WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL GARCIA, *Applicant*

vs.

SOUTHERN CALIFORNIA EDISON, permissibly self-insured, and self-administered, *Defendant*

Adjudication Numbers: ADJ13719149, ADJ10738865
Oxnard District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted a petition for reconsideration filed in case number ADJ10738865 and a petition for reconsideration filed in case number ADJ1371949 to further study the factual and legal issues presented in these cases.[1] We now issue our Opinion and Decision After Reconsideration with respect to both cases.[2]

Applicant seeks reconsideration of the Findings of Fact and Award (F&A) issued on August 6, 2019 in case number ADJ10738865, wherein the workers' compensation administrative law judge (WCJ) found that applicant failed to prove that defendant discriminated against him in violation of Labor Code[3] section 132a and ordered that he take nothing on his claim.

Defendant seeks reconsideration of the Findings and Order (F&O) issued on September 24, 2021 in case number ADJ1371949, wherein the WCJ found in pertinent part that (1) the statute of limitations date under section 5412 for applicant's alleged continuous trauma (CT) bilateral knee injury for the period of November 28, 1983 through December 8, 2014 is February 18, 2021; (2) the application for adjudication of the CT claim for the period of November 28, 1983 through

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[1] On December 13, 2021, a panel consisting of Chair Zalewski, Commissioner Lowe, and Commissioner Dodd granted reconsideration in case number ADJ1371949. On September 6, 2019, a panel consisting of Deputy Commissioner Schmitz, Commissioner Snellings, and Commissioner Lowe granted reconsideration in case number ADJ10738865. To ensure a consistent outcome and avoid bifurcation, the cases were reassigned for a consolidated decision to Chair Zalewski, Commissioner Lowe, and Deputy Commissioner Schmitz.

[2] We note that the record is unclear as to why proceedings continued in case number ADJ13719149 after we granted reconsideration in case number ADJ10738865, given that both cases involve overlapping claims and defenses and have been adjudicated by the same workers' compensation administrative law judge.

[3] Unless otherwise stated, all further statutory references are to the Labor Code.

December 8, 2014 was filed on October 10, 2020; and (3) the CT claim for the period of November 28, 1983 through December 8, 2014 is not barred by the statute of limitations. The WCJ ordered that the CT claim for the period of November 28, 1983 through December 8, 2014 is not barred by the statute of limitations.

Applicant contends that the evidence establishes that defendant subjected him to disadvantages not visited upon other employees who were injured by failing to engage in the interactive process, failing to offer him modified work, and terminating his employment.

Defendant contends that the evidence demonstrates that the statute of limitations date under section 5412 for applicant's alleged CT injury is March 18, 2013, the filing date of a prior claim; or, in the alternative, December 14, 2011, the filing date of another prior claim.

We received Answers from defendant and applicant.

The WCJ filed a Report and Recommendation on applicant's Petition for Reconsideration (Report on applicant's Petition) recommending that it be granted. The WCJ filed a Report and Recommendation on defendant's Petition for Reconsideration (Report on defendant's Petition) recommending that it be denied.

We have considered the allegations in the Petitions, the Answers, and the contents of the Reports. Based on our review of the record, and for the reasons stated below, we will rescind the F&A in case number ADJ10738865 and return the matter for further proceedings consistent with this decision; and we will affirm the F&O in case number ADJ1371949.

BACKGROUND

On July 2, 2019, the matter proceeded to trial in case number ADJ10738865 on the issue of whether defendant violated section 132a. (Minutes of Hearing and Summary of Evidence, July 2, 2019, p. 2:10.)

The parties stipulated that, while employed during the period of November 14, 1983 through December 9, 2014 by defendant as a lineman, applicant sustained injury arising out of and in the course of employment pursuant to a February 19, 2019 Stipulated Findings and Award. (*Id*., p. 2:6-9.)

At trial, applicant testified that he went off work in 2014 due to cancer, which he discovered as a result of his having right shoulder complaints. (Minutes of Hearing and Summary of Evidence, July 2, 2019, p. 4:25.) After the cancer went into remission, he still had right shoulder complaints

and filed a workers' compensation claim, which defendant initially delayed and denied, but subsequently admitted on October 17, 2017. (*Id*., p. 5:4-5.)

Applicant further testified that there was an October 13, 2017 letter showing that he needed a medical release from Dr. Tenn to return work. (*Id*., p. 5:7.) He called John Valdez, a workers' compensation claims representative, to tell him he could not get an appointment with Dr. Tenn before the time provided in the letter and was terminated on November 12, 2017. (*Id.*, p. 5:9-10.)

Applicant further testified that he obtained a report on November 10, 2017 from Dr. Tenn, who informed him that there had been no interaction with defendant. (*Id*., p. 5:12-13.) He was never offered any modified work, but could have performed underground inspections or other jobs. (*Id*., pp. 5:14, 6:5.)

Lynne Muro testified that she has been employed with defendant for two years, prior to which she worked as a transitional return to work coordinator for claims administrator Sedgwick for seven years. (*Id.*, p. 6:15-16.) In December 2016, applicant provided defendant with his work restrictions, and she conferred with long-term disability and was advised that since the restrictions could not be accommodated, no further action would be required. (*Id.*, p. 6:21-24.) She only checked to see whether applicant could do his usual and customary work and believed his shoulder condition was either related to the non-industrial condition or did not know what it was. (*Id*., p. 7:7-9.)

Monica Camara testified that she has been an HR consultant for eighteen years and was the third-party administrator with Sedgwick when she sent applicant a letter regarding the interactive process. (*Id*., p. 7:16-21.) Applicant completed a form indicating that he felt he had some work capacity. (*Id*.) She is not aware of anyone contacting applicant after his condition went from cancer to industrially-injured shoulder. (*Id*.) On October 13, 2017, she was unaware of applicant's workers' compensation claim; and, had she been aware of it, she would not have changed the path she took. (*Id*., p. 8:2-3.) She moved forward with applicant's termination and handles both industrial and non-industrial long-term disability issues. (*Id*., p. 8:8-9.).

In the Report on applicant's Petition, the WCJ states:

> In the case at bar, applicant was off work on a leave of absence for a non-work related disability (cancer). Defense witnesses testified that there are two different divisions set up to handle disability leave. One staff for industrially related disability and a different staff for non- industrially related disability.

> The correspondence and interactive process applicant and defendant engaged in was only related to his non-industrial condition; the cancer. Although, as defendant testified, there should have been an interactive process initiated (which would have extended the time periods for returning to work, finding alternative positions, etc.) for the industrially related shoulder condition, no processes were done. No interactive interview, no offer of modified or alternative work and no time to allow applicant to obtain medical reporting to support his position.
>
> Applicant did suffer a loss of benefit as a result of his industrial injury and is entitled to an increase in benefits, reinstatement and back wages.
> (Report, p. 4.)

On July 8, 2021, the matter proceeded to trial in case number ADJ13719149 as to the issue of whether applicant's claim is barred by the statute of limitations set forth in section 5404. (Minutes of Hearing and Summary of Evidence, July 8, 2021, p. 2:19-20.)

The parties stipulated as follows: (1) while employed by defendant as a lineman, applicant claims to have sustained injury arising out of and in the course of employment to his bilateral knees during the period of November 28, 1983 through December 8, 2014; (2) applicant filed a DWC-1 claim form on or about February 26, 2013; (3) applicant also filed a DWC-1 claim form reflecting the date of injury of December 1, 2011 through December 8, 2011; (4) a benefit notice denying the February 26, 2013, specific injury was issued on or about May 24, 2013; and (5) a benefit notice denying the continuous trauma injury issued on January 10, 2012. (*Id*., p. 2:5-17.)

The record in EAMS reveals that the WCJ admitted the February 18, 2021 Report of panel qualified medical evaluator (PQME) Scott A. Graham, M.D. (Ex. 1, Report of Dr. Graham, February 18, 2021.)[4] Dr. Graham wrote:

> Sternal fracture motorcycle accident February 2013. . . . It is unclear whether there was a right knee injury at that time. He did undergo arthroscopic surgery some nine months later.
> . . .
> **Past Surgical History:**
> . . . left knee ACL reconstruction (softball injury) . . .
> (*Id*., p. 10.)

[4] Dr. Graham had previously evaluated applicant on September 13, 2017, and October 10, 2018, regarding the right shoulder cumulative injury claim for the period from November 14, 1983, through December 9, 2014. (Ex. 1, Report of Dr. Graham, February 18, 2021, p. 3.)

> It is within a reasonable degree of medical probability that the claimants bilateral knee conditions are resultant from CT with date of injury his last day of work which is reported to be 12/10/14.
>
> The claimant's injury arose out of employment and was caused by employment.
> (*Id*., p. 13.)

The WCJ also admitted defendant's January 10, 2012 letter denying applicant's claim for an injury arising on December 14, 2011 on the grounds that applicant advised defendant on January 5, 2012 that he did not wish to see a doctor and, in consequence, defendant could not conduct discovery on the claim. (Ex. F, Benefit Notice Denial, January 10, 2012, p. 1.) The letter does not identify the body part allegedly injured. (*Id*.)

The WCJ also admitted defendant's May 24, 2013 letter denying applicant's claim for an injury arising on February 26, 2013 on the grounds that "the cause of your injury(s) was due to an accident which occurred during your normal commute route home." (Ex. E, Benefit Notice Denial, May 24, 2013, p. 1.) The letter does not identify the body part allegedly injured. (*Id*.)

The WCJ also admitted defendant's October 19, 2020 letter denying applicant's application for adjudication filed on October 13, 2020, alleging injury to his bilateral knees while employed during the period from November 28, 1983 through December 8, 2014. (Ex. B, Benefit Notice Denial, October 19, 2020.)

At trial, applicant testified that he was honest and truthful with Dr. Graham. (Minutes of Hearing and Summary of Evidence, July 8, 2021, p. 3:22.) He does not recall complaining to anyone at work about his swollen left knee or getting a denial letter in December 2011. (*Id.*, p. 3:23-24.) In December 2011, he received treatment from his private physician, Dr. Simonian, but does not recall which knee it was for. (*Id.,* p. 4:1-2.) At no time was he ever told his knee injury was industrial. (*Id*., p. 4:2.) In February 2013, he had a motorcycle accident on his way home from work and injured his right knee and other body parts, and told his supervisor about it. (*Id*., p. 4:3-4.) He recalls signing a claim form and getting a denial letter. (*Id*., p. 4:5.)

He further testified that no doctor ever said his disabilities in his knees were related to his job until Dr. Graham, in his capacity as a PQME, advised him his knee injuries were industrial. (*Id*., p. 4:7-8.) He had previously been told by Dr. Simonian that his right knee was injured as a result of the motorcycle accident. (*Id*., p. 4:11.)

He started work for defendant as a mechanic and worked in several garages. (*Id*., p. 4:13-14.) The jobs were arduous and difficult and often required standing, lifting, carrying, and kneeling. (*Id.,* p. 4:15-16.) He did brake jobs and general maintenance, and could be on these jobs for two to six hours per day, much of that time working on his knees. (*Id.*) He had a couple of knee surgeries in the 1990's. (*Id*., p. 4:17.) From 2003 to 2015, he was a lineman for defendant and would climb and work on poles and ladders, which required constant standing and lifting and caused pain and problems to his knees. (*Id*., p. 4:18-19.) He saw Dr. Simonian in 2008 and 2009 and had a third knee surgery in 2009. (*Id*., p. 4:20-21.) Although he discussed his job duties with the doctor, at no time did the doctor say his knee problems were industrial. (*Id*.) He does "believe work contributed to his knees." (*Id.,* p. 4:22-23.)

The last date he worked was in November 2014. (*Id*., p. 5:6.) It was only after Dr. Simonian told him that he needed a total knee replacement that he filed for an industrial injury. (*Id.,* p. 5:11-12.)

In the Opinion on Decision, the WCJ states:

> Applicant did have prior treatment, including surgery to his left knee as far back as 2009. Applicant filed a claim form in 2011 for his left knee, this was denied by defendant. Applicant also submitted another claim form for his right knee in 2013, which was also denied by defendant.
>
> However, Applicant filed a claim for a continuous trauma that extends through his last date of employment. This is a different and distinct injury.
> . . .
> No credible evidence was presented to show applicant had actual knowledge or even constructive knowledge to support he should have reasonably known his knees were industrially injured through his last day of employment nor did he suffer any disability due to a bilateral knee injury for the period of exposure up through his last date of employment.
> . . .
> For L.C. § 5412 purposes, the date of injury is February 18, 2021 Since the Application for Adjudication of Claim for the CT ending on 12/10/2014 was filed on October 10, 2020, the claim is not barred by the statute of limitations. (Opinion on Decision, pp. 1-2.)

In the Report on defendant's Petition, the WCJ states:

> Applicant testified credibly that the first doctor to opine and advise him his bilateral knee condition was industrially related and provided for temporary disability was Dr. Graham, in his capacity as a PQME.
> . . .

> Since applicant's first knowledge of the industrial nature of his bilateral knees coupled with disability in the form of temporary disability was the February 18, 2021 report of PQME Scott Graham, M.D., the claim filed on October 5, 2020 was timely and is not barred by the statute of limitations.
>
> Defendant points to two previous claims both of which were denied and neither were for bilateral knees nor were they for exposure up through his last day of work.
>
> Dr. Graham documented, reviewed and summarized listed numerous medical records documenting applicant's medical history and prior injuries and claims. Nowhere in those records is there any reflection of applicant having advised or did any physician note in the records applicant had a bilateral industrially related knee condition due to his entire period of time he was employed through 2014.
>
> Defendant has failed to meet their burden of proof to show applicant had knowledge of the industrial nature of his injuries coupled with disability, prior to the reporting of PQME Scott Graham, M.D.
> (Report, pp. 2-3.)

DISCUSSION

Under section 132a, "[i]t is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment." Section 132a protects an employee from retaliation or discrimination by an employer because of an exercise of workers' compensation rights. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143 [63 Cal.Comp.Cases 944] (*Moorpark*); *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658 [43 Cal.Comp.Cases 1205]; *Department of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281, 1298-1299 [68 Cal.Comp.Cases 831]; *Smith v. Workers' Comp Appeals Bd.* (1984) 152 Cal.App.3d 1104, 1109 [49 Cal.Comp.Cases 212] (*Smith*); see *Usher v. American Airlines, Inc.* (1993) 20 Cal.App.4th 1520, 1526 [58 Cal.Comp.Cases 813].)

Section 132a states in pertinent part that:

> Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim…or an application for adjudication, or because the employee has received a rating, award, or settlement…testified or made known his or her intention to testify in another employee's case… may be guilty of a misdemeanor and responsible for the

> payment of increased compensation, costs, lost wages and work benefits to the injured employee.

This section has been "interpreted liberally to achieve the goal of preventing discrimination against workers injured on the job," while not compelling an employer to "ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available." (*Lauher*, *supra*, 30 Cal.4th at pp. 1298-1299 [citations omitted].)

In *Lauher*, the Supreme Court clarified its definition for "discrimination," noting that in its previous decisions in *Smith*, *supra* and *Barns v. Workers' Comp. Appeals Bd.* (1989) 216 Cal.App.3d 524, the Court held that an employer's action which caused detriment to the employee because of an industrial injury was sufficient to show a violation of the statute. (*Lauher, supra,* 30 Cal.4th at p. 1299 quoting [1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed., Peterson et al. edits, 2002)], § 10.11[1], p. 10-20 ["[t]he critical question is whether the employer's action caused detriment to an industrially injured employee"]; see *Barns, supra*, 216 Cal.App.3d at p. 531.)

The *Lauher* court noted with approval the Court of Appeal's finding that the formulation enunciated in *Smith*, and adopted by *Barns* to establish a prima facie case was "analytically incomplete:"

> The court explained that, although Lauher had clearly suffered a detriment by having to use his accumulated sick leave and vacation time for his visits to see Dr. Houts, he never established he 'had a legal right to receive TDI [temporary disability indemnity] and retain his accrued sick leave and vacation time, and that [his employer] had a corresponding legal duty to pay TDI and refrain from docking the sick leave and vacation time.' Thus, said the court, '[t]o meet the burden of presenting a prima facie claim of unlawful discrimination in violation of section 132a, it is insufficient that the industrially injured worker show only that . . . he or she suffered some adverse result as a consequence of some action or inaction by the employer that was triggered by the industrial injury. *The claimant must also show that he or she had a legal right to receive or retain the deprived benefit or status, and the employer had a corresponding legal duty to provide or refrain from taking away that benefit or status.*'" (*Lauher*, *supra*, 30 Cal.4th at pp. 1299-1300, italics added.)

The Court further agreed with the Court of Appeal that "[an] employer thus does not necessarily engage in 'discrimination' prohibited by section 132a merely because it requires an employee to shoulder some of the disadvantages of his industrial injury. By prohibiting 'discrimination' in section 132a, we assume that the Legislature meant to prohibit treating injured

employees differently, making them subject to disadvantages not visited on other employees because the employee was injured or had made a claim." (*Lauher, supra* at p. 1300.)

As the *Lauher* court determined in the first part of its decision, the employee was no longer entitled to temporary disability indemnity (TDI) because his condition was permanent and stationary. (*Lauher*, *supra* at p. 1297.) Therefore, even though the employee's use of sick and vacation leave was for medical treatment and time off due to his industrial disability, because he was not entitled to TDI, the employee was treated in the same way as non-industrially disabled workers who were also required to use sick and vacation leave for medical treatment and time off due to a disability. Because the employee in *Lauher* was on the same legal footing as non-industrially injured employees with respect to this issue, he could not show a legal right to TDI, and therefore could have only established a prima facie case for discrimination if he had been "singled out for disadvantageous treatment." (*Id.* at p. 1301; *Accord*, *Gelson's Markets, Inc. v. Workers' Comp. Appeals Bd.* (2009), 74 Cal.Comp.Cases 1313, *County of San Luis Obispo v. Workers' Comp. Appeals Bd.* (2005)133 Cal.App.4th 641 *(Martinez)*; Compare with *San Diego Transit, PSI, Hazelrigg Risk Management Services, Administrator, Petitioners v. Workers' Compensation Appeals Board* (2006) 71 Cal.Comp.Cases 445 (*Calloway*) [writ den.; defendant violated section 132a by refusing to return applicant to her bus driver position after she was released to work by her PTP, another treating physician and an AME.]).)

Based on its specific application to the facts of *Lauher*, we view the Court's phrase "singled out for disadvantageous treatment" to be an *application* of the broader standard adopted by *Lauher*—that, in addition to showing that he or she suffered an industrial injury and that he or she suffered some adverse consequences as a result of some action or inaction by the employer that was triggered by the industrial injury, an applicant "must also show that he or she had a legal right to receive or retain the deprived benefit or status, and the employer had a corresponding legal duty to provide or refrain from taking away that benefit or status." (*Lauher*, *supra* at p. 1300.) Stated another way, an employee must show they were subject to "disadvantages not visited on other employees because they were injured. . . ." (*Id.*)[5] Because the employee in *Lauher* was not deprived of a legal right to TDI, and therefore could not show he was treated differently than other

[5] *Accord, St. John Knits v. Workers' Comp. Appeals Bd.,* 2019 Cal. Wrk. Comp. LEXIS 75 [writ den.; the Court of Appeals found no reasonable grounds to review a WCAB finding of section 132a discrimination based upon substantial evidence of defendant employer's subjection of industrially-injured employee to disadvantages not visited on other employees.]

employees with respect to his alleged detriment, he could not establish a prima facie case of discrimination.[6]

In the present case, applicant contends as follows:

> [Defendant's] witnesses testified that [defendant] bifurcates non-industrial and industrial conditions between its departments. If it's non-industrial, they deal with the problems through its Long Term Disability (LTD) division. If it's a work related injury, then it goes through its Workers' Compensation (WC) division.
> . . .
> [Defendant] continued to adjust [applicant's] claim through its non-industrial LTD division as opposed to its WC division which led to his termination. Further, it failed to assign an RTW coordinator in the WC division for industrial injuries as it was supposed to do . . . [and] relied on stale reporting to make its employment determinations despite having access to more recent reporting in the WC claim.
> (Petition, p. 4:5-19.)

Although these contentions are unsupported by citations to the record, and although we are unable to discern support for these contentions in the scant summary of evidence before us, we recognize that the Report explicitly states that defendant's witnesses testified that defendant has different divisions handling employees' disability leave depending upon whether the leave is industrially or non-industrially related, that the parties engaged in an the interactive process for applicant's non-industrial cancer but not his industrially-injured shoulder, and that defendant admitted that it failed to engage in the interactive process for the industrially-injured shoulder, effectively denying applicant an interactive interview, an offer of modified work, and an opportunity to obtain medical reporting to support his position. (Report, p. 4.) It thus appears that defendant may have deviated from its usual procedures for returning employees to work and, as such, that applicant demonstrated his prima facie section 132a claim. (See, e.g., *Calloway, supra,* 71 Cal. Comp. Cases 445, 446-557, finding that an industrially injured employee may establish section 132a discrimination based upon evidence that the employer deviated from its usual procedures for evaluating whether the employee can perform an available job.) However, because the record of defendant's testimony is not more fully presented in the summary of evidence, we

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[6] We also note that the particular standard denoted by the phrase "singled out" does not literally apply where the detriment affects injured workers as a class, although the broader standard would apply. (*Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1377-78 [72 Cal.Comp.Cases 389].)

are unable to discern the evidentiary basis for the WCJ's conclusion. (Report on applicant's Petition, p. 4.)

Furthermore, we note that the record contains applicant's testimony that defendant accepted his injury claim on October 17, 2017 and terminated him on November 12, 2017. (Minutes of Hearing and Summary of Evidence, July 2, 2019, p. 5:5-10.) This evidence suggests that a close temporal proximity may exist between defendant's notice of the validity of applicant's claim and defendant's initiation of adverse action against him, and thus may prove that defendant subjected him to disadvantageous treatment because of his industrial injury. (See, e.g. *Arteaga v. Brink's, Inc*. (2008) 163 Cal.App.4th 327, 353, finding that temporal proximity between a worker's filing of a workers' compensation claim and an employer's adverse action against the worker is sufficient to establish a prima facie section 132a claim.) However, the Report on applicant's Petition does not discuss the evidence of a close temporal proximity between defendant's acceptance of applicant's claim and his termination, and we are otherwise unable to ascertain from the record what, if any, evidence may establish applicant's prima facie section 132a claim on the separate ground that defendant took adverse action against him shortly after receiving notice of the validity of his claim.

Section 5313 requires the WCJ to produce "a summary of the evidence received and relied upon and the reasons or grounds upon which the [court's] determination was made." (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22.) The WCJ's opinion on decision "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." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans* v. *Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton, supra,* at p. 478), and must be supported by substantial evidence. (§§ 5903, 5952, subd. (d); *Lamb* v. *Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza* v. *Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque* v. *Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton,* "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra,* at p. 475.)

In this case, pursuant to the discussion above, we are unable to ascertain the reasons or grounds upon which the WCJ determined in the Report that applicant presented evidence sufficient to prove his prima facie claim. We note, moreover, that a record of the grounds for such a decision is necessary not only for our review, but for defendant to present its business necessities defense, as appropriate. We therefore conclude that the WCJ should develop the record on the issue of whether and on what grounds applicant has established a prima facie case that defendant discriminated against him in violation of section 132a, and other issues such as whether the business necessities defense applies or constitutes a mere pretext for adverse treatment, as appropriate. Accordingly, we will rescind the F&A in case number ADJ10738865 and return the matter for further proceedings consistent with this decision.

Turning to defendant's Petition in case number ADJ1371949, we observe that it is well established that the burden of proof rests upon the party holding the affirmative of the issue, and all parties shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (§ 5705; *Lantz v. Workers' Comp. Appeals Bd*. (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (*Obernier*) (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289].) "Preponderance of the evidence" is defined by section 3202.5 as the "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." (§ 3202.5.)

Section 5404 states in part:

> Unless compensation is paid within the time limited in this chapter for the institution of proceedings for its collection, the right to institute such proceedings is barred.
> (§ 5404.)

Pursuant to section 5405:

> 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. …
> (§ 5405.)

Section 5412 defines the date of injury for a cumulative injury claim as:

> [T]hat 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.
> (§ 5412.)

For purposes of determining the date of a cumulative injury, it is not assumed that a worker has knowledge that the disability is job-related without medical confirmation, unless the nature of the disability and the worker's qualifications are such that he or she should have recognized the relationship. (*City of Fresno v. Workers' Comp. Appeals Bd., (Johnson)*, (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53].) An injured worker's knowledge that he or she sustained symptoms is not knowledge that the symptoms were work related. (*Pacific Indemnity Company v. Industrial Accident Commission (Rotondo)* (1950) 34 Cal. 2d 726, 729 [15 Cal.Comp.Cases 37].) Whether an employee knew or should have known his or her disability is industrially related is generally a question of fact to be determined by the trier of fact, i.e., the WCJ. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson), supra*; *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104]; *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33 Cal.Comp.Cases 722]; *Alford v. Industrial Accident Com.* (1946) 28 Cal.2d 198 [11 Cal.Comp.Cases 127].)

Here, applicant testified that, although he had sought treatment for knee injuries and had discussed his job duties with his treating physician, the first doctor to advise that his bilateral knee condition was industrially related was Dr. Graham, in his capacity as PQME. (Minutes of Hearing and Summary of Evidence, July 8, 2021, p. 4:1-21; Report on defendant's Petition, p. 2.) The WCJ determined that this testimony was credible, a determination which we accord great weight because the WCJ had the opportunity to observe applicant's demeanor at trial. (Report on defendant's Petition, p. 2; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358].)

In addition, the documentary evidence in the record before us corroborates applicant's testimony: Dr. Graham's February 18, 2021 report is the only medical record in evidence opining that applicant sustained industrial injury to his bilateral knees as a result of a CT injury for the entire period of his industrial exposure. (Report on defendant's Petition, p. 3; Ex. 1, Report of Dr. Graham, February 18, 2021, p. 13.) Notably, Dr. Graham issued this opinion with knowledge of

the contents of the medical records regarding applicant's prior knee surgeries and injuries over the years. (See Ex. 1, Report of Dr. Graham, February 18, 2021, pp. 3-13.)

Notwithstanding this record, defendant contends that the parties' stipulations that applicant filed claims on March 18, 2013 and December 14, 2011 "regarding each knee" demonstrate that one of those dates must apply for statutory limitations purposes to the claim herein. (Petition, pp. 3, 5.) But contrary to defendant's position, the parties' stipulations fail to identify or otherwise reference the body parts applicant alleged were injured in those claims. (Minutes of Hearing and Summary of Evidence, July 8, 2021, p. 2:5-17.) Moreover, the record shows that defendant denied both claims and that neither of the claims alleged injury to the bilateral knees for the period through applicant's last day of work. (*Id.*; Report on defendant's Petition, p. 3.) Thus, defendant's contention that the parties' stipulations demonstrate that the statute of limitations date for applicant's claim is either December 14, 2011 or March 18, 2013 is without support.

Defendant also argues that "it is disingenuous to state applicant had no knowledge that his work activities as a lineman" caused his knee injuries because he "had been experiencing pain in them directly related to work activities since the 1980s, 1990s, and 2000s, as a mechanic and lineman." (Petition, p. 5.) However, applicant's knowledge that he sustained symptoms does not constitute knowledge that the symptoms were work related, and there is no evidence before us that the nature of his disability or work qualifications were such that he should have recognized that his symptoms were the result of cumulative trauma. (Report on defendant's Petition, p. 3; *Pacific Indemnity Company v. Industrial Accident Commission (Rotondo), supra*; *City of Fresno v. Workers' Comp. Appeals Bd., (Johnson), supra*.)

Defendant also argues that applicant, "testified that he knew work activities cause pain in his knees." (Petition, p. 5.) However, the record of applicant's testimony shows that as of the time of the trial applicant believed his "work contributed to his knees," not that he testified that he was aware of a cumulative injury prior to being told by Dr. Graham that his knee injuries were work related. (Minutes of Hearing and Summary of Evidence, July 8, 2021, p. 4:22-23.)

Defendant also argues that Dr. Graham's report opining that applicant sustained injury to his bilateral knees is based upon an incomplete medical history and therefore fails to constitute substantial medical evidence. However, the issue before us is not whether applicant has established that he sustained his claimed CT injury, but rather when the period in which he may assert that injury begins. Thus, the question of whether or not Dr. Graham's medical report

constitutes substantial medical evidence has no bearing on our determination of the statutory period.

Defendant also argues that, because section 3208.1 provides that "there can only be one cumulative trauma claim and the date of injury is determined under [section] 5412," and because applicant did not seek treatment for his knees during the last nine months of his employment and was disabled from work before then as a result of his non-industrial 2013 motorcycle injury, applicant has failed to assert the occurrence of a cumulative trauma injury during a period beyond the statutory periods applicable to his previous claims. (Petition, p. 11:9-10.)

However, contrary to defendant's position, section 3208.1 does not state that there can be only one cumulative trauma claim and does not proscribe claims of cumulative injury that become manifest after employment. Rather, section 3208.1 provides that an "injury . . . may be 'cumulative[]'" when it is one "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*." (§ 3208.1 [Emphasis added.].) Furthermore, section 3208.1 explicitly provides that the date of a cumulative injury shall be determined under section 5412. (*Id.*) It is thus clear that, as explained above, the determination of the date of applicant's claimed CT injury requires analysis of the record under section 5412 and applicable case law, and does not depend upon the fact of whether or not applicant previously filed claims for different injuries which may partially overlap the period of alleged injury herein.

The case law supplies the rationale for our adherence to section 5412. In *J. T. Thorp v. Workers' Comp. Appeals Bd*. (*Butler*) (1984) 153 Cal.App.3d 327 [49 Cal.Comp.Cases 224], the court states:

> The "date of injury" is a statutory construct which has no bearing on the fundamental issue of whether a worker has, in fact, suffered an industrial injury … [T]he "date of injury" in latent disease cases "must refer to a period of time rather than to a point in time." [Citation.] The employee is, in fact, being injured prior to the manifestation of disability … [T]he purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury."
> (153 Cal.App.3d at p. 341.)

In *City of Los Angeles v. Workers' Comp. Appeals Bd.* (*Calvert*) 88 Cal.App.3d 19 [43 Cal.Comp.Cases 1280], the court similarly states:

> The purpose of section 5412 is the application of the statute of limitations as set forth in Labor Code section 5405, subdivision (a) . . . Thereby, in occupational disease and cumulative injury cases, only when there is a concurrence of both knowledge and disability can the statute of limitations run. In this way no claim for benefits is barred before the injured is aware of his rights.
> (88 Cal.App.3d at p. 27, fn. 6.)

And in *Chavez v. Workmen's Comp. Appeals Bd.* (1973) 31 Cal.App.3d 5, 12, fn. 7 [38 Cal.Comp. Cases174], the court declares:

> Section[] …5412 of the Labor Code should be taken to mean that wherever a working man suffers a compensable injury of an insidious character so that as of the date of injury or exposure he has no actual disability and neither knows or in the exercise of reasonable diligence should know that he has suffered such an injury, the statute of limitations will run from that date on which there is a concurrence of both disability and actual or constructive knowledge of job connection.
> (88 Cal.App.3d at p. 27, fn. 6.)

Thus, we are unable to discern support for defendant's contention that applicant is barred by section 3208.1 from alleging a CT claim that includes the period after his return to work following his non-industrial 2013 motorcycle injury.

Therefore, we agree with the WCJ's reasoning that defendant's Petition fails to show that applicant had knowledge of the industrial nature of his alleged injury to the bilateral knees coupled with disability or need for medical treatment before he received Dr. Graham's report. (Report on defendant's Petition, p. 3.) Accordingly, we will affirm the F&O in case number ADJ1371949.

Accordingly, as our Decision After Reconsideration, we will rescind the F&A in case number ADJ10738865 and return the matter for further proceedings consistent with this decision and affirm the F&O in case number ADJ1371949.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Award issued on August 6, 2019 in case number ADJ10738865 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

IT IS FURTHER ORDERED that the Findings and Order issued on September 24, 2021 in case number ADJ1371949 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 21, 2022

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

MICHAEL GARCIA
GHITTERMAN, GHITTERMAN & FELD
INGBER & WEINBERG

SRO/*pc*

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