

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BEVERLY GARDNER, *Applicant*

vs.

**STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS AND
REHABILITATION CENTER, legally uninsured; STATE COMPENSATION
INSURANCE FUND STATE EMPLOYEES, *Defendants***

Adjudication Number: ADJ11297325
San Bernardino District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 14, 2022

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

**BEVERLY GARDNER
WHITING, COTTER & HURLIMANN
STATE COMPENSATION INSURANCE FUND**

PAG/ara

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

REPORT AND RECOMMENDATIONS
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation: Correctional Officer
 Applicant's Age: 59
 Date of Injury: In dispute
 Parts of Body Injured: Circulatory system; lower extremities;
 Varicose veins

2. Identity of Petitioner: Defendant has filed the Petition
 Timeliness: The petition is timely
 Verification: A verification is attached to the petition

3. Date of service of Findings October 20, 2021 (First Amended)
and Award:

II
CONTENTIONS

1. That by the Decision, the Appeals Board acted without or in excess of its powers;
2. The evidence does not justify the Joint Findings of Fact;
3. The Findings of Fact do not support the Decision.

III
FACTS

The Applicant, Beverly Gardner, filed an Application for Adjudication of Claim asserting an injury in the form of varicose veins resulting from a cumulative trauma from August 10, 1984 through May 24, 2017 against the State of California Department of Corrections and Rehabilitation where she worked as a Correctional Officer. The Applicant filed her Application on May 1, 2018.

Defendant denied liability of this cumulative trauma injury on December 23, 2019, reasoning that the varicose veins condition was previously ruled out and that the injury was barred by legal defenses under Labor Code sections 5405 and 5412.

This parties proceeded to Trial on September 9, 2021. The undersigned WCJ issued a First Amended Opinion on Decision on October 18, 2021, which found, among other things, that the Applicant's date of injury per Labor Code section 5412 for the cumulative trauma involving the varicose veins to be October 30, 2018. This date reflects the first time the Applicant was medically

diagnosed with varicose veins by a medical provider, Internal Medicine PQME Dr. Denise Townsend, and was advised by said provider that the varicose veins had at least one causative factor related to her occupation. (Applicant's Exhibit 1, pages 12-13.) In turn, the undersigned found that the Applicant's claim was not barred by the statute of limitations under Labor Code section 5405(a) as the Applicant filed her Application for Adjudication of Claim within one year of the October 30, 2018 date of injury.

The WCAB served the First Amended Opinion on Decision on October 20, 2021. On November 15, 2021, the Defendant filed a Petition for Reconsideration, contending that the undersigned WCJ acted without or in excess of its powers, that the evidence does not justify the findings of act, and that the findings of fact do not support the order, decision, or award.

IV **DISCUSSION**

Under Labor Code section 5900(a), a Petition for Reconsideration may only be taken from a "final" order, decision, or award. A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal. App. 3d 1171, 1180) or determines a threshold issue that is fundamental to the claim for benefits (*Maranian v. Workers' Comp. Appeal Bd.* (2000) 81 Cal. App. 4th 1068, 1070.) Pursuant to Labor Code section 5903, any person aggrieved by any final order, decision, or award may petition for reconsideration upon one or more of the following grounds:

- (a) That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.
- (b) That the order, decision, or award was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order, decision, or award.

Defendant asserts under Labor Code section 5903 that the undersigned acted without or in excess of his powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision, or award.

Defendant does not explain with any specificity as to how the undersigned acted in excess of his powers. Thus, the undersigned now addresses whether the evidence justifies the findings of fact and whether the findings of fact supports the decision issued.

Exercise of Reasonable Diligence

First, Defendant asserts that the Applicant should have known upon the exercise of reasonable diligence that the disability resulting from varicose veins was industrially-related at a time earlier

than Dr. Townsend's October 30, 2018 evaluation. Defendant does not provide an alternative theory as to the date of injury of this cumulative trauma per Labor Code section 5412. Instead, Defendant merely contends that the Applicant and Applicant counsel did not exercise reasonable diligence by failing to "act with any sense of urgency" in relation to the discovery of the varicose veins condition. (Defendant's Petition for Reconsideration, page 4, lines 19-20.) Defendant further contends that the Applicant and her attorney did not exercise reasonable diligence by taking nine years to obtain a QME report that indicates that the varicose veins were industrially-caused. (*Id.* at page 4, lines 6-8.)

