WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AMADO SANCHEZ, *Applicant*

vs.

JACUZZI WHIRLPOOL BATH aka BATH ACQUISITION; AMERICAN HOME ASSURANCE, adjusted by GALLAGHER BASSETT *Defendants*

Adjudication Number: ADJ12382020
Pomona District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendants seek reconsideration of the Findings and Order (F&O) issued on September 27, 2023 by a workers' compensation administration law judge (WCJ), wherein the WCJ found that applicant's claim is not barred by the doctrine of res judicata and/or collateral estoppel; that applicant's claim is not barred by the statute of limitations; and, that applicant's claim is not presumed compensable.[1]

Defendant contends that applicant's cumulative trauma claim found to have a Labor Code[2] section 5412 date of injury in 2011 by an agreed upon medical evaluator (AME) is barred by the statute of limitations in sections 5405 and 5410; and, that applicant's 2011 cumulative trauma claim is barred by the doctrine of collateral estoppel pursuant to a 2015 Stipulations with Request for Award and Award which resolved two concurrent claims against the same employer and included the same 2011 cumulative trauma claim.

Applicant did not file an answer to the Petition for Reconsideration. The WCJ filed a Report and Recommendation recommending that the petition be denied.

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[1] The WCJ also made various evidentiary findings (Findings of Fact no. 1) and orders. Defendant does not raise the evidentiary findings or orders on reconsideration, and we therefore do not address them in this decision.

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

We have reviewed the record in this case, the allegations of the Petition for Reconsideration, and the contents of the Report. Based on the Report which we adopt and incorporate (except for section III. A. 2. from last ¶, p. 5 to first ¶, p. 7, and section III. B. 2. on p. 9), and for the reasons set forth below, we deny reconsideration.

We concur with the WCJ that applicant sustained a subsequent cumulative trauma injury for the period September 2007 through December 2008. (See *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227 [58 Cal.Comp.Cases 323] and *Aetna Casualty and Surety Co. v. WCAB* (*Coltharp*) (1973) 35 Cal.App.3d 329 [38 Cal.Comp.Cases 720].)[3] We therefore concur with the WCJ that applicant's current CT claim is not barred by the doctrine of claim preclusion[4] because the current CT claim does not involve the same cause of action as that in ADJ6967095.[5] (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 [2015 Cal. LEXIS 4652] [claim preclusion arises only when the second suit involves the same cause of action as the first between the same parties or those in privity after a final judgment].)

The WCJ is also correct that "if treatment is provided on an ongoing basis before and after the five-year anniversary of the date of injury, then Labor Code Section 5410 is simply inapplicable. Instead, the tolling continues pursuant to Labor Code Section 5405(c)." (Report, pp. 8-9.) Section 5405 (b) and (c) "operate to extend the time for filing original claims beyond the five-year limitation of section 5410 when benefits continue to be paid voluntarily, without award, beyond that five-year period." (*Sanchez v. Workers' Comp. Appeals Bd.* (1990) 217 Cal.App.3d

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[3] "There is but one cause of action for each injury coming within the provisions of this division. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such injury may, in the discretion of the appeals board, be joined in the same proceeding at any time; provided, however, that no injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury; nor shall any award based on a cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability, need for medical treatment or death." (Lab. Code, § 5303; see Lab. Code, §§ 3208.1, 3208.2.)

[4] "We have sometimes described 'res judicata' as synonymous with claim preclusion, while reserving the term 'collateral estoppel' for issue preclusion. (See *Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896 [123 Cal. Rptr. 2d 432, 51 P.3d 297] (*Mycogen*).) On occasion, however, we have used the term 'res judicata' more broadly, even in a case involving only issue preclusion, or collateral estoppel. (See *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813 [122 P.2d 892].) We are not the only court to sometimes use the term 'res judicata' with imprecision. (See, e.g., *Migra v. Warren City School Dist. Bd. of Ed.* (1984) 465 U.S. 75, 77, fn. 1 [79 L. Ed. 2d 56, 104 S. Ct. 892].) To avoid future confusion, we will follow the example of other courts and use the terms 'claim preclusion' to describe the primary aspect of the res judicata doctrine and 'issue preclusion' to encompass the notion of collateral estoppel..." (*Faerber, supra,* 61 Cal.4th at p. 824.)

[5] Res judicata, or claim preclusion is an affirmative defense and it was defendant's burden to establish its elements. (Lab. Code, § 5705.)

346, 352 [55 Cal.Comp.Cases 179], citing *State of California v. Ind. Acc. Com. (Busch)* (1962) 198 Cal.App.2d 818, 827 and *Subsequent Injuries Fund v. Industrial Acc. Com. (Ferguson)* (1960) 178 Cal.App.2d 55, 59-61.)[6]

Here, defendant does not appear to dispute that applicant continued to receive medical treatment for his neck under the stipulated award in ADJ6967095 through one year prior to filing the pending claim. Therefore, applicant's statute of limitations was tolled through one year prior to filing the pending claim under section 5405, subdivision (c), pursuant to the holding in *Plotnick v. Workers' Comp. Appeals Bd.* (*Plotnick*) (1970) 1 Cal.3d 622, 623-626 [35 Cal.Comp.Cases 13], based on the provision of medical treatment by an employer for an earlier injury that also provides treatment for a subsequent injury.[7]

Defendant implies that somehow the Supreme Court's holding in *Plotnick* did not survive enactment of section 5412, a statute which defines the date of injury for a CT injury. (Lab. Code, § 5412.) However, no matter what the section 5412 date of injury was for applicant's CT injury, the statute of limitations was *tolled* under section 5405, subdivision (c), as long as medical treatment was being provided by defendant for the earlier injury that also provided treatment for the subsequent injury, as stated above.

Moreover, *Plotnick* is still a citable case and we find no contrary published decision by the Supreme Court or any Court of Appeal. It is therefore controlling authority which the Appeals Board must follow. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377, 384, fn. 5.)

Accordingly, given that applicant's claim is not barred by claim preclusion or by the statute of limitations, we deny the Petition for Reconsideration.

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[6] *McDaniel v. Workers' Comp. Appeals Bd.* (1990) 218 Cal.App.3d 1011, 1017 [55 Cal.Comp.Cases 72] holds that, "Once the one-year limitation is tolled by the voluntary furnishing of benefits, the five-year rule of section 5410 is in turn triggered. (citation) In other words, after the voluntary furnishing of benefits, including medical treatment, section 5410 extends the period within which an original proceeding may be instituted from one to five years. (citations)" (*Id.*, at p. 1017.) "In other words, after the voluntary furnishing of benefits, section 5410 extends the period within which an original proceeding may be instituted from one to five years on the ground that the injury has resulted in further disability or a need for vocational rehabilitation. (citations) ... Subdivisions (b) and (c) of section 5405 operate to extend the time for filing original claims beyond the five-year limitation of section 5410 when benefits continue to be paid voluntarily, without award, beyond that five-year period. (citations) (*Sanchez, supra,* 217 Cal.App.3d, at p. 352.)

[7] In *Plotnick*, the Supreme Court found that "[i]t follows inevitably" that any medical treatment received from the employer during the CT injury period "must to some extent have been designed to relieve [the injured worker] from the effects" of the CT injury, even when the treatment "may also had as their purpose to relieve petitioner from the effects of the original injury." (*Id*. at pp. 625-626.) The Court therefore held that the claim was timely filed within one year of the provision of medical treatment for the CT pursuant to section 5405(c). (*Id*.)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued on September 27, 2023 by a workers' compensation administration law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 22, 2023

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

AMADO SANCHEZ
GRAIWER & KAPLAN
SIEGEL, MORENO & STETTLER

AJF/abs

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

STATE OF CALIFORNIA

Division of Workers' Compensation Workers' Compensation Appeals Board
CASE NO.: ADJ12382020

POMONA DISTRICT OFFICE

AMADO SANCHEZ	**vs.**	**JACUZZI WHIRLPOOL BATH aka BATH ACQUISITION; AMERICAN HOME ASSURANCE, adjusted by GALLAGHER BASSETT**
WORKERS' COMPENSATION JUDGE:		**ASHLEY L. ODOR**
DATE OF INJURY:		**CT September 2007-December 2008 (pled as 2/2/08-2/2/09)**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendant has filed a timely, verified Petition for Reconsideration, dated and received by the Pomona District Office on 10/23/23, appealing the Findings and Orders (F&O) and Opinion on Decision issued by the undersigned WCJ on 9/25/23. Said order was served by the Pomona District Office on 9/27/23, giving Defendant until 10/23/23 to petition for reconsideration, since the 25th day fell on a weekend.

This case involves an allegedly injured worker, Amado Sanchez, an electrical mechanic, Occupational Group Number 370, who was 55 years old on the last day of the CT period as pled. No body parts were specifically mentioned in the stipulations and issues, but according to the Application for Adjudication, which was filed on 7/19/19, Applicant allegedly injured his neck, shoulders - scapula and clavicle, hand - not wrist or fingers, wrist, both upper extremities, upper/lower back, internal, GERD, and urinary incontinence due to "continuous trauma."

The case first went forward to trial on the record on 6/21/23 and again on 7/19/23 for continuing testimony, at which time the matter was submitted. The three issues for the trial

were whether the case was barred by the doctrines of res judicata and/or collateral estoppel, whether the case was barred by the statute of limitations in Labor Code Sections 5405 and/or 5410, and whether the case was presumed compensable.

In its 9/25/23 decision, the court found that the case was not barred by the doctrines of res judicata and/or collateral estoppel because the case at bar, which was pled as a CT injury from 2/2/08-2/2/09, is a separate CT injury pursuant to the *Coltharp* case, and it was not included in the prior Stipulations with Request for Award in ADJ6967095, which were approved on 4/20/15, which settled a prior CT injury period pled from 1/1/06-1/31/07. The court also found that the case is not barred by the statute of limitations under Labor Code Section 5405 because, although the date of injury was found to be 1/5/11 per Labor Code Section 5412, and the application was not filed until 7/19/19, the Applicant was receiving ongoing medical treatment for his prior stipulated cases with overlapping body parts bringing this case under Labor Code Section 5405(c), which allows an application to be filed within one year of the last provision of medical treatment. Finally, the court found that the case was not presumed compensable because no DWC-1 claim form was admitted into evidence and none was filed at the time of the Application for Adjudication. The court also ordered various objectionable exhibits to be either admitted or excluded, and the court ordered the parties to complete any necessary discovery on all remaining issues. In its Opinion on Decision, but not in the F&O itself, the court also struck Defendant's 6/13/23 responsive trial brief.

Defendant contends that the court acted without or in excess of its powers, that the evidence does not justify the findings of fact, and that the findings of fact do not justify the order, decision, or award. Specifically, Defendant argues that, since the Opinion on Decision found the date of injury for this CT injury pursuant to Labor Code Section 5412 to be 1/5/11, then the case should be found barred by the statute of limitations in Labor Code Sections 5405 and 5410, as well as by the doctrine of res judicata. Importantly, Defendant does not dispute the court's opinion that this claim is a subsequent CT injury per *Coltharp.*

Either an answer has not yet been filed by Applicant, or it has not yet been uploaded into FileNet.

Based on the discussion below, the court recommends that the Petition be denied.

II

FACTS

Applicant physically worked at Jacuzzi Whirlpool Bath aka Bath Acquisition from 2004 until December 2008. He was ultimately laid off on 2/2/09. He originally filed two cases prior to the case at bar. These were ADJ6903677, a specific date of injury on 6/27/07, and ADJ6967095, a CT injury pled during the period of 1/1/06-1/31/07.

When the application for that CT injury was filed on 10/8/09, the claimed body parts, per the e-cover sheet, were originally 850 RESPIRATORY SYSTEM - (lungs, trachea, etc.) and 999 UNCLASSIFIED - insufficient information to identify body parts. It was not until the case settled via Stipulations with Request for Award on 4/21/15 that the body parts for that CT injury were amended to reflect only the neck as an injured body part.

As for the specific date of injury of 6/27/07, the application was filed on 2/20/09 alleging a specific date of injury to 850 RESPIRATORY SYSTEM - (lungs, trachea, etc.), 842 NERVOUS SYSTEM - Psychiatric/psych, and 999 UNCLASSIFIED - insufficient information to identify body parts. The alleged cause was constant exposure to chemicals. By the time, the specific injury case settled via Stipulations with Request for Award on 4/21/15, the body parts were amended to reflect the neck, psyche, bilateral upper extremities, and back/spine.

On 7/19/19, Applicant filed the application for the current case, a CT injury pled during the period of 2/2/08-2/2/09. The body parts alleged were neck, shoulders, hand, wrist, and multiple, though none of these were specifically mentioned in the stipulations and issues at the trial.

Shortly after Applicant's specific date of injury on 6/27/07, Applicant had neck surgery on 6/29/07 and was off work for several months after this. Per AME Dr. Berman, Applicant was on TTD for 10 weeks. Applicant continued to receive treatment during his time off. He then returned to work in late September or early October 2007 doing his full, regular duties despite restrictions being recommended, according to Dr. Berman, which worsened his symptoms.

The settlement papers for the CT injury indicate the period being settled was 1/1/06-1/3/07. There is also a passage in paragraph 9 on p. 7 of the Stipulations with Request for Award that initially stated "Applicant stipulates that the only injury he alleges to have suffered

at Jacuzzi Whirlpool Bath/Bath Acquisition is the injury included in this settlement agreement." However, this passage was crossed out prior to the award being issued. Also, the settlement papers do not directly refer to Dr. Wakim's cross-examination on 1/5/11. Instead, they specifically mention Dr. Wakim's 12/17/09 report, which does not say that Applicant suffered a CT injury until his last day of work. The papers also mention AME Dr. O'Brien's 2/8/10 report, and Dr. Hyman's 10/4/10 report, neither of which establish a CT as to the neck.

Dr. Wakim opined in his 1/5/11 cross-examination that Applicant had injurious exposure until his last day of work, which would have been in December 2008. He did not say whether there was only one CT injury, or whether there were two CT injuries. He was silent on that issue. On p. 18, where he opines that the period of continuous trauma will be from when Applicant first felt symptoms on 1/1/06 through the last day of his employment, he was responding to a line of questioning about apportionment between the two existing claims—one a CT, and the other a specific—under *Benson*.

In contrast, AME Dr. Berman specifically finds a subsequent CT injury on p. 140 of his 6/1/21 report. Dr. Berman's extensive record review also reveals that Applicant received ongoing treatment for his neck from 2011 until the application for his subsequent CT injury was filed in 2019.

III

DISCUSSION

A. THIS CASE IS NOT BARRED BY RES JUDICATA AND/OR COLLATERAL ESTOPPEL

1. This case is a separate cause of action

Res judicata and/or collateral estoppel do not apply to bar this case because it is not the same cause of action as the prior CT pled as 1/1/06-1/31/07 (ADJ6967095) which settled via stipulated award on 4/20/15. The court found in its Opinion on Decision pursuant to *Aetna Casualty and Surety Co. v. WCAB (Coltharp)* (1973) 38 CCC 720, that the case at bar is actually a subsequent CT injury running from September 2007 through December 2008, whereas the previously settled CT injury was for the period of exposure running from 1/1/06 through June 2007, at which time Applicant had surgery, was placed on disability, and was off

work for about three months before returning to his regular work duties in September 2007. It is axiomatic that a subsequent CT injury is not the same cause of action as a prior CT injury. Separate dates of injury cannot be merged pursuant to Labor Code Sections 3208.1, 3208.2 and 5303. Defendant does not dispute the court's opinion that there are two CT injuries.

Defendant argues on p. 8, line 26 that "Res judicata or claim preclusion also precludes re-litigation of claims which "were litigated, or could have been litigated, in a prior action." It does not bar workers' compensation claims that involve new injuries that could not have been litigated or settled in the prior injury claim." (Emphasis by Defendant in original removed.) Although res judicata has been held to bar claims that could have or should have been litigated in a prior case, that principle simply does not apply where there are two dates of injury constituting separate causes of action. It is thus unpersuasive to argue that the subsequent CT injury claim is barred because it could have been litigated at the same time as the earlier filed cases. Defendant's argument would only be persuasive if we were dealing with just a single date of injury, where certain aspects of the injury should have been raised in the initial litigation but which were not.

Following Defendant's logic, if an injured worker has multiple dates of injury but has only filed an application for one date of injury, and then is examined by an AME who opines that the worker has several industrial dates of injury, and then the worker settles just the one case for which an application was filed without filing applications for the other dates of injury and without mentioning them in the settlement papers, then the other cases will always be barred by res judicata because the worker "could have or should have" litigated the other injuries at the same time as the settled case. That simply is not the law, nor should it be. There could be a plethora of legitimate reasons why an application is not yet filed for other existing industrial dates of injury, and it would be absurd to require injured workers to file applications for all known dates of injury prior to settling a single date of injury. Thus, if the Commissioners agree that there are two CT injuries here, then Defendant's res judicata and/or collateral estoppel argument must fail.

[III. A. 2. Omitted]

B. THE CASE IS NOT BARRED BY THE STATUTE OF LIMITATIONS

1. The subsequent CT injury was filed within one year after the last provision of treatment pursuant to Labor Code Section 5405(c)

The subsequent CT injury must have been filed within the time deadlines in Labor Code Section 5405. The court was persuaded by Applicant's argument in their trial brief, consistent with the *Plotnick* case, that when treatment is provided for an injury that settled via stipulated award and Applicant has another unfiled date of injury for the same body part, when he gets treatment under the stipulated award he is also getting treatment on the unfiled case for purposes of Labor Code Section 5405(c). Applicant was still getting treatment for the neck under his stipulated award in ADJ6967095 less than a year before the Application for Adjudication was filed in the case as bar for the same body part. Thus, the claim is not barred under Labor Code Section 5405.

Defendant argues somewhat confusingly that the claim was previously time-barred and that "compensation paid after the statute of limitations has expired does not revive a stale claim." What is not explained by Defendant is exactly how the claim was time-barred prior to the provision of the ongoing treatment for the neck. Defendant has the burden of proof on this issue. In the case cited by Defendant, *Khaimchaev v. L.A. County*, 2018 Cal. Wrk. Comp. P.D. LEXIS 557, the WCJ was reversed after finding that benefits paid to the Applicant *after* an untimely application was filed revived the applicant's claim. Here, on the other hand, medical treatment was provided to Applicant's neck *before* the Application was filed in 2019.

Defendant also confusingly argues that the *Khaimchaev* case found that "when a defendant provides medical treatment benefits knowing of a potential claim for workers' compensation benefits, per the provision of treatment per the one-year limitations period of Labor Code section 5405(c), it will also trigger the five-year period of Labor Code section 5410 running from the date of injury." Defendant thus appears to argue that, since the court has found the date of injury here to be 1/5/11, that the case is barred by the five-year statute regardless of whether medical treatment was provided less than one year before the application was filed under Labor Code Section 5405(c). However, the *Khaimchaev* case did not say that. Footnote no. 2 in that case did refer to the case of *McDaniel v. WCAB* (1990) 55 CCC 72, and the footnote explained that "absent *further tolling*, the last day for applicant to file an application for adjudication of claim in case ADJ8713579 was August 23, 2012." (Emphasis added by the undersigned.) This would have been exactly five years after the date of injury in the *Khaimchaev* case, which was 8/23/07. Again, it must be stressed that if treatment is provided on an ongoing basis before and after the five-year anniversary of the date of injury,

then Labor Code Section 5410 is simply inapplicable. Instead, the tolling continues pursuant to Labor Code Section 5405(c).

[III. B. 2. Omitted]

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

Ashley L. Odor
WORKERS' COMPENSATION JUDGE

DATE: NOVEMBER 9, 2023