WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LETICIA GARCIA, *Applicant*

vs.

CKE HOLDINGS, INCORPORATED, dba CARL'S JR. RESTURANTS, LLC; TRAVELERS, ARM MANAGEMENT, INCORPORATED, STATE FARM, *Defendants*

Adjudication Numbers: ADJ11292762, ADJ11292764, ADJ12720128
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant CKE Restaurant Holdings seeks reconsideration of the March 5, 2021 Findings of Fact wherein the workers' compensation administrative law judge (WCJ) found that applicant did not file duplicative cases and that applicant's attorney did not engage in bad faith tactics that are frivolous or solely intended to cause unnecessary delay. Previously, the Appeals Board granted removal and issued a February 7, 2020 Opinion and Order Granting Petition for Removal and Decision After Removal. The Appeals Board returned the matter to the trial level for the WCJ to determine if an application filed November 8, 2019 (ADJ12720128) alleged a new injury or was duplicative of the application filed in ADJ11292762.

Defendant contends that the WCJ erred in finding that the applications in ADJ1272028 and ADJ11292762 were not duplicative. Defendant argues that, contrary to applicant's testimony at trial, applicant's supervisor continued in the role of supervisor after a change in ownership of applicant's employer in 2017. Defendant also contends that the application in ADJ12720128 alleges a cumulative trauma period that is a small portion of the longer cumulative trauma period alleged in the original application. Finally, defendant also contends that discovery should remain closed and applicant should not be allowed to effectively reopen discovery by filing duplicative applications.

We have reviewed applicant's Answer. 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, the Answer, the contents of the Report, and we have

reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration, rescind the Findings of Fact, issue an order dismissing the application in ADJ12720128 and return the matter to the trial level for the matter to be set for trial in ADJ1129762 and ADJ11292764.

We note that defendant attached approximately 300 pages of documents to its Petition for Reconsideration in violation of WCAB Rule 10945. (Cal. Code Regs., §10945.) Specifically, Rule 10945(c)(2) states: "A document that is not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer unless a ground for the petition for reconsideration is newly discovered evidence." In this case, defendant is not alleging newly discovered evidence as a ground for its petition. We admonish defendant to follow the WCAB Rules of Practice and Procedure. We have not considered the improperly attached documents.

FACTS

We will briefly review the relevant facts. There are three pending applications. Applicant filed the first two applications on April 26, 2018. The third application was filed on November 8, 2019 after the first two cases were set for trial.

The applications filed on April 26, 2018 alleged a specific injury and a cumulative trauma. In ADJ11292762, applicant claimed she sustained an injury to her psyche, nervous system, unclassified body systems, head, neck, shoulders, back, lower extremities, upper extremities, and stroke during the period of September 1, 2006 through March 9, 2018. In ADJ11292764, applicant claimed that she sustained a specific injury on September 1, 2013 to her back, head, neck, shoulders, lower and upper extremities, psyche, and in the form of stress, a hernia, and a sleep disorder.

In ADJ12720128, in an application filed on November 8, 2019, applicant claimed she sustained a cumulative trauma from August 27, 2012 to November 15, 2017 to the nervous system, psyche, and other unclassified body parts. On page 4, the mechanism of injury is described as follows: APPLICANT'S INJURIES INCLUDE PSYCHE AND SLEEP. (November 8, 2019, Application for Adjudication of Claim, p. 4, ¶ 2.)

On January 6, 2020, the WCJ ordered the matter off calendar based on the new application in ADJ12720128. Defendant objected to the matter being taken off calendar and asked for sanctions, alleging that the new application was a bad faith effort by applicant's attorney to re-open discovery. Defendant filed a Petition for Removal. The Appeals Board granted removal and

returned the matter to the calendar for the WCJ to determine whether the applications were duplicative.

A trial was held on January 13, 2021. At the trial, applicant's testimony was the only evidence submitted on the record. Applicant testified that her manager caused applicant stress and that, in 2017, the manager left and the harassment and mistreatment of applicant stopped. (January 13, 2021, Minutes of Hearing and Summary of Evidence (MOH/SOE) p. 2.) Applicant also testified that "[i]n 2017, the applicant stopped working for two weeks. The applicant stopped working at that time because the company was sold. When the company was sold, the applicant was still an employee. The applicant had to reapply to get a job." (Ibid.) Applicant went off work in 2018 because she was experiencing headaches and she had a stroke. (Id. at p.3.)

The WCJ issued the March 5, 2021 Findings of Fact that the applications were not duplicative. The WCJ explained: "Cases ADJ12720128 and ADJ11292762 are not duplicative cases. The difference between these two cases is that ADJ2720128 alleges an injury to psyche and sleep and that the injury stopped in 2017 because the people who were harassing the applicant stopped working for the employer when the business was sold. Case ADJ11292762 is for an injury that continued even after the business was sold." (Report, p. 4.)

DISCUSSION

Labor Code section 3208.1 provides that an injury may be either cumulative or specific and that a cumulative industrial injury occurs whenever the repetitive mentally or physically traumatic activities of an employee's occupation cause any disability or a need for medical treatment.[1] There is but one cause of action for each injury coming within the provisions of the division." (Lab. Code, §5303.) "Only one application shall be filed for each injury. Duplicative applications are subject to summary dismissal." (Cal. Code Regs., tit. 8, §10455(a).)

Section 5412 provides that "[t]he 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.) As used in Section 5412, "disability" means either compensable temporary disability or permanent disability. Medical

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

treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to section 5412, but it may be evidence of compensable permanent disability. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [69 Cal.Comp.Cases 579, 584].) Likewise, modified work is not a sufficient basis for finding compensable temporary disability, but it may be indicative of a compensable permanent disability, especially if the worker is permanently precluded from returning to his usual and customary job duties. (*Id.)* No cumulative injury can occur without disability. (*Van Voorhis v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal1.App.3d 81, 86-87 [39 Cal.Comp.Cases 137]; *Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd. (Coltharp)* (1973) 35 Cal.App.3d 329, 342-343 [38 Cal.Comp.Cases 720]*; Ferguson v. City of Oxnard* (970 35 Cal.Comp.Cases 452 [WCAB en banc].)

While lay testimony, including applicant's testimony, can be used to establish that applicant's occupation involved repetitive mentally or physically traumatic activities, medical evidence is required to establish a date of injury pursuant to Section 5412 because the existence of disability or need for medical treatment is a medical question beyond the bounds of ordinary knowledge. (*City & County of San Francisco v. Industrial Acc. Com. (Murdock)* (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].)

Establishing a date of disability pursuant to section 5412 does not necessarily resolve the issue of whether a particular defendant is liable for benefits. Section 5500.5 provides:

> Except as otherwise provided in section 5500.6, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, [1981], shall be limited to those employers who employed the employee during a period of [one year] immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. (Lab. Code, § 5500.5(a).)

If an applicant sustains multiple injuries, it is impermissible to "merge" the injuries for the purpose of awarding benefits. (Lab. Code, §5303.) Under Section 3208.1, there are two cumulative trauma injuries when a period of disability and need for medical treatment are interspersed within the alleged course of the cumulatively traumatic activities. (*Coltharp, supra,* 35 Cal.App.3d at 342.) The number and nature of the injuries suffered are questions of fact for the WCJ or the

Workers' Compensation Appeals Board. (*Western Growers Ins. Co (Austin)*, (1993) 16 Cal.App.4th 227, 234–235 [58 Cal.Comp.Cases 323.)

In this case, the WCJ incorrectly focused on whether applicant could have sustained a cumulative trauma ending in 2017 rather than whether she could have sustained two cumulative trauma injuries. Two applications for a single cumulative trauma injury are duplicative. If the cumulative trauma date pled in an application is incorrect, the application can be amended. Even if the issue were whether applicant sustained an injury through 2017, the WCJ's analysis is incorrect. The WCJ concluded that applicant could have sustained an injury ending in 2017 "because the people who were harassing the applicant stopped working for the employer when the business was sold." (Report, p. 4.) While applicant's last date of injurious exposure may have been in 2017, the last date of injurious exposure does not set a date of injury for a cumulative trauma injury unless it also coincides with compensable disability. (Lab. Code, §§5412, 5500.5.)

At the January 13, 2020 hearing regarding whether applicant's attorney filed duplicative applications, applicant's burden was to show that it is possible that she sustained two cumulative trauma injuries and that she did not file two applications for the same injury in violation of WCAB Rule 10455. As discussed above, to recover for a 2017 injury and a 2018 injury, applicant must show, among other things, that she sustained compensable disability in 2017. In this case, the only evidence applicant's attorney offered on this issue was applicant's testimony. Applicant did not testify that she missed work for medical reasons, sought medical treatment, or had modified duties in 2017. Absent evidence of disability in 2017, pursuant to Section 5412, applicant sustained one injury–not two. Accordingly, we will dismiss the second cumulative trauma application pursuant to WCAB Rule 10455. We will dismiss the application without prejudice. If additional evidence shows that applicant sustained a second cumulative trauma, applicant may file a new application consistent with Section 5412.

Because applicant has not shown a valid reason for the filing of the second cumulative trauma application, if applicant's attorney filed the application in bad faith or solely to delay proceedings, the filing of the second application would be sanctionable conduct. Therefore, we defer the issue of defendant's Petition for Costs and Sanctions with jurisdiction reserved at the trial level. A WCJ has the authority to order a party's attorney to pay "reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics . . ." (Lab. Code, § 5813(a).) In addition, a WCJ, "in its sole discretion, may order additional sanctions

not to exceed two thousand five hundred dollars ($2,500.00) to be transmitted to the General Fund." (Lab. Code, § 5813(a).) "Before issuing such an order, the alleged offending party or attorney must be given notice and an opportunity to be heard." (Cal. Code Regs., tit. 8, § 10561(a).)

Section 5813 sanctions must be based on, ". . . bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, § 5813(a).) Generally, such actions or tactics include those "that result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board, or that are done for an improper motive or are indisputably without merit." (Cal. Code Regs., tit. 8, § 10561(b).) Specifically, bad faith actions or tactics "shall include but are not limited to . . ."

> (2) Filing a pleading, petition or legal document unless there is some reasonable justification for filing the document.
> . . .
>
> (6) Bringing a claim, conducting a defense, or asserting a position:
>
> (A) that is: (i) indisputably without merit, (ii) done solely or primarily for the purpose of harassing or maliciously injuring any person, and/or (iii) done solely or primarily for the purpose of causing unnecessary delay or a needless increase in the cost of litigation; and
>
> (B) where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct. (Cal. Code Regs., tit. 8, § 10561(b)(2), (4), (5), (6).)
> . . .

While we defer the issue of sanctions to the trial level, we note that by filing a second application for the same injury, applicant's attorney's actions caused significant delay. Upon return of this matter to the trial level, the remaining cases should be set for trial.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the March 5, 2021 Findings of Fact is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS AND ORDER

FINDINGS OF FACT

1. The application in ADJ127220128 claims an injury for the same body parts and time period as the application in ADJ11292762.
2. Pursuant to WCAB Rule 10455, the later filed application is subject to summary dismissal.
3. The issue of Defendant's Petition for Costs and Sanctions is deferred with jurisdiction reserved at the trial level.

ORDER

IT IS HEREBY ORDERED that the application in ADJ12720128 is hereby **DISMISSED** without prejudice.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 26, 2021

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

LETICIA GARCIA
LAW OFFICE OF ROBERT LEE
ALBERT & MACKENZIE
ROSENBERG YUDIN & PEATMAN

MWH/oo

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