

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**CRYSTAL LEMIEUX BENEDICT, *Applicant***

**vs.**

**K M MEAT COMPANY, INC.; STARR INDEMNITY AND LIABILITY COMPANY,  
Administered by SEDGWICK, *Defendants***

**Adjudication Number: ADJ11734603  
Anaheim District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

On December 6, 2021 applicant's attorney filed a letter addressed to the workers' compensation administrative law judge (WCJ) requesting an amended award addressing the issue of attorney fees. We will treat applicant's attorney's letter as a Petition for Reconsideration. Defendant filed a Petition for Reconsideration on December 8, 2021. We have considered the allegations of the Petitions 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 stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, rescind the November 23, 2021 decision, and substitute it with new Findings of Fact that amend the Labor Code<sup>1</sup> section 5412 date of injury to November 15, 2019,<sup>2</sup> defer the issue of attorney fees and the award, and otherwise affirm the WCJ's findings. We will also return this matter to the trial level for further proceedings as the WCJ determines necessary on the issue of attorney fees and for the reissuance of the award.

---

<sup>1</sup> All further statutory references are to the Labor Code, unless otherwise noted.

<sup>2</sup> In the November 23, 2021 Findings of Fact and Award, the WCJ found the section 5412 date of injury to be November 15, 2018 to November 15, 2019. In his Report, he notes that the finding of section 5412 date of injury should have been November 15, 2019. We agree with this recommendation.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the November 23, 2021 Findings of Fact and Award is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 23, 2021 Findings of Fact and Award is **RESCINDED** and **SUBSTITUTED** with new Findings of Fact, as provided below, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

#### **FINDINGS OF FACT**

1. Applicant, Crystal Lemieux Benedict, while employed during the period November 15, 2018 to November 15, 2019, as a Sales Manager, group number 251, at Los Angeles, California by KM Meat Company, Inc., insured by Starr Indemnity & Liability Company, administered by Sedgwick, sustained injury arising out of and occurring in the course of employment to her cervical spine, lumbar spine, and bilateral knees.
2. The injury caused temporary total disability from November 15, 2019 to November 15, 2021 at the weekly rate of \$1,251.38.

3. The date of injury pursuant to Labor Code 5412 is November 15, 2019 with Starr Indemnity & Liability Company, administered by Sedgwick liable pursuant to Labor Code 5500.5 (a).
4. The issue of attorney fees is deferred.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 7, 2022**

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

**CRYSTAL LEMIEUX BENEDICT  
LEVITON, DIAZ & GINOCCHIO, INC.  
DIETZ, GILMOR & CHAZEN, APC  
TOBIN LUCKS  
EMPLOYMENT DEVELOPMENT DEPT. DEVELOP  
LAUGHLIN, FALBO, LEVY & MORESI**

**PAG/ara**

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

**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

**I.**  
**INTRODUCTION**

1. Applicant's Occupation: Sales Manager  
Applicant's Age: 65  
Date of Injury: 11/15/19  
Parts of Body Injured: Cervical Spine, Lumbar Spine, and knees.  
Manner in which injuries alleged to have occurred: Cumulative Trauma
  
2. Identity of Petitioner: **Defendant** filed the Petition.  
Timeliness: The petition was timely filed.  
Verification: A verification is attached to the petition.
  
3. Date of issuance of Findings of Fact and Award: 11/23/2021
  
4. **Petitioners contentions:** The defendant requests Reconsideration of the Findings of Fact and Award due to:
  - (a) the WCJ finding the date of injury to be 11/15/18 to 11/15/19 pursuant to Labor Code Section 5412.

**II.**  
**FACTS**

Applicant, Crystal Lemieux Benedict, while employed as a Sales Manager, sustained industrial injuries to her head, cervical spine, lumbar spine, and bilateral knees during the period 11/15/18 to 11/15/19 while employed by defendant K M Meat Co., Inc. and insured by Starr Indemnity Liability; administered by Sedgwick CMS.

The parties proceeded to trial on 09/07/2021 on the issues of parts of body injured, temporary disability, and date of injury.

The parties submitted Joint Exhibits of the AME reports of Dr. Laura Wertheimer Hatch and defendant submitted exhibits of their denial of claim and primary treating physician reports by Dr. Deckey.

On 11/23/2021, the court issued its Findings of Fact and Award finding (1) applicant sustained injury to her cervical spine, lumbar spine, and bilateral knees, (2) the injury caused temporary total disability from 11/15/19 to 11/15/21 at the rate of \$1,251.38, and (3) the date of injury pursuant to

Labor Code 5412 is 11/15/18 to 11/15/19 (should be 11/15/19) with Starr Indemnity & Liability Co., administered by Sedgwick CMS liable pursuant to Labor Code 5500.5 (a).

It is from these Findings of Fact and Award that defendant seeks reconsideration.

As a side note, applicant's attorney filed a letter dated 12/6/21 requesting an "Amended Order" to include an award for reasonable attorney's fees but that is not subject to this request for reconsideration.

### **III. DISCUSSION**

A. Labor Code Section 5412 addresses the "Date of injury for occupational diseases or cumulative injuries." The section reads, "The date of injury in cases of occupational diseases or cumulative injuries is the 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." (Emphasis added) Hence, both elements must be met to establish the date of injury.

We start with the element of "disability." Disability can be either temporary or permanent disability. Chavira v. WCAB (1991) 235 Cal. App. 3d 43; 56 Cal. Comp. Cases 631. As stated in Chavira, Labor Code Section 5412 "was enacted to codify the holding in Marsh v. Industrial Acc. Com., (1933) 217 Cal.338 [18 p.2d 933, 86 A.L.R. 563] that in the case of a progressive occupational disease, the date of injury is the date on which disability occurs and by reasonable diligence the employee can discover the disability. In Marsh the court also concluded that a **disability is compensable if it results in impairment of earning capacity**, even if the employee is able to perform his ordinary occupation." (Emphasis added)

Based upon the record, the applicant did not have any periods of temporary disability related to this cumulative trauma claim prior to 11/15/19. In addition, defendant's petition concedes there was no temporary disability in 2011 (See Petition for Reconsideration, page 3, lines 15-16). The applicant worked her normal job, despite being afforded work restrictions, until 11/15/19 when applicant could no longer perform her job and her employer no longer accommodated her restrictions.

Petitioner contends that applicant suffered from permanent disability in 2011 and applicant knew or should have known that the permanent disability in 2011 was caused by her employment relying on State Compensation Ins. Fund v. WCAB (Rodarte), 119 Cal. App. 4th 998; 69 Cal. Comp. Cases 579 (2004); 14 Cal. Rptr. 3d 793. In Rodarte, the Court of Appeal stated that modified work may indicate a permanent impairment of earning capacity, **especially if the worker is not able to return to the original job duties**. The court further concluded that whether an injured worker has a disability required to satisfy Labor Code 5412 is a question for the trier of fact to determine and may require expert medical opinion.

Defendant's contention is that applicant was working with work restrictions in 2011 and those work restrictions constitute "permanent disability".

Applicant suffered a prior industrial injury on 06/04/2004 and previously treated for that injury with Dr. Deckey, who is also applicant's treating doctor in this cumulative trauma claim.

Defendant contends applicant suffered permanent disability in the form of work restrictions back on May 24, 2011 based upon Dr. Deckey's May 24, 2021 report and that AME Dr. Hatch interpreted that as applicant's first instance of disability for the purposes of Labor Code 5412 (See Petition for Reconsideration, page 5, lines 7-12).

Defendant did offer a medical report by PTP Dr. Deckey dated May 24, 2011, but that report is entitled "Primary Treating Physician's Progress Report" and the report is addressing applicant's "old" 06/04/2004 date of injury, based on its caption, and not this instant cumulative trauma case (See Defendant's Exhibit "C"). Even assuming the work restriction in May 2011 by Dr. Deckey constitutes "disability," it constitutes disability for the 2004 date of injury.

It appears that defendant is trying to "bootstrap" applicant's "old" 2004 injury and disability caused by that injury as "disability" for this cumulative trauma case.

There is no evidence in the record to indicate the "work restrictions" in May 2011 by Dr. Deckey were in connection with this cumulative trauma injury or whether the work restrictions were permanent work restrictions. In fact, applicant testified that she was under the belief and was told the work restrictions were only temporary (See MOH, Page 6, Lines 20-21). Defendant did not provide any contradictory evidence to suggest applicant was working under permanent work restrictions in 2011.

Therefore, there is no evidence in the record of compensable disability prior to 11/15/19 related to this cumulative trauma claim since there is no evidence of any impairment in applicant's earning capacity prior to 11/15/19.

As such, applicant's first compensable lost time, i.e. "disability" came on 11/15/19 when she could no longer perform her usual and customary work and her employer no longer accommodated her work restrictions. This is the "first disability" suffered by applicant in this cumulative trauma case as this was applicant's first impairment of earning capacity, consistent with the holding in **Chavira**.

We next address "applicant's knowledge." Pursuant to Labor Code 5412, applicant's knowledge stems from when she knew or should have known that her resultant disability was caused by her employment. An employee is not charged with "knowledge" of industrially caused disability in the absence of medical advice unless the nature of the disability and the employee's training, intelligence, and qualifications are such that the employee should have recognized that she had industrially caused disability (See **Chavira** supra).

Applicant's un rebutted and unimpeached testimony was that she has no special knowledge of any workers' compensation laws or the practice of medicine (See MOH, Page 5, Lines 5-6). Defendant did not provide any contradictory evidence to suggest that applicant has any special

training, intelligence, or qualifications to understand or know work restrictions, temporary or other otherwise, qualify as a disability for the purposes of applying Labor Code Section 5412.

The court finds applicant did have knowledge on 11/15/19 that her disability was caused by her employment because she was informed by AME Dr. Hatch as early as 2017 that her injuries were caused by work, hence applicant either knew or should have known in the exercise of reasonable diligence that the temporary disability beginning 11/15/19 was caused by work.

This instant case is distinguished from **Rodarte** in that applicant was able to maintained her usual and customary work even though she was afforded work restrictions, i.e., applicant was able to continue working her original job duties. Applicant's un rebutted and unimpeached testimony was that her work restrictions and doing her usual and customary job were no different because she was able to do that on her own even without the restrictions (See MOH, Page 6, Line's 17-19). Therefore, in line with the holding in **Chavira**, there was no impairment of earning capacity until 11/15/19.

Even assuming applicant had the requisite permanent disability back in 2011 based upon work restrictions, not only would that represent permanent disability related to applicant's 2004 injury, there is nothing in the record that demonstrates that applicant had the requisite knowledge that the work restrictions were actually considered as a disability that could be construed as related to this cumulative trauma case.

Defendant's contention that the medical opinion of AME Dr. Hatch as to when the applicant had first knowledge of disability should hold great weight is legally misplaced. Even as cited in **Rodarte**, "whether an injured worker has a disability required to satisfy Labor Code 5412 is a question for the trier of fact to determine".

#### **IV.** **RECOMMENDATION**

As such, it is respectfully recommended that the defendant's Petition for Reconsideration be Denied. In addition, it is respectfully requested the matter be returned in order for the court to address applicant's attorney request for an amended award to include attorney's fees.

DATE: December 22, 2021

**Ben H. Nakatani Jr.**  
WORKERS' COMPENSATION JUDGE