WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BENJAMIN MORALES, *Applicant*

vs.

WESTERN TUBE & CONDUIT CORP.;
MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA,
administered by MITSUI SUMITOMO MARINE MANAGEMENT, *Defendants*

Adjudication Numbers: ADJ6818414 ADJ9980198
Los Angeles District Office

OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION

Mitsui Sumitomo Insurance Company (Mitsui) seeks reconsideration of the July 12, 2021 Findings and Order wherein the workers' compensation arbitrator denied Mitsui's Petition for Contribution because applicant's Labor Code section 5412 date of injury was after his last date of employment and Mitsui insured applicant's employer during the last year of industrial exposure.[1] The arbitrator found that "applicant's date of cumulative trauma, as defined by the provisions of Labor Code §5500.5 and §5412, to be June 16, 2007 through June 16, 2008." The arbitrator denied Mitsui's Petition for Contribution.

Mitsui contends that applicant sustained a cumulative trauma injury in the form of hypertension ending in March of 2007 because applicant had knowledge that his hypertension was work related and first suffered disability in March of 2007. Relying on *Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal. App. 3d 1102 [53 Cal.Comp.Case 502], Mitsui contends that it is only required to show industrial knowledge and actual disability under Section 5412 and Mitsui did not need to prove that applicant had knowledge of a cumulative trauma injury.

We have received an answer from Insurance Company of the West. The arbitrator prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed by the arbitrator in his Report, which we adopt and incorporate by reference and for the reasons discussed below, we will amend the Findings and Orders to clarify that applicant's 5412 date of injury was after his last date of injurious exposure. We will affirm the arbitrator's denial of Mitsui's Petition for Contribution.

Section 5405 provides that, unless certain tolling provisions apply, workers' compensation proceedings must commence within one year of the employee's date of injury. Applicant's date of injury is also relevant to division of liability among defendants in Section 5500.5 contribution proceedings.

"For the purpose of establishing the date of injury, section 3208.1 distinguishes between 'specific' and 'cumulative' injuries." (*Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal. App. 3d 1102, 1109-1110 [53 Cal.Comp.Cases 502]; see also *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].) A specific injury occurs "as the result of one incident or exposure which causes disability or need for medical treatment," while a cumulative injury results from "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 injury for a cumulative injury "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.)

As used in Section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavira v. Worker's Comp. Appeals Bd. (*1991) 235 Cal.App.3d 463 [56 Cal.Comp.Cases 631]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1003-1006 [69 Cal.Comp.Cases 579].) Medical treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to section 5412, but it may be evidence of compensable permanent disability. (*Rodarte, supra,* 119 Cal.App.4th 998, 1005 [69 Cal.Comp.Cases 579, 584].) Likewise, modified work is not a sufficient basis for finding compensable temporary disability, but it may be indicative of a compensable permanent disability, especially if the worker is permanently precluded from returning to his usual and customary job duties. (*Id*.)

"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].) "[A]pplicant 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." (*Johnson, supra,* 163 Cal.App.3d at p. 473.)

In *Bassett-McGregor,* the applicant had a heart attack at work on July 27, 1984. Applicant timely filed a claim for compensation for a specific industrial injury. Approximately two years after applicant's heart attack, applicant received a medical opinion that her disability was the result of cumulative trauma and applicant filed a second claim for a cumulative trauma injury. Following trial, the workers' compensation judge awarded benefits for the cumulative injury and denied applicant's initial claim for specific injury. The Appeals Board granted reconsideration and found that applicant's cumulative trauma claim was barred by the Section 5405 statute of limitations. The Court of Appeal reversed the Appeals Board explaining that in cases where an injury is pled as a specific injury, an amended application alleging a cumulative trauma injury will generally relate back to the original application. As the Court of Appeal explained in *Bassett-McGregor,*

> Applicant's amended application seeking benefits on the theory of a cumulative injury to her heart does not allege a new and different cause of action. (See *Bland v. Workmen's Comp. App. Bd*. (1970) 3 Cal.3d 324, 330–331 [90 Cal.Rptr. 431, l196, 200 [211 Cal.Rptr. 461]; see also § 5303*; Chavez v. Workmen's Comp. Appeals Bd*. (1973) 31 Cal.App.3d 5, 14 [106 Cal.Rptr. 853]; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598 [346 P.2d 545].) Our holding that an amendment substituting a claim for cumulative rather than specific injury does not constitute a new and different cause of action is limited to circumstances such as these in which the disability is the same and the injury arose from the same set of facts, and is consistent with the guiding principle that claims should be adjudicated on substance rather than formality of statement. (See *Beveridge v. Industrial Acc. Com., supra,* at p. 598.) (*Bassett-McGregor, supra,* at 1116.)

