WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FERNANDO AYALA, *Applicant*

vs.

GARDENERS' GUILD AND FEDERAL INSURANCE COMPANY, ADMINISTERED BY GALLAGHER BASSETT,
Defendants

Adjudication Numbers: ADJ16629567, ADJ15190569
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration (Petition) 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.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd*. (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated

as a petition for reconsideration because the decision resolves a threshold issue. To the extent that the petitioner challenging a hybrid decision disputes the WCJ's determination regarding interlocutory issues, the Appeals Board will evaluate those issues under the removal standard applicable to non-final decisions.

The petitioner challenges both final and interlocutory findings in the decision. Accordingly, we will apply the removal standard to our review of the interlocutory findings. (See *Gaona, supra*.)

The WCJ's finding that the evidentiary record must be further developed resolves an intermediate procedural or evidentiary issue. The decision does not determine any substantive right or liability and is not a threshold issue. Thus, petitioner's challenge to the evidentiary finding is subject to the removal standard. Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) Here, based upon the WCJ's analysis of the merits of the petitioner's arguments, we are not persuaded that significant prejudice or irreparable harm will result if the petition is denied and/or that reconsideration will not be an adequate remedy.

Therefore, we will deny the Petition.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 28, 2023

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

FERNANDO AYALA
BRIDGES LAW FIRM
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

LN/pm

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

Defendant seeks reconsideration of my Findings of Fact, dated September 6, 2023, that the applicant suffered a specific injury arising out of and in the course of employment (AOE/COE) in ADJ16629567 that is not barred by the post-termination defense of Labor Code section 3600(a)(10) or by the statute of limitations defense. Defendant also seeks reconsideration of my findings that further development of the record is required on the parts of body injured on the specific injury, and on whether the applicant suffered a cumulative trauma arising out of and in the course of employment. Filed on September 29, 2023, defendant's petition is timely and verified. Applicant filed an Answer to the Petition for Reconsideration on October 11, 2023. [Applicant's Answer was filed under EAMS Doc Title "Petition for Reconsideration" in error, and does not seek reconsideration of any Findings or Order.]

FACTS

1. Background.

In case no. ADJ16629567, applicant Fernando Ayala, while employed on February 9, 2021, as a gardener in Richmond, California, by Gardeners' Guild, insured by Federal Insurance Company, claimed to have sustained AOE/COE in the form of a hernia and to his bilateral hands, bilateral hips, spine, and bilateral shoulders.

In case no. ADJ15190569, the applicant, while employed during the period through June 9, 2021, as a gardener in Richmond, California, by Gardeners' Guild, insured by Federal Insurance Company, claims to have sustained injury AOE/COE in the form of a hernia, to his bilateral hands, bilateral hips, spine, and bilateral shoulders.

Edward Tang, D.C. is the Panel Qualified Medical Evaluator (PQME) for both cases. Peter McDuff, M.D. is a prior QME in these cases, and Lance Miller, D.C. is the treating physician. The issue for trial in both cases was injury arising out of and in the course of employment, with defendant asserting a post-termination defense, as well as the statute of limitations defense. All other issues were deferred. The case proceeded to trial on May 4, 2023, with additional testimony on June 8, 2023.

2. Findings of Fact and Order – September 6, 2023.

After consideration of all of the evidence I concluded that the applicant sustained a specific injury AOE/COE on February 9, 2021 to his lumbar spine in ADJ16629567. I found that the applicant gave notice to his employer of his specific lifting injury on February 9, 2021, prior to his termination, and therefore the post-termination defense did not apply. I also found that the employer did not meet its burden to show that the statute of limitations defense applies. I found the record not yet sufficiently developed to determine whether there is a cumulative trauma injury arising out of and in the course of employment with Gardeners' Guild in ADJ15190569.

3. Contentions on Reconsideration.

In its Petition for Reconsideration, defendant has three main contentions, which center on a lack of credibility of the applicant. Defendant contends: 1) because of the applicant's lack of credibility, there is not substantial medical evidence to support a specific injury AOE/COE on February 9, 2021 (9/29/2023 Petition, p. 4, line 4 – p. 5, line 23.); 2) the applicant failed to report his specific injury prior to termination and therefore his claim is barred by the post-termination defense (9/29/2023 Petition, p. 5, line 24 – p. 8, line 5.); and 3) defendant contends that my finding of a need for development of the record, and order to develop the record, on injury AOE/COE for the alleged cumulative trauma, and on the parts of body injured, is contrary to case law and statute. (9/29/2023 Petition, p. 8, line 6 – p. 9, line 18.)

Throughout Defendant's Petition for Reconsideration it is asserted that applicant's testimony and statements to providers are unreliable, and thus corrupts the medical reporting and statements that the applicant reported his injury. (For example. Petition for 9/29/2023 Petition, p. 4, lines 16-21, p. 5, line 11, and p. 6, lines 26-28.) Defendant also asserts that "… even IF applicant was clear to Yepez that he had a specific injury caused by an activity at work, and even IF Yepez reported the same to Wilber [sic], it is the duty of the injured worker to report injuries to those in appropriate management positions including foreman, manager or superintendent. Yepez was none of these." (9/29/2023 Petition, p. 7, lines 6-10.) Defendant asserts that, "In order to maintain a claim for benefits, an employee must first show an employer had knowledge of an industrial injury requiring more than first aide OR lost time, in order to trigger the employer requirement to investigate or otherwise provide a claim form [DWC 1].See LC 5401 and 5402." (9/29/2023

Petition, p. 5, line 26 – p. 6, line 1.) Defendant then cites to Honeywell v. Workers' Comp. Appeals Bd., 35 Cal. 4th 24 in support of its position that the employer did not have notice of an injury. (9/29/2023 Petition, p. 6, lines 1-28.)

4. Evidence at Trial

Relevant documentary evidence is summarized as follows:

Defendant's Exhibit A: Report of PQME Edward Tang, D.C., dated January 20, 2023.
Defendant's Exhibit B: Report of PQME Edward Tang, D.C., dated November 29, 2022.
Defendant's Exhibit J: Report of PQME Edward Tang, D.C., dated July 8, 2022.

Edward Tang, D.C. first evaluated the applicant remotely by video on June 9, 2022. (Defendant's Exhibit J, p. 2.) In the initial appointment he was evaluating the applicant for a June 9, 2021 injury claimed to the abdomen, low back, upper back, neck, headaches, and bilateral shoulders while working at Gardener's Guild. (Id. at pp. 3-4.) The applicant's deposition, a job description, and medical records were provided to Dr. Tang. (Id. at pp. 6-11.) Dr. Tang wrote that the history of the injury as described by the applicant as, "Mr. Ayala was lifting a tree which was supposed to be a 4 person job, but only 2 were available. While lifting up the tree, he felt a "pop" in his lower back and abdominal area. Mr. Ayala continued to work for the rest of the day." (Id. at p. 11.)

The applicant's complaints were of right shoulder pain, abdominal pain, lower back pain, and cervical spine pain. (Defendant's J, pp. 11-12.) Dr. Tang has notes for a physical examination, although the examination was remote, but noted a need to perform an in-person physical examination of the abdomen on the next visit. (Id. at pp. 13-15.) Dr. Tang found industrial injury to the right shoulder, the cervical spine and the lumbar spine. (Id. at p. 16.) He recommended evaluation by an evaluator in appropriate specialties for the headache complaints and the abdomen as those conditions were outside his area of expertise. (Id. at p. 16.) The applicant's disability was not yet permanent and stationary. (Id. at p. 16.) Despite the specific incident referenced by the applicant in his history of injury, Dr. Tang found the injuries related to the cumulative trauma. (Id. at p. 16.)

Defendant requested a supplemental report of Dr. Tang, questioning his finding of a cumulative injury, as opposed to a specific injury. (Defendant's B, p. 3.) Responding to specific

questions posed by defendant, Dr. Tang concurred that there was only evidence for a specific injury, and no objective evidence for a cumulative injury. (Id. at p. 12-13.)

Applicant then requested a supplemental report regarding the issues of whether the applicant suffered a cumulative or specific injury. Dr. Tang stated that there was not evidence to support a possible cumulative trauma. (Defendant's A, p. 3.) As to whether he opined the applicant suffered a specific injury on or about February 9, 2021, Dr. Tang stated, "After reviewing the records, Mr. Ayala sought help after lifting something heavy and felt a popping sensation and a bump in his umbilical area. It appeared that Mr. Ayala sustained an umbilical hernia on or about February 9, 2021[.]" (Id. at p. 3.)

Applicant's Exhibit 3: Peter McDuff, D.C., PQME Evaluation Report dated May 16, 2022.

The applicant had been evaluated by a prior QME Peter McDuff, D.C. on April 27, 2022, for a cumulative trauma injury from June 9, 2020 to June 9, 2021. (Applicant's 3, p. 1.) The reason for the replacement of Dr. McDuff is not clear in the record. Because he was replaced as medical-legal evaluator, the medical determinations of Dr. McDuff are not relevant. However it is noted that Dr. McDuff reported the history of injury as:

"Patient states that on 06/09/2020 "I was lifting a tree of about 200 pounds with a coworker. As I lifted the tree, I felt a burning pain in the center of my abdomen, and low back pain. I continued to work with the pain until the end of the day." The patient states that he reported the injury to his supervisor, Juan Yepes, the same day. Patient also reports additional industrial injuries that have occurred over time during his employment with Gardeners' Guild described as, neck pain, right shoulder pain and numbness in the right hand." (Applicant's 3, p. 2.)

Applicant's Exhibit 1: Lance Miller, D.C., Request for Authorization dated September 7, 2022.
Applicant's Exhibit 2: Lance Miller, D.C., Permanent & Stationary Report dated August 23, 2022.
Applicant's Exhibit 4: Lance Miller, D.C., Doctor's First Report dated October 29, 2021.
Defendant's Exhibit C: Report of Lance Miller, D.C., dated October 29, 2021.
Defendant's Exhibit E: Subpoenaed records of Lance Miller, D.C. dated February 11, 2022.

The applicant was first seen by Dr. Miller on October 29, 2021 for a June 9, 2020 date of injury. (Defendant's E, Bates no. 0037.) [Applicant's Exhibit 4, and Defendant's Exhibit E, are the same as the October 29, 2021 report contained in the subpoenaed records.] The mechanism of injury was recorded as "While carrying heavy boxes of trees to set up patient states he felt a sharp pain in his belly button/ab region. The sharp pain in his lower-upper back and neck." (Id. at Bates no. 0037.) In his examination of the applicant, Dr. Miller observed a loss of range of motion and

provided numerous diagnoses, including lumbar strain and sprain. (Id. at Bates nos. 037 - 0038.) Dr. Miller found the diagnoses to be consistent with the reported account of an injury. (Id. at Bates no. 0038.)

Dr. Miller prepared a permanent and stationary report on August 23, 2022 following an August 16, 2022 evaluation. (Applicant's Exhibit 2, p. 1.) Dr. Miller reviewed the May 16, 2022 report of Dr. McDuff, but did not review any of Dr. Tang's reports. (Id. at p. 6.) Dr. Miller found the applicant to have a specific industrial injury of June 9, 2021 to the lumbar spine and the abdomen in the form of a hernia, as a result of lifting. (Applicant's Exhibit 2, p. 10.) He also found a cumulative trauma injury through June 9, 2021 to the neck and right shoulder. (Id. at p. 10.)

On September 7, 2022 Dr. Miller issued a report indicating a change in circumstances, taking the applicant off work, and referring the applicant for additional testing. (Applicant's Exhibit 1, pp. 1-2.) The reason for the change is that, "Patient finally seen for a PQME Dr. McDuff who states he is not permanent and stationary and needs testing/Tx." (Id. at p. 1.) Since it appears Dr. Miller had Dr. McDuff's May 16, 2022 report previously, it is not clear if Dr. Miller is referencing a report of Dr. McDuff that is not in evidence.

TESTIMONY

The applicant testified on his own behalf and defendant called four witnesses. The relevant portions of testimony, as summarized in my Opinion on Decision, are excerpted below:

Testimony of Applicant

On February 9, 2021, he hurt his abdomen when lifting a heavy tree. On that day, he reported the injury right away to Juan Yepez who is bilingual, and Mr. Yepez told Ed Wilbar. On that day, they started around 10:00 a.m., and lifting was done by two people. He was lifting with Thomas. He continued working. He also reported the injury to his team, which included Thomas and another co-worker name he could not remember the name of. He reported the injury a few days later to Juan Pablo Perez. He told Mr. Perez that he injured himself sometime at work while doing regular job duties, and he was in need of medical treatment. He also told Pablo and the Human Resources person about the injury on the day he was terminated. In that meeting he asked them why they were firing him and what happened with his hernia. They said nothing in response, gave him no claim form, and did not refer him to a doctor. After the injury, he told people in the mornings that he could not lift heavy things.

