WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GREG ROTH, *Applicant*

vs.

WESTERN RIM CONSTRUCTORS, INC.;
STATE COMPENSATION INSURANCE FUND, ET AL., *Defendants*

Adjudication Numbers: ADJ9388767(MF); ADJ5769266
San Diego District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and the Opinion on Decision, both of which are both adopted and incorporated herein, and for the reasons discussed below, we will deny reconsideration.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. *(Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 28, 2022

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

GREG ROTH
O'MARA & HAMPTON
STATE COMPENSATION INSURANCE FUND, LEGAL
GOLDMAN, MAGDALIN & KRIKES, LLP
CHERNOW, PINE AND WILLIAMS
STOCKWELL, HARRIS, WOOL YERTON & HELPHREY
SIEGEL, MORENO & STETTLER, APC
AIG CLAIMS - LITIGATION UNIT
WAI & CONNOR, LLP
ALBERT & MACKENZIE, LLP

PAG/mc

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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

1.	Applicant's Occupation:	Construction Worker
	Applicant's Age:	65
	Dates of Injury:	1) 07/15/2004
		2) 2003 to 01/20/2017
	Parts of Body Injured:	1) Left knee
		2) Right knee, left knee, right hip, neck, lumbar
2.	Identity of Petitioner:	Defendant Cypress Insurance Company
	Timeliness:	Petition was timely filed on October 31, 2022
	Verification:	Petition was properly verified.
3.	Date of Findings and Order:	10/10/2022
4.	Petitioner's Contentions:	The WCJ's decision is in error because that (1) The evidence does not justify the Findings of Fact; (2) The Findings of Fact do not support the order, decision or award; and (3) By issuing the Findings and Order the Board acted without or in excess of its powers.

I.
STATEMENT OF THE CASE AND FACTS

The Petitioner filed two claims over his period of employment for various injuries. Petitioner had been a Construction Worker for the same employer from 2003 to January 17, 2017. Over the time period, the employer had several insurance carriers. Fundamentally, there were two claimed injuries, a specific and a continuous trauma.

The first injury claimed was a specific injury on July 15, 2004. This was a claim for a left knee injury with a compensable consequences allegation of injuries to his right knee, right hip, neck and lumbar. The carrier for this date of injury was State Compensation Insurance Fund. This was an admitted injury to the left knee but denied as to the nature and extent of the compensable

consequences. The primary treating physician was Dr. Peter Hanson, M.D. The parties to that claim utilized Dr. Michael Kimball, M.D. as the PQME.

The second injury was an alleged continuous trauma injury during the period 2003 through January 17, 2017. This claim was for injuries to Applicant's right knee, left knee, right hip, neck and lumbar. There were several carriers for the employer during this period. This was a denied injury AOE/COE. The primary treating physician was Dr. Peter Hanson, M.D. The parties to that claim utilized Dr. John Lane, M.D. as the PQME.

The carriers for the employer during the CT period were as follows: State Compensation Insurance Fund for the period October 1, 2004 through September 30, 2005; American Home Assurance for the period May 19, 2005 through May 19, 2006; Zenith Insurance Company for the period October 1, 2005 through October 1, 2006; American Home Insurance for the period May 19, 2006 through May 19, 2007 through May 19, 2007; Zenith Insurance Company for the period October 6, 2006 through October 1, 2007; American Home Insurance for the period August 1, 2012 through July 1, 2018. There were some duplicate coverages at various times in this scenario.

At issue in the specific injury case was the nature and extent of the injuries claimed by Applicant. In other words, were the injuries to Applicant's right knee, right hip, neck and lumbar, compensable consequences of the admitted left knee injury?

At issue in the CT claimed injury were 1) Injury AOE/COE; 2) need for future medical treatment; 3) attorney's fees; 4) dates of injury; is there a single CT period or separate CT period dates of injury; 5) what is the liability of the party defendants for these periods pursuant to Labor Code Section 5500.5? 6) Is Applicant allowed to end his election against Zurich Insurance Company? 7) are there any of these claims that would be barred by the Statute of Limitations?[.]

The matter proceeded to trial. After trial, an initial Joint Findings of Fact and Award along with a Joint Opinion on Decision was issued. A Petition for Reconsideration was filed by Applicant in that regard. After a review of that Petition, the WCJ determined that an error had been made and a new First Amended Joint Findings of Fact and Joint Opinion on Decision was issued.

In the First Amended Findings of Fact, it was found that in the Applicant had sustained an injury to his left knee but that the alleged body parts of right knee, right hip, neck and lumbar were not compensable consequences in case ADJ5769266. Those findings are really not the subject of this Petition for Reconsideration.

As to the CT claimed injury in case ADJ9388767, it was found that the injuries claimed were AOE/COE. This included the right knee, left knee, right hip, neck and lumbar. It was further found that there was only one large CT period and not separate individual CT periods. Further, the date of

injury was found to be April 1, 2014 pursuant to Labor Code Section 5412. After that finding, the WCJ applied Labor Code Section 5500.5 which put liability solely on the Petitioner.

It is from these findings that the Petition has filed this Petition for Reconsideration.

It should be emphasized at this point that the facts and circumstances surrounding Applicant's medical treatment and periods of temporary disability are undisputed. Applicant treated with Dr. Peter Hanson throughout the pendency of this matter. State Compensation Insurance Fund which is the carrier for the admitted specific injury to the left knee had authorized treatment to both of Applicant's knee injuries up until 2014.

Prior to 2014, Applicant was in pro per. It wasn't until 2014 that State Compensation Insurance Fund when confronted with the prospect of the recommendation of total knee replacements and additional treatment to the right knee that things became at issue. In response to a letter requesting clarification of the causation of the need for the treatment from State Compensation Insurance Fund, Dr. Hanson indicated that there were injuries to both knees due to Applicant's employment over a period of time. It was at that point that State Compensation Insurance Company then denied treatment.

It was this denial that caused the Applicant to seek legal counsel. At that time, legal counsel explained to the Applicant that he had a potential continuous trauma injury. Applicant's attorney then filed a new Application on Applicant's behalf. Additional carriers through the period of employment were then joined.

Applicant testified unrebutted that he did not know what a CT claim was until that point. He was found to be credible by the WCJ. Petitioner goes to great length to claim that Applicant had some type of constructive knowledge earlier, but this argument is without merit or justification. The Applicant was ignorant of the law. He was clearly detrimentally relying on State Compensation Insurance Fund providing him with medical treatment.

II.

THE FINDING OF INJURY AOE/COE IS BASED UPON SUBSTANTIAL MEDICAL EVIDENCE

Any decision by the Appeals Board or a WCJ must be supported by substantial evidence. Labor Code Section 5952(d); Lamb v. WCAB (1974) 39 CCC 310. "In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability." E.L. Yeager Construction v. WCAB (Gatten) (2006) 71 CCC 1687. Here, all of the reporting physicians both treating and in QME capacities, found that the Applicant had sustained left and right knee, right hip, neck and lumbar injuries.

All of the doctors felt that the Applicant's right knee injury, right hip, neck and lumbar were not compensable consequence injuries the specific injury. All of the doctors reported that those injuries were the result of one long CT period.

III.

THE FINDING OF ONE CT PERIOD IS SUPPORTED BY SUBSTANTIAL MEDICAL EVIDENCE

All of the reporting physicians felt that the Applicant's claimed injuries were the result of one lone continuous trauma period. This is true even though Applicant went off work and returned at various intervals. As such, there is really no issue in that regard.

IV.

THE DATE OF INJURY PURSUANT TO LABOR CODE SECTION 5412 IS APRIL 1, 2014

Fundamentally, the Petitioner is arguing that the date of injury should be in 2008 and not as found by the WCJ in April of 2014. It is admitted that the case law on this issue is somewhat inconsistent when it comes to the issue of the knowledge required by the Applicant as to the existence of a CT claim.

As stated above, the Applicant credibly testified he was unaware of what the term CT meant. He had sustained a specific injury for which State Compensation Insurance Fund was providing benefits.

Over time, the Applicant began to develop other problems. He felt it was due to overuse of his opposite knee. He was back doing his usual and customary job duties which were very strenuous. He was receiving treatment covered by State Compensation Insurance Company. He was in fact unaware that he was continuing to injury himself with the continuous stress and strain of his employment. He was clearly unaware that he should be filing an additional claim against another insurance carrier.

Petitioner argues that Applicant had some type of constructive knowledge that he had sustained a CT injury as far back as 2008. At that time, the Applicant was in pro per. He admitted reading some his reports that were served on him. However, he credibly testified that he had no knowledge what a CT injury was until he talked to legal counsel. Moreover, no one ever advised him that he had such a claim. State compensation was paying medical expenses. He was reasonable in believing that he had sustained a specific injury at best.

Labor Code Section 3208.1 provides that "[t]he date of a cumulative injury shall be the date determined under Section 5412." In this case, we have a continuous trauma period of October 31, 1976 through October 31, 2012.

Pursuant to Labor Code Section 5412, the date of injury in cumulative injury cases is the date the employee (1) first suffered disability and (2) "either knew, or in the exercise of reasonable diligence should have known" that the injury was caused by employment. So, the date of a cumulative trauma injury will be established only when both elements are met — disability and knowledge.

The date for a cumulative trauma injury requires the concurrence of compensable disability and knowledge of industrial causation. A disability under Labor Code Section 5412, is defined as "an impairment of bodily functions which results in the impairment of earnings capacity." More clearly, it has been held that disability for the purposes of Labor Code Section 5412 requires either compensable temporary disability (emphasis added) or permanent disability.

As stated in the First Amended Opinion on decision, the real issue was when did the Applicant attain the requisite knowledge that he had sustain a cumulative trauma work related injury? The employee is not charged with knowledge just because he or she had some symptoms. Medical opinion expressed to an employee that his or her disability was caused by employment is sufficient for the purposes of Labor Code Section 5412.

However, an applicant is generally not deemed to understand, or have knowledge of a CT injury, unless so advised by a physician. City of Fresno v. WCAB (Johnson)(1985), 50 CCC 53. There are no medical records evidencing that this advice was given to the Applicant by any doctor or that he knew what a CT injury was in this case other than when he first consulted with his attorney on April 1, 2014.

It would be patently unfair to impute constructive knowledge to the Applicant while he was in pro per on a very complicated area of law. Particularly when another carrier was picking up benefits. Why would it be reasonable for an in pro per to go out and file anew Application under these circumstances.

Once again, the law appears to be that an employee generally will not be charged with knowledge that his 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 he or she should have recognized the relationship between the known adverse factors of the employment and the disability.

The nature of cumulative trauma injuries, statutory presumptions of compensability and particularly medical causation are very complex. The fact that the Applicant had some experience in workers' compensation cases was not enough. There was no evidence presented by the Defendants

that the Applicant had actual knowledge. There was no evidence presented by the Defendants that was persuasive that the Applicant should have known either.

Consequentially, it should be found that the concurrence of disability and knowledge did not occur until the Applicant had consulted with his attorney of April 1, 2014. Pursuant to Labor Code Section 5412, it is found that the date of injury is April 1, 2014.

V.

THE PETITIONER IS LIABLE PURSUANT TO LABOR CODE SECTION 5500.5

The Petitioner's argument about liability is basically premised on its argument that the date of injury should be other than April 1, 2014. Since the finding of date of injury should be April 1, 2014 as state above, the application of Labor Code Section 5500.5 is somewhat mechanical. Petitioner was the only carrier in the one year period following the found date of injury.

VI.

RECOMMENDATION

Based upon the foregoing, it is respectfully recommended that the Petition for Reconsideration be denied in its entirety.

DATE: November 14, 2022

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Jeffrey J. Bruflat
WORKERS' COMPENSATION JUDGE

JOINT OPINION ON DECISION
INJURY AOE/COE (ADJ5769266)

Based upon applicant's credible testimony and the medical reports of Dr. Michael Kimball, M.D., Dr. Peter Hanson, M.D. and Dr. John Lane, M.D., various dates, it is found that applicant sustained injury to his left knee arising out of and occurring in the course of employment on July 15, 2004. He did not sustain compensable consequence injuries to his right knee, right hip, lumbar or neck from this injury.

There was no medical opinion which corroborated the compensable consequences injuries to be associated with this specific injury.

INJURY AOE/COE (ADJ9388767 -MF)

Based upon applicant's credible testimony and the medical reports of Dr. Michael Kimball, M.D., Dr. Peter Hanson, M.D. and Dr. John Lane, M.D., various dates, it is found that applicant sustained injury to his left knee, right knee, right hip, neck and back arising out of and occurring in the course of employment during the period 2003 to and including January 20, 2017. The date of injury pursuant to Labor Code Section 5412 is discussed below.

THERE IS ONLY ONE CONTINUOUS TRAUMA PERIOD

One of the issues that required a factual determination was whether there was actually several continuous trauma periods or just one. Based upon the totality of the evidence including Applicant's testimony and the medical record, it is found that there is just one large CT period.

The case of Western Growers Insurance Company v. WCAB (Austin) 58 CCC 323 applies a four-step analysis in cases like the one at bar. The Court looks as to 1) Whether the Applicant had continued care; 2) Whether there were distinct periods of temporary disability; 3) Whether injurious exposure was similar throughout the course of employment; and 4) Whether the periods of disability were caused by separate specific events.

The Applicant testified unrebutted that while he did have brief periods of temporary disability associated with the treatment of his injuries, that he basically worked full duty throughout the CT period. The medical evidence admitted corroborates fairly continuous treatment for Applicant's injuries throughout the period.

While admittedly the Court has not been totally consistent in applying the Western Growers factors, the trend is to find one continuous period when the repetitive traumatic activities at work result in medical treatment and temporary total disability, followed by a return to work and continuing traumatic activities that also result in additional medical treatment and temporary total disability, and

the periods of temporary total disability are linked by the continuing need for medical treatment and are not distinct or instigated by separate specific incidents. Great Divide 82 CCC 760.

The medical record also confirms that the reporting doctors believed that there was actually just one large CT period.

DATE OF INJURY PURSUANT TO LABOR CODE SECTION 5412

One of the other main issues at trial in case ADJ9388767 besides whether there were multiple continuous trauma injury dates or just one, was what is the date of injury? Based upon that finding, the Court could then apply Labor Code Section 5500.5 to determine which one or ones of the joined carriers was liable. That liability determination is discussed after this issue.

Labor Code Section 3208.1 provides that "[t]he date of a cumulative injury shall be the date determined under Section 5412." In this case, we have a continuous trauma period of October 31, 1976 through October 31, 2012.

Pursuant to Labor Code Section 5412, the date of injury in cumulative injury cases is the date the employee (1) first suffered disability and (2) "either knew, or in the exercise of reasonable diligence should have known" that the injury was caused by employment. So, the date of a cumulative trauma injury will be established only when both elements are met — disability and knowledge.

The date for a cumulative trauma injury requires the concurrence of compensable disability and knowledge of industrial causation. A disability under Labor Code Section 5412, is defined as "an impairment of bodily functions which results in the impairment of earnings capacity." More clearly, it has been held that disability for the purposes of Labor Code Section 5412 requires either compensable temporary disability (emphasis added) or permanent disability.

The real issue was when did the Applicant attain the requisite knowledge that he had sustain a cumulative trauma work related injury? The employee is not charged with knowledge just because he or she had some symptoms. Medical opinion expressed to an employee that his or her disability was caused by employment is sufficient for the purposes of Labor Code Section 5412. However, an applicant is generally not deemed to understand, or have knowledge of a CT injury, unless so advised by a physician. City of Fresno v. WCAB (Johnson)(1985), 50 CCC 53. There are no medical records evidencing that this advice was given to the Applicant by any doctor or that he knew what a CT injury was in this case other than when he first consulted with his attorney on April 1, 2014.

OCCUPATION

Based upon the stipulations of the parties, it is found that applicant was employed as a Construction Worker, Occupational Group Number 370.

LIABILITY OF DEFENDANTS PURSUANT TO LABOR CODE SECTION 5500.5

At issue during trial was not only what the date of injury was pursuant to Labor Code Section 5412, but also which carrier or carriers would be liable for the claim pursuant to Labor Code Section 5500.5.

Based upon the findings that there was one continuous trauma period and the date of injury being April 1, 2014, the one year statutory period of Labor Code Section 5500.5 would be April 1, 2013 to April 1, 2014. Cypress Insurance was not only the terminal carrier for that period but also the only carrier. As such, it is found that pursuant to Labor Code Section 5500.5 that Cypress Insurance is the insurance carrier liable in case ADJ9388767.

APPLICANT'S PETITION TO RESCIND HIS ELECTION DEFENDANT ZURICH IS GRANTED

At issue herein, was the Applicant's election against Defendant Zurich American Insurance Company. Applicant had made an election against Zurich American Insurance Company at a Priority Conference on July 20, 2020. The Applicant was mistaken that this Defendant was the terminal carrier for the continuous trauma period of industrial exposure as alleged.

After the conference, both the attorneys for the Applicant and Defendant Zurich were provided with discovery that Defendant Zurich American Insurance Company had only site specific insurance policies covering the employer. The Applicant never worked at any of the covered sites.

Based upon this new information, the Applicant filed a Petition for an Order allowing it to withdraw his prior election on September 28, 2020. There were no objections filed by any of the co-Defendants to this Petition.

Based upon the foregoing, it found that there is good cause shown to allow the Applicant to withdraw his election. As such, there is no election against Zurich American Insurance Company by the Applicant.

APPLICANT'S CLAIM IS NOT BARRED BY THE STATUTUE OF LIMITATIONS

It was found that the date of injury herein for the continuous trauma claim was April 1, 2014. The Application for Adjudication of Claim was filed by the Applicant on April 8, 2014. Based upon that scenario, the Application was timely filed. The claim is not barred by the Statute of limitations.

NEED FOR FURTHER MEDICAL TREATMENT

Based upon the medical reports of Dr. Michael Kimball, M.D., Dr. Peter Hanson, M.D. and Dr. John Lane, M.D., various dates, it is found that applicant is in need of further medical treatment to cure or relieve from the effects of the industrial injury to his left knee in case ADJ5769266.

Based upon those same doctors, it is found that applicant is in need of further medical treatment to cure or relieve from the effects of the industrial injuries to his left knee, right knee and right hip.

ATTORNEY FEES

There are no funds from which to award an attorney's fee.

DATE: October 10, 2022

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Jeffrey J. Bruflat
WORKERS' COMPENSATION JUDGE