In this case, unlike *Bassett-McGregor,* there are two distinct causes of action. Applicant claims he sustained two injuries -- a specific March 2, 2007 injury and a cumulative injury through his last date of employment in 2008. Because the applicant in *Bassett-McGregor* sustained a single injury, when the application for a cumulative injury was filed, the date of knowledge for purposes

of determining a cumulative trauma date of injury was the date of the application for the specific injury. Mitsui incorrectly states that *Bassett-McGregor* supports a finding that applicant had knowledge of industrial causation in 2007 because applicant did not need knowledge of cumulative injury and it "is sufficient if Applicant simply has knowledge that the disability is industrially-caused." (Petition, p. 5.) The Court explicitly stated that its holding was limited "to circumstances such as these in which the disability is the same and the injury arose from the same set of facts, and is consistent with the guiding principle that claims should be adjudicated on substance rather than formality of statement." (*Bassett-McGregor,* supra, at 1116.)

The evidence relied on by defendant in its attempt to move the 5412 date of injury back to March of 2007 is evidence of a specific injury and is not evidence that applicant had knowledge of or disability related to a cumulative trauma. Therefore, the arbitrator correctly determined that applicant first experienced disability on his last date of employment. However, the arbitrator did not make a determination regarding when applicant first had knowledge that his disability was work related. On June 2, 2009, applicant's attorney filed an application for a cumulative trauma injury from May 1, 1979 through June 16, 2008. Applicant had concurrence of knowledge and disability on June 2, 2009. Therefore, we will amend the Findings of Fact to reflect a 5412 date of injury of June 2, 2009.

Finally, while establishing a 5412 date of injury is a necessary step in a contribution proceeding, a final determination of liability must be made in accordance with Section 5500.5 which provides:

> Except as otherwise provided in section 5500.6, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, ina period of [one year] immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. (Lab. Code, § 5500.5(a).)

Section 5500.5 was enacted in 1951 to codify the holding in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79 [11 Cal.Comp.Cases 226] that an employee who sustains an injury as a result of a progressive occupational disease may obtain an award for the entire amount of burden of seeking apportionment. The defendant must institute proceedings within one year after

an award of compensation benefits for "an apportionment of liability or right of contribution." (Lab. Code, § 5500.5(e).) Unless defendants have stipulated to a division of liability, at arbitration, issues of liability among defendants are decided de novo. (*Greenwald v. Carey Dist. Co. (Greenwald) (*1981) 46 Cal.Comp.Cases 703 (Appeals Board en banc).) [2]

In this case, the arbitrator correctly determined that Mitsui is solely liable for applicant's cumulative trauma injury because they insured the employer during the last year of injurious exposure. However, for the reasons discussed above, we will amend the Findings and Orders to clarify applicant's date of injury and the basis for denying Mitsui's Petition for Contribution.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the July 12, 2021 Findings and Order is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board that the July 12, 2021 Findings and Orders is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant's date of injury as defined by Labor Code section 5412 is June 2, 2009.

2. Applicant's last year of injurious exposure pursuant to Labor Code section 5500.5 was June 16, 2007 through June 16, 2008.

3. Mitsui Sumitomo Insurance Company of America is solely liable for applicant's cumulative trauma injury.

[2] Pursuant to *Greenwald, supra,* Insurance Company of the West is entitled to raise any defenses to liability, and the arbitrator must determine the issues raised de novo.

ORDER

IT IS ORDERED that the Petition for Contribution filed by Mitsui Sumitomo Insurance Company of America is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 28, 2021

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

GALE SUTOW & ASSOCITES
LOUIE & STETTLER
SAUL ALLWEISS

MWH/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

This case involves a March 2, 2007 specific injury and cumulative trauma injury, the date of which was at issue for the 6/23/2021 Arbitration.

Defendant Mitsui Sumitomo Marine Management USA (hereinafter "Mitsui") has filed a timely and verified Petition for Reconsideration dated 7/30/2021; however, the Arbitrator received no answer.

Mitsui seeks reconsideration on the grounds that the Arbitrator acted without or in excess of his powers as the evidence does not justify the Arbitrator's Findings of Fact and that the Arbitrator's Findings of Fact do not support the decision.

The questions presented to the Arbitrator was the date of the cumulative trauma injury and its effect on Mitsui's right to contribution/reimbursement.

Essentially, Mitsui's position is that the date of injury established by Labor Code §5412 would have been established in March, 2007 based upon Dr. Guerrero's reporting (Exhibit F) and that the Arbitrator's finding that the applicant had no knowledge of the cumulative trauma injury at that time, sufficient to trigger the "knowledge" prong of Labor Code §5412, lacks legal basis. Mitsui relies heavily on *Bassett-McGregor v. WCAB* (1988) 53 CCC 502 for holding that "Section 5412 does not expressly require knowledge of the type of industrial causation ... "*(McGregor at 511)*

STATEMENT OF FACTS

The applicant filed an Application for Adjudication of Claim for a specific industrial injury to his back and lower extremities which occurred on March 2, 2007 (Mitsui's 7/30/2021 Petition for Reconsideration, Page 3, Lines 1-3).

At that time, the applicant treated with Dr. Gue1Tero and it was noted that the applicant had a "hypertensive crisis" directly related to pain and stress related to the 3/2/2007 specific injury (Mitsui's 7/30/2021 Petition for Reconsideration, Page 3, Lines 5-8).

The applicant was indeed off work as a result of the 3/2/2007 specific injury for approximately 2 months but then continued to work for the employer until 6/16/2008 (Mitsui's 6/1612021 Arbitration Brief, Page 7, Lines 14-16).

The applicant filed an Application for Adjudication of Claim on 6/2/2009 alleging a cumulative trauma from 5/1/1979 through 6/16/2008 (Mitsui's 7/30/2021 Petition for Reconsideration, Page 2, Lines 16-18).

Dr. Alpern was selected and served as the Panel Qualified Medical Evaluator in internal medicine and his deposition was taken on 6/23/2016 (Mitsui's 7/30/2021 Petition for Reconsideration, Page 3, Lines 17-18).

Dr. Alpern agreed there was a spike in the applicant's hypertension after the 3/2/2007 specific injury, and this was due to the 3/2/2007 specific injury (Mitsui's 7/30/2021 Petition for Reconsideration, Page 3, Lines 19-23).

Dr. Alpern also opined that causation of the applicant's hypertension would have been due to continued work if the applicant was working with pin and having back problems from the date of the specific injury to the applicant's last day worked (Mitsui's 7/30/2021 Petition for Reconsideration, Pages 3-4, Lines 23-2).

In fact, in no uncertain terms, Dr. Alpern testified that the applicant's employment through his last day of work in June, 2008 contributed to the cause of the applicant's injury (Exhibit H, Page 48, Lines 18-20).

DISCUSSION

The Arbitrator has carefully reviewed the *McGregor* (supra) case heavily relied on by Mitsui in its Petition for Reconsideration and must point out the distinguishing facts which serve to distinguish the results between that case and this one.

In *McGregor*, the applicant suffered a cardiac arrest while working on 7/27/1984 and filed her claim for this incident as a specific injury in December, 1984. On 7/23/1986, the applicant in *McGregor* filed an Application for Adjudication of Claim alleging a cumulative trauma through 7/27/1984, which caused the cardiac arrest. It is crucial to point out here that in *McGregor*, there was no allegation of injurious exposure subsequent to the date of the 7/27/1984 cardiac arrest.

In this case, unlike *McGregor*, the applicant, in fact, alleged injury on a cumulative trauma basis through his last day of work and, in this case, there is substantial medical evidence from Dr. Alpern that the applicant, in fact, suffered a cumulative trauma through his last day of work on 6/16/2008.

It is this distinction of facts between McGregor and this case, which completely undermines Mitsui's rationale, and thus its position. Mitsui seems to take the position that the

applicant had knowledge of a cumulative trauma through 6/16/2008, more than a year before in March, 2007.

As a result, the Arbitrator may indeed determine the date of injury for the cumulative trauma based upon the applicant's knowledge that a cumulative trauma existed. In this matter, unlike in *McGregor*, there is no concurrence of an alleged specific injury and a cumulative trauma, where the alleged two injuries share the same date. Because the cumulative trauma was pied through 6/16/2008, the medical evidence, in fact, establishes a cumulative trauma through 6/16/2008, and the medical evidence establishes two separate dates for the specific injury (3/2/2007) and the cumulative trauma (through 6/16/2008), the Arbitrator must necessarily make a determination on when the applicant had the requisite Labor Code §5412 knowledge as to the alleged 6/16/2008 cumulative trauma.

Therefore, the Arbitrator must consider whether the medical evidence proximate to the 3/2/2007 specific injury established the requisite knowledge of a cumulative trauma for the purpose of determining the date of injury. To do otherwise would be to ignore the allegation and medical evidence of a cumulative trauma through 6/16/2008 and arbitrarily assign a cumulative date of injury simply because the applicant had knowledge of an unrelated industrial specific injury. The Arbitrator must again distinguish *McGregor* and point out that, although in *McGregor*, the applicant's specific and cumulative injuries would have necessarily shared the same date, these are not the facts in this case.

Taking Mitsui's reliance on the reasoning in *McGregor* and that holding's effect in this case to its conclusion, an injured worker could suffer a cumulative trauma over the entirety of a 20-year career; however, a specific injury that resulted in disability in the first year of this injured worker's career would somehow impute knowledge as to the cumulative date of injury 19 years later. Because applicant of the holding in *McGregor* to the facts in this case would necessarily lead to absurd results, the Arbitrator believes Mitsui's reliance on *McGregor* is misplaced.

RECOMMENDATION

Considering substantial medical evidence reflects the applicant suffered from a cumulative trauma through the last day work on 6/16/2008, and considering the Arbitrator found the Section 5412 concurrence of disability and knowledge related to the 6/16/2008 date of injury occurred subsequent to that date, the Arbitrator recommends that the 7/30/2021 Petition for Reconsideration be denied.

SAUL ALLWEISS
Arbitrator

Dated: August 2, 2021