

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

**VICTOR LOMELI, *Applicant***

**vs.**

**COUNTY OF LOS ANGELES, *Permissibly Self-Insured, Defendant***

**Adjudication Number: ADJ14990392  
Van Nuys District Office**

**OPINION AND DECISION AFTER RECONSIDERATION**

In order to further study the factual and legal issues in this matter, on January 13, 2023, we granted defendant Petition for Reconsideration of a workers' compensation administrative law judge's (WCJ) Partial Findings, Award and Order of October 24, 2022, wherein it was found that while employed as a fire captain during a cumulative period ending on March 28, 2016, applicant sustained industrial injury in the form of asthma causing permanent disability of 25%. The WCJ found that applicant's claim was not barred by the statute of limitations.

Defendant contends that the WCJ erred in finding that the claim was not barred by the statute of limitations. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will affirm the WCJ's decision for the reasons stated by the WCJ in the Report, and for the additional reasons stated below.

The running of the statute of limitations is an affirmative defense, and the burden of proving it is on the party opposing the claim. (Lab. Code, § 5409; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 67, fn. 8 [50 Cal.Comp.Cases 411].) The burden is on defendant to show when the statute of limitations began to run, "starting from any and all three points designated [in Labor Code section 5405]." (*Colonial Ins. Co. v. Industrial Acc. Com. (Nickles)* (1945) 27 Cal.2d 437, 441 [10 Cal.Comp.Cases 321].) The three points designated in section 5405 are date of injury (Lab. Code, § 5405, subd. (a)); the last payment of disability indemnity (Lab. Code, § 5405, subd. (b)); and the last date on which medical treatment benefits were furnished (Lab. Code, § 5405, subd. (c).) In this case, it appears that the applicant was not

provided with disability indemnity or medical treatment. Thus, the relevant date for statute of limitations purposes is the date of injury.

The date of injury in cumulative injury cases 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 [emphasis added].)

Even if we were to generously indulge the defendant’s argument that applicant knew or should have known his asthma condition was industrial, defendant has failed its burden of proof because it has not even argued, let alone submitted any evidence, that applicant sustained compensable disability more than a year before the filing of the application for adjudication of claim.

As explained in the case of *J. T. Thorp, Inc. v. Workers’ Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 336 [49 Cal.Comp.Cases 224]:

The term “disability” as used in section 5412 is, of course, to be given the same meaning as elsewhere in the [Workers’ Compensation] Act [citations], i.e., an impairment of bodily functions which results in the impairment of earnings capacity. (*Marsh v. Industrial Acc. Com.* (1933) 217 Cal. 338, 344 [19 I.A.C. 159]; see *Associated Indem. Corp. v. Ind. Acc. Com.* (1945) 71 Cal.App.2d 820, 824 [10 Cal.Comp.Cases 295]; 2 Hanna, [Cal. Law of Employee Injuries and Workmen’s Compensation (2d ed., 1983 rev.)] § 13.01, p. 13-2.) Accordingly, where an employee suffers from a cumulative injury or occupational disease, there is a ‘date of injury’ only at such time as the employee suffers an impairment of bodily functions which results in the impairment of earnings capacity.

In *State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579], the Court of Appeal made clear that neither medical treatment nor modified work restrictions without wage loss, in and of themselves, are sufficient to constitute “disability” for purposes of Labor Code section 5412. As explained in *Rodarte*, Labor Code section 5412 requires compensable disability, either temporary or permanent. Permanent disability is not compensable until it is ratable. Except in the case of insidious, progressive diseases, a disability is not ratable until it is permanent and stationary. (*Chavira v. Workers’ Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].)

While defendant argues in its Petition that applicant should have known his asthma *diagnosis* was industrial in September of 2016, it has not carried its burden of explaining when

applicant first sustained *disability* as a result of his asthma condition. In fact, our own review of the record reveals that independent medical evaluator internist Albert E. Lipper, M.D. did not find any periods of temporary disability, and the parties stipulated that applicant did not achieve maximal medical improvement until September 15, 2021. (Minutes of Hearing and Summary of Evidence of September 20, 2022 trial at p. 2.) Without having to decide the issue, it thus appears that the August 4, 2021 filing of the Application for Adjudication of Claim actually preceded the Labor Code section 5412 date of injury.

We therefore affirm the WCJ's decision. We otherwise affirm for the reasons stated in the WCJ's Report, which we quote here:

**REPORT AND RECOMMENDATION OF WORKERS'  
COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION  
FOR RECONSIDERATION**

**INTRODUCTION:**

On November 14, 2022, Defendant filed a verified Petition for Reconsideration of the Partial Findings, Award and Order dated October 24, 2022. The Defendant contends:

(a) Applicant's claim should be barred under the statute of limitation because Applicant made the connection between his wheezing and his employment as a firefighter two years before filing his Application for adjudication; and,

(b) Applicant has knowledge of his workers' compensation rights because the Applicant himself has experience and knowledge of reporting and litigating a work related injury.

**STATEMENT OF RELEVANT FACTS:**

The parties appeared by phone at trial on September 20, 2022, documentary evidence was received and the matter was submitted on the issues of AOE/COE, permanent disability, apportionment, need for further medical treatment and attorney fees. On October 26, 2022, the undersigned WCJ issued partial findings, award and order. The undersigned WCJ found the injury was not barred by the statute of limitation, the Applicant was granted a permanent disability award of twenty-five percent and attorney fees. The undersigned WCJ found the record needed to be developed on the issue of further medical treatment. Defendant seeks relief from the finding that the claim is not barred by the statute of limitations.

## DISCUSSION

### DEFENDANT DID NOT MEET ITS BURDEN TO SHOW THE STATUE OF LIMITATION BARS THE CLAIM

Labor Code section 5409 states that the statute of limitations is an affirmative defense that operates to bar the remedy and not to extinguish the right of the employee. Thus, under Labor Code section 5409, an applicant's claim is barred if an application is not timely filed from either one year from the date of injury, one year from the date of last indemnity benefits furnish, or one year from the last date of medical benefits.

Labor Code section 5412 defines "date of injury" as "the date of injury in cases of occupational disease 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". Here, the real question is whether or not the Applicant would have known his injury was work related had he done a reasonable diligent investigation. Applicant first learned of his asthma diagnosis when he was evaluated by Kaiser on September 6, 2016. (Exhibit A1.) There is no indication in the record that Applicant was informed at that time his injury was work related. On December 2, 2019, the applicant informed the Kaiser physician that he had been working with some dust, and he specifically worried because of his history of being a firefighter. (Exhibit A3.) The record does not state that the doctor told Applicant the Asthma was work related. However, from the actions of the doctor, continuing to care for Applicant through his private insurance, we can deduce that the doctor did not tell Applicant the condition was work related. The court found that this interaction with a medical professional constituted a reasonable diligent investigation to determine if Applicant's asthma was work related. Applicant did not have knowledge that his injury was work related until about August 3, 2021.

### APPLICANT'S KNOWLEDGE OF WHAT WORKERS' COMPENSATION RIGHTS HE HAS IS NOT RELEVANT IF HE DOES NOT KNOW HE HAS A WORK RELATED INJURY

The contention that Applicant knows is workers' compensation rights is not relevant if Applicant has no reason to exercise those rights. The only relevance would be in determining what constituted a reasonable investigation once the Applicant had a suspicion that his injury may be work related. For this argument to succeed, the Defendant would have had to have shown that Applicant knew that asking his private doctor is not good enough to determine the cause of the asthma, that he had to seek a doctor intimately familiar with workers' compensation. It is a stretch to assume the Applicant knew the

distinction between a regular Kaiser doctor and a Kaiser workers' compensation doctor. Defendant did not meet it burden.

**RECOMMENDATION:**

The undersigned WCJ respectfully recommends Defendant's Petition for Reconsideration filed November 14, 2022 should be denied.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Partial Findings, Award and Order of October 24, 2022 is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**January 17, 2023**

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

**VICTOR LOMELI  
STRAUSSNER, SHERMAN, LONNE, TREGER, HELQUIST  
COUNTY OF LOS ANGELES COUNTY COUNSEL**

**DW/abs**

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