WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUANA LEYVA, ***Applicant***

vs.

MILLENEUM BILTMORE HOTEL;
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
ADMINISTERED BY BROADSPIRE,
Defendants

Adjudication Number: ADJ10353716
Van Nuys District Office

OPINION AND ORDER
DENYING PETITION FOR
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 in part, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 6, 2023

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

JUANA LEYVA
SCHUMMER, ROLBIN & HURST
GOLDMAN, MAGDALIN & KRIKES

LN/pm

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Defense counsel has submitted a timely Petition for Reconsideration in the above noted claim. Defendant, Millennium Biltmore Hotel, timely files a Petition for Reconsideration of the Opinion on Decision and Findings of Fact and Award filed by the Workers' Compensation Appeals Board on 11/18/2022 upon the following grounds:

A. By the Order, Decision, and Award made by the Workers' Compensation Judge, the Workers' Compensation Judge acted without or in excess of his powers.

B. That the evidence does not justify the Findings of Fact.

C. That the Findings of Fact do not support the Order, Decision or Award.

The issue was whether the Applicant was barred by the Statute of Limitations had run, based on the timing of when she knew or should have known that her condition was work related.

As a history, it is noted that Applicant did claim a work related injury to her head, cervical spine and right upper extremity, including elbow, wrists, hands, elbows, arms for the period 12/01/2006 through 12/16/2008 in prior claim ADJ6746882. That matter proceeded to trial. This court takes judicial notice of the Finding and Award, Opinion on Decision dated 03/22/2012 (EAMS ID 40378885) finding injury only to the right elbow. The Finding of that Workers' Compensation Judge was that Applicant did not sustain injury to the head, or any other part of the right upper extremity, or to the left upper extremity.

At that time, the WCJ relied up on the findings of the PQME, Timothy Ross, MD. The PQME, at that time determined in various reports, that the Applicant's complaints then were diffuse and non-organic in nature. PQME, Timothy Ross, MD determined the complaints were migratory, polysomatic and not industrially related (Finding and Award, Opinion on Decision dated 03/22/2012 -EAMS ID 40378885 page 4 of 7 [page 2 of the Opinion on Decision]).

The Petitioner asserts that the Applicant had knowledge that the conditions were industrially related when she filed the Application for Adjudication two and one-half years after her last day of employment.

The Petitioner asserts that the Findings of Fact and Award disregard the Applicant's testimony at trial. At the time that the WCJ found her other body parts to be non-industrial the Applicant has good cause to believe that her symptoms to the neck, either shoulder, right upper extremity, other than the elbow, and the left upper extremity were not work related.

When looking at the Labor Code, LC 3208.1 provides that 11 [t]he date of a cumulative injury shall be the date determined under Section 5412." California Labor Code Section 5412 identifies the date of injury in cases of occupational diseases or cumulative injuries as 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.

In the case of *City of Fresno v. WCAB (Johnson)*, (1985) 50 CCC 53 an employee suffered from chest pain and "began believing" that the condition was industrial without the advice of a medical expert. The employer had him examined by a physician who opined that the condition was not caused by the employment. More than a year later, employee filed his claim for workers' compensation benefits. The Court of Appeal held that the employer failed to meet its burden that the employee knew or should have known that the disability was job-related. The court reasoned that the employee did not have knowledge under LC 5412, even though he formed the belief that the condition was industrial, because his belief was not based on medical advice, and because the only medical opinion determined that the disability was not job-related. The court stated, "[A]n applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and the applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." City of Fresno v. WCAB (Johnson) (1985) 50 CCC 53, 57-58.

The "*Johnson*" case (ibid) is very similar to the present case. She had a prior opinion that she did not have true conditions. Moreover, now she has medical evidence to the contrary. The Applicant may have been able to file up to the date of the PQME. She filed before then upon the advice of an attorney to file to complete discovery on the issue.

Sullivan on Comp also references *Hampton v. WCAB* (2001) 66 CCC 1269 (Court of Appeal opinion unpublished in official reports) (applicant not charged with knowledge until a medical opinion confirmed industrial causation); *City of Oxnard v. WCAB (Ball)* (2003) 68 CCC 1196 (writ denied) (applicant had no knowledge of employment connection to carpal tunnel injury until she was informed by a physician; there was no evidence that applicant possessed qualifications or training to recognize the connection); *Zenith Insurance Co. v. WCAB* (Williams) (1997) 62 CCC 448 (not published in official reports) (applicant was told in 1994 about his back condition, but did not know it was work related until years later); *International Paper Co. v. WCAB (Benato)* (1981) 46 CCC 503 (applicant suspected that his hearing loss was work related but was not informed of the nature of his injury until 15 years after he stopped working); *Hosepian v. Los Angeles Unified School District,* 2012 Cal. Wrk. Comp. P.D. LEXIS 295 (injured worker's suspicion that injury is work related

insufficient to establish date of injury on a cumulative injury); *Garcia v. Atlanta Braves*, 2021 Cal. Wrk. Comp. P.D. LEXIS 97 (no evidence applicant had training to identify industrial nature of his developing injuries); *City of Pasadena v. WCAB (Tucker)* (2021) 86 CCC 1015 (writ denied) (police officer did not have special training or knowledge to recognize injury).

Up to the 03/12/2012 Findings and Order, I would say that there was reasonable diligence to determine whether the Cumulative Trauma through 2008 was industrial. However, WCJ Davidson-Guerra determined, based on the evidence, that the condition was NOT industrial. The WCJ based her determination on review and weight of the evidence to the treating doctors and the PQME, Dr. Ross. The same PQME that was utilized for the present claim. At the point that her condition was found non-industrial by the WCJ, despite the opinions of the treating doctors, Applicant had no good cause to determine her complaints were industrial.

However, just as in the case of *City of Fresno v. WCAB (Johnson)(Ibid)* even though she "believed" that the condition was industrial, she did not have reliable medical evidence of that "belief'. At least not until that same PQME said that due to the change of circumstances, her condition was due to the new cumulative trauma.

When the Applicant filed the Application, she only had medical from the prior PTPs ongoing reports, which were not given greater weight than the PQME in the prior claim. Still, those prior PTPs reference the original cumulative trauma as the cause on injury, rather than any reference to a new and further condition. Thereafter, the Applicant continued employment through 09-13-2013. Applicant continued treatment on a non-industrial basis through Kaiser.

We must next determine when the Applicant "first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by present or prior employment."

The parties returned to Timothy Ross, MD as Orthopedic PQME. This makes sense as the same parties relied upon the decision of Dr. Ross in that prior claim. It would be logical for the parties to utilize the same PQME to determine whether the Applicant's conditions, which increased to the point that the applicant proceeded to surgery.

[] The Applicant den[ies] knowledge of an industrial condition through the time of her Application and up to the time of the new PQME evaluation. Again, the prior medical findings of PQME Ross and the Workers Compensation Judge found similar conditions as non-industrial. This is a special case of a new conditions following additional periods of employment. Further, she treated for these conditions well after stopping her work time with the employer.

The Defense does not present any sort of evidence setting forth any intervening notice regarding the industrial elbow to have her question whether her post determination employment could have caused this increased condition.

The Defense will argue that the Applicant had knowledge of industrial causation from the reporting of Pain Control Solutions/Dr. Capen (Defense Exhibit D). The Applicant did continue to treat after the finding of non-industrial causation. However, Dr. Capen's reports still noted the date of injury to the prior cumulative, and does not indicate a new condition.
The Kaiser records offered in Defense Exhibit E likewise show[s] treatment. However, there is no reference to a work related injury.

The Defense offers the records of Timothy Hunt, MD (Defense Exhibit C). I look at the report of Dr. Ahn (Defense Exhibit C, page 67 of 250). This still indicates treatment from the initial cumulative trauma case, and prior to the determinations of the WCJ that the conditions are not industrial.

Naturally, the records of Dr. Ross (Defense Exhibit B) reference the cumulative trauma through 2008. The record indicates that the conditions, other than the right elbow, were non-industrial.

Based on the evidence provided, Applicant did not know of her present condition being caused by a new industrial cumulative trauma until she had medical confirmation by the State Panel Qualified Medical Evaluator. Therefor there was no running of the Statute of Limitations.

As the Statute has not run, the Application was not late. The Carrier had been ordered to commence benefits in this matter.

The issue of whether the 07/20/2021 report (Court Exhibit X) and the 11/15/2021 deposition transcript pf the PQME (Court Exhibit Y) is substantial medical evidence is actually more of a red herring. The real issue is whether the Applicant had knowledge that her condition was industrial. Knowledge began when the PQME that all parties relied upon at the 2013 trial made a new determination as to causation of new conditions, evidenced by his review of the medical record available to him at the time of the 07/20/2021 evaluation. The Applicant then had knowledge that the condition was industrial.

Finally, as to the issue of res judicata. It is noted that the applicant continued to work after the original injury. She continued to work until the time of her neck surgery. A new period of cumulative trauma was claimed. The PQME, Dr. Ross found a new cumulative trauma. The Applicant could not know whether the PQME was going to find the condition was due to the old non-industrial condition, or a new cumulative trauma until the PQME provided his opinion on such.

In addition, as this is a new period of employment, working with that prior condition, a different cause of action, with different facts, there is no prior ruling as to the second cumulative trauma, and therefore not "res judicata".

RECOMMENDATION

It is the recommendation of this WCJ that the Petition for Reconsideration be DENIED.

DATED: 12/13/2022

Jeffrey Marrone
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE