WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ROSA CERVANTES, *Applicant*

vs.

CLASSIC COSMETICS, INC.; MAJESTIC TECHNOLOGY,
adjusted by AMTRUST NORTH AMERICA; NORTH RIVER INSURANCE COMPANY,
adjusted by CRUM & FORSTER, *Defendants*

Adjudication Numbers: ADJ8578580 ADJ8570120
Los Angles District Office

OPINION AND DECISION
AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case. This is our decision after reconsideration.

Defendants North River Insurance Company adjusted by Crum & Forster (North River) and Majestic Insurance Company adjusted by AMTrust North America (Majestic) each seek reconsideration of the December 20, 2019 Amended Joint Findings and Award.[1] In ADJ8570120, the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an assembly line worker by Classic Cosmetics on September 24, 2010, sustained an industrial injury to both shoulders and her lumbar spine that caused periods of temporary disability and 46% permanent partial disability. In ADJ8578580, the WCJ found that applicant sustained a cumulative trauma injury to both shoulders, her lumbar spine, both hands/wrists, and psyche from 1999 through September 12, 2012. The WCJ found that the injury caused temporary disability and that applicant is entitled to 33% permanent disability after apportionment. The WCJ found that Majestic insured Classic Cosmetics from November 20, 2010 to November 20, 2011 and North River insured Classic Cosmetics from November 20, 2011 through November 20, 2012. The WCJ

[1] Both defendants incorrectly identified a third party administrator as the party seeking reconsideration. A third party administrator is neither an employer nor an insurer and should not be identified as a party.

issued a joint and several award against North River and Majestic for all benefits that applicant is entitled to receive as a result of the cumulative trauma injury. The WCJ also found that liability pursuant to Labor Code section 5500.5(a) is from September 12, 2011 to September 12, 2012. [2]

Majestic contends that the WCJ erred in assigning the left shoulder to the cumulative trauma injury in ADJ8578580. Majestic also contends that the WCJ erred in finding that the applicant's entire employment contributed to the cumulative trauma rather than finding a shorter cumulative trauma period in accordance with the parties' stipulation.

In an untimely Petition for Reconsideration filed on January 15, 2020, North River contends that the WCJ erred in finding that the applicant's lumbar spine was injured as a result of the cumulative trauma and in awarding permanent disability and temporary disability related to the lumbar spine.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted solely to correct a clerical error in a case number. We have considered the Petitions for Reconsideration, the contents of the Report and the record in this matter. For the reasons discussed below, as our Decision After Reconsideration, we will rescind the December 20, 2019 Findings and Award, and return the matter to the trial level for further proceedings and a new decision. We will dismiss the untimely Petition for Reconsideration.

As an initial matter, to be timely, a petition for reconsideration must be filed and received by the Appeals Board within 20 days of the service of the final order, plus an additional five days if service of the decision is by any method other than personal service, including by e-mail or mail, upon an address in California. (Lab. Code, §§ 5900(a), 5903, Cal. Code Regs., 10605(a)(1) [formerly 10508].) Because December has 31 days and the defendant was served by mail in California, North River's petition is a day late. Therefore, we will dismiss it.

FACTS

In the Report, the WCJ summarized the relevant facts as follows:

> The Applicant was employed by the defendant employer, a cosmetics company, beginning in 1999 as an assembly worker. Her job was performed along a production line where while standing during her shift, she would attach plastic wrapping to products that were sent on a conveyor belt to an oven where plastic

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

was melted on the product. See Minutes of Hearing, Summary of Evidence date October 1, 2019, page 7:1-25. On September 24, 2010 the Applicant fell at work and sustained an admitted injury to both shoulders and lumbar spine. She was sent for treatment for her injuries to US Healthworks and was treated by Dr. Reich.

The record reflects that applicant was taken off work by doctors at US Healthworks on November 30, 2010. She had her first of two left shoulder surgeries by Dr. Reich at US Healthworks on January 20, 2011 who released her to return to work on April 26, 2011. Dr. Reich had the applicant return to her regular duties on May 23, 2011. She worked her regular duties until November 3, 2011 when she had her second left shoulder surgery by Dr. Reich. See Joint Exhibit 2, report of Dr. Heskiaoff August 29, 2014, pgs. 14-17; page 22. She returned to work on March 20, 2012 and worked until September 13, 2012 when she left to have right shoulder surgery.

The Applicant credibly testified at trial that when she was released to return to work each time by Dr. Reich, her duties did not change and she still worked on the production line doing the same job duties she performed prior to the specific injury of September 24, 2010. She was also assigned to build boxes during the time between her two left shoulder surgeries. See Minutes of Hearing, Summary of Evidence October 1, 2019, page 8:15-16; Dr. David Heskiaoff MD Joint Exhibit 2, page 46.

Dr. David Heskiaoff was selected as the agreed medical examiner in orthopedic surgery and ultimately opined that all of Applicant's left shoulder and lumbar spine disabilities were caused by the specific injury of September 24, 2010. See Joint Exhibit 2, page 49. However, after obtaining additional diagnostic testing, Dr. Heskiaoff opined that applicant's bilateral hand and wrist conditions were due to a cumulative trauma of her employment period with the defendant employer. See September 23, 2014 report of Dr. Heskiaoff, Joint Exhibit 1, page 4. An AME in psychiatry opined that Applicant's psychiatric permanent disability was entirely due to cumulative trauma of her employment with the defendant employer. See report of Dr. Myron Nathan MD March 1, 2018, Defendant Exhibit A.

On May 15, 2015, a deposition of Dr. Heskiaoff occurred at which time after reviewing his previous two reports described above, he concluded that the Applicant's right shoulder disability was 70% caused [by] a compensable consequence of the specific injury of September 24, 2010 and 30% was caused by the cumulative trauma injury from March 1, 2011 to present." See Joint Exhibit 3, deposition of Dr. Heskiaoff pages 7:4 through 8:24.

The matter went to trial on the merits on September 17, 2019 at which time stipulations and issues were framed on the record, and exhibits were identified, marked, and admitted into evidence. (Report, pp. 3-5.)

The Minutes of Hearing reflect that in both ADJ8578580 and ADJ8570120, the issues submitted for decision at trial included "Parts of body injured." (September 17, 2019, Minutes of Hearing and Summary of Evidence (MOH/SOE) p. 3, 4.)

In ADJ8578580, the parties stipulated that an insurance policy issued by Majestic provided insurance coverage for applicant's employer from November 20, 2010 through November 20, 2011 and that an insurance policy issued by North River provided coverage from November 20, 2011 to November 20, 2012. The parties also stipulated that applicant sustained an industrial injury to her right shoulder while employed during the period March 1, 2012 through September 26, 2012. (MOH/SOE, p.4.) Applicant's date of injury was not placed at issue.

In ADJ8578580, the WCJ found that applicant sustained a cumulative trauma injury to both shoulders, her lumbar spine, both hands/wrists, and psyche from 1999 through September 12, 2012. In the Opinion on Decision, the WCJ provided an analysis of the medical records and a "rating string" to support the award of permanent disability. The WCJ relied on the "reports of Dr. Heskiaoff and his final apportionment conclusions …set forth in his deposition testimony from May 14, 2015 in which he concludes that 100% of the applicant's permanent disability to her left shoulder and lumbar spine…are due to the specific injury…." (December 19, 2019, Opinion on Decision, p. 12.)

In the Report, the WCJ did not address the contradiction between medical evidence cited in the Opinion on Decision and the finding that applicant sustained a cumulative injury to applicant's lumbar spine and left shoulder.

ANALYSIS

As we will explain further below, we are rescinding the December 20, 2019 decision because, in addition to the inconsistency between the Findings and Award and the Opinion on Decision noted above, the WCJ exceeded his authority by determining issues that were not submitted at trial. Of particular importance, applicant's date of injury was not submitted as an issue for decision in ADJ8578580. Because applicant has not elected against a defendant in ADJ8578580 and both defendants are parties, assigning a new date of injury may impact which insurer or insurers pay the award. All parties in workers' compensation cases are entitled to due process. (*Beverly Hills Multispecialty Group v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461].) As a result of the procedural defects, we will rescind the Findings and Award and return the matter to the trial level for a new decision.

Section 5412 provides that "[t]he date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment. (Lab. Code, § 5412.)

As used in Section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavira v. Worker's Comp. Appeals Bd. (*1991) 235 Cal.App.3d 463 [56 Cal.Comp.Cases 631]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1003-1006 [69 Cal.Comp.Cases 579].) Medical treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to section 5412, but it may be evidence of compensable permanent disability. (*Rodarte, supra,* 119 Cal.App.4th 998, 1005 [69 Cal.Comp.Cases 579, 584].) Likewise, modified work is not a sufficient basis for finding compensable temporary disability, but it may be indicative of a compensable permanent disability, especially if the worker is permanently precluded from returning to his usual and customary job duties. (*Id*.)

The cumulative trauma period includes the entire period of employment where the injured worker engaged in the activities that caused the injury. However, not all employers who employed the applicant during the cumulative trauma period are liable for benefits.

Section 5500.5 provides:

> Except as otherwise provided in section 5500.6, liability 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(a).)

When an employee sustains a cumulative trauma injury, the employee may pursue his or her claim for benefits against any one or more of successive employers that employed the employee during the cumulative trauma. (Lab. Code, § 5500.5.) If there are multiple employers during the 5500.5 liability period, the employers are jointly and severally liable for the entire award

and may seek contribution from each other during separate proceedings. (Lab. Code, § 5500.5(e); *Denny's Inc. v. Workers' Comp. Appeals Bd. (Bachman)* (2003) 104 Cal. App. 4th 1433 [68 Cal.Comp.Cases 1].)

Section 5500.5 was enacted in 1951 to codify the holding in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79 [11 Cal.Comp.Cases 226] that an employee who sustains an injury as a result of a progressive occupational disease may obtain an award for the entire amount of permanent disability from any one employer or insurer and the defendant held liable will have the burden of seeking apportionment. "Section 5500.5 is long and complex, but its design is reasonably clear. It is intended to allow an employee to recover for his entire cumulative injury from one or more employers of his choosing for whom he worked within the preceding five years,[3] even though a portion of his injury was incurred in prior employments. The employer or employers against whom compensation is awarded are in turn authorized to seek contribution from other employers in the five-year period." (*Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 325–326 [44 Cal.Comp.Cases 212].) "The purpose of the limitation contained in subdivision (a) of section 5500.5 was to 'alleviate the difficulties encountered by the parties in complying with the requirements of former section 5500.5 whereby employees and their attorneys were frequently compelled to expend much time, effort and money in tracing the applicant's employment history over the entire course of his adult life.'[citation omitted.]" (*County of Riverside v. Workers' Comp. Appeals Bd. (Sylves)* (2017) 10 Cal. App. 5th 119, 126-127 [82 Cal.Comp.Cases 301].)

An applicant may elect against any defendant who has potential liability for the alleged cumulative injury, and any defendant held liable may proceed against other potentially liable insurers or employers. (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 60 Cal.App.4th 548 [62 Cal.Comp.Cases 1661].) If an applicant elects to proceed against a single insurer, the insurer is entitled under Labor Code section 5500.5 to seek contribution for awarded benefits from the remaining insurers in subsequent proceedings. (*See Schrimpf v. Consolidated Film Industries, Inc.* (1977) 42 Cal.Comp.Cases 602 [en banc].) This procedure is intended to promote a prompt determination of an injured worker's entitlement to workers' compensation benefits. (*Rex Club v. Workers' Comp. Appeals Bd. (Oakley-Clyburn)* (1997) 53 Cal.App.4th 1465 [62 Cal.Comp.Cases 441].) Disputes over the right of contribution pursuant to Section 5500.5 are

[3] For workers' compensation claims filed after January 1, 1981, the injured worker may elect against any employer in the year immediately preceding his or her injury. (Lab. Code, § 5500.5(a).)

required to be submitted to arbitration and the cost of arbitration is split between the parties. (Lab. Code, §§ 5273, 5275(a).)

We also note that Section 5500.5 extends the Appeals Board's jurisdiction to amend an award if a timely petition for contribution is filed. Section 5500.5(e) states:

> At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under the award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution. The proceeding shall not diminish, restrict, or alter in any way the recovery previously allowed the employee or his or her dependents, but shall be limited to a determination of the respective contribution rights, interest or liabilities of all the employers joined in the proceeding, either initially or supplementally; provided, however, if the appeals board finds on supplemental proceedings for the purpose of determining an apportionment of liability or of a right of contribution that an employer previously held liable in fact has no liability, it may dismiss the employer and amend its original award in such manner as may be required.

In this case, applicant's 5412 date of injury was not listed as an issue at trial and it is unclear whether the parties meant to resolve the issue of applicant's 5412 date of injury with their stipulation that applicant sustained an injury from March 1, 2012 to September 26, 2012 to her right shoulder. An alternate reading of the stipulation is that the stipulation addresses applicant's period of injurious exposure during her last year of employment.

A determination regarding an applicant's date of injury pursuant to Section 5412 may change the liability determination pursuant to Section 5500.5. While the WCJ's reasoning for rejecting the stipulation appears sound, it was error to determine an issue not raised at trial. Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584] citing *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158.)

Similarly, the WCJ's finding of fact regarding the liability of defendants pursuant to Section 5500.5 exceeds the WCJ's authority because the WCJ determined an issue that was not raised at trial. In fact, apportioning liability between defendants is unnecessary to the adjudication of applicant's case and could be addressed in supplemental arbitration proceedings if necessary.

For the foregoing reasons,

IT IS ORDERED that the Petition filed on January 15, 2020 by Bradford and Barthel on behalf of defendant North River Insurance Company adjusted by Crum & Forster be **DISMISSED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 20, 2019 Findings and Award is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and a new decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 15, 2021

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

ROSA CERVANTES
LAW OFFICES OF SOLOV & TEITELL
LLARENA MURDOCK LOPEZ & AZIZAD
BRADFORD & BARTHEL

MWH/oo

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