WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MINERVA DE BARTOLO, ***Applicant***

vs.

SOUTHERN CALIFORNIA PIZZA COMPANY dba PIZZA HUT, permissibly self-insured, administered by ATHENS ADMINISTRATORS, ***Defendants***

Adjudication Number: ADJ11608819
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in this matter to further study the factual and legal issues presented. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration in response to the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on April 21, 2021. As relevant herein, the WCJ found that applicant did not sustain injury arising out of and in the course of employment (AOE/COE) to various body parts during the period of February 7, 2007 through July 30, 2018 while employed by the defendant.

Applicant contends, as relevant herein, that the evidence does not justify the WCJ's findings as to her credibility; and that the medical evidence supports that she sustained industrial injury and that her claim is not barred by Labor Code section 3600(a)(10).[1]

We received an Answer from defendant. We received a Report and Recommendation (Report) from the WCJ recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the WCJ with respect thereto. Based on our review of the record and the WCJ's analysis of petitioner's arguments in the report, and as our decision after reconsideration, we will rescind the WCJ's decision, and substitute a new F&O, which finds that applicant sustained injury AOE/COE to her lumbar spine and that the issue of injury to any other body parts is deferred, that applicant's claim is not barred by section 3600(a)(10), and that all other issues are deferred.

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

FACTUAL BACKGROUND

Applicant claims injury to her right leg, lower back, neck, bilateral hands, bilateral wrists, bilateral fingers, upper extremities, lower extremities, internal, skin, right eye, headaches, and psyche while employed by the defendant as a driver and dishwasher during the period of February 7, 2007 through July 30, 2018.

In a report dated October 31, 2017, Vigen Khojayan, M.D., states "here for follow up lumbar spine PT referral". (Applicant's Exhibit 3, Excerpts from Subpoenaed Records of Vigen Khojayan, M.D., p. 29.)

In a report dated August 20, 2018, Vigen Khojayan, M.D., states that applicant's diagnoses are: acute sciatica, lumbago with sciatica, lumbar disc prolapse with radiculopathy, neurologic disorder due to degeneration of lumbar intervertebral disc, and hyper tension. (Applicant's Exhibit 3, Excerpts from Subpoenaed Records of Vigen Khojayan, M.D., p. 23.)

In a report dated December 26, 2018, Edwin Haronian, M.D., states that applicant's diagnoses are: cervical spine radiculopathy, lumbar spine radiculopathy, right shoulder impingement, right wrist sprain, right hip sprain, and grade 1 spondylolisthesis at the L5-S1 level. (Applicant's Exhibit 1, Initial Report from Edwin Haronian, M.D., December 26, 2018.)

Applicant was evaluated by Panel Qualified Medical Evaluator (PQME) Theodore Georgis, M.D. In a report dated January 9, 2020, Dr. Georgis states that applicant's diagnoses are:

1. Chronic cervical sprain/strain. There is no evidence of cervical radiculopathy by clinical findings. X-rays showed degenerative disease at C5-6. The MRI scan shows multilevel degenerative disease and disc bulges, without significant spinal stenosis. The EMG study does not show evidence of cervical radiculopathy.
2. Chronic lumbar sprain/strain, with right lumbar radiculitis. There is no evidence of lumbar radiculopathy by clinical findings. X-rays showed degenerative disease at L2-3, L3-4, L4-5 and L5-S1[,] and grade I spondylolisthesis at L5-S1. MRI scan shows a 6-7mm disc protrusion, with moderate right neural foraminal stenosis and right L5 nerve root impingement and mild left neural foraminal stenosis[,] a 5mm disc protrusion at L2-3, a 3-4mm disc protrusion at L3-4 and L4-5, and bilateral L5-S1 facet arthorpathy. EMG study shows chronic right L5 radiculopathy.
3. Right wrist/thumb pain, consistent with chronic sprain/strain. X-rays show severe osteoarthritis of the CMC joint of the thumb. The MRI scan shows severe CMC osteoarthritis of the thumb, mild scaphoid-trapezial osteoarthritis, low-grade partial-thickness scapholunate ligament tear, tearing of the TFCC, moderate extensor carpi ulnaris tenosynovitis, and sprain of the volar radioscaphocapitate ligament.

4. Upper extremities, contended[:] asymptomatic except for the right wrist/base of the thumb, as above. EMG/NCV study shows mild to moderate bilateral carpal tunnel syndrome, and very mild left cubital tunnel syndrome.
5. Bilateral lower extremities, contended[:] deemed related to the radicular symptoms on the right, from the lumbar spine down the right leg. The rest of the examination of the lower extremities is unremarkable.
6. Eyes, deferred.
7. Headaches, deferred.
8. Internal, deferred.
9. Emotional, deferred.
10. Skin, deferred.
11. Circulatory, deferred.
12. Recent EMG/nerve conduction studies of the bilateral lower extremities, performed on August 16, 2019 was negative for active lumbar radiculopathy. Suggested poly-neuropathy.

(Joint Exhibit B, PQME Report from Dr. Georgis, January 9, 2020, pp. 15-16.)

