WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LAWRENCE REICHELT, *Applicant*

vs.

CITY OF LOS ANGELES, LOS ANGELES POLICE DEPARTMENT; permissibly self-insured, *Defendants*

Adjudication Number: ADJ2895646 (VNO 0380163)
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration.[1]

Applicant seeks reconsideration of the July 30, 2020 Findings and Award (F&A), wherein the presiding workers' compensation administrative law judge (PWCJ) found in pertinent part that applicant, while employed during the period from 1983 through 1987 as a police officer, sustained injury arising out of and in the course of his employment to his liver, systemically in the form of Hepatitis C infection, and to his psyche as a compensable consequence of the Hepatitis C infection; that the 1984 Permanent Disability Rating Schedule (1984 PDRS) applies "in light of the Appeals Board finding the date of injury in this matter is 1983 through 1987" and that the 1997 Permanent Disability Rating Schedule (1997 PDRS) did not apply; that at the time of applicant's injury, the relevant indemnity rates were $196.00 per week for temporary disability and $140.00 per week for permanent disability; that temporary total disability indemnity is owed for the period of July 16, 1983 through August 27, 1983; that applicant's additional claim for temporary total disability indemnity for the period from August 5, 1999 through May 2, 2001 is denied; that applicant's injuries resulted in permanent disability of 76% after apportionment, with payment to applicant in the sum of $140.00 per week for 429.25 weeks, commencing on May 3, 2001, with a life pension

[1] On October 23, 2020, we issued an "Opinion and Order Granting Petition for Reconsideration." Commissioner Lowe, who was on the panel that issued that order, no longer serves on the Appeals Board and a new panel member was appointed in her place.

thereafter; and that attorney's fees of 15% based on the permanent disability indemnity only are to be held in trust pending resolution between applicant and his former counsel or upon further order of the court.

In his August 8, 2020 "Petition for Reconsideration or in the Alternative Petition for Removal,"[2] applicant alleges that: he was totally temporarily disabled from Hepatitis A in July and August 1983, and not Hepatitis C, and that his injury in the form of Hepatitis A is a different injury; Hepatitis Non-A, Non-B, later known as Hepatitis C, did not cause him disability until August 5, 1999; he is entitled to further total temporary disability from August 5, 1999 through May 2, 2001; the date of injury under Labor Code section 5412[3] requires both disability and knowledge and he did not have knowledge until 1997 and did not have disability until August 5, 1999, so that his date of injury under section 5412 is August 5, 1999 and that based on that date of injury, the 1997 PDRS applies; he already submitted evidence that his former attorney is not entitled to attorney's fees; and "applicant responded to an affirmative defense offered by the defendants that the 1986 police board of rights was res judicata."

We received an Answer from defendant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the PWCJ, recommending that the Petition be denied.

As our Decision After Reconsideration, we rescind the F&A, and substitute a new F&A, which finds that applicant sustained injury to his liver and systemically in the form of Hepatitis C and to his psyche; that applicant's date of injury under section 5412 is August 5, 1999; that the 1997 PDRS applies to applicant's injury; that applicant is not entitled to further temporary total disability indemnity for the period from August 5, 1999 to May 2, 2001; that applicant's rate for payment of permanent disability indemnity is determined as of his date of injury of August 5, 1999; that applicant is entitled to medical treatment and defendant is liable for the cost of reasonable and necessary self-procured medical treatment and medical-legal costs, including mileage, with jurisdiction reserved to the trial level in the event of a dispute; that applicant is permanent and stationary from the effects of this injury on May 2, 2001; and that the issues of

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[2] Applicant filed supplemental pleadings on August 26, 2020 and August 28, 2020, however, applicant did not seek permission, and those pleadings have not been considered. (Cal. Code Regs., tit. 8, § 10964.) To the extent that applicant has submitted documents to the Appeals Board while this matter has been pending on reconsideration regarding issues that are properly before the trial court, those documents have not been considered.

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

permanent disability, apportionment, any life pension, any COLA, any attorney's fees, and liens are deferred.

FACTS

The factual background in this case is set forth in our January 26, 2016 Opinion and Decision After Reconsideration (2016 Opinion), except as noted herein.

In our 2016 Opinion, as relevant herein, we found that "while employed during the period 1983 through 1987 as a police officer, applicant sustained injury by way of the Hepatitis C virus" and deferred the issue of whether applicant sustained injury to psyche; that applicant's earnings at the time of injury were maximum for temporary disability, warranting indemnity at the rate of $196.00 for temporary disability and the statutory rate for permanent disability; that applicant is entitled to accrued temporary disability indemnity for the period July 16, 1983 through August 27, 1983; and that the issues of permanent disability and apportionment were deferred. We awarded temporary disability indemnity for the period from July 16, 1983 through August 27, 1983, at the rate of $196.00 per week. In our Opinion, we explained that the 1997 PDRS applies, and not the 2005 PDRS, because at the time the parties proceeded to trial in 2002, multiple medical-legal reports were offered and section 4660(d) states that one of the instances where the 2005 PDRS applies is where there has been no medical-legal reporting.

On June 2, 2016, the Court of Appeal issued an order denying defendant's petition for writ of review.

DISCUSSION

We begin with the issue of applicant's date of injury.

Section 5411 states that:

> The date of injury, except in cases of occupational disease or cumulative injury, is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed.

Here, according to the medical evidence, applicant's injury in the form of Hepatitis C was caused by a needle stick; in other words, a specific incident. (See Lab. Code, § 3208.1.) However, under section 5411, since the incident gave rise to an occupational disease, the date of injury is determined under section 5412. Section 5412 states that:

> The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

"The '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.' (citation.) The employee is, in fact, being injured prior to the manifestation of disability. . . ." (*J. T. Thorp v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 341 [49 Cal.Comp.Cases 224].)

The term "disability" as used in section 5412 is "either compensable temporary disability or permanent disability," and, "medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal. Comp. Cases 579].)

Regarding the "knowledge" component of section 5412, whether an employee knew or should have known their 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)*.) An employee is not charged with knowledge that their disability is job-related without medical advice to that effect, unless the nature of the disability and the applicant's training, intelligence and qualifications are such that they should have recognized the relationship between the known adverse factors involved in their employment and their disability. (*Johnson, supra,* at 473; *Newton v. Workers' Co. Appeals Bd.* (1993) 17 Cal. App. 4th 147 [58 Cal. Comp. Cases 395].) In many cases applying section 5412, knowledge of industrial causation is not found until the employee receives medical opinion expressly stating so, even where they have indicated a belief that the disability is due to employment. (e.g. *Johnson, supra,* 163 Cal.App.3d 467, 471 (applicant believed heart problems were work related, but doctor said they were not); *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33 Cal.Comp.Cases 722] (despite applicant's testimony that work tired him, the Court reversed Appeals Board's determination that applicant failed to exercise reason able diligence to ascertain that disability originated with work); *Gleason v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 1049 (writ den.) (no evidence

that applicant, a nurse who believed she contracted cirrhosis of the liver from needle stick, knew about latency period of hepatitis C, so she was not charged with knowledge); *Modesto City Schools v. Workers' Comp. Appeals Bd. (Finch)* (2002) 67 Cal.Comp.Cases 1647 (writ den.) (doctor's report represents earliest knowledge, even though application was filed before the report). See also *Hughes Aircraft Co. v. Workers' Comp. Appeals Bd. (Zimmerman)* (1993) 58 Cal.Comp.Cases (writ den.) (statement by doctor that stress at work was depleting her immune system insufficient to find that applicant should have recognized the relationship between employment and disability); *Kaiser Foundation Health Plan v. Workers' Comp. Appeals Bd. (Bradford)* (1986) 51 Cal.Comp.Cases 355 (writ den.) (statement by doctor that back condition was aggravated by work not sufficient to charge applicant with knowledge). This is because "the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acci. Com.* (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].)

While we do not further consider the issue of applicant's injury in the form of Hepatitis A, we observe that applicant's injury in the form of Hepatitis A has a different date of injury, and thus is a different injury. That is, as stipulated by the parties, applicant had compensable disability in July 1983, and knowledge of his Hepatitis A at that time. We further clarify that applicant's period of injurious exposure of 1983 through 1987 with respect to his Hepatitis C, as specified in our 2016 Opinion, is not a date of injury. (See Lab. Code, § 5500.5(a) ["liability shall be imposed upon the last year of employment exposing the employee to the hazards of the occupational disease…"].) Here, the evidence demonstrates that applicant had knowledge of his injury in the form of Hepatitis C in 1997 or 1998, but based on the medical evidence, he did not have compensable disability until August 5, 1999. Thus, applicant's section 5412 date of injury is August 5, 1999.

In cases involving cumulative trauma or occupational disease injuries, the date of injury pursuant to section 5412 "also sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right[s]." (*Argonaut Mining Co. v. Ind. Acc. Com.* (1951) 104 Cal.App.2d 27, 31 [1951 Cal. App. LEXIS 1564].) As we explained in our 2016 Opinion, and since applicant's section 5412 date of injury is August 5, 1999, the applicable schedule is the 1997 PDRS.

For injuries sustained after January 1, 1990, section 4453 disability indemnity benefits are calculated "according to the limits in this section in effect on the date of injury." (Lab. Code, § 4453(d); see *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 4446-447 [76 Cal.Comp.Cases 701].) Where there is concurrence of compensable disability and the employee's knowledge that the disability was caused by employment, the date of injury is pursuant to section 5412. (*Chevron U.S.A. v. Workers' Comp. Appeals Bd.* (*Steele*) (1990) 219 Cal.App.3d 1265, 1270-1271 [55 Cal.Comp.Cases 107].) Consequently, the applicable permanent disability indemnity amount and rate provided in section 4453 is based on the date of injury and not the date of compensable disability or permanent and stationary status. (*Steele, supra,* 219 Cal.App.3d at pp. 1270-1271.) Therefore, the applicable permanent disability indemnity amounts and the rate in this case should be based on the date of injury of August 5, 1999, and defendant was liable for payments of permanent disability beginning on May 2, 2001.

Turning to the issue of whether applicant is owed total temporary disability indemnity for the period from August 5, 1999 to May 2, 2001, our 2016 Opinion found injury to applicant by way of the Hepatitis C virus and that applicant was entitled to total temporary disability indemnity from July 16, 1983 through August 27, 1983. Applicant conflates the issue of whether he had two different injuries, one in the form of Hepatitis A, and one in the form of Hepatitis C (with a compensable consequence of injury to psyche), with the issue of whether he was entitled to further temporary total disability indemnity.

As set forth by the PWCJ in his Report,

> . . .Applicant claimed the additional period of temporary total disability at the trial before the prior trial judge, Linda Davidson-Guerra in 2015 and the trial judge denied that period. The Appeals Board decision only found temporary total disability for the claimed period July 16, 1983 through August 27, 1983. The additional claimed period is legally precluded even after new evidence (Dr. Nacouzi's conclusions after the January 26, 2016 Appeals Board decision) of the additional temporary total disability period was medically found. This contention remains statutorily precluded since Labor Code Section 5815 does not permit a party to raise an issue after that issue had been litigated and is not subject to reopening even upon discovery of new evidence. The second period of claimed temporary total disability is subject to statutory issue preclusion pursuant to Labor Code Sections 5815 and 46561 (1987 version) and under *Radesky v. City of Los Angeles* (1974) 37 Cal. App. 3d 537, 112 Cal. Rptr. 444. See also *Nickelsberg v. Workers' Compensation Appeals Board* (1991) 54 Cal. 3d 288, 285 Cal. Rptr. 86, also quoted in *County of San Diego v. Workers' Compensation Appeals Board*

> (2018) 21 Cal. App. 5th 1, 229 Cal. Rptr. 3d 815, 83 Cal. Comp. Cases 465. (Report, p. 7.)

Applicant raised the issue of whether he was entitled to the period of temporary disability indemnity on the first day of trial on February 4, 2002. As stated in the Minutes of Hearing from that day: "Applicant claims temporary disability from March 23, 1999 through the present and continuing." (Minutes of Hearing, February 4, 2002, p. 2.) Applicant also raised the issue after proceedings were transferred to a new WCJ and when trial commenced before her on December 13, 2010. As stated in the Minutes of Hearing from that day, "4. Temporary disability: The employee claiming the period from August 5, 1999 to May 2, 2001." (Minutes of Hearing, December 13, 2010, p. 3.)

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].) Once we issued our 2016 Opinion, applicant's remedy was to seek review with the appropriate Court of Appeal. On June 2, 2016, the Court of Appeal denied defendant's petition for writ of review, and thus, our decision of January 26, 2016 is final as to any threshold issues and any final findings. Therefore, applicant's claim for the period of temporary disability indemnity from August 5, 1999 to May 2, 2001 is barred.

We note that since we are deferring the issue of attorneys' fees, we do not address the merits of whether fees are appropriate. Finally, with respect to the issue raised by applicant of: "applicant responded to an affirmative defense offered by the defendants that the 1986 police board of rights was res judicata," we are unable to discern what relief applicant is seeking. In his Report, the PWCJ stated that:

> The WCAB has no jurisdiction to re-litigate the Applicant's dissatisfaction with the results of his being terminated from employment as a police officer for cause. The issue of how the alleged perjured testimony of police officers at the Applicant's Board of Rights hearing and during WCAB testimony cannot be resolved in these proceedings. The Applicant was given the benefit of the doubt concerning the psychiatric effects of his work as a

> police officer, his development of Hepatitis C infection and the manifestation thereof on his physical and mental health. (Report, p. 8.)

To the extent that applicant is seeking to re-litigate his Board of Rights hearing, we agree with the PWCJ that we do not have jurisdiction to address this issue.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the PWCJ on July 30, 2020 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant, Lawrence Reichelt, while employed during the period 1983 through 1987, as a police officer, Occupational Group 54 at Los Angeles, California by the City of Los Angeles/Los Angeles Police Department, permissibly self-insured, sustained injury arising out of and in the course of employment to his liver, and systemically in the form of Hepatitis C infection, and to his psyche as a compensable consequence of the Hepatitis C infection.

2. Applicant's date of injury under Labor Code section 5412 is August 5, 1999.

3. The 1997 Permanent Disability Rating Schedule applies to applicant's injury.

4. At the time of injury, the employer's workers' compensation claims administrator was the City of Los Angeles, permissibly self-insured.

5. Applicant's rate for payment of permanent disability indemnity is determined as of his date of injury of August 5, 1999.

6. The claims administrator, City of Los Angeles has paid no benefits.

7. The employer has provided no medical treatment.

8. Based on the stipulation between the parties, temporary total disability indemnity is owed for the period of July 16, 1983 through August 27, 1983. The City of Los Angeles paid Injury On Duty (IOD) time for that period in lieu of temporary total disability.

9. Applicant's claim for temporary total disability indemnity for the period August 5, 1999 through May 2, 2001 is barred.

10. The City of Los Angeles is liable for reasonable and necessary self-procured medical treatment and medical-legal costs. This includes reasonable mileage reimbursement for medical treatment and medical-legal evaluations, subject to proof, to be adjusted between the parties, and jurisdiction is reserved to the trial level in the event of a dispute.

11. Applicant is found to be permanent and stationary from the effects of this injury on May 2, 2001 pursuant to the findings of Roger Nacouzi, M.D.

12. The issues of permanent disability, apportionment, any life pension, any COLA, and any attorneys' fees are deferred.

13. Liability for self-procured treatment and liens for medical treatment, medical-legal expenses, and costs pursuant to Labor Code Section 5811 are deferred and ordered off calendar pending a filing of a Declaration of Readiness on those issues by any interested party.

14. There is a need for future medical treatment to cure or relieve the effects of the industrial injuries herein.

AWARD

Joint Award is made in favor of LAWRENCE REICHELT and against the City of Los Angeles permissibly self-insured for:

1. Reimbursement for self-procured medical treatment expenses, including reasonable mileage reimbursement, to be adjusted between the parties with jurisdiction reserved to the trial level in the event of a dispute;

2. Reimbursement for medical-legal costs, to be adjusted between the parties with jurisdiction reserved to the trial level in the event of a dispute;

3. Future medical treatment to cure or relieve the effects of the industrial injuries herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 31, 2023

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

LAWRENCE REICHELT
KEGEL TOBIN & TRUCE
AM LIEN SOLUTIONS, LLC

AS/mc

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