WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VAN THAI NGUYEN, *Applicant*

vs.

CATALINA RESTAURANT GROUP DBA COCO'S BAKERY RESTAURANT;
MITSUI SUMITOMO CLEVELAND;
CNA, administered by GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Numbers: ADJ8068969; ADJ8312788
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Mitsui Sumitomo Insurance Company of America (Petitioner) seeks reconsideration of the June 14, 2023 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a server from June 19, 2002 to May 1, 2011, sustained industrial injury to cervical and lumbar spine, psyche, right shoulder, bilateral wrists, left shoulder, mid back, headache and "multiple." The WCJ found that applicant sustained but one cumulative injury, and that the date of injury pursuant to Labor Code[1] section 5412 was 2011. Accordingly, the WCJ determined that section 5405 did not bar compensation, and that the period of liability under section 5500.5 commenced in 2010.

Petitioner contends that applicant's self-procured medical treatment in 2008 resulted in the requisite knowledge and disability necessary to fix the date of injury per section 5412 no later than April 18, 2008.

We have received an Answer from co-defendant CNA Claims Plus (CNA). We have not received an Answer from any other party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration and affirm the decision of June 14, 2023, except that we will amend the decision to clarify that there is not an overlapping cumulative injury ending November 30, 2009, and to clarify the period of liability per section 5500.5 as May 1, 2010 to May 1, 2011.

BACKGROUND

Applicant has filed two Applications for Adjudication. In Case No. ADJ8068969, applicant claimed injury to her cervical and lumbar spine, psyche, right shoulder, bilateral wrists, left shoulder, mid back, headache and "multiple," while employed as a server from June 19, 2002 to May 1, 2011 by Catalina Restaurant Group DBA Coco's Bakery Restaurant. (Minutes of Hearing and Order of Consolidation, March 1, 2023, p. 2:8.) In Case No. ADJ8312788, applicant alleged injury to the same body parts from June 19, 2002 to November 30, 2009.[2]

The employer's workers' compensation carriers were CNA from June 30, 2006 to December 30, 2008, and Mutsui Sumitomo from December 30, 2008 to April 1, 2015. (*Id.* at 2:13.)

The parties have selected Lawrence Feiwell, M.D., to act as the Agreed Medical Evaluator in orthopedic medicine, and have further selected Gabriel Wang, M.D., as the Qualified Medical Evaluator in neurology/neuropsychology. Applicant also selected primary treating physician was Gabriel Rubanenko, M.D.

The parties proceeded to trial on March 1, 2023, framing issues of whether applicant sustained one or two cumulative injuries, the date of injury per section 5412, and the period of liability per section 5500.5. Applicant's testimony was adduced on April 19, 2023, and the matter submitted for decision.

The WCJ issued her decision on June 14, 2023, finding in relevant part that pursuant to the opinion of AME Dr. Feiwell, applicant sustained but one cumulative trauma. (Findings of Fact, July 12, 2023, Finding of Fact No. 4.) The WCJ further found the date of injury to be 2011, and the period of liability under section 5500.5 to commence in 2010. (Finding of Fact No. 3.) The

[2] The Pre-trial Conference Statement and the March 1, 2023 Minutes of Hearing and Order of Consolidation list both injuries as "sustained," i.e. admitted injuries. However, the Minutes further specify that defendant CNA does not admit any injuries, and maintains its denial. (Minutes of Hearing and Order of Consolidation, March 1, 2023, p. 2:18.)

WCJ's Opinion observed that the record did not reflect medical advice to applicant or compensable disability arising out of the claimed injury under 2011.

Mitsui Sumitomo's Petition for Reconsideration (Petition) asserts that the date of concurrence of knowledge of industrial injury and disability arising therefrom was no later than April 18, 2008. (Petition, at 13:8.) In support of this contention, Petitioner notes that applicant self-procured medical treatment at a local health clinic in 2008, wherein an attending physician noted applicant's symptoms were exacerbated by her work as a waitress. (*Id.* at 9:23.) Applicant further advised AME Dr. Angerman that she attempted to report her injuries in the mid-1980's, and again in 2010. Applicant's course of treatment in 2008 included wrist splints, physical therapy and medication. (Petition, at 7:6.) Accordingly, Petitioner asserts that applicant sustained compensable disability and had knowledge of her injury and its relation to her employment activities no later than April 18, 2008.

CNA's Answer avers applicant received no medical advice as to the existence of a cumulative injury until 2011, and further did not sustain compensable disability until she left work in May, 2011 for her first carpal tunnel surgery. (Answer, at 3:12.)

The WCJ's Report differentiates between knowledge that work activities exacerbate an underlying injury, and the receipt of advice that work activities have a *causal* connection to the injury. The WCJ further observes that to the extent that Petitioner relies on the report of former AME Dr. Angerman, the reporting and deposition testimony of the subsequent AME Dr. Feiwell were found to be substantial evidence. (Report, at pp. 3-4.) The WCJ recommends we deny the Petition, accordingly.

DISCUSSION

Generally, proceedings before the Workers' Compensation Appeals Board ("WCAB") are commenced by the filing of an application. (Lab. Code § 5500; Cal. Code Regs., tit. 8, § 10450.) The time limitations for commencing proceedings are set forth in California Labor Code section 5405:

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

(b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
(c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

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

Defendant contends the date of injury is no later than April 18, 2008.

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

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

The Court of Appeal has defined "disability" per section 5412 as "either compensable temporary disability or permanent disability," noting that "medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579].)

Regarding the "knowledge" component of section 5412, whether an employee knew or should have known his disability was industrially caused is a question of fact. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53] (*Johnson*).)

In *Johnson*, applicant, a long-term employee of the City of Fresno, experienced chest pain on December 21, 1980, and was subsequently hospitalized with a myocardial infarction. (*Johnson, supra*, at p. 469.) Applicant entertained the belief that his condition was work-related in early 1981, but a medical examination conducted in June, 1981 concluded that applicant's heart problems were nonindustrial. In July, 1981, the City provided applicant with the requisite notices regarding his

workers' compensation rights. However, applicant did not file his claim for workers' compensation benefits until July 9, 1982. The WCJ found applicant's claim was not barred by the statute of limitations, and the WCAB affirmed. Following defendant's Petition for Writ of Review, the 5th District Court of Appeal began its analysis by observing that, "[w]hether an employee knew or should have known his disability was industrially caused is a question of fact." (*Id.* at p. 471.) The court pointed out that "[a]n employee clearly may be held to be aware that his or her disability was caused by the employment when so advised by a physician," but that "in some cumulative injury cases a medical opinion that the applicant's disability is work related is not necessary to support a finding that an applicant, in the exercise of reasonable diligence, should have known of that relationship." (*Id.* at pp. 472-473.) Synthesizing these principles, the *Johnson* court concluded that, "applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*Id.* at p. 473.) Accordingly, and notwithstanding his suspicions of work-relatedness, Johnson was not charged with knowledge that his condition was work related. (*Ibid.*)

Here, Petitioner contends the disability requirement of the section 5412 date of injury was established in 2008, when applicant sought medical treatment for pain arising out of multiple body parts and conditions. (Petition, at 6:10.) Petition avers that pursuant to *Allianz Ins. Group v. Workers' Comp. Appeals Bd.* (*Hinojosa*) (1999) 64 Cal.Comp.Cases 83, 84 [1999 Cal. Wrk. Comp. LEXIS 5209] (*Hinojosa*), and *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579] (*Rodarte*), the disability component of a section 5412 date of injury includes both compensable permanent and temporary disability. In addition, permanent disability may also be established when the injured worker is forced to seek medical attention and is prescribed splints and medication. (Petition, p. 6:3, quoting *Hinojosa, supra*, at p. 84.) Petitioner observes that in the present matter, applicant sought medical attention from the Ventura County Medical Clinic in April, 2008, at which time she was provided with wrist splints, and was prescribed physical therapy and medication. Applicant further reported that her symptoms interfered with her ability to drive a vehicle. (Petition, at 7:6.) Petitioner contends that the disability component was demonstrated as of the date of these treatment modalities, no later than April 18, 2008.

Petitioner further contends that applicant's knowledge of the causal relation between her work activities and her industrial injury is evidenced in the April 18, 2008 examination notes, in which the attending physician observed that applicant's symptoms were exacerbated by her work activities. (Petition, at 9:23.) Petitioner observes that applicant recounted to Dr. Angerman and Dr. Feiwell prior attempts to report her symptoms to her employers, the first at an unspecified point in the 1980's, and again at some point prior to being laid off in 2009. (Petition, at 11:6.) Petitioner concludes that because applicant required medical treatment in 2008 sufficient to indicate the existence of permanent disability in 2008, and because applicant had knowledge of the industrial causation of her injury in 2008, that the concurrence of knowledge and disability fixes the date of injury as April 18, 2008.

In evaluating this contention, we are guided by the admonition of the Court of Appeal, that "…the purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury." (*J. T. Thorp v. Workers' Comp. Appeals Bd., supra,* 153 Cal.App.3d 327, 341.) The date of injury requirements of section 5412 ensure that the statute of limitations does not begin to run prior to the emergence of a disability, and the accompanying knowledge of its work-relatedness.

In the present matter, we agree with the WCJ that the record supports a date of injury in 2011. With respect to the disability component of section 5412, the Court of Appeal in *Rodarte* held that disability may be established by compensable temporary or permanent disability, and that "because actual wage loss is required for temporary disability, modified work alone is not a sufficient basis for compensable temporary disability. But, a modification may indicate a permanent impairment of earning capacity, especially if the worker is never able to return to the original job duties." (*Rodarte, supra*, at p. 1005.) Here, the record reflects that applicant was prescribed wrist splints, physical therapy and medication in 2008. However, applicant did not sustain compensable wage loss in 2008, nor does the record reflect the imposition of either temporary or permanent work restrictions. Applicant continued to work her usual and customary duties until she was laid off from the Ventura Blvd. location, and six months later, returned to her usual and customary duties at the East Daily Drive location, until going off work for surgery in 2011. Applicant first sustained compensable temporary disability when she went off work prior to

her initial carpal tunnel surgery, on or about May 5, 2011.[3] Accordingly, we concur with the WCJ's determination that applicant sustained no disability for purposes of fixing the date of injury until going off work for surgery on May 1, 2011.

With respect to the knowledge requirement of section 5412, defendant avers applicant's medical treatment records in 2008 demonstrate a causal link between applicant's work activities and her symptoms. (Petition, at 9:23.) We agree with the WCJ's observation, however, that knowledge that pain from an injury is exacerbated by work activities is not equivalent to knowledge that the injury is caused by work activities. (Report, at p. 3.) Additionally, while applicant may have attempted at some point to report an injury to her employer, the record does not demonstrate that applicant possessed an understanding of the nature of a cumulative injury, or had the experience, background or training necessary to recognize a relationship between her work activities and a cumulative injury. (*Johnson, supra*, at p. 473; *Chambers v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 556, 559 [33 Cal. Comp. Cases 722] (*Chambers*). Also, there is no evidence of medical advice to applicant of the existence of a cumulative injuury, or its work relatedness prior to 2011. The first advice to applicant of the existence of a cumulative injury and its work-relatedness was in 2011, when applicant first met with her attorney, filed an application for adjudication, and was evaluated by primary treating physician Dr. Rubanenko who placed applicant on temporary total disability. (Ex. Y, Report of Lawrence Feiwell, M.D., April 14, 2021, p. 40.)

Accordingly, we concur with the WCJ's determinations that applicant did not sustain compensable disability or acquire the requisite knowledge her cumulative injury was work-related until 2011. Because the application, filed November 14, 2011, was filed within one year of the date of injury under section 5412, compensation is not barred by section 5405.

Following our review of the record, however, we note that the Findings of Fact indicate applicant sustained injury as a result of both claimed cumulative trauma injuries. This is inconsistent with Finding of Fact No. 4, which determines there to be but one injury. We will therefore amend Finding of Fact No. 2 to reflect that applicant did not sustain a separate, overlapping injury from June 19, 2002 through November 30, 2009.

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[3] Both Dr. Angerman and Dr. Feiwell note that the actual operative report was unavailable for their review. However, applicant testified credibly to her last day worked as May 1, 2011, and the medical records reviewed by both Dr. Angerman and Dr. Feiwell describe the initial surgery date of May 5, 2011. (Ex. Y, Report of Lawrence Feiwell, M.D., April 14, 2021, p. 40.)

We further note that the period of liability under section 5500.5 is set by the earlier of the date of injury or the last day of injurious exposure. Here, applicant's last day of injurious exposure was May 1, 2011, which fixes the one year period of liability as May 1, 2010 through May 1, 2011. We will amend Finding of Fact No. 3 to reflect both dates.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of June 14, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of June 14, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

*** * * * ***

2. Applicant did not sustain a separate, overlapping injury from June 19, 2002 to November 30, 2009, while employed as a server at Camarillo, California, by Catalina Restaurant Group DBA Coco's Bakery Restaurant.

3. Pursuant to Labor Code section 5412, the date of injury is 2011. Pursuant to Labor Code section 5500.5, the period of liability is May 1, 2010 to May 1, 2011.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 29, 2023

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

VAN THAI NGUYEN
GALE SUTOW & ASSOCIATES
MICHAEL SULLIVAN & ASSOCIATES

SAR/abs

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