WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CHRISTOPHER THOMPSON, *Applicant*

vs.

PAQ INCORPORATED; WCF NATIONAL INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ15383875
San Luis Obispo District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the April 12, 2023 Findings of Fact, Orders, and Opinion on Decision (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a combo/grocery store manager during the cumulative injury period ending January 31, 2021, sustained industrial injury to the bilateral hips.

Defendant contends that applicant's testimony was unreliable; that applicant's date of injury under Labor Code section 5412[1] was no later than February 25, 2019; that the statute of limitations was not tolled; and that compensation is barred by section 5405.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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 April 12, 2023, except that we will amend the decision to find that the date of injury pursuant to section 5412 was September 1, 2021.

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

BACKGROUND

Applicant claimed injury to the bilateral hips while employed as a combo/grocery store manager by defendant PAQ, Incorporated, from January 31, 2020 to January 31, 2021. Defendant denies liability, asserting the claim is barred by the statute of limitations.

In March, 2021, the applicant requested a DWC-1 claim form alleging industrial injury. (Petition, at 3:10; Answer, at 2:27; Minutes of Hearing and Summary of Evidence (Minutes), March 6, 2023, at p. 4:24.)

On April 1, 2021, defendant denied applicant's claim for benefit based on lack of coverage. (Ex. B, Notice of Denial of Claim, April 1, 2021, at p. 1.)

The parties thereafter selected orthopedic Qualified Medical Evaluator (QME) Thor Gjerdrum, M.D., who evaluated applicant on September 1, 2021 and issued a comprehensive medical-legal report pursuant to section 4060, in the specialty of orthopedic medicine. Therein, Dr. Gjerdrum discussed the results of applicant's clinical evaluation and a limited record review. (Joint Ex. 1, Report of Thor Gjerdrum, M.D., dated September 1, 2021, at p. 2.) Applicant reported that in July, 2018, he was pushing carts when he first felt pain in the left hip, but did not seek medical treatment and missed no time from work. The pain gradually worsened, and applicant eventually sought care through his primary care physician. (*Ibid.*) Dr. Gjerdrum concluded that applicant had sustained cumulative injury from 2018 through January 31, 2021. (*Id.* at p. 9.)

On September 21, 2021, Dr. Gjerdrum reviewed additional records and issued a supplemental report, indicating no change to his prior opinions. (Joint Ex. 2, Report of Thor Gjerdrum, M.D., dated September 21, 2021, at pp. 5-6.)

On November 4, 2021, applicant filed an Application for Adjudication, claiming injury from January 31, 2020 to January 31, 2021 to the bilateral hips.

On September 28, 2022, Dr. Gjerdrum reviewed additional records and issued a supplemental report, indicating no change to his prior opinions. (Joint Ex. 3, Report of Thor Gjerdrum, M.D., dated September 28, 2022, at p. 5.)

On March 6, 2023, the parties proceeded to trial on the issue of whether applicant had sustained injury arising out of and in the course of employer (AOE/COE), the date of injury, and defendant's affirmative defense that compensation was barred by the statute of limitations. (Minutes, at p. 2:9.) Applicant and two employer witnesses testified, and the parties submitted the matter for decision.

On April 12, 2023, the WCJ issued his F&O, determining that applicant, while employed by defendant during the period ending January 31, 2021, sustained injury AOE/COE to the bilateral hips. (F&O, Finding of Fact No. 5.) The Opinion on Decision discussed the requirements of section 5412, and concluded that applicant's date of injury was January 31, 2021, the last day of the claimed cumulative injury. The WCJ further concluded that the statute of limitations was tolled until applicant was provided with a claim form in March, 2021. (F&O, Opinion on Decision, pp. 7-8.)

