WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GREGORY VAUGHN, *Applicant*

vs.

COLORADO ROCKIES; TAMPA BAY RAYS; ACE AMERICAN INSURANCE COMPANY, CHUBB, *Defendants*

Adjudication Number: ADJ11208094
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration on its own motion to consider the merits of applicant's petition for reconsideration of the Findings and Order issued by the workers' compensation judge ("WCJ") on April 9, 2020. We also granted reconsideration to further study the factual and legal issues raised by applicant's petition.[1] We have completed our review and now issue our Decision After Reconsideration.

In the Findings and Order of April 9, 2020, the WCJ found that applicant, while employed as a professional baseball player from June 1, 1986 through July 13, 2003, at various locations within and outside California by the Tampa Bay Rays from December 13, 1999 through March 22, 2003, and by the Colorado Rockies from April 11, 2003 through July 14, 2003 insured by Ace American Insurance Company, claims to have sustained industrial injury to his head, neck, back, arms, shoulders, elbows, wrist, hands, fingers , legs, hips, knees, ankle, feet, toes, neurological and internal system. The WCJ further found that the WCAB maintains jurisdiction based on applicant having been hired by the San Diego Padres, that applicant's claim was properly pursued in California, and that applicant's claim is time-barred by the Statute of Limitations. Based on the latter finding, the WCJ issued a take-nothing order.

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[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration on Board Motion dated June 4, 2020. Commissioner Lowe is no longer a member of the Appeals Board. Accordingly, a new panel member has been substituted in her place.

Applicant filed a Petition for Reconsideration of the WCJ's decision. Applicant contends, in substance, that the WCJ erred in finding his claim barred by the Statute of Limitations, and that the WCJ erred in applying Labor Code section 3600.5(e).[2]

Ace American Insurance Company filed an answer.

The WCJ submitted a Report and Recommendation ("Report"). In his Report, the WCJ suggests applicant's petition should be dismissed for lack of verification. However, the alleged failure to verify the petition is not a jurisdictional defect that mandates dismissal. (*Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 [Significant Panel Decision].) Under the circumstances of this case, where the WCJ did not correctly address the Statute of Limitations, we exercise our discretion not to dismiss applicant's petition based upon the lack of a proper verification.

Based on our review of the record and applicable law, we conclude that the WCJ must revisit the issue of whether applicant's claim of injury is barred by the Statute of Limitations, in light of the correct legal analysis, and with further development of the record as necessary or appropriate to inform that analysis. Therefore, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ.

At the outset, we note that after June 4, 2020, when the Board invoked Labor Code section 5900(b) to grant reconsideration on its own motion, defendant filed a petition for removal on July 22, 2020. Therein defendant contended that the Board's order granting reconsideration would result in significant prejudice or irreparable harm, that the Board had no authority to act on applicant's petition for reconsideration because it was not timely-filed, that applicant's petition should have been dismissed as unverified, that applicant's lack of due diligence should not infringe on defendant's rights, that the Board erred in granting reconsideration on its own motion because the Board may not act arbitrarily or capriciously, and that the Board erred in not specifying grounds for reconsideration under section 5903.

We will deny defendant's petition for removal. 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

[2] Section 3600.5(e) states: "An employer of professional athletes, other than a California-based team, shall be exempt from Article 4 (commencing with Section 3550) of Chapter 2, and subdivisions (a) to (c), inclusive, of Section 5401."

only if the petitioner shows that substantial 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).)

In this case, we are not persuaded that substantial prejudice or irreparable harm will result from our order granting reconsideration of June 4, 2020. Since we are rescinding the WCJ's decision and returning this matter to the trial level for further proceedings and new decision by the WCJ (further discussed below), defendant maintains the right to seek reconsideration of a final decision issued by the WCJ or petition for a writ of review if a decision adverse to defendant ultimately is issued by this Board. (Lab. Code, §§ 5900 et seq. & §§ 5950 et seq.)

Turning to the merits of applicant's petition, we note that the law relevant to the Statute of Limitations on a claim of cumulative trauma injury is well-settled. As a primary matter, it is clear that defendant bears the burden of proof because the Statute of Limitations is an affirmative defense. (Lab. Code, § 5409.)

It is also instructive to set out the legal definition of a cumulative trauma injury. Labor Code section 3208.1(b) defines a cumulative injury as "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." Section 3208.1 further provides, "[t]he date of a cumulative injury shall be the date determined under Section 5412."

Under Labor Code section 5412, "[t]he date of injury in cases of…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."

Section 5412 requires a convergence of two elements: (1) the date when the employee first suffers disability; and (2) the employee's acquisition of knowledge that such disability was caused by the employee's present or prior employment.

As for the first element, we note there is no "disability" within the meaning of section 5412 until there has been either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2004) 119 Cal.App.4th 998, 1003 [69 Cal.Comp.Cases 579] ("*Rodarte*"); *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].)

In connection with the second element, it is settled law that "an 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." (*County of Riverside v. Workers' Comp. Appeals Bd.* (*Sylves*) (2017) 10 Cal.App.5th 119, 124-125 [82 Cal.Comp.Cases 301] ("*Sylves*"), quoting *City of Fresno v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 473.)

In this case, the WCJ addressed the Statute of Limitations on applicant's cumulative trauma claim at pages 3-4 of his Opinion on Decision, as follows:

> With respect to the timeliness of filing a claim, LC §5405 limits the filing to (a) one year from the date of injury, (b) one year from expiration of any period covered by payment under Article 3, or (c) one year from the last date on which any benefits provided for in Article 2 were furnished. Only (a) is applicable as no payments or benefits have been furnished.
>
> Pursuant to LC §5412, the date of injury is that which applicant knew or should have known his injury is work-related and he suffered disability, either permanent or temporary. Defendant correctly avers in its trial brief applicant's disability was no later than 2004 when he ended his professional career. It may also be as early as 1997 when he underwent right knee surgery while under contract for the San Diego Padres. As defendant cites, a medical opinion is not always necessary when an injured worker has the knowledge that his/her injury is related to work and does not require a medical diagnosis to affirm it. Here, applicant is engaged in a very physical sport widely known to cause various injuries from repetitive batting, running, throwing. His testimony confirms this wherein he stated he did not know how he could have injured himself other than playing baseball. (Summary of Evidence, p. 6, line 17.)
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> Although applicant was not informed regarding filing a claim for workers' compensation, he also testified treatment was provided for him and he was told to fill out paperwork so treatment would be covered by insurance. Nevertheless, the purpose of the Statute of Limitations is designed to give injured workers, and all plaintiffs for that matter, a designated time in which to ascertain their rights regarding filing claims, after which they are foreclosed. Additionally, as defendant points out, Labor Code §3600.5(e) exempts out of state employers specifically from LC §5401.

> Thus, having filed a claim for injury 13 years after expiration of the Statute of Limitations,[3] utilizing a 2004 date of injury or 20 years if utilizing a 1997 date of injury, applicant is time-barred from recovery herein.

We find several flaws in the WCJ's analysis. The WCJ states, "[d]efendant correctly avers in its trial brief applicant's disability was no later than 2004 when he ended his professional career." As noted above, however, "disability" under section 5412 requires a showing of either compensable temporary disability or permanent disability. The WCJ's analysis falls short both because an "averment" by defendant in a trial brief is not evidence, and because the WCJ did not refer to any medical evidence showing whether and when applicant sustained compensable temporary or permanent disability.

On the question of applicant's knowledge of pursuing a claim for cumulative trauma injury, we noted above that an 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.

In this case, the WCJ stated in his Opinion on Decision that applicant was engaged in a very physical sport widely known to cause various injuries from repetitive batting, running, throwing, and that applicant's testimony indicates he did not know how he could have injured himself other than playing baseball.

Although we express no final opinion, on the present record we disagree with the WCJ that general knowledge of the physical strains of playing professional baseball, and/or applicant testimony's that he did not know how he could have injured himself other than playing baseball, necessarily equates to possessing the training, intelligence and qualifications sufficient to establish that applicant should have recognized the relationship between the hazards of his employment and his (temporary or permanent) disability.

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[3] According to Dr. Hatch's report dated November 16, 2018, it was on February 18, 2018, that applicant filed his claim for cumulative trauma injury during the period June 1, 1986 through July 13, 2003. (Defense exhibit D, p. 5.) Though we do not make a final finding of fact, it appears that applicant filed his claim of injury more than 14 years after the end of the alleged cumulative trauma period. In light of the law pertaining to section 5412, the time gap between the end of the cumulative trauma period and applicant filing his claim is not necessarily dispositive. In any event, the WCJ should specify the date applicant filed his claim in revisiting the outstanding legal issues at the trial level.

In fact, it appears that although applicant probably knew or should have known about his right to pursue a claim of specific injury, the evidence is equivocal concerning whether he knew or should have known that he could pursue a cumulative trauma claim. At trial on January 16, 2020, applicant testified on cross-examination and redirect examination as follows:

> The first surgery to the right shoulder was in 1994 while working for Milwaukee where he also developed right elbow pain. At the time he had the surgery in 1994, applicant had a belief the injury was due to playing baseball. Applicant also had surgery to his right knee in 1994 and an injury to the left shoulder while playing for the Padres. Applicant does not know how he injured it other than playing baseball. This resulted in left shoulder surgery in 1996. While playing for Milwaukee, applicant developed back pain which he had every year including today. While playing major professional baseball, applicant did not file a claim against any team, but in the minor leagues while with the Brewers, applicant had to file a claim for workers' compensation to get treatment. Applicant had physical therapy in the off-season after surgery and does not know if he signed paperwork for workers' compensation. Applicant did not know if the team had him sign paperwork for treatment after the surgery.
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> Several years have gone by before applicant now filing a claim, and the reason he didn't file previously is because he did not know the process or the severity of his injuries. Applicant had injuries while playing baseball and knew it was from his career, but he didn't know he could file a claim for workers' compensation as no one told him he could.
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> REDIRECT EXAMINATION BY APPLICANT'S ATTORNEY (MR. RIVERA):
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> Applicant had right knee surgery with Milwaukee in 1994.
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> No one in Milwaukee informed applicant that he could file a workers' compensation claim. He had to sign a bunch of papers, but he didn't know what he signed as he didn't have to pay for the treatment. This is the same as to other surgeries as the team has him sign paperwork and they take care of the treatment.
>
> Applicant does not know what a continuous trauma claim is.

On one hand, applicant testified that he "had injuries while playing baseball and knew it was from his career," but on the other hand he "does not know what a continuous trauma claim is." Without expressing a final opinion, we note the latter testimony suggests that applicant's

training, intelligence, and qualifications were not such that he should have recognized the relationship between the known adverse factors involved in his employment and his disability.

In his Opinion on Decision, the WCJ also mentioned in passing that Labor Code section 3600.5(e) exempts out of state employers from the notice requirements of Labor Code section 5401. (See *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726 [39 Cal.Comp.Cases 768].) However, it appears that the WCJ put the cart before the horse. That is, if applicant filed his claim of cumulative trauma injury within one year of sustaining temporary or permanent disability while having knowledge that his disability was related to repetitive, physically traumatic activities during his baseball career from June 1, 1986 through July 13, 2003, then the applicability of section 3600.5(e) would be irrelevant.

We therefore rescind the WCJ's decision and return this matter to the trial level for the WCJ to revisit the Statute of Limitations under the correct legal analysis outlined above, with further development of the record as necessary or appropriate, and for a new decision by the WCJ. We express no final opinion on the merits of the Statute of Limitations defense. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of April 9, 2020, is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

IT IS FURTHER ORDERED that defendant's Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 24, 2023

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

GREGORY VAUGHN
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HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP

JTL/ara

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