WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LANCE D. MIRACO, *Applicant*

vs.

CITY OF SALINAS, permissibly self-insured, administered by CORVEL CORPORATION, *Defendants*

Adjudication Number: ADJ14038029
Salinas District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the September 26, 2023 Findings, Award and Order (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a police officer from January, 1994, to December 31, 2013, sustained industrial injury to his low back and right leg, and in the form of gastritis, gastroesophageal reflux disease, insomnia and hypertensive cardiac disease. The WCJ determined that all of the components of the claimed injury were attributable to a single cumulative injury. The WCJ further determined that the date of injury for applicant's low back and right leg injury was December 16, 2020, and that applicant claim of gastritis and gastroesophageal reflux disease and related insomnia were compensable consequence injuries related to applicant's orthopedic injuries. Finally, the WCJ determined that the date of injury for the claimed hypertensive cardiac disease was June 14, 2013, and that applicant's claim of cardiac injury was barred by Labor Code[1] section 5405.

Applicant contends that the date of injury for applicant's hypertensive cardiac disease was September 7, 2021, and that compensation is not barred by section 5405.

We have received an Answer from the defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the dates reflecting

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

applicant's visit to the emergency room be amended to reflect 2013, rather than 2012; however, as to the merits of the petition, the WCJ recommends that the petition be denied.

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, and for the reasons discussed below, we will grant the Petition, rescind the F&A and substitute new findings that applicant has sustained injury to the low back, right leg, and in the form of gastritis, gastroesophageal reflux disease, insomnia and hypertensive cardiac disease; that the date of injury is December 16, 2020; and that compensation is not barred by section 5405.

FACTS

Applicant claimed injury to his low back, and right leg, and in the form of hypertensive cardiac disease, gastritis, gastroesophageal reflux disease, and insomnia, while employed as a police officer by defendant City of Salinas during the period ending December 31, 2013. Defendant admits injury to the low back and right leg, but disputes injury in the form of hypertensive cardiac disease, gastritis, gastroesophageal reflux disease, and insomnia.

On June 17, 2020, applicant completed a DWC-1 claim form, alleging injury to the low back and hypertension/heart. (Ex. J-8, DWC-1 Claim Form, dated June 17, 2020.)

The parties selected Douglas Curran, D.C., to act as the Qualified Medical Evaluator (QME) in orthopedic medicine, and Roger Nacouzi, M.D., as the QME in internal medicine.

On December 11, 2020, QME Dr. Curran issued a report detailing the results of his evaluation of applicant on November 12, 2020. Therein, Dr. Curran noted applicant's description of the injury as occurring over time, filed in response to medical information received from treating physician Dr. Wong in April, 2020, following a reading of applicant's lumbar MRI study. (Ex. J-6, Report of Douglas Curran, D.C., dated December 11, 2020, at p. 4.) The QME undertook a clinical examination of the applicant, reviewed the submitted medical history, and diagnosed a cumulative injury through applicant's last day worked in 2013. The QME opined that applicant was not yet permanent and stationary.

On December 24, 2020, applicant filed an Application for Adjudication of Claim, asserting injury to the neck, back, and right leg, and in the form of injury to the circulatory system/heart, gastritis, and insomnia.

On August 19, 2021, Roger Nacouzi, M.D., evaluated applicant as the QME in internal medicine. The applicant related a history to QME Dr. Nacouzi which included treatment in 2012[2] when applicant was seen in the emergency room for hypertension and palpitations. (Ex. J-7, Report of Roger Nacouzi, M.D., dated August 19, 2021, p. 7.) Applicant was diagnosed at the time with "stress-induced chest symptoms" and was started on blood pressure medications. (*Ibid*.)

In April, 2020, applicant was diagnosed with degenerative disk disease, and in June, 2020, applicant was seen in the Emergency Room at Salinas Valley Memorial Hospital for chest discomfort and palpitations. Dr. Nacouzi described a clinical evaluation of applicant, reviewed the submitted medical record, and concluded that applicant sustained cumulative injury through December 31, 2013 in the form of hypertensive cardiac disease, gastritis, gastroesophageal reflux disease and insomnia. (*Id.* at p. 8.)

On June 21, 2023, the parties proceeded to trial, framing issues of injury arising out of and in the course of employment (AOE/COE), parts of body injured, need for further medical treatment, date of injury pursuant to section 5412, and whether section 5405 bars compensation. (Minutes of Hearing and Summary of Evidence (Minutes), dated June 21, 2023, at p. 2:14.) Applicant testified, and the parties submitted the matter for decision as of July 7, 2023.