The report then states that: "For all non-orthopedic conditions, I defer these to the appropriate medical specialists, as these are outside of my area of specialty." (*Id*. at p. 16.)

In a report dated March 20, 2019, under the heading "Causation," Dr. Georgis states:

> Based on the history as related by the patient, review of the available medical records, as well as today's evaluation, it is my opinion that the normal job duties and industrial exposure are consistent with an injury to her cervical spine, lumbar spine with radicular right leg symptoms, as well as right wrist/ hand. ¶ The medical findings are consistent with the alleged injury. ¶ As such it is my opinion with reasonable medical probability that the patient's case meets the threshold for AOE/COE for a cumulative trauma industrial injury with the dates of July 30, 2017 to July 30, 2018, involving her cervical spine, lumbar spine with radicular right leg symptoms, as well as right wrist/hand, as claimed.

(Joint Exhibit E, PQME Report from Dr. Georgis, March 20, 2019, p. 28.)

In the January 9, 2020 report under the heading "Causation," Dr. Georgis states:

> My opinions on causation remain unchanged from my previous PQME reporting. ¶ It is my opinion that the bilateral carpal tunnel syndrome is related to the cumulative trauma claim.

(Joint Exhibit B, PQME Report from Dr. Georgis, January 9, 2020, p. 17.)

In a report dated September 16, 2020, under the heading "Causation," Dr. Georgis states:

> My opinions on causation remain unchanged from my previous PQME reporting. ¶ Based on the history as related by the patient, review of the available medical records, as well as today's evaluation, it is my opinion that the normal job duties and industrial exposure are consistent with an injury to her cervical spine, lumbar spine with radicular right leg symptoms, right wrist/hand, as well as bilateral carpal tunnel syndrome. ¶ The medical findings are consistent with the alleged injury. ¶ As such it is my opinion with reasonable medical probability, that the patient's case meets the threshold for AOE/COE for a cumulative trauma industrial injury with the dates of July 30, 2017 to July 30, 2018 involving her cervical spine, lumbar spine with radicular right leg symptoms, as well as right wrist/hand, as claimed.
>
> As discussed in my previous PQME reporting and two deposition transcripts, an issue of credibility of the patient as a historian has been raised, and I defer this issue to the trier of fact in this case. As the issue of causation is impacted by the accuracy of the patient's history, this issue is also ultimately deferred to the trier of fact.
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> (Joint Exhibit A, Panel QME Report from Theodore Georgis, M.D., September 16, 2020, p. 7.)

The parties proceeded to trial on November 18, 2020. According to the Minutes of Hearing and Summary of Evidence (MOH/SOE), the issue for trial was injury AOE/COE. Defendant raised the post-termination defense. (MOH/SOE, November 18, 2020, p. 2.) Applicant testified. The matter was continued to February 9, 2021 for further proceedings at which applicant and two employer witnesses testified.

The WCJ issued the resulting F&O as discussed above. In her Petition, applicant contends in relevant part that the WCJ did not address the report by Dr. Khojayan from October 31, 2017 as evidence that she sought medical treatment for her lumbar spine prior to her termination by defendant. The Report of the WCJ states in relevant part that:

> While the above exam of August 20, 2018 included reference to [applicant's] spine complaints, it took place 20 days after the applicant stopped working, and Dr. Khojoyan did not indicate that her back was work related. Further, the doctor did not include in his report, as the applicant testified, that she was unable to walk, that it was due to stress, or any mention about the events of her last day worked. This report also called into question the applicant's credibility.[2]
>
> Therefore, based on the above, and despite the Panel QME's findings of injury, the undersigned issued a Findings of Fact, and Opinion on Decision, on April 21 2021, finding, in relevant part, that the applicant was not credible, and did not sustain an injury. Defendant's post-termination defense was not specifically addressed,

[2] It is not apparent what part(s) of this report the WCJ references when she states it "called into question the applicant's credibility."

> because the undersigned believed it was moot, given that the applicant was not found to be credible.
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> (Report, June 10, 2021, p. 4.)

DISCUSSION

In the Opinion on Decision and the Report, the WCJ explained in detail why she found applicant not to be credible. A WCJ's opinions regarding witness credibility are entitled to great weight, (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]), and we do not question the WCJ's opinion as to applicant's credibility. However, when deciding a medical issue, such as whether an applicant sustained a cumulative injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) With respect to matters requiring medical knowledge, the WCJ cannot disregard a medical expert's conclusion when the conclusion is based on expertise in evaluating the significance of medical facts. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006)145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687].)

Although the factual issue of the occurrence of the alleged incident is a determination for the WCJ, the issue of injury is a medical determination, which requires expert medical opinion. As the Court of Appeal explained in *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188]: "Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences."

Applicant bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.[3]) It is sufficient to show that work was a contributing cause of the injury. (See *Clark*, *supra*, 61 Cal.4th at p. 298; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) Applicant need only show that industrial causation was "not zero" to show sufficient contribution

[3] All statutory references not otherwise identified are to the Labor Code.

from work exposure for the claim to be compensable. (*Clark*, *supra*, 61 Cal.4th at p. 303.) The burden of proof "manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].) It has also long been established that "all reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee." (*Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1310 [81 Cal.Comp.Cases 324], citing *Clemmons v. Workmen's Comp. Appeals Bd.* (1968) 261 Cal.App.2d 1, 8; see also *Garza*, *supra*, 3 Cal.3d at p. 317; Lab. Code, § 3202.)

