WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHUCK TIFFANY, ***Applicant***

vs.

LOS ANGELES DODGERS, TAMPA BAY RAYS and ACE AMERICAN INSURANCE COMPANY/CHUBB administered by SEDGWICK CLAIMS MANAGEMENT SERVICES; GOLDEN BASEBALL LEAGUE and STATE COMPENSATION INSURANCE FUND, Defendants

Adjudication Number: ADJ8402781
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

The Golden Baseball League/State Compensation Insurance Fund (hereafter defendant) seek reconsideration of the Amended Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on June 23, 2019, wherein the WCJ found in pertinent part that during the period of his employment as a professional baseball player applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his left hip, left shoulder, left elbow, and knees; and that the Labor Code Section 5500.5 liability period was the last year of injurious exposure, from August 29, 2009, through August 28, 2010, during which applicant was employed by the Golden Baseball League.

Defendant contends that the date of injury was in the year prior to July 2006, when applicant had left shoulder rotator cuff surgery, or in the alternative, that applicant sustained two separate cumulative injuries.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from applicant and from co-defendants Los Angeles Dodgers, Tampa Bay Rays and Ace American Insurance Company/ Chubb administered by Sedgwick Claims Management Services.

We have considered the allegations in the Petition and the Answers, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to defer the issues of the Labor Code section 5412 date of injury and the Labor Code section 5500.5 liability period (Finding of Fact 3). Based thereon, we will rescind the Amended Award and order that the award of benefits identified in the Amended Findings of Fact is deferred, and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his neck, back, left shoulder, left elbow, right knee, left hip, and left knee, and in the form of a hernia, and sleep disorder, while employed as a professional baseball player by the Los Angeles Dodgers for the periods from August 6, 2003, through January 14, 2006, and April 18, 2009, through June 17, 2009; while employed by the Tampa Bay Rays from January 14, 2006, through March 31, 2009; while employed by the Grand Prairie Airhogs in 2009; while employed by the Freedom from 2009 to 2010; and while employed by the St. George Roadrunners / Golden Baseball League from July 31, 2010, through August 28, 2010.[1]

In July 2006, applicant underwent a left shoulder surgery, due to a torn rotator cuff injury that occurred while he was employed by the Tampa Bay Rays. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 18, 2019, p. 9.) Applicant received a course of treatment from orthopedic physician Daniel A. Capen, M.D., beginning in October 2012. (See App. Exhs. 2 – 9.) In his initial evaluation and treatment report, Dr. Capen stated:

> On July 13, 2006, the patient [applicant] underwent left shoulder [torn rotator cuff] surgery which was performed by Dr. Andrew at Saint Vincent in Alabama. Post-operatively, the patient participated in a course-of physical therapy for his left shoulder. … ¶ … On August 5, 2008, an MR arthrogram of the left shoulder was performed at Indian River Radiology Open MRI. ¶ … Mr. Tiffany continued to play professional baseball with pain and discomfort through June or July 2011. The patient played his last game at that time. He states that he was experiencing pain in his left side of his ribs after throwing a pitch during a game. (App. Exh. 9, Daniel A. Capen, M.D., October 12, 2012, pp. 3 – 4.)

[1] The record is not clear as to whether "the Freedom" was a team in, or associated with, the Golden Baseball League, or whether it was "Florence Freedom," a member of the Frontier League that was not joined as a party in this matter. (See Def. Exh. B, regarding the years 2009 and 2010.)

In his permanent and stationary report Dr. Capen stated that applicant had whole person impairment (WPI) regarding his knees, left elbow, left hip, and left shoulder as a result of the cumulative injury applicant sustained during the period from August 6, 2003, through September 1, 2010. (App. Exh. 3, Dr. Capen, April 26, 2013, pp. 3 – 4.)

Dr. Capen's deposition was taken on October 5, 2015. (Def. Exh. I, Dr. Capen, October 5, 2015, deposition transcript.) His testimony included:

> A. Well, okay. For certain there would be one long continuous trauma for everything in the lower extremities including the knees and the hips. If you can split the baby to the point where the few months of not throwing but doing physical therapy is an interruption that would merit two continuous traumas, that could be a consideration.
>
> Q. So is that your opinion today that there are two separate cumulative traumas?
> A. Well, as I say I can see your point, but I don't know -- I didn't get a history from him exactly how long his doctor told him not to throw and when exactly he resumed the rubber bands and stretching which is use of the extremity.
>
> Q. Well, is that the sort of surgery that you could the next day start using a rubber band?
> A. No.
>
> Q. So there would be sometime where the shoulder at least was absolutely immobile?
> A. Yes.
>
> Q. Okay. So it would be fair to say that there was definitely a period of disability?
> A. Yes.
> (Def. Exh. I, p. 22.)

The parties proceeded to trial on April 18, 2019. The WCJ's summary of applicant's testimony included:

> Sometime in the Off Season of 2006, perhaps around February, he was traded to the Tampa Bay Rays. He was with the Rays from about March 2006 to March 2009, a period of about three years. He was injured while working for the Rays. He pulled his hamstring, his lats, his elbow, his knee, his hip was inflamed, and his rotator cuff was injured. … He received surgery around July of 2006 for his torn rotator cuff. He rehabilitated with team trainers. … ¶ He was paid from $1,600.00 to $2,200.00 per month while working for the Rays. His first year was probably close to $1,600.00 per month, then it went up to $1,800.00 per month the next year. The pay went up with his year and level. … ¶ He received

> rehabilitation after his July 2006 rotator cuff surgery for about two years because his first game after surgery was around August 2008.
> (MOH/SOE, pp. 9 – 10.)

The issues submitted for decision included injury AOE/COE, employment, and insurance coverage. (MOH/SOE, p. 2.)

DISCUSSION

Labor Code section 5500.5 states in part that:

> [L]iability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1981, shall be 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.
> (Lab. Code, § 5500.5.)[2]

Section 5412 states that:

> 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.)

The WCJ explained the Finding as to the date of injury as follows:

> Based upon the medical evidence, applicant's testimony, and State Comp. Ins. Fund (Rodarte) (2004) 69 Cal.Comp.Cases 579, it is found that the date of injury under Labor Code Section 5412 is after the end of applicant's professional baseball career, as there is no evidence of compensable temporary disability, or permanent disability, prior thereto. The previous finding of an earlier date of injury, based upon a report indicating that Mr. Tiffany will miss work (a scheduled start) on April 24, 2006, due to "throwing overuse," was incorrect, because there was no evidence of wage loss and therefore no compensable temporary disability, nor evidence of permanent disability, which are required to support a finding of date of injury under Labor Code Section 5412, as explained in Rodarte. The liability period under Labor Code Section 5500.5 is therefore the last year of injurious exposure, from August 29, 2009 through August 28, 2010, during which period applicant was employed by the Golden Baseball League, insured by State Compensation Insurance Fund.
> (F&O/Amended Opinion on Decision, p. 2.)

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

We agree with the WCJ that the Second District Court of Appeal concluded:

> … [E]ither compensable temporary disability or permanent disability is required to satisfy section 5412. Medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion.
> (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal. App.4th 998, 1005 - 1006 [69 Cal.Comp.Cases 579].)

Compensable temporary disability means actual wage loss. (*Id.* at p. 1005.) As quoted above, Dr. Capen testified that if applicant had a period of disability due to his shoulder surgery, they may be "two continuous traumas." He then agreed there would be a period after the surgery when applicant's shoulder was "absolutely immobile" which would be a period of disability. (Def. Exh. I, p. 22.)

We first note, the fact that an injured worker is receiving medical treatment is not in and of itself substantial evidence that the injured worker is temporarily totally disabled. Dr. Capen first treated applicant approximately six years after applicant's left shoulder surgery. His testimony pertains to his expectations regarding a patient's post-surgery treatment and physical activity, it does not constitute evidence of applicant's activity level during his rehabilitation from the surgery.

Further, "The essential purpose of temporary disability indemnity is to help replace the wages the employee would have earned, but for the injury, during his or her period(s) of temporary disability." (*Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 801 [71 Cal.Comp.Cases 1044] (quoting from *Jimenez v. San Joaquin Valley Labor* (2002) 67 Cal.Comp.Cases 74, 78 (Appeals Board en banc).) The summary of applicant's trial testimony includes his statement that during his first year with the Tampa Bay Rays he was paid $1,600.00 per month, and his pay was increased to $1,800.00 per month the next year. (MOH/SOE, pp. 9 – 10.) He then testified that, "He received rehabilitation after his July 2006 rotator cuff surgery for about two years because his first game after surgery was around August 2008." (MOH/SOE, p. 10.)

Review of the trial record, including applicant's testimony and Def. Exh. B, indicates that applicant was employed by the Tampa Bay Rays for approximately three years, starting January 14, 2006, and the shoulder surgery was performed on July 13, 2006. There is no evidence in the record clearly indicating that applicant had any loss of wages during his two years of

"rehabilitation" after his surgery and applicant testified as to his monthly income for those two years. Also, it must be noted that applicant's testimony that "he was not the same as before the surgery" (MOH/SOE, p. 10), is not substantial evidence upon which to base a finding of compensable permanent disability for purposes of section 5412. (See *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988, 996 [42 Cal.Comp.Cases 114]; *Peter Kiewit Sons v. Industrial Acc. Com., (Mc Laughlin)* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].)

For these reasons, we conclude that the trial record does not contain substantial evidence addressing the issues of when applicant first suffered disability as a result of the claimed cumulative injury, nor when he knew or should have known, that his disability was caused by his employment as a professional baseball player. In turn, it does not contain substantial evidence to support a finding as to the section 5412 date of injury. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence to fully adjudicate the issues submitted for decision. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].) Upon return of this matter, we recommend that discovery be re-opened so the parties may obtain and submit evidence addressing the issues discussed herein.

Finally, the record indicates that applicant was employed by "the Freedom from 2009 to 2010" and by the St. George Roadrunners / Golden Baseball League from July 31, 2010, through August 28, 2010. (MOH/SOE, pp. 2 and 8.) As noted above (See footnote 1) we are unable to determine whether "the Freedom" was a team in, or associated with, the Golden Baseball League, or whether it was "Florence Freedom" a member of the Frontier League. This must be clarified in that this matter is based on a cumulative injury claim and may ultimately address the liability of an entity that has not been joined as a party.

Accordingly, we affirm the F&A except that we amend the F&A to defer the of issues of the Labor Code section 5412 date of injury and the Labor Code section 5500.5 liability period (Finding of Fact 3). Based thereon, we rescind the Amended Award and order that the award of benefits identified in the Amended Findings of Fact is deferred, and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 23, 2019 Amended Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. The issues of the Labor Code section 5412 date of injury and the Labor Code section 5500.5 liability period are deferred.

* * *

IT IS FURTHER ORDERED that the Amended Award is **RESCINDED** and the award of benefits identified in the Amended Findings of Fact is **ORDERED** deferred pending development of the record, and the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 1, 2022

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

CHUCK TIFFANY
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK, LLP
LAW OFFICES OF MARK SLIPOCK, PC
STATE COMPENSATION INSURANCE FUND

TLH/*pc*

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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