On September 26, 2023, the WCJ issued her decision, finding in relevant part that "all components of injury for this claim are attributed to a single cumulative exposure during the span of Applicant's employment from January 1994 through December 31, 2013." (Finding of Fact No. 7.) The WCJ further determined that applicant sustained injury to his low back, right leg, and sustained gastritis, gastroesophageal reflux disease, insomnia and hypertensive cardiac disease. (Finding of Fact No. 1.) The WCJ determined that the date of injury pursuant to section 5412 for applicant's hypertensive cardiac disease was June 14, 2013, and that compensation for those body parts was barred pursuant to section 5405. The WCJ further determined that the date of injury for applicant's low back and right leg injuries was December 16, 2020. (Finding of Fact No. 4.) The WCJ also determined that applicant's gastritis, gastroesophageal reflux disease and related insomnia are compensable consequence injures associated with the Applicant's orthopedic injuries. (Finding of Fact No. 5.) Based on these findings, the WCJ awarded future medical care

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[2] As is noted in the WCJ's Report, the references in Dr. Nacouzi's reporting to a hospital visit in 2012 appear to be based on the applicant's recollection. However, records reviewed by Dr. Nacouzi reflect an Emergency Department evaluation on June 13, 2013. (Report, at pp. 5-6; Ex. J-7, Report of Roger Nacouzi, M.D., dated August 19, 2021, pp. 4-5.)

to the low back, right leg, gastritis, gastroesophageal reflux disease, and insomnia. (F&A, Award, p. 2.)

Applicant's Petition for Reconsideration (Petition) asserts that section 5412 requires both the existence of compensable disability, and knowledge that it is caused by employment. Applicant contends that he had neither compensable disability nor knowledge of its industrial causation until the August 19, 2021 reporting of Dr. Nacouzi was received by applicant on September 7, 2021. (Petition, at p. 10:7.) Accordingly, applicant asserts that compensation for his hypertensive cardiac disease is not barred by the one year statute of limitation of section 5405.

Defendant's Answer points out that applicant received diagnostic studies in 2013 showing enlargement of the ventricles in his heart, and that applicant knew or should have known that work stress was a causative factor for his condition. (Answer, at p. 3:23.) Accordingly, defendant asserts the date of injury per section 5412 as it relates to the claimed hypertensive cardiac disease was June 14, 2013. Defendant concludes that because the application for adjudication was filed more than one year from the date of injury, compensation is barred by section 5405.

DISCUSSION

I.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10507(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10508.) To be timely, however, a petition for reconsideration must be *filed* (i.e., received) within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10845(a), 10392(a).) As explained further below, petitions for reconsideration are required to be filed at the district office, and not directly at the Appeals Board. (Cal. Code Regs., tit. 8, § 10940(a)); see Cal. Code Regs., tit. 8, § 10205(l) [defining a "district office" as a "trial level workers' compensation court."]).

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd*. (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656] (*Maranian*); *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122

Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

Timely petitions for reconsideration filed *and received* by the Appeals Board are "acted upon within 60 days from the date of filing" pursuant to section 5909, by either denying or granting the petition. The exception to this rule is a petition *not received* by the Appeals Board within 60 days due to irregularities outside the petitioner's control. (See *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312].) Labor Code section 5909 provides that a petition is denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.)[3]

However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].)[4] In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

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[3] The Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909 based on the Supreme Court's holdings that summary denial of reconsideration is no longer sufficient after the enactment of section 5908.5. (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350], *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) ["We hold that if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision." (See Lab. Code, § 5908.5; See also *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 893 [35 Cal.Comp.Cases 27].)

[4] Under the grant of authority in the California Constitution, the Appeals Board operates as an appellate court that reviews and decides appeals from decisions issued by workers' compensation administrative law judges, and all decisions of the Appeals Board are final unless appealed to the courts of appeal. (Cal. Const., art. XIV, § 4; §§ 111-116, 133-134, 3201, 5300-5302, 5900 et seq.) In performing its duties as a court, the Appeals Board is bound by the constitutional mandate that it "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character..." (Cal. Const., Art. XIV, § 4.) *Substantial justice requires the Appeals Board to protect the due process rights of every person seeking reconsideration*. (*See San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986]; and *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Pursuant to the holding in *Shipley* allowing tolling of the 60-day time period in section 5909, the Appeals Board acts to grant or deny such petitions for reconsideration within 60 days of receipt of any such petition, and thereafter issues a decision on the merits. By doing so, the Appeals Board also preserves the parties' ability to seek meaningful appellate review.[5] (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra,* 68 Cal.2d at p. 753.) This approach is consistent with *Rea* and other California appellate courts,[6] which have consistently followed *Shipley's* lead when weighing the statutory mandate of 60 days against the parties' constitutional due process right to a true and complete judicial review by the Appeals Board.[7]

