WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICHARD CYBURT, *Applicant*

vs.

SAN FRANCISCO GIANTS; CIGA FOR FREMONT INSURANCE IN LIQUIDATION; MINNESOTA TWINS; TRAVELERS FOR AETNA CASUALTY, *Defendants*

Adjudication Number: ADJ14613252
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER 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 grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the decision of August 24, 2023.

In addition to the discussion set forth in the WCJ's September 22, 2023 Report and Recommendation on Defendant's Petition for Reconsideration (Report), we observe the following. Applicant alleges injury from June 9, 1977 through June 20, 1979, and has obtained medical reporting pursuant to former section 4062. (Report, at pp. 2-3.) Defendant avers that because the medical reporting offered into evidence by applicant was not obtained pursuant to Labor Code section 4062.2, the reporting is inadmissible in these proceedings, and that the WCJ erred in relying on applicant's reporting. (Petition for Reconsideration (Petition), at p. 16.) Defendant avers that the Court of Appeal decisions in *Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584 [71 Cal.Comp.Cases 161] (*Nunez*) and its companion case, *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, [71 Cal.Comp.Cases 155] (*Cortez*), stand for the proposition that

the date of injury pursuant to section 5412 establishes the appropriate procedure by which the parties are to obtain medical-legal reporting. (Petition, at p. 7.)

However, we observe that in both *Nunez* and *Cortez*, the Court of Appeals considered the appropriate medical-legal procedure as it applied to *specific injuries* (July 15, 2002 in *Nunez*, June 29, 1999 in *Cortez*). The court in both cases was neither asked nor required to consider whether the date of injury pursuant to section 5412 was dispositive of the appropriate medical-legal procedure, and there is no discussion in either case of a cumulative injury or section 5412. Thus, when the court in *Nunez* and *Cortez* agreed with the Appeals Board that "the Legislature intended former sections 4060 et seq. to remain operative for represented cases with a date of injury before January 1, 2005," the term "date of injury" in those cases referred to the date of the occurrence of the specific injury, rather than a judicial determination as to the date of injury in a cumulative injury pursuant to section 5412. We thus find defendant's arguments regarding these cases unpersuasive.

In the absence of appellate authority relevant to a cumulative injury, we turn to the en banc decision of the Appeals Board in *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217, [2005 Cal. Wrk. Comp. LEXIS 3] (*Simi*), which is both instructive and mandatory authority herein, and which the court in *Nunez* and *Cortez* specifically approved. (*Nunez, supra*, at p. 593.) In *Simi*, the parties stipulated that applicant sustained a cumulative injury ending September 5, 2002. (*Id.* at p. 218.) We held that because the legislature did not provide a medical-legal procedure for cases occurring prior to the effective date of SB899, "section 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which AME and QME medical-legal reports are obtained in cases involving represented employees." (*Id.* at p. 221.)

Conversely, in our significant panel decision in *Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 [2006 Cal. Wrk. Comp. LEXIS 313 (writ den.) (*Ward*), we held that pursuant to section 4060(c), disputes regarding compensability with respect to a claimed cumulative injury ending June 8, 2005, that is, after the effective date of SB899, were subject to the medical-legal procedure set forth in section 4062.2. In addition, because the injury occurred after the effective date of SB899, reports obtained pursuant to section 4064(d) would not be admissible. (*Id.* at p. 1314.)

Applying these principles in *Tanksley v. City of Santa Ana* (January 25, 2010, ADJ2005173) [2010 Cal. Wrk. Comp. P.D. LEXIS 74.], a case involving a claimed cumulative injury from December, 2003 to December 2004, we held:

> *...[T]he question of the process that applies to applicant's claim does not first require a finding of the date of injury.* Instead, for injuries that are claimed to have occurred prior to January 1, 2005, as alleged in this case, section 4062 as it existed before its amendment by SB 899 continues to provide the procedure by which medical-legal reports are to be obtained. (*Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584 [38 Cal. Rptr. 3d 914, 71 Cal.Comp.Cases 161] (*Nunez*); *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596 [38 Cal. Rptr. 3d 922, 71 Cal.Comp.Cases 155]; *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 (Appeals Board en banc); c.f. *Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 (significant panel decision), 71 Cal.Comp.Cases 1900 (writ den.).) (*Id.* at pp. 9-10.)

Our decision in *Tanksley* emphasized that the parties to a claim of injury occurring prior to January 1, 2005 should not be required to obtain a judicial determination as to the date of injury pursuant to section 5412 in order to determine the appropriate procedure by which to obtain medical-legal reporting. (*Ibid*.) Such a holding would be inconsistent with the California Constitutional mandate that the workers' compensation law "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., Article XIV, § 4.)

Moreover, as the WCJ has observed, defendant herein has declined to undertake medical-legal discovery efforts between the dates of the filing of the application and the January 30, 2023 Mandatory Settlement Conference. (Report, at p. 5; see also Ex. 11, Letter from Defense Counsel, August 31, 2021). Having considered the rationale for avoiding delay in obtaining medical-legal reporting as discussed in *Tanksley*, our en banc decision in *Simi*, defendant's dilatory arguments regarding the applicability of section 4062.2, and defendant's lack of pre-trial discovery, we agree with the WCJ's determination to admit into evidence the reporting of applicant's physicians obtained under former section 4062. We grant the petition solely to correct for clerical error, as recommended by the WCJ in his Report.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of August 24, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of August 24, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

AWARD

…

b. Permanent disability award of 75 percent, equivalent to 513.25 weeks of indemnity payable at the rate of $290.00 per week, in the total sum of $148,842.50, less prior payments made and less attorney fees of $ 22,326.38, which shall be commuted from the far end of the award. After that, life pension becomes payable at the rate of $115.96 per week, less attorney fees.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

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.

RICHARD CYBURT
GLENN, STUCKEY & PARTNERS
GUILFORD SARVAS & CARBONARA
DIMACULANGAN AND ASSOCIATES

SAR/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 JUDGE ON DEFENDANT'S PETITION FOR RECONSIDERATION

Defendant, CIGA for Fremont Insurance, in liquidation, for the San Francisco Giants filed a verified and timely Petition for Reconsideration of the Findings and Award dated August 23, 2023.

Defendant asserts that this WCJ erred in finding that Labor Code §4062, as it existed before its amendment by SB 899, provides the procedure by which medical-legal reports were to be obtained. Moreover, Defendant points out the conflict in the 80% Award noted in the Award section, compared to the 74% Award noted in the Findings.

STATEMENT OF FACTS

Applicant filed an application for adjudication on May 8, 2021, alleging a cumulative trauma injury during the period of 6/9/1977 through 6/15/1979, as a professional baseball player, against the San Francisco Giants. (Applicant Exhibit 13). A proof of service dated May 8, 2021 indicates that the San Francisco Giants, CIGA, Minnesota Twins and Travelers were served with a copy of the application, claim form and other documents. (Applicant Exhibit 16). The California Insurance Guarantee Association (CIGA) issued a Notice of Denial on July 7, 2021. Travelers issued a notice of denial on June 14, 2021. (Defendant Travelers Exhibit E.) On September 16, 2021, the California Insurance Guarantee Association (CIGA) for Freemont Insurance in Liquidation and insured San Francisco Giants filed an answer denying injury and liability. (Defendant CIGA Exhibit B). On October 18, 2021, applicant was evaluated by applicant qualified medical examiner Michael J. Einbund, M.D. for an orthopedic evaluation, which was served on CIGA and Guilford Sarvas on November 15, 2021. (Applicant Exhibit 1). Applicant had an internal evaluation with applicant qualified medical examiner, Dr. Marvin Pietruszka, M.D. on October 19, 2021, which was served on CIGA and Law Offices of Guilford Sarvas & Carbonara on April 29, 2022. (Applicant Exhibit 2).

Applicant underwent an applicant qualified medical examination in dentistry on October 19, 2021 with Michael W. Wells, DDS, which was served on CIGA and Guilford Sarvas on 12/2/2021 (Applicant Exhibit 3). Applicant underwent an applicant qualified medical evaluation in neurology with Rosabel R. Young, M.D. on July 18, 2022, which was served on CIGA on January 1, 2023. (Applicant Exhibit 4). At the 1/30/2023 MSC, the case was set for trial over

CIGA's objection that the case required Panel Qualified Medical Examiners. (EAMS DOC ID 76219565.) This case initially proceeded to trial on February 16, 2023. (MOH 12/16/2023.)

Despite CIGA having notice of applicant's claim since May 8, 2021 and applicant's med legal discovery commencing on November 15, 2021, CIGA made no effort to conduct med legal discovery in any form until applicant had completed his discovery and the matter was set for MSC on 1/30/2023. CIGA's strategy of not conducting discovery in the form of med legal discovery in either the Defense QME or Panel QME discovery is puzzling.

At [trial] applicant alleged injury during the periods of 6/9/1977 through 6/15/1979, against the San Francisco Giants and Minnesota Twins, and claimed to have sustained injury arising out of and in the course of employment to his head, jaw, neck, back, feet, toes, psyche, injury in the form of neurology, ENT, internal, dental, sleep and neuropsyche. Trial issues included injury arising out of the and in the course of employment, earnings, temporary disability, permanent and stationary date, permanent disability, apportionment, need for further medical treatment, attorney fees, commutation of attorney fees on permanent disability and life pension, date of injury pursuant to Labor Code section 5412 for indemnity rates, 1.4 modifier and COLA, adverse inference against defendant for failure to produce records, defendant argues that applicant's medical evidence lacks substantial medical evidence, defendant raises that applicant's medical are not in compliance with Labor Code section 4060(c) and 4062. Travelers requested to be found without liability pursuant to Labor Code section 5500.5.

On August 23, 2023 the undersigned found that Labor Code Section 4062," as it existed before its amendment by SB899, provides the procedure by which medical-legal reports were to be obtained in this matter. The court also found that applicant sustained injury to his cervical spine, lumbar spine, both shoulders, both thumbs, both hips, both knees, injury in the form of: sleep disorder, hypertension, headaches, insomnia, temporal mandibular joint (TMJ) disorder, mental state cognitive, and emotional/behavioral. Moreover, it was found that date of injury pursuant to Labor Code section 5412 is October 18, 2021, that injurious exposure during the last year runs from June 20, 1978 to June 20, 1979, to which the San Francisco Giants had liability for. The undersigned found earnings to be $650 per week, that applicant is entitled to temporary disability for three months after retirement in June of 1979, applicant was permanent and stationary as of September of 1979. Additionally, the undersigned found legal apportionment of 20% to applicant's hypertension to non-industrial factors, 10% apportionment to applicant's headaches to non-

industrial factors, and 40% apportionment to applicant's temporal mandibular joint (TMJ) disorder to nonindustrial factors.

This WCJ found that applicant is entitled to a permanent disability award of 75 percent, equivalent to 513.25 weeks of indemnity payable at the rate of $290.00 per week, in the total sum of $148,842.50, less prior payments made and less attorney fees of $22,326.38, which shall be commuted from the far end of the award. After that, life pension becomes payable at the rate of $115.96 per week, less attorney fees of $22,326.38. In addition[,] it was found that applicant is entitled to the cost of living adjustment, need of further medical treatment to cure or relieve from the effects of the industrial injury. Lastly, applicant's attorney['s] request for commutation was deferred for applicant attorney to follow up with the disability evaluation unit, with jurisdiction reserved by this court. These findings were based on applicant's qualified medical examiners (Applicant Exhibits 1-4).

Defendant, CIGA for Freemont Insurance, in liquidation, for the San Francisco Giants filed a Petition for Reconsideration of the Findings and Award disputing the undersigned's determination that Labor Code §4062, as it existed before its amendment by SB 899, provided the procedure by which medical-legal reports were to be obtained and the conflict in a[n] 80% Award compared to the 75% Award noted in the Findings.

DISCUSSION

Regarding the Award section b. on page 3 of the Findings and Award, this WCJ agrees with defendant, the Award should read:

b. Permanent disability award of 75 percent, equivalent to 513.25 weeks of indemnity payable at the rate of $290.00 per week, in the total sum of $148,842.50, less prior payments made and less attorney fees of $22,326.38, which shall be commuted from the far end of the award. After that, life pension becomes payable at the rate of $115.96 per week, less attorney fees.

LABOR CODE SECTIONS 4060/4062

CIGA's request for discovery appears disingenuous. They failed to conduct any discovery despite being on notice of applicant's discovery as early as November 15, 2021 and waited until

the 01/30/2023 MSC. This strategy is a tactic that causes unnecessary delay as they had more than ample opportunity to conduct discovery in any manner they wished. Nonetheless, defendant claims that for injuries on or after January 1, 2005, medical disputes regarding compensability must be resolved solely through the procedures of Labor Code § 4062.2. CIGA contends that in this matter, the date of injury under section 5412 for applicant's injury did not arise until after January 1, 2005, and as such, the medical-legal procedures described in section 4062.2 are applicable. In *Lauter v. Ravens*, this exact issue was raised and addressed the Appeals Board. (*Lauter v. Ravens*, 2022 Cal. Wrk. Comp. P.D. LEXIS 270 (Cal. Workers' Comp. App. Bd. September 19, 2022). The board in *Lauter*, cited *Tanksley v. City of Santa Ana* [2010 Cal. Wrk. Comp. P.D. LEXIS 74], where it was observed:

> [T]he question of the process that applies to applicant's claim does not first require a finding of the date of injury. Instead, for injuries that are claimed to have occurred prior to January 1, 2005, as alleged in this case, section 4062 as it existed before its amendment by SB 899 continues to provide the procedure by which medical-legal reports are to be obtained. (*Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584 [71 Cal.Comp.Cases 161]; *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596 [71 Cal.Comp.Cases 155]; *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 (Appeals Board en banc); cf. *Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 (significant panel decision), 71 Cal.Comp.Cases 1900 (writ den.).) (Id. at *9, emphasis added.)

Further, *Lauter* noted that in the en banc decision of *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 [2005 Cal.Wrk.Comp. P.D. LEXIS 3], held that because there was no operative law other than former section 4062 to provide a procedure for obtaining AME and QME medical legal reports for cases involving represented employees who sustained injuries prior to January 1, 2005, "injuries occurring prior to January 1, 2005, section 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which AME and QME medical-legal reports are obtained in cases involving represented employees. (Emphasis added.)

Here, the applicant claims injury from 6/9/1977 through 6/20/1979, when applicant was employed with defendants. Therefore, as in *Lauter*, "Labor Code Section 4062," as it existed before its amendment by SB899, provides the procedure by which medical-legal reports were to be obtained in this matter. As a result, applicant's exhibits 1-4 should be admitted to evidence. Defendant's cite to *Hale v. Bills*, 2022 Cal. Work. Comp. P.D. LEXIS 310, is not persuasive nor binding.

RECOMMENDATION

It is respectfully, recommended that defendant's Petition for Reconsideration be granted as to amend section b. on page 3 of the Findings and Award to be read as:

b. Permanent disability award of 75 percent, equivalent to 513.25 weeks of indemnity payable at the rate of $290.00 per week, in the total sum of $148,842.50, less prior payments made and less attorney fees of $ 22,326.38, which shall be commuted from the far end of the award. After that, life pension becomes payable at the rate of $115.96 per week, less attorney fees.

It is recommended that defendant's Petition for Reconsideration regarding the med-legal procedure be denied.

DATE: September 22, 2023

Juan Cervantes
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE