WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CARLOS CHAVEZ LOPEZ, ***Applicant***

vs.

INTERIOR REMOVAL SPECIALIST;
ZURICH AMERICAN INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ14904660
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION 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, except as noted below, and for the reasons stated below, we will grant reconsideration for the sole purpose of amending the November 30, 2023 Findings of Fact, Order & Award to make a finding of the Labor Code[1] section 5412 date of injury. We otherwise affirm the WCJ's decision.

Because we are amending the WCJ's decision to add a section 5412 date of injury, we do not adopt or incorporate the WCJ's recommendation that we deny reconsideration.

"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*

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

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 C*hambers 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, while applicant knew that he had symptoms, defendant has not met its burden to show that he knew that his injury was job-related until, at earliest, when applicant filed an Application for Adjudication of Claim on July 15, 2021. We observe that in cases involving cumulative trauma injuries, the date of injury pursuant to section 5412 "also sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right[s]." (*Argonaut Mining Co. v. Ind. Acc. Com*. (1951) 104 Cal.App.2d 27, 31.) Since the section 5412 date of injury is July 15, 2021, applicant's claim is not barred by the post-termination defense (Lab. Code, § 3600(a)(10)(d)).

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 30, 2023 Findings of Fact, Order & Award is **AFFIRMED**, **EXCEPT** as **AMENDED** below.

FINDINGS OF FACT

* * *

7. The Labor Code section 5412 date of injury is July 15, 2021.

* * *

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
FEBRUARY 5, 2024
SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

CARLOS CHAVEZ LOPEZ
LAW OFFICES OF ANTONY E. GLUCK
GREENUP, HARTSON & ROSENFELD

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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.
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REPORT AND RECOMMENDATION ON PETITION FOR PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1. Minutes of Hearing	September 7, 2023
2. Findings and Order	November 30, 2023
2. Identity of Petitioner	Defendant
3. Verification	Yes
4. Timeliness	Petition is timely
5. Petition for Reconsideration	December 26, 2023
6. Proof of Service	Yes* (*not served on the applicant)

II.

FACTS AND PROCEDURAL HISTORY

Applicant, a now 48-year-old male, claims to have sustained a cumulative trauma injury to his cervical spine, right wrist, right hand, and left knee during his employment for Interior Removal Specialists, Inc. ("IRS") as a general laborer during the period May 18, 2020 to May 18, 2021. It is uncontroverted that he worked on construction sites, performing arduous and physical demolition work, for over nine years at IRS.

Applicant filed the cumulative trauma injury claim on July 15, 2021. The parties utilized the services of a Panel Qualified Medical Evaluator (PQME), Dr. Moheimani. PQME. Dr. Moheimani examined the applicant and issued a report dated August 1, 2022. (Joint Ex. 1) Dr. Moheimani found industrial cumulative trauma injury to his cervical spine, right hand, right wrist and left knee. The PQME states that the complaints are all "medically probable" and that "although there are some inconsistencies with the way in which he reported his injuries to me, in the medical records, and in the deposition, as well as the fact that he really did not begin to seek treatment until after employment was no longer available" the injuries are AOE/COE. (Joint Ex. 1, pg. 35).

On September 7, 2023, the Parties appeared before the undersigned on the issues of (1) AOE/COE and (2) whether the affirmative defense of post-termination outlined in Labor Code § 3600 (a)(10) provides a bar to benefits in this case. The undersigned issued Findings and Orders and an Opinion on Decision on November 30, 2023, finding in favor of the Applicant on the issue of AOE/COE as to the cumulative injury claim and against Defendant on it's post-termination

affirmative defense under Labor Code § 3600 (a)(10) finding that it does not provides a bar to benefits in this case. Thereafter, Defendants filed the instant Petition for Reconsideration on December 26, 2023.

Defendant's Petition for Reconsideration is based on the following grounds:

1. The evidence does not justify the findings of fact; and

2. The findings of fact do not support the order, decision or award.

Essentially, Defendant petitioner argues that (1) the applicant's testimony was not credible, (2) there is insufficient evidence of industrial injury, and (3) the injury is barred by Labor Code § 3600(a)(10).

III.

DISCUSSION

A.

