WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CLAUDIA NITO, *Applicant*

vs.

STATE OF CALIFORNIA, IN-HOME SUPPORTIVE SERVICES, Legally Uninsured; administered by INTERCARE, *Defendants*

Adjudication Number: ADJ11780107
Anaheim 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/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 15, 2023

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

CLAUDIA NITO
SUNIL SHAH LAW OFFICES
INGBER & WEINBERG

AS/*pc*

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

I.

INTRODUCTION

Date of Alleged Injury:	March 1, 2016 through June 14, 2017
Parts of Body Alleged:	Cervical spine, bilateral wrists, bilateral hands, back, bilateral hips, bilateral knees, bilateral ankles, bilateral feet, bilateral elbows, bilateral arms, psyche.
Identity of Petitioner:	Defendant
Timeliness:	The petition was timely filed on December 19, 2022
Verification:	The petition was verified
Date of Orders:	November 23, 2022

Petitioner's Contentions:

> Petitioner contends the WCJ erred by finding (1) the December 20, 2018 Amended Application was a valid filing of an Application for Adjudication of Claim against defendant California In-Home Supportive Services, and (2) Applicant's claim was not barred by the statute of limitations in California Labor Code § 5405 et seq.
>
> Petitioner, raising a new issue for the first time in its Petition for Reconsideration, also contends (1) the Proof of Service reflecting service of the Amended Application on December 20, 2018 "contained an inaccurate address so defendant was not 'reasonably put on notice that applicant was asserting a cause of action against it" at that time and (2) defendants did not receive notice of the claim until 2020.

II.
INTRODUCTION

Petitioner's Petition for Reconsideration contains four pages of "facts" (numbered 1 through 23) it believes are relevant to the issues in this case. Very few of the "facts" reference the Board file and very few of the "facts" reference documents admitted into the evidentiary record. In fact, several of the "facts" reference information and documents that were neither offered nor admitted into evidence and are therefore not a part of the record of the proceedings nor are they part of the adjudication file. This trend continues throughout the Petition for Reconsideration with petitioner referencing documents and information that were neither offered nor admitted into the evidentiary record.

Petitioner was required to "support its evidentiary statements by specific references to the record" yet repeatedly failed to do so. (California Code of Regulations Title 8 Section 10845(b).) As a result, the "facts" upon which the petitioner relies in support of its Petition for Reconsideration are not facts at all, but are rather simply arguments that are unsupported by the evidence.

III.
STATEMENT OF FACTS

On November 14, 2018, applicant filed an Application for Adjudication of Claim (Application) alleging to have sustained injury arising out of and in the course of employment with Alsco, Inc., dba Steiner Corporation (Alsco), during the period of January 12, 2016 through January 26, 2016 to her hands, shoulders, bilateral upper extremities, wrists, fingers, neck, back and elbows. (See Defendant's Exhibit A, EAMS Doc ID 41833118.) This claimed injury was assigned case number ADJ11780107.

On December 20, 2018, applicant filed a document entitled "Amended Application for Adjudication of Claim" in ADJ11780107 wherein applicant amended the employer to reflect employment by "Orange County In Home Supportive Services" (IHSS), amended the insurance carrier to reflect "York Risk Services" (which is actually a third party administrator), and amended the date of injury to reflect the period of "03/01/2016 -7/30/2017." (See Joint Exhibit Z, EAMS Doc ID 7603060.) Page 3 of the document noted, "[a]mend to include new employer & new date of injury." (*Id*. at p. 3.) The "Amended Application for Adjudication of Claim" was accompanied by a DWC-1 Claim form dated November 14, 2018 reflecting an injury occurring at Alsco, Inc. (Id. at p. 6.) Both the "Amended Application for Adjudication of Claim" and the claim form were served upon defendant Orange County In Home Supportive Services and its third party administrator on December 20, 2018. (*Id*. at p. 7.) The Proof of Service notes service of the documents in the matter of "**Claudia Nito vs. Alsco, Inc., dba Steiner Corporation & IHSS**" (*Id*.) Defendant IHSS and its then third party administrator York were added to the Official Address Record on December 20, 2018. (EAMS.) The Court has confirmed that the address listed on the Proof of Service for defendant In Home Supportive Services is the same address as is reflected on the Official Address Record.

