WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GEOFFREY RAYA, *Applicant*

vs.

COUNTY OF RIVERSIDE, PERMISSIBLY SELF-INSURED, *Defendants*

Adjudication Number: ADJ12509226
Riverside District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the March 27, 2020 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a deputy sheriff from May 1, 1994 to June 20, 2008, sustained industrial injury to his reproductive system in the form of testicular cancer. The WCJ found that the cancer presumption of Labor Code[2] section 3212.1 applied, and that compensation is not barred by section 5405.

Defendant contends that compensation is barred by section 5405 because the August 20, 2019 application for adjudication of claim was filed more than one year from the section 5412 date of injury in 2008.

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

Defendant has also filed a Petition for Supplemental Response and a Supplemental Reply, dated May 11, 2020. Pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10964

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[1] Commissioners Lowe and Sweeney, who were previously members of this panel when it granted reconsideration, no longer serve on the Workers' Compensation Appeals Board. Other panelists have been assigned in their place.
[2] All further references are to the Labor Code unless otherwise noted.

(Cal. Code Regs., tit. 8, § 10964), we have granted the request and have reviewed the Supplemental Reply herein.

We have considered the Petition for Reconsideration, the Answer, the Supplemental Reply, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the Findings of Fact.

FACTS

Applicant claims injury to his reproductive system in the form of testicular cancer while employed as a deputy by defendant County of Riverside from May 1, 1994 to June 20, 2008. Defendant denies liability for the injury.

In April, 2008, applicant discovered a lump in his left testicle, and on May 5, 2008, a physician evaluated applicant and diagnosed testicular cancer. (Minutes of Hearing and Summary of Evidence (Minutes), February 25, 2020, at p. 5:15.) Applicant underwent left orchiectomy on June 29, 2008, and was off work for approximately one week. (Ex. 1, Report of James Padova, M.D., dated August 27, 2008, at p. 2.) Applicant received radiation therapy for approximately six weeks thereafter. (Minutes, at p. 5:17; Ex. 3, Transcript of the deposition of Geoffrey Raya, dated December 16, 2019, at p. 24:23.)

Applicant filed a claim form for workers' compensation benefits in approximately June, 2008. (Minutes, at 5:19.) The employer directed applicant to attend an August 27, 2008 evaluation by James Padova, M.D. Therein, Dr. Padova conducted a clinical examination of applicant, and reviewed applicant's vocational and medical history. Dr. Padova opined that applicant had not "demonstrated probable exposure to a known carcinogen that could reasonably be linked to the cancer condition in question and, therefore, I would not consider this patient's testicular cancer as being presumptively related to his employment as a police officer." (Ex. 1. Report of James Padova, M.D., dated August 27, 2008, at p. 9.)

On September 3, 2008, defendant denied liability for applicant's claim, noting that pursuant to the August 27, 2008 evaluation by Dr. Padova, "your testicular carcinoma is not work related." (Ex. E, Notice of Denial of Claim, dated September 3, 2008, at p. 1.) The notice advised applicant that he had one year to file an application for adjudication if he wished to challenge defendant's decision, and that he had the right to seek the advice of an attorney, and to an evaluation with a Qualified Medical Evaluator. (*Ibid*.)

Applicant took no further action with respect to the claim for workers' compensation benefits until he retained counsel in 2019 and filed an Application for Adjudication of Claim on August 20, 2019.

Applicant's counsel deposed Dr. Padova on November 13, 2019. Therein, Dr. Padova testified, in relevant part, that applicant was exposed to known carcinogens during the course of his employment, and that applicant's cancer manifested during his employment. (Ex. 2, Transcript of the deposition of James Padova, M.D., dated November 13, 2019, at pp. 17:11; 31:14.)

The parties proceeded to trial on February 25, 2020, and framed issues of injury arising out of and in the course of employment (AOE/COE), attorney fees, the presumption of injury of section 3212.1, and the statute of limitations.[3] Applicant testified under direct and cross-examination, and the parties submitted the matter for decision.

The WCJ issued his Findings of Fact on March 27, 2020, finding in relevant part that applicant was entitled to the presumption of section 3212.1, that applicant sustained injury AOE/COE in the form of testicular cancer, and that applicant's claims is not barred by the statute of limitations. (Findings of Fact Nos. 1, 2 and 3.) The WCJ's Opinion on Decision explained that pursuant to the deposition testimony of Dr. Padova, applicant's employment exposures triggered the presumptions of section 3212.1 regarding his claimed testicular cancer, and defendant had not met its burden of rebutting the presumption. (*Ibid*.) Accordingly, the WCJ determined that applicant sustained injury AOE/COE. The WCJ further determined that the August 27, 2008 report of Dr. Padova applied an incorrect standard with respect to causation because it failed to apply the presumptions of section 3212.1. When the defendant issued its denial on September 3, 2008, applicant detrimentally relied on that denial until Dr. Padova revised his opinion in 2019. (Opinion on Decision, at p. 6.)

Defendant's Petition avers that applicant sustained compensable disability when he underwent surgery on June 29, 2008, and that applicant knew his condition was work related when he filed a claim form on June 10, 2008. Accordingly, defendant contends the date of injury pursuant to section 5412, was June 29, 2008. In the alternative, defendant avers applicant worked as a Chief Deputy, and in that capacity acquired the necessary training, experience and background

[3] Applicant objected to the issue of the statute of limitations of section 5405, on the grounds that Dr. Padova "misrepresented his conclusion which induced the applicant to not file the application or proceed with any further action." (Minutes, at p. 3:1.)

to appreciate the industrial nature of his disability. (Petition, at 5:26.) Defendant also contends that even if applicant was not possessed of the necessary training, background or experience to appreciate the industrial nature of his disability, he failed to exercise reasonable diligence following the defendant's denial of his claim. (*Id.* at p. 7:9.) Defendant concludes that because applicant did not commence proceedings for the collection of benefits until 2019, compensation is barred by the statute of limitations of section 5405. (*Id.* at p. 12:13.)

Applicant's Answer contends that the defendant is precluded from raising the issue of the statute of limitations because the issue was not raised at the time of the priority conference, and no evidence responsive to the issue was listed in the pre-trial conference statement. (Answer, at p. 4:16.) Applicant also contends defendant is estopped from asserting the statute of limitations because Dr. Padova applied an incorrect legal standard to his analysis, on which applicant relied to his detriment. (Answer, at p. 6:8.)

Defendant's Supplemental Reply avers that applicant's raising of estoppel in the Answer, rather than a Petition for Reconsideration, is tantamount to waiver of the issue. (Supplemental Reply, at 4:12.)

The WCJ's Report observes that defendant's Petition does not contest the applicability of the presumption of section 3212.1, or the WCJ's determination that the reporting of Dr. Padova was not substantial medical evidence until his deposition was taken on November 13, 2019. (Report, at p. 3.) The WJC observes that defendant erroneously relied on Dr. Padova's "incomplete and inaccurate" initial report, and that the application of the statute of limitations under the circumstances undermines public policy. (*Ibid.*)

DISCUSSION

Defendant contends that compensation is barred by section 5405, which limits the time in which an employee may commence proceedings for the collection of California workers' compensation benefits. Section 5405 provides:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
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> (a) The date of injury.
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> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.

> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

Thus, an applicant must commence proceedings with the WCAB within one year of (1) the date of injury or (2) the expiration of the period covered by the employer's last payment of disability indemnity or (3) the date of the last furnishing by the employer of medical, surgical or hospital treatment. (*J.T. Thorp, Inc. v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327 [49 Cal.Comp.Cases 224, 229] (*Butler*).)

In cases involving an alleged cumulative trauma injury, the date of injury is governed by Labor Code section 5412, which holds:

> 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.

The court of appeal has defined "disability" per section 5412 as "either compensable temporary disability or permanent disability," noting that "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 Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579] (*Rodarte*).)

Here, applicant testified that he underwent surgery shortly after his cancer diagnosis and was out of work for approximately one week before returning to normal duties. (Minutes, at p. 5:17; Ex. 1, Report of James Padova, M.D., dated August 27, 2008, at p. 2.) Thus, applicant sustained compensable disability as of the date of his surgery on June 29, 2008.

Regarding the "knowledge" component of section 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 Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53] (*Johnson*).) An employee is not charged with knowledge that his or her disability is job-related without medical advice to that effect, unless the nature of the disability and the applicant's training, intelligence and qualifications are such that he should have recognized the relationship between the known adverse factors involved in his employment and his disability. (*Johnson, supra,* at 473; *Newton v. Workers' Co. Appeals Bd.* (1993) 17 Cal.App.4th 147 [58 Cal. Comp. Cases 395].)

The burden of proving that the employee knew or should have known rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms. (*Johnson, supra*, 163 Cal.App.3d 467, 471.) This is because "the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acci. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].)

Here, applicant testified that he filed a claim form shortly after his cancer diagnosis. (Minutes, at 5:19.) The claim form is not in evidence. However, there is no dispute that shortly after applicant filed his claim, defendant scheduled an AOE/COE compensability evaluation with Dr. Padova. Therein, Dr. Padova opined that there was no causal relationship between applicant's work activities or exposures and his recently diagnosed testicular cancer. (Ex. 1. Report of James Padova, M.D., dated August 27, 2008, at p. 9.) Following the issuance of Dr. Padova's report, defendant issued a denial of applicant's claim. Thereafter, the record reflects no further action taken by either party until August 20, 2019 when applicant retained counsel and filed an Application for Adjudication of Claim.

Defendant contends that applicant had actual knowledge of the industrial nature of his disability in 2008 when he filed a claim form. (Petition, at 4:18.) Defendant also contends that applicant knew his workplace exposures to drug labs caused his testicular cancer, and that he had testified to this knowledge in deposition and at trial. (*Id.* at p. 5:4.) Defendant further contends that applicant's position as a Deputy Chief imparted to applicant sufficient training and knowledge to appreciate the industrial nature of his cancer. (*Id.* at p. 5:26.)

"The 'date of injury' is a statutory construct which has no bearing on the fundamental issue of whether a worker has, in fact, suffered an industrial injury…the 'date of injury' in latent disease cases 'must refer to a period of time rather than to a point in time.' (citation.) The employee is, in fact, being injured prior to the manifestation of disability…[T]he purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury." (*Butler, supra,* 153 Cal.App.3d 327, 341.)

The question of what constitutes reasonable awareness has been the subject of nearly a century of California jurisprudence. In 1933, the California Supreme Court in *Marsh v. Industrial Acc. Com.* (1933) 217 Cal.338 [18 P.2d 933] (*Marsh*) addressed the necessity of knowledge of

disability to employment exposures prior to the running of the statute of limitations. The claimants in *Marsh* included an injured worker and the surviving spouses of two additional injured workers, who had contracted silicosis as a result of industrial exposures. However, their claims were brought only after the statutory limitation for filing workers' compensation claims had expired. "*Marsh* determined for the first time in this state that in the event of a latent and progressive disease, such as silicosis, it cannot reasonably be said that the injury dates from the last day of exposure to a dust-laden atmosphere and that the limitation period does not begin to run from that date; rather, the date of injury in such a case is the time when the accumulated effects of the disease culminate in a disability traceable to the latent disease as the primary cause, and it is or should be apparent by the exercise of reasonable care and diligence that the employment was the cause of the disability. (*Fruehauf Corp. v. Workmen's Comp. Appeals Bd.* (*Stansbury*) (1968) 68 Cal.2d 569 [33 Cal.Comp.Cases 300] (*Stansbury*).) Accordingly, the court held that the claims brought by the injured worker and the surviving spouses in *Marsh* would not be barred due to the "failure to make a correct medical diagnosis of [their] own condition." (*Marsh, supra*, 217 Cal. at p. 346.)

The Supreme Court again addressed the issue of knowledge of disability and its industrial origins in *Alford v. Industrial Acc. Com.* (1946) 28 Cal.2d 198 11 Cal.Comp.Cases 127] (*Alford*). Therein, the court determined that the applicant was, or should have been, aware that his respiratory illness was caused by his occupation more than six months prior to filing his claims of injury. The *Alford* court wrote that the "petitioner as a reasonable man was then aware, or in the exercise of ordinary care and diligence should have been aware, he had a respiratory disability, that was caused by his occupation as a plaster caster, and that it was seriously impairing the efficiency of his work." (*Id.* at p. 205.) The court discussed the indicia relevant to a determination of when applicant knew or reasonably should have known his disability was related to work, as follows:

> While it does not appear in the record that prior to the permanent severance of his employment on November 29, 1943, petitioner was informed by a physician that his physical disabilities were caused by his work, yet beginning in January, 1943, petitioner was intermittently receiving medical treatment for the relief of his back, sore throat, successive colds, and sinus condition; and at least several months prior to his final termination of work, there is evidence that petitioner had correlated his impaired health with his occupation. Thus, in "the latter part of June or July, 1943, petitioner asked his employer for "a release from the plant" because the work was "detrimental to [his] health" and "it might be fatal" if he continued. From such conduct it could reasonably be inferred that petitioner in

> any event then knew that he had a compensable disability directly traceable to his work in the dust-laden atmosphere of the plant, and that he was not depending on a medical diagnosis to give him knowledge of the injurious character of his employment on his physical well-being.
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> (*Alford, supra*, 28 Cal.2d, at pp. 205-206.)

In many cases, knowledge of the existence of a disability and its industrial etiology is established through medical advice. In *Pacific Indem. Co. v. Industrial Acc. Com.* (*Rotondo*) (1950) 34 Cal.2d 726 [34 Cal.2d 726], applicant flight instructor felt his symptoms of tuberculosis were industrial as early as 1942 but received no medical advice of an industrial relationship. The applicant further inquired of his employer whether his symptoms might be industrial, but the employer advised the symptoms were not. Applicant obtained medical treatment and took several months off work. Following his return to work, applicant later began to experience the recurrence of symptoms. In 1944, applicant was advised by a physician that his tubercular condition had been reactivated by his work activities. (*Id.* at p. 727.) Applicant filed a claim in 1945 and was awarded benefits. Defendant appealed the award, averring applicant's date of injury was as early as 1942, and that compensation was barred by section 5405. The California Supreme Court observed that applicant's undisputed testimony established he was unaware that he had a compensable condition until receiving explicit medical advice in 1944. With respect to the question of when the applicant should have known prior to that date, the court observed that no physician had advised applicant against flying prior to 1944, and that the Industrial Accident Commission[4] (IAC) was therefore justified in finding that defendant had not sustained the burden of proving applicant's claim was barred by the statute of limitation. (*Id.* at p. 730.) Similarly, in *Price v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1687 [2007 Cal. Wrk. Comp. LEXIS 388] (writ den.),[5] the Appeals Board held that the applicant's receipt of March 27, 2003 reporting of an Agreed Medical Evaluator (AME) describing her injury and its industrial relationship was sufficient to trigger the running of the statute of limitations of section 5405. (cf. *Hughes Aircraft Company v. Workers' Comp. Appeals Bd.* (*Zimmerman*) (1993) 58 Cal.Comp.Cases 220 [1993 Cal. Wrk. Comp. LEXIS

[4] The Industrial Accident Commission was the predecessor to the Workers' Compensation Appeals Board (WCAB).
[5] Panel decisions are not binding precedent (as are en banc decisions) on all Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) A California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 [Appeals Bd. en banc].) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Bd. en banc).)

2853] (writ den.) [general medical advice that work stress was depleting applicant's immune system insufficient to confer knowledge for purposes of section 5412].) Accordingly, "[t]here is no real disagreement that medical advice to an applicant for workers' compensation benefits that his disability was caused by his employment is sufficient to trigger the statute of limitations." (*Johnson, supra,* 163 Cal.App.3d 467.)

Another consideration in assessing knowledge for purposes of section 5412 is the nature and complexity of the injury that results in disability. In *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104] (*Nielsen*), the applicant regularly performed heavy lifting as part of his job duties, which caused neither pain nor discomfort. However, in the final three weeks of his employment, applicant was assigned to assembling and disassembling bottle racks, which caused the immediate onset of radiating pain in applicant's low back and leg. (*Id.* at p. 924.) The court in *Nielsen* held that "…the Board's decision that the applicant here either knew or reasonably should have known that his injury was industrially caused is not contrary to law or the evidence ... The injury claimed was not some exotic disease the causes of which might be obscure and debatable. The injury claimed was an injury to the applicant's lower back affecting his left leg, and his employment duties involved frequent bending and lifting heavy objects." (*Id.* at p. 930.) In addition, applicant testified emphatically to his knowledge of the work-relatedness of his injury and suggested as much to a treating physician. (*Id.* at p. 926.) Taking these factors together, the *Nielsen* court attributed to applicant the requisite knowledge that his condition was caused by industrial exposures as of the time the disability occurred. (See also *Estrella v. Workers' Comp. Appeals Bd.* (2016) 81 Cal.Comp.Cases 525 [2016 Cal. Wrk. Comp. LEXIS 57] (writ den.).)

However, there is also a significant body of decisional authority wherein California courts have *declined* to attribute to an injured employee the training, background or experience necessary to diagnose a medical condition and its industrial causation. In *Stansbury, supra,* 68 Cal.2d 569, applicant assembler claimed injury to the low back more than one year from the date he first experienced symptoms. (*Id.* at p. 571.) The California Supreme Court affirmed that the claim was nonetheless timely because applicant did not learn of his disability and its industrial origins until more than a year from the onset of low back pain. The court concluded, "[i]t would be unreasonable to hold that although an employee who has suffered an injury resulting from several minor traumas is deemed not to be injured for the purposes of the statute of limitations until the minor traumas

result in disability, once the injury has ripened into disability he is required to know immediately that such disability was caused by his employment. As *Marsh* and other authorities have held, an employee is not to be deprived of compensation merely because he fails to make a correct medical diagnosis." (*Id.* at p. 577, citing *Marsh, supra,* 217 Cal. 338.)

Similarly, in *City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53], the Court of Appeal held that despite the injured worker's *suspicion* that his disability was caused by his employment, his heart troubles were not susceptible to lay diagnosis sufficient to establish knowledge for purposes of section 5412. The court wrote:

> Applicant enjoyed his work and did not believe it was stressful. However, he did form the belief more than one year before he filed his application for workers' compensation benefits that his cardiac problems were job related. He also discussed his claim with the claims person for the city. Applicant's belief that his disability was work related was not based on any medical advice. In fact, the only medical opinion on causation stated applicant's disability was not job related. That opinion was expressed in a report furnished about six months after applicant suffered his disability.
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> Under these circumstances we conclude there is substantial evidence to support the board's decision that applicant was not chargeable with knowledge that his disability was work related. Applicant did not have the training or qualifications to recognize the relationship between the known adverse factors involved in his employment and his disability. Applicant's expression of the belief, shared by most disabled employees, that his employment caused his disability does not mandate a contrary conclusion.
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> (*Id.* at p. 473.)

Indeed, the perils of lay diagnosis of complaints as quotidian as low back pain were discussed by the court of appeal in *Pieter Kiewit Sons v. Industrial Acci. Comm.* (*McLaughlin*) (1965) 234 Cal.App.2d 831 [30 Cal.Comp.Cases 188]). Therein, applicant claimed a low back injury while working for Kiewit, the last of three employers for whom applicant had worked in four years. Despite applicant describing similar low back complaints arising out of all three employments, the IAC assessed liability to the terminal employer alone. In granting review of the IAC decision, however, the Court of Appeal found "[t]hat issue may run a gamut from the blatantly obvious to the scientifically obscure," and that expert testimony would be necessary:

> Back disabilities in particular shout loudly for expert advice. No human ailment has produced more medicolegal headaches than the aching back. This delicately articulated structure of nodulated bones, cushioned by cartilaginous bodies and gelatinous material, interlaced by the complex and sensitive fibers of the cerebrospinal nervous system and held in array by strands and cords of muscular and ligamentous tissue, is vulnerable to a vast and bewildering variety of traumatic, pathological, deteriorative ailments and neurotic manifestations, singly and in diverse combinations. Precise diagnosis often baffles neurologists and orthopedists. In assessing the respective roles of trauma and predisposing conditions and of objective and subjective complaints, subtle value judgments may be unavoidable. In the face of this anatomical, physiological and psychological intricacy, semantically dubious, pseudomedical jargon infiltrates the conflux of medicine and jurisprudence. Whiplash, traumatic arthritis, traumatic neurasthenia and railroad spine are solecisms in current or past fashion. These verbal conveniences tempt the medically untrained into complacent substitution of simplicity for complexity. In a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation.
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> (*Id.* at pp. 839-840.)

Another factor considered by California courts in assessing knowledge for the purpose of establishing a date of injury has been the filing of a claim form. In *Bassett-Mcgregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102 [53 Cal.Comp.Cases 502], applicant initially filed a claim for specific injury in the form of a heart attack. Two years later, applicant received medical advice that the injury was the result of cumulative injury and filed a corresponding second claim. The Court of Appeal held, however, that applicant's claim for cumulative injury was filed more than one year from the section 5412 date of injury and compensation was therefore barred by the statute of limitations. The court reasoned that as a result of her heart attack, applicant consulted a lawyer and filed a claim, and further testified to her knowledge of industrial causation, and "[t]hat claim leaves no doubt that as of December 12, 1984, applicant knew her cardiac arrest was job related." (*Id.* at p. 1114.)

Similarly, in *Ramos v. County of Sonoma*[6] (February 1, 2016, ADJ9924024) [2016 Cal. Wrk. Comp. P.D. LEXIS 78] (*Ramos*), applicant received a diagnosis of non-Hodgkins Lymphoma

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6 Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en

in August, 2013, and filed a claim for workers' compensation benefits in October, 2013. Defendant delayed decision on the claim on October 21, 2013, and denied the claim on November 18, 2013. (*Id.* at p. *4.) Applicant did not file an Application for Adjudication until April 20, 2015. Following a trial that included the issue of the statute of limitations, the WCJ determined that a section 5412 date of injury had not yet occurred, because there was no medical advice in evidence that applicant's condition was work related. A panel of the Appeals Board disagreed, holding that "by submitting a DWC-1 claim form and seeking workers' compensation benefits on October 9, 2013, applicant "knew" for the purposes of section 5412 that his injury was work related." (*Id.* at p. *5.)

Conversely, in *Modesto City Schools v. Workers' Comp. Appeals Bd.* (*Finch*) (2002) 67 Cal.Comp.Cases 1647 [2002 Cal. Wrk. Comp. LEXIS 1618] (writ den.), the Appeals Board held that the earliest applicant knew of the connection between his employment as teacher/coach and a claimed cumulative trauma bilateral shoulder injury was a physician's report dated November 22, 2000, notwithstanding applicant's filing of an *earlier* claim form on August 22, 2000, for a cumulative injury ending in 1998. Thus, notwithstanding the filing of a claim form, the date of knowledge was established by the *later provision of medical advice* as to the existence of a cumulative injury caused by industrial exposures. Similarly, in *ExpoServices/San Francisco Expo Servs. v. Workers' Comp. Appeals Bd.* (*Cratty*) (2004) 69 Cal.Comp.Cases 260 [2004 Cal. Wrk. Comp. LEXIS 61] (writ den.) (*Cratty*), the date of knowledge was found to be the date of medical advice, notwithstanding a prior claim denial and application for adjudication. In *Cratty*, applicant suffered a myocardial infarction on January 3, 2000. The employer issued a delay notice, and later denied liability for workers' compensation benefits on January 21, 2000, despite applicant not having yet filed a claim form. (*Id.* at p. 261.) Defendant's denial relied in part on a medical evaluation by a cardiologist who opined that applicant's heart trouble was unrelated to his employment. Following the employer's denial, applicant filed an application for adjudication in June, 2000. Applicant first received medical advice that his heart trouble was industrial in the form of a December 16, 2001 report of the Qualified Medical Evaluator (QME). Based on this sequence of events, applicant's date of injury was determined to be December 16, 2001, the date of the first report linking applicant's disability with industrial exposures. (*Id.* at p. 263.) Because the

banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to panel decisions because of their relevance to the issues at being discussed.

application for adjudication was not filed more than one year from the date of injury, compensation was not barred by section 5405.

Often, the determination of the date of injury under section 5412 involves an analysis of several indicia of knowledge, as identified in the factual circumstances of each case. In *Zenith Ins. v. Workers' Comp. Appeals Bd.* (*Yanos*) (2010) 75 Cal.Comp.Cases 1303 [2010 Cal. Wrk. Comp. P.D. LEXIS 208], a panel of the Appeals Board held that applicant's meeting with her attorney was the first date of knowledge, despite first sustaining disability in 2002 and being advised by a treating physician to file a workers' compensation claim. The panel in *Yanos* noted, however, that the employer failed to provide applicant with claim forms, had no workers' compensation notices posted in the workplace, and applicant testified that she did not know what a cumulative injury was, or that she had the right to bring a workers' compensation claim. (*Id.* at pp. 1306-1307.)

Similarly, in *City of Chico v. Workers' Comp. Appeals Bd.* (*Scholar*) (2012) 77 Cal.Comp.Cases 440 [2012 Cal. Wrk. Comp. LEXIS 34] (*Scholar*), a split panel of the Appeals Board affirmed the WCJ's determination that a firefighter's presumptive claim of injury in 2004 in the form of cancer was timely filed, despite not being filed until 2008. The panel majority wrote:

> We agree with the WCJ's finding that, given the unique and complex medical scenario outlined in this case, the applicant did not and should not have known of his industrial occupational disease until his 2008 diagnosis of cancer at the base of the tongue. Applicant was given a number of diagnoses, including cat scratch fever, and even testified that he was told that the mass could be congenital. Although squamous cell carcinoma was suspected, the early medical reports make clear that scans and biopsies were never definitive. Most importantly, the applicant testified that the diagnoses were always presented to him in an equivocal manner. The WCJ found his testimony in this regard credible, and because a WCJ has the benefit of viewing witnesses' live testimony, the WCJ's credibility determinations are entitled to "great weight." [Citation.] Given the disparate diagnoses given to the applicant when he first sought medical treatment, the fact that biopsies and scans were producing conflicting results, and the equivocal language communicated to the applicant, it would be understandable for a lay person such as the applicant to have reasonable doubts as to a diagnosis even when the weight of the medical evidence pointed to squamous cell carcinoma.
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> (*Id.* at p. 443.)

The panel majority also noted that there was no evidence applicant was advised that his condition was work related, and no evidence that applicant knew that squamous cell carcinoma was subject to a statutory presumption. (*Ibid*.)

Thus, the determination of knowledge is an inherently fact-based inquiry, requiring an individualized analysis in each case.

Here, applicant filed a claim form for workers' compensation benefits at an unknown point following his cancer diagnosis in April, 2008. (Minutes, at 5:19.) Thereafter, the unrepresented applicant attended an employer-directed evaluation with Dr. Padova, who issued a report on August 27, 2008. Dr. Padova opined that applicant had not "demonstrated probable exposure to a known carcinogen that could reasonably be linked to the cancer condition in question and, therefore, I would not consider this patient's testicular cancer as being presumptively related to his employment as a police officer." (Ex. 1. Report of James Padova, M.D., dated August 27, 2008, at p. 9.) Based on the reporting of Dr. Padova, defendant denied the claim on September 3, 2008. (Ex. E, Notice of Denial of Claim, dated September 3, 2008, at p. 1.) The notice advised applicant of his rights to file an application for adjudication, of his rights to seek an attorney, and of the statutory time limits for filing. (*Ibid*.) Thereafter, applicant took no further action with respect to the claim for workers' compensation benefits until he retained legal counsel in 2019 and filed an Application for Adjudication of Claim on August 20, 2019.

Defendant contends that applicant's filing of a claim form on or about June 10, 2008 is evidence that applicant knew of the industrial relationship between his cancer and his work exposures. Coupled with applicant's compensable wage loss following the cancer surgery beginning June 29, 2008, defendant avers the date of injury pursuant to section 5412 was June 29, 2008. (Petition, at p. 3:23.) Because applicant did not file an application for adjudication of claim until 2019, defendant asserts that compensation is barred by section 5405.

However, we are not persuaded that applicant had knowledge of the industrial nature of his disability because the medical advice applicant received at the time *denied the existence* of any relationship between applicant's disability and work exposures. In much the same way that medical advice *establishing* that disability is industrial is sufficient to trigger a date of injury under section 5412, medical advice *negating* such a relationship would similarly negate a finding of a section 5412 date of injury. It was for this reason that the Court of Appeal in *Nielsen* wrote:

> However, in both his petition for reconsideration and in his petition for review in this court applicant has asserted that until he consulted Dr. Lay and a CAT scan was performed, all the doctors by whom he was examined informed him that his injury was nonindustrial. It is then implied, although the applicant did not so testify, that the failure to file a claim for workers' compensation benefits within one year after October 8, 1981, resulted from applicant's reliance on the statement that his condition was nonindustrial, allegedly made by the physicians who examined him before he saw Dr. Lay. *Were those the facts the Board would no doubt have determined the statute of limitations had not run and we would have affirmed that determination.*
>
> (*Nielsen, supra*, 164 Cal. App. 3d 918, 927-928, italics added.)

Similarly, in *Chambers v. Workmens' Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33 Cal.Comp.Cases 722], an employee suffering from emphysema was advised by his physician that he could no longer work, and that his emphysema was *unrelated* to applicant's employment. The California Supreme Court held that applicant's claim, filed some years later when the applicant read in a newspaper that his condition might be industrial, was timely filed. Despite applicant's suspicion that his condition was work-related, "[t]here is no evidence in the record that [applicant] had any indication before December 1966 that emphysema could have been caused by the conditions under which he worked and therefore no rational basis existed upon which he should have concluded that his disability was connected with his employment." (*Id.* at pp. 560-561.) The court's decision in *Chambers* declined to apply the statute of limitations to a claim where applicant was given medical advice disproving the relationship between work exposures and disability. Thus, the affirmative denial of a link between industrial exposure and the development of subsequent disability deprives the injured worker of the knowledge necessary to trigger a date of injury under section 5412 and the running of the statute of limitations under section 5405.

We acknowledge that under some circumstances, the filing of a claim for workers' compensation benefits may be one factor to be considered among the various indicia of knowledge that a condition or disability is work-related. For example, in *Bassett-Mcgregor, supra,* 205 Cal.App.3d 1102, the filing of the claim form was but one of the various factors identified by the court in establishing a date of injury, including applicant's prior consultation with an attorney and her testimony that she knew her injury was industrial. (*Id.* at p. 1114.)

There are also instances, and we believe this to be one of them, where the applicant lacks sufficient knowledge of the industrial causation of a disability at the time of the filing of a claim form to commence the running of the statute of limitations. (*Modesto City Schools Workers' Comp.*

Appeals Bd. (*Finch*), *supra*, 67 Cal.Comp.Cases 1647; *ExpoServices/San Francisco Expo Servs. v. Workers' Comp. Appeals Bd.* (*Cratty*), *supra*, 69 Cal.Comp.Cases 260.) This is especially true when the disability itself results from a condition or ailment that is difficult to diagnose. (*Johnson, supra*, 163 Cal.App.3d 467; cf. *Nielsen, supra*, 164 Cal.App.3d at pp. 927-928.) Difficulties in attribution arise in situations where the occult nature of the injury or disease process renders a reasonable opinion on its relationship to work exposures difficult under the best of circumstances. (*McLaughlin*, *supra*, 234 Cal.App.2d 831.)

Here, we are not persuaded that applicant's testicular cancer was conducive to lay attribution. The record offers no evidence that applicant, a law enforcement officer employed by the defendant since 1994, had any specialized training or experience in recognizing the existence of cancer, or in identifying a link between cancer-related disability and his work exposures.[7] In the absence of specialized training or experience in assessing industrial causation, the unrepresented applicant acceded to the medical advice of an evaluating physician *disproving* a causal link between his cancer and his employment.

Having considered the above case law, the legislative intent informing section 5412 and its interaction with the statute of limitations, and based on our review of the specific facts of this case, we conclude that applicant's filing of a claim form in June, 2008 was a reflection of applicant's *suspicion* that his condition was work related. (*Johnson, supra*, 163 Cal.App.3d 467.) We further conclude that the causation of applicant's testicular cancer was not amenable to lay attribution, and that the applicant required medical advice as to the industrial nature of his claim prior to the commencement of the running of the statute of limitations. Here, applicant first received medical advice that his condition was related to work exposures in the deposition of Dr. Padova on November 13, 2019. Applicant filed his Application for Adjudication of Claim on August 20, 2019. Accordingly, applicant commenced proceedings for the collection of benefits within one year of the date of injury, and compensation is not barred by section 5405. (Lab. Code, § 5405.)

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[7] We also note that the cancer presumption found in section 3212.1 as alleged by applicant is included within "a series of presumptions of industrial causation" enacted by the Legislature, reflective of a public policy whose purpose is "to provide additional compensation benefits to employees who provide vital and hazardous services by easing their burden of proof of industrial causation." (*City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 310–311 [70 Cal.Comp.Cases 109] (*Garcia*), citing *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.* (1994) 23 Cal.App.4th 1120, 1123–1124 [59 Cal.Comp.Cases 180].) The Court of Appeal in *Garcia* made clear, "the Legislature was concerned with the unfairness to firefighters and peace officers who, while exposed to carcinogens during the course of their job duties, nonetheless were denied benefits because it was not possible to prove the genesis of the cancer." (*Id.* at pp. 316-317.) Thus, the legislature enacted the cancer presumption of section 3212.1 precisely because of the difficulty in establishing causation of the condition.

In summary, and based on our review of the record, we conclude that the nature of applicant's disability was not amenable to lay attribution, and therefore required medical advice as to its relation to applicant's work activities for purposes of establishing a date of injury pursuant to section 5405. The first evidence of such advice in the evidentiary record was November 13, 2019. Because the concurrence of applicant's compensable permanent disability and knowledge that such disability was caused by his employment occurred on November 13, 2019, applicant's claim is not barred by the statute of limitations of section 5405. We will affirm the WCJ's March 27, 2020 Finding of Fact, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 27, 2020 Findings of Fact is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 29, 2024

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

GEOFFREY RAYA
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
HERMANSON, GUZMAN & WANG

SAR/abs

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