WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARISELA BERRIOS, ***Applicant***

vs.

CHRISTOPHER RANCH LLC;
THE HARTFORD, ***Defendants***

Adjudication Number: ADJ11192906
Salinas District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Marisela Berrios. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) of August 11, 2022, wherein the workers' compensation judge (WCJ) concluded that applicant did not sustain cumulative injury arising out of and occurring in the course of employment (AOE/COE) and that all other issues were moot. Applicant contends that the undisputed medical evidence indicates that applicant sustained a work related injury; that the WCJ has a duty to develop the record if the WCJ is not satisfied that the medical evidence is sufficient to support a finding of AOE/COE; and that defendant did not meet its burden of proof to support the affirmative post-termination defense.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration and (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, for the reasons discussed below, we rescind the WCJ's Order and return this matter to the WCJ for further proceedings.

FACTS

Applicant claimed industrial injury to her right hip, right leg, right foot, right hand, and lumbar spine while employed as a packer during a period ending September 7, 2017. Applicant was terminated on September 19, 2017. She filed her DWC claim form on October 19, 2017. (Ex. D1, DWC-1 Claim Form, M Berrios/ Hartford, 10/19/17, p. 1.) Applicant filed an Application for Adjudication on February 6, 2018, and claimed cumulative injury.

Prior to her termination, applicant presented at the Saint Louise Regional Hospital on February 17, 2015, for right calf pain but the hospital did not find deep vein thrombosis. (Ex. D2, Extracts of Records, South County Health Center, various dates, pp. 28-29.) Applicant again presented with right leg pain on March 31, 2015, at the Gardner Medical South County Health Center. (Ex. D2, pp. 15-17.)

In the first report of PQME Dr. Henry Domeniconi dated February 19, 2018, Dr. Domeniconi reported that applicant presented to him for injuries she sustained while working at Christopher Ranch on September 7, 2017. (Ex. A1, Report of Henry Domeniconi, DC, QME 2/19/18, p. 1.) She stated to Dr. Domeniconi that she injured her low back while lifting a bag of onions. (Ex. A1, p. 1.) She further stated that she had seen her family doctor regarding her injury and he had taken her off of work. (Ex. A1, p. 1.) Dr. Domeniconi stated "There is strong probability and likelihood that, indeed, Ms Barrios had an industrial related injury on 09/07/2017, while at work." (Ex. A1, p. 4.) Dr. Domeniconi further stated:

> It is my opinion, that at this time, Ms Barrios can not continue to compete in the open labor market as she did prior to the work injury on 09 /07/2017. Therefore, it is my opinion that Ms Barrios should be limited to 10 lbs of lifting, with no repetitive bending or standing, until my above recommendations have been preformed [sic] and I have reviewed the medical file.

(Ex. A1, p. 4.)

> In Dr. Domeniconi's PQME supplemental report of March 26, 2019, he stated
>
> After reviewing the lumbar MRI dated 11/15/2018 (showing a normal MRI), it is my opinion Ms Berrios complete 24 Chiropractic treatments with physiotherapy, and continue with the work restrictions laid out in my initial report. Once this has been completed I should see the applicant for a re-evaluation to determine the future course of treatment.

(Ex. A2, Report, Henry Domeniconi, DC, QME, 3/26/19, p. 1.)

In Dr. Domeniconi's PQME supplemental report of August 30, 2019, Dr. Domenconi stated that there were no changes in his opinions from his prior reports that "lifting at work applicant's low back was injured." (Ex. A3, Report, Henry Domeniconi, DC, QME, 8/30/19, p. 1.)

In Dr. Domeniconi's PQME examination report of December 24, 2019, Dr. Domeniconi stated that applicant was undergoing chiropractic treatments and aquatic therapy, was prescribed oral steroids, and continued to remain off of work due to her injury. (Ex. A5, Report, Henry Domeniconi, DC, 12/24/19, p. 2.) Her current complaints were low back pain/stiffness/tightness (up and down with activity); pain and tingling into her right leg past the knees at times; and difficulty bending, light lifting, and prolonged standing. (Ex. A5, p. 2.) Dr. Domeniconi also reported that applicant experienced pain through all planes to the lumbar paraspinals. (Ex. A5, p. 2.) Dr. Domeniconi further stated in the report:

> FUTURE TREATMENT
> Ms. Berrios's findings are consistent with the reported work injury of 09/07/2017. I recommend she be made available chiropractic manipulative therapy (CMT) in conjunction with spinal traction and physiotherapy, as per MTUS Guidelines, for Chronic conditions. Based on my physical examination and the history taken from the patient, I further recommend that Ms. Barrios see a pain management specialist for possible epidural steroid injections. Further treatment might be warranted after reviewing the medical file.
>
> PERMANENT AND STATIONARY
> Ms. Barrios has been known to have pain in the lumbar spine that travels into her right buttock and legs. The patient appears sincere. This level of subjective pain with the objective findings warrant the type of treatment recommended and outlined above. At this time, it is my opinion that Ms. Barrios is probably "PERMANENT AND STATIONARY". However, I need to review the entire medical file before making my final opinion and recommendations on this subject.
>
> APPORTIONMENT/CAUSATION
> There is strong probability and likelihood that, indeed, Ms. Barrios had an industrial related injury on 09/07/2017, while at work. Without reviewing the medical file, I cannot comment on any prior disability or concurring work with another employer that could have added to her injury, or other industrial or
> non-industrial factors.
>
> WORK PRECLUSIONS
> It is my opinion, that at this time, Ms. Barrios cannot continue to compete in the open labor market as she did prior to the work injury on 09/07/2017. Therefore, it is my opinion that Ms. Barrios should be limited to 10 lbs. of lifting, with no repetitive bending or standing, until I have reviewed the medical file.
> (Ex. A5, pp. 3-4.)

In the PQME re-examination report of February 25, 2021, Dr. Domeniconi reviewed applicant's medical history. Applicant had an office visit with Gardner St. James Health Center on September 27, 2017, for back, right leg, and right heel pain. (Ex. A6, Report, Henry Domeniconi, DC, 2/25/21, p. 31.) She stood all day for work and used her right leg to step on a pedal. (Ex. A6, p. 31.) The treatment plan included back stretches, ice/heat packs, avoiding strenuous activity, and rest and she was advised to stay active but avoid lifting more than 10 pounds. (Ex. A6, p. 31.) Applicant had another appointment at the same Health Center on October 4, 2017, with similar complaints of right foot/ heel pain, right leg and thigh, and lower back; she stated the heel pain was due to pedaling at work. (Ex. A6, p. 31.) The treatment plan included ice, stretching, and an x-ray. (Ex. A6, p. 32.) Applicant had an x-ray of her right foot on March 28, 2018; there were no fractures and the alignment was normal. (Ex. A6, p. 36.) Applicant again had an office visit at the Gardner St. James Health Center on May 30, 2018, for right heel pain. (Ex. A6, p. 37.) Applicant was in a car accident on July 2, 2019, and suffered from low back pain and neck pain/soreness. (Ex. A6, pp. 38-39.)

Dr. Domeniconi further noted in his re-examination report of February 25, 2021, that the findings of an MRI on August 23, 2019 were:

> Straightening of the lumbar spine seen
> Early disc desiccation is noted at L4-5 level
> Hemangioma noted at Ll, L2, and L4 vertebra
> Simple renal cortical cyst measuring 2.5 cm seen on left side
> L4-5 focal central disc protrusion with annular tear effacing
> the thecal sac. Spinal canal and neural foramina are patent. Disc
> measurements neutral 2.9 mm

(Ex. A6, p. 40.) Applicant participated in physical therapy from August 28, 2019, to January 9, 2020. (Ex. A6, p. 46.) Dr. Domeniconi's diagnostic impression was:

> DIAGNOSTIC IMPRESSION (Orthopedic injuries for work injury date given CT-09/14/2016-09/07/2017
> a) Lumbar sp/st (S13.4)- Chronic
> b) Lumbo/Sacral Radiculitis (M54.16XA)
>
> FUTURE TREATMENT/APPORTIONMENT/CAUSATION
> Ms. Berrios's findings for her work injury given the date: CT 09/14/2016-09/07/2017, are clouded by a MVA that occurred on 07/02/2019. An MRI scan prior to the MVA and after the work injury in question showed a normal study. However, another MRI study was taken after the MVA that showed lumbar vertebrae abnormality.

Couple this with numerous medical reports after the MVA stating the effects of that accident to her lumbar spine were significant, and the applicant herself stating, in a report dated 08/23/2019 From Dr Sarkis, " the symptoms have affected her life and making it hard to work", directs me to apportion the majority of her lumbar injury to the MVA on 07/02/2019. Also, in a report from Dr Sarkis dated 10/18/2019, the good doctor states Ms Berrios is "still suffering from the MVA of 07/02/2019.
Therefore, I will rate her permanent work disability to the lumbar spine as it presented prior to the MVA on 07/02/2019.
NOTE: In medical reports from Dr Sarkis after the MVA, examination findings found "NO" subjective complaints or objective findings to the wrists, hips, or shoulders.
As far as future treatment for her work injury, at this time no treatment is recommended.

PERMANENT AND STATIONARY
Ms. Barrios has been known to have pain in the lumbar spine that travels into her right buttock and leg prior to the MVA on 07/02/2019. The patient appears sincere. This level of subjective pain with the objective findings warrant the type of treatment recommended and outlined above. At this time, it is my opinion that Ms. Barrios is "PERMANENT AND STATIONARY" for her work injury.

WORK PRECLUSIONS
It is my opinion, that at the time of Ms. Barrios's work injury she could have continued to compete in the open labor market as she did prior to the work injury on 09/07/2017. Therefore, it is my opinion that Ms. Barrios had no limitations.

ACTORS OF DISABILITY
As stated, it is my opinion that Ms. Barrios has reached Permanent and Stationary status for her work injury, and can be ratable for permanent disability as follows:
Strict AMA Guide Rating for Lumbar spine:
OBJECTIVE FACTORS OF DISABILITY
Musculoskeletal impairments
Spinal diagnosis - related estimates
Page 384, 15.4 DRE: Lumbar spine - table 15-3:
Clinical history and examination findings are compatible with a specif,ic injury, findings may include significant muscle guarding or spasm observed, at the time of the examination, a symmetrical loss of range of motion or non-verifiable radicular complaints, defined as complaints of radicular pain without objective findings, no alteration of the structural integrity and no significant radiculopathy
DRE lumbar spine - Category 11 = him 8% WPI

(Ex. 6, pp. 48-50.)

In his PQME supplemental report of July 25, 2021, Dr. Domeniconi stated that the permanent disability was “DRE Category 111 = 13% WPI to lumbar spine.” (Ex. A7, Report, Henry Domeniconi, DC, QME, 7/72/21, p. 1.) Dr. Domeniconi further found

Apportionment: MVA attributed to a large percentage of applicant's present disability, to where her work injury is at 8% WPI.

> Work restrictions: limit lift to 15 pounds and not repetitive lumbar activity
> Future medical: Chiropractic with physiotherapy per MTUS guidelines for "chronic conditions". Orthopedic intervention if needed.

(Ex. A7, p. 2.)

In his deposition, Dr. Domeniconi testified that applicant told him that she was injured when she lifted a bag of onions at work. (Ex. A8, Deposition of Dr. Domeniconi, pp. 8-15, 37.) Therefore, he initially stated that the injury was specific. (Ex. A8, p. 8.) When asked whether it was his experience that injured workers were knowledgeable about distinguishing between a specific injury and cumulative trauma, Dr. Domeniconi responded

> I can't answer that question. I just go by what they tell me. I'm not an attorney. I ask them how the injury happened. I am not going to be here and suggest that I can rate someone's intelligence on understanding my questions. I ask a question, they respond, I move on.

(Ex. A8, p. 9.) The deposition continued with the following:

> Q. So are you saying in this particular case it's impossible to say whether it's a specific injury or a cumulative trauma?
> A. Based on the information given, correct.

(Ex. A8, p. 13.)

Dr. Domeniconi further stated that there was nothing in applicant's lumbar MRI that "is conclusive that could distinguish between long term and short term." (Ex. A8, p. 14.) Dr. Domeniconi then testified that "Right now with the information given to me I'm thinking it's a specific injury, that's my opinion at this point." (Ex. A8, p. 15.) He also stated that he made a mistake and failed to include applicant's medical history in his report. (Ex. A8, pp. 16-17.) He also took into account applicant's motor vehicle accident that occurred after her work injury when discussing apportionment. (Ex. A8, p. 21.) He did not note any other relevant non-industrial causes of injury other than the car accident. (Ex. A8, pp. 21-22.) In the July supplemental report, Dr. Domeniconi indicated that eight percent impairment was attributable to the work injury. (Ex. A8, pp. 26-27.)

Dr. Domeniconi then testified

> Q. So you used a different rating method for the impairment to avoid addressing the result of the motor vehicle accident but then you also apportioned some of that to account for the motor vehicle accident; is that right?
> A. Sounds correct, counsel.
> Q. Are you now acknowledging that was incorrect?

A. I am.
Q. Okay. So is my understanding from what you have said that if you were to do this now you would provide a rating pursuant to the range of motion method for the lumbar spine; is that right?
A. That is correct.

(Ex. A8, p. 27.)

Dr. Domeniconi further testified that there was a need for further medical treatment for the lumbar spine as a result of the work injury. (Ex. A8, p. 30.) As of his July 2021 report, he found the applicant permanent and stationary with respect to her lumbar spine. (Ex. A8, pp. 35-36.) Although he stated in his report that the injury was cumulative, he now stated that statement was a typographical error and he currently believes that the injury is specific. (Ex. A8, pp. 36-37.)

On July 21, 2022, the parties proceeded to trial. The parties admitted the following facts: (1) Applicant, while employed during a period ending September 7, 2017, at Gilroy, California by Christopher Ranch, LLC, claims to have sustained injury AOE/COE to her right hip, right leg, right foot, right hand, and lumbar spine; (2) At the time of injury, the employer's workers' compensation carrier was The Hartford; (3) The employer has provided no benefits; (4) No attorney fees have been paid and no attorney fee arrangements have been made; and (5) applicant was terminated by the employer on September 19, 2017. (Minutes of Hearing/ Statement of Evidence (MOH/SOE). p. 2.)

The issues for trial were: (a) Injury AOE/COE; (b) Permanent disability; apportionment; (c) Occupation and group number claimed by the employee is Packer - Agricultural - 360; and by the employer, Sorter - Garlic – 221; (d) Need for further medical treatment; (e) Attorney fees; (f) Defendant claims the post-termination bar to the claim under Labor Code Section 3600(a)(10); (g) All other issues, including Labor Code Section 5814 penalties and interest, are deferred, with jurisdiction reserved. (MOH/SOE, p. 2.)

Applicant testified in pertinent part as follows. She started working for the employer in 2006 to 2007, starting with sorting initially for two years, then working as a floor lead for ten years, and then returning to sorting for her final two years on the job. (MOH/SOE, p. 4.) As a sorter while working on the line, she would pack and sort garlic and onions. (MOH/SOE, p. 3.) More than once per day, she would lift boxes of garlic that weighed between 10 and 20 pounds. (MOH/SOE, p. 3.) She would stand for her entire eight to ten hour shift for five to six days per week. (MOE/SOE, p. 3.) She would also peel and sort garlic and fill bags of produce.

(MOH/SOE, p. 3.) She would sometimes have to lift the bags for an average of two and a half hours per day. (MOH/SOE, p. 3.) As a floor lead, she would stand or walk for her entire shift, which was the same number of hours as when she worked as a sorter. (MOH/SOE, p. 4.) She would sometimes lift boxes of onions and garlic while working as a floor lead. (MOH/SOE, pp. 3-4.)

Applicant began experiencing discomfort in her low back or hip in March or April 2017, or about six months before the end of the job. (MOH/SOE, pp. 4-5.) The company would provide a brace when lifting activity was required in the job. (MOH/SOE, p. 4.) She requested a brace from the foreman Amparo Diaz three times per week during the last six months of the job. (MOH/SOE, pp. 4, 6.)

Applicant's supervisor, Jesus Rodriguez, testified that, according to company policy, an employee must report any injury to their floor supervisor. (MOH/SOE, p. 6.) Rodriquez confirmed that Diaz was applicant's floor supervisor and therefore was the correct person to receive applicant's report of an injury. (MOH/SOE, p. 6.) Diaz did not notify Rodriquez about any injury of applicant. (MOH/SOE, p. 6.)

DISCUSSION

I.

The employee bears the burden of proving the injury arose out of and in the course of employment (AOE/COE) by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.)[1] An injury may be either "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or "cumulative," occurring 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. (Lab Code § 3208.1.)

Here, applicant claimed a cumulative injury, but the WCJ found that she did not meet her burden of proof to support a cumulative injury and ordered that she take nothing. In coming to this conclusion, the WCJ stated that

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

> The evidence is not in the record, but if one assumes Applicant did not understand the concept of cumulative trauma, she may have identified 9/7/17 as the injury date, because that is about the time her symptoms increased to a point where she sought medical treatment. However, the existence of a cumulative trauma injury is the subject of medical expertise, and no such medical support is present. When confronted with this issue in his deposition, Dr. Domeniconi did not change his opinion, that the injury was specific in nature.

(Opinion on Decision, p. 2.)

"The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 [2005 Cal.Wrk.Comp.LEXIS 71] (Appeals Bd. en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

On the other hand, there must be some solid basis in the medical report for the doctor's ultimate opinion; the Board may not blindly accept a medical opinion which lacks a solid underlying basis, and must carefully judge its weight and credibility. (*National Convenience Stores v. Workers' Comp. Appeals Bd. (Kesser)* (1981) 121 Cal.App.3d 420, 426 [46 Cal.Comp.Cases 783].) In other words, the Board must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence, and accordingly, the expert's opinion is no better than the facts on which it is based. (*Turner v. Workers' Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1044 [39 Cal.Comp.Cases 780].)

While we agree that Dr. Domeniconi's opinion does not constitute substantial evidence to support cumulative injury, we disagree with the WCJ that Dr. Domeniconi's conclusion ends the

inquiry into applicant's claim of industrial injury. Dr. Domeniconi had difficulty differentiating between a specific and cumulative injury. His confusion is apparent in his deposition testimony. He initially stated that the injury was specific because that was what applicant had told him. (Ex. A8, pp. 8-9.) When asked if injured workers were knowledgeable about distinguishing between a specific injury and cumulative trauma, he responded that he could not answer that question and that he just went "by what they tell me. I'm not an attorney." (Ex. A8, p. 9.) He then proceeded to state that it was impossible to say whether the injury was a specific injury or cumulative trauma. (Ex. A8, p. 13.) He also stated that he made a mistake and failed to include applicant's medical history in his report. (Ex. A8, pp. 16-17.) He later testified that although he stated in his report that the injury was cumulative, he now stated that statement was a typographical error and he currently believes that the injury is specific. (Ex. A8, pp. 36-37.) Dr. Domeniconi's equivocating as to the nature of applicant's injury is not substantial medical evidence. Instead, his opinion is merely speculative and is based solely on applicant's statement that the injury was specific instead cumulative.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods*. (2005) 70 Cal.Comp.Cases 797 [2005 Cal. Wrk. Comp. LEXIS 182]; *Lopez v. Wps Fbo Garco Enters* (January 5, 2022, ADJ12017211) [2022 Cal. Wrk. Comp. P.D. LEXIS 2, *18-19].) The Appeals Board has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].)

Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 [2002 Cal.Wrk.Comp.LEXIS 1218] (Appeals Bd. en banc).) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*., *supra*, 79 Cal.App.4th at p. 404.)

When the record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case.

(*McDuffie v. L.A. County Metro. Transit Auth*., *supra*, 67 Cal.Comp.Cases at p. 142.) If the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, the selection of an agreed medical evaluator (AME) by the parties should be considered, or alternatively, the WCJ may appoint a regular physician. (*Id*.)

Therefore, upon return to the WCJ, we recommend that the record be further developed. Since Dr. Domeniconi appears to misapprehend the legal definition of cumulative trauma, we recommend that the parties consider an AME, or that the WCJ appoint a regular physician.

II.

The WCJ did not address defendant's post-termination defense as he found all other issues were moot once he found that applicant did not sustain a cumulative injury AOE/COE. However, on the record before us, defendant failed to meet its burden on the post-termination defense.

The Labor Code allows for a post-termination defense on behalf of the defendant as follows in relevant part:

> Where the claim for compensation 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, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
> (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
> (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
> (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
> (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.

(Lab. Code, § 3600(a)(10).)

First, applicant's medical records that existed prior to the notice of termination contain evidence of the injury. (Lab. Code, § 3600(a)(10)(B).) This exception requires the medical records contain only evidence of "the injury," not evidence of industrial causation. (*Marquez Auto Body, Mid-Century Ins. v. Workers Comp. Appeals Bd*. (1996) 61 Cal.Comp.Cases 408, 410.) Applicant's medical records contain evidence of the injury as early as February 17 and March 31, 2015. (Ex. D2, pp. 15-17, 28-29.) Therefore, defendant's post-termination defense claim fails under subsection (a)(10)(B).

Further, pursuant to subdivision (D), if the date of injury, as defined by section 5412, is subsequent to the date of the notice of termination or layoff, the claim is not barred by the post-termination defense. (Lab. Code, § 3600(a)(10)(D).) Section 5412 specifies 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.) Section 5412 requires both disability and knowledge that the disability was caused by the employment.

Disability for the purposes of section 5412 is compensable temporary disability or compensable permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [69 Cal.Comp.Cases 579].) The term "disability," as used in section 5412 refers to "an impairment of bodily functions which results in the impairment of earnings capacity." (*Permanente Med. Grp. v. Workers' Comp. Appeals Bd.* (1985) 171 Cal.App.3d 1171, 1179-80 [50 Cal.Comp.Cases 491].) "Because actual wage loss is required for temporary disability, modified work alone is not a sufficient basis for compensable temporary disability. But, a modification may indicate a permanent impairment of earning capacity, especially if the worker is never able to return to the original job duties." (*Rodarte*, *supra*, at p. 1005.)

Furthermore, the "burden of proving that the employee knew or should have known [his disability was industrially caused] rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms." (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53].) Generally, "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." (*Id*. at p. 473.) If the 5412 date of injury is subsequent to the notice of layoff, the exception to the post-termination defense under section 3600(a)(10)(D) applies and applicant's claim is not barred by the post-termination defense.

If applicant's injury is cumulative in the instant case, there is no evidence in the record before us so far that applicant had knowledge that her disability was industrial until she filed her claim form on October 19, 2017. (Ex. D1, p. 1.) Therefore, the date of injury could be no earlier

than October 19, 2017. The date of injury is after the date of her termination and the post-termination defense fails pursuant to section (a)(10)(D) as well.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the August 11, 2022, F&O is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 25, 2023

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

MARISELA BERRIOS
SPRENKLE, GEORGARIOU & DILLES
YOUNG, COHEN & DURRETT

JMR/abs

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