Other body parts injured with Gardeners' Guild include his right shoulder, neck, and back as well. He believes he was injured because he had to carry pallets and other heavy material and put them into the truck and throw them out. He didn't say anything to the employer about the

additional body parts because they didn't say anything about the hernia, and he had to work. When he had to lift something heavy, he told someone everyday that he had an abdominal injury. No claim form was ever offered. He believes his abdominal injury is the same now as when he suffered the injury.

He did not seek treatment on his own because he didn't have medical coverage and had no money. He first sought treatment in October 2021 with Dr. Miller. He saw Dr. Miller because his attorney referred him there. He received no medical treatment for his stomach symptoms, shoulder, neck, or back while working at Gardeners' Guild.

[…]

He last worked for Gardeners' Guild on June 9, 2021, when he was terminated. He began working a full-time job with Alliance Marine in September 2021, but was laid off from Alliance Marine in May 2022. When he was with Gardeners' Guild, he was employed as a full-time gardener.

There were no safety meetings at work. There were no morning meetings about the job they were doing that day. They would just get up on the truck and somebody would drive to the job site. They were not told where they were going. They would say you are going there, and then tell them what to do at the job site. He never got paperwork on where he is going.

The applicant does not speak English. He communicated in Spanish, and Mr. Yepez would interpret when he was available. He heard Mr. Yepez communicate about the injury incident to Ed Wilbar. When he communicated with Mr. Perez, he communicated in Spanish. When he communicated with Mr. Yepez, he communicated in Spanish. He was able to communicate effectively. He felt he communicated effectively with his co-workers in Spanish.

[…]

Testimony of defense witness, Juan Yepez

In February 2021, he was an eight-year employee of Gardeners' Guild. His job title was crew leader. He was not a manager, foreman, or superintendent. He knew, and communicated effectively in Spanish with Mr. Ayala. When necessary, he would interpret for Mr. Ayala, who could speak just a few words in English. He would see Mr. Ayala at the safety meetings in the morning. In those meetings, they would talk about whether or not there had been an accident, and to be careful using tools. Morning meetings were once a week. Whoever was working that day was required to attend.

An employee would be required to report an injury to a foreman. If not an English speaker, then the worker would have to come to the crew leader. This was because the foreman would come to crew leaders to interpret for them. It was not his job to report injuries, but he would have to notify a foreman.

[…]

Mr. Ayala reported an injury lifting, but did not tell him that it was a tree he was lifting. Mr. Ayala told him he lifted something, and felt pain when lifting something. He doesn't remember Mr. Ayala telling people in meetings that he had an injury, but he would mention pain when lifting some things. Mr. Ayala always said the pain was because of work. There were also times in the morning where Mr. Ayala felt discomfort in his stomach and said it was because of tablets he took for new dentures. He was given a number of causes for the applicant’s stomach pain.

Mr. Ayala told him to tell the foreman, Mr. Wilbar, about the injury, but he doesn't know what was done after that. He told Mr. Wilbar that Mr. Ayala hurt himself lifting something. He told Mr. Ayala that if he wanted a written report, he would have to tell Mr. Wilbar, and that was for Mr. Ayala to do. He never personally interpreted between Mr. Wilbar and Mr. Ayala regarding the injury. Mr. Ayala made no specific report to Mr. Wilbar as far as he knows.

He didn't see if Mr. Ayala was ever given a claim form, but he was transferred out of there shortly after that time. He needed to interpret between Mr. Wilbar and Mr. Ayala because Mr. Wilbar didn't speak Spanish. At that time, there was an additional crew leader he would swap with, so he wasn't always the crew leader every day.

When he informed Mr. Wilbar that Mr. Ayala had been injured, Mr. Wilbar did not give him a claim form to give to Mr. Ayala. He thought maybe a claim form wasn't given because Mr. Ayala jokes around a lot. For work assignments, the foreman would come to him, and then he told Mr. Ayala what to do. When he wasn't there, he is not sure if Mr. Ayala understood instructions for the day from Mr. Wilbar.

One week after Mr. Ayala told him what happened, he was moved to a different work area. When he would run into Mr. Ayala at the yard, and Mr. Ayala mentioned the incident, he told him to go to Human Resources if Mr. Wilbar didn't listen to him.

Testimony of defense witness, Edward Wilbar

In February 2021, he was a foreman for Gardeners' Guild. In 2021, safety meetings were held twice a month, in the yard, and in the middle of the month at the job site. Employees who were working on the day the safety meetings were held were required to attend. At the meetings, employees were told what types of injuries to report, who to report them to, and how to report injuries. There was always a Spanish speaker to translate the meetings.

Crew leaders get daily tasks from him that are then assigned to individual workers. Crew leaders report any injuries to him.

[…]

In February 2021, he was working with the applicant on a project. The project was fairly long and may have lasted six months. He communicated with the applicant in "Spanglish." The witness understands a decent amount of Spanish. He felt he understood the applicant and that the applicant understood him. He has spoken with the applicant in English. He thinks the applicant is pretty sharp in English. If something he needs to communicate is important, he goes through Mr. Yepez, and it is policy to go through Mr. Yepez. It is not an official job duty of Mr. Yepez to interpret.

The witness keeps a daily log including information on hours, injuries, illnesses, and vacation hours. In February 2021, the applicant never reported an injury while lifting. In the past, the applicant had reported an injury when he got into some poison oak shortly after starting work. The applicant did not report any injury to his neck, back, hip, or stomach. Mr. Yepez provided interpretation between the witness and the applicant. Mr. Yepez never informed the witness that the applicant was hurt lifting a tree or something heavy. If an injury had been reported to him, the witness would have taken the injured worker for treatment or back to the yard to see the safety person. He would have done the same if Mr. Yepez had reported the injury to him.

[…]

There was no chance that he was forgetting the applicant reporting an injury. The witness never received a report the applicant was injured.

Testimony of defense witness, Juan Pablo Perez

He was an employee of Gardeners' Guild in February 2021 as a field supervisor. In 2021, Gardeners' Guild had safety meetings every two weeks. Work injuries were discussed at these meetings including who to report to and how to report injuries. He had attended a safety meeting with the applicant in attendance, but had not worked directly with the applicant. He didn't recall the applicant ever having a work injury or injury to the abdomen, hip, neck, or back.

He was hired in part because he is bilingual, and therefore employees can come directly to him to verbally report an injury. He spoke Spanish when talking to the applicant, and the witness felt he was able to effectively communicate with the applicant. He did not hear the applicant speak English. The applicant would have filled out a timecard, containing an attestation that no injury had been suffered, every day.

If an injury is reported, then that report would go to Human Resources. Ed Wilbar is below him on the employer hierarchy. A crew leader doesn't really count as management. A worker can go to Human Resources to report an injury.

The witness was involved in the termination of the applicant. He was also involved in taking disciplinary actions against employees. Human Resources was present at the termination meeting with the applicant. Communication with the applicant at the meeting was in Spanish. The applicant did not say anything about an injury at the termination meeting.

Testimony of defense witness, Michael Davidson

He has been president and CFO of Gardeners' Guild for approximately three years and worked with the company for 33 to 34 years. He is familiar with the hiring process. During the employee orientation, employees are provided information on how to report an injury and who to report an injury to. They are advised that they should report an injury to their direct supervisor or manager. They are also advised how to fill out time cards.

[…]

Mr. Ayala should have reported his injury to a manager or supervisor. The manager of the division is Paul Thunstrom. The field supervisor is Pablo Perez, and the foreman is Ed Wilbar. Mr. Wilbar was the primary foreman during Mr. Ayala's time with the company. Any report of injury should have gone to Mr. Wilbar or to Pablo Perez for an injury that Mr. Ayala suffered.

[…]

Mr. Davidson is aware that Mr. Ayala made an injury report in approximately July 2019 of a rash following exposure to poison oak. He is confident that the injury report went through the process he previously described, but he does not recall who the injury was reported to. The process in effect in 2019 was the same process in effect in 2020.

Mr. Davidson did not become aware of the claim of an injury from lifting a tree until at least three to four months after Mr. Ayala left the company. He became aware of the injury claim when he received paperwork regarding the applicant's representation by counsel. He had not seen any paperwork before then reflecting the alleged injury lifting a tree.

Between the date of injury and Mr. Ayala's termination, he frequently met with Mr. Ayala. He estimates that he met with him three to four times in face-to-face meetings between the date of injury and his termination for various disciplinary issues. Mr. Ayala never referenced lifting a tree and never indicated any injury to his abdomen, back, neck, bilateral upper extremities, or bilateral lower extremities. Mr. Davidson is not aware of Mr. Ayala ever bringing forward any injury claim between the date of injury and his termination.

Mr. Yepez was a crew leader. Mr. Yepez is honest and he has never known Mr. Yepez to be dishonest. Crew leaders' duties depend on the specific job. In the absence of a foreman, the crew leader makes sure that assignments are getting completed. There is a foreman present on most jobs. If the foreman is not present, then workers would take instructions from a crew leader. However, the crew leader doesn't make decisions. Mr. Yepez would not have been considered Mr. Ayala's supervisor, but rather a coworker. If an employee reported an injury to a crew leader and it didn't get reported to the right person, such as a foreman, manager, or supervisor, then the company wouldn't have known about the injury. Mr. Davidson believes that it was clear Mr. Ayala was familiar with the procedures for reporting an injury based on his reporting of his poison oak injury claim.

[…]

Neither Mr. Thunstrom nor Mr. Perez ever said that Mr. Ayala was complaining of an injury. There is no reason that Mr. Davidson is aware of as to why an injury report by Mr. Ayala would have deviated from the standard process. Mr. Ayala did not tell Mr. Davidson about any injury.

(Opinion on Decision dated September 6, 2023, at pp. 7-16.)

DISCUSSION

Injury AOE/COE in ADJ16629567.

The burden of proof rests on the party holding the affirmative of an issue. (Labor Code §5705.) To meet his burden, the applicant is required to prove each fact supporting his claim by a preponderance of the evidence. "Preponderance of the evidence' means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code, § 3202.5.) The threshold of proof for the industrial causation of disease or disability requires a showing of more than a mere possibility. The applicant must show that "industrial causation is reasonably probable." (McAllister v. Workers'Comp. Appeals Bd., (1968) 69 Cal.2d 408; Rosas v. Workers' Comp. Appeals Bd. (1993) 16 Cal.App.4th 1692.) Decisions of the Appeals Board must be supported by substantial evidence. (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.)

I remain persuaded by the totality of the medical and evidentiary record that the applicant suffered a specific injury to his lumbar spine on February 9, 2021. Dr. Tang found an industrial injury to the lumbar spine, and confirmed in supplemental reporting that the injury was specific. Dr. Tang's opinion is supported by the mechanism of injury which is largely consistent across the medical record, in the applicant's testimony, as well as in the testimony of Mr. Yepez that the applicant reported an injury while lifting. Furthermore, treating physician Dr. Miller, who did examine the applicant in person, found the objective findings of loss of lumbar range of motion and diagnosis of lumbar sprain and strain consistent with the reported mechanism of injury. Thus, the medical record is not entirely reliant on the credibility of the applicant since Dr. Miller observed a loss of lumbar range of motion.

Date of injury was not raised as an independent issue, and the parties stipulated to February 9, 2021 as the date of the alleged specific injury. (MOH/SOE of 5/4/2023, p. 2, lines 20-25.) Defendant cites the multiple potential dates of injury as further evidence of the unreliability of the applicant in this matter. (9/29/2023 Petition, p. 5, lines 11-13.) It is noted that the reporting of Dr. Miller and Dr. McDuff indicate the specific date of injury is June 9, 2021, whereas the applicant testified to a February 9, 2021 date of injury. Given the context of the testimony of the applicant, and that of Mr. Yepez, it is clear that applicant did not suffer and report an injury for the first time on his last day of work. I am therefore persuaded that February 9, 2021, the date stipulated to by the parties and testified to by the applicant, is the date of the specific injury in ADJ16629567.

I therefore continue to find there is substantial medical evidence that the applicant suffered a specific injury on February 9. 2021 to the lumbar spine arising out of and in the course of his employment with Gardeners' Guild.

Development of the Record Regarding Parts of Body Injured.

Parts of body injured was not expressly an issue for this trial. Additionally the parties the stipulated that all other issues were deferred. (MOH/SOE of 5/4/2023, p. 2, line 38, and p. 3, line 24.) Defendant is disputing injury to the abdomen in the form of a hernia as was found by Dr. Miller. Thus, the opinion of a QME is warranted to evaluate the possible hernia injury. Although Dr. Tang stated in his supplemental report that there was a specific industrial hernia injury, he initially deferred to the appropriate specialty to evaluate the hernia. Therefore, further development

is needed with Dr. Tang to ascertain if, after an in-person exam, he is able to opine on the hernia, or defers to a specialist. Similarly there is a conflict between Dr. Miller and Tang on the whether the right shoulder and cervical spine are the result of a specific or a cumulative injury. Further clarification is needed from Dr. Tang following an in-person evaluation.

Defendant asserts that discovery closed at the MSC in this matter, and applicant waived any opportunity to further development by seeking a trial on the issue of AOE/COE. It is first noted that trial was set on injury AOE/COE and not parts of body injured, and discovery was not closed on other issues. (Pre-Trial Conference Statement from 2/27/2023, EAMS Doc ID 76479134.) A Workers' Compensation Judge is empowered to obtain additional medical evidence where records are inaccurate, incomplete, or inconsistent. (McDuffie v. Los Angeles County Metro. Transit Auth., (2002) 67 Cal. Comp. Cases 138, 141 (WCAB En Banc).) Since I have found the record inconsistent and incomplete on the parts of body injured, further development of the record on the issue is reasonable and warranted.

Development of the Record in ADJ15190569.

I found the record in not yet sufficiently developed to determine whether there is a cumulative trauma injury arising out of and in the course of employment with Gardeners' Guild. Again, a Workers' Compensation Judge is empowered to obtain additional medical evidence where records are inaccurate, incomplete, or inconsistent. (McDuffie, supra at 141.)

There are inconsistencies between treating physician Dr. Miller, and QME Dr. Tang as to whether or not the applicant suffered a cumulative trauma injury. However, the doctors find injury to the same body parts of the lumbar spine, right shoulder, neck, and hernia. Dr. Tang says there is no cumulative injury, but has not had the opportunity to evaluate the applicant in person. Dr. Miller finds a cumulative trauma to the neck and right shoulder. However, Dr. Miller did not review the reporting of Dr. Tang and his finding of a specific injury, and neither party queried Dr. Miller on his finding of a cumulative trauma. Dr. Miller also appeared to change his opinion on the applicant's injury being permanent and stationary after reviewing Dr. McDuff's report, and it is not clear that Dr. Miller's opinion on the applicant's injuries is complete.

Since Dr. Tang has not had the opportunity for an in person evaluation, and Dr. Miller has not reviewed any of Dr. Tang's reporting, I continue to believe the record needs to be developed as to whether the applicant suffered a cumulative trauma injury AOE/COE in ADJ15190569.

Whether applicant's claim in ADJ16629567 is barred by a post-termination defense.

Defendant asserts that the applicant's injury claims are barred by the post-termination defense of Labor Code section 3600(a)(10), alleging that the applicant failed to report any injury prior to termination. Labor Code section 3600(a)(10) states in relevant part:

"Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:

(A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff…."

Regarding notice under Labor Code section 5400, "…[k]nowledge of an injury, obtained from any source, on the part of an employer, his or her managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under Section 5400." (Labor Code § 5402.)

Defendant argues that applicant did not meet the standard of reporting an injury as described in Honeywell v. Workers' Comp. Appeals Bd., 35 Cal. 4th 24. I do not find that the decision in Honeywell applies in this case. Honeywell considered notice requirements for the commencement of the employer's duty to investigate a claim when the presumption of compensability was raised pursuant to Labor Code section 5402(b). Honeywell did not analyze notice under Labor Code 5402(a) as it relates to the exception to the post-termination defense under Labor Code section 3600(a)(10)(A).

In this case I remain persuaded by the testimony of Juan Yepez, which corroborates that of the applicant, that the applicant reported a specific injury while lifting on the date of injury. Although Mr. Yepez was not himself the applicant's supervisor, he stated that he told the foreman, Mr. Wilbar. I am not convinced by Mr. Wilbar's testimony that no injury was reported to him by

Mr. Yepez. The reporting by the applicant of a lifting injury, through Mr. Yepez to Mr. Wilbar, a foreman, is tantamount to notice of an injury under Labor Code section 5402(a).

It is clear from the testimony of defense witnesses that it is standard practice to use crew leaders as interpreters where management and employees cannot communicate effectively in English. Both Mr. Yepez and Mr. Perez testified that the applicant did not speak English, and communicated in Spanish. Therefore, on the job site it would be usual to utilize Mr. Yepez, as an interpreter, to report an injury to Mr. Wilbar.

It is noted that the applicant's testimony contained a number of contradictions with the medical record, such as in reference to the date of injury. Additionally the applicant denied the existence of safety meetings, but every other witness testified to the occurrence of those meetings. However, even the employer witnesses differed on whether they were every week or bimonthly. I would not have found the applicant's testimony reliable in isolation. However, I do not find the applicant to be entirely devoid of credibility, particularly where his testimony is supported by an employer witness. Thus, I make my determination that the applicant reported his injury based on the corroborating testimony of Mr. Yepez. I am not convinced that the applicant reported his injury to Mr. Perez, either at or before his termination meeting. However, the reporting to Mr. Wilbar through Mr. Yepez is sufficient notice under Labor Code 5402(a).

Defendant argues that Mr. Yepez was not in a position of power, and had no obligation to report and injury on behalf of someone else. (9/29/2023 Petition, p. 6, lines 22-24.) However, that is not relevant here. The evidence and testimony shows that Mr. Yepez did inform the foreman Mr. Wilbar, thus providing the employer notice, from any source, of a potential industrial injury pursuant to Labor Code 5402(a). That the applicant failed to report his injury to Mr. Perez, or human resources, does not alter the fact that the employer had notice of the injury.

Defendant also argues in its Petition for Reconsideration that Mr. Yepez did not explicitly state that he told Mr. Wilbar that the applicant suffered an injury lifting at work. (9/29/2023 Petition, p. 6, lines 14-19.) The context of the testimony makes clear that Mr. Yepez was discussing a lifting injury at work when he reported the injury to Mr. Wilbar. For example, Mr. Yepez discussed how the applicant always said the pain was from work. Also, Mr. Yepez discussed telling the applicant that he should go to human resources if Mr. Wilbar didn't listen to him. This makes clear that applicant's injury Mr. Yepez reported to Mr. Wilbar was a work injury.

I continue to find that the applicant gave notice to his employer of his specific lifting injury on February 9, 2021, prior to his termination. Therefore the Labor Code section 3600(a)(10)(A) exception to the post-termination defense applies, and the applicant's specific injury claim in ADJ16629567 is not barred by that defense.

Whether applicant's claim in ADJ16629567 is barred by the Statute of Limitations defense.

Having carefully considered defendant's arguments, and continuing the find that applicant provided notice of his injury to his employer, I continue to find that defendant failed to meet its burden to show applicant's claim is barred in the specific injury claim. As stated in my Opinion on Decision:

"Labor Code § 5405 governs the period in which proceedings with the Appeals Board must be commenced:

"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."

However, where an employee is not provided notices relating to potential workers' compensation benefits, then the employer is precluded from asserting a statute of limitations defense. (Reynolds v. Workmen's Comp. Appeals Bd. (1974) 12 Cal.3d 726, 730.) If the employer breaches their duty to provide notices, the employer bears the burden of showing that the employee had actual knowledge of their workers' compensation rights to prevent to tolling of the statute of limitations. (California Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd., (2008) 73 Cal. Comp. Cases 771, 776.) The burden of proof rests on the party holding the affirmative of an issue. (Labor Code section 5705.)

There was no request for judicial notice to be taken of the filing date of applicant's Application for Adjudication of Claim. However, judicial notice may be taken of the EAMS file. (Evidence Code section 452(d); Faulkner v. WCAB (2004) 69 CCC 1161 (writ denied).) The Application for Adjudication of Claim in ADJ16629567 was filed in EAMS on August 31, 2022.

In this case, as discussed above, I conclude that the defendant had notice of the applicant's February 9, 2021 injury on the date of the injury. No evidence was offered of defendant providing a DWC-1 claim form, or any other notices, to the applicant prior to his filing of an application. Because defendant did not provide claim forms to the applicant upon notice of a specific injury, defendant is precluded from asserting a statute of limitations defense. Defendant has demonstrated that the applicant had knowledge of how to report an injury at Gardeners' Guild, but have not offered evidence that the applicant had actual knowledge of his workers' compensation benefits related to the specific injury claimed in ADJ16629567.

Therefore, the defendant has failed to meet its burden to show the statute of limitations bars applicant's claim of a specific injury on February 9, 2021 in ADJ16629567." (Opinion on Decision dated September 6, 2023, at pp. 21-22.)

Conclusion

There is sufficient substantial medical evidence to support a specific injury AOE/COE on February 9, 2021 to the lumbar spine in ADJ16629567. Because the applicant reported his specific injury to the employer prior to his termination, he has established an exception to the post-termination defense under Labor Code section 3600(a)(10)(A) in in ADJ16629567. The defendant has failed to meet their burden to sustain a statute of limitations defense in in ADJ16629567. There is a need to develop the record as to the parts of body injured in in ADJ16629567, as well as to all other issues beyond AOE/COE. There is a need to develop the record on injury AOE/COE for the cumulative trauma pled in ADJ15190569.

RECOMMENDATION

For the foregoing reasons, I recommend that the Petition for Reconsideration of defendant, filed herein on September 29, 2023, be DENIED.

DATE: October 13, 2023

LAWRENCE KELLER
WORKERS' COMPENSATION JUDGE