

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

JUAN ANGEL, *Applicant*

vs.

**WESTMONT COLLEGE, GUIDEONE INSURANCE COMPANY/CHURCH MUTUAL
INSURANCE COMPANY; RITE AID CORPORATION,
TRAVELERS INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ10616980
Santa Barbara District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the 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 the Opinion on Decision, both of which we adopt and incorporate herein, we will grant reconsideration, rescind the October 4, 2022 Findings and Award and substitute it with new Findings of Fact and Order that amends the WCJ's decision as recommended in the report. In addition, and for the reasons stated below, we will amend Findings of Fact No. 14 to find that the liability period under Labor Code¹ section 5500.5 is February 27, 2017 to February 27, 2018. We will then return this matter to the trial level for further proceedings as the WCJ determines necessary to obtain a new commutation and recalculation of the attorney fees, and a reissuance of the award.

Liability for a cumulative injury is determined under section 5500.5, which 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

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

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.)

In this case, the section 5412 date of February 27, 2018 occurred before applicant's last day of injurious exposure on June 1, 2018. Therefore, the liability period under section 5500.5 is February 27, 2017 to February 27, 2018.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the October 4, 2022 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 4, 2022 Findings and Award is **RESCINDED** and **SUBSTITUTED** with new Findings of Fact and Order, as provided below, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

FINDINGS OF FACT

1. Juan Angel, while employed during the period January 15, 1991 through June 8, 2018, as a custodian at Westmont College and as a cashier at Rite Aid, sustained injury arising out of and within the course of employment to his cervical spine, left arm, right arm, left shoulder and right shoulder.
2. Applicant was an occupational group 340 at Westmont College and an occupational group 214 at Rite Aid.
3. At the time of the injury, the employer's workers' compensation insurance companies were Guideone Insurance Company and Travelers Insurance Company.
4. Charles Schwarz, M.D. is the orthopedic PQME and David Waldman, M.D. is the internal PQME.
5. It is found applicant's earnings, at the time of the injury were \$672.40, resulting in a temporary disability rate of \$448.26 and the maximum statutory rate for permanent disability.
6. It is found applicant was temporarily partially disabled during the period of June 8, 2018 through August 27, 2020. No evidence presented of any offer of modified work by defendant, applicant is entitled to temporary disability benefits; subject to the 104-week cap.
7. It is found applicant became permanent and stationary on August 27, 2020.
8. Applicant is entitled to a partial permanent disability award of 80% and to a life pension.
9. It is found there is no legal basis for apportionment.
10. It is found there is a need for further medical care to cure or relieve the effects of the industrial injury.
11. It is found applicant is entitled to be reimbursed for self-procured medical care in an amount to be adjusted by the parties, according to proof.
12. The issue of attorney fees is deferred.
13. It is found the date of injury, pursuant to Labor Code section 5412 is February 27, 2018.
14. It is found that the liability period under Labor Code section 5500.5 is February 27, 2017 to February 27, 2018.

15. It is found Travelers Insurance Company has no liability for this injury is dismissed as a party defendant in this case.

IT IS FURTHER ORDERED that defendant Church Mutual Insurance Company is hereby **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



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.

**JUAN ANGEL
LAW OFFICES OF ALAN H. FENTON
GUIDEONE LEGAL
STANDER REUBENS THOMAS KINSEY
MARRIOTT & ASSOCIATES**

PAG/es

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION
ON PETITIONS FOR RECONSIDERATION

I.

INTRODUCTION

- | | |
|----------------------------------|-----------------------------------------------------------------------------------------------------------------------|
| 1. Applicant's Occupation: | Custodian / cashier |
| Age of Applicant: | 67 |
| Date(s) of Injury: | January 15, 1991 – June 8, 2018 |
| Parts of Body Injured: | Cervical spine, bilateral shoulders, elbows, and wrists |
| Manner in Which Injury Occurred: | Continuous trauma |
| 2. Identity of Petitioner: | Defendants |
| Timeliness: | The petitions are timely |
| Verification: | The petitions are verified |
| Services: | The petitions were served on all parties |
| 3. Date of Issuance of Order: | October 4, 2022, served on October 11, 2022 |
| 4. Petitioner's Contention: | Defendant Church Mutual avers they should be Dismissed. Defendant Guideone contends the entire decision is incorrect. |

II.

FACTS

Applicant was employed as a custodian for Westmont College and a cashier at Rite Aid. Applicant, through counsel, filed an Application for Adjudication of Claim on October 21, 2016, alleging a specific injury of February 10, 2015 against Westmont College. The application indicates it was specific date of injury, however, in the body of the application on page 9, it states the injuries occurred over the course of his job duties.

On January 31, 2017, another Application for Adjudication of Claim was filed to amend the previous application. The document indicates it is amended to correct the DOI to a cumulative injury for the period of January 1, 1996, through January 19, 2017; and added claims of injury to the digestive system and nervous system.

Applicant was evaluated by a PQME, Charles Schwarz, M.D., who opined applicant did suffer a cumulative trauma type injury while employed at Westmont College. As a result of the PQME findings, Guideone Insurance was joined as a party defendant.

It was determined applicant had concurrent employment during part of the continuous trauma period claimed, Rite Aid and its insurance carrier Travelers were joined.

The matter proceeded to trial on June 23, 2022, with a Findings and Award dated October 4, 2022, finding inter alia applicant sustained injury arising out of employment and occurring within the course of employment, temporary disability (TD), permanent and stationary date, permanent disability (PD), date of injury per L.C. § 5412, L.C. § 5500.5 and a dismissal petition.

III. DISCUSSION

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cures those defects.

Defendant Church Mutual filed a petition for reconsideration contending they should be dismissed based on the WCJ's finding the date of injury under L.C. § 5412 to be June 1, 2018. That the last year of injurious exposure was during the period of June 1, 2017, through June 1, 2018, and their coverage ended May 1, 2015.

If the WCJ's determination that this was one long continuous trauma claim that ended June 1, 2018, then Church Mutual Insurance Company should be dismissed and the petition for reconsideration should be granted.

Defendant Guideone filed a petition for reconsideration attacking five findings: TD, PD (reliance on *KITE*), attorney fees, date of injury and when the last year of injurious exposure occurred.

Defendant contends TD is not owed because applicant testified to one (1) email advising of an alternate position available with no follow up. No written evidence was offered by defendant offering applicant modified work. Applicant testified he stopped working in June 2018 because he

was called into human resources and was told they could not give him a job that would satisfy his restrictions. (Page 8, lines 15 -17).

Therefore, the TD awarded for the period of June 8, 2018, through August 27, 2020, subject to the 104-week cap based on the medical reporting of PQME Charles Schwarz, M.D. is supported.

Next, defendant contests the finding of the applicability of adding the upper extremity impairments. In his deposition of April 22, 2021, starting on page 11, line 8 and continuing through page 12, line 19.

In response to applicant's questioning, Dr. Schwarz affirmed he had a duty to provide the most accurate rating that the shoulders and arms have a synergistic effect that would not otherwise occur and adding the arm and shoulder impairment would be more accurate than just using the combined values chart. He ultimately concluded, "I would tend to add the upper extremities and then combine it with the cervical spine. I think that, based upon the circumstances, is what I would believe is accurate."

Dr. Schwarz explained and showed a clear understanding of the *Kite* decision and the cases that followed and supported his conclusion the upper extremity impairments should be added and then combined with the cervical spine.

Defendant's third contention is the awarding of attorney fees. Defendant is correct, the WCJ erroneously indicated in his request for the DEU commutation applicant's date of birth was January 18, 1982. Applicant's correct date of birth is []. A new commutation is needed.

Defendant's fourth dispute is the WCJ's finding that the date of injury corresponded to his last day of work. The fact that applicant's last date of work was February 27, 2018, was not a factor considered by the WCJ. Rather, it was the re-evaluation medical reporting of Charles Schwarz, M.D. dated February 27, 2018.

On page 17 under CAUSATION, in the third paragraph Dr. Schwarz wrote as follows:

"Based on all of the information available, it is concluded that the patient sustained injuries to the cervical spine and bilateral upper extremities, including both shoulders, elbows, and wrist, due to the repetitive work activities performed on the job, based on my understanding of those activities."

On page 19 of that same report, he found impairment translating to permanent disability to applicant's right upper extremity, left upper extremity, cervical spine with a 3% pain add on.

Applicant originally pled his industrial injury as a specific injury occurring in 2015. However, it was the first time, in this medical report, where applicant had the occurrence of both knowledge of an industrial injury coupled with disability. The medical reporting supports the determination of the date of injury pursuant to L.C. § 5412 is February 27, 2018.

Defendant's last argument is that the last year of injurious exposure was in 2015 based on a variety of factors.

However, again the re-evaluation medical reporting of Charles Schwarz, M.D. dated February 27, 2018, on page 17 under CAUSATION, in the fourth paragraph Dr. Schwarz wrote as follows:

“In conclusion, the patient sustained a cumulative trauma injury in the course of his employment with Westmont College, based on my understanding of those activities.”

Applicant stopped working for Westmont College June 8, 2018. Therefore, based on Dr. Schwarz's finding the applicant's injurious exposure period occurred during the course of his employment with Westmont College, the last year of injurious exposure was June 8, 2017 – June 8, 2018.

IV. RECOMMENDATION

For the reasons stated, it is respectfully recommended that Defendant Church Mutual Insurance Company's Petition for Reconsideration be granted based on the arguments and merits addressed herein, and Guideone's Petition for Reconsideration be granted as to the recalculation of attorney fees and denied as to all other contentions raised.

DATE: _____November 14, 2022_____

Scott Seiden

PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

STIPULATIONS:

The stipulations of the parties as set forth in the Minutes of Hearing are accepted as fact.

INJURY AOE/COE

Based on the credible testimony of applicant with due regard for his demeanor as a witness together with the medical reporting of Charles Schwarz, M.D., in the capacity of a PQME, it is found applicant sustained injury arising out of and occurring within the course of employment to his cervical spine, both shoulders, both elbows and both wrists.

EARNINGS

Based on the credible testimony of applicant with due regard for his demeanor as a witness and the range of the evidence, it is found applicant's average weekly earnings were \$672.40, resulting in a temporary disability rate of \$448.26 and the maximum statutory rate for permanent disability.

TEMPORARY DISABILITY

Based on the credible testimony of applicant with due regard for his demeanor as a witness together with the medical reporting of Charles Schwarz, M.D., in the capacity of a PQME, it is found applicant was temporarily partially disabled during the period of June 8, 2018 through August 27, 2020; subject to the 104 week cap.

Due to no evidence having been presented of any offer of modified work by defendant, applicant is entitled to temporary disability benefits for the period found hereinabove.

PERMANENT & STATIONARY DATE

Based on the credible testimony of applicant with due regard for his demeanor as a witness together with the medical reporting of Charles Schwarz, M.D., in the capacity of a PQME, it is found applicant became permanent and stationary on August 27, 2020.

PERMANENT DISABILITY

The factors of disability are based upon the medical reporting of Charles Schwarz, M.D. and rate as follows

Cervical spine -

15.01.02.02 - 21 - [1.4]29 - 340G - 32 - 40 PD (A)

Left arm

16.01.02.02 - 6 - [1.4]8 - 340F - 8 - 11 PD (B) (MEDIAN NERVE)

16.01.02.03 - 1 - [1.4]1 - 340F - 1 - 1 PD (B) (SENSORY NERVE)

Left shoulder

16.02.02.00 - 12 - [1.4]17 - 340F - 17 - 22 PD (B) (1% add on for pain)

Right arm

16.01.02.02 - 6 - [1.4]8 - 340F - 8 - 11 PD (B) (MEDIAN NERVE)

16.01.02.03 - 1 - [1.4]1 - 340F - 1 - 1 PD (B) (SENSORY NERVE)

Right shoulder

16.02.02.00 - 14 - [1.4]20 - 340F - 20 - 26 PD (C) (2% add on for pain)

(B) 22 C 11 C 1 = 32 PD

(C) 26 C 11 C 1 = 35 PD

(A) (35 + 32) 67 C 40 = 80 PD

Applicant is entitled to a partial permanent disability award of 80% equivalent to 593.25 weeks payable at the weekly rate of \$290.00 in the total sum of \$172,042.50; commencing June 1, 2018 (or the actual last date worked or the last date TD was paid), less attorney fees as provided hereinbelow.

Applicant is also entitled to a life pension award of \$154.61 per week to commence following the date permanent disability is last paid, for the remainder of his life, less attorney fees as provided hereinbelow.

APPORTIONMENT

Based on the credible testimony of applicant with due regard for his demeanor as a witness together with the medical reporting of Charles Schwarz, M.D., in the capacity of a PQME, there is no legal basis for apportionment to non-industrial factors.

NEED FOR FURTHER MEDICAL TREATMENT

Based on the credible testimony of applicant with due regard for his demeanor as a witness together with the medical reporting of Charles Schwarz, M.D., in the capacity of a PQME, there is a need for further medical care to cure or relieve the effects of the industrial injury.

LIABILITY FOR SELF PROCURED MEDICAL TREATMENT

Based on the credible testimony of applicant with due regard for his demeanor as a witness together with the medical reporting of Charles Schwarz, M.D., in the capacity of a PQME, applicant is entitled to be reimbursed in an amount to be adjusted by the parties, according to proof.

ATTORNEY FEES

Based upon the Workers' Compensation Appeals Board Rules of Practice and Procedure, the guidelines for awarding attorney fees found in Policy & Procedure Manual Index Number 6.8.4, a reasonable attorney's fee in connection with the permanent disability awarded is found to be \$23,315.59 which shall be commuted off of the far end of the award.

Applicant's attorney is also entitled to a reasonable attorney's fee in connection with the life pension awarded, which is found to be \$26,067.75 which shall be commuted off of the side of the award.

LABOR CODE § 5412

Based on the credible testimony of applicant with due regard for his demeanor as a witness together with the medical reporting of Charles Schwarz, M.D., in the capacity of a PQME, it is found applicant sustained one long continuous trauma injury.

Further, the date of injury pursuant to L.C. § 5412 is February 27, 2018. That is the first time applicant had knowledge of both the industrial nature of his injuries coupled with disability. Applicant certainly had medical treatment prior to February 27, 2018 and may have missed time from work, however, no evidence was presented that applicant received any temporary disability

or permanent disability benefits nor had any physician imposed permanent disability prior to the PQME's findings.

LABOR CODE § 5500.5

Based on the credible testimony of applicant with due regard for his demeanor as a witness together with the medical reporting of Charles Schwarz, M.D., in the capacity of a PQME, it is found the last year of injurious exposure was June 1, 2017 through June 1, 2018.

PETITION FOR DISMISSAL

Based on the credible testimony of applicant with due regard for his demeanor as a witness together with the medical reporting of Charles Schwarz, M.D., in the capacity of a PQME, it is found Rite Aid and its carrier, Travelers Insurance Company is dismissed.

PENALTIES

Deferred with jurisdiction reserved.

DATE: _____ October 4, 2022 _____

Scott Seiden
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE