WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JULIA ENGEN, *Applicant*

vs.

CITY OF IRVINE, Permissibly Self-Insured, Administered By ADMINSURE, *Defendant*

Adjudication Numbers: ADJ11289453
Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact of February 4, 2021, wherein it was found that applicant's claim is not barred by the statute of limitations. In this matter, applicant claims that, while employed as a police officer during a cumulative period ending on August 13, 2012, she sustained industrial injury in the form of cancer, specifically squamous cell carcinoma of the anus.

Defendant contends that the WCJ erred in finding that applicant's claim was not barred by the statute of limitations. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will deny reconsideration for the reasons stated by the WCJ in the Report quoted below. As explained following the quoted passage, we do not incorporate one small portion of the Report. We incorporate the following from the WCJ's Report:

I. INTRODUCTION

1.	Date of Claimed Injury:	4-18-1994 – _8-13-2012
2.	Identity of Petitioner:	Defendant
3.	Timeliness:	The petition was timely filed on 2-26-2021
4.	Verification:	The petition was verified.
5.	Date of Issuance of [Order]:	2-4-2021

6. Petitioner's contentions: The WJC erred with her finding that applicant's claim is not barred by the statute of limitations in California Labor Code §5405 et seq.

II.
STATEMENT OF FACTS

Applicant, while unrepresented, filed a DWC-1 Claim Form dated December 20, 2012 alleging industrial injury in the form of "internal cancer – anus, rectum, ovary, lymphnodes [sic]." The date of injury on the DWC-1 Claim form is "Diagnosis 8-13-12"; the employer was notified of the injury on August 20, 2012 and provided the applicant with the claim form on that date; the claim form was returned by the applicant on December 20, 2012. (*See* EAMS Doc ID 34608489.) By way of correspondence dated March 18, 2013, defendant conditionally denied the claim pending a medical-legal examination. (*See* EAMS Doc ID 34608495.)

While still unrepresented, applicant attended a PQME evaluation with Dr. Charles Wisemen, M.D. on March 26, 2013. In his report of the same date (signed April 26, 2013) under "Discussion/Causation" Dr. Weisman opined that not only was he unable to define a precise date of injury, he was also unable to determine if applicant's squamous cell carcinoma of the anus was casually connected to her employment. (*See* EAMS Doc ID 34608487.) Thereafter by way of correspondence dated May 14, 2013 defendant denied the claim based on Dr. Wiseman's reporting. (*See* EAMS Doc ID 34608494.)

On April 24, 2018, applicant, through counsel, filed an Application for Adjudication of Claim for a cumulative trauma occurring during the period of April 18, 1994 through August 13, 2012 alleging injury to "880 other body systems", "toxic exposure and environmental carcinogens/cancer." (*See* EAMS Doc ID 26113263). There is no DWC-1 Claim Form on file in association with the pled cumulative trauma injury. On July 10, 2018, defendant filed an Answer to Application of Adjudication of Claim wherein the claim was denied AOE/COE. (*See* EAMS Doc ID 26743876.)

The singular issue presented for trial was whether applicant's claim is time barred per California *Labor Code* §5405. No witnesses were called to testify and the matter was submitted on the documentary record.

Applicant offered into evidence multiple medical reports and the deposition of PQME Charles Wiseman, M.D. authored/occurring after the date upon which the Application for Adjudication was filed. Defendant objected to the admission of said exhibits on the grounds that they were irrelevant to the singular question of whether the Application for Adjudication of Claim was untimely filed. The

exhibits offered by the applicant were deemed relevant to the statute of limitations analysis and they were therefore admitted into evidence.

After review of all of the documentary evidence submitted, this trier of fact was not persuaded that applicant had sufficient knowledge of her workers' compensation rights to give notice, report or assert a cumulative trauma claim in association with her squamous cell carcinoma of the anus until done so by way of an Application for Adjudication of Claim filed on April 24, 2018. Based thereon it was found that applicant's claim was not barred by the statute of limitations in California *Labor Code* §5405 et seq.

III.
DISCUSSION

Per *California Labor Code* §5412, the "date of injury" for purposes of determining the commencement of the limitations period in a cumulative injury case is the concurrence of compensable disability and the date of the employee's knowledge of the injury's industrial relationship. Determination of a section 5412 "date of injury" is therefore a two-part analysis: 1) when did the employee first suffer a compensable disability from a cumulative injury and; 2) when did the employee know or in the exercise of reasonable diligence should have known, that the compensable disability was caused by her employment. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th. 998.) Whether an employee knew, or in the exercise of reasonable diligence should have known, that the disability was caused by employment is a question of fact, and the employer bears the burden of proof. *(Nielsen v. Workers' Comp. Appeals Bd*. (1985) 50 Cal.Comp.Cases 104; *County of Riverside v. Workers' Comp. Appeals Bd. (Sylves)* (2017) 82 Cal.Comp.Cases 301, 305; *City of Los Angeles v. Workers' Comp. Appeals Bd. (Travers)* (2010) 75 Cal.Comp.Cases 148 (writ denied).)

As applicant was not called to testify at the trial, the Court was required to review all of the documentary evidence presented to determine if applicant knew, or in the exercise of reasonable diligence should have known, that her disability was work related more than a year prior to her filing the Application for Adjudication of Claim.

Applicant was re-evaluated by PQME Dr. Charles Wiseman on September 23, 2019, a re-evaluation that was scheduled based on the joint agreement of the parties. (*See* EAMS Doc ID 70656134.) The report of September 23, 2019 states in pertinent part:

"In my previous report, I discussed latency, some of the known epidemiology and pathophysiology of HPV (human papilloma virus) and expressed some hesitation to exclude or refute the presumption of industrial causation. In addition to the issues of direct carcinogenesis, an indirect process,

immunosuppression, deserves some attention. Many authorities consider development of cancer in general to be, by definition, a failure of the subject's immune resistance.

The previous report was in reference to an evaluation in March 26, 2013. The following year, in 2014, a fairly extensive review was published concerning human papilloma virus and immunosuppression … That review seems especially cogent in reference to the Applicant's cancer. Virtually everyone, at one time or another, has likely been exposed to papilloma virus, but anal cancer occurs very rarely: approximately 8000 new cases occur in the US each year, an incidence of less than one in a hundred thousand. Clearly, there must be some co-factor, fellow-traveler or contributing event or process. The writer opines that industry-related exposures impaired Officer Engen's immune resistance to the human papilloma virus and that impairment allowed the development of her anal cancer.

. . .

While I cannot prove in detail the mechanism leading to this cancer, it would seem to be extremely difficult to falsify that there was no relationship between the exposure to the virus, exposure to the immunosuppressants, and the ultimate development of carcinoma of the anus. Exposure to HPV is almost universal, anal cancer is extremely rare. I do not know how to disprove the notion that the Injured Worker's exposures to hazardous, carcinogenic, and immunosuppressive agents contributed to development of her cancer. **I opine that, in my considered medical opinion, the cancer is AOE/COE and is 100% industrially related.**" (emphasis added) (*See* EAMS Doc ID 34608486 under "Discussion/Causation".)

It was in this report that Dr. Wiseman found AOE/COE for the first time. Despite this, petitioner contends that applicant's education and occupation as an "Assistant Chief of Police for a major metropolitan city" would have given her the requisite knowledge to recognize the causal relationship of her injury and employment, even on a cumulative trauma basis, when she filed her claim form back in 2012.

In partial support thereof, petitioner offered into evidence Stipulations with Request for Award approved November 2, 2011 wherein applicant, while unrepresented, settled a cumulative trauma claim for injury to her neck. (*See* EAMS Doc ID 34663836.) [… .However], this WCJ found applicant's prior orthopedic cumulative trauma claim to be of little significance in establishing applicant's requisite knowledge of this cumulative trauma injury.

Dr. Wiseman, who is Board Certified in Internal Medicine and Medical Oncology was unable to determine that applicant's squamous cell carcinoma of the anus was industrially related until his report of September 29, 2019 and did

not opine that applicant sustained a cumulative trauma injury until his deposition on May 18, 2020. (*See* EAMS Doc ID at 11:2-21.)

If the medical expert responsible for determining AOE/COE was unable to determine industrial causation until 2019, this WCJ found it illogical to infer that the applicant possessed a more specialized level of medical expertise in 2013 to impute she had the requisite knowledge that her squamous cell carcinoma of the anus was industrial and was a result of a cumulative trauma injury. (If an employee forms an opinion that the disability may be job-related, but the opinion is dispelled by a physician, the employee will not be charged with knowledge. (*City of Garden Grove v. Workers' Comp. Appeals Bd. (Tucker)* (1995) 60 Cal.Comp.Cases 613 (writ denied); *Con J. Franke Electric v. Workers' Comp. Appeals Bd. (Alexander)* (2004) 69 Cal.Comp.Cases 792 (writ denied); *Technicolor v. Workers' Comp. Appeals Bd. (Minichiello-Smith)* (2014) 79 Cal.Comp.Cases 1581 (writ denied); *Gonzalez v. Jezowski & Markel Contractors, Inc.*, 2016 Cal. Wrk. Comp. P.D. LEXIS 348).)

IV.
CONCLUSION

The statute of limitations is an affirmative defense that operates to bar the remedy and not to extinguish the right of the employee. The burden of proof as to whether the claim is barred rests with the defendant. A defendant asserting that an employee's claim was not timely filed within one year from the date of injury has the burden of proof to show when the employee knew or should have known that the disability was caused by the industrial cumulative trauma. (*Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1110; *City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471, 474.)

The trier of fact is required to render an opinion based on evidence, not one based on argument or conjecture. While applicant may have believed her squamous cell carcinoma was connected to her employment back in 2012 this belief was refuted by the reporting of the PQME.

In fact, the evidence establishes that PQME Dr. Wiseman did not determine that applicant's squamous cell carcinoma of the anus was casually connected to her employment until his report of September 29, 2019 and did not find a cumulative trauma injury until his deposition on May 10, 2020. By this time, however applicant had already filed an Application for Adjudication of Claim.

Based thereon, and after a review of all of the documentary evidence submitted, this Court was not persuaded that applicant had sufficient knowledge of her workers' compensation rights to give notice, report or assert a cumulative trauma claim in association with her squamous cell carcinoma of the anus until done so

> by way of an Application for Adjudication of Claim filed on April 24, 2018. The petitioner failed to prove otherwise.

(Report at pp. 1-6.)

The only sentence of the Report which we have not incorporated is, "Actual knowledge of the 'potential eligibility for a particular injury' however cannot be proven by showing an injured worker's 'general awareness of the existence of the workers' compensation system" or "past experience with workers' compensation[.]' (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd. (Carls)* (2008) 163 Cal.App.4th 853, 860, referencing *Reynolds v. Workmen's Comp. Appeals Bd*. (1974) 12 Cal.3d 726, 729.)" This proposition is in apposite given that *Carls* dealt with what constituted "actual knowledge" of workers' compensation rights sufficient to stop the tolling of the statute of limitations for failure of the employer to provide the injured worker with notice of the injured worker's potential right to workers' compensation benefits. However, unlike that scenario, Labor Code section 5412 requires actual or constructive knowledge ("knew, or in the exercise of reasonable diligence ***should have known***. [Emphasis added.]) Indeed, the issue presented by defendant's Petition is whether applicant had constructive knowledge of her workers' compensation injury. In other words, whether she should have known. For the reasons stated in the Report, we agree that applicant did not have actual or constructive knowledge of industrial causation until she filed her application for adjudication of claim. Although applicant suspected an industrial injury, Dr. Wiseman expressly stated that he was unable to find industrial causation. In circumstances in which an expert opinion is solicited and the expert finds no industrial nexus, we cannot find that even a sophisticated injured worker had constructive knowledge of industrial causation.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact of February 4, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 27, 2021

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

JULIA ENGEN
GORDON, EDELSTEIN, KREPACK, GRANT, FELTON & GOLDSTEIN
BRIAN T. RILEY

DW/oo

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