WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KALILI STALLWORTH, *Applicant*

vs.

COUNTY OF SACRAMENTO, permissibly self-insured, *Defendant*

Adjudication Number: ADJ17110321
Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact, Award, and Order (FA&O) of September 28, 2023, wherein the workers' compensation administrative law judge (WCJ) found in relevant part that applicant's claim was not barred by the statute of limitations. Defendant contends that applicant's claim was barred by the statute of limitations.

We have not received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration; affirm the September 28, 2023 FA&O except that we will amend Findings 9 and 10, the award, and the order; and return this matter to the WCJ for further proceedings.

FACTS

Applicant claimed industrial injury to his low back during the period from January 1, 2018 to December 3, 2021, while working for defendant as a deputy probation officer. Applicant filed the application for adjudication on December 27, 2022. Applicant's earlier claim for industrial

injury to his bilateral wrists and low back from December 5, 2007 to December 5, 2017, had been dismissed. (Joint Ex. 4, Findings and Order in ADJ11135103, dated 7/22/20, p. 1.)

The case proceeded to trial on the issue of whether the injury arose out of employment and occurred during the course of employment (AOE/COE), and specifically whether the claim was barred by the statute of limitations. (9/26/23 Minutes of Hearing/Statement of Evidence (MOH/SOE, p. 2.) Applicant testified that he went off work on December 3, 2021, because of low back pain. (MOH/SOE, p. 4.) While the applicant believed that his low back pain was work related, no doctor told him that it was or was not work related. (MOH/SOE, p. 4.) Applicant filed the application so that he could get treatment. (MOH/SOE, p. 4.)

DISCUSSION

Labor Code section 3600(a)[1] provides for liability for injuries sustained "arising out of and in the course of the employment." An employer is liable for workers' compensation benefits "without regard to negligence." (Lab. Code, § 3600(a).) An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.) Whether an employee's injury arose out of and in the course of employment is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346, 353 [67 Cal.Comp.Cases 51].) Labor Code section 3600(a)(2) requires as a condition of compensation that "at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment."

For the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*), *supra*, 61 Cal.4th at pp. 298-299.) "The applicant in a workers' compensation proceeding has the burden of proving industrial causation by a 'reasonable probability.' (citation) That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1701 [58 Cal.Comp.Cases 313].) Medical evidence that industrial injury was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE.

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

(*McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) Although the factual issue of the occurrence of the alleged incident is a determination for the WCJ, the issue of injury is a medical determination, which requires expert medical opinion. As the Court of Appeal explained in *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188]: "Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences."

Further, the relevant statute of limitations for filing a workers' compensation claim is one year from the date of injury. (Lab. Code, § 5405(a).) The running of the period of limitations is an affirmative defense; the burden of proving it has run, therefore, is on the party opposing the claim. (Lab. Code, § 5409; *Kaiser Found. Hosps. Permanente Medical Group v. Workers' Comp. Appeals Bd.* (1985) 39 Cal.3d 57, 67, fn. 8 [50 Cal.Comp.Cases 411].)

We note that the "date of injury in cases of occupational 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." (Lab. Code, § 5412.) Whether an employee knew or should have known his disability was industrially caused is a question of fact. (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53] (*Johnson*); *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 927 [50 Cal.Comp.Cases 104]; *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556, 559 [33 Cal.Comp.Cases 722].)

The employer has the burden of proving that the employee knew or should have known their disability was industrially caused. (*Johnson*, *supra*, at p. 471, citing *Chambers v. Workers' Comp. Appeals Bd.*, *supra*, 69 Cal. 2d at p. 559.) That burden is not sustained merely by a showing that the employee knew they had some symptoms. (*Johnson*, *supra*, at p. 471, citing *Chambers*, *supra*, at p. 559.) In general, an employee is not charged with knowledge that their disability is job-related without medical advice to that effect. (*Johnson*, *supra*, at p. 473; *Newton v. Workers' Comp. Appeals Bd.* (1993) 17 Cal.App.4th 147, 156, fn. 16 [58 Cal.Comp.Cases 395].)

Here, there was no finding of industrial injury. (FA&O, pp. 1-2.) Additionally, while applicant knew that he had symptoms, defendant has not met its burden to show that applicant knew that his injury was job-related as there was no medical evidence regarding applicant's injury.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *Nunes* (*Grace*) *v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.) The Appeals Board has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403.)

Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 (Appeals Bd. en banc).) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*., *supra*, 79 Cal.App.4th at p. 404.) The record must be developed in order to determine industrial injury pursuant to section 3600(a) and the date of injury pursuant to section 5412. Therefore, we will grant the Petition for Reconsideration; affirm the September 28, 2023 FA&O except that we will amend Findings 9 and 10, the award, and the order; and return this matter to the WCJ for further proceedings. Upon return to the WCJ, we recommend that the medical record be developed to cure the lack of medical evidence related to the issues of industrial injury and date of injury.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the September 28, 2023 Findings of Fact, Award, and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 28, 2023, Findings of Fact, Award, and Order is **AFFIRMED** except that it is **AMENDED** as follows:

9. The issue of the date of injury under Labor Code section 5412 is deferred.

10. The issue of whether applicant's claim for a cumulative trauma injury to the low back through December 3, 2021 is barred by the statute of limitations is deferred.

AWARD

The issue of an award is deferred.

ORDER

It is ordered that the parties further develop the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 18, 2023

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

KALILI STALLWORTH
NOVEY LAW GROUP
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP

JMR/*ara*

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