Whether an employee should have known in the exercise of reasonable diligence that her disability was the result of his employment is a question of fact, and the employer has the burden of proof on that issue. (*Chambers v. Workers' Comp. Appeals Bd.* (1968) 69 Cal. 2d 556, 559.) The Defendant's burden is not sustained merely by showing that the employee knew he had some symptoms. (*Ibid.*)

Defendant's Petition for Reconsideration suggests that the Applicant and her attorney did nothing in the nine years leading up to her eventual varicose veins diagnosis by Internal Medicine QME Dr. Townsend on October 30, 2018. However, the evidence in the record suggests otherwise. The Applicant availed herself of various medical providers through her earlier-filed 2010 cumulative trauma injury and through her private insurance; she was evaluated by various physicians of varying specialties within and outside of the Workers' Compensation system over the course of a few years. This included evaluations with medical personnel at Kaiser Permanente in 2011, Internal Medicine AME Dr. Jonathan Green in 2011, Orthopedic AME Dr. Michael Luciano in 2011, Vascular Surgeon Dr. Bakhtiar Ahmad in 2012, and Internal Medicine consult Dr. Glenn Marshak in 2013. None of these physicians definitely diagnosed the Applicant with varicose veins.

Medical personnel at Kaiser Permanente suggested on February 18, 2011 that the Applicant had poor circulation and potential restless leg syndrome.¹ (Defendant's Exhibit D, page 6.) Dr. Green, an Internal Medicine physician, suggested within his July 10, 2011 medical-legal report that Applicant's leg symptoms were part of her "orthopedic complaints." (Defendant's Exhibit C, pages 2, 9.) Dr. Green did not make any mention of the potential presence of varicose veins. Dr. Luciano, an Orthopedic Surgeon, recognized Applicant's complaints by diagnosing her with "rule out vascular insufficiency, lower extremities," and referred her to a vascular surgeon.² (Defendant's Exhibit D, pages 14, 16.) Vascular Surgeon Dr. Ahmad evaluated the Applicant on April 25, 2012, and diagnosed the Applicant with "rule out venous insufficiency secondary to valvular disease of the lower extremity veins." (Defendant's Exhibit H, page 1.) He recommended that the Applicant undergo Venous Doppler studies. (*Ibid.*) Defendant State Compensation Insurance Fund's Utilization Review affiliate, CompPartners, non-certified the requested studies on May 9, 2012. Defendant emphasizes in its Petition for Reconsideration that this non-certification was merely based on CompPartners being unable to reach Dr. Ahmad for peer-to-peer comment. However, this is misleading as it is only part of the explanation for the non-certification

¹ The reference to an evaluation with Kaiser Permanente on February 18, 2011 appears in Dr. Michael Luciano's records review contained in his November 16, 2011 report, Defendant's Exhibit D.

² Both Internal Medicine AME Dr. Jonathan Green and Orthopedic AME Dr. Michael Luciano reported on the Applicant's earlier-filed 2010 cumulative trauma claim, ADJ7442479.

determination. The Utilization Review physician explicitly indicates that the Venous Doppler studies are exclusively used to identify valvular incompetence in patients with varicose veins, and that the *Applicant had no evidence of varicose veins or complications of that condition.* (Defendant's Exhibit I, pages 2-3, *emphasis added.*)

The Applicant was then evaluated by Dr. Marshak on February 20, 2013. While Dr. Marshak was reviewing the Applicant's body systems, it appears that the Applicant explicitly reported her belief that she had varicose veins. (Defendant's Exhibit K, page 7.) Despite explicitly reporting what she believed was varicose veins, Dr. Marshak neither addressed nor diagnosed the Applicant with the same. Dr. Marshak went as far as referring the Applicant out to various other specialists, including an Ophthalmologist, a Toxicologist, a Neurologist, a Psychologist, and an Orthopedist to address Applicant's other various medical issues outside of his specialty. Nonetheless, there was no discussion by Dr. Marshak relating to Applicant's varicose veins.

Defendant asserts that "any doctor who examined [the Applicant's] legs for her 2010 claim would have seen [the varicose veins]." (Defendant's Petition for Reconsideration, page. 6, lines 25-27.) However, it appears that Applicant's varicose veins condition was not obvious enough to at least 5 medical providers to definitively diagnose the Applicant with the same. This is further corroborated by the Utilization Review physician's reasoning that there was no evidence that the Applicant had varicose veins or complications with such condition. Furthermore, these medical providers proffered other varying diagnoses, including potential restless leg syndrome, rule out vascular insufficiency, and rule out venous insufficiency.

Thus, the undersigned cannot reasonably find that the Applicant or her attorney knew or should have known of the existence of an industrially-related varicose veins disability before the eventual 2018 diagnosis when several doctors were unable to do so. Furthermore, the undersigned cannot agree that the Applicant and her attorney sat idle for nine years in relation to the medical discovery for the varicose veins condition. Based on the medical evidence submitted on the record, the undersigned finds that the Applicant had exercised reasonable diligence relating to her varicose veins condition prior to her eventual diagnosis in 2018 as she availed herself to various doctors of varying specialties, none of which could or would definitively diagnose her condition. As such, the undersigned WCJ maintains that the Applicant's date of injury per Labor Code section 5412 is October 30, 2018, and that the Applicant's claim is not barred under Labor Code section 5405.

Actual Knowledge of Varicose Veins

The undersigned further recognizes Defendant's contentions that the Applicant knew she had varicose veins, possibly as far back as 2005. (Defendant's Petition for Reconsideration, page 6, lines 23-25.) Defendant supports this argument by referencing Applicant's extensive history of symptoms with varicose veins (Id., page 5, lines 5-15). However, the relevant authority is clear in that an Applicant cannot be charged with knowledge of disability and knowledge that such disability is industrially-related without medical evidence to that effect unless the nature of the disability and the Applicant's training, intelligence, and qualifications are such that the Applicant should have recognized the relationship. (*City of Fresno v. WCAB (Johnson)* (1985), 50 Cal. Comp. Cases 53, 57-58.)

Prior to having been medically diagnosed with varicose veins by Dr. Townsend in 2018, the Applicant had subjectively complained of pain, swelling, and circulatory problems in her legs. Defendant argues that these subjective complaints are akin to having knowledge of the varicose veins, suggesting that experiencing symptoms of varicose veins and actual knowledge of varicose veins “is a distinction without a difference.” (Defendant’s Petition for Reconsideration, pg. 6, lines 16-18.) However, as seen with the medical evidence on the record, the presence of the symptoms as described by the Applicant could potentially be a myriad of other medical conditions, such as restless leg syndrome that the Kaiser Permanente personnel contemplated. It would not be obvious to a medically untrained layperson that pain and swelling in the lower extremities must be varicose veins and nothing else. Defendant assumes that “anyone who has an older female relative who works on her feet knows that varicose veins occur when the valves in your veins in yours legs and feet fail and the blood pools, causing swelling.” (Defendant’s Petition for Reconsideration, page 6, lines 19-21.) However, even the Applicant’s various providers between 2011 through 2013 could not and did not definitively conclude that the Applicant was afflicted by varicose veins. Thus, the undersigned cannot reasonably expect the Applicant to have reached that medical conclusion.

Even if the Applicant reported to Dr. Marshak in 2013 during her review of systems that she suspected she had varicose veins, there was no showing by the Defendant that the Applicant had the requisite medical training, intelligence, and qualifications for her to definitively know that she in fact had such condition. Further, even though by her 2013 evaluation with Dr. Marshak, the Applicant appears to have manifested a belief that she was afflicted by varicose veins, this belief was specifically not confirmed by any of the doctors evaluating her at that time. As noted above, the applicant saw 3 different physicians during the period of 2011 through 2013, all of whom provided different diagnosis, none of which was varicose veins. Thus, the applicant’s diagnosis of varicose veins was not confirmed until Dr. Townsend diagnosed the Applicant with the same in 2018. Therefore, the undersigned continues to believe the applicant’s date of “knowledge” is when she was diagnosed with varicose veins and advised there was an industrial component with respect to causation of the same, by Dr. Townsend on October 30, 2018.

V
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Defendant’s Petition for Reconsideration be denied.

DATE: November 24, 2021

JASON L. BUSCAINO
WORKERS’ COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

The Applicant, Beverly Gardner (hereinafter “Applicant”), born March 25, 1962, worked for the State of California Department of Corrections and Rehabilitation as a Correctional Officer. The Applicant started working for the Department of Corrections and Rehabilitation in August of 1984. (MOH/SOE, September 9, 2021, page 4, line 16.) Throughout her career as a Correctional Officer with the Department of Corrections and Rehabilitation, the Applicant was placed at the California Institute for Men in Chino, the Patton State Hospital in San Bernardino, and the California Rehabilitation Center in Norco. (MOH/SOE, September 9, 2021, page 5, lines 4-12.) The Applicant retired from the Department of Corrections in August of 2012. (MOH/SOE, September 9, 2021, page 4, line 17.)

The Applicant filed an Application for Adjudication of Claim on September 15, 2010, asserting to have sustained a cumulative trauma injury from August 10, 1984 through June 30, 2010 to her back and legs and in the form of hypertension, sleep deprivation, sleep apnea, obesity, and dizziness while working for the Department of Corrections and Rehabilitation (ADJ7442479). The parties resolved this claim via Stipulations with Request for Award on August 29, 2017 for 80% Final Permanent Disability and a life pension with a general Award for future medical treatment. The parties stipulated that as a result of the cumulative trauma injury from August 10, 1984 through June 30, 2010, the Applicant sustained injuries arising out of and in the course of her employment as follows: heart, hypertension, teeth, lumbar spine, right ankle, right shoulder, psych, GERD, bladder, headaches, and sleep.¹

The Applicant also filed an Application for Adjudication of Claim on September 21, 2011, asserting to have sustained another cumulative trauma injury from August 10, 1984 through July 24, 2011 to her nervous system while working for the Department of Corrections and Rehabilitation (ADJ7992523). The parties resolved this claim on August 28, 2017 via Stipulations with Request for Award for 39% Final Permanent Disability with a general Award for future medical treatment. The parties stipulated that as a result of the August 10, 1984 through July 24, 2011 cumulative trauma injury, the Applicant sustained injuries arising out of and in the course of her employment as follows: psych, teeth, mouth, and headaches.²

Since settling the aforementioned claims, the Applicant asserted to have sustained yet another cumulative trauma injury from August 10, 1984 through May 24, 2017 while working for the Department of Corrections and Rehabilitation, filing her Application for Adjudication of Claim on May 1, 2018 (ADJ11297325). The Applicant asserted further injuries to her circulatory system and lower extremities, specifically in the form of varicose veins.

¹ This Court takes judicial notice of the Stipulations with Request for Award filed under ADJ7442479, EAMS Doc ID # 64712462, pursuant to California Evidence Code § 452, subd. (d).

² This Court takes judicial notice of the Stipulations with Request for Award filed under ADJ7992523, EAMS Doc ID # 64712466, pursuant to California Evidence Code § 452, subd. (d).

Though a determination of liability was initially delayed on May 16, 2018, Defendant ultimately denied liability for this alleged cumulative trauma injury on December 23, 2019.³ (Defendant's Exhibits A and B.) In its denial, Defendant asserted that the varicose veins and the vascular insufficiency of the lower extremities were previously ruled out by AME Dr. Michael Luciano in his November 16, 2011 report. (Defendant's Exhibit B.) Defendant also asserted legal defenses under Labor Code sections 5405 and 5412. (*Ibid.*)

The Applicant first noticed varicose veins in her right leg, right thigh, and both ankles in approximately 2005. (MOH/SOE, September 9, 2021, page 5, lines 22-23.) She described the symptoms from her varicose veins as being swollen, itchy, sore, and burning. (MOH, September 9, 2021, page 5, lines 24-25.) The Applicant reported pain in her legs to Internal Medicine Agreed Medical Evaluator Dr. Jonathan Green on July 20, 2011 (Defendant's Exhibit C.) The Applicant reiterated the pain in her legs to Orthopedic Agreed Medical Evaluator Dr. Michael Luciano on November 16, 2011; she further described her legs to involve circulation problems. (Defendant's Exhibit D.) Dr. Luciano then recommended that the Applicant be referred to a vascular surgeon to evaluate the Applicant's lower extremities. (*Ibid.*) The Applicant consulted with Dr. Bakhtiar Ahmad, who requested Venous Doppler studies to rule out venous insufficiency in the Applicant's lower extremities. (Defendant's Exhibit H.) Defendant's Utilization Review department non-certified the requested diagnostics, citing that the Venous Doppler studies are used for patients with varicose veins and that there was no documentation evidencing the same. (Defendant's Exhibit I.)

The parties ultimately secured a Qualified Medical Evaluator Panel in Internal Medicine, upon which Dr. Denise Townsend was the last remaining physician from the panel to evaluate the varicose veins condition. Dr. Townsend initially evaluated the Applicant on October 30, 2018, and assessed the Applicant with, among other things, mild bilateral varicose veins, right inner thigh and bilateral ankles. (Applicant's Exhibit 1.) Dr. Townsend further opined that the causative factors are likely the prolonged standing in her occupation, her obesity, her advancing age, and previous history of pregnancy. (*Ibid.*)

Dr. Townsend subsequently reviewed a requested ultrasound of the bilateral lower extremities, which confirmed the presence of varicose veins with some reflux and perforating veins, suggestive of chronic venous insufficiency associated with varicose veins. (Applicant's Exhibit 3.) Dr. Townsend reiterated that there is an industrial component as to the Applicant's varicose veins condition, particularly the prolonged standing and sitting while working as a Correctional Officer. (*Ibid.*) Dr. Townsend provided the Applicant with an impairment rating for the varicose veins condition under Chapter 17, Table 17-38 of the AMA Guides 5th Edition. (*Ibid.*)

This matter proceeded to Trial on September 9, 2021 as to ADJ11297325 only. Within the Pre-Trial Conference Statement, the parties stipulated to amend the cumulative trauma period from August 10, 1984 through August 9, 2012, changing the end date to reflect the Applicant's retirement from the Department of Corrections and Rehabilitation. The parties further stipulated that the Applicant's varicose veins condition is in fact industrially-related based on the opinions

³ The Defendant's denial appears to exceed the 90-day period upon which liability of a claim may be rejected under Labor Code section 5402, subdivision (b), which would allow for a presumption of compensability. However, this issue was not raised by the parties.

from Dr. Townsend. Despite this stipulation, Defendant maintained its denial of the claim by asserting the statute of limitations defense per Labor Code section 5405.

ISSUES

WHETHER THIS CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS PER LABOR CODE SECTION 5405

Under Labor Code section 5405, subdivision (a), an Applicant's claim is barred if proceedings do not commence within 1 year from the date of injury. A cumulative trauma injury occurs as a result of repetitive mentally or physically traumatic activities extending over a period of time. (*Lab. Code* § 3208.1) The date of injury for a cumulative trauma injury for purposes of the statute of limitations is defined under Labor Code section 5412. (*Chambers v. WCAB* (1968) 33 Cal. Comp. Cases 722.)

Labor Code section 5412 defines the date of injury of a cumulative trauma injury to be the date upon which the employee first suffered disability and either knew, or should have known upon the exercise of reasonable diligence, that such disability was caused by her employment. The 3rd District Court of Appeal has defined disability under Labor Code section 5412 to mean an impairment of bodily functions which results in the impairment of earnings capacity. (*J.T. Thorp v. Workers' Comp. Appeals Bd.*, 153 Cal.App.3d 327, 336). This definition was further delineated to mean "compensable disability," that is, temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal. App. 4th 998, 1005; cf. *Herrera v. Workmen's Comp. App. Bd. (Goleta Lemon Assn.)* (1969) 71 Cal.2d 254, 257 [no compensable temporary disability is found until the worker suffers wage loss]; *Dept. of Motor Vehicles v. Indus. Acc. Com. (Dinan)* (1939) 14 Cal.2d 189 [wage loss is not required for an injured worker to be entitled to permanent disability compensation].) Medical treatment alone is not disability, but may be evidence of compensable permanent disability. (*Rodarte (supra)* 119 Cal. App. 4th at 1005.) These are questions for the trier of fact to determine and may require expert medical opinion. (*Id.*, at 1006.)

