

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

ANNE MERINO, *Applicant*

vs.

**VENTURA COUNTY FIRE DEPARTMENT, legally uninsured, adjusted by SEDGWICK,
*Defendants***

**Adjudication Number: ADJ14007595
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on October 3, 2022. By the F&O, the WCJ found that applicant sustained a cumulative trauma injury to her left hip from September 20, 1998 through December 14, 2020. The WCJ further found that applicant is entitled to temporary disability from March 5, 2021 until the present, as well as Labor Code¹ section 4850 benefits for up to one year. (Lab. Code, § 4850.)

Defendant contends that there should be one single continuous trauma claim for applicant's internal, cardiovascular and orthopedic injuries. Defendant also contends that the date of injury per section 5412 must be April 11, 2019, the last date applicant worked because section 5412 purportedly only implicates the statute of limitations. (Lab. Code, § 5412.) Lastly, defendant contends that applicant is not entitled to an additional year of section 4850 benefits or temporary total disability beyond 104 weeks.

We received an answer from applicant. The WCJ issued a Report and Recommendations on Petition for Reconsideration (Report) recommending that we deny the Petition.

¹ All further statutory references are to the Labor Code unless otherwise stated.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant reconsideration, rescind the F&O and issue a new decision finding that applicant's date of injury is March 5, 2021 per section 5412 and she was temporarily disabled from March 5, 2021 to the present and continuing, less credit for advanced disability pension payments and an attorney's fee. We will also include a finding that the claim is not barred by the statute of limitations and that applicant is not barred from receiving section 4850 benefits for this claim.

FACTUAL BACKGROUND

Applicant claims injury to the left hip from September 20, 1998 through December 14, 2020 while employed as a firefighter by the Ventura County Fire Department. An Application for Adjudication of Claim for this injury was filed by applicant's attorney on December 17, 2020. On January 18, 2021, defendant sent applicant a Notice of Denial of Claim for Workers' Compensation Benefits denying this injury "because there is a lack of medical reporting that substantiates industrial causation for your left hip and based on the Statute of Limitations." (Defendant's Exhibit D, Denial letter, January 18, 2021, p. 1.)

Applicant has filed other claims related to her employment with defendant including: a specific injury to the heart, respiratory system, nervous system and sleep on January 3, 2018 (ADJ13371154); a specific injury to the right hip on November 7, 2015 (ADJ11570698); and a cumulative trauma injury to the respiratory system through January 6, 2022 (ADJ15683146). The 2015 right hip claim was resolved by Stipulations with Request for Award on February 27, 2019 for 31% permanent disability. (Defendant's Exhibit C, Prior award, February 27, 2019.) The only body part named in the Award was the right hip. (*Id.* at exh. p. 9.)²

Todd Dietrick, M.D. provided treatment for applicant's 2015 right hip injury. He declared her right hip condition to be permanent and stationary in his January 26, 2018 report. (Defendant's Exhibit A, Volume I of the Congress Medical Records, pp. 26-31.) Dr. Dietrick notes that applicant reported pain in the left hip as well, but does not discuss whether this is industrially related. (*Id.* at p. 27.) Applicant was considered able to perform full duties by Dr. Dietrick. (*Id.* at p. 29.)

² Applicant's claims have not been consolidated and the only claim that was adjudicated by the trial level was the left hip claim (ADJ14007595).

On September 29, 2020, defendant emailed a modified duty job offer to applicant. (Defendant's Exhibit G, Email from employer for offer to return to work, September 29, 2020.) The work restrictions were identified as "[m]ay not be exposed to active firefighting." (*Id.*) On October 1, 2020, defendant sent a Notice Regarding Temporary Disability Benefits Payment Termination to applicant stating that payments were ending because applicant was released to return to modified duties. (Defendant's Exhibit F, Temporary disability notice, October 1, 2020, p. 1.) The date of injury referenced on the Notice was "01/03/2018" and was based on a report from Mark Lensky, M.D. (*Id.*)

On March 5, 2021, Dr. Dietrick noted in a progress report that applicant reported left hip pain, which was described as follows:

She presents today for an evaluation of her left hip.

She has been experiencing intermittent moderate pain for the past several years since 2005/2006. She feels that the pain has been getting worse. She notes it was brought on by repetitive motions and strenuous work over the years at work. The pain is now more constant and severe. She describes the pain as sharp, dull, throbbing, and aching. She rates it at a 7/10.

Her pain is localized deep in the groin. The pain occasionally radiates down to her leg. She does not trust it. She has subjective feelings of instability, but no frank giving way. She is unable to walk for more than 1 block without any rest. She has stiffness and soreness after prolonged activities including sitting, walking, and standing. She has difficulty walking up and down stairs. She has difficulty getting in and out of her car and bed. She has limited range of motion. Her pain is exacerbated by certain movements. She is unable to don and doff her shoes. She has pain at night that is positional in nature, which wakes her up. She feels that pain is affecting her quality of life, and is limiting her activities of daily living.

She has tried activity modifications, resting, icing, heating, Naproxen, oral anti-inflammatories, and therapeutic exercise programs for over 1 year with minimal improvement.

(Applicant's Exhibit No. 17, Report from William Dietrick, M.D., March 5, 2021, p. 1.)

Dr. Dietrick obtained an x-ray of the left hip and diagnosed applicant with primary osteoarthritis of the left hip. (*Id.* at p. 3.)

The parties apparently had an interactive process meeting on February 25, 2021 to discuss the "accommodations requested, work restrictions and how the department can reasonably

accommodate those restrictions.” (Applicant’s Exhibit No. 18, Interactive meeting notes, March 2, 2021, p. 1.) The meeting notes contain the following statements as relevant:

In September 2020, the Workers’ Compensation QME provided work restrictions to the Ventura County Fire Department (VCFD) which reported that you could work a light duty assignment in office for a duration of six months while treatment was explored. The VCFD offered a light duty assignment, which was declined because your treating provider was of a different opinion and indicated that you were not able to return to work. As form of reasonable accommodation, the department agreed to accommodate you through Leave of Absence.

...

The most recent medical certification from February 09, 2021 completed by Nurse Practitioner McKenna stated that it is unsafe for you to be cleared to return to work and provide no indication that established treatment regimen had been defined or started, as indicated was needed in January. The medical certification did not clearly indicate if it were safe for you to return-to-work in a light or full capacity or if your work restrictions would be temporary or permanent.

...

Mr. Helquist added that the QME did not give permanent restrictions; the heart claim was accepted, but pulmonary was being treated privately. He added that you do not believe you can work light duty.

The department continues to be willing and able to accommodate any modified duty assignments based on the restrictions noted by the QME. The department will also consider accommodating restrictions from either a Workers’ Compensation or a private treating physician.

Your attorney, Mr. Helquist, agreed that certification from the nurse practitioner was confusing and required clarification. He stated you would seek that clarification and he would write a letter indicating what information was needed. Once the department receives the updated medical certification, we will schedule a new meeting to either discuss an accommodation or if there are permanent work restrictions, then we will look for what other options there are to consider.

(*Id.* at pp. 1-2.)

Edwin Haronian, M.D. began to provide treatment for applicant’s left hip in February 2021. (Applicant’s Exhibit No. 2, Report of Dr. Edwin Haronian, February 24, 2021.) Dr. Haronian summarized applicant’s work duties:

The patient states over the course of employment, she gradually developed pain to her left hip, which she attributes to her work duties, involving: firefighting, wearing a full gear weighing in excess of 70 pounds, pulling hose, operating a fire engine, maintaining the fire truck and the station, operating equipment,

providing emergency life support service, and rescuing. She drove cars, trucks, and other equipment, and was exposed to excessive noise, dusts, fumes, chemicals, and working at heights. She utilized special visual and auditory equipment. She made forceful entries with the use of equipment.

The precise activities required entailed a combination of extensive standing, walking, and driving, and repetitive bending, stooping, squatting, kneeling, crawling, twisting, turning, forceful pushing and pulling, forceful gripping and grasping, reaching to all levels, torquing, climbing, running, hiking, ascending and descending ladders and stairs, and lifting up to 150+ pounds when lifting a body or equipment.

She continued working and her pain progressively worsened.

She states over the course of employment, she frequently stepped off curbs, and walked on uneven terrain, aggravating her left hip pain. She continued working full duty and just dealt with the pain.

She worked in pain until April 11, 2019, when she was taken off work on other matters not related to her left hip injury.

(Applicant's Exhibit No. 3, Report of Dr. Edwin Haronian, March 19, 2021, exh. p. 4.)

Dr. Haronian opined that applicant's left hip symptoms resulted from her "arduous work duties." (*Id.* at exh. p. 7.) In his initial February 11, 2021 report, Dr. Haronian provided work restrictions:

The patient has been placed on temporary total disability by the pulmonologist. From an orthopedic standpoint, she could return to the work-place, but should not squat or climb. She should not stand or walk for more than 45 minutes per hour consecutively.

(*Id.*)³

Dr. Haronian continued to see applicant at regular intervals throughout 2021 and into January 2022. (Applicant's Exhibits Nos. 3-11.) He noted that she underwent a left hip replacement surgery on April 13, 2021. (Applicant's Exhibit No. 4, Report of Dr. Edwin Haronian, May 5, 2021, p. 1.) He opined that she was temporarily totally disabled through 2021 and was still temporarily totally disabled as of January 27, 2022. (Applicant's Exhibit No. 11, Report of Dr. Edwin Haronian, January 27, 2022.)

