

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

ROBERT BROWN, *Applicant*

vs.

**STATE OF CALIFORNIA, HIGHWAY PATROL, legally uninsured;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ8259453, ADJ8261355
Fresno District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.¹

On September 24, 2020, the Workers' Compensation Administrative Law Judge ("WCJ") issued separate decisions in the consolidated cases² of ADJ8259453 and ADJ8261355.

In the Findings and Order in ADJ8259453, the WCJ found that on September 5, 2006, applicant, while employed as a police officer for the California Highway Patrol, sustained injury arising out of and occurring in the course of employment to his neck and right knee, that "applicant failed to demonstrate he timely commenced his claim for workers' compensation, so collection of workers' compensation benefits for [the] September 5, 2006, date of injury [is barred]," that further medical treatment for applicant's neck and right knee is barred, that applicant's claim for out-of-pocket expenses for self-procured medical treatment is barred, that the issue of "whether the injury caused permanent disability is deferred," and that "there is no legal basis for apportionment to non-industrial factors."

¹ Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated January 4, 2021. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

² The consolidation order is set forth in the Minutes of Hearing of July 21, 2020, page two.

In the Findings, Award and Order in ADJ8261355, the WCJ found that applicant, while employed during the cumulative period January 28, 1980 through April 9, 2009, claims to have sustained injury arising out of and occurring in the course of employment (“industrial injury”) to his neck, upper extremities, shoulders, back, fingers, bilateral arms and wrists, ears, high blood pressure and right knee, that “applicant sustained [industrial] injury to the neck (with resulting shoulder discomfort and upper extremity numbness), right knee, sleep disorder, high blood pressure, hearing loss and tinnitus resulting from the cumulative trauma...through April 9, 2009,” that “applicant’s cumulative trauma claim is not statutorily barred pursuant to Labor Code section 5412 for injury to the neck, only,” that applicant is entitled to further medical treatment for his neck (with resulting shoulder discomfort and upper extremity numbness), that applicant is entitled to out-of-pocket expenses for self-procured medical treatment, that the issue of “whether the injury caused permanent disability is deferred,” and that “there is no legal basis for apportionment to non-industrial factors.”

Applicant filed a petition for reconsideration of the WCJ’s decision in ADJ8261355. (We explain below that the petition was timely-filed.) Applicant contends that the cumulative trauma injury of hearing loss, sleep disorder, and high blood pressure is not barred by the Statute of Limitations. Applicant further contends that his hearing loss and tinnitus are industrial, resulting in permanent disability consistent with Dr. Serebrakian’s assessment of seven percent Whole Person Impairment (“WPI”).

Defendant filed an answer.

The WCJ submitted a Report and Recommendation (“Report”).³

PRELIMINARY CONSIDERATIONS

At the outset, we agree that applicant’s petition for reconsideration was timely-filed on November 5, 2020, sixteen days after October 20, 2020, when defendant effected mail service of the WCJ’s decision. The WCJ explains this in her Report, as follows:

Pursuant to authority set forth in WCAB In Re: COVID-19 State of Emergency 2020 MISC. NO. 260 (*En Banc*) suspending the WCAB requirement of service by mail, the WCAB Fresno District Office electronically served Defendant a copy of the *Findings and Order* and *Findings and Award* on September 24, 2020, designating Defendant to serve a copy of the *Findings and Order* and *Findings and Award* on all parties listed

³ We adopt and incorporate only those parts of the WCJ’s Opinion on Decision and Report set forth in the body of this decision.

on the Official Address of record, excluding the employer. A copy of the Official Address of Record, accompanied the *Findings and Order* and *Findings and Award*.

On September 28, 2020, Defendant filed a copy of its proof of service, declaring under penalty of perjury that Defendant served the *Findings and Order* in ADJ8259453 on that same date. Defendant failed to file a copy of the proof of service, demonstrating service of the *Findings and Award* in ADJ8261355. While Defendant has still failed to file a proof of service demonstrating compliance with the Order designating them to serve a copy of the *Findings and Award*, on all parties, Petitioner affirms in its verified *Petition* that it was mailed to Petitioner October 20, 2020. Therefore, the *Petition* was filed timely.

Next, we observe that if a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include but are not limited to, injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or Court of Appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, the Findings, Award and Order in ADJ8261355 is a hybrid decision because it included a final finding on industrial injury and a non-final finding on permanent disability. The latter finding is interlocutory in nature and thus subject to challenge by petition for removal. However, we treat applicant’s challenge to the Findings, Award and Order in ADJ8261355 as a petition for reconsideration because the WCJ included a finding that applicant’s claim of

cumulative trauma to his right knee, sleep disorder, high blood pressure, hearing loss and tinnitus during period January 28, 1980 through April 9, 2009 is barred by the Statute of Limitations.⁴ That finding represents a final resolution of a threshold issue. Therefore, the Findings, Award and Order in ADJ8261355 is properly challenged by petition for reconsideration, and we address applicant's petition as such. However, we also must consider whether there is any basis to disturb the WCJ's Findings and Order in the other consolidated case, ADJ8259453.

Labor Code section 5904 states: "The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration."

Here, we note that neither party filed a petition for reconsideration of the WCJ's Findings and Order in ADJ8259453. Applicant included both ADJ8259453 and ADJ8261355 in the caption of his petition for reconsideration, but otherwise the petition is devoid of any mention or objection to the WCJ's Findings and Order in ADJ8259453. We further note that in his post-trial brief (p. 6), applicant alleged that "since the neck and shoulder residuals are related to the cumulative trauma, and not to the September 5, 2006 injury, it will be of no consequence if the September 5, 2006 date of injury is barred by the Statute of Limitations." Based on the principle of waiver by operation of Labor Code section 5904, we decline to disturb the WCJ's Findings and Order in ADJ8259453 and thus we will affirm that decision.⁵

Turning to the merits of the Findings, Award and Order in ADJ8261355, and based upon our review of the record and applicable law, we find merit in applicant's contention that the WCJ erred in placing the burden of proof on applicant to show that his claim of cumulative trauma injury *is not barred* by the Statute of Limitations. Rather, the burden of proof is on defendant to show the claim *is barred* by the Statute of Limitations. We conclude that defendant has failed its burden of proof. As our Decision After Reconsideration, we will rescind the Findings, Award and Order in ADJ8261355 and replace it with Findings consistent with the above conclusion.

⁴ The WCJ's finding that "applicant's cumulative trauma claim is not statutorily barred pursuant to Labor Code section 5412 for injury to the neck, only" is not a model of clarity, but we understand it to be a finding that applicant's claim of injury by way of cumulative trauma to his right knee, sleep disorder, high blood pressure, hearing loss and tinnitus is barred by the one-year Statute of Limitations under Labor Code section 5405(a).

⁵ As noted before, the WCJ found in ADJ8259453 that applicant's claim of specific injury on September 5, 2006 is barred by the Statute of Limitations. For this reason, the WCJ's findings on permanent disability and apportionment in ADJ8259453 were unnecessary and do not make sense. Pursuant to section 5904, however, these "irregularities" have been waived.

FACTUAL BACKGROUND

In ADJ8261355, applicant claims that during the period January 28, 1980 through April 9, 2009, while flying single-engine aircraft for the California Highway Patrol (“CHP”), he sustained injury by way of cumulative trauma to his neck, upper extremities, shoulders, back, fingers, bilateral wrists, right knee, ears, and high blood pressure.

On pages three and four of her Opinion on Decision, the WCJ provides a brief overview of the relevant factual background:

Applicant began his employment as a police officer for the California Highway Patrol, in 1980, after serving in the army ten years prior. His duties required him to ride patrol and to fly aircraft []. On February 9, 2009, he sustained an unrelated injury to the right shoulder, elbow, forearm, wrist and fingers. Applicant last worked April 9, 2009, went he underwent right shoulder surgery for that injury. Applicant retired June 9, 2009. Applicant had right knee surgery September 9, 2010. Applicant also had cervical fusion September 14, 2011. On March 28, 2012, Applicant filed an Application of Adjudication alleging injury to the neck, back shoulders, right knee, bilateral wrists, bilateral arms, fingers, high blood pressure and hearing loss during the cumulative period of his employment...from January 28, 1980, through April 9, 2009. On March 28, 2012, Applicant also filed an Application of Adjudication alleging to have sustained injury to the neck, back and knee on September 5, 2006, ADJ8259453.

Armen Serebrakian, M.D. serves as the panel qualified medical evaluator for Applicant’s alleged hearing injuries. Samuel Sobol, M.D. serves as the panel qualified medical evaluator for Applicant’s alleged internal injuries. Applicant’s orthopedic complaints were initially evaluated by George Glancz, M.D. serving in the capacity of the panel qualified medical evaluator. Alice Martinson, M.D. then assumed the role of the PQME for Applicant’s orthopedic complaints when Dr. Glancz retired.

At trial on July 21, 2020, the WCJ heard applicant’s testimony and received in evidence the reports of the medical evaluators identified above. In the Findings, Award and Order in ADJ8261355 disputed here, the WCJ found that during the cumulative period January 28, 1980 through April 9, 2009, applicant sustained industrial injury to his neck (with resulting shoulder discomfort and upper extremity numbness), right knee, sleep disorder, high blood pressure, hearing loss and tinnitus, and that all injuries except the cumulative trauma to applicant’s neck (with resulting shoulder discomfort and upper extremity numbness) are barred by the Statute of Limitations. The WCJ explained her finding on the Statute of Limitations in her Opinion on Decision, as follows:

On March 28, 2012, Applicant filed an Application of Adjudication alleging injury to the neck, back shoulders, right knee, bilateral wrists, bilateral arms, fingers, high blood pressure and hearing loss during the cumulative period of his employment from January 28, 1980, through April 9, 2009. Applicant's commencement of proceedings for the collection of benefits was well beyond one year from the date of injury. Applicant failed to introduce any evidence that Defendant paid Applicant compensation pursuant to Labor Code sections 4650 et seq., or provided medical treatment pursuant to Labor Code sections 4600 et seq. The date of a cumulative injury is determined under Labor Code §5412 as the date upon which the employee first suffered disability and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

Dr. Serebrakian opined that Applicant sustained injury of hearing loss and tinnitus resulting from the cumulative trauma injury through April 9, 2009. Applicant reported that his employer has tested him for hearing loss which he was aware of. No evidence was introduced as to when Applicant was first informed that his hearing loss and tinnitus may be a result of a cumulative trauma injury. Therefore, Applicant's claim for hearing loss and tinnitus are statutorily barred pursuant to Labor Code § 5412.

DISCUSSION

In applying the Statute of Limitations to bar applicant's claim of cumulative trauma from January 28, 1980 through April 9, 2009 to his right knee, sleep disorder, high blood pressure, hearing loss and tinnitus, the WCJ incorrectly transferred the burden of proof from defendant to applicant. Contrary to the WCJ's approach, the burden is not on applicant to establish that his claim of cumulative trauma injury is not barred by the Statute of Limitations. Rather, the Statute of Limitations is an affirmative defense upon which defendant bears the burden of proof. (Lab. Code, § 5409.) This means that defendant must come forward with evidence that establishes the date of cumulative trauma injury per statutory and case law, and that shows applicant filed his claim more than one year after that date. (See Labor Code section 5405(a): "The period within which proceedings may be commenced for the collection of the benefits...is one year from any of the following: [¶] (a) The date of injury.")

The date of a cumulative trauma injury is determined by reference to the relevant statutes and case law. Labor Code section 3208.1(b) defines a cumulative injury 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.” Section 3208.1 further provides, “[t]he date of a cumulative injury shall be the date determined under Section 5412.”

Under Labor Code section 5412, “[t]he date of injury in cases of...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.”

Section 5412 requires a convergence of two elements: (1) the date when the employee first suffers disability; and (2) the employee’s acquisition of knowledge that such disability was caused by the employee’s present or prior employment.

As for the first element, we note there is no “disability” within the meaning of section 5412 until there has been either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd.* (2004) 119 Cal.App.4th 998, 1003 [69 Cal.Comp.Cases 579] (“*Rodarte*”); *Chavira v. Workers’ Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].)

In connection with the second element, it is settled law that “an 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 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.” (*County of Riverside v. Workers’ Comp. Appeals Bd. (Sylves)* (2017) 10 Cal.App.5th 119, 124-125 [82 Cal.Comp.Cases 301] (“*Sylves*”), quoting *City of Fresno v. Workers’ Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 473.)

In this case, applicant testified at trial on July 21, 2020 that “the first time he was ever informed that he might have cumulative trauma injury to his neck and wrists” was September 1, 2011, when he saw Dr. Watson. The doctor “advised [applicant] as to a possible cause of his neck injury and carpal tunnel injury, and advised him that he needed surgery to remove two disks from his neck.” We further note that applicant had been referred to Dr. Watson by Dr. McGann, who saw applicant for his shoulders in July 2011. However, applicant did not testify that Dr. McGann advised him that his shoulder problems were related to work by way of cumulative trauma. (See Summary of Evidence, 7/21/20, pp. 5-6.) Defense counsel cross-examined applicant at trial, but elicited no testimony about applicant’s knowledge of work-related disability or cumulative trauma injury. In its answer herein, defendant claims that applicant’s knowledge is demonstrated by his

deposition testimony. However, applicant's deposition is not in evidence, and defendant refers to it concerning the specific injury of September 5, 2006, which is not relevant to our inquiry here.

It is undisputed that applicant filed his claim of cumulative trauma injury on March 28, 2012. This date is within one year of "the first time [applicant] was ever informed that he might have cumulative trauma injury to his neck and wrists," by Dr. Watson on September 1, 2011. The application having been filed within one year of the date of cumulative trauma injury under section 5412, it is not barred by the Statute of Limitations under section 5405(a).

However, the WCJ erred in finding that "applicant's cumulative trauma claim is not statutorily barred pursuant to Labor Code section 5412 for injury to the neck, *only*."⁶ As noted before, defendant has the burden of proving the Statute of Limitations defense. However, defendant failed to establish the date of cumulative trauma injury to applicant's right knee, sleep disorder, high blood pressure, hearing loss and tinnitus. Accordingly, we conclude that the entirety of applicant's claim of cumulative trauma injury is not time-barred.

Finally, we address applicant's contention that he should be awarded permanent disability for hearing loss and tinnitus based on Dr. Serebrakian's finding of seven percent WPI. Although the WCJ deferred the issue of permanent disability caused by the neck injury, the WCJ's finding that applicant's claim of injury to other body parts is time-barred is tantamount to a final order denying permanent disability for hearing loss and tinnitus. In light of our finding that applicant's claim of cumulative trauma injury to all the body parts is not time-barred, we conclude that the WCJ must revisit the issue of the overall permanent disability resulting from the entire cumulative trauma, i.e., all the body parts in issue. It also follows that the WCJ's finding of no apportionment was premature, because the WCJ at the same time attempted to defer the issue of permanent disability, which encompasses the issue of apportionment. (Lab. Code, § 4663(c).) In revisiting the issues of overall permanent disability and apportionment, the WCJ may further develop the record as deemed necessary or appropriate. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].)

⁶ The relevant statutes refer to the word "injury," not body parts. Section 5405(a): "The period within which proceedings may be commenced for the collection of the benefits... is one year from any of the following: [¶] (a) The date of *injury*." Section 3208.1(b) states, "[t]he date of a cumulative *injury* shall be the date determined under Section 5412." Section 5412 defines "[t]he date of *injury* in cases of...cumulative *injuries*..." (Italics added.)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of September 24, 2020 in ADJ8259453 is **AFFIRMED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Order of September 24, 2020 in ADJ8261355 is **RESCINDED**, and the following Findings are **SUBSTITUTED** in its place:

FINDINGS

1. Applicant Robert Brown, while employed during the period January 28, 1980 through April 9, 2009, sustained cumulative trauma injury arising out of and occurring in the course of employment to his neck (with resulting shoulder discomfort and upper extremity numbness), right knee, sleep disorder, high blood pressure, hearing loss and tinnitus.
2. The claim for injury set forth in Finding 1 is not barred by the Statute of Limitations.
3. Applicant is entitled to further medical treatment for the injury set forth in Finding 1.
4. At the time of injury, applicant's weekly earnings were \$1,961.54, warranting indemnity at the weekly rate of \$986.69 for temporary disability and \$270.00 for permanent disability.
5. All other outstanding issues are deferred pending further proceedings and determination by the WCJ, jurisdiction reserved at the trial level.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ on all outstanding issues, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 9, 2024

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

**ROBERT BROWN
THOMAS J. TUSAN, ATTORNEY AT LAW
STATE COMPENSATION INSURANCE FUND
4600 BOEHM**

JTL/ara

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