WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

APOLINAR DEL HOYO, *Applicant*

vs.

ARCHSTONE HARBORVIEW, ACE GROUP/ESIS;
IRVINE COMPANY, FEDERAL INSURANCE/SEDGWICK, *Defendants*

Adjudication Numbers: ADJ8555171 (MF), ADJ10259448, ADJ11129372
San Diego 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.[1]

In the Findings and Award of July 21, 2020, the workers' compensation judge ("WCJ") issued various findings in the three case numbers captioned above.[2] Relevant to the instant petition for reconsideration, the WCJ found "in ADJ10259448 only" that "the responsible insurance carrier per the requirements of Labor Code section[s] 5500.5 and 5412 is the Irvine Company, insured by Federal Insurance." In addition, the WCJ ordered that "the parties shall confer informally to resolve the remaining issues of permanent partial disability and need for further medical treatment. Should the parties be unable to resolve this issue, the case may be returned to the WCJ for further hearings."

Defendant Irvine Company ("Irvine") filed a timely Petition for Reconsideration of the WCJ's decision. Irvine contends that in ADJ10259448, the WCJ erred in failing to explain why he determined Irvine is the "responsible insurance carrier" for the cumulative trauma from June 3,

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[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated October 20, 2020. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

[2] In the Findings and Award of July 21, 2020, the WCJ issued an Award in ADJ8555171 against Archstone Harborview and Ace Group/ESIS for permanent disability of 22% and further medical treatment. In ADJ11129372, the WCJ issued an Award against Irvine Company, insured by Federal Insurance, for permanent disability of 2% and further medical treatment.

2007 through June 29, 2015, pursuant to Labor Code sections 5412 and 5500.5. Irvine further contends that the WCJ erred in failing to issue a Summary of Evidence and in failing to analyze the facts and applicable law.

Defendant, Archstone Harborview and Ace Group/ESIS ("Archstone"), filed an answer.

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

At the outset, we observe that Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.)

On June 5, 2020, the State of California's Governor, Gavin Newsom, issued Executive Order N-68-20, wherein he ordered that the deadlines in sections 5909 and 5315 shall be extended for a period of 60 days.[3] Pursuant to Executive Order N-68-20, the time within which the Appeals Board must act was extended by 60 days. Therefore, the Opinion and Order Granting Petition for Reconsideration of October 20, 2020 and this Decision After Reconsideration are timely.

Turning to the merits of Irvine's petition, our review of the record leads us to conclude that the WCJ must revisit and re-determine the issues raised by Irvine in connection with case number ADJ10259448, as more specifically discussed below. Therefore, we will rescind the Findings and Award of July 21, 2020 and return this matter to the trial level for further proceedings and new decision by the WCJ.

Preliminarily, we observe that WCAB Rule 10962(b) provides, in relevant part, that the WCJ's Report must include "a discussion of the support in the record for the findings of fact and the conclusions of law that serve as a basis for the decision or order *as to each contention raised by the petition* [for reconsideration]." (Cal. Code Regs., tit. 8, § 10962(b), italics added.) Here, the WCJ's Report is not compliant with Rule 10962(b) because it copies the WCJ's Opinion on Decision and thus is unresponsive to each contention raised by Irvine's petition for reconsideration.

There are other problems with the record in this matter. The Minutes of Hearing ("MOH") of June 25, 2020 reflect that there were no disputed issues in case numbers ADJ8555171 or

[3] Governor Newsom's Executive Order N-68-20 may be accessed here: https://www.gov.ca.gov/wp-content/uploads/2020/06/6.5.20-EO-N-68-20.pdf. (See Evid. Code, § 452(c).)

ADJ11129372. Yet these two cases proceeded to trial and the WCJ issued findings in them. It appears that the inclusion of these two cases in the trial record and in the Findings and Award of July 21, 2020 needlessly complicated this matter. In further proceedings, the parties and the WCJ should limit the record to ADJ10259448 if it is the only case involving unresolved issues.

Even considering ADJ10259448 in isolation, the record is problematic. The alleged cumulative trauma injury in ADJ10259448 was identified in the MOH as a "claimed" injury. Thus, the issue of injury apparently remained in dispute in ADJ10259448. However, the WCJ did not make a final finding on injury in ADJ10259448, and it also appears the WCJ issued a non-final Order in ADJ10259448. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) In short, the Findings and Award issued by the WCJ on July 21, 2020 did not satisfy the requirements of Labor Code sections 5313 and 5815.[4]

Turning to the key issue of defense liability for the (alleged) cumulative trauma injury in ADJ10259448, Labor Code section 5500.5(a) provides that 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 section 5412 speaks to the issue of the date of cumulative injury for purposes of applying the Statute of Limitations. The two issues are distinct but related, in that 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*").)

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

[4] Section 5313 provides in relevant part that the WCJ "shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties." Section 5815 provides in relevant part that "[e]very order, decision or award, other than an order merely appointing a trustee or guardian, shall contain a determination of all issues presented for determination by the appeals board prior thereto and not theretofore determined."

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, the WCJ's Report relies on the April 10, 2018 medical report of Dr. Whalen, the Panel Qualified Medical Evaluator ("PQME") in chiropractic medicine,[5] to support the WCJ's conclusion that "there was one long cumulative trauma," which "continued to occur during the two years and ten months that applicant was employed by the terminal employer, the Irvine Company." (Report and Recommendation, p. 5.)

However, the WCJ never squarely addressed or determined the two necessary elements of section 5412, which must be addressed to determine liability under section 5500.5(a). That is, the WCJ did not address or determine the convergence of (1) the date when applicant first suffered disability and (2) applicant's acquisition of knowledge that such disability was caused by his present or prior employment. The convergence of the two elements must be analyzed and determined by the WCJ in order for the WCJ to determine what occurred first for purposes of applying section 5500.5(a): the year immediately preceding the date of injury as determined by section 5412, or the last date on which applicant was employed in an occupation exposing him to the hazards of the cumulative injury.

[5] Applicant's Exhibit 5.

It is well-settled that "the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further [inquiry or] evidence." (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 [66 Cal.Comp.Cases 1290].)

In this case, we conclude the matter must be returned to the WCJ for further proceedings and new decision on the outstanding issues, which include but may not be limited to whether applicant sustained an industrial cumulative trauma during the period June 3, 2007 through June 29, 2015, the date when applicant first suffered disability, the date when applicant acquired knowledge that such disability was caused by his present or prior employment, and what occurred first for purposes of applying section 5500.5(a) - the year immediately preceding the date of injury as determined by section 5412, or the last date on which applicant was employed in an occupation exposing him to the hazards of the cumulative injury.

We express no final opinion on any of the outstanding questions listed above. When the WCJ issues a new decision that complies with Labor Code sections 5313 and 5815, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of July 21, 2020 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 28, 2023

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

APOLINAR DEL HOYO
LAW OFFICE OF MICHAEL K. WAX
BRADFORD & BARTHEL
CHOU LAW GROUP

JTL/*ara*

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