

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MISAYE NORIKANE, *Applicant*

vs.

**SAFEWAY, INC.; permissibly self-insured,
administered by SEDGWICK CLAIMS
MANAGEMENT SERVICES, INC., *Defendant***

Real Party in Interest:

**CALIFORNIA INSURANCE GUARANTEE ASSOCIATION for Western Employers
Insurance Company, in liquidation, insuring for Benihana of Tokyo, Inc.**

**Adjudication Number: ADJ13355568
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.¹

Defendant California Insurance Guarantee Association for Western Employers Insurance Company, in liquidation, (CIGA) seeks reconsideration of the Findings of Fact and Orders (F&O) issued on January 14, 2022, by the workers' compensation administrative law judge (WCJ), wherein the WCJ found in pertinent part that CIGA's claim for reimbursement was time-barred by Labor Code section 5405².

CIGA contends that there was insufficient evidence to establish a date of injury pursuant to section 5412, so that the finding that it filed its claim one-year beyond that time is not supported by substantial evidence.

¹ Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been appointed in her place.

² Unless otherwise stated, all further statutory references are to the Labor Code.

We have received an answer from defendant Safeway, Inc., (Safeway). The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations in CIGA's Petition, Safeway's Answer and the contents of the WCJ's Report. Based upon our review of the record, and for the reasons stated below, as our decision after reconsideration, we rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

BACKGROUND

In case number ADJ2881803, applicant, on June 14, 1982, sustained an industrial injury to her low back while employed by Benihana of Tokyo, Inc., insured for workers' compensation by Western Employers Insurance Company, resulting in a stipulated Award entitling her to further medical treatment. Upon its liquidation, CIGA, on behalf of Western Employers Insurance Company, assumed responsibility for applicant's ongoing medical treatment.

On June 29, 2020, CIGA filed an Application for Adjudication of Claim (Application) asserting that applicant sustained a cumulative during the period from September 19, 1983 to April 17, 2020, to her low back from repetitive work activities while employed by her subsequent employer Safeway. CIGA sought reimbursement against Safeway pursuant to Insurance Code section 1063.1.³

With respect to the evidentiary record, Peter J. Mandell, M.D., who served as a Qualified Medical Evaluator (QME), wrote in his report dated October 19, 2016, that, as a result of her injury on June 14, 1982, she "developed symptomatic L5 on S1 spondylolysis and spondylolisthesis as well as some right-side lower extremity radiculopathy." (Def. Safeway Ex. A., p. 6.) Applicant continued working for Safeway for a few years in the office and, subsequently, as a produce clerk/checker. After that, she had concurrent employment as a dental assistant and, later, as a dental hygienist. (*Ibid.*)⁴ James Rhee, M.D., treated applicant for her low back pain for 10 years. (*Id.* at pp. 6-7.) With respect to causation, Dr. Mandell opined as follows:

Allocation of responsibility for medical treatment is challenging, I admit. However, it's my medically probable opinion that approximately 33% of the causation of her

³ A review of the evidentiary record did not reveal that CIGA filed a formal petition for reimbursement.

⁴ Dr. Mandell's history appears to find erroneously that applicant's concurrent employment as a dental assistant/hygienist was with Benihana rather than Safeway, as this conflicts with his opinion on causation.

impairment is a direct result of the Benihana injury of 1982, with the remainder going to subsequent cumulative trauma at both her Safeway job and her dental assistant/hygienist jobs. Since she works more hours at Safeway than at the dental hygienist job, approximately 45% of her need for treatment would be related to Safeway with the remainder going to the dental work. It's possible but not probable that the 2014 motor vehicle accident plays a role here.

(*Id.* at p. 7.)

On January 4, 2022, CIGA and Safeway agreed to submit the case at trial on the one-page minutes of hearing, without a court reporter, on the sole issue of whether section 5405 barred CIGA's claim.

On the same day, the WCJ issued her F&O admitting both CIGA's and Safeway's exhibits into evidence and holding that section 5405 time-barred CIGA's claim. In her Opinion, she reasoned that Dr. Mandell's report dated October 19, 2016 placed CIGA on notice of a potential claim of reimbursement. Since CIGA filed its Application on June 29, 2020, the Application was filed more than one year from the "date of injury."

Aggrieved by this decision, CIGA seeks reconsideration.

DISCUSSION

Insurance Code section 1063.1 defines specifically CIGA's liability as extending only to "covered claims." "[C]overed claims" under section 1063.1 "are not coextensive with an insolvent insurer's obligations under its policies" and section 1063.1 "does not include an obligation to insurers, insurance pools, or underwriting associations, nor their claims for contribution, indemnity, or subrogation, equitable or otherwise, except as otherwise provided in this chapter." (*Ind. Indemnity Co. v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 60 Cal. App.4th 548, 557 [62 Cal. Comp. Cases 1661]; see Ins. Code, § 1063.1(c)(5)(A).)

As a result, if CIGA and a solvent insurer are jointly and severally liable for a benefit, the solvent insurer must pay the benefit and CIGA is relieved of liability. (*CIGA v. Workers' Comp. Appeals Bd. (Weitzman)* (2005) 128 Cal.App.4th 307, 319 [70 Cal.Comp.Cases 556]; *CIGA v. Workers' Comp. Appeals Bd. (Hooten)* (2005) 128 Cal. App. 4th 5697, 573 [70 Cal. Comp. Cases 551]; *Denny's Inc. v. Workers' Comp. Appeals Bd. (Bachman)* (2003) 104 Cal. App. 4th 1433, 1439 [68 Cal. Comp. Cases 1]; see *CIGA v. Workers' Comp. Appeals Board (Hernandez)* (2007) 153 Cal.App.4th 524, 537 [72 Cal. Comp. Cases 910] ("CIGA is not another workers' compensation insurer; it is a fund with responsibilities that are limited by statute in order

to insure that the worker is protected. CIGA does not protect insurers.”.)]

Generally, the filing of an Application commences proceedings before the WCAB. (Lab. Code, § 5500; Cal. Code Regs., tit. 8, § 10450.) The time limitations for commencing proceedings are set forth in section 5405 as follows:

The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:

- (a) The date of injury.
- (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
- (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

(Lab. Code, § 5405.)

Thus, a party must commence proceedings with the WCAB within one year of: (1) the date of injury; (2) the expiration of the period covered by the employer's last payment of disability indemnity; or (3) the date of the last furnishing by the employer of medical, surgical or hospital treatment. (*J.T. Thorp v. Workers' Comp. Appeals. Bd.* (1984) 153 Cal.App.3d 327, 333-334 [49 Cal.Comp.Cases 224].)

Pursuant to section 3208.1:

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 trauma injury shall be the date determined under [§] 5412.

(Lab. Code, § 3208.1.)

In addition, pursuant to section 5412:

The date of injury in cases of occupational disease 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.

(Lab. Code, § 5412.)

“Disability,” as used in section 5412, is evidence that there is either “compensable temporary disability or permanent disability.” (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal. App. 4th 998, 1003-1004 [69 Cal.Comp.Cases 579].) CIGA obtains

knowledge that applicant's disability is industrial when it receives medical findings to that effect. (*Rivera v. Salvation Army* [2013 Cal. Wrk. Comp. P.D. LEXIS 77].)⁵

Based on the above authorities, the date where there is a convergence of temporary or permanent disability and knowledge determines the right to file a claim based on the date of injury under section 5412.

Finally, in *De Lay v. CIGA* (2019) 84 Cal.Comp.Cases 934, the Appeals Board rescinded the WCJ's decision that section 5405 barred CIGA's petition for reimbursement for a subsequent injury against a permissibly self-insured employer for benefits paid by CIGA up through the date of trial. The Appeals Board relied on the California Supreme Court case of *Plotnick v. Workers' Comp. Appeals Bd.* (1970) 1 Cal. 3d 622, 623-626 [35 Cal.Comp. Cases 13]), holding that medical treatment provided by an employer for an earlier injury that also overlaps with treatment for a subsequent injury may toll the statute of limitations for the subsequent injury under section 5405(c). In *Plotnick*, the injured worker sustained successive injuries to the same body part. (*Id.* at pp. 623-624.) The Supreme Court found that "[i]t follows inevitably" that any medical treatment received from the employer for a previous injury "must to some extent have been designed to relieve [the injured employee] from the effects" of the subsequent 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 Supreme Court therefore held that filing of the claim was timely within the one year of the provision of medical treatment pursuant to section 5405(c). (*Id.*)

Here, the WCJ failed to determine the date of injury in accordance with section 5412 and failed to determine when CIGA last paid benefits under section 5405(c) for its administrated claim. Accordingly, upon return, the WCJ must determine not only when CIGA had knowledge of its right to file an Application, but must also determine when applicant first suffered temporary or permanent disability from the cumulative injury in order to raise a cognizable claim for CIGA's reimbursement of benefits. In addition, the WCJ must determine when CIGA last paid benefits on companion case number ADJ2881803, to determine the applicability of section 5405(c) in the

⁵ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

statute of limitations analysis. Filing a petition for reimbursement with an attached printout of benefits would best serve that purpose. We observe that the medical reporting shows that applicant worked concurrently as a dental assistant/hygienist while employed with Safeway. The joinder of that employer(s) and insurance carrier(s) appears to be essential for complete adjudication of the case.

We finally note that the WCJ submitted the case without creating a proper adjudicatory record. An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 477 (Appeals Board en banc).) This "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Id.* at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) Therefore, upon return, a record must be created and when the WCJ issues a new decision, the WCJ shall comply with *Hamilton*.

Accordingly, we rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Orders is **RESCINDED** and the matter is **RETURNED** to the district office for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 8, 2026

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

**MISAYE NORIKANE
CALIFORNIA INSURANCE GUARANTEE ASSOCIATION
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.
D' ANDRE LAW, LLP**

DLP/md

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

CS