³ Applicant's Exhibit No. 1 is identified as a report dated February 11, 2021, but is actually a report dated March 11, 2021. (Minutes of Hearing and Summary of Evidence, February 8, 2022, p. 3.) Dr. Haronian's initial February 11, 2021 report is contained in Applicant's Exhibit No. 3 as an attachment to a March 19, 2021 report.

Jonathan Berkowitz, M.D. evaluated applicant as the orthopedic qualified medical evaluator (QME) for the left hip claim on May 21, 2021. (Applicant's Exhibit No. 12, Report of Jonathan Berkowitz, M.D., May 21, 2021.) With respect to causation, Dr. Berkowitz concluded:

I can state, with reasonable medical probability, based on my assessment of the examinee's history, medical records, and physical examination that her left hip injury was caused by her job duties while working as a firefighter for Ventura County over the period of September 20, 1998, to April 11, 2019. The claimed date of injury past April 11, 2019, is inconsequential and she does not know where the date December 14, 2020, came from. To me, the fact that her claim extends longer than the date of her last physical employment on April 11, 2019, does not matter as her claim is over a 20-year period and a few months one way or the other should not matter. There is no question that carrying 70 pounds of equipment and jumping off of a firetruck onto uneven surfaces would cause a hip injury as the one she sustained.

(*Id.* at p. 11.)

Dr. Berkowitz was asked to issue a supplemental report, in which he stated:

The claimed date of injury past April 11, 2019 is inconsequential. Her claim is over a 20-year period and her injury was caused by jumping off of a firetruck with very heavy equipment on her back over this 20 year period. The period of injurious exposure to Ms. Merino's left hip is September 20, 1998, through the last day of her employment, April 11, 2019. It does not matter whether her claim was filed in the year 2019 or 2020 because it refers to injurious exposure over the prior 20-year period.

With specificity, the date she first became temporarily disabled due to the left hip was the date of her surgery, April 13, 2021. I understand that this is after the time of her claim, or after the time of her last day of employment, but that is when she was disabled from this injury. As it is now past August 2, 2021, it is reasonable to say that she is now permanent and stationary from this injury. I have not had the opportunity to evaluate her myself, but this is a standard amount of time in which one would expect to be fully recovered from such a surgery.

(Applicant's Exhibit No. 13, Report of Jonathan Berkowitz, M.D., May 26, 2021, p. 3.)⁴

In another supplemental report, Dr. Berkowitz opined in relevant part:

It was asked whether the date of the report that I sent as a supplemental was from May 26, 2021, or from August 7, 2021. The answer to this question is that the date of the report should be August 7, 2021.

It was also asked if a prior specific injury to her right hip could have caused

⁴ Dr. Berkowitz clarified in his September 25, 2021 report that the actual date of this report is August 7, 2021.

injury to her left hip. If it did not cause the injury, did it at least in part contribute to her condition?

The answer to this is no, her left hip injury is not related to her right hip injury. It is likely that her left hip injury would have occurred even in the absence of the right hip injury. It is impossible to state, with any degree of certainty, whether or not her right hip injury did in some way contribute to the development of an injury in her left hip. However, what is possible to say is that she would most likely have developed the left hip injury in the absence of the right hip injury.

(Applicant's Exhibit No. 14, Report of Jonathan Berkowitz, M.D., September 25, 2021, pp. 1-2.)

The matter proceeded to a mandatory settlement conference on November 30, 2021. A pre-trial conference statement was prepared setting the matter for trial, but with discovery left open. (Pre-Trial Conference Statement, November 30, 2021, p. 2.)

Dr. Berkowitz was cross-examined on December 8, 2021. (Applicant's Exhibit No. 16, Deposition transcript of Jonathan Berkowitz, M.D., December 8, 2021.) He testified as follows:

Q ...Although it was filed as a specific injury to the right hip, because she had these left hip complaints at the same time, you know, is her current condition was that due to that specific injury back in 2015?

A Okay. So to that I can say clearly that her left hip injury was not related to her right hip injury that she had in 2015 from the specific injury. There is evidence to show that there is a cumulative trauma injury to the left hip and that cumulative trauma would have happened irrespective of the right hip injury.

It's not surprising to me that she does mention the left hip to her orthopedic doctor, because she has had symptoms for a long time in regards to the left hip. As it's not part of that claim, I don't think that it was originally injured in that 2015 injury. I think these are more consistent with her just mentioning it to her doctor.

...

So, again, it's impossible to say did her right hip injury in any way contribute to her left hip injury, because we don't really know and we will never know. But what I can state with confidence is that even in the absence of a right hip injury, it's reasonably medically probable that she would have developed this left hip injury.

...

MR. HELQUIST: ...My question for the doctor is whether he agreed with the primary treating physician's work restrictions as indicated in the February 24th, 2021, report.

THE WITNESS: I would agree with that, yes.

