WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ERIC BATES, *Applicant*

vs.

CINCINNATI REDS, PERSMISSIBLY SELF-INSURED, *Defendants*

Adjudication Number: ADJ11861129
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the September 13, 2023 Findings and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed by the Cincinnati Reds from June 1, 1989 to March 31, 1991, sustained industrial injury to the head, eyes (vision), jaw, neck, back, shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet and toes, psyche, neurological systems, sleep, ears, nose, throat, teeth, mouth, internal systems and neuropsyche, and deferred final determinations as to temporary and permanent disability pending development of the record.

Defendant contends that applicant was not an employee of the Cincinnati Reds; that as a result, there is no subject matter jurisdiction as to the Cincinnati Reds; that there is no estoppel to assert the running of the statute of limitations; that applicant's claim is barred by the statute of limitations; that the WCJ's determination of applicant's earnings was in error; and that applicant's claim for psychiatric injury is barred by the six-month employment requirement found in Labor Code[1] section 3208.3(d).

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

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted to amend applicant's average weekly wages, but otherwise denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration, rescind the WCJ's decision, and substitute new Findings of Fact and Orders.

FACTS

Applicant claimed injury to the head, eyes (vision), jaw, neck, back, shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet and toes, psyche, neurological systems, sleep, internal, ENT, dental, and neuropsyche. while allegedly employed as a professional baseball player by defendant Cincinnati Reds from June 1, 1989 to March 31, 1991. Defendant avers a lack of subject matter jurisdiction over the claimed injury, and further denies the injury arose out of and in the course of employment.

The parties have obtained Qualified Medical Evaluator (QME) reporting from Larry Danzig, M.D., in orthopedic medicine, Myron Nathan, M.D., in psychiatry, Andrew Berman, M.D., in otolaryngology, and Gary Stewart, M.D., in internal medicine. Applicant has further obtained medical reporting from Michael Einbund, M.D., in orthopedic medicine, Ted Greenzang, M.D., in psychiatry, Michael Wells, DDS, in dentistry, and Prakash Jay, M.D., in internal medicine.

On June 1, 2023, the parties proceeded to trial, framing issues including employment, whether applicant's injury arose out of and in the course of employment (AOE/COE), earnings, temporary and permanent disability, the permanent and stationary date, apportionment, need for further medical treatment, and attorney fees. (Minutes of Hearing and Summary of Evidence (June 1, 2023 Minutes), June 1, 2023, at p. 2:18.) The parties further raised the issue of compensability per the statute of limitations of section 5405, subject matter jurisdiction, liability of the defendants pursuant to section 5500.5, the six-month employment rule of section 3208.3, the equitable defense of laches, and the section 5412 date of injury.

On August 22, 2023, the WCJ conducted additional trial proceedings, from which the parties submitted the matter for decision.

On September 13, 2023, the WCJ issued his F&O, determining in relevant part that applicant was an employee of the Cincinnati Reds from June 1, 1989 to March 31, 1991. (Finding of Fact No. 1.) The WCJ further found injury AOE/COE, with a date of injury of June 1, 1989 to July 31, 2019. (Finding of Fact No. 2.) In addition, the WCJ found California subject matter jurisdiction over the claimed injury, with a date of injury of June 1, 1989 to July 31, 2019. (Findings of Fact No. 3 & 4.) The F&O determined that the section 3208.3(d) six-month employment requirement would not bar compensation for claimed psychiatric injury, and that the period of liability pursuant to section 5500.5 was July 31, 2018 to July 31, 2019. (Findings of Fact Nos. 6 & 7.) Finally, the WCJ determined applicant's average weekly wages were $950.00 per week. (Finding of Fact No. 8.) The WCJ deferred the determination of both temporary and permanent disability pending development of the record. (Findings of Fact Nos. 11 & 12.)

Defendant's Petition for Reconsideration avers the written contracts in evidence demonstrate applicant was employed by entities other than the Cincinnati Reds. (Petition for Reconsideration (Petition), October 6, 2023, at p. 3:2.) Lacking a contract of hire, defendant avers the court is without "subject matter jurisdiction over the Reds." (*Id.* at p. 4:1.) The Petition maintains that defendant is not estopped from asserting that compensation is barred by the statute of limitations, because applicant was "well aware of his work injuries more than a year before filing this claim and yet did not timely pursue any workers['] compensation benefits." (*Id.* at p. 4:24.) Defendant's Petition asserts the date of injury pursuant to applicant's knowledge was more than one year prior to the filing of the application. (*Id.* at p. 5:17.) Defendant further contends that the WCJ mistakenly substituted applicant's monthly earnings in lieu of his weekly earnings. (*Id.* at p. 7:18.) Defendant further contends that the six-month employment requirement of section 3208.3(d) bars compensation for psychiatry injury. (*Id.* at p. 8:6.) Finally, defendant avers that the lack of employment with the Cincinnati Reds and the lack of any other joined employers obviates the designation of a liable employer pursuant to section 5500.5. (*Id.* at p. at p. 9:14.)

DISCUSSION

Defendant's Petition avers "there is no evidence of employment with [the] Cincinnati Reds." (Petition, at p. 3:2.) Based on the lack of an employment relationship between applicant and the Cincinnati Reds, defendant avers there can be no subject matter jurisdiction over the team, and no liability for the injuries pleaded by applicant. (*Id.* at p. 4:1.)

Pursuant to Labor Code section 3300, an "employer" includes, in relevant part, every "person … which has any natural person in service." (Lab. Code, § 3300, subd. (c).) An "employee" is any person "in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed …." (Lab. Code, § 3351.) "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." (Lab. Code, § 3357.)

Here, the defendant has stipulated to, and simultaneously contested, applicant's employment with the Cincinnati Reds. (June 1, 2023 Minutes, at p. 2:4; 2:18; see also Joint Pre-trial Conference Statement, pp. 2-3.) However, as is observed by the WCJ, applicant offered credible testimony relevant to the issue of employment with the Cincinnati Reds:

> There are photos of Applicant signing the contracts in this matter. Ex. 12 (see Ex. 13 for the contracts). There is credible, unrebutted testimony of Applicant. He signed all of his pro contracts while physically in California, referring to the June 1989 contract and the January 1990 contract, confirming both of those were with the Cincinnati Reds and signed in California. Minutes of Hearing and Summary of Evidence EAMS Doc ID: 76830277 (hereinafter "MOH/SOE I") June 1, 2023 p: 8; ll: 2-4.
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> A Cincinnati Reds scout Roger Ferguson told Applicant he was drafted by the Reds, would be present to sign the contract and was in fact identified as sitting down together to sign the 1989 contract in Fair Oaks California with him. Id. ll: 4-10.
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> A Cincinnati Reds scout Jeff Zimmerman mailed the 1999 contract with the Cincinnati Reds to Applicant, went to Applicant's apartment in Rancho Cordova, California and they sat down, reviewed, and signed the contract which Applicant's ex-wife photographed. Id. ll: 11-16. There is photographic evidence of the California contract signing(s). Ex. 12; MOH/SOE p: 8: ll: 16-21.
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> The teams identified in the contracts were affiliates of the Cincinnati Reds, the Billings Baseball Club owned by the Cincinnati Reds, and the Cincinnati Reds paid Applicant; he has all the checks according to his credible, unrebutted testimony. Id. p: 9; ll: 2-7. A preponderance of evidence reflects California contracts executed with the Cincinnati Reds via its owned or affiliated minor league teams. Exs. 12-13; K.
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> (Report, at p. 4.)

The WCJ further observes:

> Applicant provided the Cincinnati Reds services by playing baseball for its minor league teams and affiliates. The undersigned finds further Applicant provided services to the Cincinnati Reds in the form of granting it his contract rights, thus ensuring his baseball services were available to it and no other non-affiliated professional baseball teams. The testimony and contracts in this matter reflect consideration paid by the Cincinnati Reds, its minor league teams and/or affiliates to Applicant for these services, though the contracts themselves are not binding alone on the issue of employment.
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> (Report, at p. 3.)

We agree with the WCJ's analysis of applicant's testimony, and further note that the WCJ specifically found applicant's testimony to be credible. (See generally, Report, at pp. 8-9, 11.) "[W]here the findings are supported by 'ample, credible evidence' [citation] or 'substantial evidence' [citation] they are entitled to great weight [citations] because of the referee's 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand ….' [Citation.]" (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].)

