WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAFAEL SAAVEDRA, ***Applicant***

vs.

COUNTRY FRESH HERBS; REPUBLIC UNDERWRITERS; FALLS LAKE INSURANCE COMPANY; and PREFERRED PROFESSIONAL INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ10834249
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCUR NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 9, 2022

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

RAFAEL SAAVEDRA
LAW OFFICES OF DENNIS RYAN
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN

PAG/*pc*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION
(corrected - typographical error as to date of trial)

I
INTRODUCTION

This matter proceeded to trial on December 22, 2021. At trial the parties stipulated that Rafael Saavedra age 62 on the alleged date of injury, while employed during the period April 12, 2016, through April 12, 2017, as a laborer, Occupational Group Number 360, at Tarzana, California, by Country Fresh Herbs, sustained injury arising out of and in the course of employment to his lumbar spine, neck, shoulders, knees, feet, and thoracic spine. The parties also stipulated that Applicant was employed by Country Fresh Herbs from 1995 to December 20, 2020 and that PQME Silverman found that the Applicant's entire period of employment was injurious. At the time of injury, the employer's workers' compensation carriers were Republic Underwriters for the period January 1, 2016, through December 31, 2016; Falls Lake Insurance Company for the period January 1, 2017, through December 31, 2017; and Preferred Professional Insurance Company for the period January 1, 2018, through December 20, 2020. The sole issue presented for determination was the date of injury pursuant to Labor Code § 5412 and Labor Code § 5500.5, with Republic Underwriters contending that the liability period pursuant to Labor Code § 5500.5 is after its last date of coverage. A Findings and Order issued on February 18, 2022 in which it was found that the date of injury for the cumulative trauma pursuant to Labor Code § 5412 is September 12, 2017, with the liability period under Labor Code § 5500.5 running from September 12, 2016 through September 12, 2017. Defendant filed a timely verified petition for reconsideration of the February 18, 2022 Findings and Order. Petitioner contends the WCJ erred by: a) finding the Labor Code § 5412 date of injury to be September 12, 2017 when defendant contends the date of injury should have been found to be May 21, 2018; b) finding the Labor Code § 5412 date of injury to be September 12, 2017 when defendant contends that alternatively the date of injury could have been found to be November 13, 2017; and c) finding that applicant knew or should have known that his disability was caused by his employment on September 12, 2017.

II
FACTS

Applicant was employed as laborer by Country Fresh Herbs from 1995 to December 20, 2020. He worked in the fields from 1995 through 2012 picking vegetables which he placed in boxes. In 2012 he was transferred to a warehouse where he worked packing vegetables. Applicant was off work for several weeks in April 2016 after a March 30, 2016, specific injury, but the employer continued to pay his wages. On April 19, 2017 applicant filed an Application for Adjudication of Claim alleging a cumulative trauma to his neck, back, shoulders,

lower extremities and multiple body parts. Applicant presented himself for an evaluation by Panel Qualified Medical Evaluator Mitchell Silverman M.D. on September 12, 2017 stating that he had sustained a March 30, 2016 specific injury and a cumulative trauma. Dr. Silverman performed a thorough orthopedic evaluation and reviewed voluminous medical reports including x-ray studies of applicant's bilateral knees. He provided a number of orthopedic diagnoses including, but not limited to, bilateral end stage bone on bone knee arthritis. He noted that the applicant continued to work with pain. On October 1, 2017 the parties sent a joint interrogatory to Dr. Silverman requesting ". . . a provisional rating in this matter to assist the parties in early settlement efforts." (Exhibit E, Medical Report of Mitchel Silverman M.D. dated November 13, 2017, page 1, paragraph 1). Dr. Silverman then issued a supplemental report dated November 13, 2017 in which he noted that:

> "Permanent impairment ratings are calculated in accord with the criteria and methods of the *American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition*, and the principles established by the *Almaraz/Guzman* decisions.
>
> For the subjective and objective factors used to calculate Permanent Impairment, please refer to pages 13-22 of my report dated September 12, 2017." (Exhibit E, Medical Report of Mitchel Silverman M.D. dated November 13, 2017, page 8, paragraphs 3-4).

Dr. Silverman then went on to outline whole person impairment for applicant's left shoulder, left long head biceps tendon rupture, lumbar spine, cervical spine, right knee, and left knee. In doing this he referred to the applicable Tables, Charts, and pages in the *AMA Guides*. He provided strict AMA ratings as to all body parts except as to the ruptured bicep tendon for which he provided an Almaraz/Guzman analysis by "analogizing" to occult instability of the left shoulder.

The matter proceeded to trial and a Findings and Order issued on February 18, 2022. It is from this Findings and Order that the defendant has filed a timely verified petition for reconsideration.

III
DISCUSSION

A
Labor Code § 5412 Date of Injury September 12, 2017 not May 21, 2018

Labor Code § 5412 defines the date of injury for a cumulative trauma as "that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." Petitioner argues that

applicant did not have *compensable* disability on September 12, 2017 because his condition had not yet been found to be permanent and stationary and cites *Jack in the Box, Inc. v. WCAB (Abel*) (2004) 69 CCC 511; *Chavira v. WCAB* (1991) 56 CCC 631, 639; and *SCIF v. WCAB (Rodarte*) (2004) 69 ccc 579, 582 as authority for its argument. The *Abel* case is not applicable in that it only addresses *disability* in the context of determining whether a single or multiple cumulative trauma injuries have been sustained. While *Chavira* and *Rodarte* both stand for the proposition that "disability" as used in section 5412 means either temporary or permanent disability, neither case supports the proposition that permanent disability cannot exist before permanent and stationary status is achieved.

Although the extent of permanent disability is normally reported when permanent and stationary status is achieved, a physician is not precluded from reporting that permanent disability exists before the time when an injured worker has reached permanent and stationary status, or the extent of ratable permanent disability is known. (See *Genlyte Group, L.L.C. v. WCAB (Zavala*) (2008) 73 CCC 6). Additionally, this WCJ notes that California Code of Regulations § 9812 (e) (1) contemplates that permanent disability can exist prior to permanent and stationary status in that it requires a permanent disability notice to be sent to the injured worker under the following condition:

> "If the injury *has* resulted or may result in permanent disability but the employee's medical condition is not permanent and stationary . . . ." (Italics added).

Petitioner argues that the *Zavala* case is distinguishable because the physician in *Zavala* used the words "permanent disability" whereas in this case Dr. Silverman did not. (See Petition for Reconsideration, page 5, lines 15 through 20). This argument fails to acknowledge Mr. Saavedra's case involves a cumulative trauma injury occurring on or after January 1, 2013, and that pursuant to Labor Code §4660.1 the determination of permanent partial or permanent total disability takes into account the nature of the physical injury or disfigurement by incorporating the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition). Therefore, Dr. Silverman's assessment of Mr. Saavedra's level of disability is properly phrased in terms of "whole person impairment" instead of "permanent disability".

In the present case Panel Qualified Medical Evaluator Mitchel Silverman, M.D. first examined the applicant on September 12, 2017. He issued a report dated that same day which is in evidence as Defendant's Exhibit G. On pages 13 through 22 of this report the doctor outlines subjective and objective factors of impairment. Pursuant to the request of the parties Dr. Silverman issued a supplemental report dated November 3, 2017 in which he provided whole person

impairments. In his November 3, 2017 report Dr. Silverman specifically indicates that his findings of whole person impairment are based upon his physical examination of Mr. Saavedra on September 12, 2017 stating "[f]or the subjective and objective factors used to calculate Permanent Impairment, please refer to pages 13-22 of my report dated September 12, 2017." (Exhibit E, Medical Report of Mitchel Silverman M.D. dated November 13, 2017, page 8, paragraph 4). In the September 12, 2017 report he outlined multiple factors of impairment including, but not limited to, bilateral end stage bone on bone knee arthritis. Beginning at the bottom of page 9 of his November 13, 2017 report Dr. Silverman discusses the "bone on bone" condition with complete loss of joint space in the medial compartments of applicant's right and left knees. He provides whole person impairment based on table 17 – 31 at page 544 of the AMA Guides. The Guides explain on page 544 that:

> "The best roentgenographic indicator of disease stage and impairment for a person with arthritis is the cartilage interval or joint space. The hallmark of all types of arthritis is thinning of the articular cartilage; this correlates well with disease progression."

Dr. Silverman's findings as set forth in his September 12, 2017 report are unrebutted. There is no dispute that applicant had a "bone on bone" arthritic condition with complete loss of joint space in the medial compartments of both of his knees at the time of that evaluation. This condition is clearly ratable under the AMA Guides. Thus, applicant had permanent disability at that time.

B
Labor Code § 5412 Date of Injury September 12, 2017 not November 13, 2017

Petitioner argues that even if "impairment" is "disability" for the purpose of establishing the Labor Code §5412 date of injury, the earliest it could be found would be November 13, 2017 when Dr. Silverman issued his supplemental report. This argument fails to recognize that the November 13, 2017 report merely outlined the AMA whole person impairment values which correspond to the subjective and objective factors Dr. Silverman identified at the time he examined Mr. Saavedra. His November 13, 2017 report specifically indicates:

> "Permanent impairment ratings are calculated in accord with the criteria and methods of the *American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition*, and the principles established by the *Almaraz/Guzman* decisions.
>
> For the subjective and objective factors used to calculate Permanent Impairment, please refer to pages 13-22 of my report dated September 12, 2017." (Exhibit E, Medical Report of Mitchel Silverman M.D. dated November 13, 2017, page 8, paragraphs 3-4).

It is clear that the subjective and objective factors used by Dr. Silverman to calculate Permanent Impairment were in existence at the time he evaluated Mr. Saavedra on September 12, 2017. Therefore the corresponding permanent disability existed at that time as well.

C
Applicant's Knowledge Disability Caused by Employment on September 12, 2017

As indicated above Labor Code § 5412 defines the date of injury for a cumulative trauma as "that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." Petitioner has two contentions with regard to the "knowledge" component of Labor Code § 5412. First, petitioner argues that applicant could not have the requisite level of knowledge of disability because petitioner contends that the applicant did not have compensable disability on September 12, 2017. The issue of whether applicant had permanent disability has been discussed above. This WCJ believes applicant did in fact have permanent disability on September 12, 2017. Second, petitioner contends that Dr. Silverman's September 12, 2017 report did not sufficiently place applicant on notice that he had disability and that such disability was caused by his employment. This argument fails to address the fact that the applicant appears to have told Dr. Silverman that he believed his injuries were work-related. On page 2 of Dr. Silverman's September 12, 2017 report (Defendant's Exhibit G) the doctor states that the applicant presents with respect to an injury "which the claimant states occurred on March 30, 2016 and a CT 4/12/16 to 4/12/17, while employed by the above-mentioned employer." Additionally applicant retained counsel and filed an Application for Adjudication of Claim dated April 19, 2017 which is in evidence as Applicant's Exhibit 2. The application alleges that applicant sustained a cumulative trauma injury to his neck, back, shoulders, lower extremities, knees, and feet due to his work. On this basis it was found that on September 12, 2017, when applicant was first found to have disability by Dr. Silverman, applicant knew or should have known that it was caused by his employment. Thus, based on this coalescence of disability and knowledge, applicant's Labor Code § 5412 date of injury was found to be September 12, 2017.

IV
RECOMMENDATION

It is respectfully recommended the defendant's petition for reconsideration be denied.

DATE: March 22, 2022

Randal Hursh
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE