WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PERCY TUCKER, ***Applicant***

vs.

CITY OF PASADENA; Permissibly Self-Insured, administered by ADMINSURE, INC., ***Defendants***

Adjudication Number: ADJ11951678
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 as quoted below, and for the reasons stated below, we will grant reconsideration, rescind the WCJ's decision, substitute it with new Findings of Fact which amend the findings of permanent disability and attorney fees as recommended in the report, amend the finding of Labor Code section 5412 date of injury for the reasons stated below, and otherwise restate the findings made by the WCJ. We return this matter to the trial level for a new commutation and issuance of the award.

We adopt and incorporate the following quote of the WCJ's report, correcting the WCJ's reference to the role of Clive M. Segil, M.D., in this case. Dr. Segil acted as the panel qualified medical examiner (PQME) and not the agreed medical examiner (AME).

> **INTRODUCTION**:
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> On January 27, 2021, the Defendant filed a timely and verified petition for reconsideration dated January 27, 2021, alleging that the undersigned WCJ

erred in his Findings of Fact & Award dated January 5, 2021. The Defendant contends as follows:

1. That the undersigned WCJ erred in relying on the opinion of Clive M. Segil, M.D., the [panel qualified] medical evaluator, in applying East Bay Municipal Utility District v. Workers' Comp. Appeals Bd. (Kite) (2013) 78 Cal. Comp. Cases 213 (writ denied), to award the Applicant 89% permanent disability; and

2. That the undersigned WCJ erred in finding that the Applicant's claim of injury was not barred by the statute of limitations pursuant to Labor Code § 5405.

STATEMENT OF FACTS:

The Applicant, while employed during the period September 20, 1982 to April 15, 2012, as a police officer by the City of Pasadena, claimed to have sustained industrial injury to his cervical spine, lumbar spine, both hips, both knees and both ankles.

On September 29, 2020, the parties appeared before the undersigned WCJ for trial on, among other issues, injury AOE/COE, permanent disability and applicability of Labor Code § 5405. The parties jointly submitted into evidence several [panel qualified] medical evaluation reports of Dr. Segil, along with his deposition dated January 9, 2020.

According to the trial testimony of the Applicant, "[t]he first time the Applicant was given medical information that his orthopedic complaints were work-related was when he was evaluated by Clive Segil, M.D." [MOH/SOE, 09/29/2020, 5:5-7]

On October 5, 2020, the undersigned WCJ vacated submission of the case and developed the record by way of soliciting a supplemental report from Dr. Segil dated

November 25, 2020 to seek clarification from him regarding his application of Kite to the present case.

Dr. Segil, in his supplemental report dated November 25, 2020, on page two, responded to the undersigned WCJ as follows:

> "I believe there is a synergistic effect in regard to the lumbar spine and right hip. These are anatomically closely related, and as a result would affect the pain from the lumbar spine to the right hip and vice versa.

> In the cervical spine, it is a separate entity that would be based then on the combined values chart.
>
> In regard to the right ankle and right hip, there is a synergistic association because of the involvement of whole of the right lower extremity and that would be added instead of combined.
>
> This also applies to the left hip and left ankle where there is a synergistic effect again, based on the whole of the left lower extremity.
>
> The Kite decision of adding these charts are based on the synergistic effect."

On December 11, 2020, the undersigned WCJ requested a formal rating from the disability evaluation unit with the following instructions:

> "In accordance with Dr. Segil's supplemental report dated November 25, 2020, (WCAB Exhibit "A"] you are combine by addition the lumbar spine and right hip. You are to combine by addition the right ankle and right hip. You are to combine by addition the left hip and left ankle. Finally, with respect to the remaining parts of body, you are to combine them by the combined values chart. The aggregate permanent disability award should be calculated by the combined values chart."

On December 15, 2020, Mike Tarakhchyan from the disability evaluation unit provided the following formal rating strings:

CERVICAL: 8 WP
50% (15.01.01.00 - 8 - [5]10 – 490I- 15 - 18) = 9 PD

LUMBAR: 5 WP
15.03.01.00 - 5 - [5]6 – 490I - 9 - 11 PD

RIGHT HIP: 15 WP
17.03.10.01 - 15 - [5]19 – 4901 - 26 - 31 PD

LEFT HIP: 15 WP
17.03.10.01 - 15 - [5]19 – 490I – 26 - 31 PD

RIGHT KNEE: 4 WP
17.05.04.00 - 4 - [2]5 – 490I - 8 - 10 PD

LEFT KNEE: 0 PD

RIGHT ANKLE: 12 WP
17.07.04.00 - 12 - [2]14 – 490I- 20 - 24 PD

LEFT ANKLE: 8 WP
17.07.04.00 - 8 - [2]9 – 490I- 14 - 17 PD

ADD: LUMBAR 11 PD + RIGHT HIP 31 PD = 42 PD
ADD: RIGHT ANKLE 24 PD + RIGHT HIP 31 PD = 55 PD
ADD: LEFT HIP 31 PD + LEFT ANKLE 17 PD = 48 PD
CERVICAL: 9 PD
RIGHT KNEE 10 PD
LEFT KNEE: 0 PD
COMBINE: 55 C 48 C 42 C 10 C 9 = 89 FINAL PD

Having failed to receive any objections or requests to cross-examine Mr. Tarakhchyan, the undersigned WCJ issued his Findings of Fact and Award that the Applicant did sustain industrial injury, that his claim was not barred by the statute of limitations and that he sustained 89% permanent disability with the need for further medical treatment.

Aggrieved by this decision, the Defendant filed its petition for reconsideration.

DISCUSSION:

PERMANENT DISABILITY

Pursuant to Labor Code § 4660(c), the ratings under the 2005 permanent disability rating schedule constitute prima facie evidence of the percentage of permanent disability attributable to an industrial injury. § 4660(c) also provides that the combined values chart is generally to be used to combine impairments to different body parts, unless there is an overriding reason to use a different method of accounting for multiple impairments. [2005 Permanent Disability Rating Schedule, pp. 1-10; 8-1; Labor Code § 4660(c); Ace American Insurance Co. v. Workers' Comp. Appeals Bd. (Botto) (2020) 85 Cal. Comp. Cases 590, 594 (writ denied)] Accordingly, the combined values chart is rebuttable. [Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman) (2010) 75 Cal. Comp. Cases 837]

In Kite, supra, 78 Cal. Comp. Cases at pp. 215-216, the WCAB held that the WCJ was correct in combining the permanent disability arising from an injury to both of the applicant's hips using addition, rather than the combined values chart. The WCJ relied upon the opinion of a qualified medical evaluator who found there was a "synergistic effect"[1] of the injury to the bilateral hips versus body parts from different regions. Although the 2005 Permanent Disability

[1] Synergism is defined in Webster's Dictionary as an "interaction of discrete agencies (such as industrial firms), agents (such as drugs), or conditions such that the total effect is greater than the sum of the individual effects."

Rating Schedule provides that impairments usually are combined using the combined values chart, the WCAB noted that the AMA Guides describe several methods of combining impairments, and a strict application of the combined values chart is not mandated. Moreover, the scheduled impairment rating is rebuttable, and the qualified medical evaluator appropriately determined that the combined impairment resulting from the applicant's left and right hip injuries was more accurately rated by using simple addition rather than by using the combined values formula. The qualified medical evaluator used the term "synergistic effect" to justify the use of the additive method because it described the greater impact on the resulting disability.

The determination as to whether the final permanent disability is rated using the combined values chart or by addition is based upon the medical evidence. The issue is to determine the most accurate rating, not merely whether there is a synergistic relationship or absence of overlap between the impaired body parts. As set forth in De La Cerda v. Martin Selko & Co. (2017) 83 Cal. Comp. Cases 567 (writ denied), the fact that a medical-legal report does not use the term "synergistic" to advocate for the use of the additive rating method is not determinative of the validity of using that method. The impairments may be added if substantial medical evidence supports the physician's opinion that adding them will result in a more accurate rating of the applicant's level of disability than the rating resulting from the use of the combined values chart.

….

In this case, the undersigned WCJ relied on the medical opinion of Dr. Segil and found that his application of Kite in the present facts was substantial medical evidence.

With respect to the Defendant's contention that the undersigned WCJ duplicated the permanent disability to the right hip, the permanent disability rating should be corrected to account for that as follows:

ADD: LUMBAR 11 PD + RIGHT HIP 31 PD + RIGHT ANKLE 24 PD = 66 PD
ADD: LEFT HIP 31 PD + LEFT ANKLE 17 PD = 48 PD
CERVICAL: 9 PD
RIGHT KNEE 10 PD
LEFT KNEE: 0 PD
CVC: 66 C 48 C 10 C 9 = 85 FINAL PD

STATUTE OF LIMITATIONS

Labor Code § 5405(a) bars an employee's application for workers' compensation benefits if it is not filed within either one year of the date of injury.

In addition, pursuant to Labor Code § 5412:

> "The date of injury in cases of occupational disease 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."

A date of injury under § 5412 is not established merely by showing an applicant had knowledge of his or her physical pain. [Chavira v. Workers' Comp. Appeals Bd. (1991) 56 Cal. Comp. Cases 631, 641] Instead, "disability," as used in § 5412, is evidence that either there is "compensable temporary disability" or "permanent disability." [State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte) (2004) 69 Cal. Comp. Cases 579, 584] An applicant obtains knowledge that his disability is industrially caused when he receives medical advice to that effect. [Zenith Ins. Co. v. Workers' Comp. Appeals Bd. (Yanos) (2010) 75 Cal. Comp. Cases 1303, 1305 (writ denied)]
In short, a cumulative trauma date of injury under § 5412 is established when there is evidence of temporary or permanent disability as well as medical knowledge that the disability was caused by the present or prior employment. In order to have medical knowledge, a confirming medical opinion is an important factor in making that determination. [Nielsen v. Workers' Comp. Appeals Bd. (1985) 50 Cal. Comp. Cases 104.]

In this case, notwithstanding the contention of the Defendant, the Applicant's occupation as a police office did not endow him with the special training or knowledge under Labor Code § 5412 that he could reasonably have known that his orthopedic complaints were work-related until he was so advised by Dr. Segil. [See Arias v. City of Los Angeles (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 83 (Appeals Board noteworthy panel decision); Swanson v. City of Stockton (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 652 (Appeals Board noteworthy panel decision); Paolozzi v. City of Torrance (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 119 (Appeals Board noteworthy panel decision); Foster v. City of Buenaventura (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 43 (Appeals Board noteworthy panel decision); Turco v. City of Oakland (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 492 (Appeals Board noteworthy panel decision).]

….

RECOMMENDATION:

> The undersigned WCJ respectfully recommends that the Defendant's petition for reconsideration dated January 27, 2021 be granted to amend the permanent disability award to 85% permanent disability with the attorney's fee adjusted accordingly and denied as to the Defendant's contention that the claim should be barred by the statute of limitations.

A cumulative injury is defined "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. The date of a cumulative injury shall be the date determined under Section 5412." (Lab. Code, § 3208.1(b).) Therefore, the determination of the "date of injury" of a cumulative injury for purposes of Labor Code section 5405 is governed by section 5412.

Section 5412 provides that "[t]he 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." Determination of a section 5412 "date of injury" is a two-part analysis: 1) when did the employee first suffer a compensable disability from a cumulative injury; and, 2) when did the employee know, or in the exercise of reasonable diligence should have known, that the compensable disability was caused by her employment. (See *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579].)

Whether an employee knew or should have known that the 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*) (1985) 163 Cal.App.3d 467, 471, [50 Cal.Comp.Cases 53]; *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].) It is not be sufficient for defendant to show that applicant "knew he had some symptoms." (*Johnson, supra*, 163 Cal.App.3d at 471, citing to *Chambers, supra*, and *Pacific Indem. Co. v. Industrial Acc. Comm*. (1950) 34 Cal.2d 726.)

Thus, date of injury when the employee knew or should have known that the disability was caused by cumulative injury from employment may be established by the date the employee

received expert medical advice to that effect. (*County of Riverside v. Workers' Comp. Appeals Bd. (Sylves)* (2017) 10 Cal.App.5th 119, 124-125 [82 Cal.Comp.Cases 301]; *Chambers, supra*, 69 Cal.2d at p. 559; *Johnson, supra*, 163 Cal.App.3d at pp. 472-473.) Alternatively, an employee may have had sufficient training, knowledge, or qualifications to recognize the causal relationship between the disability and employment, or be informed by the employee's attorney based on the record. (*Nielsen, supra*, 164 Cal.App.3d at p. 927; *Johnson, supra*, 163 Cal.App.3d at pp. 472-473; *Bassett-McGregor, supra*, 205 Cal.App.3d at pp. 1111-1115; *Hurwitz v. Workers' Comp. Appeals Bd*. (1979) 97 Cal.App.3d 854, 867-874 [44 Cal.Comp.Cases 983].)

In this case, we agree with the WCJ that defendant did not meet it burden to show the concurrence of knowledge and disability in 2012. However, we attribute knowledge to applicant once he filed the Application for Adjudication of Claim on February 14, 2019 alleging "CUMULATIVE TRAUMA INJURY TO HIPS BACK NECK KNEES AND ANKLES DUE TO WORK INJURIES." (*Old Republic Insurance v. Workers' Comp. Appeals Bd.* (2000)85 Cal.Comp.Cases 504 (writ den.) Therefore, we find the section 5412 date of injury to be February 14, 2019 and will amend the WCJ's decision accordingly.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the January 5, 2021 Findings of Fact & Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the January 5, 2021 Findings of Fact & Award is **RESCINDED** and **SUBSTITUTED** with new Findings of Fact, as provided below, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

FINDINGS OF FACT

1. The Applicant, Percy Tucker, while employed during the period September 20, 1982 to April 15, 2012, as a police officer, occupational group number 490, at Pasadena, California, by the City of Pasadena, sustained injury arising out of and in the course of employment to his cervical spine, lumbar spine, both hips, both knees and both ankles.

2. The injury herein caused 85% permanent disability.

3. There is a reasonable basis to apportion 50% permanent disability to the cervical spine to pre-existing factors.

4. There is no reasonable basis to apportion any permanent disability to the lumbar spine, both hips, both knees and both ankles to pre-existing factors.

5. The Applicant is entitled to further medical treatment to his cervical spine, lumbar spine, both hips, both knees and both ankles.

6. Applicant's attorney fees in the amount of 15%.

7. With respect to the applicant's lumbar spine, the claim is presumptively compensable pursuant to Labor Code § 3213.2.

8. The Labor Code section 5412 date of injury is February 14, 2019.

9. The claim is not barred by the statute of limitations pursuant to Labor Code § 5405.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 29, 2021

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

PERCY TUCKER
LEWIS MARENSTEIN
ARMSTRONG SIGEL

PAG/bea

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