WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CAYETANO GONZALEZ, *Applicant*

vs.

LAM RESEARCH CORPORATION and SAFETY NATIONAL CASUALTY CORPORATION, administered by TRISTAR RISK MANAGEMENT, *Defendants*

Adjudication Number: ADJ14380906

San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on June 30, 2023, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his right shoulder, that the Labor Code section 5412 date of injury is October 15, 2020, that applicant was notified of the October 12, 2020 termination of his employment with defendant on October 8, 2020; and that applicant's injury claim is not barred by the Labor Code section 3600(a)(10)(D) post-termination defense.[1]

Defendant contends that the trial record does not contain substantial evidence that applicant's section 5412 date of injury is October 15, 2020; and that the trial record does not contain substantial evidence that establishes an exception to the post-termination defense, so applicant's injury claim is barred by section 3600(a)(10).

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

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

BACKGROUND

Applicant claimed injury to his right shoulder while employed by defendant as a process technician specialist during the period from October 1, 2019, through April 1, 2020.

Applicant contacted the office of Jeffrey Anderson, M.D on October 7, 2020, regarding his right shoulder pain and an appointment was scheduled for October 15, 2020. (App. Exh. 4, p. 21.) On October 8, 2020, applicant received notice that his employment with defendant would be terminated as of October 12, 2020. (Def. Exh. C, p. 1.) He received medical treatment from Dr. Anderson starting on October 15, 2020 (the exhibits pertain to treatment applicant received through March 31, 2021; see Def. Exh. A, Jeffrey Anderson, M.D., pp. 11 – 35).

On July 7, 2021, applicant was evaluated by orthopedic qualified medical examiner (QME) David E. Fisher, M.D. After examining applicant, taking a history, and reviewing a June 4, 2021 right shoulder MRI, Dr. Fisher diagnosed applicant as having right shoulder joint arthritis, probable superior labral anterior to posterior (SLAP) lesions, and possibly a rotator cuff tear; he concluded that applicant had not reached maximum medical improvement. (App. Exh. 1, David E. Fisher, M.D., July 7, 2021, pp. 4 - 5.) Dr. Fisher re-examined applicant on June 9, 2022. The diagnoses were, "Adhesive capsulitis of the right shoulder with down sloping [sic] of the acromion, possible posterior labral tear, and acromioclavicular joint arthritis" and the doctor stated, "Absent treatment, the examinee appears to be maximally medically improved at this time." (App. Exh. 2, David E. Fisher, M.D., June 9, 2022, pp. 4 – 5.) Regarding the cause of applicant's right shoulder condition, Dr. Fisher stated:

> It is reasonable his right shoulder worsened in the performance of his usual and customary [job duties]. I think it best to consider the specific event in 2019 to be included in the cumulative trauma claim. This continues to be a denied claim, but I do find that his usual and customary [job] duties did contribute to his right shoulder injury and impairment.
> (App. Exh. 2, p. 6.)

The parties proceeded to trial on April 4, 2023. The issues submitted for decision included injury AOE/COE, date of injury, and the post-termination defense. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 4, 2023, p. 2.)

DISCUSSION

Section 5412 states that:

> The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.
> (Lab. Code, § 5412.)

There are factual scenarios where an injured worker's last date of exposure, resulting in a cumulative injury, is before the date the worker first suffered disability and knew that the disability was caused by his or her employment, thereby establishing the section 5412 date of injury. A worker's section 5412 date of injury could also be before the last date of the exposure causing the injury. The section 5412 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.

> [T]he '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, 340 - 341 [49 Cal. Comp. Cases 224].)

Also, the Fourth District Court of Appeals has explained:

> Moreover, "[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." (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53]; see *id*. at p. 473 ["an applicant 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 applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability."].)
> (*County of Riverside v. Workers' Comp. Appeals Bd. (Sylves)* (2017) 10 Cal.App.5th 119, 124-125 [82 Cal.Comp.Cases 301].)

Pursuant to section 3600(a)(10)

> (10) …[W]here the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply: …
> (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.
> (Lab. Code, § 3600.)

In his Opinion on Decision, the WCJ stated:

> Dr. Anderson did certify to EDD that the applicant's disability due to his right shoulder began October 15, 2020. I therefore find the EDD certification, in conjunction with Dr. Anderson having examined the applicant on October 15, 2020 to be substantial evidence that the first date of disability was October 15, 2020. This is also supported by the Lam Research "Attending Physician Statement" completed by Dr. Anderson that has October 15, 2020 as the start date of disability. …. ¶ The first date the applicant had both knowledge and disability for purposes of Labor Code section 5412 is therefore shown by a preponderance of the evidence to be October 15, 2020. Accordingly I find the date of injury for the applicant's right shoulder cumulative trauma injury is October 15, 2020.
> (Opinion on Decision, p. 13.)

Based on our review of the trial record, we agree with the WCJ that the record contains substantial evidence that applicant sustained an injury AOE/COE to his right shoulder and that October 15, 2020, is the proper section 5412 date of injury. Thus, we also agree with the WCJ that applicant's injury claim is not barred by the section 3600(a)(10) post-termination defense.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on June 30, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 15, 2023

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

CAYETANO GONZALEZ
DURARD, MCKENNA & BORG
RTGR LAW LLP

TLH/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Lawrence Keller, Workers' Compensation Judge, hereby submits his report and recommendation on the Petition for Reconsideration filed herein.

INTRODUCTION

Defendant seeks reconsideration of my Findings of Fact, dated June 30, 2023, that the applicant's claim for injury is not barred by the post-termination defense of Labor Code section 3600(a)(10) in this matter. Defendant contends the evidence does not support the finding of fact that the legal date of injury is October 15, 2020, and particularly disputes my finding that there was not compensable disability until that date. Filed on July 19, 2023, defendant's petition is timely and verified. Applicant filed an Answer to the Petition for Reconsideration on July 27, 2023. In his Answer applicant disputes my opinion that the applicant had knowledge of injury on October 8, 2020, and contends the date of knowledge, was significantly later.

FACTS

1. Background.

Applicant Cayetano Gonzalez, born [xx-xx-xxxx], while employed during the period October 1, 2019 through April 1, 2020 as a process technician by Lam Research, insured by Safety National Casualty Corporation, claims to have sustained injury arising out of and in the course of his employment to his right shoulder. On April 4, 2023 this matter proceeded to trial on issues of injury arising out of and in the course of employment, the date of injury, and defendant's post-termination defense.

2. Evidence at Trial.

Applicant's Exhibit 1: Report of QME David Fisher, M.D., dated July 7, 2021.
Applicant's Exhibit 2: Report of QME David Fisher, M.D., dated June 13, 2022.
Applicant's Exhibit 3: Report of QME David Fisher, M.D., dated September 14, 2022.

David Fisher, M.D. performed an initial orthopedic QME panel exam on July 7, 2021. (Applicant's Exhibit 1, page 1.) The applicant's job duties as reported by Dr. Fisher included,

"… lab cleanup, packing up carrier boxes, and moving them from one space to another. Usually, the weight of the stacks of 25 carriers was 30-40 pounds, but on some occasions, he had to lift as many as two boxes, stacking them on tables or reaching above shoulder height on occasion." (*Ibid*.) The applicant began to experience severe pain in his right shoulder on November 10, 2019 with his pain continuing to increase to April 10, 2020. (Applicant's Exhibit 1, page 1.)

Dr. Fisher stated that the applicant reported the injury in April of 2020. (Applicant's Exhibit 1, page 1.) In his report, Dr. Fisher stated that the applicant was told to go see his own doctor, Dr. Anderson, which the applicant did. (*Id*. at pages 1-2.) Dr. Fisher reported that the applicant then retired with his last day being April of 2020, "… although there were periods of time when he was off work using vacation time-and for COVID during that period." (*Id*. at page 2.)

After reviewing medical records and conducting a physical exam, Dr. Fisher found a right shoulder injury attributable to an industrial cumulative trauma through April of 2020. (Applicant's Exhibit 1, page 5.) The applicant was not maximally medically improved. (*Id*. at pages 5.)

The applicant was re-evaluated by Dr. Fisher on June 9, 2022. (Applicant's Exhibit 2, page 1.) At the re-evaluation, the applicant denied a cumulative trauma injury, and asserted only a specific injury. (*Ibid*.) Dr. Fisher opined that, "The medical records previously submitted support an injury through cumulative trauma. I have not been provided with any medical records documenting a specific injury on November 10, 2019." (*Id*. at pages 1-2.)

Following a physical examination of the applicant and review of additional medical records, Dr. Fisher revised his causation opinion to be a single injury "… that the examinee describes occurring on November 10, 2019." (Applicant's Exhibit 2, page 5.) However, he explained that the specific incident on November 10, 2019 was part of the cumulative trauma injury. (*Ibid*.) In explaining his opinion, Dr. Fisher stated:

> "Mr. Gonzalez continues to give a history for a specific injury on November 10, 2019. On this date he was doing lab cleanup, carrying 30-pound boxes, two at a time under each arm. On this particular day he had a significant increase in pain when there was a sudden jerking of his right shoulder while doing this. Previously

> he states that as he continued working, he had worsening pain. The records previously made available, particularly the October 15, 2020 report by Dr. Anderson, indicated that the examinee began having pain in September 2019, and his repetitive lifting at work over time caused worsening of his pain. Considering the description of his work, the repetitive lifting and carrying of boxes and he report [sic] that his work required frequent overhead work, [sic] do find that within reasonable medical probability he sustained a specific injury at some pain [sic] in 2019 in the performance of his usual and customary duties, but a specific date cannot be pinned down by the conflicting history provided and the available records. It is reasonable his right shoulder worsened in the performance of his usual and customary. I think it best to consider the specific event in 2019 to be included in the cumulative trauma claim. This continues to be a denied claim, but I do find that his usual and customary duties did contribute to his right shoulder injury and impairment." (Applicant's Exhibit 2, pages 5-6.)

Dr. Fisher prepared a September 14, 2022 supplemental report where he opined:

> "Mr. Gonzalez's complaints were that of pain in the right shoulder increased with heavy lifting. He described an injury that occurred cumulative trauma from October 2019 to April 2020, while packing carrier boxes. This began in November 2019 and the pain continued to increase. At no time, he had been temporarily totally disabled unless he would to proceed with any surgical repair. Although he is retired, he still would be restricted at work with no lifting above shoulder height with his right arm, although reaching could be done on limited basis and any movement would be appropriate." (Applicant's Exhibit 3, page 1.)

It is not clear if Dr. Fisher was referring to prior or current work restriction, and Dr. Fisher did not provide any dates for when the work restrictions would have applied.

Applicant's Exhibit 4: Tristar claims notes (redacted).

The notes were reviewed in full, but only the relevant sections are summarized herein. The claim was opened on November 17, 2020. The applicant confirmed to the adjuster that he sought an appointment earlier, but did not see a doctor until October 15, 2020. (Applicant's Exhibit 4, pages 18-19.)

Defendant's Exhibit A: Subpoenaed records of Jeffrey Anderson, M.D.

Records from Jeffrey Anderson, M.D.'s office range from October 15, 2020 to March 31, 2021. The date of the first treatment report is October 15, 2020, which is a Doctor's First Report of Occupational Injury or Illness. (Bates nos. 00013-00015.) Dr. Anderson stated that the applicant began having right shoulder pain on or about September of 2019, which became over time. (Bates no. 00013.) The report also does not discuss the applicant's work status. None of Dr. Anderson's reports contained an opinion on causation of the right shoulder injury.

In his report for his October 29, 2020 examination of the applicant, Dr. Anderson stated that the applicant would return in four to six weeks and "He will be off work until then." (Bates no. 00012.) Dr. Anderson also stated that the applicant had been off work since July 10, 2020 because of the shoulder injury. (*Ibid*.) Dr. Anderson examined the applicant again on December 9, 2020 and wrote that the applicant was unable to return to his former occupation and was to be off-work until January 23, 2021. (Bates no. 00010.) Dr. Anderson's March 31, 2021 report noted that the applicant was to be off-work until May 15, 2021. (Bates no. 00008.) Dr. Anderson also prepared a work status slip indicating the applicant was temporarily totally disabled from November 30, 2019 to May 15, 2021. (Bates no. 00016.)

An EDD claim form was completed by Dr. Anderson on March 31, 2021. (Bates no. 00031.) The claim form certified the applicant for EDD benefits and indicted that disability began October 15, 2020, and that disability was caused or aggravated by the patient's regular or customary work. (Bates nos. 00029-000030.) Dr. Anderson also completed an undated Lam Research "Attending Physician Statement" which indicated the applicant was disabled due to a right rotator cuff tear from October 15, 2020 through January 23, 2021, and the applicant's condition was work related. (Bates no. 00032.) Although undated the Attending Physician Statement indicated the last date of treatment was October 29, 2020. (*Ibid*.)

Defendant's Exhibit B: Subpoenaed records of Stephen Sims, M.D.

The applicant was seen by Stephen Sims, M.D. on April 27, 2020 for COVID testing, but there was no discussion of shoulder pain. (Bates nos. 00026-00029.) Dr. Sims indicated he would write a letter that the applicant was to be off work from July 20, 2020 to October 12, 2020, due to COVID risk. (Bates no. 00032.) None of the reports of Dr. Sims contain any mention

of shoulder complaints or a shoulder injury. There is a copy of the applicant's October 9, 2020 email to members of Lam Research that is reviewed below.

Defendant's Exhibit C: Emails from applicant and employer dated between September 2, 2020 and October 9, 2020.

Defendant has offered a series of emails from September 2, 2020 through September 25, 2020 between employees of Lam Research, including Isabelle Orain, the applicant's supervisor, regarding the termination of the applicant's employment (Pages 2-4.) On October 9, 2020, the applicant sent an email to several Lam Research employees regarding his termination. (Page 1.) The email reflects that the applicant was advised by phone by Isabelle Orain on October 8, 2020 that he was being terminated effective October 12, 2020. (*Ibid*.) He stated that he had advised Ms. Orain in the phone call that he had a doctor appointment the following Thursday for his right shoulder pain. (*Ibid*.) The applicant stated that the shoulder pain "…was due to an injury from work which occurred ~ September of last year." (*Ibid*.) He had not reported the injury because he hoped the pain would go away, but it had not. (*Ibid*.)

Defendant's Exhibit D: DWC-1 form dated November 20, 2020.

The applicant completed a DWC-1 claim form on November 20, 2020 providing a date of injury of "End of Nov. 2019." The mechanism of injury was described as, "Right shoulder. During one of the area clean ups carrying 300mm wafer boxes from my area to reclaim area."

Testimony of Applicant Cayetano Gonzalez

The applicant testified that his consistent, day to day job duties including moving boxes of 300-millimeter silicon wafers in boxes containing up to 25 wafers with boxes weighing about 30 pounds. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 13, 2023, page 4, line 45-page 5, line 40.) Three to four times a year there is a lab cleanup when the applicant would carry up to three or four boxes at a time, containing up to 75 wafers in a box, and weighing perhaps 90 pounds in total. (*Id.* at page 5, lines 10-16.)

On direct examination the applicant stated he first experienced shoulder problems in September or October of 2019 during his daily routine. (MOH/SOE, supra. at page 5, lines 19-22.) On cross-examination the applicant stated that shoulder pain began suddenly while carrying boxes

during a lab cleanup, which may have been around November of 2019. (*Id.* at page 6, lines 29-31.) From the time the pain began the applicant did not stop working until the COVID pandemic started in mid-March 2020. (*Id.* at page 5, lines 10-16.)

His manager, Isabelle Orain, called him about going back to work, but he refused because he was nervous about COVID. (MOH/SOE, supra. at page 5, lines 40-41.) The applicant believed he did not return to Lam Research after going off work for the COVID pandemic. (*Id.* at page 7, lines 16-18.) In a phone call with Ms. Orain on October 8, 2020, he was told he was being terminated effective October 12, 2020. (*Id.* at page 7, lines 7-10.) The applicant did not tell his manager about his shoulder pain until after he was told he was being terminated. (*Id.* at page 6, lines 40-41.) At the time he did not know he had an injury, only that he had pain. (*Id.* at page 6, lines 42-43.)

He did not receive medical treatment for his shoulder pain until his first appointment with Dr. Anderson on October 15, 2020. (MOH/SOE, supra. at page 5, lines 44-45, and page 6, lines 24-25.) He made that appointment to see Dr. Anderson before he was terminated. (*Id.* at page 6, line 45.) He did not discuss getting an MRI with Dr. Anderson before he was terminated. (*Id.* at page 7, lines 2-3.) Although Dr. Sims had been his personal doctor for 10 years, he did not talk to Dr. Sims about his shoulder complaints. (*Id.* at page 7, lines 12-14.)

Testimony of Employer Witness Isabelle Orain

Ms. Orain was the applicant's supervisor. (MOH/SOE, supra. at page 8, lines 9-11.) There was only one lab cleanup in 2019 and that was on June 5, 2019. (Id. at page 8, lines 41-46.) She remembers nothing unusual about the cleanup. *(Id*. at page 8, lines 41-42.) Process technicians like the applicant do not have to perform regular cleanups because there is a need to clean as you go along. (*Id.* at page 8, line 46 - page 9, line 1.)

Lam Research stopped in-person work on March 10, 2020 and resumed in-person work two weeks later. (MOH/SOE, *supra*. at page 9, lines 8-9.) The applicant did not wish to return to work and used his time off, as well as two weeks additional leave provided by the company. (Id. at page 9, lines 41-42.) The applicant did return to work at the end of April or early May, and continued working until the end of June, perhaps June 21, 2020. (Id. at page 9, lines 12-14.)

About one week prior to October 8, 2020 Ms. Orain was able to leave the applicant a message saying that she had bad news, and was sorry, but the applicant should prepare himself. (MOH/SOE, *supra*. at page 10, lines 18-20.) It was not until October 8, 2020 that the applicant called back, and

she told the applicant of the decision to terminate his employment. (Id. at page 10, lines 21-24.) The applicant said that he would sue Lam Research for disability, and asked who he should call. (Id. at page 10, lines 25-27.) She was surprised by the statements, and directed the applicant to human resources. (Id. at page 10, lines 27-29.) The applicant never told her of a work injury. (Id. at page 10, lines 31-32.)

3. Findings of Fact – June 30, 2023.

After consideration of all of the evidence I concluded that the applicant sustained a cumulative trauma injury to his right shoulder. I found the applicant had knowledge of the link between his employment and his shoulder pain no later than October 9, 2020. However, I determined that the earliest date of disability was October 15, 2020. Therefore I determined that the date of injury pursuant to Labor Code section 5412 was October 15, 2020 as the first date the applicant had both disability and knowledge of the link between that disability and his work.

I found the applicant was informed on October 8, 2020 that he was being terminated from employment effective October 12, 2020. As the date of injury was subsequent to the date of termination, I found that the Labor Code section 3600(a)(10)(D) exception to the post-termination defense applied, and therefore the applicant's claim was not barred. Additionally, I did not find that Labor Code section 3600(a)(10)(D) failed to apply where claims are purely retaliatory, as is argued by defendant. Therefore no opinion was expressed, or finding made, as to whether the injury claim was retaliatory.

4. Contentions on Reconsideration.

There is no dispute in either defendant's Petition for Reconsideration nor in applicant's Answer that the applicant was informed on October 8, 2020 of his October 12, 2020 termination. In its Petition for Reconsideration, defendant contends the date of injury is prior to October 15, 2020, based on the applicant having knowledge and disability prior to termination. (See generally, Petition for Reconsideration, filed July 19, 2023.) In particular, defendant disputes my finding that October 15, 2020 was the first date of disability. (*Ibid*.) Defendant does not enumerating a date of injury, but relies most heavily on Dr. Fisher's finding of a cumulative trauma through April 2020,

or through the last date worked,[1] as October 15, 2020 as the first date of compensable disability. (*Id*. at page 20, lines 27-28.)

Throughout Defendant's Petition for Reconsideration it is alleged that I ignored relevant facts of record or evidence. (For example. Petition for Reconsideration, filed July 19, 2023, page 8, lines 22-27, page 9, lines 23-25, and page 10, lines 20-22.) No evidence was ignored in reaching my opinion and findings, however, I did find some evidence more persuasive. I endeavored in my opinion to explain my reasoning, and will do so again here.

Applicant did not file a Petition for Reconsideration, but in his Answer to defendant's petition argues that the date of knowledge is not until the applicant was evaluated by Dr. Fisher. (See generally, Answer to Petition for Reconsideration, filed July 27, 2023.)

DISCUSSION

Defendant asserts that the applicant's cumulative trauma injury claim is barred by the post-termination defense of Labor Code section 3600(a)(10), which states in relevant part:

> "Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
> (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
> (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
> (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
> (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff."

In this case there is not a dispute as to the date of termination, and that the applicant's first treatment appointment for his shoulder injury came after termination. The dispute in this matter

[1] The evidence is not clear as to the last date worked. However, it was sometime between March 2020 and June 2020. The specific date is relevant only if the date the applicant first suffered disability was the last day worked, which I do not find.

centers on whether as exception to the post-termination defense, specifically Labor Code section 3600(a)(10)(D) applies in this case. Therefore, it is necessary to determine the date of injury under Labor Code section 5412:

> "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

DATE OF DISABILITY

Disability for the purposes of Labor Code section 5412 requires either compensable temporary disability or permanent disability. (State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte) (2004) 119 Cal. App. 4th 998, 1005-1006.) "Because actual wage loss is required for temporary disability, modified work alone is not a sufficient basis for compensable temporary disability. But, a modification may indicate a permanent impairment of earning capacity, especially if the worker is never able to return to the original job duties." (State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., 119 Cal. App. 4th 998, 1005.)

Defendant argues that the reporting of Dr. Fisher is substantial evidence of compensable disability prior to October 8, 2020. (See generally, Petition for Reconsideration, filed July 19, 2023.) Defendant argues that Dr. Fisher's opinion must be relied upon and that his opinion showed disability beginning in November of 2019. (Id. at page 12, lines 24 – page 18, line 4.)

The Court of Appeal in *W. Coast Drywall & Paint v. Workers' Comp. Appeals Bd.*, and the Appeals Board in a series of panel decisions, discussed disability for Labor Code section 5412 thus:

> "As explained in the case of *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd*. (Butler) (1984) 153 Cal.App.3d 327, 336 [200 Cal. Rptr. 219, 49 Cal.Comp.Cases 224]:
>
> The term "disability" as used in section 5412 is, of course, to be given the same meaning as elsewhere in the [Workers' Compensation] Act [citations], i.e., an impairment of bodily functions which results in the impairment of earnings capacity. (*Marsh v. Industrial Acc. Com.* (1933) 217 Cal. 338, 344 [118 P.2d 933, 9 I.A.C. 159]; see *Associated Indem. Corp. v. Ind. Acc. Com.* (1945) 71 Cal.App.2d 820, 824 [163 P.2d 771, 10 Cal.Comp.Cases 295]; 2 Hanna, [Cal. Law of Employee

Injuries and Workmen's Compensation (2d ed., 1983 rev.)] § 13.01, p. 13-2.) Accordingly, where an employee suffers from a cumulative injury or occupational disease, there is a 'date of injury' only at such time as the employee suffers an impairment of bodily functions which results in the impairment of earnings capacity.

In *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (Rodarte) (2004) 119 Cal.App.4th 998 [14 Cal. Rptr. 3d 793, 69 Cal.Comp.Cases 579], the Court of Appeal made clear that neither medical treatment nor modified work restrictions without wage loss, in and of themselves, are sufficient to constitute "disability" for purposes of Labor Code section 5412. As explained in Rodarte, Labor Code section 5412 requires compensable disability, either temporary or permanent. Permanent disability is not compensable until it is ratable. Except in the case of insidious, progressive diseases, a disability is not ratable until it is permanent and stationary. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [286 Cal. Rptr. 600, 56 Cal.Comp.Cases 631].)"

(*W. Coast Drywall & Paint v. Workers' Comp. Appeals Bd*., (2015) 80 Cal. Comp. Cases 1238, 1239-1240; see also, *Lomeli v. County of Los Angeles,* 2023 Cal. Wrk. Comp. P.D. LEXIS 17, *3; *Escalante v. W. Anaheim Med. Ctr*., 2020 Cal. Wrk. Comp. P.D. LEXIS 39, *3-4; *Severiana Salazar Galvan v. Suites*, 2019 Cal. Wrk. Comp. P.D. LEXIS 369, *2-4; *Chavez v. DPR Constr. & Nat'l Union Fire Ins. Co.,* 2019 Cal. Wrk. Comp. P.D. LEXIS 219, *4-5; *Cole v. Marconi Conf. Ctr.*, 2018 Cal. Wrk. Comp. P.D. LEXIS 422, *4-6; *McKeowen v. Cast*, 2018 Cal. Wrk. Comp. P.D. LEXIS 535, *4-5; *Rivera v. ERA Prods*., 2016 Cal. Wrk. Comp. P.D. LEXIS 599, *4-5; *Garner v. Tampa Bay Buccaneers*, 2014 Cal. Wrk. Comp. P.D. LEXIS 320, *9-11.)

Compensable Temporary Disability

The first medical report with contemporaneous evidence of disability related to the right shoulder injury is October 29, 2020 when it was indicted by Dr. Anderson that the applicant was off-work for his shoulder injury. I am not persuaded that Dr. Anderson's October 29, 2020 report is substantial evidence of compensable disability from the last date of work. Dr. Anderson's reports are too short on detail or explanation to be substantial evidence of disability prior to his first evaluation of the applicant on October 15, 2020. He does not sufficiently explain his opinion that the applicant had disability before his first examination of the applicant. Dr. Anderson's statement that the applicant was disabled due to his shoulder injury in July 2020 is contradicted by Dr. Sims' statement that he would write a letter taking the applicant off work from July 20, 2020 to October 12, 2020 due to COVID risk, not for any shoulder condition.

On March 31, 2021, Dr. Anderson wrote a work slip indicating the applicant had been temporarily totally disabled from November 20, 2019, this is also not substantial evidence of compensable temporary disability since the applicant did in fact perform his work without restriction from November 30, 2019 until he went off work in 2020 due to the COVID pandemic. Therefore this statement by Dr. Anderson cannot support a finding of compensable disability from November 2019.

Dr. Anderson's October 15, 2020 report is silent on disability status or work restrictions, and is therefore not substantial evidence of temporary disability on its own. However, on March 31, 2021, Dr. Anderson certified to EDD that the applicant's disability due to his right shoulder began October 15, 2020, the date of his first evaluation. October 15, 2020 as the first date of temporary disability is also supported by the Lam Research "Attending Physician Statement" completed by Dr. Anderson listing October 15, 2020 as the start date of disability. Although the form is undated, it appears the form was completed between the October 29, 2020 and December 9, 2020 exams by Dr. Anderson since he notes the last appointment was October 29, 2020. Taken together, I find sufficient evidence that the applicant first had compensable temporary disability on October 15, 2020, when he was first seen by Dr. Anderson.

Dr. Fisher opined that the applicant would not have been temporarily totally disabled absent surgical intervention, of which there is no evidence. Although Dr. Fisher provided that the applicant would have had work restrictions, "…modified work restrictions without wage loss, in and of themselves, are sufficient to constitute "disability" for purposes of Labor Code section 5412." (*W. Coast Drywall & Paint v. Workers' Comp. Appeals Bd.*, (2015) 80 Cal. Comp. Cases 1238, 1240.) There is no evidence of wage loss related to the right shoulder before October 15, 2020. Although there are statements by Dr. Anderson after October 15, 2020 that the applicant was off work for the shoulder injury from July 2020, that is contradicted by the reporting of Dr. Sims at the time that the applicant was off work due to COVID concerns. Therefore, the reporting of Dr. Fisher is not substantial evidence of compensable temporary disability before October 15, 2020.

Compensable Permanent Disability

Defendant argues that Dr. Fisher found a cumulative trauma through April 2020 with ratable disability during that period, and therefore the date disability first existed was the last date worked. In this case the applicant treated with Dr. Anderson between October 15, 2020 and March 31, 2021 evidencing that his disability was not permanent. Additionally, in his June 13, 2022 supplemental report Dr. Fisher indicates that the **absent treatment**, applicant is at a state of maximum medical improvement. He then goes on to recommend an MRI Arthrogram would help to determine the type of right shoulder surgery the applicant requires. Dr. Fisher again hedges when providing impairment ratings in his September 14, 2022 report by saying, "Again, future medical treatment has been outlined but …" and then providing his impairment. (Applicant's Exhibit 3, page 2.) In this denied claim it is not clear that the applicant has exhausted his treatment options. Therefore there is not sufficient evidence that the applicant's disability is permanent and thus ratable, even at the time of the final report of Dr. Fisher.

Additionally, Dr. Fisher provides a rating based on limitations in range of motion and pain. Although it might be assumed, there is no evidence showing limited range of motion in April 2020. There is no evidence to demonstrate ratable permanent disability in April 2020. Indeed, the evidence from Dr. Sims between March 2020, and October 15, 2020 indicates the only condition limiting the applicant's earning capacity was the COVID pandemic. Therefore, absent evidence of ratable permanent disability before October 15, 2020, that is the first date of disability for Labor Code section 5412 purposes.

DATE OF KNOWLEDGE

Although not filing a Petition for Reconsideration, applicant argues in his Answer that date of knowledge for Labor Code section 5412 purposes should not be until the applicant's evaluation with Dr. Fisher. The applicant will be charged with knowledge for Labor Code section 5412 purposes where he knew or should have known his disability was industrially caused.

> "The general rules regarding the effect of medical advice on whether an applicant knew or in the exercise of reasonable diligence should have known his disability was caused by his employment are stated in 2 Hanna, California Law of Employee Injuries and Workmen's Compensation, supra, section 18.03[5][b]: " An employee clearly may be held to be aware that his or her disability was caused

> by the employment when so advised by a physician. Generally, until he receives such medical advice, he is not chargeable with knowledge of his condition and its relation to his work . . . ."" (*City of Fresno v. Workers' Comp. Appeals Bd.*, 163 Cal. App. 3d 467, 472.)

However, when an employee expresses unequivocal knowledge of a link between his injury and his employment, the opinion of an examining doctor is not required. (*Nielsen v. Workers' Comp. Appeals Bd.*, (1985) 164 Cal. App. 3d 918, 931.) Furthermore, the applicant need not know that an injury is cumulative, rather than specific. (*Bassett-Mcgregor v. Workers' Comp. Appeals Bd.*, (1988) 205 Cal. App. 3d 1102, 1114-1115.)

In this case the applicant states in his October 9, 2020 email to the employer that his shoulder pain, "… was due to an injury from work which occurred ~ September of last year." (Defendant's Exhibit C, page 1.) Based on this unequivocal statement of the link between his shoulder pain and work, I find applicant to have knowledge for the purposes of Labor Code section 5412 on October 9, 2020.

WHETHER RETALIATORY FILING VOIDS POST-TERMINATION EXCEPTION

Although defendant's Petition for Reconsideration does not expressly request a finding as such, defendant argues that case law supports a finding that the post-termination defense applies regardless of exception, where it is shown that the applicant's claim is purely retaliatory. (Petition for Reconsideration page 17, lines 7 – page 20, line 20.) The two cases cited by defendant do not support that Labor Code section 3600(a)(10)(D) can be disregarded if a clam is retaliatory in nature. In *Cuen v. Workers' Compensation Appeals Bd.*, (2002) 67 Cal. Comp. Cases 466 (writ denied), the applicant's claim to an exception to the post-termination defense did not fail because the claim was retaliatory. Rather, the applicant in *Cuen* failed to prove an exception to the post-termination defense, and this is why his cumulative trauma claim was barred by the post-termination defense. (*Id*. at 467.) In the other case cited by defendant, *Faulkner v. Workers' Comp. Appeals Bd.*, (2004) 69 Cal. Comp. Cases 1161 (writ denied), the WCAB again found that the applicant failed to meet his burden to prove an exception to Labor Code section 3600(a)(10). (*Id*. at 1163.)

Both cases mention that the claims made by the applicant's in those cases were retaliatory in nature, and thus the type of claim that Labor Code section 3600(a)(10) seeks to bar. However the claims in *Faulkner*, supra and *Cuen*, supra were not barred because they were retaliatory in

nature, they were barred because the applicants failed to prove an exception to the post-termination defense. That is not the case here, where the applicant has proven a date of injury subsequent to the termination date. I find no case law supporting a contention that an exception to a post-termination defense fails where an injury claim is retaliatory.

CONCLUSION

Because the date of injury of October 15, 2020 postdates his October 8, 2020 notice of termination, and October 12, 2020 termination, the applicant has established an exception to the post-termination defense under Labor Code section 2600(a)(10)(D). There is no basis to void this exception, and therefore defendant's post-termination defense does not bar applicant's claim in this matter.

RECOMMENDATION

For the foregoing reasons, I recommend that the Petition for Reconsideration of defendant, filed herein on July 19, 2023, be DENIED.

DATE: August 3, 2023

Lawrence Keller
WORKERS' COMPENSATION JUDGE