Thus, applicant's credible and unrebutted testimony supports the assertion that applicant negotiated his contract with representatives for the Cincinnati Reds, and signed contracts with those same representatives in 1989 and again in 1990. Applicant's testimony further establishes that applicant performed services for and conferred a benefit on the Reds. Accordingly, and on the record before us, we concur with the WCJ's determination that applicant has made prima facie showing of an employment relationship with the Cincinnati Reds, by a preponderance of the evidence.

Applicant has the initial burden on the issue of employment. "Once the presumption of employment comes into play, the burden shifts to the employer to establish that the injured person was an independent contractor or otherwise excluded from protection under the Workers' Compensation Act." (*Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 642 [52 Cal.Comp.Cases 467].) If the alleged employer denies the "essential contract of hire," the first task is to "determine whether the employment contract existed." (*Id.* at p. 471.) Given the "broad statutory contours" of workers' compensation:

> … an "employment" relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act [citations omitted] In so doing we must bear in mind section 3202's mandate that "workmen's compensation statutes are to be construed liberally in favor of awarding compensation." [citations omitted]
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> (*Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777 [37 Cal.Comp.Cases 185].)

The Supreme Court in *Laeng* did not "imply that common law notions of the employment relationship should never be considered in determining the issue of 'employment' under workmen's compensation, but only that such common law principles are not determinative of the issue." (*Id*. at 777, fn. 7.)

> As both Larson and Hanna have pointed out, the differences between the common law and workmen's compensation usage of the term "employment" stem from the fundamentally different purposes served by the employment concept in each context. Thus, whereas at common law the "master-servant" concept was utilized primarily to delimit the scope of the master's vicarious tort liability and was thus concerned with injuries caused by the employee, the basic inquiry in compensation law involves which injuries to the employee should be insured against by the employer. [citations omitted] Although there is considerable overlap between the two fields, in each context the determination of the presence or absence of a sufficient "employment" relationship must ultimately depend on the purpose for which the inquiry is made. Earlier cases, such as *Western Ind. Co. v. Pillsbury* (1916) 172 Cal. 807, 813–814 [159 P. 721] and *County of Los Angeles v. Industrial Acc. Com.* (*Calderwood*) (1932) 123 Cal. App. 12, 17 [11 P.2d 434], while concededly reflecting a less receptive attitude to the "purposive" approach to statutory interpretation than that shared by most courts today, stopped short of freezing the "employment" concept into an unchanging mold, insensitive to the context in which the term is used, as the respondents apparently would have this court do.
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> (*Id.* at p. 777, fn. 7.)

Here, defendant offers no evidence to rebut applicant's assertion that he was scouted by the Cincinnati Reds, was drafted by the Reds, that he entered contract negotiations with the Reds, and that Billings Baseball and the Charleston Wheelers were affiliates of the Reds. Defendant avers that there is nothing in the 1989 and 1990 contracts that indicates applicant's employment was with the Cincinnati Reds. (Petition, at p. 3:17.) However, applicant's credible and unrebutted

testimony supports the WCJ's conclusion that both teams were affiliates of the Reds at all relevant times. Defendant offers no evidence and interposes no witnesses to establish that the Billings and Charleston teams were not affiliates of the Reds, or to rebut applicant's assertions with respect to contract formation in California. In short, applicant has met his burden of establishing the existence of an employment relationship sufficient for purposes of invoking California's workers' compensation law, and defendant has not affirmatively met its burden of overcoming applicant's prima facie showing. (Lab. Code, §§ 3351, 5705.) Following our independent review of the record occasioned by defendant's Petition, we discern no good cause to disturb the WCJ's findings that applicant was an employee of the Cincinnati Reds from June 1, 1989 to March 31, 1991. (Finding of Fact No. 1.)

Defendant further contends that the WCJ erred in his determination as to the date of injury pursuant to section 5412. (Petition, at 5:19.) Defendant avers applicant knew of his symptoms as early as 2004, when he discussed the issue with his physicians at UC Davis. The WCJ's Report observes:

> Defendant argues Applicant's date of injury pursuant to Labor Code §5412 was February of 1990, when Applicant last played professional baseball. Petition EAMS Doc ID: 48510139 p: 5; ll: 19-20. Defendant recognizes Labor Code §5412 fixes cumulative trauma date of injury as "that date upon which the employee first suffered disability therefrom and either knew, or should have known, that such disability was caused by his present or prior employment." Id. The undersigned disagrees with Defendant's assertions as follow[s]:
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> "Applicant knew his need for surgery to the right arm was related to his baseball career and informed doctors of this in 2004 as set forth in the records from UC Davis. (See, Defense Ex. H). The records of UC Davis are prelitigation and should be considered credible. They have specific details that Applicant was told to have surgery in the 90's but that he refused because he was afraid. The records further state the basis for his fear was that his friend's mom died during surgery. Applicant confirmed at trial that indeed his friend's mom had died during surgery (See MOH/SOE page 12 lines 19-22). There would be no reason for the UC Davis physicians to ever hear about his friend's mom dying during a surgery unless Applicant told them that information; and there would be no reason for Applicant to tell them that information unless he was explaining why he did not have surgery previously.
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> The Applicant's testimony that he was never told to have a prior surgery is not credible; that information is littered throughout the records of UC Davis records which are all pre-litigation and must be considered reliable. The undersigned finds the above records lack enough specificity as to medical causation of the

need for Applicant's surgeries as opposed to simply need for surgery, such that Applicant had enough medical information, knowledge, expertise and/or notice of rights to file a California cumulative trauma claim due to a California workers' compensation injury. The undersigned finds the above records insufficient to attribute knowledge therefrom to Applicant that he suffered cumulative disability of any kind due to California employment in baseball by the Cincinnati Reds.

Whether an employee knew or should have known his disability was industrially caused is a question of fact. *City of Fresno v. WXB (Johnson)* (1985) 50 CCC 53; *Pacific Indemnity Co. v. IAC* (1950) 34 Cal.2d 726, 729; *Chambers v. WCAB* (1968) 69 Cal.2d 556, 559. The burden of proving that the employee knew or should have known rests with the employer.

This burden is not sustained merely by a showing that the employee knew he had some symptoms. *Chambers v. WCAB*, Id., at p. 559*; Pacific Indemnity. Co. v. IAC*, Id., at p. 729. Even if Defendant proves knowledge of a specific industrial injury it is not equivalent to knowledge of the right to file a claim of cumulative trauma industrial injury. An employee is not charged with knowledge of an employment relationship without evidence of medical advice to that effect unless the nature of the disability and the employee's training is such that the relationship between employment and disability is recognized. *City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467 (50 Cal. Comp. Cases 53]; *City of Los Angeles/Los Angeles Police Department v. Workers' Comp. Appeals Bd. (Darling)* (2005) 70 Cal. Comp. Cases 1147 [2005 Cal. Wrk. Comp. LEXIS 22] (writ den.). While Applicant may have been aware he had pain and/or perhaps that he suffered specific work injuries, Applicant was not aware of, nor did he appear to have obtained the requisite knowledge that he had suffered a continuous trauma injury, and no physician apprised him of this being a possibility prior to the filing of his CT claim. A worker is not chargeable with knowledge that his disability is job-related without medical confirmation, unless the nature of the disability and the worker's qualifications are such that he should have recognized the relationship. *City of Fresno v. WCAB (Johnson)* (1985) 50 CCC 53; *Con J. Frank Electric v. WCAB (Alexander)* (2004) 69 CCC 792.

Applicant's testimony is found credible by the undersigned even in light of and after review of the UC Davis records cited by Defendant. Applicant's credible testimony is he lacks requisite training and knowledge to have known he retained a right to file a workers' compensation claim before late 2018 or early 2019 when he talked to his attorney and that his treatment prior to his filing was due to California cumulative trauma injuries. MOH/SOE II p:7, ll: 17-20.

(Report, at pp. 8-10.)

While we agree with the WCJ's analysis, above, we also note that Finding of Fact No. 3 identifies a date of injury pursuant to Labor Code section 5412 as June 1, 1989 to July 31, 2019. We observe that "[t]he 'date of injury' is a statutory construct which has no bearing on the fundamental issue of whether a worker has, in fact, suffered an industrial injury … the 'date of injury' in latent disease cases 'must *refer* to a period of time rather than to a point in time' …[t]he employee is, in fact, being injured prior to the manifestation of disability … 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.* (*Butler*) (1984) 153 Cal.App.3d 327, 341 [49 Cal.Comp.Cases 224] (italics added).) Accordingly, a date of injury in a cumulative injury claim is a *fixed date*, rather than a period of time.

Labor Code section 5412 sets the date of injury for cumulative injury and occupational disease cases, as "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.) Thus, to determine the date of applicant's cumulative injury, there must exist a concurrence of disability with knowledge of industrial origin. Disability means either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579] (*Rodarte*).) Knowledge requires more than an uninformed belief. "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*).) While an employer's burden of proving the statute of limitations has run can be met by presenting medical evidence that an injured worker was informed a disability was industrially caused, "[t]his burden is not sustained merely by a showing that the employee knew he had some symptoms." (*Johnson, supra*, at p. 55.) The fact that a worker had knowledge of disease pathology does not necessarily mean that he knew, or should have known, that he had disability caused by the employment. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631]; *Rodarte, supra,* at p. 998.) An injured worker's suspicion that an injury is work-related is not sufficient to establish the date of injury on a cumulative injury. An injured worker will not be charged with knowledge that a disability is job-related without medical advice to that effect, unless given "the

nature of the disability and the applicant's training, intelligence and qualifications," he or she should have recognized the relationship. (*Johnson, supra*, at p. 57.)

Here, the WCJ's Opinion on Decision identifies the date of the concurrence of knowledge and disability as July 31, 2019, following applicant's receipt of the reporting of Dr. Einbund which established cumulative injury with industrial causation. (Opinion on Decision, p. 9.) Accordingly, we will amend Finding of Fact No. 3 to reflect a date of injury pursuant to section 5412 of July 31, 2019.

Defendant also avers error in the WCJ's wage calculations. (Petition, at p. 5:17.) Defendant contends the WCJ substituted applicant's monthly earnings in place of weekly earnings. The WCJ's Report acknowledges error in his calculations, and recommends we grant defendant's Petition for the purposes of correcting the weekly wage to reflect monthly earnings as set forth in applicant's contracts. We concur and will amend Findings of Fact No. 8 to reflect average weekly wages of $209.69.

Defendant further contends compensation for any claimed psychiatric injury is barred pursuant to the six-month employment requirement of section 3208.3(d). However, the WCJ observes in his Report:

> Applicant's contractual rights are exclusively the Cincinnati Reds' "during the calendar years 1989 and 1990 or the portion of that year remaining after the effective date of this Uniform Player Contract including Club's training season, the Club's exhibition games, the Club's championship playing season, any official league play-off series, any other official postseason series in which Club shall be required to participate, and in any other game or games in the receipts of which Player may be entitled to share." Ex. 13 pp: 1 & 7 ("Employment Year").
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> Applicant was employed during calendar years 1989 and 1990, physically working the months of June, July and August during the 1989 season, was last employed by the Reds until he last played pro baseball in 1990 and the Reds "owned his contract rights" until March 1, 1990." MOE/SOE II pp: 2; ll: 15-17; 10: ll: 2-5; 11: l: 17.
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> The same contracts are clear in distinguishing between the end of the contract by virtue of end date in time or existence, and affirmatively discontinuing employment by "termination" with required notice, i.e., an affirmative, unilateral act required of The Cincinnati Reds. The contract cited by the Cincinnati Reds for earnings support also addresses termination of employment as opposed to cessation of contract which may be noticed to Applicant in writing on seven (7) limited, specifically enumerated grounds. Id. pp: 5 & 11.

> There appears no substantial evidence of termination of Applicant's employment according to contractual terms. Further there appears no substantial evidence of "the delivery of written or telegraphic notice to Player" required for Applicant's termination. The mutual, agreed upon end-date of a contract is not found the equivalent of termination of Applicant's employment for purposes of Labor Code §3208.3(e) by the undersigned.
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> The undersigned recognizes Labor Code §5000 is clear no contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by the statutory division found applicable to this claim, and Labor Code §3202 requires the division shall be liberally construed by the Courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment. In this matter Applicant is presumed an employee independent of contractual terms, meets the definition of employee independent of the contracts in evidence, and the statutory presumption of employee is not rebutted by Defendant. Supra. pp: 3-4.
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> (Report, at pp. 11-12.)

We agree with the WCJ's analysis, and based thereon, decline to disturb Finding of Fact No. 6, finding that compensability for claimed psychiatric injury is not barred by section 3208.3(d).

Next, defendant avers the lack of an employment relationship with the Cincinnati Reds coupled with the lack of any other joined defendants obviates any designation of a liable party. (Petition, at p. 9:14.) However, we affirm the WCJ's determination of an employment relationship with the Cincinnati Reds herein, and further note that issues of temporary and permanent disability are deferred. (Findings of Fact 11 & 12.) In addition, we observe that the period of liability pursuant to Labor Code section 5500.5 is the one-year period prior to the *earlier* of the date of injury pursuant to section 5412, or the last date of injurious exposure. (Lab. Code, § 5500.5(a).) Here, the WCJ has found applicant played for the Cincinnati Reds through March 31, 1991. (Finding of Fact No. 1.) Accordingly, the earlier of the last date of injurious exposure (March 31, 1991) and the date of injury pursuant to section 5412 (July 31, 2019), is March 31, 1991. We will therefore amend Finding of Fact No. 7 to reflect that the period of liability under section 5500.5 is the one-year period preceding March 31, 1991.

Finally, we further observe that the WCJ has deferred a determination as to temporary and permanent disability pending development of the record. (Findings of Fact, Nos. 11 & 12.) Given the pendency of these issues, we will rescind Findings of Fact Nos. 9 and 10 with respect to causation and apportionment of possible permanent disability.

In summary, we agree with the WCJ that applicant has established through credible and unrebutted testimony that he was an employee of the Cincinnati Reds, and that defendant has not met its burden of rebutting applicant's assertion of employment. We also agree with the WCJ's recommendation that we grant defendant's Petition to reflect corrected average weekly wages. We therefore grant reconsideration, rescind the WCJ's F&O, and substitute new Findings of Fact that reflect a single date of injury of July 31, 2019, a period of liability pursuant to section 5500.5 of March 31, 1990 to March 31, 1991, and weekly earnings of $209.69. We will further rescind the WCJ's findings on the issue of apportionment, pending a determination as to permanent disability.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of September 13, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of September 13, 2023 is **RESCINDED,** and the following substituted therefor**:**

FINDINGS OF FACT

1. Applicant was an employee of the Reds during the period of June 1, 1989 to March 31, 1991.
2. Repetitive employment activities and repeated employment exposures during Applicant's employment by the Reds caused cumulative trauma injury to his head, eyes (vision), jaw, neck, back, shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet and toes, psyche, neurological systems, sleep, ears, nose, throat, teeth, mouth, internal systems and neuropsyche.
3. Applicant's date of injury pursuant to Labor Code section 5412 is July 31, 2019.
4. California has subject matter jurisdiction over Applicant's cumulative trauma claim.
5. The defense of estoppel is not applicable in this matter.
6. Labor Code §3208.3 exception does not bar Applicant's compensable psychiatric injury.
7. The liability period pursuant to Labor Code section 5500.5 is March 31, 1990 to March 31, 1991.

8. Applicant's average weekly wage is $209.69 per week for the purposes of determining applicable workers' compensation benefit rates.
9. The record must be further developed in the form of supplemental reporting by Dr. Michael Einbund M.D. on the periods of temporary total disability if herein.
10. The medical-legal record must be more fully developed on permanent disability WPI for each body part, overlap of permanent disability if any and psyche causation related only to Labor Code §4660.1 liability.
11. Applicant attorney is not entitled to attorney fees at this time as indemnity upon which attorney fees may be based cannot be determined without further development of the record.

ORDERS

1. Parties further develop the medical-legal record by obtaining supplemental reporting by Dr. Michael Einbund to address periods of temporary total or partial disability and dates thereof, if any.
2. Parties further develop the medical-legal record by obtaining supplemental reporting by all medical-legal evaluators regarding Applicant's WPI, if any, for every body part industrial or remaining allegedly industrial.
    a. All evaluators in differing specialties must also address overlap of WPI issued by other evaluators, if any.
    b. Evaluators of Applicant's psyche claim must evaluate whether psyche impairment is related to Applicant's orthopedic injuries or there is an independent employment basis for psyche injury to determine Labor Code §4660.1 as well as other deficiencies outlined in the Opinion below.

3. Parties submit all medical-legal reporting upon completion of 2. above to the Disability Evaluation Unit for consultative ratings.
4. The matter is off-calendar pending completion of further development of the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 5, 2023

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

ERIC BATES
GLENN, STUCKEY & PARTNERS
BOBER, PETERSON & KOBY

SAR/abs

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