The Testimony of The Applicant Is Credible

Defendants claim that the undersigned WCJ erred in determining that Applicant's testimony was credible.

Credibility determinations of the WCJ, as the trier of fact, are entitled to great weight based upon the opportunity to observe the demeanor of witnesses as they testified and were subject to cross-examination. (*Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 312.) Furthermore, a WCJ's credibility determination may be disturbed only where there is contrary evidence of considerable substantiality. (*Id*.) There is no such evidence of considerable substantiality here. As such, there is no reason to disturb the credibility findings of the WCJ here. Generally, when reviewing the record, the appeals board must accord a WCJ's credibility determinations great weight because the judge had the opportunity to observe the demeanor of witnesses and weigh their statements in connection with their manner on the stand. (*Id*.)

The testimony was credible and the undersigned made a determination that the applicant was credible. After reflecting on the record as a whole and after carefully weighing and considering the witnesses' demeanor while testifying and the manner in which they testified; their personal interest or lack of interest in the outcome of the proceeding; their capacity to accurately perceive, recollect, and communicate the matters on which they testified; and their attitudes toward this proceeding and towards their giving of testimony (see, e.g., Cal. Evid. Code, § 780 [listing various

factors to consider in determining credibility]), the court found that the applicant's testimony on the dispositive facts were credible.

Based on the credible testimony of the applicant at trial, and the range of admitted evidence, it was found by the undersigned that the applicant did in fact sustain the injuries claimed, AOE/COE, and that the post termination defense does not provide a bar to workers' compensation benefits for this applicant in the instant case. The undersigned further found that the applicant acted within a reasonable time to advise his employer of his injuries. In this case, those findings required a decision in favor of the applicant.

B.

There Exists Substantial Evidence of Industrial Injury

It has been well established under California workers' compensation law that an award for benefits must be supported by substantial evidence. (*LeVesque v. WCAB* (1970) 35 CCC 16). Labor Code section 5952(d) requires an award of the appeals board to be "supported by substantial evidence." Furthermore, Labor Code section 5953 provides in part: "The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the appeals board." Together, LC 5952 and LC 5953 have been interpreted as establishing that "[t]he findings and conclusions of the appeals board on questions of fact are conclusive and final" as long as, "based upon the entire record," they are "supported by substantial evidence." (*LeVesque* at 25 fn. 19) So if the appeals board's findings are supported by inferences that may fairly be drawn from evidence even though the evidence is susceptible to opposing inferences, the reviewing court will not disturb the award. (*Crown Appliance v. WCAB* (Wong) (2004) 69 CCC 55 (writ denied)).

The test of substantiality is measured on the basis of the entire record. The appeals board may not isolate a fragment of a doctor's report or testimony and disregard other portions that contradict or nullify it; it must give fair consideration to all of the doctor's findings. (*Gaytan v. WCAB* (2003) 68 CCC 693, 706). In evaluating the evidentiary value of medical evidence, the physician's report and testimony must be considered as a whole, not segregated parts. So the entire report and testimony must demonstrate that the physician's opinion is based on reasonable medical probability. (Bracken v. WCAB (1989) 54 CCC 349, 355).

In the instant case, the undersigned WCJ carefully and judiciously evaluated the testimony of the applicant, all of the medical reports admitted into evidence and the thoughtful argument on

the issues by counsel for both parties. The undersigned WCJ did not isolate any fragment of a doctor's report nor testimony and did not disregard other portions that contradict or nullify it; indeed, the undersigned gave fair consideration to all testimony and all of the doctor's findings. In this case, those findings are in favor of the applicant.

Applicant credibly testified that he went on two to three jobs per day. He further testified that he also used hammers and pliers and would demolish flooring using a chipping hammer. He used an electronic saw that weighed 25 to 30 pounds to cut the floors. Moreover, he removed ceilings and kneeled on the scaffolding for days to months depending on the size of the job. He wore a tool belt with tools that weighed about 10 pounds. Also, he filled trash cans with wheels that weighed about 75-100 pounds after filling them, and he took them out. This job does not require him to drive. (MOH/SOE 4:12-21) His work shift is typically 8 hours per day, though at times it lasted 10 to 12 hours with a total of 80 work hours per week. He would work during the daytime, sometimes lasting until nighttime. (MOH/SOE 4:20-21) Applicant testified that his supervisors vary from day to day. He worked seven days a week and would report to work tired. (MOH/SOE 4:21-24).

The applicant saw QME Dr. Moheimani who took a history of his injury and the Applicant testified that honest with the QME. (MOH/SOE 6:5) Dr. Moheimani gave a fair and thorough analysis of all the factors that caused the injury. This report was offered as a Joint Exhibit (Joint Ex. 1).

In his causation analysis, he commented that this claim is a "post-termination claim". Moreover, "the Applicant was not symptomatic to the pled body parts per the medical records however, despite these observations, and absent job description relying on the Applicant's description of his job that is demanding in nature", Dr. Moheimani found AOE/COE. He further pointed out that the "developing knee pain as an individual who repeatedly squats to do repetitive work activities, hand pain, and numbness when he is knocking down walls on a repetitive basis and developing some pain in the neck, though he describes it primarily as stress-related, are all medically probable." He further elaborates that though there are inconsistencies with the way the injuries are reported, there is causation based on the "heavy nature' of his job and concluded that "it is medically probable that he would develop symptoms in the cervical spine, right hand and wrist and his left knee." Dr. Mohemani found that there is a continuous trauma period from May 18, 2020, to May 18, 2021, to these body parts. (Joint Ex. 1 p. 35).

C.

The Injury Is Not Barred By Labor Code 3600(a)(10)

For injuries occurring on or after July 16, 1993, Labor Code section 3600(a)(10) provides the employer with a "post-termination" defense to a claim of injury. The purpose of this defense is to protect the employer from retaliatory and fraudulent claims made by employees who have been terminated or laid off. *Faulkner v. WCAB* (2004) 69 CCC 1161 (writ denied). This statutory defense eliminates liability for compensation for certain claims that are filed subsequent to a termination, layoff or receipt of notice thereof.

The general rule is that an injury is not compensable if a claim "[is] filed after notice of termination or layoff, including voluntary layoff, and ... the claim is for an injury occurring prior to the time of notice of termination or layoff." In order for Labor Code 3600(a)(10) to come into play, the employer must establish: (1) that the claim for compensation was filed after the notice of termination or layoff; and (2) that the claim is for an injury occurring before the time of notice of termination or layoff. *Hart v. WCAB* (2002) 67 CCC 961 (writ denied). The Employer has met their burden here. However, that does not end the inquiry.

Once the employer has established these elements, the burden shifts to the employee to prove that the post-termination defense does not apply. *Chico v. Onemor, Inc., dba McDonald's California Restaurant Mutual Benefit Corp.*, 2014 Cal. Wrk. Comp. P.D. LEXIS 222. Labor Code 3600(a)(10)(A)(B)(C)(D) provides that the employee can overcome the employer's defense by demonstrating with a preponderance of the evidence that at least one of these conditions applies to the alleged injury:

1. The employer was aware of the claimed injury before the employee was notified of the termination.

2. Evidence of a claimed injury is contained in medical records that existed before notice of the termination or layoff.

3. The employee sustained a specific injury subsequent to the date of notice of termination or layoff, but before the effective date of the termination or layoff.

4. The employee sustained an occupational disease or cumulative injury with a date of injury subsequent to the date of notice of termination or layoff.

In the instant case, the applicant provided credible testimony that the employer was aware of the claimed injury before the employee was notified of the termination. The Applicant presented

credible testimony that he informed Maria Vazquez of his symptoms to his neck, and later his knee. Maria Vasquez testified that no such reporting took place. In the opinion of the undersigned WCJ, after carefully weighing and considering the witnesses' demeanor while testifying and the manner in which they testified; their personal interest or lack of interest in the outcome of the proceeding; their capacity to accurately perceive, recollect, and communicate the matters on which they testified; and their attitudes toward this proceeding and towards their giving of testimony, that the applicant was credible and that he did report the injury.

RECOMMENDATION

For the reasons stated above, it is respectfully requested that Defendant's Petition for Reconsideration be denied.

DATE: January 16, 2024

HON. TROY SLATEN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE