WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAMES ROSS, *Applicant*

vs.

CITY OF SCOTTS VALLEY; ACCLAMATION INSURANCE MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ12707737
Salinas District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings, Award and Order (F&O) issued on December 8, 2023, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a Worker II, applicant sustained injury arising out of and in the course of employment during the period from June 23, 2003 through May 10, 2013, to his lumbar spine, cervical spine, bilateral shoulders, and in the form of bilateral carpal tunnel syndrome, bilateral epicondylitis, hearing loss, and hypertensive cardiac disease; (2) the dates of injurious exposure for all of the asserted cumulative trauma injuries are from June 23, 2003 through May 10, 2013; (3) the statute of limitations date for applicant's hypertensive cardiac is October 11, 2021; (4) the statute of limitations date for applicant's hearing loss is March 11, 2022; (5) the statute of limitations date for applicant's orthopedic injuries is August 19, 2020; (6) applicant's application for adjudication was filed on November 5, 2019, and amended on October 26, 2020, and is not barred by the statute of limitations; (7) applicant is entitled to further medical treatment to cure or relieve the effects of the injuries to his lumbar spine, cervical spine, bilateral shoulders, bilateral carpal tunnel syndrome, bilateral epicondylitis, hearing loss, and hypertensive cardiac disease; and (8) all other issues are deferred.

The WCJ issued an award in applicant's favor in accordance with these findings and ordered that all other issues be deferred.

Defendant contends that the WCJ erroneously (1) found that applicant's claim is not barred by the statute of limitations; (2) found that the reporting of PQME Drs. Gagnon, Nacouzi and Ward

constitute substantial medical evidence; and (3) failed to find that applicant's claim is barred by the doctrine of laches.

We received an Answer from applicant.

The WCJ filed a Report and Recommendation on the Petition for Reconsideration (Report) recommending that it be denied.

We have considered the Petition, the Answer, and the contents of the Reports. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to correct a clerical error as to the date applicant filed his application for adjudication and to find that applicant's date of date of cumulative injury for all body parts is November 4, 2019.

BACKGROUND

On November 4, 2019, applicant filed an application for adjudication, alleging cumulative injury to the shoulders, back, knees, arms, hands, upper extremities, heart, and kidneys. (Application for Adjudication, November 4, 2019, p. 4.)

Also on November 4, 2019, applicant filed a fee disclosure statement, which was signed by applicant on that date. (Fee Disclosure Statement, November 4, 2019.) In the statement, applicant's attorney represents that he met with applicant on that date. (*Id.*)

On September 19, 2023, the matter proceeded to trial on the following issues:

> (a) Injury AOE/COE.
> (b) Parts of body injured.
> (c) Need for further medical treatment.
> (d) Labor Code Section 5412 date of injury/injuries, with Applicant asserting that there is not yet a 5412 date of injury for the orthopedic injuries, that a 5412 date of injury is 6/3/22 for hearing loss, and the 5412 date of injury is 10/11/21 for hypertensive cardiac disease.
> (e) If there is no date of injury for the orthopedic c ondition, then Defendant asserts that there is no orthopedic injury, as per the disability and knowledge requirements.
> (f) If there is a date of injury for the orthopedic condition, then Defendant asserts that the claim is barred by the statute of limitations, per Labor Code Section 5405.
> (g) If there is no orthopedic injury or if the orthopedic injury is barred by the statute of limitations, then by extension, is the heart/cardiovascular claim also not compensable and/or barred by the statute of limitations.
> (h) Is the heart/cardiovascular injury and/or loss of hearing claim barred by the statute of limitations.
> (i) Whether the reports and opinions of PQME Dr. Gagnon, PQME Dr. Ward, and PQME Dr. Nacouzi, are substantial medical evidence.
> (Minutes of Hearing and Summary of Evidence, September 19, 2023, p. 2:18-3:14.)

At trial, applicant testified that his duties included cleaning bathrooms, repairing roads, repairing buildings, and helping to repair vehicles. He worked 40 hours per week until May 10, 2013, when he stopped working as a result of an April 29, 2013 knee injury. (*Id*., p. 5:11-15.) He injured his knee at work when he jumped down from a truck and has not worked since then. (*Id.*, p. 5:16-19.)

Applicant further testified that, in addition to his specific injury in April of 2013, he is alleging a continuous trauma injury, which he recalls as being filed in October 2019. He filed his cumulative injury claim after he came to see his attorney about his specific knee injury and, with the attorney's help, realized he had a "continuous trauma thing." (*Id*., p. 5:20-23.) Before seeing the attorney, he did not know that that he had this problem. (*Id*., pp. 5:23-25.)

In the Opinion on Decision, the WCJ states:

> Based on the stipulation of the parties and Applicant's testimony, which was found to be credible, Applicant worked for the City of Scott's Valley for approximately 10 years, providing a range of maintenance work. The Applicant's work duties involved heavy lifting, use of hand held machines, such as a chain saw, auto maintenance requiring repetitive use of the hands and use of small tools, and repetitive work with arms above shoulder level. As a veteran, the Applicant made use of his medical benefits at the Veteran's Administration (VA), and private physicians. The Applicant was aware of the process for filing a workers' compensation claim and did file a claim for a specific knee injury. There is substantial medical evidence presented which indicates that the Applicant sustained cumulative trauma orthopedically to his lumbar spine, cervical spine, and bilateral shoulders, and sustained bilateral carpal tunnel syndrome, and bilateral epicondylitis during his work for the city of Scott's Valley from 2003 to 2013. Based on the medical evidence reviewed, the Applicant was diagnosed and treated for atrial fibrillation prior to his employment with Scott's Valley, but hypertensive cardiac disease appears to have been diagnosed and treated during the employment with Scott's Valley. Hearing loss, significant enough to require hearing aids is reflected as early as 2008, based on the medical evidence, which would have been during employment with Scott's Valley. For purposes of entitlement to workers' compensation benefits, the issue becomes when the Applicant first sustained disability with respect to the components of injury and knew or should have known that the disability was caused by his employment with Scott's Valley.
>
> Labor Code §5412 states that the date of injury in cases of occupational disease or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew or in the exercise of due diligence should have known, that such disability was caused by his present or prior employment. Significant numbers of records were reviewed by Qualified Medical Evaluators, Roger Nacouzi,

M.D., Michel Gagnon, D.C. and Ronald Ward, M.D. These records indicate a history of treatment for atrial fibrillation and hypertensive cardiac disease, hearing loss and multiple orthopedic complaints, including the specific injury to the knee. The records themselves were not admitted into evidence, but as referenced by the QMEs in their respective reports, none provide an indication that the Applicant was provided information by any of the doctors that his symptoms could be related to the cumulative impact of his work for the City of Scott's Valley. Therefore, although the Applicant may have had disability associated with specific medical conditions, he did not know that these conditions were caused by his employment with Scott's Valley. Both elements are essential to establish a date of injury, which should not be confused with the period of injurious exposure, and requires both disability and knowledge of industrial causation, as indicated in *Chavez v. WCAB* (1973) 38 CCC 174 and *P.M. & Associates v. WCAB* (*Wagner*) (2000) 65 CCC 878 (writ denied), where specifically it was determined that knowledge without disability was insufficient to establish date of injury.

Here we have the opposite, situation, where the Applicant was aware of certain disabling conditions but may not have understood that these disabilities were causally related to his employment with Scott's Valley. In ascertaining whether the Applicant could have known through the exercise of due diligence that his injuries were caused by his employment with Scott's Valley, the fact that the Applicant had a long employment history with multiple employers as well as a history of military service would complicate the ability to ascertain the specific cause of his disabilities. Additionally, the fact that many of the symptoms increased gradually during employment, or pre-existed and were exacerbated, would complicate the ability to ascertain that work for Scott's Valley was the cause. It was determined that considering these complexities, that even with the exercise of due diligence the Applicant could be unaware of the connection between his injuries causing disability and his employment. Its also significant that the Qualified Medical Evaluators (QMEs), Dr. Gagnon and Dr. Nacouzi, needed diagnostic testing and thorough review of specific medical records to make a final determination regarding causation.

The date of injury consistent with Labor Code§5412 for the orthopedic injuries is August 19, 2020, and determined based on the 4th report of QME Michel Gagnon, D.C., as this is the report that initially ascertains causation and attributes causation, to the Applicant's employment with Scott's Valley, and also includes diagnostic impressions that constitute disability for the cervical spine, lumbar spine, bilateral shoulders and the carpal tunnel syndrome. Based on a date of injury of August 19, 2020, Applicant's claim for benefits for the orthopedic injuries, initiated with an Application filed on November 5, 2019, is timely pursuant to Labor Code §5405, and would not be barred. Applicant's ability, as a lay person, to distinguish that the orthopedic symptoms and disability were cause by his employment were hampered by his prior low back injury, which symptoms appear to have increased during employment with Scott's Valley, as well as potential assumptions related to the natural progression with aging. These factors may result in apportionment of

resulting permanent disability, but they also make it more difficult to ascertain that the symptoms and disability may be related to current or previous work.

The date of injury consistent with Labor Code§5412 for the hearing loss injury is March 11, 2022, and determined based on the report of QME Ronald Ward, M.D., as this is the report that initially ascertains causation and attributes causation, to the Applicant's employment with Scott's Valley. Applicant would have had hearing loss disability for this injury in 2008, when, as indicated in the March 18, 2018 report of Dr. Roger Nacouzi, his review of medical records includes that the Applicant has been using self purchased hearing aids for the past ten years. Based on a date of injury of March 11, 2022, Applicant's claim for benefits for the hearing loss, initiated with an amendment to the original Application filed on October 26, 2020, is timely pursuant to Labor Code §5405, and would not be barred. The determination of Dr. Ward substantiates that it is likely that all of the Applicant's employment contributed to his hearing loss, which again, may provide a basis for apportionment, but further complicates the ability for the Applicant to identify that his work for Scott's Valley was a cause.

The date of injury consistent with Labor Code§5412 for the hypertensive cardiac disease is October 11, 2021, as addressed in the report of QME, Roger Nacouzi, M.D., as this is the report that initially ascertains causation and attributes causation, to the Applicant's employment with Scott's Valley, and also includes explanation of the Applicant's atrial fibrillation which was determined to pre-exist the Applicant's employment, and distinguishes it from the Applicant's hypertensive cardiac disease. Dr. Nacouzi determined that the Applicant's work for Scott's Valley did not contribute or aggravate the Applicant's preexisting atrial fibrillation. However, Dr. Nacouzi determined, after review of substantial medical records, that the Applicant was diagnosed with hypertensive cardiac disease during employment, and the hypertensive cardiac disease is a compensable consequence of the orthopedic injuries. In his assessment of impairment in this report, he clearly indicates disability. Based on a date of injury of October 11, 2021, Applicant's claim for benefits for the hypertensive cardiac disease injury, initiated with an Application filed on November 5, 2019, is timely pursuant to Labor Code §5405, and would not be barred.
(Opinion on Decision, pp. 4-6.)

In the Report, the WCJ states:

The Application for this cumulative trauma injury claim was filed on November 4, 2019.
. . .
Based on the evidence submitted it was found that the date of injury, pursuant to Labor Code §5412, for the hypertensive cardiac disease was October 11, 2021, for the hearing loss was March 11, 2022, and for the orthopedic injuries was August 19, 2020.
. . .

Defendant has asserted that the medical reports of Panel Qualified Medical Evaluator (PQME) Michel Gagnon, DC, of PQME Ronald Ward, MD, and of Roger Nacouzi, MD, are not substantial medical evidence. Defendant asserts that Dr. Gagnon's inability to review reports contemporaneous with the Applicant's employment and onset of symptoms renders Dr. Gagnon's medical history inadequate and concludes that Dr. Gagnon relies only on the Applicant's faulty memory and deposition testimony in making final opinions regarding industrial injury. Defendant asserts that Dr. Gagnon failed to consider the Applicant's post-employment injuries, including a motor vehicle accident resulting in injury to the sternum and right knee, a second motor vehicle accident, which Mr. Ross testified did not result in any injury, and a fall causing injury to the head and face. However, Dr. Gagnon did review medical records related to the post-employment injuries, and although he did not consider them to have contributed to Applicant's claimed injuries to his lumbar spine, cervical spine, bilateral shoulders, bilateral carpal tunnel syndrome, and bilateral epicondylitis, Dr. Gagnon does appear to have reviewed and considered the records from these incidents. However, injuries to the face, the right knee and the sternum are not included as body parts associated with the cumulative trauma injuries Applicant is asserting in this current claim, as indicated and confirmed by the parties in the Minutes of Hearing and Summary of Evidence from September 19, 2023 (EAMS DOC ID 77189175).

Dr. Gagnon also conducted a physical examination of the Applicant on 1/24/2020 (Exhibit J10, EAMS DOC ID 45921255) and on 5/21/2021 (Exhibit J2, EAMS DOC ID 45921247). He requested and reviewed diagnostic testing including an MRI of the lumbar spine and an MRI of the cervical spine (Exhibit J8, EAMS DOC ID 45921253), EMG electro-diagnostics to assess carpal tunnel syndrome (Exhibit J3, EAMS DOC ID 45921248), and MRI's of the right and left shoulder (Exhibit J4, EAMS DOC ID 45921249). Dr. Gagnon reviewed the Applicant's deposition transcript (Exhibit J7, EAMS DOC ID 4592) and approximately 1,650 pages of records provided for review and discussed in his reports of 6/12/2020, 11/13/2020 and 12/15/2020 (Exhibits J9, EAMS DOC ID 45921254, Exhibit J6, EAMS DOC ID 45921251, and Exhibit J5, EAMS DOC ID 45921250). Although Dr. Gagnon, himself, found that he could not rely on the Applicant's memory completely because of the length of time since Applicant had stopped working, therefore, he clearly does not rely "only on the Applicant's memory and testimony in making final opinions regarding industrial injury", as stated by Defendant. Instead Dr. Gagnon reviews extensive records, diagnostic testing and conducted two physical examinations of the Applicant, all of which are summarized in the ten reports he completed, before making his determinations as to industrial causation, and determining that the Applicant sustained a cumulative trauma injury to his lumbar spine, cervical spine, bilateral shoulders, bilateral carpal tunnel syndrome, and bilateral epicondylitis while working for Scotts Valley.

Similarly, PQME Roger Nacouzi, MD, reviewed 2,406 pages of records and conducted a physical examination of the Applicant, as indicated in his report of September 16, 2021 (Exhibit J15, EAMS DOC ID 45921260), prior to establishing

his diagnosis regarding the Applicant's hypertensive cardiac disease, as industrially caused cumulative injury, as a result of his employment with Scotts Valley. Defendants did request clarification from Dr. Nacouzi resulting in a supplemental report, and could have requested clarification of whether the Applicant's hypertensive cardiac disease arose entirely as a result of the medication taken for the specific injury to the knee, but Dr. Nacouzi specifically includes the lumbar spine, cervical spine and upper extremities in his determination regarding the ongoing pain experienced by the Applicant during employment with Scotts Valley. Dr. Nacouzi's opinion includes a discussion regarding medications taken for pain to parts of the body that were determined by Dr. Gagnon to be related to the cumulative trauma injury claim, thus the hypertensive cardiac disease may be attributable to the cumulative trauma injury, at least in part, and would not be limited as solely a compensable consequence of the specific injury claim.

Dr. Nacouzi was asked to consider the cumulative impact of the Applicant's work activities including and prior to the last year of employment in determining causation. This would pre-date the specific injury to the knee which occurred at the end of the Applicant's employment. Dr. Nacouzi discussed that "orthopedic injuries with related pain and suffering and treatment may aggravate a cardiovascular condition. The mechanism of injury is represented by the orthopedic pain resulting in the release of stress hormones as well as the treatment of the chronic orthopedic pain with injected steroidal and oral nonsteroidal anti-inflammatory medications which may further contribute to the cardiovascular condition." He notes that the Applicant was having ongoing orthopedic pain prior to 2009 and treatment including medication and cortisone injections between 2009 and 2013, based on pain in his knees as well as his cervical spine, lumbar spine and upper extremities, all of which contributed to the hypertension which started in 2008. This diagnosis is explained in some detail in the report of October 11, 2021, and is not presented as a theory, but as a medical conclusion (Exhibit J14, EAMS DOC ID 45921259). Dr. Nacouzi includes the information received directly from the Applicant in his reporting but also considers the physical evaluation, the medical records provided and the diagnostic testing completed, to make his determinations.

PQME, Ronald Ward, conducted a physical examination of the Applicant and reviewed 342 pages of records for his initial report of July 26, 2021. The records included an audiogram conducted on March 1, 2018, with notes in the reports of March 1, 2018 and April 2, 2018 that the Applicant had been self-purchasing hearings aids for at least 10 years prior to 2018, or as much as the past 13 years prior to 2018 (Exhibit J19, EAMS DOC ID 45921264). In his subsequent report of March 11, 2022, Dr. Ward reviews current audiometric studies which he compares to the previous audiometric studies available (Exhibit J18, EAMS DOC ID 45921263). Dr. Ward reviewed an additional 11 pages and 625 pages of medical records for his reports issued on August 9, 2022 and December 23, 2022.

Dr. Ward is specific, that there is insufficient documentation or medical history to assess the industrial or non-industrial nature of the Applicant's bilateral conductive component of hearing loss. Since he cannot speculate, he assesses the conductive hearing loss as entirely non-industrial. However, with regard to the Applicant's sensorineural hearing loss from 2004 to 2014, Dr. Ward attributes the Applicant's hearing loss to industrial noise exposure. He considered the Applicant's service in the National Guard Missilery (1960 – 1969), his work for Ford Motor Company (1960 – 1971), his work for various employers prior to his hire with the city of Scotts Valley (1971 – 2003), and his employment with Scotts Valley (2003 – 2013). Dr. Ward assesses the hearing loss progression from 2016 to 2022 to be attributed to age related presbycusis. In arriving at his conclusions regarding causation, Dr. Ward includes the discussion with the Applicant, the review of hundreds of pages of medical records, the physical evaluation of the patient and two audiometric studies.

None of the three PQME's who evaluated the Applicant in this case developed their conclusions based on the Applicant's memory and testimony alone. Each of the doctors took a complete history, reviewed and summarized prior medical records, and provided conclusions they composed and drafted in their reports, as required by Labor Code §4628. None of the three doctors established their opinions based on surmise, speculation, conjecture or guess. Dr. Gagnon required specific diagnostics be completed for his review before he provided his final conclusions. Dr. Ward requested additional audiographic studies before making his final conclusions. All three doctors conducted complete physical examinations of the Applicant prior to rendering any opinion. Their conclusions are reasonable in nature, credible, of solid value and provide adequate evidence to support the conclusion that the Applicant's cumulative injuries to his lumbar spine, cervical spine, bilateral shoulders, bilateral carpal tunnel syndrome, bilateral epicondylitis, hearing loss and hypertensive cardiac disease were at least in part, caused by his work activities for the city of Scott's Valley. This is consistent with the determination establishing substantial medical evidence in the case of *Braewood Convalescent Hospital v. Workers' Compensation Appeals Board* (*Bolton*) (1983) 48 Cal Comp Cases 566, 568; *Insurance Company of North America v. Workers' Compensation Appeals Board* (*Kemp*) (1981) 46 Cal Comp Cases 913; *Teitelbaum v. Workers' Compensation Appeals Board (Bowen*) (1997) 62 Cal Comp Cases 1527. . . . In this case the content of the medical reports were considered in their entirety and determined to be substantial medical evidence establishing industrial causation associated with injury to the lumbar spine, cervical spine, bilateral shoulders, bilateral carpal tunnel syndrome, bilateral epicondylitis, hearing loss and hypertensive cardiac disease.

. . .

There is no dispute that the Applicant worked for the city of Scotts Valley from approximately June 23, 2003 to May 10, 2013, or that the Applicant did not file an Application for the cumulative trauma claim, asserting injury to his lumbar spine, cervical spine, bilateral shoulders, bilateral carpal tunnel syndrome, bilateral epicondylitis, hearing loss and hypertensive cardiac disease, until November 4,

2019, more than six years after his last day of work for the city of Scotts Valley. Labor Code §5412 states that the date of injury in cases of occupational disease 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. In this case the Applicant claimed injury to multiple body parts, which requires the determination of disability and knowledge individually. The date of injury determined for each component is consistent with Labor Code §5412 and was determined to be August 19, 2020, for the orthopedic injuries, based on the 4th report of QME Michel Gagnon, D.C., as this is the report that initially ascertains causation and attributes causation, to the Applicant's employment with Scotts Valley and also includes diagnostic impressions that constitute disability for the cervical spine, lumbar spine, bilateral shoulders and the carpal tunnel syndrome; March 11, 2022, for the hearing loss injury, based on the report of QME Ronald Ward, M.D., as this is the report that initially ascertains causation and attributes causation to the Applicant's employment with Scotts Valley; October 11, 2021, for the hypertensive cardiac disease, based on the report of QME, Roger Nacouzi, M.D., as this is the report that initially ascertains causation and attributes causation to the Applicant's employment with Scotts Valley, and also includes explanation of the Applicant's atrial fibrillation which was determined to pre-exist the Applicant's employment, and distinguishes it from the Applicant's hypertensive cardiac disease.

. . .

As stated in the Opinion, Applicant's ability, as a lay person, to distinguish that his symptoms and disability were caused by his employment at Scotts Valley were hampered by his prior injury, as well as potential assumptions related to the natural progression with aging. Clear indications in the diagnostic testing related to the orthopedic injuries includes degeneration and osteoarthritis, as indicated by Dr. Gagnon. Dr. Ward concludes that in part, the Applicant's current level of hearing loss is partly attributed to age related presbycusis. Dr. Nacouzi determines that in addition to the Applicant's hypertensive cardiac disease, the Applicant also has preexisting paroxysmal atrial fibrillation that was not aggravated or in any way worsened by his employment with Scotts Valley. For each type of symptom experienced, the Applicant had contributing non-industrial factors which would have made a determination that his symptoms were caused by his work more difficult. The Applicant also had a long employment history and a history of military service to further complicate the ability to ascertain the specific cause of disabilities, despite having symptoms while working. The standard utilized by the trier of fact was whether the Applicant knew or in the exercise of reasonable (due) diligence should have known that his disability was caused by his employment with Scotts Valley. Based on the medical evidence presented, which included reports from three medical experts acting as Panel Qualified Medical Evaluators, all of whom required additional information beyond that provided by the Applicant when initially evaluated in order to determine that the Applicant's symptomology and disability was caused, at least in part, by his employment with Scotts Valley, as well as the trial testimony, it was determined that even with the exercise of

reasonable diligence the Applicant could be unaware of the industrial causation of his disabilities.

It is important to distinguish between the Applicant's experiencing of symptoms and believing certain symptoms may be related to work related activities, and the knowledge that disability is caused by work related activities. For example, the Applicant had the symptom of pain in his lumbar spine while working for the city of Scotts Valley, but had a prior injury and surgery to the lumbar spine before he began working for Scotts Valley, which might be determined to be the cause of his symptoms, or might not. Without evaluation by a doctor it is not unreasonable that Applicant would not know the true source of the symptoms or that his disability is actually attributable, in part, to an industrial cause. Defendants would, of course be entitled to apportionment based on the prior disability. Symptomology alone is not a conclusive indication of industrial causation and is insufficient to establish knowledge of disability, as indicated in *Lewis v. City and County of San Francisco* (1981) 46 Cal Comp Cases 206 and *Jordan Potash, Inc. v. Workers' Compensation Appeals Board* (*Ward*) (1983) 48 Cal Comp Cases 472 (writ denied). The question of whether the Applicant knew or should have known that his disability was industrially caused is a question of fact, and the employer bears the burden of proof, establishing that the employee should have known, as stated in *City of Fresno v. WCAB* (1985) 163 Cal App 3d 467, which includes 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 the applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability". In the current case, the Applicant indicated that he had symptoms while working, but there is no indication that he was aware of work related disability or its relation to causation of his symptoms during his employment with Scotts Valley, until he received information from each of the PQME's in this case establishing causation and informing him of the causal relation between his disability, the resulting symptoms and the work related causation.

. . .

Labor Code §5405 sets the statute of limitations for commencing proceedings for the collection of benefits as one year from either the date of injury, the date of expiration of any period covered by payment under Article 3, or the last date on which any benefits provided for in Article 2 were furnished. In the present case no payments under Article 3, or benefits under Article 2 were provided for this claim of injury, therefore the issue is whether the Applicant commenced proceedings within one year of the date of injury.

. . .

Laches is raised by Defendant in the Petition for Reconsideration but has not been raised previously. Laches was not raised in the Pre-Trial Conference Statement or indicated as an issue in the Minutes of Hearing and Summary of Evidence from the trial on September 19, 2023, when the parties specifically confirmed the issues as had been read into the record. In *Butler v. Holma*n (1956) 146 Cal App 2d 22, the court described laches as an unreasonable delay in asserting a right, which causes

prejudice for an adverse party if assertion of the right is permitted. In disallowing assertion of a right under a laches theory, the Court exercises its equity powers independent of any statute of limitations. In *Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board* (*Martin*) (1985) 50 Cal Comp Cases 411, it was decided that laches may apply in workers' compensation proceedings. However, the Defendant must show prejudice as a result of the delay. In this case Labor Code §5412 is specifically intended to toll the statute of limitations of Labor Code §5405, by providing that the date of injury does not occur until the Applicant has both disability and knowledge of the work related nature of the disability. Therefore, some delay is anticipated until both have been achieved.

Additionally, Defendant has not made a showing of any prejudice due to the delay, and in fact did not provide any evidence or even raise the issue until the filing of the Petition for Reconsideration. As a result the issue of laches was not addressed in the Findings, Award and Order issued on December 8, 2023. To address it now, without affording the Applicant the opportunity to be aware that the issue of laches has been raised and have the opportunity to respond, would violate the due process clause of the 14th Amendment of the Constitution of the United States. In the case of *Rucker v. Workers' Compensation Appeals Boar*d (2000) 82 Cal App 4th 151, 65 Cal Comp Cases 805, it was confirmed that the Board is bound by the due process clause of the 14th Amendment of the Constitution of the United States, to give the parties before it a fair and open hearing. *Fortich v. Workers' Compensation Appeals Board* (1991) 233 Cal App 3d 1449, 56 Cal Comp Cases 537, similarly asserts that "An elemental and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections." Applicant was not provided with either notice or the opportunity to present its objections to the issue of laches in this matter. Therefore, laches should not be considered as an issue appropriate for reconsideration. Additionally, prejudicial impact is not supported by the evidentiary record, and as an affirmative defense not raised at trial it should be deemed waived.
(Report, pp. 1-12.)

DISCUSSION

Defendant first contends that the WCJ erroneously found that applicant's claim is not barred by the statute of limitations. Specifically, defendant argues that the evidence shows that applicant "knew his orthopedic injuries, internal/hypertension, and hearing loss all developed while he was working" for it in 2013. (Petition, p. 7:14-15.)

It is well established that the burden of proof rests upon the party holding the affirmative of the issue, and all parties shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (§ 5705; *Lantz v. Workers' Comp. Appeals Bd*. (2014) 226

Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (*Obernier*) (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289].) "Preponderance of the evidence" is defined by section 3202.5 as the "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." (Lab. Code § 3202.5.)

Labor Code section 5404 states in part:

> Unless compensation is paid within the time limited in this chapter for the institution of proceedings for its collection, the right to institute such proceedings is barred.
> (Lab. Code § 5404.)

Pursuant to Labor Code section 5405:

> 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. …
> (Lab. Code § 5405.)

Labor Code section 5412 defines the date of injury for a cumulative injury claim as:

> [T]hat 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.)

For purposes of determining the date of a cumulative injury, it is not assumed that a worker has knowledge that the disability is job-related without medical confirmation, unless the nature of the disability and the worker's qualifications are such that he or she should have recognized the relationship. (*City of Fresno v. Workers' Comp. Appeals Bd., (Johnson)*, (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53].) An injured worker's knowledge that he or she sustained symptoms is not knowledge that the symptoms were work related. (*Pacific Indemnity Company v. Industrial Accident Commission (Rotondo)* (1950) 34 Cal. 2d 726, 729 [15 Cal.Comp.Cases 37].) Whether an employee knew or should have known his or her disability is industrially related is generally a question of fact to be determined by the trier of fact, i.e., the WCJ. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson), supra*; *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104]; *Chambers v. Workmen's Comp. Appeals Bd.* (1968)

69 Cal.2d 556 [33 Cal.Comp.Cases 722]; *Alford v. Industrial Accident Com.* (1946) 28 Cal.2d 198 [11 Cal.Comp.Cases 127].)

In this regard, applicant testified that he did not know that he could have a cumulative trauma injury until October 2019, when he met with his attorney regarding his specific knee injury and learned that he apparently had an injury resulting from continuous trauma. (Minutes of Hearing and Summary of Evidence, September 19, 2023, p. 5:20-24.) The WCJ determined that this testimony was credible, a determination to which we accord great weight because the WCJ had the opportunity to observe applicant's demeanor at trial. (Opinion on Decision, p. 4; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358].)

In addition, as stated in the Opinion on Decision, the documentary evidence in the record before us is consistent with applicant's testimony: The reports of PQME Drs. Nacouzi, Gagnon, and Ward reflect applicant's history of treatment for atrial fibrillation and hypertensive cardiac disease, hearing loss and multiple orthopedic complaints, but do not indicate that he received information from any medical provider that his symptoms resulted from continuous trauma experienced while working for defendant. (Opinion on Decision, pp. 4-5.)

In the absence of evidence that any medical provider made known that his symptoms arose from cumulative injury, defendant argues that applicant should have known that his symptoms resulted from cumulative injury through the exercise of due diligence. But applicant's knowledge that he sustained symptoms does not constitute knowledge that they were work-related, and there is no evidence before us that the nature of his atrial fibrillation, hypertensive cardiac disease, hearing loss and orthopedic complaints were such that he should have recognized that his symptoms could have resulted from work-related cumulative trauma. (Report. pp. 9-10; *Pacific Indemnity Company v. Industrial Accident Commission (Rotondo), supra*; *City of Fresno v. Workers' Comp. Appeals Bd., (Johnson), supra*.)

Accordingly, we are unable to discern merit in defendant's argument that the WCJ erroneously found that applicant's claim is not barred by the statute of limitations.

In *J. T. Thorp v. Workers' Comp. Appeals Bd*. (*Butler*) (1984) 153 Cal.App.3d 327 [49 Cal.Comp.Cases 224], the court states:

> 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 … [T]he "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 … [T]he purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury."
> (153 Cal.App.3d at p. 341.)

In this regard, we have explained that the record fails to show that applicant knew or should have recognized that his symptoms resulted from cumulative injury at work until his October 2019 meeting with his attorney. However, the record shows that applicant met with his attorney and filed his application for adjudication alleging cumulative injury to the shoulders, back, knees, arms, hands, upper extremities, heart, and kidneys on November 4, 2019. (Application for Adjudication, November 4, 2019, p. 4; Fee Disclosure Statement, November 4, 2019.) It is thus clear that applicant was reasonably aware of his injury on or about November 4, 2019, a date before he received his diagnoses of cumulative hypertensive cardiac disease, hearing loss, and orthopedic injuries that nevertheless falls within the statutory period.

Accordingly, we will amend the F&O to correct a clerical error as to the date applicant filed his application for adjudication and to find that applicant's date of date of cumulative injury for all body parts is November 4, 2019. (See *Toccalino v. Workers' Comp. Appeals Bd*. (1982) 128 Cal.App.3d 543 [180 Cal. Rptr. 427, 47 Cal.Comp.Cases 145, 154-155] (stating that that the Appeals Board may correct a clerical error at any time without the need for further hearings).)

We next address defendant's contention that the WCJ erroneously found that the reporting of PQME Drs. Gagnon, Nacouzi and Ward constitute substantial medical evidence.

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [262 Cal. Rptr. 537, 54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) 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).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [93 Cal. Rptr. 15, 480 P.2d 967, 36 Cal.Comp.Cases 93, 97].)

Here, as stated in the Report, PQME Drs. Gagnon, Nacouzi and Ward each obtained a complete history, reviewed extensive medical records, and opined in terms of reasonable medical probability based upon a thorough record. (Report, p. 6.)

Accordingly, we are unable to discern merit to defendant's contention that the reports of PQME Drs. Gagnon, Nacouzi and Ward do not constitute substantial medical evidence.

Lastly, we address defendant's contention that the WCJ erroneously failed to find that applicant's claim is barred by the doctrine of laches.

Here, as stated in the Report, defendant failed to raise the issue of laches for trial and, therefore, the issue was waived. (Report, pp. 11-12; see Lab. Code,§ 5904; *Los Angeles Unified Sch. Dist. v Workers' Comp. Appeals Bd.* (*Henry*) (2001) 66 Cal.Comp.Cases 1220 (writ denied); *Jobity v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 978 (writ den.); *Hollingsworth v Workers' Comp. Appeals Bd*. (1996) 61 Cal.Comp.Cases 715 (writ denied).)

Additionally, as stated in the Report, the record fails to show that defendant suffered prejudice resulting from any alleged delay in applicant's filing of his cumulative injury claim. (Report, pp. 11-12.)

Accordingly, we are unable to discern merit to defendant's contention that the WCJ erroneously failed to find that applicant's claim is barred by the doctrine of laches.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to correct a clerical error as to the date applicant filed his application for adjudication and to find that applicant's date of date of cumulative injury for all body parts is November 4, 2019.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings, Award and Order issued on December 8, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Order issued on December 8, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

***

3. The date of cumulative injury for all body parts under Labor Code section 5412 is November 4, 2019.

4. Based on the date of cumulative injury for all body parts, and based upon the filing of applicant's application for adjudication on November 4, 2019, as amended on October 26, 2020, applicant's cumulative injury claim is not barred by the statute limitations (Labor Code section 5405).

5. Applicant is entitled to further medical treatment to cure or relieve the effects of the injuries to his lumbar spine, cervical spine, bilateral shoulders, bilateral carpal tunnel syndrome, bilateral epicondylitis, hearing loss, and sustained hypertensive cardiac disease.

6. All other issues are deferred.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 26, 2024

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

JAMES ROSS
DILLES LAW GROUP
WITZIG, HANNAH, SANDERS & REAGAN
4600BOEHM

SRO/*cs*

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