Defendant's Petition asserts that applicant's reporting of the injury is inconsistent in the evidentiary record, and is unreliable. (Petition, at 5:17.) Defendant avers the date of injury pursuant to section 5412 was no later than February 25, 2019, the date applicant signed and submitted his Family Medical Leave Act (FMLA) paperwork. (*Id.* at 7:21; 9:12.) Defendant also contends that the statute of limitations was not tolled, because applicant had actual knowledge of his right to file a claim, but failed to do so in a timely manner. Accordingly, defendant contends the F&O should be rescinded in favor of a new decision that compensation is barred under section 5405. (*Id.* at 9:24.)

Applicant's Answer observes that both the WCJ and QME Dr. Gjerdrum found applicant to be a credible witness, and that applicant did not have the required compensable disability and knowledge of its work-relatedness until January 30, 2021. (Answer, at p. 4:25.) Applicant also asserts that the employer's failure to offer a claim form tolled any statute of limitations until at least March, 2021. (Answer, at p. 6:9.)

DISCUSSION

We note from the outset that the WCJ determined that applicant's trial testimony was credible. (F&O, Opinion on Decision, p. 3.) Defendant's Petition nonetheless asserts that "applicant's reporting of the injury cannot be confirmed," as the testimony of applicant is inconsistent and unreliable. (Petition, at p. 5:14.) However, in workers' compensation proceedings, a WCJ's credibility determinations are "entitled to great weight because of the [WCJ's] 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand …." (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Only evidence of considerable substantiality would warrant rejecting the WCJ's credibility determination. (*Id.* at pp. 318-319.) Following our review of the

record occasioned by defendant's Petition, we discern no such evidence of considerable substantiality, and therefore decline to disturb the WCJ's determinations as to witness credibility. (F&O, Opinion on Decision, p. 3.)

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 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.* (1984) 153 Cal.App.3d 327 [49 Cal.Comp.Cases 224].)

In cases involving an alleged cumulative trauma 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 date of injury under section 5412 is an integral consideration with respect to various workers' compensation benefits. (e.g. Lab. Code, §§ 4658, 4660 et seq.) In *Argonaut Mining Co. v. Ind. Acc. Com. (Gonzalez)* (1951) 104 Cal.App.2d 27 [16 Cal.Comp.Cases 118], the court held that in addition to identifying the date of injury for purposes of the operation of the statute of limitations, section 5412 "also sets the date for the measurement of compensation payable, and all

other incidents of the [worker's] right." (See also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) 268 Cal. Rptr. 699 [55 Cal.Comp.Cases 107].)

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].)

Here, applicant sustained compensable disability when he went off work in February, 2019 for two weeks, and again in March, 2021, following arthroscopic hip surgery. (Petition, at p. 2:25; Answer, at p. 2:14.) We also observe that applicant was restricted from ascending or descending stairs at work by his primary care physicians as early as 2019. (Ex. D, Records of Dennis Blackburn, D.O. (report of James Kasper, M.D.), August 23, 2019, at p. 13; Minutes, at 7:24.)

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.*)

In *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104] (*Nielsen*), applicant worked generally as a welder, but three week before his last day worked, applicant had been assembling and disassembling heavy bottle racks. The applicant noted in these final three weeks the onset of radiating pain in his left leg. The applicant informed his foreman of the pain while still working, and consulted a Dr. Nery on his last day worked. When asked by Dr. Nery, applicant related the causation of his injury to either his work activities, or an incident of "kick-fighting" with a friend several weeks earlier. At trial, "[a]pplicant testified emphatically he thought from the very first day he was off work that his condition was caused by the work assembling and disassembling the bottle racks …." (*Id.* at p. 927.) The Court of Appeal held that "[w]ithout more, applicant's emphatic testimony he thought from the very first day he was off work that his condition was caused by the work assembling and disassembling the bottle racks and his suggesting to Dr. Nery, the first physician he consulted, that his condition might have been caused by lifting and bending on his job would be sufficient to support the determination of both the WCJ and the Board that he knew or reasonably should have known as of that date that his disability was caused by the employment (*Id.* at p. 927). *Nielsen* also addressed the applicant's contention that medical advice was necessary to support "legal knowledge" for purposes of §5412, as was the holding in *Johnson, supra*. The *Nielsen* court reviewed the holding in *Johnson*, and concluded that "the absence of a medical opinion confirming industrial causation is but one important circumstance which is to be considered together with the other circumstances in determining in a particular case whether the applicant should reasonably have known his or her injury was industrially caused." (*Id.* at p. 930).

Here, defendant avers that applicant's knowledge of the work-relatedness of his injuries is demonstrated by his complaints to his personal physicians in 2018 and 2019 that long days and heavy exertion at work increased his pain. (Petition, at 6:20.) However, the evidentiary record

describes no medical advice to applicant of the existence of a cumulative injury claim in 2018 or 2019, or that any such injury was industrially caused. While defendant contends applicant received training on how to *file* a workers' compensation claim (Petition, at p. 8:17), defendant offers no evidence that applicant, a clerk/cashier and later assistant manager in a retail setting, had the requisite training, skills or experience to recognize the constellation of symptoms he was experiencing as a cumulative injury, or to reach the conclusion that such injury was industrially caused. (*Johnson, supra,* at p. 473.) Defendant elicited no trial testimony confirming applicant's awareness of the existence of a cumulative injury and its industrial causation at any time in 2018 or 2019. We also observe that applicant's intake questionnaire for his personal treating physicians at Central Coast Orthopedic Medical Group in January, 2019, lists the onset of applicant's hip-related pain and loss of motion as "gradual," and that applicant was "unsure" as to how the injury occurred. (Ex. D, Records of Dennis Blackburn, D.O., January 9, 2019, at p. 36.)

Accordingly, we are persuaded that applicant may not be charged with knowledge that his disability is job related without medical advice to that effect, because applicant did not possess the training, intelligence and qualifications to independently recognize the relationship between the known adverse factors involved in his employment and his disability." (*Johnson, supra*, at p. 473.) The first medical advice to applicant of the existence of a cumulative injury was the reporting of QME Dr. Gjerdrum on September 1, 2021. (Joint Ex. 1, Report of Thor Gjerdrum, M.D., September 1, 2021, at p. 9.) The QME's initial report is also the first evidence to attribute applicant's cumulative injury to his work activities. (*Ibid.*) Accordingly, we conclude that the concurrence of applicant's prior compensable disability with knowledge of the injury and its industrial causation fixes the section 5412 date of injury as September 1, 2021.

The statute of limitations is an affirmative defense, and the burden of proof rests with defendant. (Lab. Code, §§ 5409, 5705.) Here, defendant has not established that the date of injury as set by section 5412, was more than one year removed from the date of commencement of proceedings for the collection of benefits. (Lab. Code, § 5405(a).) We therefore concur with the WCJ that defendant has not met the burden of establishing that compensation is barred by the statute of limitations.

In addition, and irrespective of the above analysis under section 5405(a), we further observe that the running of the statute of limitations was tolled under section 5405(c). Pursuant to section 5405(c), applicant may commence proceedings for the collection of benefits within one

year of the last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished. (Lab. Code, § 5405(c).) Here, the employer's provision of healthcare benefits constitutes the provision of benefits specified in section 5405(c), and serves to toll the running of the statute of limitations. (*Plotnick v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 622 [35 Cal.Comp.Cases 13] (*Plotnick*).)

In *Plotnick,* the Supreme Court held that Labor Code section 5405(c) applied to toll the statute of limitations where medical treatment was provided by the employer for a prior specific injury to the same part of the body as that claimed in a subsequent cumulative trauma. The injured worker in *Plotnick* sustained an injury to his right leg in 1956, for which he received an award of permanent disability and future medical treatment in 1958. He had returned to work in 1957, but suffered increasing pain in his leg and other parts of his body due in part to the effects of his specific injury as well as cumulative trauma. He received continuous medical treatment subsequent to his 1956 injury. In 1966, his physician advised him to stop working due to the continued effects of his injuries. In December of 1967, he filed a claim for a cumulative trauma injury from 1957 and October 26, 1966, to his right leg, hip and back.

The Appeals Board held his claim was barred, finding that although he did sustain a cumulative trauma injury in October 1966, his intervening medical treatment was related to applicant's 1956 injury. On appeal, the Court reversed the Appeals Board, finding the medical treatment provided for the earlier specific injury was also necessary to treat the subsequent cumulative trauma injury, and that "[i]t follows inevitably that any treatment received during that time from the employer must to some extent have been designed to relieve him from the effects of the injury incurred in the 1957-1966 period." (*Plotnick*, *supra*, at pp. 15-16.)

Similarly, medical treatment afforded by an employer in the form of group medical coverage utilized to cure or relieve a claimed industrial injury is a benefit related to applicant's industrial injury. (*Pizza Hut of San Diego, Inc. v. Workers' Comp. Appeals Bd. (Bailey)* (1978) 76 Cal.App.3d 818, 822-23 [43 Cal.Comp.Cases 70] (an employer's "group insurance policy came within the scope of … voluntarily furnishing medical benefits to relieve the effects of [an] industrial injury"); *Mihesuah v. Workmen's Comp. Appeals Bd.* (1972) 29 Cal.App.3d 337, 339-340 [37 Cal.Comp.Cases 790].)

Here, applicant testified that in 2018, he felt a "tweak in the lower half of my body," a pinch, and reported it to his supervisor, but did not receive a claim form. (Minutes, at 3:25.)

Applicant sought nonindustrial treatment through his health insurance and requested and received work accommodations of no climbing stairs. (Minutes, at pp. 3:25; 7:24; 9:4.) Thereafter, applicant continued to treat on a nonindustrial basis, eventually culminating in an arthroscopic surgery in March, 2021, and a subsequent total hip arthroplasty in June, 2021. Pursuant to *Bailey, supra*, 76 Cal.App.3d 818, and *Mihesuah, supra*, 29 Cal.App.3d 337, the running of the statute of limitations was tolled by the employer's provision of healthcare benefits utilized by applicant to both diagnose and treat a workplace injury.

Thus, and irrespective of our analysis of the date of injury under section 5405(a), the statute of limitations would not bar compensation herein because the provision of employer-sponsored medical benefits to treat a workplace injury constitutes treatment provided under section 4600. (Lab. Code, § 5405(c).) Whether analyzed under section 5405 subdivisions (a) or (c), defendant has not met its burden of establishing that compensation is barred by the running of the statute of limitations. We affirm the F&O, accordingly.

However, we also observe that the section 5412 date of injury is a necessary consideration in the evaluation of the statute of limitations defense to a cumulative injury claim under section 5405(a), and further, that the parties placed the section 5412 in issue for decision. (Minutes, at p. 2:10.) We will therefore amend the F&O to include a finding that the date of injury under section 5412 was September 1, 2021.

In summary, we accord to the WCJ's credibility determination the great weight to which it is entitled. We further find that applicant's date of injury was September 1, 2021, the date applicant first received medical advice as to the existence and industrial etiology of a cumulative injury. Because the application for adjudication was filed within one year of the date of injury, compensation is not barred under section 5405(a). Finally, and irrespective of our determination with regard to section 5405(a), the employer's provision of healthcare used by applicant to cure or relieve the effects of the industrial injury tolled the running of the statute of limitations under section 5405(c). Accordingly, we affirm the F&O, except that we amend it to include the date of injury, as contemplated by section 5412 and placed in issue by the parties.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the Findings of Fact, Orders, and Opinion on Decision, issued April 12, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Orders, and Opinion on Decision, issued April 12, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

6. The date of injury pursuant to Labor Code section 5412 was September 1, 2021.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 3, 2023

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

CHRISTOPHER THOMPSON
EDWIN K. STONE LAW
ALBERT AND MACKENZIE

SAR/abs

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