WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BALDOMERO CUEVAS, *Applicant*

vs.

**A-1 MACHINE MANUFACTURING;
REPUBLIC INDEMNITY COMPANY OF AMERICA,
AMERICAN HOME ASSURANCE, CYPRESS INSURANCE care of BERKSHIRE HATHAWAY, *Defendants***

Adjudication Numbers: ADJ11652399; ADJ12153397
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

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 stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We further add that defendant's burden of proving the knowledge component of Labor Code Section 5412 is not met merely by showing that the employee knew he had some symptoms. (*Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556, 559 [33 Cal.Comp.Cases 722]; *Pacific Indemnity Co. v. Industrial Acc. Com. (Rotondo)* (1950) 34 Cal.2d 726, 729 (15 Cal.Comp.Cases 37).) These principles were discussed by the appellate court in *City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53].) In the *Johnson* case applicant formed the belief more than one year before he filed his application for workers' compensation benefits that his cardiac problems were work related. The Appeals Board and appellate court concluded that applicant did not have the requisite knowledge of an industrial injury even though he believed his cardiac symptoms were caused by his work:

> Applicant did not have the training or qualifications to recognize the relationship between the known adverse factors involved in his employment and his disability. Applicant's expression of the belief shared by most disabled employees, that his employment caused his disability does not mandate a contrary conclusion.
> (*Johnson, supra*, 50 Cal.Comp.Cases at p. 58.)

The *Johnson* case supports the general rule that an employee is not chargeable with knowledge of an industrial injury until so advised by a physician unless the employee has medical knowledge or specialized training to establish knowledge of an industrial injury. (*Id*. at p. 56.) In the current case defendant introduced no evidence that applicant had any specialized training or medical knowledge which would satisfy the requirements of Labor Code Section 5412.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 25, 2021

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

BALDOMERO CUEVAS
LAW OFFICE OF JOHN E. HILL
FINNEGAN, MARKS, THEOFEL & DESMOND
LAUGHLIN, FALBO, LEVY & MORESI
GILSON DAUB

PAG/*pc*

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:	Ceramics Cleaner
	Applicant's Age:	53
	Date of Injury:	August 15, 2016 through August 16, 2017
	Parts of Body Inured:	Neck, back, thoracic spine, and bilateral shoulders
2.	Identity of Petitioner:	Defendant Helmsman Management Services[1] ("defendant")
	Timeliness:	Yes
	Verification:	Yes
3.	Date of Findings and Award	November 30, 2020
4.	Defendants' Contentions:	Applicant had disability which he knew or should have known was caused by employment before September 21, 2016, and accordingly, applicant's date of injury per Labor Code section 5412[2] was September 21, 2016.

II. STATEMENT OF THE CASE AND FACTS

The Opinion on Decision provided the relevant history of injury,

> applicant filed an application for adjudication of claim alleging a cumulative injury to his upper extremities and neck while employed as by defendant through September 21, 2016 (ADJ1652399). Republic accepted the claim and provided benefits, and it later filed an application for adjudication of claim alleging that the date of applicant's cumulative injury to those body parts was through June 15, 2017 (ADJ12153397). …
>
> On September 21, 2016, applicant was seen at Physician's Medical Urgent Care for right rotator cuff tendonitis, and a report issued stating that he could return to work with restrictions. Applicant was precluded from lifting over five pounds with his right arm, extending his right arm over his shoulder, overhead reaching, and lifting with either his right arm away from his body or with his right arm extended. (Exhibit AA.)

[1] Defendant should be reminded that it should not attach documents that have already been made part of the adjudication file to Petitions for Reconsideration. (8 Cal. Code Regs., tit. 8, §10945(c)(1).)
[2] All future statutory references are to the Labor Code unless otherwise stated.

A month later, …[applicant's] work restrictions were, "No lifting, pulling and pushing more than 10 lb. [and] No overhead motions." (*Id.* at p. 9.)

In November of 2016, applicant had "not improved" with work limitations. (Exhibit CC at p. 6.) Applicant's work restrictions were, "No lifting, pulling and pushing more than 10 lbs. No overhead motions. No reaching out. No repetitive use of the upper extremities. 5 minute breaks every 30 minutes to icde [*sic*] and rest." (Id. at p. 5.) In December of that year, applicant was "feeling the same despite conservative and work limitations," but he was not provided with different applicant's work restrictions. (Exhibit DD at pp. 2, 10.)

On February 22, 2017, applicant's new treating physician, Robert Martin, M.D., issued a report stating in relevant part that applicant had a progressive increase in shoulder pain over a four month period with work related tasks, that applicant took "days off when the pain became severe... (Exhibit FF at p. 1.) Applicant was permitted to return to work, but was precluded from overheard work and lifting over ten pounds. (*Id.* at p. 3.) On March 8, 2017, Dr. Martin stated that applicant continued to require those restrictions. (Exhibit GG at p. 2.)

On July 5, 2017,[3] Dr. Martin recommended the same work restrictions and recommended left shoulder surgery. (Exhibit HH at p. 2.)

On August 15, 2017, Dr. Martin performed the recommended left shoulder surgery and Republic began temporary disability indemnity payments to applicant. (Exhibit II; Admitted Facts.)

Diane Michael, D.C. was selected to act as the qualified medical evaluator, and on February 15, 2019, she issued a report stating in relevant part that although work restrictions were recommended, applicant's work was "not really restricted." (Joint Exhibit 100 at p. 100.) Dr. Martin also reviewed physical therapy notes written between December 13, 2016 and February 21, 2017. (*Id.* at pp. 13-15.) As relevant herein, her summary of those records indicates that applicant's left shoulder appears to have become the more irritated shoulder during that time and that by February of 2017, applicant no longer had an assistant at work. (*Id.* at pp. 13, 15.) … On July 29, 2020, applicant was deposed and as relevant herein he testified that before September of 2016, he took approximately 8

[3] The Exhibits did not include any reports issued between March 8, 2017 and July 5, 2017.

sick days over the course of three to four months because of his shoulder pain. (Exhibit A at pp. 18:16-19:23.) He told his boss that the time off work was for shoulder pain related to his work activities. (*Id.* at p. 22.) However, he did not obtain any medical treatment before he reported the claim. (*Id.* at p. 19:24-2 0:2.) After he reported the injury, he was placed on modified work and was not lifting heavy items, but his shoulder pain worsened. (*Id.* at p. 22:10-22:23.)

On November 10, 2020, the matter proceeded to trial. As relevant herein, applicant testified as follows: … Between September 16, 2016 and August 15, 2017, he repetitively used his right hand at work and he used a water pressure machine which he held over his shoulder. While on modified duty he occasionally lifted up to 100 pounds and his symptoms worsened while he was on modified duty. Before reporting his injury in September of 2016, he took approximately six days off work but they were not together. He believed his shoulder pain was related to his job duties and his supervisor did not believe him. After he reported the injury, he was provided with a helper who helped lift items that weighed over 40 pounds. If the item weighed less than that, he would lift it by himself with difficulty, but sometimes his helper could assist him with lifting such items. While he was on modified duty, he was not able to take 5 minute breaks because there was too much work.
(Opinion on Decision, November 30, 2020, pp. 4-6.)

On November 30, 2020, I rejected defendant's argument that applicant sustained an injury to his bilateral shoulders, thoracic spine, and cervical spine through September 21, 2016, and determined in relevant part that applicant sustained an injury to those body parts while employed by defendant through August 15, 2017.

III.
DISCUSSION

It is well established that decisions of the Appeals Board must be supported by substantial evidence and based on admitted evidence in the record. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627; *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).)

As defendant correctly, states, section 5412 provides that, "[t]he date of injury in … 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.) As used in section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavir v. Worker's Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463 [56 Cal.Comp.Cases 631]; *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998.) Modified work is not a sufficient basis for finding compensable temporary disability, but it may be indicative of a compensable permanent disability, especially if the worker is permanently precluded from returning to his usual and customary job duties. (*Id.*) The existence of disability is a medical question beyond the bounds of ordinary knowledge, and, as such, will typically require medical evidence. (*City & County of San Francisco v. Industrial Acc. Com. (Murdock)* (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].)

In determining these matters, I recognized that applicant testified and made statements to his doctors that he took six to eight days off work because of shoulder pain, which he knew to be work related, before he filed the claim for case number ADJ1652399. However, I further determined that those missed days from work did not constitute *compensable* disability because there were no contemporaneous medical reports reflecting that applicant could not work on those days, and I further determined that there was no substantial evidence reflecting that the recommended work restrictions were indicative of permanent disability particularly since defendant did not accommodate those restrictions.

Defendant takes issue with those determinations, and it argues that on September 12, 2016, applicant had both the disability and knowledge required by section 5412. Defendant argues that in *Brawley Union High School District v. Workers' Compensation Appeals Board (Sosa)* (2020) 85 Cal.Comp.Cases 597 (writ denied), a single day of temporary disability was sufficient to meet the requirements of section 5412. Brawley is distinguishable from this matter because there was medical evidence providing that applicant was unable to work on that day. (*Id.* at p. 598.) Defendant further argues that applicant's continued work restrictions also constitute evidence of permanent disability, but there is no medical evidence reflecting that any physician believed there would be a permanent need for such restrictions. Furthermore, in this matter the recommended work restrictions should not constitute evidence of permanent disability because defendant was not fully accommodating applicant's recommended work restrictions meaning that applicant was essentially working full duty until he was placed on temporary disability.

Defendant also relies upon *California Insurance Guarantee Association v. WCAB. (Morodomi)* (2009) 74 Cal. Comp. Cases 1167, 1169–1171 (writ denied) and *City of Vista v. WCAB (Gravlin)* (2017) 83 Cal. Comp. Cases 95,

97–99 (writ denied) to argue that under a theory of a "continuum" of disability, there need not be compensable disability because the existence of disability is established with a diagnosis, medical treatment, and work restrictions. Gravlin does not contain any discussion of this "continuum" theory. Additionally, the logic of *Mordomi*, has not been widely followed, and this is most likely because of its unique fact pattern which reconciles it with the cases requiring the existence of compensable disability. (*See e.g. Rodarte, supra*, 119 Cal.App.4th 998.) In February of 2000, Ms. Mordoni's primary treating physician diagnosed her with carpal tunnel, recommended work restrictions and *provided her with wrist splints.* (*Morodomi, supra,* 74 Cal. Comp. Cases 1169. That visit was sufficient to establish the existence of permanent disability. However, Ms. Mordomi's injury would have been subject to the 1997 rating schedule, and pursuant to that schedule, wrist splints were a ratable factor of permanent disability. Accordingly, Ms. Mordoni had evidence of compensable disability when she received the splits. In this matter, there was no such evidence reflecting the existence of compensable disability before August of 2017.

Based upon the above, I recommend that defendant's Petition for Reconsideration be denied.

Date: December 30, 2020
Alison Howell
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE