WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LARRY TRIPLETT, *Applicant*

vs.

NORDIC INDUSTRIES; ENSTAR (US), INC.; dba ENSTAR administrators for CLARENDON NATIONAL INSURANCE COMPANY, as successor in interest to SEABRIGHT INSURANCE COMPANY; KIN ENTERPRISES, INC.; STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ7454093; ADJ628128 (RDG0130262); ADJ7454084
Redding District Office

OPINION DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.[1] We now issue our Opinion and Decision After 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 affirm the October 26, 2021 Findings and Order, Award.

[1] Commissioner Brass, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist was appointed in his place.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 26, 2021 Findings and Order, Award is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR (See attached Concurring Opinion),

MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 30, 2022

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

LARRY TRIPLETT
COOKE & MARSHALL
COHEN & ASSOCIATES
STATE COMPENSATION INSURANCE FUND

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

CONCURRING OPINION OF COMMISSIONER SWEENEY

I concur with the disposition reached here. Although our panel decisions are not binding precedent, I write separately to distinguish the facts in this case from the facts in the case of *Matthews v. San Diego Chargers, Et al*., 2016 Cal. Wrk. Comp. P.D. LEXIS 240, where I dissented. In *Matthews,* the applicant had continuing medical treatment during the period of interrupted employment. Here, there is no evidence of treatment and no medical evidence of disability during Mr. Triplett's 9 months off work. Moreover, because the analysis is so fact driven, I have given due regard to the trier of fact's determination in this case. Therefore, I concur with the disposition reached here.

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

Date of Injury:	In dispute
Age on DOI:	59 or 60
Occupation:	Heavy Equipment Operator
Parts of Body Injured:	Neck, back, arms, legs, hips and headaches
Identity of Petitioner:	Defendant Clarendon National Insurance Company
Timeliness:	The petition was timely filed on 11/16/21
Verification:	The petition was verified.
Date of Award:	10/22/21
Petitioner's Contentions:	Petitioner contends that the evidence and law requires that one cumulative trauma *only* exists from July of 2005 to November of 2006, and that this WCJ erred in finding two cumulative trauma periods separated by nine months of being off work with no treatment and no medical evidence indicating that applicant was disabled during those nine months of unemployment

II.

FACTS

The applicant worked for many years as a heavy equipment operator before starting work in that capacity on the Dana job in 2005. In July of 2005, while working on the Dana job, applicant was driving a tractor/scraper with poor to non-existent suspension when the machine rolled over a large piece of hardpan at speed and threw applicant around violently inside the cab. At all times while driving the tractor/scraper the ride was very rough, and the applicant described this as very strenuous work (Summary of Testimony, page 4: 12-25; S of T, 10/21/14, page 3; 24-25 and page 4: 1-12). The applicant felt that after the July incident, the work got harder on his body (Summary of Testimony, 8/10/21, page 5: 1-3; S of T, 5/9/19, page 4: 5-14).

While working on the Dana job, he missed no time from work (Summary of Testimony, 5/9/19, page 6: 8-9), although he did go home early at his own request on his last day on this job, due to pain (Summary of Testimony, 10/21/14, page 4: 13-15).

After the end of July 2005, and without a break in employment, the applicant transferred to the South Sacramento Streams job, which involved raising and widening levees. On this job, he also drove heavy equipment in the form of a grader and a loader (Summary of Testimony, 5/9/19, page 4: 16-17). The work required by this new job also resulted in the applicant being bounced around roughly inside the cab of the equipment (Summary of Testimony, 8/10/21, page 5: 3-6).

During the South Stream work, he was beset with insect bites, and the employer sent him to the doctor because of them. From his testimony, it appears he went two times to the doctor for the bites, and on the second trip, on or about 8/12/05, he asked the doctor to examine and/or treat his neck and back. The doctor asked Nordic to authorize this, but the Nordic supervisor denied authorization due to the belief that the applicant was not a Nordic employee at that time, but rather an employee of Kin Enterprises (Summary of Testimony, 10/21/14, page 4: 21-25; page 5: 1-3).

Since the employer didn't authorize treatment, he went himself to see King Chiropractic, paying for treatment with his own money. He was off work on his own volition from the 12th to the 17th. Then, he was called back to work, and he agreed to go back, as he was worried that if he did not, he would lose the job (Summary of Testimony, 10/21/14, page 5: 1-17).

Applicant then continued to work at his regular duties driving heavy machinery until the job ended around November of 2005 (Report of Dr. Barber, 5/9/2012, page 5, Applicant's Exhibit 1; Summary of Testimony, 10/21/14, page 10: 4-6).

Applicant was then off work for about 9 months, during which time he did not work or look for work, resting his body in hopes of recovery (Summary of Testimony, 8/10/21, page 5: 21-23; Summary of Testimony, 5/9/19, page 5: 17-18). During this time off, he testified he could not recall if he received any medical treatment (Summary of Testimony, 8/10/21, page 5: 24-25, page 6: 1-3).

At about the time he was running out of money to pay bills, he was offered a job through Kin in 2006 driving a loader on the Highway 50 job (Summary of Testimony, 8/10/21, page 6: 12-16. 21-22). He worked about a month or so, broken days (Summary of Testimony, 8/10/21, page 5: 13-16). He felt that the Kin/Highway 50 job did increase his symptoms (Summary of Evidence, 8/10/21, page 8: 1-2).

The carrier for Kin during this period of injury, September of 2006 through November of 2006, State Compensation Insurance Fund, has accepted liability for injury to the neck, low back, wrists, hands and upper extremities. State Fund and the applicant have already resolved any dispute over temporary disability through stipulations and order dated 10/3/2012.

Procedurally, the case has gone through a complicated history of trial and appeal, culminating in the trial of 8/10/21, which proceeded **on the sole issue of whether there are one, two or more dates of injury.**

III.

DISCUSSION

First, petitioner's reference to **LC section 5500.5** is misplaced, as that section defines which entity has liability within a single cumulative trauma period, but only once the limits of the cumulative trauma period have been established. That is not the question here. There is no dispute that the applicant's activities as a heavy equipment operator during the periods in question were injurious. The only dispute to resolve is whether there were two cumulative trauma periods, separated by 9 months or so of inactive unemployment, during which the applicant was consciously trying to rest and recover, received no medical treatment, and during which he testified he would not have accepted an offer of employment even had employment come his way.

Per LC section 3208.1(b), a cumulative trauma is defined as *"...repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes either disability or need for treatment."*

In Mr. Triplett's case, it is not seriously questioned whether he suffered cumulative trauma during the Dana/South Stream job (July 2005 to about 10/31/05), as by his own unrebutted testimony he requested medical attention because he believed his work was injuring his body, and when that was denied, he procured that treatment on his own from Dr. King. Further, applicant took time off on his own – five days off – because he felt he could no longer turn his head to see objects to his side or behind him. Arguably, this is wage loss, although no doctor took him off formally, that we know of. By petitioner's own analysis, the need for medical treatment and/or wage loss creates, under petitioner's interpretation of **Rodarte**, a separate industrial cumulative injury.

The carrier for the second period of injurious exposure, State Compensation Insurance Fund, has accepted liability for the injurious exposure that occurred during the Highway 50 job (9/06 to

11/06), and petitioner agrees that cumulative trauma occurred on that job. Therefore, all parties agree that injurious exposure occurred during the Highway 50 work.

The key question – the crux – is whether the nine months of inactivity between these two periods of undisputed cumulative trauma creates a sufficient break to establish two separate CT periods, or one continuous CT period beginning in July of 2005 and ending with the termination of work on the Highway 50 job.

The medical record is unhelpful in this case. Petitioner agrees with this judge that Dr. Ramsey's opinions are not substantial evidence, but contrary to petitioner's contentions, neither are the opinions of Dr. Shalom or Dr. Barber, at least on the question submitted for decision.

Dr. Barber, in Applicant's Exhibit 1, did not acknowledge the 9 months off work that separate the applicant's two work periods, indicating that he thought the applicant's employment was continuous for the entire 13 months (see page 22). He further speculated on two separate scenarios for injury, and then deferred to the trier of fact for a final decision. This inaccurate history and confusion of opinion on the critical issue render his reporting not substantial evidence.

Dr. Shalom does no better, failing in his multiple reports and deposition to express an understanding of the 9 month break between the Dana/South Stream job and the Highway 50 job. As he demonstrated no knowledge of this period off work, he was not able to offer any analysis of the significance of the nine month break, or lack thereof. Without a correct history, and in the absence of any analysis of the central issue presented, his opinions likewise on this issue cannot be substantial evidence.

Looking then to the evidence we do have, it is undisputed that there was injurious exposure at the three jobs. It is likewise undisputed that the applicant took about 9 months off between them, where he purposely did little physical activity in an effort to heal, and offered unrebutted testimony under oath that he would not have accepted employment driving heavy machinery had it been offered. He could recall no medical treatment during those 9 months. It wasn't until he was running out of money that he took the Highway 50 job, and as he feared, this work also resulted in further injury and permanent worsening of his symptoms.

The cases of **Aetna Cas. & Surety Co. v. WCAB (Coltharp) (1973) 38 CCC 720**, and **Western Growers Ins. Co. v. WCAB (Austin) (1993) 58 CCC 323** provide certain tests to determine the question of cumulative trauma.

On page 326 in Western Growers, the Court of Appeal determined that *"the number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB (citations omitted). For example, if an employee becomes disabled, is off work and then returns to work only to again become disabled, there is a question of fact as to whether the new disability is due to the old injury or whether it is due to a new and separate injury.*

…

"The nature and the number of injuries suffered are determined by the events leading to the injury, the medical history of the claimant, and the medical testimony received."

One test discussed by the Court was whether the applicant received continuous or near continuous medical treatment during the break or change in employment. On page 32 the Court stated the following:

"In this case Austin had a compensable injury from 1985 onward. Although he had two periods of disability, i.e., the inability to work, those two periods of disability were connected by a continuous need for medical treatment all caused by a single work-related cumulative injury-stress induced depression. There was thus no time between 1985 and the present that Austin did not have a compensable injury."

The facts in our case show that petitioner received no medical treatment during the 9 month break, and no doctor took him off work on temporary or permanent disability during those months. Thus, the two periods of cumulative trauma were not linked by medical treatment or disability per LC section 3208.1.

Another test is whether the injurious exposure was similar. Here, at all times of employment the applicant was operating heavy machinery. Although there was some variation in the type of vehicles driven, and the strenuousness of the job depending on what he was using the equipment to do, in general, the evaluators felt, from a medical perspective, that the work he did was about the same in its negative affect on the petitioner's condition. However, this test is usually relevant when the injured worker was employed continuously. Here, in our case, he was off for 9 months doing nothing at all. This extended period off work resting and doing as little as possible is not only a clear break in exposure, but also analogous to two different types of work that the test asserts would help define two separate periods of exposure.

Said a different way, if dissimilar work activities can legitimately help define two separate periods of cumulative trauma, so much more so can an extended period of no injurious exposure at all.

Therefore, as in **Western Growers** and **Coltharp**, when the separate periods of injurious exposure are not connected by continuous treatment or disability, then they are properly defined as two separate cumulative injuries.

As required by LC section 3208.1, the treatment received from Dr. King, after the applicant specifically requested treatment from his employer due to his belief that the job was causing injury, is enough to legally establish a cumulative trauma injury during the first work period from July 2005 to about 10/31/05. The finding by Dr. Barber that applicant was totally temporarily disabled at the end of the Highway 50 job establishes the time worked there as a second legal cumulative trauma period. The 9 month break between these exposures, with no treatment or disability, establishes a clear break between the two periods of cumulative trauma, and as a question of fact, and as supported by the evidence cited above, it is determined that there are two separate cumulative trauma injuries, not one continuous cumulative trauma.

IV.

RECOMMENDATION

For the reasons discussed above, it is respectfully recommended that defendant's Petition for Reconsideration be denied in its entirety.

DATE:_____11/30/21 _____

Curt Swanson
ACTING PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE