injury pursuant to section 5412. (Opinion on Decision, dated June 12, 2018, at p. 12:15.) The determination of the appropriate rating schedule rests in part on a determination of the date of

injury. (Lab. Code, §§ 4660; 4660.1.) Additionally, as is discussed with respect to both Applicant's Response and Defendant' Response, *infra*, the section 5412 date of injury sets the appropriate indemnity rates for disability arising out of a claimed injury. (*Chevron U.S.A. v. Workers' Comp. Appeals Bd. (Steele)* (1990) 219 Cal.App.3d 1265, 1269-1271 [55 Cal.Comp.Cases 107].) The date of injury further informs the application of possible COLA increases pursuant to section 4659(d). (*Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701].) Thus, and given the interdependency of the deferred and affirmed issues, we do not agree that the findings of the Permanent and Stationary date, appropriate rating schedule or percentage of permanent disability exist independently of a completed, finalized award of compensation as contemplated by section 5804.[2] We further believe that our affirmation of the permanent and stationary date, correct rating schedule and percentage of permanent disability was in error, as the issues which we deferred necessarily relate to and inform the balance of the decision.

In summary, we agree with applicant that section 5804 bars amendment or alteration of final awards of compensation more than five years from the date of the injury. In the absence of a *final award of compensation*, however, the WCAB may continue to exercise its original jurisdiction more than five years from the date of the injury. Here, we conclude that because there has been no final award of compensation, we continue to exercise our original jurisdiction in this matter, and retain the authority to alter or amend our prior findings. (*Vacho, supra,* at pp. 363-364; *Busch, supra,* at p. 827.)

II.

We next turn to the issue of the date of injury. Following our May 30, 2019 grant of reconsideration to study the legal and factual issues in this case, we carefully reviewed the record in its entirety. Based on our review, we are persuaded that March 20, 2014 is the correct date of injury pursuant to section 5412. Our January 20, 2023 NIT observes:

> The WCJ determined that "for purposes of LC 5412, the cumulative trauma ending date is 2014." (April 12, 2019 Findings of Fact, No. 1.) Defendant avers the correct date of injury was either in 1986, or no later than the date of the filing of the application in 2011. (Petition, at 22:14.)

[2] For example, in the absence of a final determination of indemnity, the parties to the matter would be unable to obtain the entry of judgment on the Award or the issuance of execution thereon in the Superior Court pursuant. (Lab. Code, § 5806.)

In cases involving an alleged cumulative trauma injury, the date of injury is governed by Labor Code section 5412, which provides:

> 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.

"The 'date of injury' is a statutory construct which has no bearing on the fundamental issue of whether a worker has, in fact, suffered an industrial injury…the 'date of injury' in latent disease cases 'must refer to a period of time rather than to a point in time.' (Citation.) The employee is, in fact, being injured prior to the manifestation of disability…[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, 341 [49 Cal.Comp.Cases 224].)

The term "disability" as used in section 5412 is "either compensable temporary disability or permanent disability," and, "medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579].)

Regarding the "knowledge" component of section 5412, whether an employee knew or should have known their disability was industrially caused is a question of fact. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53] *(Johnson)*.) An employee is not charged with knowledge that their disability is job-related without medical advice to that effect, unless the nature of the disability and the applicant's training, intelligence and qualifications are such that they should have recognized the relationship between the known adverse factors involved in their employment and their disability. (*Johnson, supra*, at 473; *Newton v. Workers' Co. Appeals Bd.* (1993) 17 Cal.App.4th 147 [58 Cal.Comp.Cases 395].)

In many cases applying section 5412, knowledge of industrial causation is not found until the applicant receives medical opinion expressly stating so, even where the applicant has indicated his or her belief that the disability is due to employment. (e.g. *Johnson, supra*, 163 Cal.App.3d 467, 471 (applicant believed heart problems were work related, but doctor said they were not); *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33 Cal.Comp.Cases 722] (despite applicant's testimony that work tired him, the Court reversed Appeals Board's determination that applicant failed to exercise reason able diligence to ascertain that disability originated with work); *Gleason v. Workers' Comp. Appeals Bd.* (2002) 67

Cal.Comp.Cases 1049 (writ den.) (no evidence that applicant, a nurse who believed she contracted cirrhosis of the liver from needle stick, knew about latency period of hepatitis C, so she was not charged with knowledge); *Modesto City Schools v. Workers' Comp. Appeals Bd. (Finch)* (2002) 67 Cal.Comp.Cases 1647 (writ den.) (doctor's report represents earliest knowledge, even though application was filed before the report). See also *Hughes Aircraft Co. v. Workers' Comp. Appeals Bd. (Zimmerman)* (1993) 58 Cal.Comp.Cases (writ den.) (statement by doctor that stress at work was depleting her immune system insufficient to find that applicant should have recognized the relationship between employment and disability); *Kaiser Foundation Health Plan v. Workers' Comp. Appeals Bd. (Bradford)* (1986) 51 Cal.Comp.Cases 355 (writ den.) (statement by doctor that back condition was aggravated by work not sufficient to charge applicant with knowledge).)

Further, "[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." (*Johnson, supra*, 163 Cal.App.3d 467, 471.) This is because "the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acci. Com.* (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].)

Here, applicant testified that he sustained a multitude of injuries over the course of his professional football career. (Transcript of Proceedings, dated August 15, 2017, at 33:14; see also Ex. 3, Report of Michael Einbund, M.D., dated March 20, 2014, pp. 11-16.) Applicant further underwent four surgeries to his bilateral knees. (Transcript of Proceedings, dated August 15, 2017, at 33:20.) However, the record demonstrates that none of these injuries were labor disabling prior to applicant's retirement in 1985. Applicant testified that he would return to his regular duties and gameplay following each injury or surgery. (Transcript of Proceedings, dated August 15, 2017, at 27:23; 28:14; 67:4.) Applicant's doctors prescribed no work restrictions. (*Id*. at 28:17.) Applicant continued to receive his regular salary during his treatment intervals. (*Id.* at 28:17; 67:21.) Applicant further testified that when he was released at the start of the 1985 season, it was for reasons unrelated to his physical condition. (Transcript of Proceedings, dated October 22, 2018, at 12:4.) Thus, the evidentiary record reflects a series of injuries over time, but that those injuries did not result in permanent work restriction, or an inability to continue playing professionally. The first documented evidence of compensable disability arising out of applicant's cumulative trauma claim is the QME reporting of March 19, 2014. (Ex. 8, Report of Kenneth Nudleman, M.D., dated March 19, 2014.)

With respect to the knowledge requirement of section 5412, defendant cites to applicant's trial testimony, wherein he indicated a subjective belief that within a year after his football career ended that he believed he had injuries related to the cumulative effect of his football career. (Petition, at 21:19.) However, as was noted in *Johnson, supra*, 163 Cal.App.3d 467, 471, absent expert medical advice,

applicant's subjective belief that his employment may have contributed to an injury is insufficient to satisfy the knowledge requirement of section 5412.

Applicant testified that he sustained a multitude of injuries over the course of his professional football career. Applicant testified that as a Quarterback, he was "sacked" 83 times. (Transcript of Proceedings, dated August 15, 2017, at 21:9.) Applicant further testified he sustained approximately 70-80 injuries to various parts of his body, including sprains and contusions to his bilateral knees, right finger, left ankle, right rib, left shoulder, and chest. (*Id*. at 33:14; see also Ex. 3, Report of Michael Einbund, M.D., dated March 20, 2014, pp. 11-16.) Applicant further underwent four surgeries to his bilateral knees. (Transcript of Proceedings, dated August 15, 2017, at 33:20.) Applicant's description is that of a long series of traumas, only recognized as a cumulative injury with the benefit of legal, and later, medical, advice. Dr. Einbund's report of March 20, 2014 reviewed applicant's history of various injuries and concluded:

> Professional football is an extremely violent occupation. In addition to the specific injuries to his knees as outlined above, Mr. Penrose has reported that he sustained numerous other injuries throughout his career as he played in games, practiced and worked out. He has indicated that he would receive treatment from the team trainers and that he would occasionally miss some playing time; however, he was always able to return to playing without any limitations. As long as he was engaged in these activities, his entire body was continuously subjected to severe traumatic forces, all of which are part and parcel to his current condition. (Ex. 3, Report of Michael Einbund, M.D., dated March 20, 2014, p. 24.)

Dr. Einbund thus provides a medical opinion identifying an overarching cumulative trauma arising out of applicant's extensive and multifactorial history of microtrauma over the course of his career in professional football.

Defendant avers that applicant's experience in insurance sales, including the sale of California workers' compensation policies, supports a finding that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability. (Petition, at 21:23.) However, applicant testified that while he sold workers' compensation policies, he received no special training regarding cumulative trauma claims. (Transcript of Proceedings, dated October 11, 2017, at 76:11.) Moreover, the record does not establish how applicant's experience in insurance sales would qualify him to reach a medical determination that he had sustained a cumulative trauma injury arising out of industrial exposures while playing professional football.

The first documentary medical evidence in the record that identifies a cumulative trauma injury is the 2014 reporting of applicant's QMEs. (Ex. 3, Report of Michael Einbund, M.D., dated March 20, 2014; Ex. 8, Report of Kenneth Nudleman, M.D., dated March 19, 2014.) However, applicant has testified that when he met with his

attorney in 2011, he learned of his right to seek workers' compensation benefits in California, and caused a cumulative trauma claim to be filed. (Transcript of Proceedings, dated October 11, 2017, at 78:1.) In subsequent pleadings and sworn testimony, applicant has consistently described 2011 as the first time he learned of his right to file a cumulative trauma claim. (Applicant's Petition for Reconsideration to Clarify an Issue Submitted for Determination, dated April 23, 2018, at 2:11; Supplemental Minutes of Hearing, dated September 26, 2018, at 4:6.) Accordingly, we conclude that applicant's first date of knowledge for purposes of section 5412 is the date he met with his attorney and caused his application to be filed, June 21, 2011. (Application for Adjudication, dated June 21, 2011; *Bassett McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1109-1110 [53 Cal.Comp.Cases 502].)

The first date of compensable disability identified in the record was March 20, 2014. The first date applicant was advised of the possible existence of a cumulative trauma injury arising of his professional football activities was June 21, 2011. Accordingly, we give notice of our intention to find that the date of injury under section 5412 was the date of concurrence of knowledge and disability on March 20, 2014.

(Notice of Intention to Submit for Decision, January 20, 2023, at pp. 16-20.)

For the reasons set forth above, we conclude that the date of injury pursuant to section 5412 is March 20, 2014.

III.

Next, we address the Permanent and Stationary date. Our January 20, 2023 NIT provided the parties with notice of our intention to find that applicant became permanent and stationary on March 20, 2014. Therein we wrote:

The WCJ has previously determined that applicant became permanent and stationary on December 31, 1986, based on the findings of Dr. Nudleman, who opined that applicant reached a permanent and stationary status one year after the end of applicant's professional football career. (March 20, 2018 F&A, Findings of Fact No. 5; Opinion on Decision, at p. 11.) We affirmed this determination in our June 12, 2018 Opinion and Order. (Opinion and Order Granting Petitions for Reconsideration, dated June 12, 2018, at 15:10.)

The WCJ's April 12, 2019 supplemental findings of fact determined the section 5412 date of injury to be in 2014, but also determined that "[b]ased on the prior Findings and Award dated March 20, 2018, which was affirmed on appeal, applicant's condition became permanent and stationary on December 31, 1986."

(April 12, 2019 F&A, Findings of Fact No. 6.) Defendant's Petition contends that it was error to award indemnity payable at 2014 rates, retroactive to applicant's permanent and stationary date in 1986. (Petition, at 17:3.) The WCJ's report responds that, "[t]his Court could not utilize the March 2014 permanent and stationary date as set forth in the deposition of Dr. Einbund at the second trial insofar as the Appeals Board had affirmed on appeal the permanent and stationary date of December 31, 1986. In light of the new finding pursuant to LC 5412 of a date of injury in 2014 this Court would recommend that the prior permanent and stationary date be vacated pursuant to LC 5803." (Report, at p. 7.)

Any award, order or decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) In order to constitute substantial evidence, a medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

The inherent difficulties in reaching competent medical conclusions with respect to applicant's medical status more than 25 years after his last football game are evident in the medical-legal reporting herein. Dr. Nudleman's initial report concludes that "[n]eurologically, [applicant] is permanent and stationary, and he became permanent and stationary one year after completing his professional football career." (Ex. 8, Report of Kenneth Nudleman, M.D., dated March 19, 2014, at p. 3.) However, the report fails to disclose any reasoning behind this conclusion. The report does not reflect a review of contemporaneous medical records from 1985 or 1986, and we find the retroactive assessment of a permanent and stationary status more than 30 years prior to be inherently speculative and otherwise unsupported in the record.

Similarly, orthopedic QME Dr. Einbund opined that applicant's condition became permanent and stationary "approximately two to three months following his retirement from professional football." (Ex. 3, Report of Michael Einbund, M.D., dated March 20, 2014, at p. 18.) Dr. Einbund's initial record review encompassed records from 1976 to 1981, and the report does not disclose the basis for the assessment that applicant reached a permanent and stationary plateau shortly after he stopped playing professional football in 1985. An expert opinion is insufficient to support a board determination when that opinion is based on surmise, speculation, conjecture, or guess. (*Owings v. Industrial Acc. Com.* (1948) 31 Cal.2d 689, 692 [192 P.2d 1]; *Spillane v. Workmen's Comp. App. Bd.* (1969) 269 Cal.App.2d 346, 351 [74 Cal.Rptr. 671]; *Industrial Indem. Co. v. Industrial Acc. Com.* (1949) 90 Cal.App.2d 262, 265-266 [202 P.2d 585]; see *Garza, supra,* 3 Cal.3d 312, 317.)

In subsequent deposition testimony, Dr. Einbund was candid regarding the difficulties in reaching a medical opinion on the issue:

> Q. So, my -- part of the definition of both MMI and P and S status is that the condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment; correct?
> A. Correct.
> Q. Within a reasonable degree of medical certainty, when do you believe that the level of disability that you found in your initial report would have supported a MMI or permanent and stationary date?
> A. Well my job when I see somebody who played years ago is to give the best estimate when he became permanent and stationary. And typically I say shortly after retirement. Sometimes I say three months, sometimes I say four months. I just do the best I can do with the information. There's no question the degeneration if I would have seen him 20, 30 years ago would be less. But the degeneration when I saw him in 2014 was a result, in my opinion, of his professional football career.
> Q. Correct. So, I'm asking you already indicated in your earlier testimony that a month after his career, he didn't have the level of disability that you described in your report; correct?
> A. That's highly probable.
> Q. I would assume that the level of disability increased over the years as a result of both his osteoarthritic condition and the injurious exposure from football; correct?
> A. Yes.
> Q. When do you believe that ripened into the level of disability that you found to exist in your initial report of March 20th, 2014?
> A. Can't answer that. X number of years later. I mean maybe five, maybe ten, maybe fifteen. I don't know how unless I saw him. So, let me answer. Let's hypothetically I saw him in 2004. I would just be guessing how bad his disability was. Let me try to refresh when the knee replacement was done. That was '07. So, for sure by '07 he had severe degeneration on that left knee. But I can't. I don't know when he had a one millimeter joint space on the right knee. I just don't know.
> Q. So, is it fair to say without additional evidence, that without speculating you can't determine his P and S date or MMI date to be before the date you evaluated him?
> A. I just do the best I can do. Because I'm obligated to give a date.

* * * * *

Q. I'm giving you the definition of permanent and stationary and MMI status and it specifically references the fact that the condition is well stabilized and unlikely to change substantially in the next year or two. Would [sic] that being said, you've-already indicated that his condition regarding disability got worse over the years; correct.
A. True. In that case assuming what you gave me is accurate, then he probably was not permanent and stationary shortly after his career. But sometime down the line and I can't give an exact date.
Q. But you can give within a reasonable degree of medical certainty you can say that he was P and S'd at least as of the date you evaluated him; correct?
A. There's no question he was P and S when I saw him.

(Ex. 2, Transcript of the Deposition of Michael Einbund, M.D., at 18:9; 21:22.)

Following our review of the record, and in the absence of contemporaneous medical records, we believe the retroactive assessment in 2014 that applicant reached a permanent and stationary status in 1986 is inherently speculative. To constitute substantial evidence, "a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo, supra,* 70 Cal.Comp.Cases 604, 621.) However, after reviewing the criteria for a Permanent and Stationary determination, Dr. Einbund opined that there was "no question," that applicant was permanent and stationary as of his evaluation date on March 20, 2014. (Ex. 2, Transcript of the Deposition of Michael Einbund, M.D., at 21:22.) Accordingly, we are persuaded that March 20, 2014 is the first date in the record that identifies applicant's permanent and stationary status to a reasonable degree of medical probability.

We therefore concur with the recommendation made by the WCJ in her Report, and we give notice of our intention to enter a new finding of fact that applicant reached a permanent and stationary status as of March 20, 2014.

(Notice of Intention to Submit for Decision, January 20, 2023, at pp. 20-23.)

Applicant's Response to our NIT avers the deposition testimony of Dr. Einbund does not constitute substantial medical evidence. (Applicant's Response, at p. 9:8.) Applicant points out that in Dr. Einbund's own words his assessment that applicant became permanent and stationary several months after he left professional sports was arbitrary. (Ex. 2, Transcript of the Deposition of Michael Einbund, M.D., at p. 21:16-19.)

However, Dr. Einbund's deposition testimony was unequivocal that applicant had reached a permanent and stationary plateau as of the time of Dr. Einbund's evaluation in 2014. (Ex. 2, Transcript of the Deposition of Michael Einbund, M.D., at pp. 18:9; 21:22.) While Dr. Einbund's deposition testimony describes the challenges of arriving at a retroactive permanent and stationary date, it does not otherwise invalidate his consistent and considered opinion that applicant was permanent and stationary as of the March 20, 2014 evaluation. *(Ibid.)* Nor does the evidentiary record persuasively describe an earlier date supported by substantial medical evidence.

Based on the foregoing, we conclude that applicant reached a permanent and stationary status as of March 20, 2014.

IV.

We next address the issue of the correct rating schedule. Our January 20, 2023 NIT discussed the reasons why the 2005 PDRS applies to the evaluation of disability herein:

> The WCJ has also previously determined that, "[b]ased on a review of the record, applicant's testimony, the medical opinion of Dr. Nudleman, and Labor Code Sections 4060(d) and 4061, the Court finds that the 1997 rating schedule applies." (March 20, 2018 F&A, Findings of Fact No. 10.) We affirmed this determination in our June 12, 2018 Opinion and Order. (Opinion and Order Granting Petitions for Reconsideration, dated June 12, 2018, at 15:10.)
>
> However, we have revisited this issue pursuant to our grant of reconsideration to study this case, and now conclude that it was error to apply the 1997 PDRS.
>
> Section 4660.1 applies to all injuries occurring on or after January 1, 2013, and requires that applicant's disability be rated under the AMA Guides, 5th Edition. (Lab. Code § 4660.1(b).) Furthermore, in cases involving cumulative trauma injuries, the date of injury pursuant to section 5412 "also sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right[s]." (*Argonaut Mining Co. v. Ind. Acc. Com.* (1951) 104 Cal.App.2d 27, 31 [1951 Cal. App. LEXIS 1564].) Accordingly, section 4660.1(b) applies to these proceedings because the section 5412 date of injury of March 20, 2014 occurred on or after January 1, 2013. (See also, *Azurdia v. Int'l Union of Operating Eng'rs* (August 29, 2016, ADJ81966282016) [2016 Cal. Wrk. Comp. P.D. LEXIS 414] [issues raised under section 4660.1, which applies to injuries occurring on or after 01/01/2013, are moot when section 5412 date of injury is June 2, 2011, thus invoking section 4660, which applies to injuries occurring before 01/01/2013]; *Gaither v. Cal. Res. Corp.* (December 18, 2018, ADJ10098723) [2018 Cal. Wrk. Comp. P.D. LEXIS 626] [section 5412 date of injury occurred after January 1, 2013, requiring use of ratings adjustment factor set forth in section 4660.1(b)].)

Although the date of injury pursuant to section 5412 is dispositive of the issue, we also observe that even if the date of injury had occurred prior to January 1, 2013, section 4660(d) would require that applicant's permanent disability be rated under the AMA Guides, 5th Edition. Section 4660(d) provides:

> (d) The schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003–04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.

"The prior rating schedule may only be used to rate permanent disabilities arising from compensable injuries that occurred prior to January 1, 2005, where one of the exceptions described in the third sentence of section 4660(d) has been established. If none of the specified exceptions is established, the revised permanent disability rating schedule applies to injuries occurring before its January 1, 2005 effective date." (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn, Republic Indem. Co. of America* (2006) 71 Cal.Comp.Cases 783, 790 [2006 Cal. Wrk. Comp. LEXIS 189] (Appeals Bd. en banc).)

Here, the evidence reflects neither a comprehensive medical-legal report, nor a report by a treating physician indicating the existence of permanent disability prior to January 1, 2005. Additionally, defendant was not required to provide a section 4061 notice to applicant prior to January 1, 2005, as the claim was not filed until 2011. Nor does the record reflect permanently modified work suggesting the existence of permanent disability. Consequently, applicant's disability would be ratable only under the AMA Guides, 5th Edition, even were the date of injury to have occurred prior to January 1, 2013, thus invoking section 4660(d).

(Notice of Intention to Submit for Decision, January 20, 2023, at p. 24.)

Applicant's Response contends that section 4660.1 is inapplicable to this case because "the date when a cumulative trauma injury 'occurs' is different than the Labor Code 5412 date of injury." (Applicant's Response, at 8:18.) However, as we explain below, the section 5412 date of injury "sets the date for the measurement of compensation payable, and all other incidents of the workman's right." (*Argonaut Mining Co. v. Industrial Acci. Com.* (*Gonzalez*) (1951) 104

Cal.App.2d 27, 31 [1951 Cal. App. LEXIS 1564]; *Chevron U.S.A. v. Workers' Comp. Appeals Bd. (Steele)* (1990) 219 Cal.App.3d 1265, 1269-1271 [55 Cal.Comp.Cases 107] *(Steele)* [concurrence of knowledge and disability sets statutory rate of indemnity benefits].)

And as we noted in our NIT, even if the section 5412 date of injury occurred prior to January 1, 2013, section 4660(d) would still require the application of the 2005 PDRS. Applicant's Response does not contest our analysis under section 4660(d).

Accordingly, we conclude that the date of injury requires the application of the 2005 PDRS pursuant to section 4660.1, and even were this not the case, the 2005 PDRS would still apply under section 4660(d).

V.

Defendant contends that if the date of injury is established as March 20, 2014, the parties should be required to follow the medical-legal procedure as set forth in Labor Code section 4062.2, and that Qualified Medical Evaluators (QMEs) in orthopedics and neurology are required. (Defendant's Response, at 1:26.)

However, in *Tanksley v. City of Sana Ana* (January 25, 2010, ADJ2005173) [2010 Cal. Wrk. Comp. P.D. LEXIS 74],[3] we observed:

> [T]he question of the process that applies to applicant's claim *does not first require a finding of the date of injury*. Instead, for injuries that are claimed to have occurred prior to January 1, 2005, as alleged in this case, section 4062 as it existed before its amendment by SB 899 continues to provide the procedure by which medical-legal reports are to be obtained. (*Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584 [38 Cal.Rptr.3d 914, 71 Cal.Comp.Cases 161]; *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596 [38 Cal.Rptr.3d 922, 71 Cal.Comp.Cases 155]; *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 (Appeals Board en banc); *cf. Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 (significant panel decision), 71 Cal.Comp.Cases 1900 (writ den.).)

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to *Tanksley v. City of Santa Ana* because it considered a similar issue.

(*Id.* at p. *9, italics added.)[4]

Additionally, in our en banc decision in *Simi v. Sav-Max Foods, Inc*. (2005) 70 Cal.Comp.Cases 217 [2005 Cal. Wrk. Comp. P.D. LEXIS 3], we held that because there was no operative law other than former section 4062 to provide a procedure for obtaining AME and QME medical-legal reports for cases involving represented employees who sustained injuries prior to January 1, 2005, "for injuries occurring prior to January 1, 2005, section 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which AME and QME medical-legal reports are obtained in cases involving represented employees." Accordingly, we are not persuaded that the medical-legal procedure as set forth in section 4062.2 is applicable. To the extent that the development of the record is required, the parties should address the issues to the existing reporting physicians, subject to the WCJ's determination of substantiality. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc) [the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case].)

VI.

Defendant contends that "[w]hen an employee sustains cumulative trauma injury or occupational disease, the disability schedule and indemnity rates for workers' compensation benefits is determined by the date upon which the employee first suffered compensable disability, not based on the [date of injury] as defined by section 5412." (Defense Response at 3:16; Defendant's Petition for Reconsideration, dated May 16, 2019, at 10:25.)

In support of this contention, defendant cites to *Argonaut Mining Co. v. Industrial Acci. Com.* (*Gonzalez*) (1951) 104 Cal.App. 2d 27 [1951 Cal. App. LEXIS 1564] (*Gonzalez*). (Petition, at 11:2.) Therein, applicant filed an application on December 22, 1948, alleging occupational silicosis from 1923 to 1928. The Industrial Accident Commission (IAC) found applicant sustained compensable injury consisting of silicosis which caused his death on April 9, 1949, and awarded

[4] The WCJ in *Tanksley* observed that at the inception of a cumulative trauma claim, the pleaded date of injury is, at most, a choice made by experienced counsel. (*Tanksley v. City of Sana Ana (January 25, 2010, ADJ2005173) [2010 Cal. Wrk. Comp. P.D. LEXIS 74] at p. *6].* In such cases, "the statutory scheme should not be interpreted so that either side is arbitrarily deprived of the right to medical evaluation or reporting," pending a determination of the section 5412 date of injury. (*Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584, 592 [71 Cal.Comp.Cases 161].) It is for this reason that a formal adjudication of the date of injury in a cumulative trauma claim is not a prerequisite to obtaining medical-legal reporting responsive to the claimed injuries.

benefits based on 1948 indemnity rates, not 1928 rates. The employer sought appellate review, and the Court of Appeal framed the dispute as follows: "Petitioner asserts that the date of injury for the purposes of fixing the amount of compensation to be awarded is the last date that the workman was exposed to the silica dust as an employee of petitioner or the date of Gonzalez's employment by petitioner. The commission asserts that in the case of an occupational disease industrial injury does not occur until disability results." (*Gonzalez, supra*, at p. 30.) Quoting the entirety of section 5412, the Court of Appeal observed that the section fell within the time limitations set forth in Division 4, part 4, chapter 2, which deals with time limitations for initiating proceedings. "This would seem to lend support to petitioner's contention that section 5412 of the Labor Code deals with the date of injury in cases of occupational diseases only for the purpose of computing the statute of limitations in such cases." However, the Court then observed that the position of the IAC was "just as logical," and that "[r]egardless of the date of exposure to disease, the claimant has no cause of action and no rights accrue to him until that point in time when the cumulative effects of his disease result in a compensable disability." (*Id*. at p. 31.) The Court concluded:

> It would seem logical that even if the *Marsh* case and the subsequent changes in the code sections are held to set the "date of injury" in cases of occupational disease only for the purpose of relieving a sufferer from occupational disease from the operation of the statutes of limitation, a necessary corollary would be that it *also sets the date for the measurement of compensation payable, and all other incidents of the workman's right*. Until the disability there is no compensable injury. When the disease results in disability there then comes into existence for the first time a right in the petitioner to seek compensation. When the right comes into existence certain rates are applicable. It would seem that these are the rates by which compensation should be payable.
>
> (*Ibid.,* italics added.)

Thus, *Gonzalez* makes clear that the date of injury pursuant to section 5412 "sets the date for the measurement of compensation payable." (*Ibid.*) We observe that in *Gonzalez*, as of the time of the filing of the application in 1948, applicant had sustained disability and had knowledge of the industrial nature of his injury, and the IAC thus concluded that applicant's date of injury to be November 23, 1948, and awarded benefits at the rates in effect for 1948. (*Id*. at p. 28.) Accordingly, applicant's date of injury under section 5412 set the "measurement of compensation payable." (*Id*. at p. 31.)

Similarly, in *Dickow v. Workmen's Comp. Appeals Bd.* (1973) 34 Cal.App.3d 762 [38 Cal.Comp.Cases 664] (*Dickow*), applicant filed an application for workers' compensation benefits on October 21, 1960 for injury alleged from 1951 to 1954. Applicant alleged exposure to dust and fumes while he worked as a service mechanic. Applicant was found to be permanently and totally disabled on October 10, 1960, but the Workers' Compensation Appeals Board (WCAB) applied benefit rates available in 1954 based on applicant's last date of injurious exposure, rather than those available in 1960. The Court in *Dickow* noted that when applicant left his employment with defendant in 1954, he was not aware of any medical problems. (*Id*. at p. 764.) However, he developed shortness of breath in 1959. On October 10, 1960, applicant was examined by a physician who first "diagnosed petitioner as being totally and permanently disabled by virtue of a disease in his lungs." (*Ibid.*) In reversing the WCAB, the Court of Appeal noted that applicant, "became disabled in 1960 and not in 1954," and further noted that if applicant "had filed a claim for injury to his lungs in 1954 he would not have been awarded any indemnity because he was not disabled at that time." (*Id.* at p. 764.) Once again, the development of applicant's disability in 1959 and 1960 coincided with applicant's receipt of medical advice as to the work-relatedness of his condition in 1960. It was not until applicant had both disability and knowledge of its industrial causation that he filed a claim for workers' compensation benefits, for which benefits were available at the rates then in effect.

Defendant cites to *Van Voorhis v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 81 [39 Cal.Comp.Cases 137] (*Van Voorhis*), for the proposition that "compensation is measured by the applicant's earning capacity at the time he incurred his compensable disability." (Petition, at p. 14:12.) In *Van Voorhis*, applicant filed an application seeking benefits resulting from hearing loss sustained from 1937-1963, but only discovered to be industrially related in 1971. The WCAB awarded calculated applicant's wages based on the date of injury as defined by section 5412, rather than applicant's wages at the "time of the injury" as set forth in the wage calculation section of 4453 as it then existed. The Appeals Board's decision had the net effect of reducing indemnity paid from maximum PD rates to minimum PD rates, and significantly reducing the award of indemnity. The Court of Appeal annulled and remanded, observing that section 4453 requires earnings be taken at the time of injury, not the "date of injury," and that "the compensation must be measured by the applicant's earning capacity as it existed at the time he incurred his compensable disability." (*Van Voorhis, supra*, at p. 87). Defendant relies on *Van Voorhis* for the

proposition that, "once the compensable disability occurs, the substantive rights of the employee or those claiming under him for the disability cannot be reduced or enhanced." (Petition at p. 15:1.) However, we have previously noted that the holding in *Van Voorhis* concerned the calculation of applicant's wages, rather than application of disability rates. (See *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Hosey)* (2017) 82 Cal.Comp.Cases 414 [2017 Cal. Wrk. Comp. LEXIS 25].) Moreover, the holding in *Van Voorhis* was premised on former section 4453, which calculated weekly wages based on when compensable disability occurred, or "at the time of the injury." (*Van Voorhis, supra*, at pp. 83-89.) However, the legislature subsequently amended section 4453(d), to require that benefits be calculated "according to the limits in this section in effect on the date of injury," rather than at the "time of the injury." (Lab. Code, § 4453(d); see *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 446-447 [76 Cal.Comp.Cases 701].) Accordingly, we are not persuaded that *Van Voorhis* requires that indemnity rates be fixed as of the first date of compensable disability.

In contrast, *Chevron U.S.A. v. Workers' Comp. Appeals Bd. (Steele)* (1990) 219 Cal.App.3d 1265, 1269-1271 [55 Cal.Comp.Cases 107] (*Steele*) concluded that the concurrence of knowledge and disability under section 5412 sets the statutory rate of indemnity benefits. In *Steele,* applicant sustained injury in the form of asbestosis, for which an award issued on September 28, 1976. However, on August 12, 1987, applicant was diagnosed with mesothelioma, and thereafter filed a claim for additional benefits. The WCJ determined that the mesothelioma was a separate disease with a separate date of injury, and awarded benefits at the rates available in 1987, despite applicant not having worked for the employer since September 15, 1975. The decision was affirmed by the WCAB and, and the employer petitioned for a writ of review with the Court of Appeal. (*Id*. at p. 1268-9.) The Court analyzed the decisions in *Gonzalez, supra*, *Dickow, supra*, and *Van Voorhis, supra*, and concluded:

> After review of the above discussed authorities, it is irrefutable that the "date of injury" for determining the relevant statute of limitations, as well as the statutory rate of indemnity benefits, in latent occupational disease cases, is the date of concurrence of disability and knowledge. Thus, we are left to determine whether one period of exposure to a harmful substance, such as asbestos, can result in more than one "injury" or "disease" and, therefore, more than one date of injury under section 5412. The law is express that there can be no compensable injury until there is disability. (§ 5412; *Argonaut Mining Co. v. Ind. Acc. Com., supra*, 104 Cal.App.2d at

> p. 31.) The fact of injury (exposure) and the date of injury (disability), by definition, are not equivalent in cases involving the latent effects of an occupational disease. (See §§ 5411, 5412; 2 Hanna, Cal. Law of Employee Injuries and Workmen's Comp. (2d rev. ed. 1990) § 18.03[6], pp. 18-21; cf. *J.T. Thorp, Inc. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 327, 343-344 [200 Cal.Rptr. 219].)
>
> (*Steele, supra*, at 1271.)

Reasoning that the fact of the injury (i.e. injurious exposure) under certain circumstances may result in more than one date of injury, the Court of Appeal upheld the WCJs determination that applicant had sustained two distinct injuries, with benefits payable at the appropriate rates for each date of injury under section 5412. (*Id.* at p. 1271; see also *General Dynamics Corp. v. Workers' Comp. Appeals Bd. (Anderson)* (1999) 71 Cal.App.4th 624 [64 Cal.Comp.Cases 515].) While we acknowledge defendant's argument that *Steele* fixes indemnity rates to the date of onset of disability, we find the argument unpersuasive in light of the unambiguous language of *Steele* which sets the *concurrence* of knowledge and disability under section 5412 as the appropriate date for determining benefit rates. (Defendant's Petition, at p. 16:10; *Steele, supra,* at p. 1271.)

VII.

In summary, we have previously provided notice of intention to affirm our June 12, 2018 Opinion and Order Granting Petitions for Reconsideration and Decision after Reconsideration except to amend the March 20, 2018 Findings and Award, to find that the issue of applicant's Permanent and Stationary date is deferred (Finding of Fact No. 5); that the issues of permanent disability, apportionment, and attorney's fees are deferred (Findings of Fact Nos. 6, 7, 15); and that the issue of the applicable rating schedule is deferred (Finding of Fact No. 10). We have further provided notice of our intention to rescind the WCJ's April 12, 2019 Findings and Award, and substitute a new Findings and Award reflecting that applicant's date of injury was March 20, 2014 (Findings of Fact No. 1); that applicant's disability must be rated using the AMA Guides, pursuant to section 4660.1 (Finding of Fact No. 2); that applicant's Permanent and Stationary date is March 20, 2014 (Finding of Fact No. 5); and that the issues of permanent disability, COLA adjustment, and attorney fees are deferred (Findings of Fact Nos. 6 & 7). We continue to exercise our original jurisdiction because there has been no prior final award of compensation. We further conclude that

the evidentiary record supports a finding that the permanent and stationary date is March 20, 2014, that the date of injury is March 20, 2014, and that the 2005 PDRS is applicable to the rating of disability in this matter. We also conclude that the date of injury pursuant to section 5412 will set the appropriate indemnity rates for applicant's injury.

Upon return of this matter to the trial level, the WCJ may wish to conduct a conference wherein the parties are encouraged to seek amicable resolution of their differences and to institute a discovery plan. (Cal. Code Regs., tit. 8, § 10758.).

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that that the Opinion and Order Granting Petitions for Reconsideration and Decision after Reconsideration issued by the Workers' Compensation Appeals Board on June 12, 2018 is **AFFIRMED** except that it is **AMENDED** as follows:

> IT IS ORDERED that the petitions of applicant and of defendant North River Insurance Company for reconsideration of the March 20, 2018 Findings And Award And Orders of the workers' compensation administrative law judge are GRANTED.
>
> IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 20, 2018 Findings And Award And Orders of the workers' compensation administrative law judge is RESCINDED and the following is SUBSTITUTED therefor:

FINDINGS OF FACT

1. Craig Penrose born [], was employed as a professional athlete, during the period April 8, 1976 through potentially February, 1985 by the following teams with the following coverage: From April 8, 1976 to October 10, 1977 by the Denver Broncos (April 8, 1976 to October 10, 1977 insured by Travelers; and October 11, 1977 to February 1, 1980 Broncos PSI), by the New York Jets from November 1, 1982 to May 25, 1983 (insured by Armour Risk Management, formerly One Beacon), by the Arizona Wranglers from November 1, 1982 to May 25, 1983 (insurance company unknown for period November 1982 to February 1, 1983; thereafter, from February 1, 1983 to February 1, 1984 by North River Insurance Company), by the Denver Gold from May 26, 1983 to February 1, 1985 (insurance carrier North River Insurance from May 26, 1983 to February 1, 1984 and Home insurance in liquidation from February 1, 1984 to February 1, 1985).
2. Based on applicant's credible testimony at trial that he signed two of his contracts in California utilizing a California agent and following a review of the record, the Court finds that she does have subject matter jurisdiction over this case for the entire cumulative trauma period pled.
3. Based on applicant's testimony at trial, the Court finds that applicant did enter into an employment contract with the Wranglers in December 1982.

4. Based on the medical opinion of Dr. Einbund, the Court finds injury to the neck, back, upper and lower extremities as well as the head. Based on the medical opinion of Dr. Nudleman, the Court finds applicant also developed a sleep disorder on an industrial basis.
5. The issue of when applicant became Permanent & Stationary is deferred.
6. The issue of permanent disability is deferred.
7. The issue of apportionment is deferred.
8. Based on the medical opinion of Dr. Einbund and Dr. Nudleman, the Court finds there is a need for future medical care to cure or relieve the effects of the industrial injury.
9. The Court orders issues of liability for self-procured medical treatment and liens deferred and off-calendar.
10. The issue of the applicable permanent disability rating schedule is deferred.
11. The Court finds that applicant's right to file a claim is not barred by the Statute of Limitations.
12. Based on applicant's uncontroverted testimony that his last game was in May 1984, the Court finds the liability period for the cumulative trauma injury under Labor Code section 5500.5 to be from May, 1983 to May 1984. The issue of the date of injury under Labor Code section 5412 is deferred.
13. In regards to Labor Code Sections 3600.5(a) and (b), this issue becomes moot insofar as the applicant signed his contracts for the Denver Broncos and the Arizona Wranglers in California.
14. In regards to Insurance Code Sections 1063.1(c)(1)-(12) and 1063.2, the Court finds that per Insurance Code Section 1063.1 that CIGA is dismissed as a party defendant due to the "other insurance" during the cumulative trauma period of injury.
15. The issue of attorney's fees is deferred.

ORDERS

IT IS ORDERED that the issue of liability for self-procured medical treatment and liens is deferred and off-calendar.

IT IS FURTHER ORDERED that CIGA be dismissed with prejudice.

IT IS FURTHER ORDERED that the Findings and Award issued by the WCJ on April 12, 2019 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. The date of injury pursuant to Labor Code section 5412 was March 20, 2014.
2. Based on the date of injury under section 5412, section 4660.1 requires that applicant's impairment be assessed under the AMA Guides, 5th Edition, and the impairment rated pursuant to the 2005 PDRS
3. The Court finds applicant was maximum for 2014 permanent disability rates.
4. The Court finds applicant would not be entitled to the 15 percent increase.
5. Applicant was permanent and stationary on March 20, 2014.
6. The issue of permanent disability and the COLA adjustment pursuant to Labor Code section 4659(c) is deferred.
7. The issue of attorney fees is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 27, 2023

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

RAYMOND PENROSE
GLENN STUCKEY & PARTNERS
SIEGEL, MORENO & STETTLER
BOBER, PETERSON & KOBY

SAR/abs

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