WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANN FILBY, *Applicant*

vs.

NORTHERN CALIFORNIA FERTILITY MEDICAL CENTER; PREFERRED EMPLOYERS INSURANCE COMPANY, HARTFORD INSURANCE COMPANY OF THE MIDWEST and EMPLOYERS COMPENSATION INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ9176726 (MF), ADJ11233844
Sacramento District Office

OPINION AND ORDER GRANTING PETITIONS FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant and defendant Employers Compensation Insurance Company ("Employers Compensation") both seek reconsideration of the Findings, Award and Order (FA&O) of July 19, 2023, wherein the workers' compensation administrative law judge (WCJ) found in case number ADJ11233844 that during the period ending December 10, 2008, applicant sustained injury arising out of and occurring during the course of employment (AOE/COE) to her back and that the period ending December 10, 2008, is applicant's first compensable date of industrial cumulative trauma.

Applicant contends that she sustained one cumulative injury through her last date of work on July 28, 2013, and that she first had knowledge of her injury on August 12, 2013 so that her Labor Code[1] section 5412 date of injury is August 12, 2013.

Defendant Employers Compensation contends that applicant did not sustain a cumulative injury ending on December 10, 2008; that applicant's date of knowledge of her disability was

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

August 12, 2013; and that she sustained one cumulative trauma up to July 28, 2013, because her last injurious exposure was on July 28, 2013.

We have received an Answer from defendant Preferred Employers' Insurance Company (Preferred) to both Petitions for Reconsideration. We also received applicant's Reply to Preferred Employers' Answer and WCJ's Recommendation on Applicant's Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petitions be denied.

We have considered the Petitions for Reconsideration, the Answer, and the Reply[2] and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petitions for Reconsideration, rescind the WCJ's FA&O, and substitute a new Joint FA&O, which finds that applicant sustained cumulative injury up to July 28, 2013 and that applicant's section 5412 date of injury is August 12, 2013.

FACTS

Applicant filed two Applications for Adjudication. In case number ADJ9176726, applicant sustained a cumulative injury to her back, body systems, and hypertension and GERD from 2004 to July 28, 2013, while employed as a lab director embryologist. In ADJ9176726, defendant's workers' compensation carrier was Preferred. (5/30/23 Minutes of Hearing/Summary of Evidence (MOH/SOE), p. 3.) In case number ADJ11233844, applicant claimed a cumulative injury to her back on December 10, 2008, while employed as a lab director embryologist.

Applicant worked for defendant employer from February 2004 to July 28, 2013, and has not worked anywhere since then. (MOH/SOE, p. 5.) From her date of hire until her last day of work, applicant did the work of senior embryologist. (MOH/SOE, p. 5.) She had the same job duties from her third month on the job until her last day. (MOH/SOE, pp. 5-6.) Applicant began experiencing back pain in 2005, and had discectomy surgery on December 10, 2008. (MOH/SOE, p. 6; Ex. II, Deposition of Dr. Hughes, dated 3/8/21, p. 20.) She was out of work for six weeks following the surgery. (MOH/SOE, p. 8.) When she returned, she had the same job duties after the surgery, although her physician recommended that she work fewer hours, her employer did not abide by her work restrictions. (MOH/SOE, p. 7.)

[2] We accept and have considered applicant's Reply as a supplemental pleading pursuant to WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964).

From January 2009 until January 2010, applicant does not believe she was okay. (MOH/SOE, p. 8.) She never asked a doctor what was causing her back pain; they asked her questions and told her they had no idea what was causing her back pain. (MOH/SOE, p. 9.) After she stopped working, she went to see an attorney about a disability accommodation and that attorney informed her about workers' compensation. (MOH/SOE, pp. 7, 9.)

The initial Qualified Medical Evaluator (QME) with specialties in physical medicine rehabilitation and pain medicine, Dr. Aidan Clarke, found in her reports of October 2014 and July 2017, that applicant's injury was AOE/COE and that she had two periods of cumulative trauma, in 2008 and 2013 based on her conclusion that applicant had improved after the 2008 surgery. (Ex. A, QME Report by Dr. Clarke dated 10/20/14, pp. 14-16; Ex. B, QME Report by Dr. Clarke dated 7/9/17, pp.48-49.) However, Dr. Clarke also stated that the periods of disability were "difficult to discern." (Ex. B, p. 48.)

The next QME with specialties in physical medicine, rehabilitation, and pain medicine, Dr. Manijeh Ryan, found that the injury was AOE/COE but repeatedly changed her mind on whether there was one cumulative trauma injury or two cumulative injuries. (Ex. JJ, QME Report by Dr. Ryan, dated 7/9/17, p. 18.) She first found one injury ending on August 12, 2013 (Ex. JJ, p. 18); then two injuries ending in December 10, 2008, and August 12, 2013 (Ex. KK, QME Report of Dr. Ryan, dated 1/22/18); then one injury again (Ex. PP, Deposition of Dr. Ryan, dated 11/14/19, p. 33); and she again found two cumulative injuries in her later reports and deposition. (Ex. LL, QME 1st Follow Up Report by Dr. Ryan, dated 6/18/20, p. 83; Ex. MM, 2nd Follow up Report by Dr. Ryan, dated 2/19/21, p. 38; Ex. NN, QME Testing Report by Dr. Ryan, dated 2/26/21, p. 1; Ex. OO, QME Supplemental Report by Dr. Ryan, dated 7/27/21, p. 10; Ex. QQ, Deposition of Dr. Ryan, dated 10/29/20, pp. 86-87, 90.)

The final QME in the case, orthopedic surgeon Dr. Edward Hughes, consistently found one cumulative injury. (Ex. DD, QME Report by Dr. Hughes, dated 9/19/19, p. 10; Ex. EE, QME Report by Dr. Hughes, dated 11/21/19, p. 2; Ex. FF, QME Report by Dr. Hughes, dated 3/8/21, p. 2; Ex. GG, QME Evaluation Report by Dr. Hughes, dated 8/9/21, pp. 7-8; Ex. HH, QME Supplemental Report by Dr. Hughes, dated 1/25/22, p. 1; Ex. II, Deposition of Dr. Hughes, dated 3/8/21, pp. 34-35.) On November 21, 2019, Dr. Hughes opined that:

> Unfortunately disc herniations will lead to degenerative changes and although the examinee had a microdiscectomy at L5-S1 with improvement of her sciatic symptoms she continued with axial low back pain. There was

> persistent motion aggravated by her frequent sitting, the sitting posture as in her employment an increasing disc pressure then in normal standing. Subsequently the examinee required a fusion L5-S1 and now it appears that she has the progression, the "cascade of progression" degenerative disc disease L4-5 with a herniated disc at that level which I'm sure will require surgical intervention, that [is] decompression and fusion.
>
> I do not find this case to be totally analogous to the "Western Growers Case" as I have difficulty comparing depression due to a purely medical condition, that is degenerative disc disease. I do however agree with the conclusion of the onset of cumulative trauma being 2005, her first complaint of her disease caused by her employment. She sustained cumulative trauma through her last [date of] work 7/28/2013. However, although she is not working she has progression of the juxtaposed disc level, L4-5 which should be considered cumulative trauma.

(Ex. EE, QME Report by Dr. Hughes, dated 11/21/19, p. 2.)

The cases proceeded to trial on May 30, 2023 and were consolidated for the purposes of trial. There were no contested issues in case number ADJ9176726; the parties stipulated that applicant, while employed during the period of cumulative trauma through August 12, 2013, as a Lab Director Embryologist by Northern California Fertility Medical Center, sustained injury AOE/COE to her back, hypertension, and GERD, and that at the time of injury, the employer's workers' compensation carrier was Preferred. (MOH/SOE, p. 3.)

The issues for trial in case number ADJ11233844 were: 1) whether the injury was AOE/COE; and 2) whether there was one CT through August 12, 2013, or if there was a second CT through December 10, 2008. (MOH/SOE, p. 2.)

DISCUSSION

I. Number of Cumulative Trauma Injuries

Labor Code section 3208.1 provides that an injury may be either cumulative or specific. No cumulative injury can occur without disability. (*Van Voorhis v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.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].) A cumulative injury is one that occurs 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." (Lab. Code, § 3208.1.)

"The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].) "[I]f an employee becomes disabled, is off work and then returns to work only to again become disabled, there is a question of fact as to whether the new disability is due to the old injury or whether it is due to a new and separate injury." (*Id*. at p. 234.) However, "[t]he general rule is that where an employee suffers contemporaneous injury to different body parts over an extended period of employment, the employee has suffered one cumulative injury." (G*ravlin v. City of Vista* (Sept. 22, 2017, ADJ513626) 2017 Cal. Wrk. Comp. P.D. LEXIS 413, *16.)[3] "If, however, the employee's occupational activities after returning to work from a period of industrially-caused disability are *not* injurious—i.e., if any new period of temporary disability, new or increased level of permanent disability, or new or increased need for medical treatment result solely from an *exacerbation* of the *original* injury—then there is only a *single* cumulative injury." (*Id.* at p. *24.)

Section 5500.5 states in pertinent part that 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 injured worker 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 them to the hazards of the occupational disease or cumulative injury, whichever occurs first. (Lab. Code, § 5500.5(a).)

In these cases, pursuant to section 3208.1, all three QMEs determined and agreed that applicant sustained industrial industry even if they did not agree on date(s) of injury. (Exs., A, p. 16; JJ, p. 18 of 31; DD, p. 10.) Therefore, there is substantial evidence to support the conclusion that applicant's injury was AOE/COE.

However, based on our review of the record, applicant sustained one cumulative injury. The instant case presents a similar scenario to that of *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.App.4th 227.) In *Western Growers*, applicant originally suffered an

[3] Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).) We find the reasoning in *Gravlin* persuasive given that the case currently before us involves similar legal issues.

industrial injury of depression. (*Id*. at p. 235.) He was off work due to his injury and never fully recovered from his depression before returning to work. (*Id*.) He remained under a doctor's care the entire time. (*Id*.) Therefore, applicant in that case suffered from a single cumulative injury. (*Id*.) Similarly, although applicant here had back surgery in 2008 and was off work for some time, she returned to her same work duties.

It is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence and the Appeals Board may rely on the medical opinion of a single physician unless it is "based on surmise, speculation, conjecture, or guess." (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Market Basket v. Workers' Comp. Appeals Bd*. (1978) 86 Cal.App.3d 137 [46 Cal.Comp.Cases 913.) Having reviewed the medical reporting, unlike Drs. Clarke and Ryan, Dr. Hughes' medical opinion is not the result of surmise, speculation, conjecture, or guess. Further, Dr. Hughes' consistent and recent QME reports contain substantial evidence of applicant experiencing one cumulative injury. (Ex. DD, QME Report by Dr. Hughes, dated 9/19/19, p. 10; Ex. EE, QME Report by Dr. Hughes, dated 11/21/19, p. 2; Ex. FF, QME Report by Dr. Hughes, dated 3/8/21, p. 2; Ex. GG, QME Evaluation Report by Dr. Hughes, dated 8/9/21, pp. 7-8; Ex. HH, QME Supplemental Report by Dr. Hughes, dated 1/25/22, p. 1; Ex. II, Deposition of Dr. Hughes, dated 3/8/21, pp. 34-35.) Therefore, based on the substantial evidence of Dr. Hughes' reporting, applicant sustained one cumulative trauma with her last date of injurious exposure as her last day of work, July 28, 2013.

II. Date of Injury

"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'*

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 she had symptoms, defendant has not met its burden to show that she knew that her injury was job-related until she discussed this issue with her attorney on August 12, 2013. (MOH/SOE, pp. 7, 9.) Therefore, the date of injury is August 12, 2013, the date when applicant first became aware that her disability was industrial after speaking to her attorney. 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.)

Since the date of injury is August 12, 2013, applicant's claim is not barred by the statute of limitations (Lab. Code, § 5405(a)-(c)) or the post-termination defense (Lab. Code, § 3600(a)(10)(d)) and her disability shall be rated based on that date of injury. (Lab. Code, § 4661(b).)

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration of the July 19, 2023 Findings, Award & Order are **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, July 19, 2023 Findings, Award & Order is **RESCINDED** and the following Joint Findings and Order in ADJ9176726 and ADJ11233844 is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. While employed as an embryologist during the period up to July 28, 2013, applicant was employed by Northern California Fertility Medical Center as an embryologist and sustained injury arising out of and occurring during the course of employment to her back. The issue of injury to other body parts is deferred.
2. Pursuant to Labor Code section 5412, the date of injury is August 12, 2013.
3. All other issues are reserved and deferred.

ORDER

The parties are ordered to adjust benefits according to the Findings of Fact and Award referenced above. WCAB jurisdiction at the trial level is reserved in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 2, 2023

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

ANN FILBY
EASON & TAMBORNINI
PEARLMAN, BROWN & WAX, LLP
SCHLOSSBERG & UMHOLTZ
OFFICE OF THE DIRECTOR-LEGAL UNIT

JMR/*ara*

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