

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

KATIA PEREZ, *Applicant*

vs.

**VIP COMMUNITY MENTAL HEALTH CENTER;
NOVA CASUALTY COMPANY, as administered by GALLAGHER BASSETT
SERVICES; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA;
REDWOOD FIRE AND CASUALTY INSURANCE COMPANY,
dba BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ11525434
Los Angeles 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, 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/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 12, 2023

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

**KATIA PEREZ
LAW OFFICES OF SOLOV & TEITELL
FISHER LAW
WOOLFORD ASSOCIATES
LAW OFFICES OF KAPLAN & BOLDY**

JMR/pc

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

I.
INTRODUCTION

1. Applicant's Occupation: Date Entry Operator (Group No. 112)
Applicant's Age: 33 at time of injury
Date of Injury: 06-09-2014-06-06-18
Parts of Body Injured: Psyche
Manner in Which Injury Occurred: Harassment by supervisor
2. Identity of Petitioner: Travelers Property Casualty Co. of America
Timeliness: The petition was filed timely.
Verification: The petition is verified.
3. Date of Issuance of Findings and Order: October 20, 2022
4. Petitioner Contents: 1. The findings of fact does not justify the opinion of the Worker's Compensation Judge (WCJ).

II.
FACTS

The following findings of fact have been determined by the trial court from reviewing the entire record.

Katia Perez worked for VIP Community Mental Health Center (VIP) as a data entry operator from June 9, 2014, thru June 6, 2018. (SOE page 3, 9/7/22 trial) She was put on psychiatric disability by Dr. Nerenberg starting on February 23, 2018 due to "severe anxiety, depressed mood, panic attacks, insomnia, fatigue, concentration plus memory impairments, severely worried." (Applicant Exhibit 7, page 48-50). She remained off worked from February 23, 2018 through May 1, 2018. She returned back to work from May 1, 2018 to June 2018. She went off work again from June 6, 2018 until she resigned on April 1, 2019. (SOE, page 5, lines 12-25).

When she returned back to work from May 1, 2018 to June 2018, she faced the same stressful conditions. (SOE, page 6, line 1).

Although Applicant testified to being taken off work by a Dr. Dean for stress in 2015, then again in 2017 and 2018, there was no medical evidence to substantiate this. The only evidence presented of Applicant first being put on disability for stress are the records from the Nerenberg Institute (Applicant's Exhibit 7). Those records indicate Applicant was certified for EDD benefits starting on February 23, 2018 through May 1, 2018 by her personnel physician Dr. Nerenberg. She was diagnosed with ICD Diagnosis Code: F41.1, F33.2 and F41.0. (Applicant's Exhibit 7, page 48-50). She was released to go back to work

on May 1, 2018. (Applicant's Exhibit 7, page 10, 17, 48). The reason given for the disability is stated as "severe anxiety, depressed mood, panic attacks, insomnia, fatigue, concentration plus memory impairments, severely worried." (Applicant's Exhibit 7, page 48-50) She was put back on disability on June 6, 2018 by Dr. Nerenberg with the same diagnose and same reasoning as previously given "extremely anxious, depressed affect, panic attacks, insomnia, fatigue, concentration and memory impairments, failure to enjoy life, extremely worried." (Applicant's Exhibit 7, page 4-9) She was continued on disability from June 6, 2018 through October 16, 2018. (Applicant's Exhibit 7, pages 4-9). Dr. Nerenberg prescribed individual psyche therapy. (Applicant's Exhibit 7, page 14, 49).

Later, she started to treat with Dr. Curtis who on October 10, 2018, diagnosed her with F32.9 Major Depressive Disorder, Single Episode; F41.1 Generalized Anxiety Disorder; F54 Psychological Factors Affecting Medical Condition and she was placed on Temporary Total Disability. (Applicant's Exhibit 5).

The Applicant was evaluated by Psych Panel Qualified Examiner (PQME), Dr. Diana Payne. On April 12, 2019, Dr. Payne, diagnosed Major Depressive Disorder, Single Episode, moderate in severity and Anxiety Disorder, NOS, with Panic Features moderate in severity. (Joint Exhibit AA, page 56) She indicated that Applicant was temporarily disabled from February 23, 2018 to May 1, 2018 and from June 6, 2018 and continuing until April 1, 2019. (Joint Exhibit AA, page 53) Dr. Payne stated "I pointed out that in the case of Katia Perez, there was no psychological treatment and there were no work modifications or claims of work impairment prior to February 23, 2018. Thus, I found it was reasonable to conclude that there was no indication of permanent psychological disability prior to February 23, 2018. (Joint Exhibit DD, page 6) Dr. Payne acknowledged that Ms. Perez's problems at work started a little after her new supervisor, Allison Foster, came on board on October 31, 2017. (Joint Exhibit AA, page 16 - 19). This includes the aggregate and combined effects of a perceived hostile work environment, time clock issues, including micromanagement, excessive scrutinizing, and specific incidents of May 4, 2018 and May 22, 2018. (Joint Exhibit AA, page 64, 78). However, when asked about the date of injury and liability of the period of CT by defendant, Dr. Payne stated "I find no reason to disagree with the Defendant's position that the date of injury for the cumulative trauma would be February 23, 2018, the date that compensable temporary disability appears to have been first established."

Based on the above facts, this court found the date of injury per Labor Code Section 5412 is February 23, 2018, and since liability dates back one year from either the date of injury, or the last date of injurious exposure, whichever occurs first, the continuous trauma period is from February 23, 2017 through February 23, 2018 per Labor Code Section 5500.5.

The parties have stipulated that at the time of injury, the employee's workers' compensation carriers were Redwood Fire and Casualty Insurance Company dba Berkshire Hathaway Homestate Companies from April 15, 2018 to June 6, 2018; Nova Casualty administered by Gallagher Bassett from April 15, 2017 to April 15, 2018; and Travelers Property Casualty Company from April 15, 2016 to April 15, 2017.

The parties further stipulated that the only issue before this court is date of injury per Labor Code 5412 and whether liability for the cumulative trauma injury should be from June 6, 2017 to June 6, 2018 and pursuant to Labor Code Section 5500.5.

III. **DISCUSSION**

Petitioner Travelers contends that the findings of fact is not supported by the evidence. Petitioner is mostly correct in that the evidence from the medical experts do state that the period of injurious exposure is from October 31, 2017 to June 6, 2018. However, in looking at her history of injury as reported to the medical experts, October 2016 is when her new supervisor, Allison, first started. According to the Applicant, at first the issues were manageable, but by October 2017, she began to worry about her situation.¹ In 2016, she had a lot of back and stomach issues. In 2017, she started developing right wrist, low back and neck pain. She reported it to her supervisor in 2017 and was referred to occupational clinic. She started wearing a brace and was referred to physical therapy. She attributed this to hostile work environment as well as gradual development due to prolonged sitting, repetitive typing and non-ergonomic work station.² She testified at trial the harassment continued until she resigned from her job, with a brief break when she was put on temporary disability from February 23, 2018 to May 1, 2018.

Labor Code §3208.1 states: An injury may be either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) "cumulative," occurring 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. The date of a cumulative injury shall be the date determined under Section 5412.

Pursuant to Labor Code §5412: The date of injury in cases of occupational

¹ Petitioner's reference to Applicant's Deposition Transcript pages 23, 39-40 is not found and was never entered into the evidentiary record. In fact, the only exhibit introduced by Travelers is Exhibit E, which only contains page 38 of Applicant's deposition transcript. Rather, this court found this information from the medical report of Dr. Payne in her review of History of Present Illness and Events Related by Applicant. (Joint Exhibit AA, pages 14 - 21; Exhibit BB, pages 16-23).

² QME report from Dr. Richard Rogachefsky dated July 9, 2021 (Joint Exhibit HH, pages 3-4)

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.

In *SCIF v. WCAB (Rodarte)*, (2004) 119 Cal. App. 4th 998, 69 Cal. Comp. Case 579, the Court of Appeal held that the date of injury under §5500.5 requires compensable temporary disability (TD) or permanent disability (PD). In *Rodarte*, the Appeals Court explained that either compensable temporary disability or permanent disability is required to satisfy §5412, that because actual wage loss is required for TD, modified work alone is not sufficient basis for compensable TD, but it may be evidence of compensable PD, as may a need for splints and modified work. *Rodarte* at 584. The court conclude that these are questions for the trier of fact to determine and may require expert medical opinion. *Id.* at 584.

In the instant case, Ms. Perez was first put on compensable TD on February 23, 2018 when her personal physician, Dr. Nerenberg took her off work for work related stress. (Applicant's Exhibit 7). Dr. Nerenberg completed an EDD form certifying her for disability benefits and took her off work due to "extremely anxious, depressed affect, panic attacks, insomnia, fatigue, concentration and memory impairments, failure to enjoy life, extremely worried" and he indicated this disabling condition is caused and/or aggravated by work. (Applicant's Exhibit 7, pages 48-50, 59). Based on the medical evidence submitted, this was the first indication we have that she suffered disability and knew that her disability was caused by her work. In other words, the concurrence of disability and knowledge that her symptoms were work related occurred on February 23, 2018. Thus, the date of injury as defined by §5412 is February 23, 2018.

This is support by the opinion of the Psyche PQME, Dr. Payne, who found the first date of compensable TD to be February 23, 2018, because this was the first time she was taken off work psychologically and after reviewing her entire medical file, Dr. Payne concluded that there was no psychological treatment and no work modification and no work impairment prior to February 23, 2018. (Joint Exhibit DD, page 6).

Pursuant to Labor Code §5500.5: (a) Except as otherwise provided in §5500.6, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to §5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupation disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease or cumulative

injury shall be decreased by one year so that liability is limited in the following manner: For claims filed or asserted on or after: The period shall be:

- January 1, 1979 three years
- January 1, 1980 two years
- January 1, 1981 and thereafter one year

Essentially, per Labor Code §5500.5, liability for a cumulative trauma (CT) dates back one year from either the date of injury as defined by Labor Code §5412 or, date of last injurious exposure, whichever occurs first. As discussed above, the date of injury, as defined by §5412 is February 23, 2018. The date of last injurious exposure is June 6, 2018 since that was the last date she worked. However, February 23, 2018, occurred prior to the date of last injurious exposure. In applying §5500.5, going back one year from the date of injury would make the CT period from February 23, 2017 to February 23, 2018. Thus, the CT period as defined by Labor Code §5500.5 is February 23, 2017 to February 23, 2018.

Travelers takes the position that the CT period should be from October 31, 2017 to June 6, 2018, based on Applicant's testimony and the medical reports that October 31, 2017, is when her work problems first began. While there is some logic to Traveler's position and it is supported by the medical opinions from internal PQME Dr. Nasoud Azizad (Joint Exhibit FF, page 3) and orthopedic PQME Dr. Richard Rogachefsky (Joint Exhibit II, page 6). However, this is not the law on defining date of injury.

The date of injury is up to the trier of fact, to be determined pursuant to §5412 and §5500.5. Ms. Perez's work problems started in October 2016, when the new supervisor came on board. She was not put on disability at that time. There is no evidence that she suffered any work-related disability until February 23, 2018. This is the first indication we have from the evidentiary record that she was put on disability for work related stress. This is the date when Applicant legally knew she had an industrial injury. In our case, although Applicant testified to being put out on disability by Dr. Dean, no records were submitted from Dr. Dean. (SOE, September 7, 2022, page 4) Thus, the disability component of §5412 is not met until February 23, 2018.

In *Ferguson*, the WCAB stated, "in our view the determining factor, ... is not the date of the employment, but the date or dates upon which the employment-caused disability or need for treatment occurs. *Ferguson v. City of Oxnard*, (1970) 35 Cal. Comp Cases 452, 456. "We are further persuaded that the word "disability" used in the Section 3208.1 proviso to define the "date of cumulative injury," connotes compensable disability. *Id. at 457*. In *Ferguson* the WCAB explained "This is so because the proviso of Labor Code Section 3208.1 defines the date of a cumulative injury as the date of disability caused thereby. Thus, it may be that an employee's activities have given rise to the occurrence

of a separate injury and thus the accrual of a right of action, in that the activities or their cumulative effect have caused a need for medical treatment. However, if the employment activities have not yet caused 'disability,' there has been no 'date of injury' as defined by the proviso of Labor Code Section 3208.1 ... " *Id.* At 457-458.

Travelers contends that the cumulative trauma should be from October 31, 2017 to June 6, 2018. We agree with Travelers that is the period of injurious exposure. However, period of injurious exposure is not the only criteria used in defining date of injury for a CT claim. If we follow Travelers logic that would mean we are finding that the date of last injurious exposure is June 6, 2018. Although that may be true. However, pursuant to Labor Code §5500.5 liability for a cumulative trauma (CT) dates back one year from either the date of injury as defined by Labor Code §5412 or, date of last injurious exposure, whichever occurs first. By requesting that we base our finding on the date of last injurious exposure, Travelers is leaving out a very significant part of §5500.5 which states "whichever occurs first."

In *City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal. 3d 371, the Supreme Court discussed the evolution of §5500.5 since its enactment in 1951. "As originally enacted, the section provided that an employee claiming benefits for an occupational disease could recover against any one of successive employers whose employment contributed to the disease. Also, any of the successive insurance carriers that provided coverage during such employments were liable. The employer or insurer held liable had the burden of seeking the apportionment (contribution) of this liability among the many other responsible employers and insurers." *City of Torrance, supra, at pp. 374-375.*

In 1973, §5500.5 was amended to limit liability for occupational disease or cumulative injury to the five years of employment immediately preceding either the date of injury or the last date on which the employee worked in an occupation which exposed him to the hazards which caused the occupational disease or cumulative injury. *City of Torrance, supra, at pp. 374-375.*

In 1977, that section was again revised. The 1977 amendment provided for the stepped reduction of the five-year limitation of liability to one year by 1981. *Id. at 375.* The purpose of these amendments was to provide greater certainty to insurers required to be joined as defendants, and to reduce the burden placed on the entire system by the former procedures.

In *Colonial Ins. Com. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79, the court held that "in progressive occupational diseases ... the employee may ... obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer ... even though the

particular employment is not the sole cause of the disability." *Colonial Ins. Co., supra, at p.82.*

Petitioner relies on *Scott Co. v. Workers' Comp. Appeals Bd* (1983) 139 Cal. Appl 3d 98 to insist that there must be proximate cause. Here, there is proximate cause since Petitioner employed the Applicant during the cumulative trauma period as found pursuant to §5500.5. Petitioner ignored footnote 3 of the Scott's decision, which stated: "the board also concluded that once injurious exposure has been found, the time period specified in §5500.5 must be calculated by using calendar years elapsed rather than years or months of actual exposure to the hazards of the disease. Petitioners do not contest that portion of the board's decision." Thus, even according to the Scott decision, actual exposure is not required under §5500.5.

Applicant's continued exposure to the same stressful work condition when she returned back to work from May 1, 2018 to June 6, 2018, is similar to the facts in *Western Growers v. WCAB*, (1993) 16 Cal. App. 4th 227, 58 CCC 323.

In *Western Growers*, a farm worker sustained an industrial psychiatric injury and was placed on TTD when he lost time from work due to a psychiatric hospitalization. He returned back to work and continued to treat. Subsequently, he had to leave work again for another psychiatric hospitalization. He continued to require medical treatment after he returned to work following the first hospitalization. One carrier supplied coverage prior to the first hospitalization, a second carrier provided coverage when applicant left work the second time. The Appeals Court did not overturn the trial Judge's decision that this was one CT, since the Judge's decision was supported by substantial evidence, but did find that the first carrier, not the second, had liability for the injury based upon the fact that the date of injury occurred when the applicant left work for the first time as there was concurrence of knowledge and disability. *Western Growers v. WCAB*, (1993) 16 Cal. App. 4th 227, 58 CCC 323.

The Appeals Court distinguished *Western Growers* from *Aetna Casualty & Surety Co. v. Workmen's Comp. Appeals Bd. (Coltharp)*, (1973) 35 Cal. App. 3rd 329, by stating that the applicant had a continuing need for medical treatment after he returned from work after the first hospitalization. Presumably, this means a continuing need for treatment implies the continuation of one CT claim rather than two separate CT claims.

Likewise, our case is distinguishable from Coltharp because Ms. Perez continued to treat with Dr. Nerenberg. Although, he returned her back to work from May 1, 2018 to June 6, 2018, he did not discharge her from care. Instead, he continued to treat her through October 16, 2018 as evidenced by the records from Dr. Nerenberg, who continued to take her off work after June 6, 2018 and certify her again for EDD disability benefits citing the same diagnosis and giving the same reasons as previously indicated: "extremely anxious, depressed affect,

panic attacks, insomnia, fatigue, concentration and memory impairments, failure to enjoy life, extremely worried." (Applicant's Exhibit 7, page 4) Additionally, he continued to request individual psyche therapy. (Applicant's Exhibit 7, page 12-15).

Accordingly, based on Ms. Perez's continued DSM diagnose and continued need to treat and continued need to be placed back on TTD by Dr. Nerenberg, *Coltharp* and Labor Code §3208.2 is not applicable.

IV.
CONCLUSION

In Conclusion, this court finds the date of injury per Labor Code Section 5412 is February 23, 2018, and since liability dates back one year from either the date of injury, or the last date of injurious exposure, whichever occurs first, the continuous trauma period is from February 23, 2017 through February 23, 2018, as defined by Labor Code Section 5500.5. Therefore, based on the period of coverage as stipulated to by the parties, there is joint and several liability between Nova Casualty and Travelers.

IV.
RECOMMENDATION

It is respectfully recommended that Defendant Travelers petition for reconsideration be denied.

November 29, 2022

Respectfully submitted,
KRISTINA WOO
Workers' Compensation Law Judge