It is also well established that decisions by 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 [39 Cal.Comp.Cases 310]; *Garza*, *supra*; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Here, PQME Dr. Georgis concluded that applicant sustained a cumulative injury AOE/COE. The PQME reviewed applicant's medical records, diagnostic studies, medical history, and work history, as well as conducted physical examinations of the applicant and explained his analyses in his reports. There is substantial medical evidence in the record here to support a finding of AOE/COE.

Next, we note the WCJ's assertion in the Report that the claim is barred by section 3600(a)(10) because applicant failed to report her injury to her employer prior to her termination or layoff. Section 3600(a)(10) bars compensation for a claim of physical injuries filed after the employee received a notice of termination or layoff unless the employee demonstrates by a preponderance of the evidence at least one of the following circumstances: (1) the employer had

notice of the injury prior to the notice of termination or layoff; (2) the employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury; (3) the date of the specific injury is subsequent to the date of notice or termination of layoff, but prior to the effective date of the termination or layoff; or (4) the injury is a cumulative trauma and the date of injury is subsequent to the date of notice of termination or layoff. If it is determined that applicant sustained a cumulative trauma injury, the WCJ must analyze whether the date of injury as described in section 5412 is subsequent to the date of notice of termination or layoff per section 3600(a)(10).

Additionally, applicant's claim is not barred by section 3600(a)(10)(B). Section 3600(a)(10)(B) bars compensation for a claim of physical injuries filed after the employee received a notice of termination or layoff unless the employee demonstrates by a preponderance of the evidence that the employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury. Here, applicant sought treatment for her lumbar spine as evidenced in Dr. Khojayan's report of October 31, 2017. (Applicant's Exhibit 3, Excerpts from Subpoenaed Records of Vigen Khojayan, M.D., p. 29.) Therefore, the employee's medical records contain evidence of the injury prior to her last day worked and her claim is not barred by section 3600(a)(10)(B).

Turning to section 3600(a)(10)(D) Section 5412(a)(10)(D) specifies 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." (Lab. Code § 5412.) Section 5412 requires both disability and knowledge that the disability was caused by the employment. Disability for the purposes of section 5412 is compensable temporary disability or compensable permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [69 Cal.Comp.Cases 579].) The term "disability," as used in section 5412, refers to "an impairment of bodily functions which results in the impairment of earnings capacity." (*Permanente Med. Grp. v. Workers' Comp. Appeals Bd.* (1985) 171 Cal. App. 3d 1171, 1179-80 [50 Cal.Comp.Cases 491].) "Because actual wage loss is required for temporary disability, modified work alone is not a sufficient basis for compensable temporary disability. But, a modification may indicate a permanent impairment of earning capacity, especially if the worker is never able to return to the original job duties. (Citations.)" (*Rodarte, supra*, at p. 1005.) The date of injury for a cumulative trauma claim may be months or years before the employee's last day worked or years after the employee stops working. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 239 [58 Cal.Comp.Cases 323].)

Furthermore, the "burden of proving that the employee knew or should have known [their disability was industrially caused] rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms." (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal. Comp. Cases 53].) Generally, "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." (*Id.*, at p. 473.)

Here, the WCJ determined that the treater Dr. Khojayan's records were not sufficient to prove that there was an industrial injury. We agree that Dr. Khojayan's records could not have provided applicant with the requisite knowledge under section 5412, and consequently, applicant's date of injury is after her termination. As stated above, PQME Dr. Georgis' reports do support a finding of injury AOE/COE, and the date of his first PQME report addressing causation is March 20, 2019. Thus, the first date applicant had knowledge of an industrial injury under section 5412 was March 20, 2019. Therefore, applicant's claim is not barred under Section 3600(a)(10)(D) since the date of knowledge of the injury was after the last date of the claimed cumulative trauma period (July 30, 2018).

Accordingly, as our decision after reconsideration, we rescind the F&O and substitute a new F&O, and find that applicant sustained injury AOE/COE to her lumbar spine and that the issue of injury to any other body parts is deferred, that her claim is not barred by section 3600(a)(10), and that all other issues are deferred

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of July 26, 2021 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant, Minerva De Bartolo, while employed by defendant Southern California Pizza Company dba Pizza Hut as a driver and dishwasher, during the period from February 7, 2007 through July 30, 2018, sustained injury arising out of and in the course of employment to her lumbar spine. The issue of injury to any other body parts is deferred.

2. During the period from February 7, 2007 through July 30, 2018, defendant Southern California Pizza Company dba Pizza Hut was permissibly self-insured for workers' compensation and administered by Athens Administrators.

3. Applicant's claim is not barred by Labor Code section 3600(a)(10).

4. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 29, 2023

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

MINERVA DE BARTOLO
CIPOLLA, CALABA, WOLLMAN & BHATTI
CALLENDER LAW

HAV/*pc*

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