On December 20, 2018 applicant also entered into a Compromise and Release with defendant Alsco settling Alsco's exposure on the cumulative trauma claim assigned ADJ11780107 and well as a specific trauma claim pled only against Alsco. (See Joint Exhibit Y, EAMS Doc ID 76030148.) Page 6 of the Compromise and Release notes that "AA replaced/amended ADJ11780107 to name only O.C. IHSS as the sole defendant. Case not settled against IHSS & York Risk Services." (*Id*. at p. 6.) Both the Minutes of Hearing and the Order Approving Compromise and Release dated December 20, 2018 reflect that the

Compromise and Release does not settle the cumulative trauma case as to defendant IHSS. (*Id.)*

On June 10, 2020 applicant apparently served another Application alleging to have sustained injury arising out of and in the course of employment with IHSS during the period of March 1, 2016 through July 30, 2017 to her hands, shoulders, bilateral upper extremities, wrists, fingers, neck, back and elbows. (See Defendant's Exhibit B, EAMS Doc ID 41833129.) The Document Cover Sheet for the Application lists the case as a new case. (*Id.*) Accompanying this Application is a DWC-1 Claim Form dated June 9, 2020 that does not list an employer or the location where the injury occurred. (*Id.)* The Application dated June 9, 2020 and the accompanying documentation were served upon IHSS and its then third party administrator Sedgwick on June 10, 2020. (*Id*.) The Court has confirmed that the address listed on the Proof of Service for defendant In Home Supportive Services is the same address as is reflected on the Official Address Record. It does not appear as though this Application generated a new case number or any actions by the Court as the Court can find no record of the Application in the Board file except for the exhibit offered by the defendant.

On February 10, 2021 applicant apparently served yet another Application alleging to have sustained injury arising out of and in the course of employment with IHSS during the period of April 1, 2016 through July 30, 2017 to her neck, upper extremities, wrist, hand, fingers, back, shoulders and elbows. (See Defendant's Exhibit C, EAMS Doc ID 41833130.) The Document Cover Sheet for the Application lists the case as a new case. (*Id*.) Accompanying this Application is a DWC-1 Claim Form dated February 10, 2021 that does not list an employer or the location where the injury occurred. (*Id*.) The Application dated on February 11, 2021 and the accompanying documentation were served upon IHSS, its then third party administrator Sedgwick and its counsel Ingber & Weinberg on February 10, 2021. (*Id*.) The Court has confirmed that the address listed on the Proof of Service for defendant In Home Supportive Services is the same address as is reflected on the Official Address Record. It does not appear as though this Application generated a new case number or any actions by the Court as the Court can find no record of the Application in the Board file except for the exhibit offered by the defendant.

On March 17, 2022, defendant filed a Declaration of Readiness to Proceed to Mandatory Settlement Conference (DOR) stating,

> "DEFENDANTS ASSERT THE APPLICATION HEREIN WAS FILED IN VIOLATION OF THE STATUTE OF LIMITATIONS. DISCUSSIONS WITH APPLICANT'S COUNSEL HAVE BEEN FRUITLESS. ASSISTANCE OF THE WCAB IS REQUESTED TO RESOLVE THIS ISSUE." (See DOR, EAMS Doc ID 40604100.)

The parties appeared for trial before the undersigned WCJ on October 12, 2022 at which time the issues were framed as follows:

> "(1) Whether the Amended Application filed on December 20, 2018 is considered a proper Application for Adjudication of Claim as concerns State of California IHSS with the defendant claiming the applicant was required to file a new Application for Adjudication of Claim against that defendant employer and with the applicant claiming the Amended Application for Adjudication of Claim was sufficiently plead.
>
> (2) Statute of Limitations with the defendant arguing that the applicant last worked for the defendant employer on June 14, 2017 and the application that is in dispute was not filed until December 20, 2018 and with the applicant arguing that the application was timely filed in accordance with Labor Code 5412 based on the preliminary findings of Dr. Mandel in his reporting of May 2018." (See Minutes of Hearing and Summary of Evidence (MOH/SOE), EAMS Doc ID 76035988.)

Applicant, who was called to testify by the defendant, was the only witness to testify after which the case was submitted for decision on the testimonial and documentary record. On November 23, 2022, this Trier of Fact issued her Findings of Fact and Opinion on Decision finding,

> "1. The December 20, 2018 Amended Application was a valid filing of an Application for Adjudication of Claim against defendant CALIFORNIA IN-HOME SUPPORTIVE SERVICES.
>
> 2. Applicant's claim is not barred by the statute of limitations in California Labor Code § 5405 et seq."

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

IV.
DISCUSSION

ADEQUACY OF APPLICATION FOR ADJUDICATION OF CLAIM - DECEMBER 20, 2018 8 CCR 10617 provides:

(a) An Application for Adjudication of Claim, a petition for reconsideration, a petition to reopen or any other petition or other document that is subject to a statute of limitations or a jurisdictional time limitation shall not be rejected for filing solely on the basis that:

(1) The document is not filed in the proper office of the Workers' Compensation Appeals Board;

(2) The document has been submitted without the proper form, or it has been submitted with a form that is either *incomplete* or *contains inaccurate information*; or

The document has not been submitted with the required document cover sheet and/or document separator sheet(s), or it has been submitted with a document cover sheet and/or document separator sheet(s) not containing all of the required information. (Cal. Code Regs., tit. 8, § 10617, *emphasis added*.)

The rule provides for considerable latitude in accepting nonstandard pleadings, so long as the pleadings contain "a combination of information sufficient to establish the case or cases to which the document relates or, if it is a case opening document, sufficient information to open an adjudication file." (Cal. Code Regs., tit. 8, §10617(b).) Similarly, 8 CCR 10517 specifies that pleadings are deemed amended to conform to the stipulations agreed to by the parties on the record or may be amended by the Appeals Board to conform to proof. (Cal. Code Regs., tit. 8, §10517.) These rules represent the application of California's public policy in favor of adjudication of claims on their merits, rather than on the technical sufficiency of the pleadings. (*Fox v. Workers' Comp. Appeals Bd.*, (1992) 4 Cal.App.4th 1196, 1205.)

Conducting a hearing on the merits is particularly important in workers' compensation cases where there is a constitutional mandate "to accomplish substantial justice in all cases." (Cal. Const., art. XIV, § 4.) In workers' compensation proceedings, it is settled law that: (1) pleadings may be informal (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (*Cairo*) (1973) 9 Cal.3d 848, 852; *Bland v. Workmen's Comp. Appeals Bd.*, (1970) 3 Cal.3d 324, 328–334; *Martino v. Workers' Comp. Appeals Bd.*, (2002) 103 Cal.App.4th 485, 491; *Rivera v. Workers' Comp. Appeals Bd*. (1987) 190 Cal.App.3d 1452, 1456; *Liberty Mutual Ins. Co v. Workers' Comp. Appeals Bd*. (*Aprahamian*) (1980) 109 Cal.App.3d 148, 152–153; *Blanchard v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590, 594–595; *Beaida v. Workmen's Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 207– 210); (2) claims should be adjudicated based on substance rather than form (*Bland, supra*; *Martino, supra; Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116; *Rivera, supra*; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598); (3) pleadings should be liberally construed so as not to defeat or undermine an injured employee's right to make a claim (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, at pp. 925–926; *Martino, supra* at 490; *Rubio v. Workers' Comp. Appeals Bd.*, 165 Cal.App.3d 196, 199– 201; *Aprahamian, supra, Blanchard, supra; Beaida, supra*); and (4) technically deficient pleadings, if they give notice and are timely, normally do not deprive the Board

of jurisdiction. (*Bland, supra* at pgs. 331–332 & see fn. 13; *Rivera, supra*; *Aprahamian, supra*; *Blanchard, supra*; *Beaida, supra*.)

With the above principles in mind, the Court considered petitioner's contention that the amended Application is invalid as it relates to IHSS. The Court observes that the Amended Application was served upon IHSS and its then third party administrator on December 20, 2018. (See Joint Exhibit Z, *supra*.) The Amended Application clearly sets forth the claims made against IHSS, including the dates the injury was alleged to have occurred and the injuries alleged to have been sustained therein. The Court can discern no difference, aside from the assignment of a new case number, the filing of a "new Application" would have made.

In addition, the Court can also conceive of no prejudice to the petitioner that arose from the applicant filing an Amended Application versus a new application. Evidence reveals that IHSS was reasonably put on notice that applicant was asserting a cause of action against it as of December 20, 2018. (*Zurich Ins. Co. v. Workers' Comp. Appeals Bd*. (1973) 9 Cal.3d 848, 852 [38 Cal.Comp. Cases 500] [absence of petition to reopen could not have prejudiced employer who received notice of hearing stating the ground for relief].)

Petitioner raised for the first time on Reconsideration that the "Proof of Service contained an inaccurate address and so defendant was not 'reasonably put on notice that applicant was asserting a cause of action against it as of December 20, 2018'" and that it did not "receive nitice (sic) of this claim until 2020." (See Petition for Reconsideration, 5:25-28, pgs. 5-9, EAMS Doc ID 44343922.) The case law is clear, "[i]t is improper to seek reconsideration on an issue not presented at the trial level." (See *Cottrell v. Worker's Comp. Appeals Bd*. (1998) 63 Cal. Comp. Cases 760, 761 (writ den.).) Despite the inappropriate nature of the argument now made, the Court confirmed that the address listed on the Proof of Service for defendant IHSS is the same address that is listed on the Official Address Record and is thus the same address at which the defendant employer has been receiving all WCAB notices. At no point has petitioner ever indicated that the address for its client was incorrectly noted and at no point did the petitioner move to have the Official Address Record corrected. The evidentiary record therefore remains clear that defendant IHSS was served with the Amended Application on December 20, 2018 as is so indicated on the Proof of Service and therefore was reasonably put on notice that applicant was asserting a cause of action against it.

STATUTE OF LIMITATIONS

California Labor Code § 5405(a) provides that proceedings must be commenced within one year of the date of injury. The statute of limitations is an affirmative defense that operates to bar the remedy and not to extinguish the right of the employee. Applicant's Amended Application alleges that she suffered a

cumulative trauma industrial injury versus IHSS. A cumulative industrial injury is defined as "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. The date of a cumulative injury shall be the date determined under Section 5412" which provides that the "date of injury" for purposes of determining the commencement of the limitations period in a cumulative injury case is the concurrence of compensable disability and the date of the employee's knowledge of the injury's industrial relationship. (California Labor Code §§ 3208.1(b) and 5412.)

A defendant asserting that an employee's claim was not timely filed within one year from the date of injury regarding a cumulative trauma has the burden of proof to show when the employee knew or should have known that the disability was caused by the industrial cumulative trauma. (*Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1110; *City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 471, 474.)

Summary of Evidence

Under questioning from petitioner, applicant testified at length regarding her job duties at IHSS, the on-set of her symptoms and the increase in her symptoms that she attributes to her work at IHSS. Applicant began her employment with IHSS in March 2016 after her employment with Alsco ended in January 2016. At no time did the applicant work for both Alsco and IHSS at the same time. At IHSS, applicant took care of elderly people which required her to lift wheelchairs and transfer people from wheelchairs to cars and from beds to wheelchairs. Applicant first noticed pain in her neck and bilateral shoulders a few months after she commenced her employment with IHSS which she attributes to the heavier work required of her.

Applicant was read portions of the transcript of her deposition taken on May 10, 2018 (taken during the litigation of her claim against Alsco) wherein the applicant testified at that time that her work at IHSS caused more discomfort and more pain and made the "pricking in her knees" more intense. Applicant confirmed that her left wrist, left hand and left shoulder got worse working for IHSS. Her duties caused new pain to her neck down to her shoulder, to her right wrist, hand and low back. As a result of her pain, she developed sleeplessness, anxiety, depression and sexual dysfunction.

Applicant was treating with Dr. Sirakoff for her specific injury at Alsco and she was working for IHSS in June 2017 when Dr. Sirakoff took her off of work. At that time applicant was having intolerable pain. She felt as though she was getting worse because she continued working.

On cross-examination by applicant's attorney, applicant testified that when she started working with IHSS she was working light work. Sometime after August

2016, her work with IHSS got heavier. She saw Dr. Mandel in May 2018 at which time they had a long conversation during which Dr. Mandel told the applicant that he could not relate all of her injuries to her specific injury of January 2016 sustained at Alsco. Dr. Mandel told her to talk to her attorney.

At some point in November 2018 applicant saw her attorney in his office where they reviewed the report of Dr. Mandel. Her attorney explained to her what a cumulative trauma was. That was the first time she knew what a cumulative trauma was. Her attorney filed a cumulative trauma claim against Alsco. When that claim was settled in December 2018, she filed another claim against IHSS.

On re-direct by the petitioner, applicant testified in detail regarding her conversation with Dr. Mandel. Dr. Mandel asked and the applicant relayed what her job at IHSS entailed. Dr. Mandel told her that because of her work at IHSS, she should speak with her attorney. She also spoke with Dr. Mandel about the job she performed at Alsco. (See MOH/SOE, EAMS Doc ID 76035988.)

Petitioner offered no medical evidence. Applicant however, offered several medical reports from applicant's treating physicians, a report from AME Dr. Mark Mandel, who served as the AME in applicant's specific trauma claim versus Alsco, and the report from PQME Dr. Carla Scheel, the PQME obtained in this cumulative trauma case against IHSS.

Applicant, while working for IHSS, was taken off of work by her PTP Dr. Dimitri Sirakoff who treated the applicant for the injuries she sustained while working for Alsco. In his initial report of June 14, 2017, Dr. Sirakoff notes applicant sustained a specific trauma on January 11, 2016 while working for Alsco. (See Applicant's Exhibit 10, EAMS Doc ID 76030333.) Dr. Sirakoff noted that applicant was currently working for another employer without restriction. After examination, Dr. Sirakoff found that applicant was temporarily totally disabled as a result of the injuries she sustained at Alsco. (*Id*.)

Applicant was seen by AME Dr. Mark Mandel in May 2018 in association with her injury of January 11, 2016 while working for Alsco. While noting applicant's history of having worked for IHSS, Dr. Mandel made no further mention of her work for IHSS nor did he provide any causal connection between her work at IHSS and her symptoms. In his apportionment discussion, Dr. Mandel mentioned, for the first and only time, the presence of a cumulative trauma injury.

> "It appears we do have a specific injury with perhaps a minimal continual trauma scenario, and then due to a lack of treatment, since it does not appear the treatment either with Dr. Galal or Dr. Sirakoff did anything to cure or relieve the effects of the industrial injury, there is a component due to a lack of care. Thus, there are three different components.

> Thus, if we look at Labor Codes 4663 and 4664, as well as the Escobedo decision and the Benson decision, of the 11% whole person impairment it is concluded that 80% is due to the initial injury, 10% is due to the short period she returned to work and the alleged increase in pain when she attended therapy, and 10% is due primarily to stiffness of the shoulder which is due to the fact she was not provided with appropriate treatment at the hand/wrist level after she stopped treating at Concentra. That appears to be consistent with reasonable medical probability."
> (See Applicant's Exhibit 1 at p. 26, EAMS Doc ID 76029200.)

Dr. Mandel provided no further discussion of a cumulative trauma nor did he opine that applicant's job at IHSS was in any way responsible for her then current complaints.

In fact, the first report addressing applicant's claimed cumulative trauma injury at IHSS is the report from her then PTP Dr. Jerry Morris dated June 18, 2019 at which time applicant reported that "she gradually began to experience pain in her neck, back, shoulders, and hands in March 2016." (See Applicant's Exhibit 5, EAMS Doc ID 76029352.) After examination and with no record review, Dr. Morris opined,

> "Based on the history and clinical examination, it is my opinion, in all medical probability, that Ms. Nito's injuries to her cervical spine, lumbar spine, bilateral shoulders, and bilateral tipper extremities arose out of her employment and were caused by her employment."
> (*Id*. at p. 6)

Dr. Morris found that applicant was temporarily totally disabled as a result of the cumulative trauma injury sustained at IHSS. (*Id*.) This is the first report in the evidentiary record documenting that applicant had sustained a cumulative trauma while working for IHSS and had suffered disability therefrom.

On May 12, 2022, applicant was evaluated by PQME Dr. Carla Scheel in connection with her claimed injuries against IHSS. Dr. Scheel was provided with 1581 pages of records for review, including medical records dating back to 2012 and those as recent as November 8, 2021. (See Applicant's Exhibit 9 at pgs., 3, 7 and 36, EAMS Doc ID 76029048.) With respect to her industrial injuries, the record review demonstrates that applicant began treating in January 2016 in connection with her left wrist injury sustained at Alsco. (*Id*. at p. 20.) The review confirms that the first report discussing a possible cumulative trauma is the AME report from Dr. Mandel quoted above. Thereafter the next report discussing a cumulative trauma is the report from PTP Dr. Morris, likewise quoted above.

After her review of records and physical examination, Dr. Scheel opined,

> "Based on the medical records I have received thus far, the applicant's history taken April 12, 2022 and her account of the job duties involved with her work at InHome Supportive Services, it is with reasonable medical probability that the aforementioned orthopedic diagnoses and any resulting disability will be, in part, caused by her employment with In-Home Supportive Services or specifically will have arisen out of employment." (Id. at p. 58.)

Discussion

An action needs to be commenced within one year from the date of injury consistent with California Labor Code § 5405. Because the claimed injury is a cumulative trauma claim however, the date of injury is determined per California Labor Code § 5412 which provides that the "date of injury" for purposes of determining the commencement of the limitations period in a cumulative injury case is the concurrence of compensable disability and the date of the employee's knowledge of the injury's industrial relationship.

Determination of a section 5412 "date of injury" is therefore a two-part analysis: 1) when did the employee first suffer a compensable disability from a cumulative injury and; 2) when did the employee know or in the exercise of reasonable diligence should have known, that the compensable disability was caused by her employment. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th. 998.) Whether an employee knew, or in the exercise of reasonable diligence should have known, that the disability was caused by employment is a question of fact, and the employer bears the burden of proof. (*Nielsen v. Workers' Comp. Appeals Bd*. (1985) 50 Cal.Comp.Cases 104; County of *Riverside v. Workers' Comp. Appeals Bd*. (Sylves) (2017) 82 Cal.Comp.Cases 301, 305. *City of Los Angeles v. Workers' Comp. Appeals Bd*. (*Travers*) (2010) 75 Cal.Comp.Cases 148 (writ denied).)

The date of injury when an employee knew or should have known that the disability was caused by a cumulative injury from employment may also be established by the date the employee received expert medical advice to that effect. (*County of Riverside v. Workers' Comp. Appeals Bd*. (*Sylves*) (2017) 10 Cal.App.5th. 119, 124-125; *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556; *Johnson, supra*.)

Finally, the date of injury when an employee knew or should have known that the disability was caused by a cumulative injury from employment may also be established if the employee has had sufficient training, knowledge or qualifications to recognize the casual relationship between the disability and employment. (*Nielson, supra*; *Johnson, supra*; *Bassett-McGregor, supra*; *Hurwitz v. Workers' Comp. Appeals Bd*. (1979) 97 Cal.App.3d 854, 867-874.) Actual knowledge of the "potential eligibility for a particular injury" however cannot be proven by showing an injured worker's "general awareness of the

existence of the workers' compensation system" or "past experience with workers' compensation[.]" (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd*. (*Carls*) (2008) 163 Cal.App.4th 853, 860, referencing *Reynolds v. Workmen's Comp. Appeals Bd*. (1974) 12 Cal.3d 726, 729.)

Applicant testified that her symptoms worsened while working for IHSS. Applicant also testified that the first time she became aware of what constitutes a cumulative trauma claim was when she reviewed AME Dr. Mandel's report with her attorney in November 2018. That report, dated May 21, 2018, does not discuss a cumulative trauma claim against IHSS.

There are no reports entered independently into evidence reflecting that applicant sustained a cumulative trauma injury at IHSS before the report of her PTP Dr. Morris dated June 18, 2019 (erroneously referenced as dated May 30, 2019 in the Opinion on Decision). There are also no reports reviewed by PQME Dr. Scheel reflecting that applicant sustained a cumulative trauma injury at IHSS before the report of her PTP Dr. Morris dated June 18, 2019 (erroneously referenced as dated May 30, 2019 in the Opinion on Decision). Finally, it was not until June 18, 2019 (erroneously referenced as dated May 30, 2019 in the Opinion on Decision) that applicant, for the first time, was found to be temporarily disabled as a result of the injuries sustained while working for IHSS.

No evidence has been presented that applicant knew or should have known that she sustained a cumulative trauma injury while working at IHSS in advance of November 2018 when she spoke with her attorney. Applicant first suffered a compensable disability from the cumulative trauma injury in the report of June 18, 2019 when found temporary totally disabled by her PTP Dr. Morris. There is therefore no evidence presented that supports that applicant's claim filed December 20, 2018 should deemed filed more than year from the date of injury as outlined in California Labor Code §§ 5405 and 5412.

Petitioner argues that Dr. Sirakoff's finding that applicant was temporarily totally disabled in June 2017 "is a perfect illustration of the definition of injury pursuant to Labor Code § 5412" establishing that there was a concurrence of applicant's knowledge of cumulative trauma claim against IHSS and disability arising therefrom. (See Petition for Reconsideration, *supra* at 15:10-13.) What this argument fails to recognize is that applicant was found to be temporarily totally disabled as a result of the injuries she sustained at Alsco, not as a result of her work at IHSS and nowhere in Dr. Sirakoff's reporting is there mention of applicant having sustained a cumulative trauma injury while at IHSS.

There no medical evidence supporting that applicant was found to be temporarily disabled from a cumulative trauma sustained while at IHSS in June 2017. In fact, applicant's period of temporary disability commencing June 2017 was found to be as a result of her prior industrial injury at Alsco, with the liability

therefore borne by defendant Alsco. (See Stipulation and Order to Pay Lien Claimant (E.D.D.), EAMS Doc ID 69042652.)

While petitioner would like the Board to rely upon the reporting of Dr. Sirakoff to establish the concurrence of disability, petitioner would also like the reporting of both Drs. Sirakoff and Morris dismissed as not constituting substantial medical evidence. Petitioner is proposing that Dr. Sirakoff's report is substantial enough to establish date of injury for purpose of the statute of limitations, but is not substantial enough to support any other finding. Petitioner "can't have its cake and eat it too."

As the Court acknowledged in her Opinion on Decision, neither Dr. Sirakoff nor Dr. Morris (at least in the limited reporting admitted into the evidentiary record) performed a record review of any kind. Case law is pretty clear. A doctor's opinion that is based on an inadequate history, conjecture, speculation or guess, is not substantial evidence. (*Granado v. Workmen's Comp. Appeals Bd*. (1970) 69 Cal.2d 399; *McAllister v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 408.) A medical report of a doctor who does not review the medical records does not contain a correct medical history. (*Kyles v. Workers' Comp. Appeals Bd*. (1987) 52 Cal.Comp.Cases 479.) The Court of Appeals in *Kyles*, supra, stated that an opinion "made in the absence of a review of all medical records, …, cannot be accepted as substantial evidence." For the record to be substantial, the doctor must disclose the basis for his opinions. Finally, a medical report must disclose the underlying basis for the conclusions contained in the report in order to constitute substantial medical evidence. (*Zemke v. Workers' Comp. Appeals Bd*. (1968) 33 Cal.Comp.Cases 258.)

Assuming in arguendo, the reporting of both Drs. Sirakoff and Morris are deemed insubstantial as neither doctor performed a record review and thus their reports are based on an "inaccurate medical history", the reports must be deemed insubstantial on all issues. If that is the case, the only medical report upon which the Court can rely for the purposes of determining the date of injury in accordance with California Labor Code § 5412 is that of PQME Dr. Carla Scheel dated May 12, 2022.

Dr. Scheel examined the applicant and was provided with 1581 pages of records for review, including medical records dating back to 2012 and those as recent as November 8, 2021. (See Applicant's Exhibit 9 at pgs., 3, 7 and 36, EAMS Doc ID 76029048.) The records provided Dr. Scheel with a comprehensive picture of applicant's medical history and applicant's evaluation provided Dr. Scheel with a comprehensive picture of applicant's employment history. It was only after that record review and evaluation that Dr. Scheel opined that applicant's "orthopedic diagnoses and any resulting disability will be, in part, caused by her employment with In-Home Supportive Services or specifically will have arisen out of employment." (See Applicant's Exhibit 9, *supra* at p. 58.) If the Board were to dismiss the reporting of Drs. Sirakoff and Morris as being insubstantial,

then the first report establishing that applicant sustained an injury while working at IHSS and disability resulting therefrom was the report of Dr. Scheel, making the Labor Code § 5412 date of injury May 12, 2022, well after even petitioner acknowledges receipt of applicant's claim.

V.
CONCLUSION

Given the informality of pleadings in proceedings before the Board, and the reasonable notice given to IHSS on the December 20, 2018 Amended Application, the Court concluded that, "[s]uch action was thereby commenced[,] though the application was irregular with respect to details." (*Ray v. Industrial Acc. Com*., *supra*, 146 Cal.App.2d 393, 397.) The Court therefore found that the December 20, 2018 Amended Application was a valid filing of an application for adjudication of claim against IHSS. Further, after a careful review of the documentary evidence submitted and in light of applicant's trial testimony the Court was not persuaded that applicant had sufficient knowledge of her workers' compensation rights to give notice, report or assert a cumulative trauma claim against IHSS until done so by way of filing the Amended Application on December 20, 2018. Petitioner failed to prove otherwise. It was therefore found that applicant's claim is not barred by the statute of limitations in California Labor Code § 5405 et seq.

If however, the Board were to determine that the December 20, 2018 Amended Application was in fact not a valid filing, the Court is still of the belief that applicant's claim was commenced within the appropriate and applicable statute of limitations.

On June 10, 2020 applicant served an Application alleging to have sustained injury arising out of and in the course of employment with IHSS during the period of March 1, 2016 through July 30, 2017 to her hands, shoulders, bilateral upper extremities, wrists, fingers, neck, back and elbows. (See Defendant's Exhibit B, *supra*.) The Document Cover Sheet for the Application lists the case as a new case. (*Id*.) Accompanying this Application is a DWC-1 Claim Form dated June 9, 2020 that does not list an employer or the location where the injury occurred. (*Id*.) The Application dated June 9, 2020 and the accompanying documentation were served upon IHSS and its then third party administrator Sedgwick on June 10, 2020. (*Id*.) The Court has confirmed that the address listed on the Proof of Service for defendant In Home Supportive Services is the same address as is reflected on the Official Address Record.

Petitioner concedes that on June 10, 2020, "counsel for applicant prepared and served an Application for Adjudication of Claim identified as 'new' on the Cover Sheet." (See Petition for Reconsideration *supra* at 4:14-15.) Petitioner also concedes that it issued a denial on June 12, 2020. (See Petition for Reconsideration *supra* at 6:19.) Incidentally, the Court notes that the

Application dated June 10, 2020 was served upon the same address for IHSS as that listed on the Proof of Service for the Amended Application served on December 20, 2018. While petitioner admits having received the Application served June 10, 2020, petitioner contends the Amended Application served December 20, 2018 (served to the same address) was never received as it was served on an "inaccurate address."

Nevertheless, assuming in arguendo it is the June 10, 2020 Application that is controlling, said application was still filed in a timely manner. Applicant first suffered a compensable disability from the cumulative trauma injury in the report of June 18, 2019 when found temporary totally disabled by her PTP Dr. Morris. The application dated and served June 10, 2020, is within one year of the first report determining applicant sustained a cumulative trauma at IHSS and suffered disability herefrom.

If Dr. Morris' report is dismissed as being insubstantial however, then the first report establishing that applicant sustained an injury while working at IHSS and disability resulting therefrom was the report of Dr. Scheel, making the Labor Code § 5412 date of injury May 12, 2022, well after petitioner acknowledges receipt of applicant's claim. Either way, it remains the Court's opinion that applicant's claim is not barred by the statute of limitations in California Labor Code § 5405 et seq.

VI.
RECOMMENDATION

Based on the foregoing, it is respectfully requested that the petition for reconsideration be DENIED.

DATE: December 29, 2022
Stefanie Ashton
WORKERS' COMPENSATION JUDGE