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[5] "The purpose of [section 5900] is to allow reconsideration, in the context of a specific, framed challenge, of a matter which has been heard only once previously. [Citations omitted.] The power to reconsider affords the WCAB an opportunity to review its own decisions and the decisions of the WCJs 'in house,' by applying the Board's administrative expertise to rectify errors, when required, prior to judicial involvement." (*Maranian, supra*, 81 Cal.App.4th at p. 1074.) Thus, meaningful review by the Appeals Board of factual determinations made at the trial level affords the parties essential due process because an appellate court considering a petition for writ of review of a decision of the Appeals Board may not reweigh the evidence or decide disputed questions of fact. (Lab. Code, § 5952.) Rather, the appellate courts must determine whether the evidence, when viewed in light of the entire record, supports the award of the WCAB. (*Keulen v. Workers Compensation Appeals Bd.* (1998) 66 Cal.App.4th 1089, 1095-1096 [63 Cal.Comp.Cases 1125].)

[6] See e.g., *Hubbard v. Workers Compensation Appeals Bd. of California* (1993) 58 Cal.Comp.Cases 739 [writ of review granted to annul Appeals Board's denial of petition for reconsideration by operation of law (Lab. Code, § 5909)]; see also, *Frontline Medical Associates, Inc. v. W.C.A.B. (Lopez, Leonel; Sablan, Yolanda)* (2022) 87 Cal.Comp.Cases 314 (writ den.); *Entertainment by J & J, Inc. v. Workers' Comp. Appeals Bd. (Bernstein)* (2017) 82 Cal.Comp.Cases 384 (writ den.); *Bailey v. Workers Compensation Appeals Bd. of California* (1994) 59 Cal.Comp.Cases 350 (writ den.). Recent denials in all District Courts of Appeal include: First District, Div. 1 (*Scaffold Solutions v. Workers' Compensation Appeals Board and Angelo Paredes* (2023) (A166655)); First District, Div. 4 (*Kaiser Foundation Health Plan v. Workers' Compensation Appeals Board and Julie Santucci* (2021) (A163107)); Second District, Div. 3 (*Farhed Hafezi and Fred F. Hafezi, M.D., Inc. v. Workers' Comp. Appeals Bd.* (2020) (B300261)(SAU8706806)); Third District (*Reach Air Medical Services, LLC et al. v.Workers' Compensation Appeals Board. et al. (Lomeli)* (2022) (C095051)); Third District (*Ace American Insurance Company v. Workers' Compensation Appeals Board and David Valdez* (C094627) (2021)); Fourth District, Div. 2 (*Carlos Piro v. Workers' Compensation Appeals Board and County of San Bernardino* (2021) 86 Cal.Comp.Cases 599); Fourth District, Div. 3 (*Patricia Lazcano v. Workers' Comp. Appeals Bd*. (2022) 88 Cal.Comp.Cases 54); Fifth District (*Great Divide Insurance Company v. Workers' Compensation Appeals Board et al. (MelendezBanegas)* (2021) 86 Cal.Comp.Cases 1046); Sixth District (*Rebar International, Inc., et al. v. Workers' Comp. Appeals Board et al. (Hay*nes) (2022) 87 Cal.Comp.Cases 905).

[7] But see *Zurich American Ins. Co. v. Workers' Compensation Appeals Bd.* (2023) 97 Cal.App.5th 1213, wherein the Second District Court of Appeal, Division 7, concluded that Labor Code section 5909 terminates the Appeals Board's jurisdiction to consider a petition for reconsideration after 60 days, and therefore decisions on a petition for reconsideration made after that date are void as in excess of the Board's jurisdiction unless specified equitable circumstances are present. The Court's opinion in *Zurich* appears to reflect a split of authority on the application of "*Shipley*" because it disagreed "with the conclusion in *Shipley* that a petitioner has a due process right to review by the Board of a petition for reconsideration even after 60 days has passed…" (*Id.*, at p. 1237.) The Court in *Zurich* did not indicate that its decision applies retroactively.

In addition to disregarding the respondent's right to due process and depriving the parties of meaningful review by the Appeals Board, the *Zurich* Court apparently failed to consider that Labor Code section 5803 provides for

In this case, the WCJ issued the Findings and Order on September 26, 2023, and applicant filed a timely petition on October 16, 2023 at the Salinas district office. As required by Rule 10205.4 (Cal. Code Regs., tit. 8, § 10205.4), applicant's paper Petition was thereafter scanned into the Electronic Adjudication System (EAMS). (See Cal. Code Regs., tit. 8, §10206 [electronic document filing rules], § 10205.11 [manner of filing of documents].) The Division of Workers' Compensation (DWC) is headed by the Administrative Director, who administers all 24 district offices, including employment of more than 190 WCJs and maintenance of EAMS. (See Cal. Code Regs., tit. 8, §§10205, 10205.4, 10206, 10208.5; see also Lab. Code §§ 110, 111 [delineating the powers of the Administrative Director and Appeals Board].) When a Petition is filed, a task is sent to the WCJ through EAMS so that the WCJ receives notice that a Report is required. (See Cal. Code Regs., tit. 8, §10206; 10962.) No such notice is provided to the Appeals Board. Thereafter, the district office electronically transmits the case to the Appeals Board through EAMS. Here, according to Events in EAMS, which functions as the "docket," the district office transmitted the case to the Appeals Board on January 12, 2024. Thus, the first notice to the Appeals Board of the Petition was on January 12, 2024. Due to this lack of notice *by the district office*, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties.[8] Therefore, considering that applicant filed a timely petition and that the Appeals Board's failure to act on that petition was in error, we find that our time to act on applicant's petition was tolled until 60 days after January 12, 2024.

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continuing jurisdiction by the Appeals Board over all of its "orders, decisions, and awards," and section 5301 provides for "full power, authority and jurisdiction" by the Appeals Board for all proceedings under section 5300. Additionally, jurisdiction is conferred on the Appeals Board when a petition is timely filed under Labor Code section 5900(a), and the Appeals Board may review the entire record, even with respect to issues not raised in the petition for reconsideration before it. A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

[8] Contrary to the Court's speculation in *Zurich, supra,* given the tremendous volume of documents that the district offices must process, the vast number of cases in the system, and the limitations of the EAMS system, the parties' ability to inquire at the district office as to the status of a petition for reconsideration is limited; in fact, there is simply no mechanism to do so. Instead, the parties must rely on a verification of timely filing from the EAMS system. (Cal. Code Regs., tit. 8, § 10206.3.)

II.

We begin our discussion with the WCJ's determination that applicant sustained but one cumulative injury. The WCJ found that "all components of injury for this claim are attributed to a single cumulative injury exposure…." (Finding of Fact No. 7.) The WCJ further explained in her Opinion on Decision:

> Labor Code §5303 directs that there is only one cause of action for each injury, but that no injury claim can be merged with another injury claim, either specific or cumulative. As this appears to be one injury claim with a common cumulative date of exposure for all parts of body asserted, no merger appears to exist, and assessment of the injuries in one proceeding is appropriate.
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> (F&A, Opinion on Decision, at pp. 5-6.)

In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].) The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB. (*Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd.* (*Coltharp*) (1973) 35 Cal.App.3d 329, 341 [38 Cal.Comp.Cases 720]; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16].)

Here, the WCJ determined that the entirety of the claimed injury arose from applicant's cumulative industrial exposures while working as a police officer from January, 1994 through December 31, 2013. (F&A, Opinion on Decision, at pp. 5-6.) The WCJ's opinion is substantiated in the physical and internal medicine QME opinions, who collectively ascribe industrial causation to the cumulative effects of applicant's employment through the end of 2013. (Ex. J-6, Report of Douglas Curran, D.C., dated December 11, 2020, at p. 24; Ex. J-7, Report of Roger Nacouzi, M.D., dated August 19, 2021, at pp. 8-10.) We further note that the applicant's trial testimony and the medical history adduced in the QME reporting reflects the contemporaneous manifestation of applicant's orthopedic and internal medicine complaints. (Minutes, at p. 4:3.) We therefore concur with the WCJ's determination that applicant sustained but one cumulative injury, from January, 1994 to December 31, 2013.

Section 3208.1 defines a cumulative injury 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." (Lab. Code, § 3208.1.) The date of a cumulative injury is defined by Section 5412, which provides, "[t]he 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.)

Accordingly, while we agree with the WCJ that applicant sustained a single cumulative injury, the contemporaneous manifestation of the injury coupled with the filing of a claim form that addresses both the orthopedic and cardiac aspects of the injury leads us to conclude that there is only one date of injury arising out of applicant's cumulative injury.[9]

Applicant challenges the WCJ's determination that the date of injury as described in section 5412 for applicant's hypertensive cardiac disease was June 14, 2013. Applicant contends that he did not sustain compensable disability or possess the requisite knowledge that such disability was caused by his employment until 2020. We agree.

"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' …[t]he employee is, in fact, being injured prior to the manifestation of disability." (*J. T. Thorp v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327, 341 [49 Cal.Comp.Cases 224] (*Butler*) (italics added).)

Labor Code section 5412 sets the date of injury for cumulative injury and occupational disease cases, as "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.) Thus, to determine the date of applicant's cumulative injury, there must exist a concurrence of disability and knowledge that it was caused by employment. Disability means either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579] (*Rodarte*).) Knowledge requires more than an

[9] As the court of appeal noted in *Austin*, *supra*, 16 Cal.App.4th 227, 234, the determination of the number and nature of injuries is an inherently factual inquiry. We acknowledge that under rare circumstances, there may be more than one date of injury arising out of the same injury. (See, e.g., *Chevron v. Workers' Comp. Appeals Bd.* (*Steele*) (1990) 219 Cal.App.3d 1265 [55 Cal.Comp.Cases 107] [applicant's claims for asbestos and mesothelioma, both arising out of the same industrial exposure, resulted in two claims with two different dates of injury based on the later manifestation of the mesothelioma, an independent disease process arising out of the same exposure].) Here, however, applicant claims only one injury, the symptoms manifested contemporaneously, and the medical evidence supports the WCJ's determination that applicant sustained a single cumulative injury.

uninformed belief. "Whether an employee knew or should have known his 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*).) While an employer's burden of proving the statute of limitations has run can be met by presenting medical evidence that an injured worker was informed a disability was industrially caused, "[t]his burden is not sustained merely by a showing that the employee knew he had some symptoms." (*Id.* at p. 55.) The fact that a worker had knowledge of disease pathology does not necessarily mean that he knew, or should have known, that he had disability caused by the employment. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631]; *Rodarte, supra,* 119 Cal.App.4th at p. 998.) An injured worker's suspicion that an injury is work-related is not sufficient to establish the date of injury on a cumulative injury. An injured worker will not be charged with knowledge that a disability is job-related without medical advice to that effect, unless given "the nature of the disability and the applicant's training, intelligence and qualifications," he or she should have recognized the relationship. (*Johnson, supra*, 163 Cal.App.3d at p. 473.)

Here, applicant sought medical treatment on June 13, 2013 for heart palpitations and shortness of breath. There are no original records in evidence regarding applicant's medical evaluations in 2013, but the records reviewed by QME Dr. Nacouzi reflect that applicant was discharged from care following a nuclear stress test "that did not show any obvious disease." (Ex. J-7, Report of Roger Nacouzi, M.D., dated August 19, 2021, at p. 4.) While applicant's myocardial perfusion scan did identify enlargement of the ventricles, the medical record reflects no periods of temporary disability, no assessment of permanent disability, no temporary or permanent work restrictions, and no other indicia that applicant sustained permanent disability. (*Id.* at p. 5; *Rodarte, supra,* at p. 998.)

The WCJ's Report concludes that applicant sustained compensable disability in 2013 because the same enlarged ventricles of the heart that were the basis of QME Dr. Nacouzi's assessment of whole person impairment based on a scan performed in 2020 were also present in a myocardial infusion scan in 2013. (Report, at p. 4.) However, there is no evidence that applicant was aware that he had sustained compensable disability in 2013. The record reflects no permanent disability or whole person impairment identified by a physician, and no temporary disability. The applicant testified that he lost no time from work because of the hospital visit or heart issue.

(Minutes, at p. 4:24.) Applicant was, in fact, "discharged home in good condition to the care of his caring family." (Ex. J-7, Report of Roger Nacouzi, M.D., dated August 19, 2021, at p. 4.)

"[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." (*Butler, supra,* 153 Cal.App.3d 327, 341.) Here, applicant could not reasonably be expected to file a claim for disability in 2013 when it was not evident at the time that he had sustained compensable disability. A retroactive assessment of compensable disability is not a reasonable basis upon which to commence the running of the statute of limitations. (*Steele, supra,* 219 Cal.App.3d at pp. 1271-1272; *Chavira, supra*, 235 Cal.App.3d at p. 474.) Nor are we persuaded that applicant's commencement of medication in 2013 and annual cardiac checkups rise to the level of compensable disability for purposes of establishing a date of injury under section 5412. (*Rodarte, supra,* 119 Cal.App.4th at p. 998.)

In addition to the issue of compensable disability, we also observe that while applicant testified at trial that he was advised that his heart issues were caused by stress, such advice does not establish that applicant knew his employment caused his injury. Applicant testified that he did not identify the stressful circumstances as being work-related, "he assumed that it was the stress related to his life." (Minutes, at p. 4:3.) We also observe that an employee's suspicion that an injury is work-related is typically insufficient to establish the date of injury on a cumulative injury without medical advice. (*Johnson, supra*, 163 Cal.App.3d at p. 473.)

Accordingly, we conclude that defendant has not met its burden of establishing that applicant sustained compensable disability and possessed the requisite understanding that the disability was caused by his employment as of 2013.

The first evidence in the record establishing compensable disability was the December 11, 2020 report of QME Dr. Curran wherein the QME identified the existence of a cumulative injury ending in 2013. (Ex. J-6, Report of Douglas Curran, D.C., dated December 11, 2020, at pp. 22-23.) The same report offers the first evidence establishing medical advice to the applicant that his disability was caused by his employment. (*Id.* at p. 24.) Accordingly, the convergence of the disability and knowledge of its industrial causation required by section 5412 was December 11, 2020.

Applicant commenced proceeding for the collection of benefits when he filed an Application on December 24, 2020. Because the Application was not filed more than one year

from the date of injury as set forth under section 5412, compensation is not barred by section 5405. (Lab. Code, § 5405.)

In summary, we agree with the WCJ's determination that the evidentiary records supports but one cumulative injury herein. We further conclude that applicant did not have the requisite compensable disability and knowledge that it was caused by his employment until December 11, 2020. Because the Application for Adjudication was not filed more than one year from the date of injury, compensation is not barred by section 5405. Accordingly, we will rescind the F&A and substitute new findings of fact that applicant sustained injury AOE/COE to the low back, right leg, and in the form of gastritis, gastroesophageal reflux disease, insomnia and hypertensive cardiac disease. We will further find the date of injury per section 5412 to be December 11, 2020, and that compensation is not barred by the statute of limitations of section 5405. We will affirm the WCJ's determination that applicant's injury arose out of a single cumulative injury ending December 31, 2013, and that the claim does not violate the anti-merger statutes of sections 3208.2 or 5303. Finally, we will affirm the WCJ's award of future medical care, including hypertensive cardiac disease.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of September 26, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of September 26, 2023 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Lance Miraco, while employed as a Police Officer, Occupational Group Number 490, in Salinas, California, by the City of Salinas, permissibly self-insured and administered by Corvel Corporation, sustained injury arising out of and in the course of employment during the period from January 1994 through December 31, 2013, to his low back, right leg, and sustained gastritis, gastroesophageal reflux disease, insomnia and hypertensive cardiac disease.
2. The dates of injurious exposure for all the asserted cumulative trauma injuries is the period January 1994, to December 31, 2013.

3. Pursuant to Labor Code section 5412, the date of injury was December 11, 2020.
4. Compensation is not barred by Labor Code section 5405.
5. Applicant's gastritis, gastroesophageal reflux disease and related insomnia are compensable consequence injuries associated with the Applicant's orthopedic injuries.
6. As all components of injury for this claim are attributed to a single cumulative injury exposure during the span of Applicant's employment from January, 1994, through December 31, 2013, the filing of one application does not violate Labor Code § 3208.2 or Labor Code § 5303.
7. Applicant is entitled to further medical treatment to cure or relieve the effects of the injuries to his low back, right leg, gastritis, gastroesophageal reflux disease, insomnia, and hypertensive cardiac disease.

AWARD

AWARD IS MADE in favor of Lance Miraco against the City of Salinas, permissibly self-insured and administered by Corvel Corporation, of workers' compensation benefits in accordance with Findings of Fact No. 1, above, finding compensable industrial injury to the low back, right leg, gastritis, gastroesophageal reflux disease, insomnia, and hypertensive cardiac disease.

ORDER

IT IS ORDERED that all other issues, including issues regarding liens are deferred and jurisdiction is reserved to the WCAB.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 12, 2024

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

LANCE D. MIRACO
SPRENKLE, GEORGARIOU & DILLES
YRULEGUI & ROBERTS

SAR/abs

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