WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE MANUEL AYALA, *Applicant*

vs.

SOUTH COAST TRANSPORTATION & DISTRIBUTION, INC., dba WESTERN REGIONAL DELIVERY SERVICES;
ZURICH AMERICAN INSURANCE, administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ15313468
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 22, 2023, wherein the WCJ found in pertinent part that: applicant, while employed by Western Regional Delivery Service from June 4, 2004, to October 7, 2021 "claims to have sustained" injury to various body parts.

Defendant contends that based on applicant's testimony at trial the cumulative injury period should be up October 7, 2020; that applicant's date of knowledge of his injury was October 2020, such that his claim is barred by the statute of limitations and as a post-termination claim; and that applicant's testimony could not be relied on about knowledge of his injury as his credibility was called into question.

We have not received an Answer from applicant.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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 and Opinion on

Decision, both of which we adopt and incorporate, we will grant reconsideration, rescind the Findings of Fact and substitute new Findings of Fact to find that applicant sustained injury arising out of and in the course of employment to his cervical spine, lumbar spine, shoulders, knees, hands, and wrists while employed by defendant as a truck driver[1] from June 4, 2004 to October 7, 2021 (Finding of Fact 1); that the date of injury pursuant to Labor Code[2] section 5412 is October 26, 2021 (Finding of Fact 4); and that the claim is not barred by the statute of limitations (Finding of Fact 5). We make no substantive changes to the decision, and we substitute new Findings of Fact as it is clear from the WCJ's Opinion and Report that these Findings should have been included in the F&O.

First, we note that we have given the WCJ's credibility determination of the applicant great weight because the WCJ had the opportunity to observe the demeanor of the applicant. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.) We observe that while defendant's Petition raises issues as to whether applicant's testimony was reliable, the WCJ adequately explained in his Opinion and his Report why applicant's testimony supported his decision.

We further note 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.) 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 53] (*Johnson*); *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 927 [50 Cal.Comp.Cases 104]; *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556, 559 [33 Cal.Comp.Cases 722].)

The employer has the burden of proving that the employee knew or should have known their disability was industrially caused. (*Johnson*, *supra*, at p. 471, citing *Chambers v. Workers'*

[1] We note that the parties did not stipulate at trial as to applicant's occupation, but in its Petition, defendant states that it is undisputed that applicant was a truck driver. Applicant also testified at trial that he was a truck driver. Thus, we will add applicant's job title, but this should not be construed as an opinion as to the proper occupational variant.

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

Comp. Appeals Bd., *supra*, 69 Cal.2d at p. 559.) That burden is not sustained merely by a showing that the employee knew they had some symptoms. (*Johnson*, *supra*, at p. 471, citing *Chambers*, *supra*, at p. 559.) In general, an employee is not charged with knowledge that their disability is job-related without medical advice to that effect. (*Johnson*, *supra*, at p. 473; *Newton v. Workers' Comp. Appeals Bd.* (1993) 17 Cal.App.4th 147, 156, fn. 16 [58 Cal.Comp.Cases 395].)

Here, while applicant knew that he had symptoms, defendant has not met its burden to show that he knew that his injury was job-related until he was seen by primary treating physician (PTP) Dr. Rubanenko on October 26, 2021. (Ex. C, Report by Gabriel Rubanenko, M.D., dated 10/26/21, p. 16.) Therefore, the date of injury is October 26, 2021, the date when applicant first became aware that his disability was industrial after the examination by Dr. Rubanenko. We observe that in cases involving cumulative trauma injuries, the date of injury pursuant to section 5412 "also sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right[s]." (*Argonaut Mining Co. v. Ind. Acc. Com.* (1951) 104 Cal.App.2d 27, 31.)

Additionally, medical evidence that existed in 2008, prior to applicant's notice of termination of layoff, contained evidence of the injury as early as 2008. (Ex. A, Kaiser designated subpoenaed records, p. 6.) Moreover, the parties stipulated at trial that medical records were in existence prior to the date of injury. (5/31/23 Minutes of Hearing/ Statement of Evidence, Stipulation 5.) Thus, the claim is not barred by section 3600(a)(10)(B). Further, since the date of injury is October 26, 2021, applicant's claim is not barred as a post-termination claim. (Lab. Code, § 3600(a)(10)(D).)

Accordingly, we grant defendant's Petition so as to clarify the F&O, and we rescind and substitute a new F&O.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order of August 22, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued on August 22, 2023, are **RESCINDED** and new Findings of Fact are **SUBSTITUTED** as follows:

FINDINGS OF FACT

1. Applicant Jose Manuel Ayala, while employed during the period from June 4, 2004, to October 7, 2021 at Fullerton, California by South Coast Transportation &Distribution dba Western Regional Delivery Services, as a truck driver, sustained injury arising out of and in the course of employment to his cervical spine, lumbar spine, shoulders, knees, hands and wrists.

2. At the time of injury, the employer's workers' compensation carrier was ZurichAmerican Insurance, as administered by Gallagher Bassett Services, Inc.

3. The primary treating physician is Khalid Ahmed, M.D.

4. Pursuant to Labor Code section 5412, the date of injury is October 26, 2021.

5. The claim is not barred by the statute of limitations.

6. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 13, 2023

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

JOSE MANUEL AYALA
MICHAEL BURGIS & ASSOCIATES
FELLMAN & ASSOCIATES
LAW OFFICES OF ANAHITA KOUROSHNIA

JMR/abs

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 OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

INTRODUCTION:

On September 14, 2023, Defendant Zurich American Insurance (hereinafter "Defendant"), filed a timely verified Petition for Reconsideration of the Finding of Fact and Order dated August 22, 2023. The Defendant contends:

(a) The Defendant found that Applicant was evasive and Defendant observed Applicant changed his testimony, putting Applicant's credibility at issue. The Defendant requests, based on Applicant's lack of credibility, the Appeals Board should reject the findings of the WCJ and issue its own findings.

(b) The WCJ erred in finding that the date of injury for the cumulative trauma from June 4, 2004 to October 7, 2021.

(c)The WCJ erred in finding Applicant's date of knowledge was 10/26/2021. The correct date of injury would be barred by the statute of limitation.

(d) The WCJ Erred in finding that Applicant's claim was not barred as a post-termination claim coupled with the statute of limitations defense.

(e) Applicant's testimony that he lacked knowledge of his injury cannot be relied on in trial and via secondary sources.

STATEMENT OF RELEVANT FACTS:

The parties appeared in person at trial on May 31, 2023, documentary evidence was admitted and testimony was taken, but not completed. On July 5, 2023, the parties appeared in person, further testimony was taken and not completed. On August 14, 2023, testimony was completed and the matter was submitted on the issues of AOE/COE, parts of body injured and the lien of the Employment Development Department. On August 22, 2023, the undersigned WCJ issued Finding of Fact stating that the Applicant sustained an industrial injury arising out of and in the course of employment to his cervical spine, lumbar spine, shoulders, knees, hands and wrists. It is from this finding that Defendant seeks relief.

DISCUSSION

APPLICANT WAS CREDIBLE

Defendant did not cite any place in the record showing that Applicant contradicted himself or where it was documented that the court found the Applicant not credible. In Fact, the only mention of credibility was were the court found Defendant's witness to have testified about events for which he had not personal knowledge and was not credible. (Opinion on Decision dated August

22, 2023 at page 3.) Furthermore, the undersigned WCJ's findings related to date of injury were based solely on the medical record

THE DATE OF INJURY PURSUANT TO LABOR CODE § 5412 IS OCTOBER 26, 2021

Per Labor Code § 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. It is well established that any award, order or decision of the WCAB must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); *Lamb* v. *Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281; *Garza* v. *Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317; *LeVesque* v. *Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635.) Also, it has long been recognized that evidence from a lay witness on an issue requiring expert opinion is not substantial evidence, and medical proof is required when issues of diagnosis, prognosis, and treatment are beyond the bounds of ordinary knowledge. (*City & County of San Francisco* v. *Industrial Acc. Com.* (Murdock) (1953) 117 Cal.App.2d 455; *Bstandig* v. *Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988.) Further, to be substantial evidence a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Escobedo* v. *Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Here, it is Defendant's contention that Applicant knew he had a continuous trauma case as far back as September 15, 2008, a contention they claim is support by the Kaiser Records. (Exhibit A at Bates page 41 of 271, sixth page of the pdf.) The records show that Applicant was a truck driver-using clutch, that his symptoms are aggravated by driving and sitting one hour and that walking eases symptoms. The x-ray of the lumbar spine was unremarkable. The report noted decreased ROM. Even though Applicant related the symptoms are aggravated by driving a truck, it does not appear the doctor agreed and continued treating the Applicant on a non-industrial basis. Perhaps the doctor found using the clutch merely exasperated the injury caused by something non-industrial. Whatever the reason, Applicant did a diligent investigation as to the injury being industrial by asking a medical expert, and his belief that he had an industrial injury was rebuffed. There is nothing else in the records that states the doctors concluded there was an industrial continuous trauma injury prior to Applicant being seen by Gabriel Rubanenko, M.D. on October 26, 2021. (Exhibit 3.) The claim was timely filed and is not barred by the post termination defense or the statute of limitations.

RECOMMENDATION:

For the above reasons, Defendant's Petition for Reconsideration filed September 14, 2023 should be denied.

Dated: September 26, 2023

M. Victor Bushin
Workers' Compensation
Administrative Law Judge

OPINION ON DECISION

BACKGROUND

Applicant, Jose Manuel Ayala, born [ ], while employed during the period June 4, 2004 to October 7, 2021, at Fullerton, California, by Western Regional Delivery Service, claims to have sustained injury arising out of and in the course of employment to his back, neck, shoulders, knees, hands, gastrointestinal in the form of gastritis, GERD, psyche, anxiety, sleep, dental, jaw, neurology, and headaches. (Minutes of Hearing and Summary of Evidence dated May 31, 2023, hereinafter MOH1, at 2:11.)

At the time of injury the alleged employer's workers' compensation carrier was Zurich American Insurance. (MOH1 at 2:15.)

The employer has furnished no medical treatment. The primary treating physician is in dispute. (MOH1 at 2:17.)

The parties stipulate that there were medical records regarding some of the body parts claimed prior to termination. (MOH1 at 2:20.)

ISSUES

1. Injury arising out of and in the course of employment.
2. Parts of body injured.
3. The lien of the Employment Development Department, which the parties agree to deferred.
4. Breach of duty to investigate if there was an injury.
5. Date of injury.
6. Admissibility of the reports of Dr. Khalid Ahmed for lack of a 4600 designation letter.

DISCUSSION

APPLICANT'S DATE OF KNOWLEDGE WAS OCTOBER 26, 2021

It is well established that any award, order or decision of the WCAB must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); *Lamb* v. *Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281; *Garza* v. *Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317; *LeVesque* v. *Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635.) Also, it has long been recognized that evidence from a lay witness on an issue requiring expert opinion is not substantial evidence, and medical proof is required when issues of diagnosis, prognosis, and treatment are beyond the bounds of ordinary knowledge. (*City & County of San Francisco* v. *Industrial Acc. Com.* (Murdock) (1953) 117 Cal.App.2d 455; *Bstandig* v. *Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988.) Further, to be substantial evidence a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in

support of its conclusions. (*Escobedo* v. *Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Here, it is Defendant's contention that Applicant knew he had a continuous trauma case as far back as 2008, a contention they claim is support by the Kaiser Records. (Exhibit A at pdf page 6.) The records show that Applicant was a truck driver-using clutch, that his symptoms are aggravated by driving and sitting one hour and that walking eases symptoms. The x-ray of the lumbar spine was unremarkable. The report noted decreased ROM. There is nothing in the records that states the doctors concluded there was an industrial continuous trauma injury. There is nothing in the record that suggests the Applicant has the medical or legal expertise to diagnoses an industrial continuous trauma injury. Furthermore, Kaiser continued to treat Applicant on a non-industrial basis implying they did not find an industrial injury. Applicant first had knowledge of the industrial continuous trauma when he saw Gabriel Rubanenko, M.D. on October 26, 2021. (Exhibit 3.) The claim was timely filed and is not barred by the post termination defense or the statute of limitations.

APPLICANT HAD AN INDUSTRIAL CONTINUOUS TRAUMA INJURY

Pursuant to the report of panel qualified medical examiner Alexander Latteri, M.D. date December 12, 2022, the Applicant had an injury arising out of and in the course of employment during the period June 4, 2004 to October 7, 2021 while employed by Western Regional Delivery Service as a Truck Driver, Loader/Unloader to his cervical spine, lumbar spine, shoulders, knees, hands and wrists. Based on the lack of personal knowledge of what happens at the customer site by defendant's witness and the creditable testimony of Applicant, it is found that Applicant did load/unload freight and wrap pallets.

KHALID AHMEND M.D. IS THE PTP AND HIS REPORTS ARE ADMISSIBLE

Applicant's Exhibit 10 is a valid 4600 letter selecting Khalid Ahmend, M.D. as the primary treating physician.

DATED: August 22, 2023

M. Victor Bushin
Workers' Compensation
Administrative Law Judge