WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL DECELLE, *Applicant*

vs.

TAMPA BAY RAYS; TRAVELERS INDEMNITY CO. SUCCESSOR IN INTEREST BY MERGER WITH GULF; *Defendants*

Adjudication Number: ADJ11318013
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on May 24, 2022, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE) with the Tampa Bay Devil Rays (Devil Rays) during the period from June 1996 until September 1999 to various body parts, which resulted in temporary disability (TD) for the period from August 1, 1999 through November 1, 1999.

Defendant Traveler's Indemnity Co., Successor in Interest by Merger with Gulf Insurance, the workers' compensation insurer for the Devil Rays, contends that the WCJ erred in finding liability because applicant was not employed by defendant Devil Rays through the last year of exposure under Labor Code section 5500.5, and that applicant's period of temporary disability is subsequent to applicant's employment for defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which is adopted in part (omitted page 3, final paragraph; page 4, paragraphs 1-2), and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

We will briefly review the relevant facts, issues raised at trial, and stipulations by the parties.

Applicant claimed injury to various body parts during the period from June 1, 1996 to September 1, 1999, while employed by defendant Devil Rays as a professional baseball player.

On April 12, 2022, the matter proceeded to trial on the following issues:

1. Injury arising out of and in the course of employment.
2. Temporary disability, with the employee claiming the period 8/1/1999 through 11/1/1999.
3. Permanent and stationary date pursuant to AME Larry Danzig, M.D.
4. Permanent disability.
5. Apportionment.
6. Need for further medical treatment.
7. Liability for self-procured medical treatment.
8. The issue of liens shall be deferred.
9. Attorney fees.
10. Labor Code Section 5500.5.
11. Labor Code Section 5412.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), April 12, 2022 trial, pp. 2-3.)

The parties entered into the following stipulations:

1. Michael DeCelle, born [], while employed during the period 6/1/1996 through 9/1/1999, as a professional baseball player, Occupational Group Number 590, by Tampa Bay Devil Rays, Applicant claims to have sustained injury arising out of and in the course of employment to lumbar spine, left shoulder, and bilateral knees.
2. At the time of injury, the employer's workers' compensation carrier was Travelers Indemnity Company, successor in interest by merger with Gulf from 1/1/1998 through 1/1/1999 for Tampa Bay.
3. At the time of injury, the employee's earnings were $1500 per week, warranting indemnity rates of $490 for temporary disability and $170 for permanent disability.
4. The employer has furnished no medical treatment.
5. No attorney fees have been paid, and no attorney fee arrangements have been made.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), April 12, 2022 trial, p. 2.)

DISCUSSION

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (Lab. Code, § 5702; Cal. Code Regs., tit. 8, § 10835; *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) Here, we will not disturb the stipulations of the parties. To the extent that defendant is raising contribution pursuant to Labor Code[1] section 5500.5, the issue is premature.

Section 5500.5 was enacted in 1951 to codify the holding in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79 [11 Cal.Comp.Cases 226] that an employee who sustains an injury as a result of a progressive occupational disease may obtain an award for the entire amount of permanent disability from any one employer or insurer and the defendant held liable will have the burden of seeking apportionment. "Section 5500.5 is long and complex, but its design is reasonably clear. It is intended to allow an employee to recover for his entire cumulative injury from one or more employers of his choosing for whom he worked within the preceding five years[2] even though a portion of his injury was incurred in prior employments. The employer or employers against whom compensation is awarded are in turn authorized to seek contribution from other employers in the five-year period." (*Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 325-326 [44 Cal.Comp.Cases 212].) "The purpose of the limitation contained in subdivision (a) of section 5500.5 was to 'alleviate the difficulties encountered by the parties in complying with the requirements of former section 5500.5 whereby employees and their attorneys were frequently compelled to expend much time, effort and money in tracing the applicant's employment history over the entire course of his adult life.' [citation omitted.]" (*County of Riverside v. Workers' Comp. Appeals Bd. (Sylves)* (2017) 10 Cal. App. 5th 119, 126-127 [82 Cal.Comp.Cases 301].)

---

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

[2] Prior to 1978, liability for occupational disease or cumulative injury claims were limited to those employers who employed the employee during a period of five years 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. Commencing January 1, 1978, on the first day of January 1978, 1979, 1980, and 1981, the liability period for occupational disease or cumulative injury decreased by one year. As relevant here, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1981, shall be limited to those employers who employed the employee during a period of one year immediately preceding either the date of injury 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).)

Subject to the limitations of section 5500.5(a), an employee may choose to obtain an award for their entire cumulative injury from one or more employers. (*Flesher, supra*, at 325-326; *Rex Club v. Workers' Comp. Appeals Bd. (Oakley-Clyburn)* (1997) 53 Cal.App.4th 1465, 1472 [62 Cal.Comp.Cases 441].)

If an applicant elects to proceed against a single insurer, the insurer is entitled under Labor Code section 5500.5 to seek contribution for awarded benefits from the remaining insurers in subsequent proceedings. (See *Schrimpf v. Consolidated Film Industries, Inc*. (1977) 42 Cal.Comp.Cases 602 (Appeals Bd. en banc).)

Under section 5500.5(e), the employer or employers held liable may thereafter institute separate proceedings to determine apportionment of liability and the right of contribution. (*Flesher, supra,* at 327; *Oakley-Clyburn, supra*, at 1465, 1472; *Raischell & Cottrell, Inc. v. Workers' Comp. Appeals Bd*. (1967) 249 Cal.App.2d 991, 995 [32 Cal.Comp.Cases 135].) The liability of non-elected defendants shall be determined in supplemental proceedings. (Lab. Code, § 5500.5(c). This procedure is intended to promote a prompt determination of an injured worker's entitlement to workers' compensation benefits. (*Oakley-Clyburn, supra*.) Section 5275(a) requires that disputes involving the right of contribution in accordance with Section 5500.5 be submitted to arbitration. (Lab. Code, § 5275(a); Cal. Code Regs., tit. 8 § 10995.)

We note that in order to seek contribution from other employers pursuant to section 5500.5, defendant must first join additional employers. However, as the issue of the cumulative injury period of June 1996 until September 1999 and the issue of multiple employers were not raised at trial, we do not address them here. Notably, defendant stipulated to the cumulative injury period of June 1996 until September 1999 and employment by the Devil Rays. We also note that while the WCJ may have discussed the issues of sections 5412 and 5500.5 in his Opinion, there are no findings on those issues, so that to the extent that defendant raises those issues on reconsideration, it is not aggrieved as to those issues. (See Lab. Code, § 5900(a).)

A petitioner for reconsideration cannot evade or shift its responsibility by attempting to place upon the Appeals Board the burden of discovering evidence in the record that supports its position. (See *Nielsen v. Workers' Comp. Appeals Bd*. (1985) 164 Cal.App.3d 918, 923-924 [50 Cal.Comp.Cases 104].) The Appeals board is not required to comb the record to locate evidence substantiating petitioner's claims. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1305.) If a party fails to meet its burden of proof by obtaining and introducing

competent evidence, it does not accomplish substantial justice to rescue the party by ordering the record to be developed. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Telles Transport Inc. v. Workers' Comp. Appeals Bd*. (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].)

Accordingly, we deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 19, 2022

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

MADANS LAW
MICHAEL DECELLE
TAMPA BAY RAYS
TRAVELERS DALLAS
WOOLFORD ASSOCIATES

JB/abs

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

STATE OF CALIFORNIA
Workers' Compensation Appeals Board
Division of Workers' Compensation

CASE NUMBER: ADJ11318013

MICHAEL DECELLE **vs.** **TAMPA BAY RAYS, TAMPA BAY RAYS; TRAVELERS DALLAS**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: ROBERT SOMMER

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

Defendant filed a timely verified Petition for Reconsideration, dated June 20, 2022 in response to the Opinion on Decision and Findings and Award, dated May 24, 2022. This matter came-on for trial on April 12, 2022; issues were framed and exhibits entered into evidence. The matter was submitted post-trial briefs on May 2, 2022. Applicant's claim involved a continuous trauma injury for the period of 6/1/1996 through 9/1/1999 as a professional baseball player. Applicant claimed injury to lumbar spine, left shoulder, and bilateral knees. Pursuant to the medical report(s) of AME Larry Danzig, M.D., dated 1/18/2020 (Joint Exhibit 1) it was found that applicant sustained injury to his lumbar spine, left shoulder, and bilateral knees arising out of and occurring in the course of employment. It was also found that applicant was entitled to temporary disability for the period beginning 8/1/1999 through 11/1/1999 at the rate of $490.00 per week, less a reasonable attorney's fee of 15% of the amount due, also based on the Danzig report. The ·issue of Labor Code § § 5412 & 5505.5 was raised.

DISCUSSION: LABOR CODE§§ 5412, 5505.5:

> Labor Code § 5500.S(a) places the liability for a cumulative injury on the employers, or carriers, during the one year immediately preceding either the last date of injurious exposure or the date of injury pursuant to Labor Code § 5412, whichever comes first.

Pursuant to Labor Code § 5412:

> 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.

A date of injury under § 5412 is not established merely by showing an applicant had knowledge of his or her disease pathology. [Chavira v. Workers1 Comp. Appeals Bd. (1991) 56 Cal. Comp.

Cases 631, 641] Instead, "disability," as used in § 5412, is evidence that either there is "compensable temporary disability" or "permanent disability." [State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte) (2004) 69 Cal. Comp. Cases 579, 584] An applicant obtains knowledge that his disability is industrially caused when he receives medical advice to that effect. [Zenith Ins.· Co. v. Workers' Comp. Appeals Bd. (Yanos) (2010) 75 Cal. Comp. Cases 1303, 1305 (writ denied)] In short, a cumulative trauma date of injury under § 5412 is established when there is evidence of temporary or permanent disability as well as medical knowledge that the disability was caused by the present or prior employment. In order to have medical knowledge, a confirming medical opinion is an important factor in making that determination. [Nielsen v. Workers' Comp, Appeals Bd. (1985) 50 Cal. Comp. Cases 104]

Pursuant to AME report of Larry Danzig, M.D., dated 1/18/2020, on this date applicant had knowledge of his disease pathology and there was evidence of compensable temporary disability or permanent disability.

Labor Code § 5500.5(a) places the liability for a cumulative injury on the employers, or carriers, during the one year immediately preceding either the last date of injurious exposure or the date of injury pursuant to Labor Code § 5412, whichever comes first. Thus, the last date of injurious exposure is 9/1/1999 and is determinative on the issue.

Pursuant to the Minor League Uniform Player Contract, dated 1998, the contract between Tampa Bay Devil Rays, Limited and applicant, is the last contract in evidence. (Defense Exhibit C)

Pursuant to applicant's deposition testimony (Exhibit 2) applicant was drafted by the Tampa Bay Rays in 1996 and signed his contract in California. (Id. at p. 22). Starting in 1998, he attended spring training with Tampa Bay. He did not recall if he signed a contract in in 1998 with Tampa Bay. (Id. at p. 41). He was released from the Tampa Bay Rays on the last day of spring training. Subsequently, he went to play in Duluth. (Id. at p. 42). He finished the 1998 season with Duluth 1998. In 1999 he played with two teams, Rio Grande Valley and Abilene. He started the 1999 season at Rio Grande Valley and believes he signed a contract with them in California. (Id. at p. 44). He was subsequently trade by Rio Grande to Abilene. (Id. at p. 46). After playing with Abilene applicant retired due to a chronic back condition. (Id. at p. 48).

Pursuant to *Royster v. NFL Europe (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 445*, Labor Code §§5305, and 3600.5(a) indicate the WCAB has jurisdiction over claims for out-of-state injury if the contract for hire was made in California.

DEFENDANT CONTENDS:

1. The award found, among other things, that Applicant was employed with the Tampa Bay Devil Rays through the last date of injurious exposure which that WCJ determined was 9/1/1999.

Defendant references
https://www.baseballalmanac.com/teamstats/schedule.php?y=1998&t=TBA to indicate the regular season began on March 31, 1998 and applicant's last date of employment with the Tampa

Bay Devil Rays would have been no later than March 30, 1998. (Defendant's Petition for Reconsideration, dated June 20, 2022, p. 3)

It should be noted that website mention above was neither entered into evidence, nor Judicial Notice requested.

Pursuant to Labor Code § 5500.5(a):

> In the event that none of the employers during the above referenced periods of occupational disease or cumulative injury are insured for workers' compensation coverage or an approved alternative thereof, liability shall be imposed upon the last year of employment exposing the employee to the hazards of the occupational disease or cumulative injury for which an employer is insured for workers' compensation coverage or an approved alternative thereof.
>
> Any employer held liable for workers' compensation benefits as a result of another employer's failure to secure the payment of compensation as required by this division shall be entitled to reimbursement from the employers who were unlawfully uninsured during the last year of the employee's employment, and shall be subrogated to the rights granted to the employee against the w1lawfully uninsured employers under the provisions of Article 1 (commencing with Section 3700) of Chapter 4 of Part l of Division 4.

The date of liability of an employer or employers under found under Labor Code §§ 5412 & 5500.5 is 9/1/1998 through 9/1/1999.

***

RECOMMENDATION

The undersigned WCJ respectfully recommends that defendant's Petition for Reconsideration, dated June 20, 2022 be denied.

Respectfully submitted,

DATED: June 29, 2022

/s/ Robert Sommer
ROBERT SOMMER
Workers' Compensation Administrative Law Judge

Served on all parties on the
Official Address Record
06/29/2022 Vanessa Campos