BY MR. HELQUIST: Okay. And would those restrictions have persisted up until the date of the surgery, at which time she would become totally temporarily disabled?

A Yes.

(*Id.* at pp. 12-13, 15, 28.)

Dr. Berkowitz reevaluated applicant on January 14, 2022. (Applicant's Exhibit No. 15, Report of Jonathan Berkowitz, M.D., January 14, 2022.) He opined in relevant part:

Upon further questioning today, she reveals that her last day of work was 04/11/2019. For some reason, her claim of cumulative trauma to the left hip was up to 12/14/2020, but being as the last day of her firefighting duty was 04/11/2019, that should be the end of the cumulative trauma claim.

(*Id.* at p. 6.)

Dr. Berkowitz found that she had been temporarily disabled from March 5, 2021 through the date of her re-evaluation. (*Id.* at p. 7.) The hip was given a 15% whole person impairment (WPI) rating with 100% of the disability attributed to her job duties with defendant "until 4/11/2019." (*Id.*)

The matter proceed to trial over two days with respect to only the left hip claim (ADJ14007595). The issues at trial included injury arising out of and in the course of employment (AOE/COE) for the left hip, the date of injury, and temporary disability from March 5, 2021 until the present and ongoing. (Minutes of Hearing and Summary of Evidence, February 8, 2022, p. 2.) Defendant claimed a credit based on section 4850 benefits paid with respect to ADJ13371154, as well as for advanced disability pension payments. (*Id.* at pp. 2-3.) Further issues included whether this injury is a distinct injury or part of ADJ13371154 and whether the statute of limitations defense applies. (*Id.* at p. 3.) The WCJ noted that the parties also marked permanent disability and apportionment as issues on the pre-trial conference statement, but that she would not be addressing those issues. (*Id.*)

Applicant testified at trial as follows in pertinent part:

Applicant began working as a firefighter on September 20, 1998. She last worked as a firefighter in April of 2019. She has only worked as a firefighter during this time and performed her typical firefighter duties during her time with the employer.

She has another open claim at this time, ADJ13371154, which is an injury to her heart.

...

She believes she went off work in April of 2019 for her heart and that the claim was denied. She did see a cardiology PQME on or about of May 2020. The PQME found her heart injury as industrial and she was given temporary disability/4850 benefits from April 15, 2019 until September 29, 2020. On September 29, 2020, benefits ended for her heart claim.

In regards to her hip injury, she has had hip pain intermittently throughout her career. The left hip got worse sometime in November of 2020. She saw Dr. Dietrick in regards to her right hip, to which she had a prior injury. The right hip was a specific industrial injury. At her annual evaluation with Dr. Dietrick, in regards to her right hip injury, on or about November or December of 2020, she discussed left hip pain with Dr. Dietrick. He informed her that he would not address her left hip with her because he was only authorized to address the right hip as part of her prior industrial injury, and her future medical care. The ADJ number for the right hip is ADJ11570698.

When Dr. Dietrick denied care to her left hip and was only willing to treat her right hip, she spoke to her attorney at that time, approximately on or about November or December of 2020. Her application for her current claim, which is for the left hip, was filed on December 17, 2020. After filing her application, she went back to Dr. Dietrick and paid with her private insurance for him to evaluate and treat her for her left hip because the left hip was also denied by the employer.

As part of the Workers' Compensation system for the left hip, she saw Dr. Haronian as her primary treating physician. She has received treatment for her left hip from Dr. Dietrick and Dr. Haronian. At some point after she complained about her left hip, Dr. Dietrick ordered a left hip MRI. On or about April 13, 2021, she had total hip replacement surgery to her left hip. She has been seen by Dr. Berkowitz as the PQME in the left hip injury case, the instant matter. She also saw Dr. Berkowitz again on January 14, 2022, and in that report, Dr. Berkowitz found the applicant MMI.

There was inquiry as to her right hip. The right hip was a specific injury. She testified that she did not mention the left hip at the time of her injury to the right hip. She has experienced pain throughout her career with the left hip also, but at that point, as a result of the specific injury, it was only her right hip that was injured. Dr. Huber performed her right hip reconstruction surgery, but because it was so damaged, she had to have a total right hip replacement. She returned to work in 2017, based on the right hip injury, and she was placed back on full duty. Applicant worked full duty until 2019.

Mr. Helquist inquired of the applicant about Joint Exhibit No. 18, which is the interactive meeting notes, dated March 2, 2021. Applicant testified that she believes that meeting was related to her heart claim. Based on the PQME Lensky report, they were requesting her to return to work on desk duty. She testified that the cardiologist and pulmonologist absolutely refused for her to return to work because of her condition with her lungs and heart, and because of

the COVID pandemic going on at the same time, not wanting her to risk her health. Again she clarified that the interactive meeting that they had about her return to work was related to the cardiology issues.

Dr. Dietrick considered her temporarily totally disabled as of March 2021, and started treating her as to the left hip.

At some point, she recalls getting Labor Code Section 4850 benefits. She believes she started getting advance disability retirement benefits on or about September or October 2021. She only recalls having permanent restrictions related to her heart condition, and no other injury. Applicant applied for disability retirement on or about July of 2021. She believes that her application was based on pulmonary and cardiology issues, based on the date of injury of January 3, 2018. She started receiving advance disability retirement benefits on or about October 2021. Her monthly disability retirement is about \$4,765 per month.

...

No benefits from the County of Ventura have been paid as to her current left hip injury.

...

From December 15, 2015 until July 23, 2017, she was put on temporary disability for her right hip injury, and received Labor Code Section 4850 benefits for one year.

Again, Applicant testified that she has had on and off left hip pain throughout her employment with the County of Ventura. She had left pain when she would get on and off the fire trucks, but that was not the only reason she would get left hip pain. Left hip pain occurred during various activities as a firefighter, such as uneven surfaces, on and off ladders, repelling down the side of a mountain to a victim, and various different times and situations during emergencies.

...

On or about September 29, 2020, Applicant spoke with Monika Maine, a representative from the employer. The telephone call was a follow-up to an e-mail sent to the applicant in regards to a written offer of modified work for Applicant to return to work. Applicant learned about the modified work through first through the phone call and later through the e-mail. Applicant declined the offer for modified work.

(Minutes of Hearing and Summary of Evidence, March 29, 2022, pp. 2-6.)

The matter was ordered submitted after the second day of trial, but submission was subsequently vacated due to an issue with defendant's exhibits. (Order Vacating Submission and Notice of Status Conference, June 14, 2022.) The matter was ordered resubmitted on August 29, 2022 and the WCJ issued the resulting F&O as outlined above.

DISCUSSION

I.

“In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events.” (*Western Growers Ins. Co. v. Workers’ Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].)⁵ Section 3208.2, the anti-merger statute, provides in full:

When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit.

(Lab. Code, § 3208.2.)

Whether an applicant has sustained a specific or a cumulative injury, or multiple injuries, is question of fact which must be determined by the WCJ. (Lab. Code, §§ 5952-5953; *Austin, supra*, 16 Cal.App.4th at pp. 233-235.) As with any decision by a WCJ, a decision on the number and nature of injuries must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); see *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

The date of injury for cumulative trauma claims “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.) Although the period of liability for cumulative trauma claims is limited to the last year of injurious exposure per section 5500.5, the actual date of injury under section 5412 may be different than applicant’s last date of work. (Lab. Code, § 5500.5.)⁶ “Pursuant to section 5412, the date of a cumulative injury is the date the employee *first* suffers a ‘disability’ and has reason to know the

⁵ Section 3208.1 defines injury as either: “(a) ‘specific,’ occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) ‘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. The date of a cumulative injury shall be the date determined under Section 5412.” (Lab. Code, § 3208.1.)

⁶ It is emphasized that the period of liability per section 5500.5 was not identified as an issue at trial and we make no comment on that issue.

disability is work related.” (*Austin, supra*, 16 Cal.App.4th at p. 238, emphasis in original.) Disability has been defined as “an impairment of bodily functions which results in the impairment of earnings capacity.” (*J.T. Thorp v. Workers’ Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 336 [49 Cal.Comp.Cases 224].) Disability can be either temporary or permanent. (*Chavira v. Workers’ Comp. Appeals Bd.* (1991) 253 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].) Medical treatment alone is not disability, although it may be evidence of permanent disability. (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005-1006 [69 Cal.Comp.Cases 579].) Whether there is temporary or permanent disability indicating the date of cumulative injury is a question of fact, which must be supported by substantial evidence. (*Austin, supra*, 16 Cal.App.4th at pp. 233-235.)

Defendant contends that applicant’s two claims, the one for the heart and the other for her left hip, may not have different section 5412 dates of injury because her injurious exposure purportedly ended on her last day of work in April 2019.⁷ Defendant appears to confuse injurious exposure with the section 5412 date of injury. This contention also ignores the express language of section 5412, by which the date of injury is based on the concurrence of disability and knowledge of the disability’s industrial relation. Section 5412 expressly contemplates the possibility that the date of injury may occur after the employee is no longer working in the injurious employment by reference to whether the disability is “caused by his present or **prior** employment.” (Lab. Code, § 5412, emphasis added.) Even where the claims involve the same body parts there may be two distinct and separate cumulative trauma injuries where there are two periods of repetitive activities or stresses at work interrupted by a period of disability or a need for medical treatment. (See *Aetna Casualty v. Workmen’s Comp. Appeals Bd. (Coltharp)* (1973) 35 Cal.App.3d 329 [38 Cal.Comp.Cases 720].) Where an employee suffers industrial injuries to different body parts, the concurrence of disability for each body part and knowledge of its industrial relation may occur on different dates, thereby resulting in different section 5412 dates of injury.

The date of injury for applicant’s heart claim has not been adjudicated to date and the

⁷ A significant portion of the WCJ’s Report focuses on whether applicant’s cumulative trauma injury to the left hip is independent from her 2015 right hip injury. Although defendant’s questioning of QME Dr. Berkowitz via supplemental reporting and during his deposition indicate a belief that the left hip injury was related to the specific right hip injury rather than a separate cumulative trauma injury, defendant does not raise this issue in its Petition for Reconsideration. Additionally, the issue at trial was whether the left hip claim was a “distinct injury or part of ADJ13371154,” which refers to the heart claim, not the prior right hip injury. In any event, Dr. Berkowitz persuasively explained that the two hip injuries are separate and distinct.

claim has been pled as a specific injury, not a cumulative trauma injury. It is therefore unclear if the heart condition is in fact a cumulative trauma injury subject to section 5412.⁸ Assuming arguendo that applicant's heart condition resulted from cumulative trauma, the record reflects that applicant suffered disability from her heart as of at least April 2019 and was aware at that time of the industrial relation for the disability from her heart condition.⁹ However, the evidence does not show that her left hip had caused disability in April 2019. She did not stop working in April 2019 due to her left hip condition. Dr. Berkowitz's comments that April 11, 2019 is the ending date of her cumulative trauma may be relevant to determining the *period of injurious exposure* when that issue is adjudicated, but his opinion is not dispositive on her section 5412 date of injury, which may differ from injurious exposure per the discussion above.

Additionally, defendant's contentions conflict with the anti-merger statute (section 3208.2), which mandates separate determination of questions of fact and law for each injury. We also disagree with defendant's contention that the section 5412 date of injury only applies to determining the statute of limitations. As noted above, the section 5412 date of injury may also determine the period of liability under section 5500.5.¹⁰ The date of injury is relevant for other purposes including how to rate the employee's level of permanent disability (e.g., section 4660 or 4660.1), the value of a permanent disability rating and maximum indemnity rates.

In the F&O, the WCJ found that the concurrence of knowledge and disability for the left hip injury was December 14, 2020. In her Report, the WCJ states that the date of injury should be March 5, 2021. (Report, November 15, 2022, p. 15.) December 14, 2020 was the date that applicant purportedly discussed her left hip with her attorney. However, as will be further

⁸ It is noted that pleadings may be amended to conform to proof. (See Cal. Code Regs., tit. 8, § 10517.) Defendant contends in its Petition that "[a]ll physicians have opined that [the heart injury] is of a continuous trauma nature." (Defendant's Petition for Reconsideration, October 26, 2022, p. 2.) None of the medical reporting from the heart claim is in evidence and whether the heart claim is a specific injury or cumulative trauma injury was not an issue at trial in this matter.

⁹ Our discussion here should not be construed as determining the date of injury with respect to the heart claim. Adjudication of disputed issues with respect to that claim must be determined in separate proceedings as these claims have not been consolidated.

¹⁰ Section 5500.5 states in relevant part:

. . . liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period . . . **[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), emphasis added.)

discussed below, the first date that applicant suffered disability from her left hip injury was March 5, 2021. Applicant had knowledge of the industrial relation of this disability as evidenced by her filing of an Application in December 2020.¹¹

Therefore, we agree with the WCJ's conclusion in her Report that the date of injury for the left hip claim per section 5412 is March 5, 2021. The new decision will reflect this date of injury.

II.

Section 5405 provides that the "period within which proceedings may be commenced...is one year from...(a) The date of injury. (b) The expiration of any period covered by payment [of temporary disability indemnity]. (c) The last date on which any [medical treatment] benefits were furnished." (Lab. Code, § 5405.) Defendant holds the burden of proof as to whether a claim is barred by the statute of limitations. (Lab. Code, §§ 5409, 5705.)

The record does not reflect that applicant has been provided with indemnity or medical treatment by defendant for her left hip injury and therefore, neither section 5405(b) nor section 5405(c) is applicable. Accordingly, the relevant date for the running of the statute of limitations is the date of injury pursuant to section 5405(a).

The date of injury for applicant's left hip claim is March 5, 2021. Applicant filed an Application for Adjudication of Claim and DWC-1 claim form in December 2020. This was within one year from the date of injury and thus her claim is not barred by the statute of limitations.

III.

Temporary disability indemnity is a workers' compensation benefit which is paid during the time an injured employee is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *Butler, supra*, 153 Cal.App.3d at p. 333.) Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.2d 585, 586-

¹¹ The date of injury per section 5412 may be after the filing of a claim form where the injury does not cause disability until after the claim has already been filed. (See e.g., *Foothill-DeAnza College District v. Workers' Comp. Appeals Bd. (Ward)* (2007) 72 Cal.Comp.Cases 1298 (writ den.) [cumulative trauma claim initially alleged through July 3, 2002, but date of injury per section 5412 was found to be in 2004 since the employee continued to work and did not suffer compensable disability until 2004].)

587 [7 Cal.Comp.Cases 250]; *Austin*, supra, 16 Cal.App.4th at p. 236.)

In *Huston*, the Court of Appeal stated more specifically that:

In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [] If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage-loss basis. [] If the partially disabled worker can perform some type of work but chooses not to, his "probable earning ability" will be used to compute wage-loss compensation for partial disability. [] If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed *total* and the injured worker is entitled to temporary total disability payments.

(*Huston*, supra, 95 Cal.App.3d at p. 868, emphasis in original.)

Thus, the language used by the *Huston* Court reflects that an employer's showing that modified work is available and offered affects an injured employee's entitlement to temporary disability.

Applicant has asserted entitlement to temporary disability from March 5, 2021 to the present and ongoing for her left hip condition. QME Dr. Berkowitz opined that applicant was temporarily disabled from March 5, 2021 through the date of his re-evaluation on January 14, 2022. (Applicant's Exhibit No. 15, Report of Jonathan Berkowitz, M.D., January 14, 2022.) The evidence reflects that applicant was temporarily partially disabled prior to her April 13, 2021 left hip replacement surgery because Dr. Haronian had provided her with work restrictions for that hip. The offer of modified work in September 2020 cannot be considered responsive to work restrictions for the left hip condition because there is no evidence of restrictions for this body part until 2021. Additionally, the work restrictions identified in that offer are not the same as those provided by the physicians for the left hip. The parties engaged in the interactive process to discuss applicant's return to modified duty in February 2021, but the record reflects that this was in relation to work restrictions for applicant's heart condition. There is therefore not substantial evidence that defendant offered applicant modified work to accommodate the restrictions provided for her left hip. She thus would fall within the "odd lot" doctrine and is entitled to temporary total disability in relation to the left hip injury as of March 5, 2021 as found by the WCJ. (See *Pacific Employers Ins. Co. v. I.A.C. (Stroer)* (1959) 52 Cal.2d 417 [24 Cal.Comp.Cases 144].)

Both Dr. Haronian and the QME Dr. Berkowitz considered applicant temporarily totally disabled following her April 13, 2021 left hip replacement surgery. Dr. Berkowitz suggests that her left hip condition became permanent and stationary as of his January 14, 2022 re-evaluation since he finds her temporary disability to end as of that date. (Applicant's Exhibit No. 15, Report of Jonathan Berkowitz, M.D., January 14, 2022, p. 7.) However, Dr. Haronian still considered applicant to be temporarily totally disabled in his subsequent January 27, 2022 report. (Applicant's Exhibit No. 11, Report of Dr. Edwin Haronian, January 27, 2022, p. 1.)

The evidence supports the finding that applicant was temporarily disabled as of March 5, 2021 for her left hip injury. There is not substantial evidence in the record showing that her left hip condition has become permanent and stationary yet since there are conflicting medical reports regarding whether her condition has reached maximum medical improvement. Consequently, we agree with the WCJ that applicant is temporarily disabled from March 5, 2021 to the present and ongoing.

IV.

Section 4850 provides that certain employees, including county firefighters like applicant, are entitled to their full salary in lieu of temporary disability for up to one year when they are disabled as the result of an industrial injury. (Lab. Code, § 4850.) The parties do not dispute that applicant is eligible for section 4850 benefits. However, defendant contends that applicant may not receive section 4850 benefits for her left hip injury because she already received one year of these benefits in relation to her heart injury.

The parties stipulated at trial that defendant paid section 4850 benefits for one year and subsequent temporary disability from April 15, 2019 until September 29, 2020 for the heart claim (ADJ13371154). (Minutes of Hearing and Summary of Evidence, February 8, 2022, p. 2.) While applicant was previously paid a full year of section 4850 benefits, those payments were made in relation to ADJ13371154. As discussed above, applicant has been temporarily disabled for her left hip as of March 5, 2021. This period of disability does not overlap with the period she was already paid benefits for a separate injury and she may receive section 4850 benefits for up to a year in lieu of temporary disability for *each* injury where the disability does not run concurrently. (See *City of Lompoc v. Workers' Comp. Appeals Bd. (Coday)* (1984) 49 Cal.Comp.Cases 248 (written.); *City of Montclair v. Workers' Comp. Appeals Bd. (Leone)* (2001) 66 Cal.Comp.Cases 899

(writ den.) Therefore, applicant is not barred from receiving section 4850 benefits for her left hip injury based on receipt of those benefits for her separate injury.

Defendant also contends that applicant cannot receive section 4850 benefits after she began receiving advanced disability pension payments as of September 20, 2021. Applicant applied for a service-connected disability retirement in July 2021. (Applicant's Exhibit No. 20, Application and records for the disability retirement benefits, July 20, 2021.) She confirmed in her trial testimony that she began receiving advanced disability pension payments on or about September or October 2021. One of the issues at trial was whether defendant was entitled to a credit for advanced disability pension payments. (Minutes of Hearing and Summary of Evidence, February 8, 2022, p. 3.)

Section 4850 benefits are payable “for the period of the disability, but not exceeding one year, **or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments** pursuant to Section 4850.3.” (Lab. Code, § 4850(a), emphasis added.) “Under long-standing law, section 4850 benefits terminate at the time of a valid PERS retirement.” (*City of Martinez v. Workers' Comp. Appeals Bd. (Bonito)* (2000) 85 Cal.App.4th 601, 614 [65 Cal.Comp.Cases 1368], citing *Ritchie v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1174, 1186-1187; *Gorman v. Workers' Comp. Appeals Bd.* (1982) 133 Cal.App.3d 998, 999-1001; *State Comp. Ins. Fund v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 200, 204.) Additionally, after the one year period of disability for which an employee may receive section 4850 benefits, section 4853 bars receipt of disability indemnity once an employee has retired under the Public Employees' Retirement Act.¹² (See *Gorman, supra*, 133 Cal.App.3d at p. 1002 [“upon the effective date of his or her retirement under the Public Employees' Retirement Act, the right to temporary disability benefits under the Workers' Compensation Act terminates”].)

¹² Section 4853 provides in full:

Whenever such disability of any such officer or employee continues for a period beyond one year, such member shall thereafter be subject as to disability indemnity to the provisions of this division other than Section 4850 during the remainder of the period of said disability or until the effective date of his retirement under the Public Employees' Retirement Act, and the leave of absence shall continue.

(Lab. Code, § 4853.)

In conclusion, we disagree with defendant that applicant may not receive section 4850 benefits for her left hip injury based on her receipt of those benefits for her separate heart claim. However, the award will include a credit for the advanced disability pension payments made by defendant since applicant may not receive section 4850 benefits or temporary disability after the effective date of her retirement.

V.

Lastly, defendant contends that it was improper for the WCJ to reject its request to try applicant's claims together. A WCJ has broad authority to issue orders to ensure proper adjudication of each claim, including "any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case." (Cal. Code Regs., tit. 8, § 10330.) This includes the authority to consolidate cases. (See Cal. Code Regs., tit. 8, § 10396(e).) The WCJ may also bifurcate the issues for trial and try them separately. (See Cal. Code Regs., tit. 8, § 10787(a).) It was not an abuse of discretion for the WCJ to proceed with adjudication of applicant's left hip injury claim without consolidating this claim with her other claims and deferring those issues not ripe for adjudication.

In conclusion, we will grant reconsideration, rescind the F&O and issue a new decision as outlined herein.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by the WCJ on October 3, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on October 3, 2022 is **RESCINDED** in its entirety and is **SUBSTITUTED** with the following:

FINDINGS OF FACT

1. Anne Merino, while employed as a firefighter at Ventura County, California by the County of Ventura, sustained a cumulative trauma injury arising out of and in the course of employment to her left hip.
2. At the time of the injury the employer's workers' compensation was administered by Sedgwick Oxnard. The employer is legally uninsured.
3. At the time of the injury the employee's earnings were \$1,917.10 per week.
4. No attorney's fees have been paid and no attorney's fees arrangements have been made.
5. Defendant paid one year of section 4850 benefits and subsequent temporary disability from April 15, 2019 through September 29, 2020 in ADJ13371154.
6. The date of injury for the left hip claim (ADJ14007595) is March 5, 2021 per Labor Code section 5412. This claim is not barred by the statute of limitations.
7. ADJ14007595 is a separate and distinct injury from ADJ13371154.
8. Applicant was temporarily disabled from March 5, 2021 to the present and continuing for the left hip.
9. Defendant is not entitled to a credit in ADJ14007595 for section 4850 benefits paid with respect to ADJ13371154.
10. Defendant is entitled to credit for advanced disability pension payments.
11. Defendant's objection to proceeding to trial solely on ADJ14007595 is overruled.

AWARD

AWARD is made in favor of **ANNE MERINO** against **COUNTY OF VENTURA** of:

Temporary disability from March 5, 2021 to the present and continuing less credit for advanced disability pension payments and less a reasonable attorney fee equal to 15% of the total of indemnity due upon retroactive payment. Jurisdiction is reserved in the event of a dispute regarding the amount owed.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 27, 2022

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

**ANNE MERINO
COLEMAN CHAVEZ
STRAUSSNER & SHERMAN**

AI/pc

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