In the instant case, the Applicant testified that at the time of her retirement on August 9, 2012, the aches and pains all over her body, including the swelling in her legs, made her feel as though she could no longer work. (MOH/SOE, September 9, 2021, page 7, lines 8-10). She described her retirement as a "disability retirement." (*Id.*, at page 4, lines 24-25.) Based on her testimony, Applicant's retirement appears to be related, at least in part, to the symptoms in her legs, which was eventually determined to be varicose veins. As such, at the time of her retirement, the Applicant cannot be said to have been unwilling to work; she felt unable to work due to her various ailments. Thus, by retiring due to her injuries, the Applicant's earning capacity has been diminished, which is akin to wage loss. (Compare with *Gonzales v. Workers' Comp. Appeals. Bd.* (1998) 63 Cal. Comp. Cases 1477 [applicant did not have any earning capacity after retirement when she unequivocally denied interest in further employment of any sort].) Thus, the Applicant suffered compensable disability relating to her varicose veins as early as the time of her retirement from the Department of Corrections and Rehabilitation on August 9, 2012.

The Court must then turn its inquiry as to when the Applicant knew, or should have known, that the disability relating to the varicose veins was industrially-related. The Applicant characterized

the symptoms relating to her varicose veins as follows: swollen legs, itchiness, soreness, and burning feeling. (MOH/SOE, September 9, 2021, at page 5, lines 24-25). She further testified that she felt these symptoms throughout her career (*Id.*, at page 6, lines 1-2), but that none of her doctors from her earlier 2010 Workers' Compensation claim or her doctors through her private health insurance ever said that the varicose veins were related to her work. (*Id.*, at page 4, lines 18-23.)

She further testified that Internal Medicine PQME Dr. Townsend was the first doctor to advise her that her varicose veins were related to her employment with the Department of Corrections and Rehabilitation. (*Id.*, at page 5, lines 1-2.) This is corroborated upon review of the admitted evidence in the record. In fact, based on a review of the evidence admitted in the record, it does not appear that any medical provider ever diagnosed the Applicant with varicose veins until Dr. Townsend did on October 30, 2018.

The Applicant saw various doctors in relation to her earlier-filed 2010 cumulative trauma claim. Evaluators included Internal AME Dr. Jonathan Green, who memorialized the Applicant's subjective complaints to the lower back and legs in his July 20, 2011 medical-legal report. (Defendant's Exhibit C.) However, Dr. Green's internal evaluation was limited to the Applicant's hypertension, headaches, dizziness, and her sleep disorder. (*Id.*, at page 9.) Dr. Green did not discuss or mention varicose veins. He referred to Applicant's leg pain as being part of the "orthopedic complaints." (*Ibid.*)

The Applicant was also evaluated by Orthopedic AME Dr. Michael Luciano, who evaluated the Applicant on November 16, 2011, Dr. Luciano memorialized the Applicant's subjective complaints to include throbbing sensations, pain, and swelling in both legs. (Defendant's Exhibit D.) He further memorialized that the Applicant felt that she had "circulation" problems. (*Id.*, at page 3.) These circulatory complaints were also memorialized in Dr. Luciano's incorporation of a February 18, 2011 report from Kaiser Permanente, which also referenced poor circulation and potential restless leg syndrome. (*Id.*, at page 6.) Dr. Luciano diagnosed the Applicant with "rule out vascular insufficiency, lower extremities," and recommended that the Applicant be referred to a vascular surgeon. (*Id.*, at page 15, 16.) Despite these subjective complaints, there was still no discussion by Dr. Luciano confirming the presence of varicose veins.

The Applicant was evaluated by Vascular consult Dr. Ahmad Bakhtiar on April 25, 2012. Dr. Bakhtiar diagnosed her with "rule out venous insufficiency secondary to valvular disease of the lower extremity veins," and recommended that Venous Doppler studies of the bilateral lower extremities be conducted. (Defendant's Exhibit H.) Defendant's Utilization Review affiliate, CompPartners, non-certified the request for the Venous Doppler studies, citing that such studies are exclusively used to identify valvular incompetence in patients with varicose veins, *and that the Applicant had no evidence of varicose veins or the complications of that condition.* (Defendant's Exhibit I) (*Emphasis added.*)

The Applicant appears to have reported her varicose veins to Internal treater Dr. Glenn Marshak on February 20, 2013. Dr. Marshak memorialized within his review of symptoms that the Applicant reported cramping and *varicose veins* in both legs. (Defendant's Exhibit K.) (*Emphasis added.*) Despite this, Dr. Marshak neither diagnosed the Applicant with a varicose veins condition nor addressed the causation of the same.

Based on the admitted evidence in the record, the Applicant was not diagnosed with varicose veins until Internal Medicine PQME Dr. Townsend reported the same in her October 30, 2018 report. Additionally, Dr. Townsend further addressed the cause of the varicose veins by opining that the prolonged standing relating to the Applicant's occupation was one of the causative factors. Though Applicant may have first experienced Labor Code section 5412 "disability" relating to her varicose veins on August 9, 2012, she did not have knowledge of its industrial-relatedness until her evaluation with Dr. Townsend on October 30, 2018.

The Court recognizes that the Applicant reported to have known about her varicose veins perhaps as early as 2005. (MOH/SOE, September 9, 2021, page 5, lines 22-23). However, for purposes of Labor Code section 5412, an Applicant cannot be charged with knowledge that her disability is industrially-related without medical evidence to that effect unless the nature of the disability and the Applicant's training, intelligence, and qualifications are such that Applicant should have recognized the relationship between the known adverse factors involved in her employment and his disability. (*City of Fresno v. WCAB (Johnson)* (1985), 50 Cal. Comp. Cases 53, 57-58.)

Here, there was no showing that the Applicant had the training, intelligence, and/or qualifications sophisticated enough for her to know or have known that her varicose veins were causally related to her employment. Similar to *Johnson (supra)*, even if she formed a belief in the mid-2000s that she had a varicose veins condition, she cannot be charged with knowledge that such condition and any resulting disability were industrially-related without medical advice. This is especially true after the Utilization Review physician dispelled the presence of a varicose veins condition. (See *City of Garden Grove v. Workers' Comp. Appeals Bd. (Tucker)* (1995) 60 Cal. Comp. Cases 613, 615 [applicant did not have actual or constructive knowledge that his heart condition was industrial for purposes of the statute of limitations since reports from at least two evaluating physicians found the same to be non-industrial].)

Thus, in accordance with Labor Code section 5412, the Applicant's date of injury for her varicose veins condition is October 30, 2018, which is after her May 1, 2018 Application for Adjudication of Claim. As such, the claim is not barred by the statute of limitations under Labor Code section 5405.

PERMANENT DISABILITY

Pursuant to Labor Code section 4660.1, subd. (a), the WCAB must consider the nature of the physical injury or disfigurement, the occupation of the injured employee, his or her age at the time of injury, and his or her diminished future earning capacity when determining an Applicant's permanent disability. For injuries on or after January 1, 2013, the nature of the physical injury or disfigurement shall be based on the descriptions and measurement of the physical impairments and corresponding measurement published in the AMA Guides 5th Edition. (*Lab. Code, § 4660.1, subd. (b), (d).*)

In this case, the sole medical report admitted into evidence that discusses the Applicant's impairment as to her varicose veins is the November 8, 2019 medical-legal report by Internal Medicine PQME Dr. Denise Townsend. (Applicant's Exhibit 3.) Dr. Townsend mirrors the

analysis provided under the Comment of Example 17-19 and places the Applicant under Class 2 of Table 17-38 of the AMA Guides 5th Edition, page 554. (*Ibid.*) Dr. Townsend assigns the Applicant 20% impairment under Class 2. (*Ibid.*)

However, there is a scrivener's error in that Dr. Townsend erroneously labeled the 20% impairment as being whole person impairment. Table 17-38 categorizes the impairment due to peripheral vascular disease as lower extremity impairment, which must then be converted to whole person impairment using Table 17-3 on page 527; this is exhibited in Example 17-19 of which Dr. Townsend explicitly relied upon. Accordingly, the Applicant's varicose veins condition is rated at 20% lower extremity impairment, which then converts to 8% whole person impairment. This Court finds Dr. Townsend's opinion regarding impairment to be substantial medical evidence.

This Court rates this as follows:

$$17.01.05.00 - 8 - [1.4]11 - 490I - 16 - 18 = 18\% \text{ Permanent Disability}$$

APPORTIONMENT

Apportionment of permanent disability is based on causation, and the employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment. (*Lab. Code*, sections 4663, subd., (a) and 4664, subd. (a).) Physicians are required to make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of the industrial injury and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury. (*Lab. Code*, § 4663, subd. (c).) For a medical opinion on apportionment to constitute substantial evidence, it must be framed in terms of reasonable medical probability it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621-622.

In her November 8, 2019 report, Dr. Townsend apportioned 30% of the disability from the varicose veins to the industrial cumulative trauma and 70% to non-industrial causes. (Applicant's Exhibit 3.) Within this report, she identified the non-industrial causes to be due to "additional risk factors," including the Applicant's gender, advancing age, and obesity. Though Dr. Townsend considered the Applicant's medical history, diagnostic studies, and scientific/medical literature, she did not provide any explanation or discussion as to whether these risk factors equate to actual pathology that contributed to the causation of the Applicant's permanent disability. As such, Dr. Townsend's opinions as to apportionment are not substantial medical evidence.

Thus, this Court finds that the Applicant is entitled to an unapportioned Award at 18% final Permanent Disability, or \$18,995.00.

NEED FOR FURTHER MEDICAL TREATMENT

An employer is required to furnish medical treatment that is reasonably required to cure the injured worker from the effects of his or her injury. (*Lab. Code*, § 4600.)

Dr. Townsend indicated that the Applicant should be eligible for future medical treatment on an industrial basis for the varicose veins condition found in the lower extremities. This Court finds the opinions of Dr. Townsend as to future medical treatment to be reasonable and well-reasoned. Thus, this Court finds that Applicant is in need of future medical treatment subject to the applicable sections of the Labor Code and California Code of Regulations.

ATTORNEY'S FEES

The appeals board may determine a reasonable attorney's fee for legal services pertaining to any claim for compensation. (*Lab. Code*, § 4903, subd. (a).) In establishing a reasonable attorney's fee, the Workers' Compensation Judge shall consider the responsibility assumed by the attorney, the care exercised in representing the Applicant, the time involved, and the results obtained. (*Cal. Code of Regs*, § 10844.) In cases of average complexity, the WCAB believes that a reasonable fee will be in the range of 9% to 12% of the compensation awarded. (*Policy & Procedure Manual*, § 1.140.) However, in cases of above-average complexity, a fee in excess of the normal upper limit of 12% applicable to all benefits is warranted. (*Ibid.*)

This case involved a complex medical condition, the diagnosis of which had been eluded for more than a decade. This has resulted in complex litigation involving Applicant's date of injury under Labor Code section 5412, which in turn raised a number of other legal issues including the statute of limitations defense under Labor Code section 5405. Thus, this case would be considered to be of above-average complexity.

As such, this Court finds that attorney's fees of 15% of the Applicant's Award to be reasonable, which amounts of \$2,849.25. The attorney's fees are to be taken from the far end of the Award.

PETITION FOR PENALTIES PER LABOR CODE SECTION 5814 (DEFERRED)

This issue is deferred at the joint request of the parties.

DATED: October 14, 2021

**JASON L. BUSCAINO
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE**