WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TIMOTHY DELGADO, ***Applicant***

vs.

COUNTY OF VENTURA, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., ***Defendants***

Adjudication Number: ADJ13410693
Oxnard 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.

In the Findings of Fact of June 22, 2021, the workers' compensation administrative law judge ("WCJ") found that during the period February 12, 2017 through July 15, 2020, applicant, while employed as a District Attorney Investigator by the County of Ventura, sustained industrial injury to his psyche in the form of post-traumatic stress disorder ("PTSD").

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends that the presumption of industrial PTSD under Labor Code section 3212.15 is inapplicable, that even if the presumption is applicable defendant has rebutted it, and that successive injuries with previous employers cannot be combined to meet the predominant causation threshold of Labor Code section 3208.3.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate, we will affirm the Findings of Fact of June 22, 2021.

As alluded to before, defendant contends that because Labor Code section 3212.15 applies only to injuries on or after January 1, 2020, the statute is inapplicable here because the date of applicant's cumulative trauma injury under Labor Code section 5500.5(a) is 2018, when he last suffered "injurious exposure" investigating the Borderline night club mass shooting. (See Petition for Reconsideration, p. 5:1-15.)

We are not persuaded. Applicant claimed injury during the period February 12, 2017 through July 15, 2020. (Minutes of Hearing, 5/26/21, p. 2.) Defendant asserts that according to Dr. Spencer, the Panel Qualified Medical Evaluator ("PQME") in psychiatry, applicant's psyche injury resulted from actual events of employment during the period 2004 through 2018. (Petition for Reconsideration, p. 3.) However, there is no indication in the record that defendant attempted to join applicant's previous employer, the City of Ventura, to raise the issue of division of liability between multiple employers during the period 2004 through 2018, pursuant to Labor Code section 5500.5(a). Under WCAB Rule 10517, moreover, "[p]leadings may be amended by the Workers' Compensation Appeals Board to conform to proof." (Cal. Code Regs., tit. 8, § 10517.) Here, there is no indication in the record that defendant requested amendment of applicant's claim of injury during the period February 12, 2017 through July 15, 2020 to conform to supposed proof that the period of injury was 2004 through 2018.

We further note that under section 5500.5(a), liability for cumulative injury claims is limited to those employers who employed the employee during a period of one year immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first.

Section 5500.5(a) speaks to the issue of determining liability for a cumulative injury, while Labor Code section 5412 speaks to the issue of the date of cumulative injury for purposes of applying the Statute of Limitations.

In cases involving a claimed cumulative trauma injury wherein multiple employers are implicated, the analysis required by the two statutes is related but distinct. That is, part of the analysis to determine liability under section 5500.5(a) requires an analysis of the date of cumulative injury under section 5412. (See *County of Riverside v. Workers' Comp. Appeals Bd.* (*Sylves*) (2017) 10 Cal.App.5th 119 [82 Cal.Comp.Cases 301] ("*Sylves*").)

In this case, applicant claims he suffered a cumulative trauma of PTSD from February 12, 2017 through July 15, 2020, while employed by a single employer, the County of Ventura. This means the date of applicant's cumulative trauma injury is properly determined pursuant to Labor Code section 5412, not section 5500.5(a). The reason is that 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," while section 3208.1 also states that the "[t]he date of a cumulative injury shall be the date determined under Section 5412." Pursuant to section 3208.1, the date of injury is correctly determined by reference to section 5412, regardless of whether or not the Statute of Limitations has been raised as an affirmative defense.

Further, under 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, 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." (*Sylves, supra,* 10 Cal.App.5th at 124-125, quoting *City of Fresno v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 473.)

In this case, PQME Spencer reported that the onset of applicant's PTSD occurred during his employment by defendant County of Ventura, "most likely in 2019." (Joint Exhibit A, Spencer report dated 3/23/21, p. 23.) However, Dr. Spencer's report also indicates that applicant evidently first suffered temporary disability on July 15, 2020. Thus, the latter date is the date when applicant

first suffered disability; that is also when he knew or should have known, from Dr. Spencer's report, that his disability was caused by his present or prior employment. Accordingly, the WCJ correctly found that the date of applicant's cumulative trauma extended through the period ending July 15, 2020.

Defendant further contends that notwithstanding the presumption of industrial PTSD provided by Labor Code section 3212.15, the long-standing predominant cause requirement of Labor Code section 3208.3(b)(1) remains applicable. Defendant alleges that since Dr. Spencer found applicant's PTSD only 20% caused by his employment by the County of Ventura, the predominant cause standard is not met. (Petition for Reconsideration, p. 8:25-9:5.)

Briefly reviewing the relevant language of the two statutes, a compensable psychiatric injury under section 3208.3(b)(1) exists where the employee "demonstrate[s] by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury." The phrase "predominant as to all causes combined" means that work-related cause(s) must have a greater than a 50 percent share of the entire set of causal factors. (*Department of Corrections/State of California v. Workers' Comp. Appeals Bd.* (*Garcia*) (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356] ("*Garcia*").)

Labor Code section 3212.15(b), as relevant here, states:

"[…] [T]he term "injury," as used in this division, includes "post-traumatic stress disorder," as diagnosed according to the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association and that develops or manifests itself during a period in which any [employee covered by the statute] is in the service of the [employer covered by the statute]."

Subdivision (c)(2) then states in relevant part, "[f]or an injury that is diagnosed as specified in subdivision (b): […] (2) The injury so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with the presumption. […]"

Thus, under section 3212.15(b) and (c), a "disputable" presumption of industrial injury arises where (1) there is a professional diagnosis of PTSD; and (2) the PTSD "develops or manifests itself" during a period in which an employee covered by the statute is in the service of an employer covered by the statute. (Here there is no dispute that applicant and defendant are

covered by the statute during the period of employment in question.) In light of the two conditions just described, it is obvious that the predominant causation standard of section 3208.3 is not an express requirement that must be satisfied in order to establish the presumption of section 3212.15.

However, defendant insists that the Legislature implicitly imported section 3208.3(b)(1)'s predominant causation requirement into section 3212.15. According to defendant, the Legislature did this by enacting the latter statute without expressly excluding the predominant causation requirement of the former statute.

We disagree. As explained by the Court of Appeal in *Marinwood Community Services, Inc. v. Workers' Comp. Appeals Bd.* (*Romo*) (2017) 10 Cal.App.5th 231, 241 [82 Cal.Comp.Cases 317] (quoting *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 310–311 [70 Cal.Comp.Cases 109]),[1] the sort of presumption afforded by section 3212.15 is a reflection of public policy whose purpose is to provide *additional* compensation to employees who provide vital and hazardous services *by easing their burden of proof* of industrial causation:

> "[I]n the case of certain public employees who provide 'vital and hazardous services' to the public [citation], the Labor Code contains a series of presumptions of industrial causation. These presumptions provide that when specified public employees develop or manifest particular injuries or illnesses, during their employment or within specified periods thereafter, the injury or illness is presumed to arise out of and in the course of their employment. (See §§ 3212 [hernia, heart trouble, pneumonia], 3212.2, 3212.3, 3212.4, 3212.5, 3212.6 [tuberculosis], 3212.7, 3212.8 [blood-borne infectious diseases], 3212.85 [exposure to biochemical substances that may be used as weapons of mass destruction], 3212.9 [meningitis], 3212.10, 3212.11 [skin cancer], 3212.12 [Lyme disease], 3213, 3213.2 [lower back impairments].) These presumptions are a reflection of public policy. [Citation.] Their purpose is to provide additional compensation benefits to employees who provide vital and hazardous services by easing their burden of proof of industrial causation."

In this case, defendant's proposed interpretation of section 3212.15 - that it inherited the long-standing predominant causation requirement of section 3208.3(b)(1) – would have the opposite effect that evidently was intended by the Legislature. That is, defendant's interpretation of section 3212.15 would likely *reduce* compensation to employees (like this applicant) who

[1] In *City of South San Francisco v. Workers' Comp. Appeals Bd.* (*Johnson*) (2018) 20 Cal.App.5th 881 [83 Cal.Comp.Cases 451], the Court of Appeal concluded that the presumption that a firefighter's cancer arose out of employment under Labor Code section 3212.1 does not govern the allocation of liability for compensation between two employers. As noted previously in this case, there is no issue of allocating liability between multiple employers.

provide vital and hazardous services, by *further burdening* their burden of proof. Defendant's proposed interpretation also is inconsistent with well-settled rules of statutory construction, e.g., statutes should be interpreted so as to promote rather than defeat the purpose of the statute, and interpretations that lead to absurd consequences should be avoided. (See *Medrano v. Workers' Comp. Appeals Bd.* (2008) 167 Cal.App.4th 56, 63 (73 Cal.Comp.Cases 1407) [The fundamental rule of statutory interpretation ascertains the Legislature's intent concerning a law's purpose by reference to the plain meaning of the statute's words; if the language has more than one reasonable interpretation, courts may look to other sources such as legislative history, the statute's purpose, and public policy. After considering these extrinsic aids, a court must select the construction that most closely comports with Legislature's apparent intent, to promote rather than defeat the general purpose of the statute, and to avoid interpretations that lead to absurd consequences.].)

We also observe that the parties have not presented the issue of whether sections 3208.3 and 3212.15 are incapable of harmonization. Nonetheless, we note that where two statutes pertaining to the same subject cannot be harmonized, the more specific statute controls. (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1118.) Here section 3212.15, which pertains to the singular psychiatric condition of PTSD, is the more specific statute.

Finally, defendant contends that its position is supported by *Lewis v. Workers' Comp. Appeals Bd.* (2011) 77 Cal.Comp.Cases 108 [writ den.] ("*Lewis*") and *Pearl v. Workers' Comp. Appeals Bd.* (2001) 26 Cal.4th 189 [66 Cal.Comp.Cases 823] ("*Pearl*").

Defendant's reliance on the two cases is misplaced.

In *Lewis*, the applicant failed to meet the predominant cause threshold for a psychiatric claim against his previous employer where the psychiatric Agreed Medical Evaluator ("AME") attributed 35% of his psychiatric injury to physical injuries he sustained with the prior employer, and 65% to a 2005 specific injury sustained in a car accident while working for a subsequent employer. It is not clear that *Lewis* was correctly decided. This is because the first employer apparently admitted that applicant's psyche injury was "100 percent industrial." If that was the case, then the greater-than-50-percent predominant causation threshold should not have barred the injured employee's claim of psyche injury against the two employers. Instead, the AME's opinion should have been found to justify a 35/65 division of liability between applicant's first and second employers. More importantly, *Lewis* is inapposite because unlike this case, *Lewis* did not involve

section 3212.15; and in *Lewis* it was not disputed that the predominant causation requirement applied to the applicant's claim of psychiatric injury.

In *Pearl*, the applicant obtained disability retirement benefits from the Public Employees' Retirement System (PERS) for a job-related psychiatric injury and petitioned the WCAB to determine whether the injury was industrial, which would entitle him to increased benefits. The WCAB applied Labor Code section 3208.3 to determine that the injury was non-industrial, and the Court of Appeal denied review. Upon further review, however, our Supreme Court concluded that Government Code section 20046 (a provision of PERS Law) and not Labor Code section 3208.3 governed whether the disability of the PERS member was industrial.

Defendant's reliance upon *Pearl* fails because the basis of the Supreme Court's decision was that workers' compensation law and PERS law involved two "distinct legislative schemes," and the Court could not "assume that the provisions of one apply to the other absent a clear indication from the Legislature." Further, the Court found that the Legislature had given no such "clear indication," so the Court could not assume the Legislature intended to amend the PERS Law by implication. (*Pearl*, *supra*, 26 Cal.4th at 197.)

Pearl is distinguishable, and it actually supports our conclusion that the predominant cause requirement of section 3208.3(b)(1) is not imported into the presumption of industrial PTSD afforded by section 3212.15. In this case, unlike *Pearl*, there is no need to wrestle with two distinct statutory schemes - sections 3208.3 and 3212.15 both are included within the statutory workers' compensation scheme. Further, and consistent with *Pearl*, we do not assume the provisions of one statute (section 3208.3) apply to the other statute (section 3212.15). As discussed before, we reach the opposite conclusion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact of June 22, 2021 are **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 21, 2023

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

TIMOTHY DELGADO
GORDON, EDELSTEIN, KREPACK, GRANT, FELTON & GOLDSTEIN
COLEMAN CHAVEZ & ASSOCIATES

JTL/*ara*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Defendant filed a timely, verified petition for reconsideration of the undersigned's 6/8/2021 Findings of Fact wherein applicant was found to have sustained injury AOE/COE to his psyche in the form of PTSD.

Applicant filed an Answer.

PROCEDURAL HISTORY

Applicant, Timothy Delgado, born [], while employed during the period 2/12/2017 to 7/15/2020, as a DA Investigator, Occupational Group Number 490, at Ventura, California, by the County of Ventura, claimed to have sustained injury arising out of and in the course of employment to his psyche in the form of PTSD, post-traumatic stress disorder. At the time of injury, the employer was permissibly self-insured, administered by Sedgwick.

Defendant, County of Ventura, denied the claim. Defendant asserts applicant failed to sustain the burden to prove employment by County of Ventura was the predominant cause of the injury to the psyche as set forth in Labor Code section 3208.3.

Applicant received treatment from Marc Ne[y]orayan, M.D. See Dr. Ne[y]horayan reports dated 8/14/2020 thru 2/12/2021, Applicant's exhibits 1 thru 5.

On 2/10/2021, applicant was evaluated by PQME Edward L. Spencer, M.D. See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021.

Applicant's history of prior employment as a police officer from about 2000 through 2017 with the City of Ventura was noted by Dr. Spencer. Applicant had been involved in patrol activities for over 10 years until he became a narcotics detective in 2012. See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021, page 6.

In 2014, applicant began drinking hard liquor which became problematic. See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021, page 6. Dr. Spencer found applicant to be suffering from PTSD from his work as a police officer for the City of Ventura, and as a DA Investigator for the County of Ventura. See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021, page 25.

Dr. Spencer found the PTSD to be caused 80% by the employment at the City of Ventura, and 20% by the employment of the County of Ventura. See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021, page 25-26.

Dr. Spencer found applicant to be temporarily totally disabled beginning on 7/15/2020. See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021, page 27.

Dr. Spencer also found applicant to be suffering from a separately identifiable depressive disorder which was caused 80% from PTSD, 10% due to alcohol dependence, and 10% due to his work as a DA Investigator. See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021, page 26.

PSYCHIATRIC INJURY in the form of PTSD is AOE/COE

Applicant asserts that while employed during the period 2/12/2017 to 7/15/2020, as a District Attorney Investigator, Occupational Group Number 490, at Ventura, California, by the County of Ventura, he sustained injury arising out of and in the course of employment to his psyche in the form of PTSD.

Applicant asserts said injury is covered under the presumption found in Labor Code section 3212.15 which applicant asserts supersedes the requirement of predominant cause set forth in Labor Code section 3208.3.

Defendant asserts applicant failed to sustain the burden to prove employment by County of Ventura was the predominant cause of the injury to the psyche as set forth in Labor Code section 3208.3.

Labor Code section 3212.15(c)(2) states,

> "**The injury so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of 3 calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.**"

The undersigned found applicant's injury to the psyche in the form of PTSD to be covered under the presumption set forth in Labor Code section 3212.15.

The undersigned found the presumption was not rebutted.

The undersigned found applicant, while employed during the period 2/12/2017 to 7/15/2020, as a District Attorney Investigator, Occupational Group Number 490, at Ventura, California, by the County of Ventura, sustained injury arising out of and in the course of employment to his psyche in the form of PTSD.

Defendant asserts in the petition for reconsideration the date of injury should end in 2018. See petition for reconsideration, page 1.

Defendant asserts in the petition for reconsideration that the undersigned failed to explain why there was a finding of injury arising out of and in the course of employment from 2/12/2017 to 7/15/2020 to applicant's psyche in the form of PTSD. See petition for reconsideration, page 5.

First, the undersigned was guided by the pre-trial conference statement, EAMS Doc ID #36811346, which indicated the parties stipulated to the date of injury to be from 7/01/2017-7/15/2020.

Next, the undersigned met with the parties on the day of trial, before calling the court reporter, to review the proposed stipulations and issues. During that meeting, the parties advised the undersigned that the *stipulated date of injury was actually 2/12/2017 to 7/15/2020*. See minutes of hearing 5/26/2021, page 2, lines 4 through 7.

Next, the undersigned reviewed the entire record including the reporting of PQME Dr. Spencer.

Dr. Spencer found the PTSD to have manifested in August of 2020. See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021, pages 22-23.

The undersigned was persuaded by the fact that Dr. Spencer found applicant's "first medical evaluation that unequivocally resulted in a PTSD diagnosis was his August 2020 evaluation in the context of this case; there was no indication in the file that he unequivocally met criteria at any previous point." See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021, page 23.

Dr. Spencer found the PTSD to be caused 80% by the employment at the City of Ventura, and 20% by the employment of the County of Ventura. See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021, pages 25-26.

Next, under Labor Code section 5412, the undersigned found, based upon the reporting of Dr. Spencer, that the first concurrence by applicant of knowledge of suffering from a continuous trauma and disability occurred when applicant was temporarily disabled beginning on July 15, 2020. See Joint exhibit A, report of Edward L. Spencer, M.D., dated 3/3/2021, page 27.

The undersigned found the reporting of PQME Dr. Spencer to be substantial evidence that applicant sustained injury to his psyche in the form of PTSD AOE/COE while employed by defendant during the period 2/12/2017 to 7/15/2020.

RECOMMENDATION

Based upon the forgoing reasons the undersigned recommends the petition for reconsideration be denied.

DATE: 07/20/2021

MICHAEL K. GREENBERG
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE