WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARINA AVOLEVAN, ***Applicant***

vs.

ANTELOPE VALLEY HOSPITAL, PERMISSIBLY SELF-INSURED; ADMINISTERED BY ATHENS ADMINISTRATORS, ***Defendants***

Adjudication Number: ADJ10027874
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the March 28, 2023 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a nurse technician from July 18, 2003 to July 18, 2013, sustained industrial injury to her right knee. The WCJ also found that compensation was not barred by Labor Code section 5412.[1]

Defendant contends that the evidence does not support the existence of an industrial cumulative trauma or that the alleged injury arose out of and in the course of her employment.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the March 28, 2023 F&A, except that we will amend the F&A to reflect that the date of injury pursuant to section 5412 was July 1, 2015.

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

FACTS

Applicant claimed injury to her right knee while employed as a nurse technician by defendant Antelope Valley Hospital (defendant), from July 18, 2003 to July 18, 2013. She alleged injury as a result of cumulative trauma. Defendant has denies the injury.

The parties selected Parviz Galdjie, M.D., as the orthopedic QME. Dr. Galdjie issued an initial report of March 13, 2019, noting that he had not yet received any medical records. (Ex. S, Report of Parviz Galdjie, M.D., March 13, 2019, at p. 6.)

On April 9, 2019, Dr. Galdjie issued a supplemental report following receipt and review of applicant's medical records, opining:

> The medical records clearly demonstrate ongoing problem with the right knee, which started in 1998. Over the course of years, the degenerative changes have advanced. The question if activities of her work in these 10 years continued to progress the degenerative changes or not. There is no question that the available activities at work such as walking, squatting, kneeling and other activities would have aggravating effect to the knee. The episode of hitting the knee against the chair by itself on July 18, 2013 does not appear to be in correlation with the findings of the MRI and radiographs of the knee. That impact at the most could cause some superficial contusion, although even this has not been shown in the review of medical records.
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> (Ex. T, Report of Parviz Galdjie, M.D., April 9, 2019, at p. 7.)

Dr. Galdjie apportioned 70 percent of the injury to prior injuries, aging and the natural progression of applicant's arthritis. (*Ibid.*)

On January 23, 2020, Dr. Galdjie issued a supplemental report in response to a letter from defense counsel. The QME noted that "as is the case in any degenerative joint condition, the degeneration unfortunately would progress with the passage of time and symptoms would be more pronounced based on the natural progress of joint degeneration." (Ex. U, Report of Parviz Galdjie, M.D., January 23, 2020, at p. 5.) Dr. Galdjie continued:

> Although I cannot with reasonable medical probability state that activities at work did not have any contribution to the current level of present pathology in the left knee I would like to modify my opinion by indicating that since Ms. Avolevan's initial examination by myself was in March 13, 2019 and the last date of claimed cumulative trauma was on 07/18/2013 the apportionment stated is most likely not accurate. As I indicated the degeneration of the joint is a progressive condition and rate of deterioration accelerate by time (the amount of joint damage in each year in term of percentage is greater than the prior year)

and therefore, the natural progress of deterioration between the cessation of work activities in 2013 to time of my examination is very significant as is confirmed by the fact that at the time of cessation of her employment Ms. Avolevan was less symptomatic than what she appears to be at the present time.

(*Ibid.*)

The parties undertook the deposition of Dr. Galdjie on August 13, 2019, and again on December 8, 2020. Dr. Galdjie testified, in relevant part:

Q So just for clarity's sake, you could not rule out that her employment was not an aggravating factor.
MS. SMITH: Objection. Vague and ambiguous. Counsel, are you asking specifically about the second report, or are you asking him overall?
MR. ASHER: I am asking an overall question.
THE WITNESS: If my understanding of the law is correct, there is a 1 percent issue.
BY MR. ASHER:
Q Correct.
A I don't think anybody could say that the activities during the work has not contributed 1 percent.
Q So then do you believe that there is at least a 1 percent contribution to both knees as a result of her employment?
A Yes.

(Ex. Z, Transcript of the deposition of Parviz Galdjie, M.D., December 8, 2020, at p. 29:1.)

Dr. Galdjie further testified:

Q Doctor, are you familiar with the concept of a normal bodily movement in workers' compensation?
A Would you please describe it to me.
Q Sure. That is a legal doctrine that, essentially, says that if someone is just engaging in normal bodily mechanics like walking, that there would not be an injury. Unless there is something like running or planting a foot a certain way -- there's a whole line of cases that I would be happy to share with you -- but that a normal bodily movement, where there is no increase in the risk factors based on the employment, that that wouldn't constitute an injury. Are you familiar with that doctrine?
MR. ASHER: I'm going to object to that line of questioning because that's a legal opinion. But go ahead, Doctor.
THE WITNESS: I was not aware of that concept. In that term, going back to the statement I just made a couple minutes ago, part of her activity happened during the work. I did not say that activity was anything out of the norm of normal activities. So if that is the fact, is determination by the judge to

consider that as a part of normal daily activities that a person would do because no unusual effect has been as a result of work, was nothing to my knowledge that she was doing at work that would not happen during a normal course of somebody's daily life. Does that make it clear?

BY MS. SMITH:

Q I think so. So essentially, you would defer to the trier of fact on the legal issue. Is that what you are saying?

A That's correct.

(*Id.* at p. 34:16.)

On September 29, 2022, the parties proceeded to trial, framing issues of injury arising out of and in the course of employment (AOE/COE), the "normal bodily movement" defense, whether there was substantial evidence substantiating the existence of a cumulative trauma injury, and whether compensation was barred by statute of limitations. (Minutes of Hearing, September 29, 2022, at p. 2:12.)

On January 26, 2023, applicant testified, and the parties submitted the matter for decision.

On March 28, 2023, the WCJ issued his F&A, finding that applicant sustained injury AOE/COE to the right knee from July 18, 2003 to July 18, 2013, and that compensation was not barred by section 5412.

On April 24, 2023, defendant's filed its Petition for Reconsideration (petition), averring the evidence does not support a finding of cumulative trauma, that applicant's primary treating physician did not identify a cumulative trauma, and that the injury arose out of "normal bodily movements." (Petition, at pp. 9-10.)

DISCUSSION

Defendant contends the finding of injury AOE/COE is not supported in the record, noting that there "are no reports of a primary treating physician or any other treating physician that establish a work-related injury on a cumulative trauma basis." (Petition, at 9:26.) However, we observe that Dr. Galdjie was selected as the QME pursuant to the dispute resolution protocols of section 4060, which applies to disputes over the compensability of an injury, and provides that in represented cases, "a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2." (Lab. Code, § 4060.) The QME is thus tasked with determining the compensability of the claim, and the lack of a corresponding report finding injury authored by a treating physician is not a prerequisite to a finding of compensability.

Additionally, it is well established that the relevant and considered opinion of one physician may constitute substantial evidence in support of a factual determination of the WCAB. (*LaVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 639 [35 Cal.Comp.Cases 16]; *Smith v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 588, 592 [34 Cal.Comp.Cases 424]; *Nuelle v. Workers' Comp. Appeals Bd.* (1979) 92 Cal.App.3d 239, 246 [44 Cal.Comp.Cases 439]; *Market Basket v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 137, 144 [43 Cal.Comp.Cases 1186].) Accordingly, we discern no error in the WCJ's reliance on the conclusions reached by the QME. (F&A, Finding of Fact No. 2.)

Defendant further contends that a finding of injury AOE/COE may not be predicated on normal bodily movements. Defendant avers, "when the injury is the result of 'normal bodily movement,' the injury may have 'occurred during the course of employment, but did not arise out of it.'" (Petition, at 10:13, citing *Bickley v. Industrial Accident Commission* (1942) 7 Cal.Comp.Cases 92, 93 [1942 Cal. Wrk. Comp. LEXIS 240].) Noting applicant's long-standing history of right knee injury, defendant observes that the QME "testified that there was nothing in the work activities performed by the Applicant at work that was any different than those performed outside of work in terms of the stress placed on the knee. [Dr. Galdjie] [n]oted the absence of any reports of knee complaints prior to the alleged specific injury of July 2013, as well as a lack of issues with the left knee, which presumably was exposed to the same stressors as the right knee." (*Id.* at p. 10:22.)

However, we observe that the QME has opined that, "[t]here is no question that the available activities at work such as walking, squatting, kneeling and other activities would have aggravating effect to the knee." (Ex. T, Report of Parviz Galdjie, M.D., April 9, 2019, p. 7.) In addition, a leading workers' compensation treatise sums up California jurisprudence regarding the "normal bodily movements" doctrine as follows:

> The early Industrial Accident Commission decisions found that injuries such as a sprain or fracture from normal bodily movements were not compensable unless there was evidence of a blow or other type of workplace contact to connect the injury with the employment. Later court decisions were unclear as to whether an injury was compensable as arising out of the employment if precipitated by a usual as opposed to an unusual strain, movement, or exertion related to the workplace.
>
> It is now settled that unusual strain, movement, or exertion is not required. From an evidentiary standpoint the causal connection will be deemed established

> when the injury or death occurs in the course of employment while the employee is performing normal bodily movements, unless there is a positive showing that the sole cause of the injury is an inherent defect of the employee.
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> (Hanna, Cal. Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed., § 4.91.)

In *Lumbermen's Mut. Casualty Co. v. Indus. Acci. Comm.* (1946) 29 Cal.2d 492 [11 Cal.Comp.Cases 289], our Supreme Court observed:

> Where an employee suffers a heart attack brought on by strain and over-exertion incident to his employment the injury or death is compensable, even though the idiopathic condition previously existed, and no traumatic injury is necessary. [Citations omitted.] That it is not required that the exertion or strain be necessarily unusual or other than that occurring in the normal course of the employment is evident. In *Liberty Mut. Ins. Co. v. Industrial Acc. Com.* (1946) 73 Cal.App.2d 555 [11 Cal.Comp.Cases 66] at page 563, the court making a comprehensive review of the authorities in regard to the aggravation of a previous condition caused by the employment states: "The cases do not, and in the nature of things cannot, stand for the proposition that the exertion must be unusual before it is compensable. . . . In such a case whether the strain is a "usual" or an "unusual" one is only one of the facts involved. If there was strain, even though the strain was a strain usual to that type of employment, the injury or death is compensable if there is competent substantial evidence to show the causal connection between that strain and the collapse."
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> (*Id.* at pp. 496-497.)

Here, the QME is clear in his assessment that there was industrial contribution to applicant's knee injury. (Ex. Z, Transcript of the deposition of Parviz Galdjie, M.D., December 8, 2020, at 29:1.) Given the finding of the QME that applicant's employment contributed to the industrial injury, we concur with the WCJ's determination that applicant sustained injury AOE/COE, and will affirm the F&A, accordingly. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291 [80 Cal.Comp.Cases 489].)

Following our review of the record occasioned by defendant's petition, however, we observe that the F&A does not identify the date of injury pursuant to section 5412.

Generally, proceedings before the Workers' Compensation Appeals Board ("WCAB") are commenced by the filing of an application. (Lab. Code § 5500; Cal. Code Regs., tit. 8, § 10450.)

The time limitations for commencing proceedings are set forth in California Labor Code section 5405:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
>
> (a) The date of injury.
> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

Thus, an applicant must commence proceedings with the WCAB within one year of (1) the date of injury or (2) the expiration of the period covered by the employer's last payment of disability indemnity or (3) the date of the last furnishing by the employer of medical, surgical or hospital treatment. (*J.T. Thorp v. Workers' Comp. Appeals. Bd.* (1984) 153 Cal.App.3d 327 [49 Cal.Comp.Cases 224].)

In cases involving an alleged cumulative trauma injury, the date of injury is governed by Labor Code section 5412, which holds:

> 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.)

The date of injury under section 5412 is an integral consideration with respect to various workers' compensation benefits. (Lab. Code, §§ 4658, 4660 et seq.) In *Argonaut Mining Co. v. Ind. Acc. Com. (Gonzalez)* (1951) 104 Cal.App.2d 27 [16 Cal.Comp.Cases 118], the court held that in addition to identifying the date of injury for purposes of the operation of the statute of limitations, section 5412 "also sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right." (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) 268 Cal. Rptr. 699 [55 Cal.Comp.Cases 107].)

The Court of Appeal has defined "disability" per section 5412 as "either compensable temporary disability or permanent disability," noting that "medical treatment alone is not

disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579].)

Regarding the "knowledge" component of section 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].) An employee is not charged with knowledge that his or her disability is job-related without medical advice to that effect. (*Johnson, supra,* at p. 473; *Newton v. Workers' Co. Appeals Bd.* (1993) 17 Cal.App.4th 147 [58 Cal.Comp.Cases 395].) In addition, even where an injured worker suspects that their disability may have an industrial component, they will typically not be charged with that knowledge until so advised by a medical professional, unless their training, intelligence and qualifications would otherwise allow the injured worker to recognize the relationship between industrial factors and the emergence of a cumulative injury. (*Ibid.*)

Here, the WCJ's Opinion on Decision observes that, "[t]here is no evidence indicating that the applicant knew or should have known that a continuous trauma claim could have been brought any earlier than it was. Moreover, no testimony was elicited at trial evincing same." (F&A, Opinion on Decision, at p. 6.) More specifically, Dr. Galdjie did not address the existence of a cumulative trauma until his report of March 13, 2019. (Ex. S, Report of Parviz Galdjie, M.D., March 13, 2019, at p. 6.)

However, following our review of the record, we observe that applicant met with her attorney in 2015 and caused the instant cumulative trauma claim to be filed. There is no dispute among the parties that the applicant had disability prior to the filing of the claim. That the applicant met with her attorney, and caused the instant cumulative trauma application to be filed, is sufficient under the facts of this case to impute knowledge of the possible relationship between industrial exposure and disability to the applicant.

We therefore conclude that the date of the application for adjudication fixed the concurrence of knowledge and disability, and that the date of injury under section 5412 was July 1, 2015. Because the date of injury occurred within one year of the filing of the application, we concur with the WCJ's determination that compensation is not barred by section 5412. We will

amend the Findings of Fact, however, to include a finding that the date of injury, pursuant to section 5412, was July 1, 2015.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 28, 2023 Findings and Award is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

4. Applicant's date of injury pursuant to Labor Code section 5412 was July 1, 2015.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 29, 2023

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

MARINA AVOLEVAN
EQUITABLE LAW FIRM
LAW OFFICE OF STEPHANIE M. SMITH

SAR/abs

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