WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL ROSE, *Applicant*

vs.

LOS ANGELES DODGERS;
ACE AMERICAN INSURANCE/CHUBB, *Defendants*

Adjudication Number: ADJ9095312
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

Applicant and defendant both seek reconsideration[1] of the May 6, 2019 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional baseball player from June 5, 1995 to September 2, 2010, sustained industrial injury to his neck, back, both shoulders, right thumb and right middle finger, both hips, ears, traumatic brain injury and post-traumatic head syndrome from repetitive severe head injury and consequently he developed a sleep disorder and injury to his psyche. The WCJ found that applicant's date of injury was September 16, 2013; that applicant's earning capacity was $500 per week; that applicant sustained 64 percent permanent disability; and that pursuant to Labor Code[2] section 5005, defendant Los Angeles Dodgers by ACE Insurance (defendant) was liable for 63.5 percent of the benefits awarded.

Applicant's Petition for Reconsideration (Applicant's Petition) contends applicant has sustained injury resulting in permanent mental incapacity, and that his disability is conclusively presumed to be total, without apportionment. Applicant further contends that his condition is progressively deteriorating, warranting an ongoing award of temporary disability and the reservation of jurisdiction over the injury. Applicant further contends the WCJ erred in excluding

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[1] Commissioners Lowe and Sweeney, who were members of the panel that granted Reconsideration to further study the factual and legal issues in this case, no longer serve on the Appeals Board. Other panelists have been assigned in their place.

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

reports obtained after the close of discovery, and that the date of injury should be November 15, 2017 or April 7, 2018, based on applicant's first knowledge of a cumulative trauma injury to his brain. Applicant further contends that his earnings should be fixed as of the time of injury, and that applicant's settlement with co-defendant State Compensation Insurance Fund (SCIF) should not be analyzed under section 5005 if applicant is deemed permanently and totally disabled.

Defendant's Petition for Reconsideration (Defendant's Petition) contends that its pro rata share of liability under sections 5005 and 5500.5 is 16 percent; that the medical evidence offered by applicant was obtained in contravention of sections 4600 and 4062.2 and cannot serve as the basis for a disability award; the reporting of treating psychiatrist Dr. Greenzang is not substantial evidence; and that applicant's injury is not catastrophic as contemplated by section 4660.1(c)(2)(B).

We have received Answers from both parties. The WCJ prepared a Report and Recommendation on Applicant's Petition for Reconsideration (Report on Applicant's Petition), recommending that we grant reconsideration to amend the percentages of liability for the Los Angeles Dodgers to correct for mathematical error, and to further clarify that defendant is 100 percent liable for applicant's psychiatric injury. The WCJ also prepared a Report and Recommendation on Defendant's Petition for Reconsideration (Report on Defendant's Petition), similarly recommending that we grant reconsideration to remedy the assessment of defendant's pro-rata share of liability, changing it from 63.5% to 39.6%, but that we otherwise deny Defendant's Petition.

We have considered the allegations in Applicant's Petition, Defendant's Petition, both Answers, and the contents of the WCJ's Reports. Based on our review of the record, and for the reasons discussed below, we will rescind the F&A and substitute new findings of fact finding that applicant sustained injury to the neck, back, both shoulders, right thumb and right middle finger, both hips, and ears, and in the form of traumatic brain injury and post-traumatic head syndrome; we will defer the issue of injury to the body parts of sleep disorder and psyche; we will find that the date of injury was September 16, 2013 and that applicant's claim is not barred by section 5405; and we will find that applicant is in need of further medical treatment to cure or relieve from the effects of his industrial injury. We will defer issues of applicant's earning capacity, temporary disability, permanent and stationary date, permanent disability, apportionment, and attorney fees. We will also defer the issue of defendant's liability for the Award under section 5005, and the

period of liability pursuant to section 5500.5. We will also defer the issue of whether applicant sustained an insidious and progressive disease warranting the reservation of jurisdiction by the Appeals Board. We will then return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

FACTS

Applicant claimed injury to head, eyes, jaw, neck, back, both shoulders, both elbows, both wrists, both hands, all fingers, both hips, both knees, both ankles, both feet, all toes, psych, internal injuries, ears, nose and throat, reproductive system, neurological system, and sleep dysfunction, while employed as a professional baseball player by the Edmonton Capitals from August 14, 2010 to September 2, 2010; the Chico Outlaws from April 2, 2010 to August 13, 2010; the Los Angeles Dodgers from February 2, 2009 to November 9, 2009; the Long Island Ducks from April 29, 2008 to May 15, 2008; the Colorado Rockies from November 21, 2007 to March 24, 2008; the Cleveland Indians from November 24, 2006 to October 29, 2007; the St. Louis Cardinals from May 5, 2006 to October 16, 2006; the Tampa Bay Rays from October 14, 2005 to May 25, 2006; the Los Angeles Dodgers from December 6, 2004 to October 14, 2005; the Oakland Athletics from November 6, 2002 to October 15, 2004; the Kansas City Royals from May 1, 2002 to October 15, 2002; the Boston Red Sox from August 18, 2001 to April 26, 2002; the Arizona Diamondbacks from March 21, 2000 to August 18, 2001; and the Houston Astros from June 5, 1995 to March 16, 2000. Defendant Los Angeles Dodgers (defendant) denies the alleged injury arose out of and in the course of employment (AOE/COE).

Applicant has obtained reporting from Michael J. Einbund, M.D., in orthopedic medicine, Kenneth L. Nudleman, M.D. in neurology, Andrew G. Berman, M.D., in otolaryngology, and Ted R. Greenzang, M.D., in psychiatry. The parties have selected Zan Ian Lewis, M.D., as the Qualified Medical Evaluator (QME) in orthopedic medicine.

On August 13, 2018, the parties proceeded to trial on issues including, in relevant part, injury AOE/COE, parts of body injured, earnings, the date of injury pursuant to section 5412, the permanent and stationary date, permanent disability, apportionment, and attorney fees. Applicant further raised the issue of the presumptive total disability pursuant to section 4662, subdivisions

(a) and (b). Defendant raised the statute of limitations pursuant to section 5405, and pro rata liability under section 5005.

On May 6, 2019, the WCJ issued his F&A, finding injury AOE/COE to the neck, back, both shoulders, right thumb and right middle finger, both hips, both ears, and in the form of traumatic brain injury and post-traumatic head syndrome, with resulting injury to the psyche and in the form of sleep disorder. (Findings of Fact Nos. 2 & 3.) The WCJ determined the date of injury under section 5412 to be September 16, 2013, and that applicant's claim was not barred by the one-year statute of limitations of section 5405. (Findings of Fact Nos. 6 & 7.) The WCJ determined that the specific incident occurring in 2000 wherein applicant was the victim of a robbery at gunpoint caused psychiatric injury but is not part of applicant's cumulative trauma claim. (Finding of Fact No. 8.) The WCJ also determined that applicant had the earnings capacity of $500 per week, and that applicant became permanent and stationary on October 17, 2016. (Findings of Fact, Nos. 10 & 12.) The WCJ determined that applicant was not permanently and totally disabled, but had sustained 64 percent permanent disability, awarding corresponding indemnity and attorney fees. (Findings of Fact Nos. 13, 14, and 16.) Finally, the WCJ found that due to applicant's prior settlement, defendant's pro rata liability was capped at 63.5 percent of the award. (Finding of Fact No. 15.)

Applicant's Petition contends he has sustained an injury to the brain resulting in permanent mental incapacity, thus meeting the standard of section 4662(a)(4) for presumptive permanent total disability, as supported in the medical record as well as the WCJ's observations of applicant at trial. (Applicant's Petition, at pp. 7:3, 9:10.) Applicant argues in the alternative that he is permanently and totally disabled "in accordance with the fact," pursuant to section 4662(b). Applicant further contends that his condition is both progressive and deteriorating, warranting the Appeals Board's reservation of jurisdiction and the award of ongoing temporary total disability. (*Id.*at 11:1.) Applicant asserts that the February 15, 2018 report of Dr. Greenzang and the April 7, 2018 report of Dr. Nudleman were referenced in the pre-trial conference statement, and should be admitted into evidence. (*Id.* at p. 14:1.) Applicant also asserts his date of injury should be fixed based on his first knowledge of a cumulative trauma injury to his brain, either on November 15, 2017, when applicant received the results of a brain scan, or on April 7, 2018, the date of the last report of Dr. Nudleman. (*Id.* at p. 17:28.) Applicant contends his earnings in 2009 and 2010 were $73,000 and $43,000, respectively, with both amounts yielding earning capacity in excess of that

identified by the WCJ of $500 per week. Applicant avers that irrespective of his partial settlement with a prior employer, the Los Angeles Dodgers would remain jointly and severally liable for the claim. (*Id.* at p. 20:11.) Finally, applicant contends that the Los Angeles Dodgers are solely liable for any compensable psychiatric injury because applicant's employment with other teams during the last year of the liability period under section 5500.5 was less than the six months of employment required by section 3208.3(d). (*Id.* at p. 21:15.)

Defendant's Petition contends its pro rata liability for any award is 16 percent, based on applicant's actual days of injurious exposure with the Los Angeles Dodgers. (Defendant's Petition, at 6:17.) Defendant also contends that orthopedic QME Dr. Lewis issued the only appropriately obtained medical-legal reporting, and that the reporting of Drs. Nudleman, Greenzang, and Berman are "cloaked as treating physicians to attempt to circumvent Labor Code section 4062.2." (*Id.* at 8:22.) Defendant further maintains that the reporting of Dr. Greenzang is not substantial medical evidence, and that "factual error, an inconclusive brain SPECT study and an unsupported assessment of the applicant's brain condition are not substantial evidence to support a finding applicant sustained a catastrophic injury," per section 4660.1(c)(2)(B).

DISCUSSION

I.

We begin our discussion with the threshold issue of the admissibility of the reporting of Drs. Einbund, Nudleman, Berman and Greenzang. Defendant contends the "offered medical evidence was obtained in contravention of section 4062.2 and 4600 and cannot serve as the basis for a disability award." (Defendant's Petition, at 7:22.) Defendant avers that the only physician properly acting as a QME is Dr. Lewis in orthopedic medicine, that the balance of the reporting physicians in this matter were obtained in violation of the medical-legal dispute resolution process of sections 4061 and 4062, and that the reporting physicians were all situated outside a reasonable geographic area from applicant's residence, place of business, or place of injury. (*Id.* at pp. 7-10.)

The California Supreme Court has discussed the admissibility of medical reports in workers' compensation proceedings, in pertinent part, as follows:

> [T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports...Under section 4064, subdivision (d), "no party

> is prohibited from obtaining any medical evaluation or consultation at the party's own expense," and "[a]ll comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board ..." except as provided in specified statutes. The Board is, in general, broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a).) These provisions do not suggest an overarching legislative intent to limit the Board's consideration of medical evidence.
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> (*Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209].)

As to the issue of the admissibility of reports privately obtained from doctors by the employee pursuant to section 4605, the Court stated:

> ...[W]hen we consider the reforms enacted by Senate Bill 863...[t]he Legislature did not...narrow employees' right to seek treatment from doctors of their choice at their own expense, or bar those doctors' report admissibility in disability hearings. Rather, it provided that privately retained doctors' reports "shall not be the sole basis of an award of compensation." (§ 4605.) The clear import of this language is that such reports may provide some basis for an award, but not standing alone.
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> (*Id.* at 1239.)

The California Court of Appeal subsequently held:

> The Board noted that section 4605 is contained in article 2 of chapter 2 of part 2 of division 4 of the Labor Code, which is titled "Medical and Hospital Treatment." Considering this context, the Board concluded that the term "consulting physician" in section 4605 means "a doctor who is consulted for the purposes of discussing proper medical treatment, not one who is consulted for determining medical-legal issues in rebuttal to a panel QME." We agree with the Board. Section 4605 provides that an employee may "provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires." When an employee consults with a doctor at his or her own expense, in the course of seeking medical treatment, the resulting report is admissible.
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> …
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> Section 4605 permits the admission of a report by a consulting or attending physician, and section 4061, subdivision (i) permits the admission of an evaluation prepared by a treating physician. Neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion.

(*Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal. App. 4th 1009, 1016 [194 Cal. Rptr. 3d 511, 80 Cal. Comp. Cases 1256].)

Here, applicant instituted proceedings for the collection of benefits by the filing of an Application for Adjudication on September 13, 2013. Defendant denied liability as of December 17, 2013. (Ex. A, Notice of Denial of Claim, December 17, 2013.) Applicant thereafter nominated Michael Einbund, M.D., to act as a treating physician, and Dr. Einbund conducted a clinical examination of applicant on November 20, 2015. (Ex. 2, Report of Michael Einbund, M.D., dated November 20, 2015, at p. 1.) Following his initial evaluation of applicant, Dr. Einbund noted presenting symptoms corresponding to conditions outside his medical specialty and requested authorization to make the appropriate referrals to other physicians specializing in neurology, psychiatry and internal medicine. (*Id.* at p. 12.) Thereafter, applicant self-procured treatment with Drs. Nudleman, Greenzang, Berman, and Reynolds. As attending and consulting physicians, the reports from each of the doctors are admissible. (*Batten v. Workers' Comp. Appeals Bd., supra* at 1016.)

Defendant contends that applicant's physicians are "cloaked" as treating physicians in an effort to avoid the medical-legal process prescribed by section 4062.2. (Petition, at 8:22.) The WCJ's Report disagrees, however, and observes:

> [Applicant's] primary treating physician, Dr. Einbund, who he saw three times, evaluated all his symptoms, made referrals to other doctors, and gave recommendations for future treatment which Applicant said were helpful [8/13/18 SOE P14, L18-20]. The applicant saw Dr. Greenzang, three to five times and a neurologist, Dr. Nudleman, also three to five times [8/13/18 SOE P14, L21-22]. He also was recommended to see Dr. Reynolds who presently is treating Mr. Rose to alleviate sleep and stress issues and to help with pain management [8/13/18 SOE P15, L2-4]. Most of the treatment was discussion by telephone [10/9/18 SOE P10, L21-23]. The treatment has been helpful [8/13/18 SOE P15, L5-7].
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> (Report on Defendant's Petition, at p. 6, footnotes omitted.)

The Report observes that because defendant denied the claim, applicant was required to self-procure his medical treatment. (*Id.* at p. 14.) The WCJ also points out that defendant has misplaced the burden of proof with respect to the availability of treating physicians closer to applicant's residence, and that the burden of establishing the availability of a similar source of medical treatment rests with the employer. (*Braewood Convalescent Hospital v. Workers' Comp.*

Appeals Bd. (*Bolton*) (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) Because defendant has not offered persuasive evidence responsive to this issue, defendant has not met its burden of proof necessary to establish that treatment with the designated treating physicians was unreasonable. (Lab. Code, § 5705.)

The WCJ's Report on Defendant's Petition further addresses the role of the treating physician as follows:

> Drs. Einbund, Nudelman, and Greenzang are examining physicians as stated in their reports. "When the services of the doctor were engaged to make an examination and report he became a witness … His report was the equivalent of testimony given in person" [*City of L.A. v WCAB*, 28 CCC 94(1963)]. Generally, reports of attending or examining physicians are admissible as evidence [Labor Code section 5703(a)].
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> A primary treating physician is the physician "*primarily responsible for managing the care of the injured worker*" and who has examined the employee at least once for the purpose of rendering or prescribing treatment [Rule 9785(a)(1)]. Drs. Einbund, Nudelman and Greenzang each did so. In this regard, Dr. Einbund stated in his initial report:
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>> *I have examined Mr. Rose in my capacity of his primary treating physician relative to injuries he sustained during the course of his career as a professional baseball player. He has not yet reached a level of maximum medical improvement. I am requesting authorization for the patient to participate in a course of physical therapy at two times per week for six weeks.*
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>> . . .
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>> *It should be noted that this report has focused on Mr. Rose's orthopaedic problems. He does have significant headaches and he was involved in collisions at home plate during his career. He also has anxiety attacks and sleep difficulties.*
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>> . . .
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>> *I am requesting authorization for him to be seen by a neurologist for evaluation of his headaches, a psychiatrist for evaluation of his depression, and an internist for evaluation of nausea and other medical problems.*
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> [Ex 2, P12-13]

> "Management" would include recommendation for involvement of physicians in other specialties. The Court notes that authorization for such referrals was never given. Under the circumstances it is appropriate for Applicant's counsel to arrange appointments with the other recommended specialists.
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> Petitioner appears to argue that because some of the treatment reports are prepared in the format of a medical-legal report, the physicians aren't really treating Applicant but merely writing reports to get Applicant around the need to follow the steps to secure a Panel QME. A medical-legal report is one prepared to help prove a contested claim. Rule 9793 describes the types of medical-legal reports and all can be done by a treating physician. Obtaining such a report from a treating physician is especially appropriate where the claim has been denied and where there are issues of permanent disability.
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> Labor Code section 4060 permits medical-legal evaluations by a treating physician, as does section 4061. Petitioner's claim that the medical reports submitted in this matter are invalid as circumventing the QME process because they were prepared by a treating physician is misplaced.
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> (Report on Defendant's Petition, at pp. 15-16, footnotes omitted.)

We agree with the WCJ's analysis, and further note that the authority cited in defendant's petition, *Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584 [71 Cal.Comp.Cases 161] and *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596 [71 Cal.Comp.Cases 155] both involved admitted injuries, where the defendant was providing medical treatment to the injured worker. Here, defendant has denied liability for the claim, and has authorized no medical treatment. We further observe that defendant did not object to the admissibility of the reporting of Drs. Einbund, Nudleman, Berman and Reynolds at trial, nor was the issue identified with particularity among the issues submitted for decision. (Minutes of Hearing and Summary of Evidence, August 13, 2018, at 3:1; *The Conco Companies v. Workers' Comp. Appeals Bd.* (*Sandoval*) (2019) 84 Cal.Comp.Cases 1067, 1070 [2019 Cal. Wrk. Comp. LEXIS 112] (writ den.); see also *City of Anaheim v. Workers' Comp. Appeals Bd. (Evans)* (2005) 70 Cal.Comp.Cases 237, 238 [workers' compensation litigants are not entitled to reconsideration on the basis of issues that could have been presented for decision at trial].) Accordingly, we discern no good cause to disturb the WCJ's decision to admit and rely upon the reporting of applicant's treating physicians.

II.

We next address the issue of earnings. Applicant contends his earnings were $73,000 in 2009, and $43,000 in 2010. (Applicant's Petition, at 19:20.) Applicant's Petition cites case law authority confirming that the value of overtime, meals, lodging and fuel are to be accounted for in the calculation of wages and restates applicant's trial testimony regarding his earnings in 2009 and 2010. *(Ibid.)* The WCJ's Opinion on Decision notes widely divergent evidence with respect to earnings following the end of applicant's career in professional sports, and that a wage capacity analysis under section 4453(c)(4) best accounted for such variations in earning. (Opinion on Decision, at p. 29.) The F&A fixes applicant's earning capacity at $500 per week. (Finding of Fact No. 10.)

The WCJ's Report observes that "[i]t would not be reasonable to use Applicant's earnings as a professional athlete to determine earning capacity because even without injury professional athletes end their careers when age diminishes skill and later earnings outside of the athletic arena are usually not anywhere near the amounts earned within it … [a]pplicant offers no evidence to suggest that Applicant's earning capacity is substantially greater than what was determined by the Court after trial." (Report on Applicant's Petition, at p. 10.)

While we agree with the WCJ's application of an earnings capacity analysis as described by section 4453(c)(4), it is unclear how the WCJ reached the figure of $450 to $500 per week. The Opinion on Decision and the WCJ's Report both indicate that the WCJ's determination was based on, inter alia, applicant's earnings both during and after his time playing professional baseball, as well as applicant's education, applicant's spouse's testimony, and the WCJ's trial observations. (Report on Applicant's Petition, at p. 10.) However, neither the Opinion on Decision nor the Report provide any specific analysis of how the WCJ's ultimate figure was determined. We acknowledge the differential between applicant's earnings during and after his employment as a professional athlete. (*Id.* at pp. 28-29.) However, the record does not adequately explain how the WCJ determined that $500 per week reasonably reflected applicant's earnings capacity pursuant to section 4453(c)(4). (*Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 891 [35 Cal.Comp.Cases 27]; see also *Godinez v. City of Los Angeles* (February 9, 2021, ADJ11998534) [2021 Cal. Wrk. Comp. P.D. LEXIS 28].) Accordingly, we will rescind Finding of Fact No. 10, and defer the issue of applicant's earnings capacity pending further proceedings and decision by the WCJ.

III.

We next address the issue of the date of injury pursuant to section 5412. The F&A finds the date of injury to be September 16, 2013, based on the date of the filing of the Application for Adjudication. (Finding of Fact No. 6; Opinion on Decision, p. 25.) Applicant's Petition appears to assert that the correct date of injury should be November 15, 2017, the date applicant first received the results of a brain scan demonstrating cumulative trauma, or in the alternative, the date of Dr. Einbund's first report relating to an orthopedic date of injury. (Applicant's Petition, at p. 19:3.)

In cases involving an alleged cumulative trauma injury, the date of injury is governed by Labor Code section 5412, which provides:

> 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…[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." (*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 applicant receives medical opinion expressly stating so, even where the applicant has indicated their 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 reasonable 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).)

Further, "[t]he burden of proving that the employee knew or should have known rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms." (*Johnson, supra*, 163 Cal.App.3d 467, 471.) 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].)

Here, the WCJ has determined that applicant's preexisting disability, coupled with his meeting with an attorney and filing the instant claim of cumulative injury fixes the concurrence of section 5412 knowledge and disability as the date of the filing of the application, September 16,

2013. (Opinion on Decision, at pp. 23-25.) While applicant contends that the date of injury should correspond to applicant's first knowledge of the existence of injury to his head/brain, the WCJ correctly notes that applicant's alleged brain injuries are but one part of his claim, which includes multiple orthopedic injuries which were not occult at the time of the filing of the application, and which were alleged to be cumulative in nature. (Report on Applicant's Petition, at p. 9.) Following our review of the evidence occasioned by both Petitions, we agree with the WCJ's analysis, and conclude that the appropriate date upon which applicant received notice of his rights to pursue a cumulative injury herein is the date of the filing of the Application for Adjudication. (*Bassett-Mcgregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1115 [53 Cal.Comp.Cases 502].) Accordingly, we will not disturb the WCJ's determination that the section 5412 date of injury is September 16, 2013.

IV.

Applicant next contends that his industrial injuries have resulted in permanent and total disability pursuant to the presumption of section 4662, which provides:

> (a) Any of the following permanent disabilities shall be conclusively presumed to be total in character:
> (1) Loss of both eyes or the sight thereof.
> (2) Loss of both hands or the use thereof.
> (3) An injury resulting in a practically total paralysis.
> (4) An injury to the brain resulting in permanent mental incapacity.
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> (Lab. Code, § 4664(a).)

The WCJ's analysis of the issue begins with the decision in *Fraser v. Geil Enterprises* (September 12, 2016, ADJ8918710) [2016 Cal. Wrk. Comp. P.D. LEXIS 454], where a panel of the Appeals Board discussed the history of section 4662 and observed that despite changes in the language of the statute, the presumption continued to require a showing of severe and pervasive cognitive injury. Applying this metric, the WCJ determined that, "[n]o medical opinion submitted by either party finds Applicant to have a permanent mental incapacity to the extent intended by the legislature in enacting the presumption in 4662(a)(4)." (Opinion on Decision, at p. 34.)

Applicant's Petition contends that the salient inquiry is whether applicant has sustained severe cognitive impairment, and that "[a] determination by one physician that a brain injury resulting in Dementia, which is disabling in itself, is sufficient to trigger LC 4662(a)(4)."

(Applicant's Petition, at p. 7:25.) Applicant contends that multiple physicians have diagnosed a brain injury resulting in severe cognitive impairment, including Dr. Reynolds who has opined to a permanent loss of mental capacity under section 4662(a)(4), and Dr. Johnson, who has similarly concluded applicant has sustained permanent mental incapacity precluding him from playing professional baseball. (Applicant's Petition, at pp. 8-9.) The WCJ's report responds that "[t]he Court did not question that Applicant has a brain injury, or that the effects of it are to a degree impairing to Applicant and disruptive to his family. He does have partial cognitive impairment, but partial or limited cognitive impairments due to injury are an insufficient basis upon which to invoke the statutory presumption." (Report on Applicant's Petition, at p. 3.)

In *Winningham v. Workers' Comp. Appeals Bd. (2016)* 81 Cal.Comp.Cases 828, 830-831 [2016 Cal. Wrk. Comp. LEXIS 101] (writ den.) (*Winningham*), applicant alleged permanent and total disability based on injury to multiple body parts and systems, including industrial injury to the brain, central nervous system, and psyche. The WCJ found that applicant's injury caused permanent disability of 84% after apportionment, and applicant appealed averring he was permanently and totally disabled pursuant to section 4662(a)(4). We affirmed the WCJ's determination that the severity of applicant's injury did not invoke the presumption of total disability found in section 4662(a)(4):

> Applicant did sustain serious psychological symptoms as a result of his injury, including a score of 45 on the Global Assessment of Functioning Scale, corresponding to "Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." (2005 Schedule for Rating Permanent Disabilities at p. 1–14.) Partially because of these serious psychiatric impairments, the WCJ found that applicant sustained overall permanent total disability. However, given the legislative history of section 4662(a)(4), when viewed alone, the partial cognitive impairments sustained as a result of the injury were not sufficient to raise the 4662(a)(4) presumption.
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> (*Winningham, supra, at pp.* 830-831.)

The WCJ's Report observes:

> As stated in *Winningham*, significant impairments arising from partial cognitive deficiency are not enough to invoke the conclusive presumption of total disability set out in section 4662(a)(4). Here, no medical opinion submitted by either party finds Applicant to have permanent mental incapacity to the extent intended by the legislature in enacting the presumption in 4662(a)(4). Dr.

Reynolds states there is loss of mental capacity that is permanent [Ex 13], but that alone is insufficient. Because there is now some slightly lesser capacity than that which existed before doesn't equate to the degree of loss necessary to invoke the presumption. Dr. Johnson said Applicant had permanent mental incapacity "from playing professional baseball" [Ex17], but didn't further describe the extent or degree, suggesting that Applicant's loss isn't total or even close to total. The detailed nature of Applicant's testimony over a number of days belies any suggestion that his cognitive impairment is so severe that he should be considered totally disabled.

(Report on Applicant's Petition, at p. 3.)

Our caselaw addressing claims of presumptive disability pursuant to section 4664(a)(4) has historically focused on organic brain injury resulting in profound cognitive compromise. In *Sherry v. Connelley's Fine Furniture* (June 27, 2008, OAK216926, OAK207971) [2008 Cal. Wrk. Comp. P.D. LEXIS 562], a panel of the Appeals Board held that applicant's injuries, which were largely orthopedic and psychiatric in nature, did not include an organic brain syndrome, rendering the presumption of former section 4662(d)[3] inapplicable. Similarly, in *Enriquez v. County of Santa Barbara* (July 18, 2014, ADJ334261 (VNO 0513526)) [2014 Cal. Wrk. Comp. P.D. LEXIS 375], a panel of the Appeals Board held that the effects of a psychiatric injury coupled with the effects of psychotropic medications were insufficient to trigger the presumptions of former section 4662(d).

However, in *Hill v. Securitas Sec. Servs. United States* (June 28, 2012, ADJ6682404) [2012 Cal. Wrk. Comp. P.D. LEXIS 294], a panel of the Appeals Board held that applicant's permanent and total disability was supported by the opinions of the QME that applicant was totally and completely neurocognitively disabled without any appreciable change of becoming functional. And in *Villegas v. Aadlen Bros Auto Wrecking* (May 22, 2015, ADJ2181555 (MON 0336275)) [2015 Cal. Wrk. Comp. P.D. LEXIS 334], a panel of the Appeals Board affirmed the WCJ's determination that applicant had sustained injury resulting in permanent mental incapacity under section 4662(a)(4) when applicant's impairments were sufficiently profound as to require the appointment of a conservator, and where his treating physicians recommended inpatient placement in a nursing home. Conversely, in *Schroeder v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 506, 510-507 [2013 Cal. Wrk. Comp. LEXIS 80], a panel of the Appeals Board held that the 12 percent whole person impairment identified by the AME in neurology did not

[3] In 2014, section 4662(d) was redesignated as section 4662(a)(4).

constitute a disability that triggered the section 4662(d) conclusive presumption. The panel held that, "[g]iven its legislative history and purpose, section 4662(d) contemplates a more severe disability," and that section 4662(d) was therefore inapplicable.

Our jurisprudence with respect to section 4662(a)(4) has thus required a showing that applicant has sustained injury to the brain resulting in profound cognitive compromise as described in the medical evidence. Additionally, the opinions of the evaluating medical-legal physicians are highly relevant to any determination concerning presumptive total disability.

Here, however, we are deferring the issue of applicant's final levels of permanent disability pending development of the record. Accordingly, we will rescind the WCJ's findings with regard to the applicability of section 4662(a)(4) pending a review of any medical evidence and medical-legal reporting adduced pursuant to the development of the record.

V.

Applicant further contends that applicant's disability should be deemed permanent and total "in accordance with the fact" pursuant to section 4662(b) or pursuant on his diminished future earning capacity. (Applicant's Petition, at 10:19.)

However, the Court of Appeal has held in *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 610 [83 Cal.Comp.Cases 1680) that section 4662(b) does not provide a separate path to a finding of permanent and total disability. Rather, *Fitzpatrick* clarified that it is section 4660 which governs how a finding and award of permanent total disability may be made "in accordance with the fact." (Ibid.)

Applicant also contends the reporting of vocational expert Dr. Mas supports a conclusion that applicant has sustained permanent and total disability. However, the WCJ found applicant's vocational reporting to be unpersuasive in large part because the reporting was based on an incorrect understanding of the record:

> Applicant's expert, Dr. Mas states, ". . . considering the language of Labor Code Section 4662, Mr. Rose as per the comments of Dr. Einbund, Dr. Lewis and Dr. Greenzang appears to meet criteria of total disability "in accordance with the fact" [Ex 14, P2]. However, reference to the reporting of the physicians he cites—Dr. Einbund, Dr. Lewis and Dr. Greenzang—fails to show any statement or opinion by these physicians that Applicant is medically permanently and totally disabled.

> Dr. Mas further states that the opinion of Dr. Greenzang nullifies possible employment options [Ex 14, P3] and consequently Dr. Mas finds that applicant is not amenable to vocational rehabilitation [Ex 14, P4] because psychological work impairments preclude retraining [Ex 14, P41]. However, contrary to the understanding of Dr. Mas, Dr. Greenzang does not tell us that Applicant is unemployable. The work impairments range only from slight to slight-to-moderate [Ex 6, P29-30] as does the over-all psychiatric disability [Ex 6, P30]. Most importantly, Dr. Greenzang says Applicant can and should participate in vocational rehabilitation along with treatment for his condition:
>
>> *Access to future supportive psychiatric care should be afforded to him in regard to his symptoms "of anxiety, manifestations of post-traumatic stress disorder, dysphoric symptoms, and the emotional handicap precipitated by his physical symptoms.*
>> . . .
>> *He is a medically eligible worker psychiatrically and he should be afforded access to appropriate vocational rehabilitation and retraining or a voucher as necessary to assist him in obtaining and maintaining employment consistent with his residual emotional and physical limitations. Providing him with access to supportive psychiatric care at the intervals noted above would be recommended during any period of retraining which he was to receive.*
>> . . .
>> *Providing him with access to appropriate supportive psychiatric care would increase the likelihood of his successfully participating in and completing any retraining program in which he was to become involved… [Ex 6, P33-34].*
>
> Misinterpreted medical evidence in determining applicant's vocational feasibility is not substantial evidence [*Schroeder v. WCAB*, 78 CCC 506 (2013)]. Under the circumstances, the Court could not rely on the opinion of Dr. Mas.
>
> (Report on Applicant's Petition, at p. 4.)

We concur with the WCJ's analysis. In addition, we observe that the reporting of Dr. Mas impermissibly purports to substitute impermissible vocational apportionment in place of otherwise valid medical apportionment. In his report of March 7, 2017, Dr. Mas reviews the nonindustrial apportionment identified by the evaluating physicians but concludes that the "extent to which nonindustrial factors contributed to [applicant's] overall disability follows the logic that applicant was not in any way limited from the returning to the open labor market by the nonindustrial issues outlined above." (Ex. 16, Report of Luis Mas, Ph.D., March 7, 2017, at p. 39.) However, as we discussed in *Nunes v. State of California Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. P.D. LEXIS 30] (Appeals Bd. en banc) (*Nunes*):

> The apportionment analysis required under 4663(a) and *Escobedo*, *supra*, does not permit reliance on facts offered in support of a competing theory of apportionment … Accordingly, a vocational report is not substantial evidence if it relies upon facts that are not germane, marshalled in the service of an incorrect legal theory. Examples of reliance on facts that are not germane often fall under the rubric of "vocational apportionment," and include assertions that applicant's disability is solely attributable to the current industrial injury because applicant had no prior work restrictions, or was able to adequately perform their job, or suffered no wage loss prior to the current industrial injury.
>
> (*Id.* at p. 754, citations omitted.)

Here, the vocational expert impermissibly discounts the nonindustrial apportionment identified by the evaluating physicians by asserting that the factors of apportionment did not impair applicant's ability to work "fully duty." (Ex. 16, Report of Luis Mas, Ph.D., March 7, 2017, at p. 39.) However, pursuant to our analysis in *Nunes, supra*, such "vocational apportionment" is incompatible with section 4663. Accordingly, and for the reasons discussed by the WCJ in the Report on Applicant's Petition, we agree that the vocational reporting does not constitute substantial evidence and the record requires further development pursuant to our decision in *Nunes, supra*.

VI.

We next turn to the issue of applicant's claimed psychiatric injury. The F&A finds that "[a]pplicant sustained injury by cumulative trauma arising out of and in the course of his employment in the form of traumatic brain injury and post-traumatic head syndrome from repetitive severe head injury and consequently he developed a sleep disorder and injury to his psyche." (Finding of Fact No. 3.) The WCJ also found that "[t]he specific incident in 2000, when Applicant was the victim of a robbery at gunpoint, caused injury to [a]pplicant's psyche, but it is not part of his cumulative trauma claim." (Finding of Fact No. 8.) The Opinion on Decision notes Dr. Greenzang's conclusions that applicant's "reaction to the physical symptoms arising from the course of applicant's baseball career and his physical limitations" were the predominant cause of the claimed psychiatric injury. (Opinion on Decision, at p. 27.)

Defendant's Petition avers the reporting of Dr. Greenzang does not constitute substantial evidence because it "overlooks non-industrial apportionment, relies on non-medical opinion inconsistent with the medical records, and relies on the conclusions of Dr. Bradley Johnson that

lack substantial evidence of any clear medical diagnosis or disability." (Defendant's Petition, at 11:24.)

With respect to psychiatric injuries, section 3208.3 provides, in relevant part, as follows:

> (a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition—Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.
>
> (b) (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.
>
> (Lab. Code, § 3208.3(a)-(b)(1).)

"Predominant as to all causes" for purposes of section 3208.3(b)(1) has been interpreted to mean more than 50 percent of the psychiatric injury was caused by actual events of employment. (*Dept. of Corr. v. Workers' Comp. Appeals Bd.* (*Garcia*) (1999) 76 Cal.App.4th 810, 816 [64 Cal.Comp.Cases 1356].) This predominant causation threshold applies to psychiatric injuries pled as a compensable consequence of a physical injury. (*Lockheed Martin Corp. v. Workers' Comp. Appeals Bd.* (*McCullough*) (2002) 96 Cal.App.4th 1237, 1249 [67 Cal.Comp.Cases 245] (*McCullough*).) The Court of Appeal in *McCullough* opined that for a compensable consequence psychiatric injury, "the precipitating physical injury constitutes an 'actual event[] of employment' within the meaning of [section 3208.3(b)(1)]." (*Ibid.*)

Here, Dr. Greenzang's opinions with respect to predominance are internally inconsistent and are therefore not substantial evidence. In his initial evaluation of June 15, 2016, Dr. Greenzang opines:

> In my opinion his history and presentation indicate that his emotional reaction to the highly traumatic incident which occurred during the course of his professional baseball career in approximately 2000 in which he was tied up and held at gunpoint has played an active, significant and predominant role of greater than fifty percent as to all causes in compromising his adaptive capacities and precipitating prominent and ongoing symptoms of anxiety and manifestations of post-traumatic stress disorder in Mr. Rose.

(Ex. 5, Report of Ted Greenzang, M.D., June 15, 2016, at p. 16.)

This assessment is reiterated in Dr. Greenzang's October 17, 2016 report at p. 23, where he again opines that the highly traumatic robbery at gunpoint played a "significant and predominant role of greater than fifty percent," of applicant's psychiatric injury. (Ex. 6, Report of Ted Greenzang, M.D., October 17, 2016, p. 23.) However, the report then attributes predominance to applicant's "emotional reaction to his having become physically symptomatic referable to several areas during the course of his professional baseball career and his emotional reaction to his having experienced ongoing symptoms and limitations in function," which played an "active, significant and predominant role of greater than fifty percent to all causes…" (*Id.* at p. 24.) This assessment is reiterated later within the same causation discussion, without reference to the doctor's previously expressed opinion that the 2000 robbery was predominant as to all causes. (*Id.* at p. 25.) The doctor's reporting is thus internally inconsistent as to what actual events of employment played a predominant role in the causation of the identified psychiatric injury. (Lab. Code, § 3208.3(b)(1).)

We also observe that with respect to causation, Dr. Greenzang's reporting initially finds the 2000 robbery at gunpoint to be the predominant cause, and that Dr. Greenzang's accompanying apportionment analysis attributes 80% of the industrially-related disability to that same highly traumatic incident. (Ex. 5, Report of Ted Greenzang, M.D., June 15, 2016, at p. 22.) However, as of his December 6, 2017 report, Dr. Greenzang opined to a significant shift in his apportionment analysis, reducing the percentage of industrially-related permanent disability attributable to the 2000 incident to 45 percent, with 45 percent now attributable to traumatic brain injury.[4] (Ex. 7, Report of Ted Greenzang, M.D., December 6, 2017, p. 9.) We acknowledge that the issue of causation of injury is distinct from causation of permanent disability. (See *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 ["the percentage to which an applicant's *injury* is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury"].) However, Dr. Greenzang has opined to a fundamental shift in his apportionment analysis, without addressing whether his analysis of causation has changed, especially in light of the attribution of applicant's disability to

[4] We also note that Dr. Greenzang's shift in opinion was premised on a medical record review, and not a reevaluation of applicant.

traumatic brain injury. (Ex. 7, Report of Ted Greenzang, M.D., December 6, 2017, p. 9.) A change in the apportionment analysis does not necessarily mandate a change in the doctor's causation analysis, but the physician should, at minimum, address whether the traumatic brain injury was considered in the causation analysis, and describe in detail why his opinion on apportionment has changed.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Thereafter, per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an agreed medical evaluator (AME) should be considered by the parties. If the parties cannot agree to an AME, then the WCJ can appoint a regular physician to evaluate applicant pursuant to section 5701. Here, the reporting of Dr. Greenzang is internally inconsistent as to the predominant cause of applicant's claimed psychiatric injury, and further offers significant changes to the apportionment analysis without corresponding discussion of the causation analysis. We will therefore amend the F&A to defer then issue of psychiatric disability and return this matter to the trial level for development of the record.

VII.

We also observe that the WCJ has entered a finding of fact with respect to the armed robbery that occurred in 2000. Finding of Fact No. 8 determines that "[t]he specific incident in 2000, when Applicant was the victim of a robbery at gunpoint, caused injury to Applicant's psyche, but it is not part of his cumulative trauma claim." Insofar as the determination purports to address causation of an independent injury, however, it is not appropriately entered as a finding of fact with respect to the issues being adjudicated herein.

We will rescind Finding of Fact No. 8, accordingly. We express no opinion as to the relevance of the incident in 2000 to the WCJ's ultimate apportionment determination.

VIII.

We next address applicant's contention that he has sustained chronic traumatic encephalopathy (CTE), which constitutes an insidious and progressive disease warranting the reservation of jurisdiction over the issue of permanent disability and an interim award of ongoing temporary total disability. (Applicant's Petition, at p. 11:16.)

The jurisdiction of the Workers' Compensation Appeals Board is generally limited to five years from the date of injury. Section 5410 provides for the Appeals Board's continuing jurisdiction within a period of five years after the date of injury upon the grounds that the original injury caused new and further disability. (Lab. Code, § 5410.) Section 5804 provides in relevant part that "no award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years and any counterpetition seeking other relief filed by the adverse party within 30 days of the original petition raising issues in addition to those raised by such original petition." (Lab. Code, § 5804.)

However, in cases involving "insidious progressive disease process that results from a remote, undramatic work exposure," the Appeals Board may tentatively rate a known disability and order advances based on that tentative rating. (*General Foundry Serv. v. Workers' Compensation Appeals Bd.* (*Jackson*) (1986) 42 Cal.3d 331 [51 Cal.Comp.Cases 375] (*Jackson*).) The Appeals Board may then reserve its jurisdiction for a final determination of permanent disability when either the employee's condition becomes permanent and stationary, or the permanent disability is total (100 percent) and further deterioration would be irrelevant for rating purposes. (*Id.* at p. 340.)

In *Ruffin v. Olson Glass Co.* (1987) 52 Cal.Comp.Cases 335 [1987 Cal. Wrk. Comp. LEXIS 2444], the Appeals Board sitting en banc held that the an "insidious, progressive disease" as described in *Jackson* is (1) caused by a "remote" and "undramatic" work exposure—one that is likely to be undetected at the time, or if detected, the significance is likely to be unappreciated, (2) that the disease worsens over time, but at a rate so gradual that it is well established before becoming apparent and, (3) that it has a "long latency period" between exposure to the risk and the onset of symptomatology.

Using this metric, the Appeals Board has applied the *Jackson* doctrine to reserve jurisdiction in cases involving hepatitis (*County of Marin v. Worker's Comp. Appeals Bd.* (*Carter*) (2001) 66 Cal.Comp.Cases 1533 [2001 Cal. Wrk. Comp. LEXIS 5323] (writ den.)), cancer (*Lockheed Martin v. Workers' Comp. Appeals Bd.* (*DeSoto*) (2003) 68 Cal.Comp.Cases 1878 [2003 Cal. Wrk. Comp. LEXIS 574]), valley fever (*Travelers v. Workers' Comp. Appeals Bd.* (*Gonzales*) (September 23, 2014, ADJ8211363) [2014 Cal. Wrk. Comp. P.D. LEXIS 497]), and chronic traumatic encephalopathy (*Oliver v. Tampa Bay Buccaneers* (September 20, 2022, ADJ9088316) [2022 Cal. Wrk. Comp. P.D. LEXIS 251]).

Here, applicant contends the reporting of Dr. Reynolds supports a determination that he has sustained a traumatic brain injury that is progressing and deteriorating. (Applicant's Petition, at p. 12:5.) Applicant asserts "CTE is a progressive brain disease [that] begins as developing patterns of dementia and manifests into developing behavioral problems." (*Id.* at p. 12:16.)

However, we note that other than the opinion of treating psychotherapist Dr. Reynolds, there is no comprehensive medical-legal reporting in evidence that identifies the existence of CTE, or that characterizes CTE as an insidious, progressive disease. In addition, we note that treating neurologist Dr. Nudleman has not diagnosed CTE, nor has he opined as to the likely progression of the disease, if applicable. It is well settled that the decisions of the Appeals Board must be supported by substantial evidence in light of the entire record. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [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. It must

be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*), *supra*, 34 Cal.3d 159, 164.)

In order to constitute substantial evidence, a medical opinion may not be based upon surmise, speculation, conjecture or guess. It is not substantial evidence if it is known to be erroneous, based upon facts no longer germane, based upon incorrect legal theory, or based upon an inadequate medical history and/or examination. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358].)

Accordingly, we find that there is an insufficient evidentiary basis upon which to determine whether the reservation of WCAB jurisdiction is appropriate under *Jackson*. We will therefore return the matter to the trial level for development of the record. Upon return of this matter, the WCJ may wish to consider directing the parties to develop the medical-legal regard with regard to whether applicant has an established diagnosis of CTE or similar injury, whether the injury was caused by a "remote" and "undramatic" work exposure, whether the disease will worsen over time, but at a rate so gradual that it is well established before becoming apparent and whether it has a "long latency period" between exposure to the risk and the onset of symptomatology.[5] (*Ruffin v. Olson Glass Co., supra,* 52 Cal.Comp.Cases 335.) The parties also need to clarify whether it is possible to determine whether the contemplated reservation of jurisdiction is a result of the alleged cumulative trauma injury, in full or in part, as distinguished from the sequelae of applicant's 2000 armed robbery incident.

IX.

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[5] Although we defer the issue herein, we observe that applicant's request for ongoing temporary disability during the pendency of a reservation of jurisdiction under *Jackson, supra,* is inapposite. Notwithstanding a reservation of jurisdiction in cases of insidious, progressive disease, the Appeals Board lacks the jurisdiction to enter an award of temporary disability more than five years after the date of injury. The Court of Appeal has observed that "[s]ince the amendment to section 4656 has been interpreted to allow temporary total disability payments to extend beyond five years from the date of injury only when the period of such disability commences in the five-year period and is continuous, the WCAB would have no authority to reserve jurisdiction to award such payments after expiration of the five-year period. (*Hartsuiker v. Workers' Compensation Appeals Bd.* (1993) 12 Cal. App. 4th 209 [58 Cal.Comp.Cases 19]; see also *Popovich v. Folsom State Prison* (September 28, 2010, ADJ2927671) [2010 Cal. Wrk. Comp. P.D. LEXIS 498].)

Applicant previously resolved his claim of injury against co-defendant Chico Outlaws, insured by State Compensation Insurance Fund, by way of Compromise and Release approved on September 14, 2017. In the instant proceedings against the Los Angeles Dodgers, the F&A reduces the overall percentage of liability for the Dodgers by the pro rata share of the claim that was released in applicant's settlement with the Outlaws. Applicant challenges this reduction, arguing that he and SCIF had a mutual understanding that the settlement would leave codefendant Los Angeles Dodgers jointly and severally liable for the entirety of the instant claim. (Applicant's Petition, at p. 20:11.)

Section 5005 provides, in relevant part:

> In any case where a compromise and release agreement of a portion of a claim has been made and approved, the employee may elect to proceed as provided in Section 5500.5 against any one or more of the remaining employers, or against an employer for that portion of his exposure not so released; in any such proceeding after election following compromise and release, that portion of liability attributable to the portion or portions of the exposure so released shall be assessed and deducted from the liability of the remaining defendant or defendants, but any such defendant shall receive no credit for any moneys paid by way of compromise and release in excess of the liability actually assessed against the released employments and the employee shall not receive any further benefits from the released employments for any liability assessed to them above what was paid by way of compromise and release.
>
> (Lab. Code, § 5005.)

Here, the WCJ identified the period of liability pursuant to section 5500.5 as August 13, 2009 to August 13, 2010, and using the days of employment with both the Dodgers and the Outlaws, calculated the pro rata liability of each team for purposes of section 5005. (Opinion on Decision, at p. 45.) The WCJ then calculated the total disability arising out of applicant's claim, and reduced it by "that portion of liability attributable to the portion or portions of the exposure so released." (Lab. Code, § 5005.)

Applicant contends that his settlement with State Compensation Insurance Fund for the Outlaws reflected a mutual understanding that the Compromise and Release agreement would leave the Los Angeles Dodgers with joint and several liability. (Petition, at 20:8.) However, as the WCJ notes in his Report, the Compromise and Release agreement reflects no such understanding. (Report on Applicant's Petition, at p. 12.) Moreover, even if the settlement did contain such language, when a defendant settles its part or portion of a cumulative injury claim, the agreement

is binding only as to the parties to the agreement. Any "understanding" between applicant and State Compensation Insurance Fund would be of no legal import in subsequent proceedings involving co-defendants who were not a party to the C&R agreement. (See, e.g., *Guzman v. Abbott's Pizza Co.* (June 12, 2017, ADJ8278101, ADJ8278102, ADJ10320660) [2017 Cal. Wrk. Comp. P.D. LEXIS 588].) Accordingly, we find no merit to applicant's contentions in this regard.

Applicant contends that if section 5005 is held to apply, that liability for any psychiatric disability must inure solely to the Dodgers, because applicant's employment with the Chico Outlaws was less than the six months required for compensable claims by section 3208.3(d), which provides, in relevant part:

> Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous.
>
> (Lab. Code, § 3208.3(d).)

We observe that per section 3208.3(d), the minimum six months of employment need not be continuous, and that the parties have stipulated to two separate periods of employment with the Los Angeles Dodgers. (Minutes of Hearing and Summary of Evidence, August 13, 2018, at p. 2:7.) In addition, the parties have stipulated to applicant's employment with the Chico Outlaws from April 2, 2010 to August 13, 2010, and the terms of the settlement agreement between applicant and the Chico Outlaws reflect the same four months and eleven days of employment. (*Ibid*.; Report on Applicant's Petition, at p. 12.) However, since we are rescinding the award of psychiatric disability and returning the matter to the trial level for development of the record, we defer this issue pending a determination of compensable psychiatric injury and corresponding liability.

Defendant avers that the pro rata percentages as calculated include days on which applicant had no injurious exposure. The parties have stipulated to the following periods of employment: Edmonton Capitals from August 14, 2010 through September 2, 2010; Chico Outlaws from April 2, 2010 through August 13, 2010; and the Los Angeles Dodgers from February 2, 2009 through November 9, 2009. (Minutes of Hearing and Summary of Evidence, August 13, 2018, at p. 2:7.) The WCJ excluded applicant's employment with the Edmonton Capitals for want of jurisdiction, and calculated applicant's employment with the Chico Outlaws at 36.5 percent of the liability period, and 63.5 percent for the Los Angeles Dodgers. (Opinion on Decision, p. 45.)

Defendant's Petition avers error in the methodology used by the WCJ in determining the percentages of liability:

> Under the WCJ's analysis that the liability is based on employment, the WCJ holds the Dodgers liable past the expiration of his employment in November 2009 until the commencement of his new employment. This analysis is directly contrary to the mandate of Labor Code section 4664(a). The Dodgers however should only be held liable for the portion of the employment constituting injurious exposure, which spanned from August 14, 2010 to the last game played on September 7, 2009 and after which the Applicant left the Dodgers.
>
> (Defendant's Petition, at p. 6:17.)

Using this metric, defendant calculates a total of 159 days of injurious exposure in the liability period. Defendant contends applicant's actual days of injurious exposure playing with the Dodgers spanned from August 14, 2009 to September 7, 2009, or 25 days, relegating the Dodgers' liability to 16% of the total 159 days.

The WCJ's Report responds:

> Petitioner claims Applicant was "inactive" during his employment after a date in September, so the latter period of his admitted employment shouldn't be considered. However, Petitioner made no effort at trial to identify whether there were similar periods of alleged "inactivity" while Applicant was with the Chico team. In other words, Petitioner didn't make an effort to establish the degree of activity related to the hazards of employment with the settling co-defendant so that the measurement for each team would be using the same criteria. Since Petitioner raised the "pro-rata" issue, it had the burden of providing evidence to support its preferred method of measurement. In the absence of evidence to use some other comparative method, and inasmuch as the parties stipulated to dates of employment, using the stipulated dates of employment was a reasonable and legally appropriate way to measure each employer's relationship to the other. Liability for an applicant's cumulative injury under Labor Code § 5500.5(e) may be apportioned pro rata between applicant's employers based on days worked for each employer during liability period, rather than by intensity of exposure [Harris v Coast Crane Co., 2017 Cal. Wrk. Comp. P.D. LEXIS 365].
>
> Having said that using dates of employment is a reasonable way to determine pro-rata share of liability, the Court now finds that its calculations were in error because there was a period between Applicant's employment with the Dodgers and the Chico team where he wasn't employed with anyone. That period needs to be removed from the calculation.
> Therefore, although the liability period covers the last year of exposure, the actual stipulated employment time with the two teams during that year was only 222 days, not 365. This is because per stipulation Applicant's employment with

> the Dodgers actually ended 11/9/09 and his employment with Chico commenced 4/2/10. In between those dates (11/10/09 to 4/1/10) is a period of 143 days that should be subtracted from the calculation. This means that the stipulated employment dates for the two teams covers only 222 days of the year: 88 for the Dodgers (8/14/09 to 11/9/09) and 134 for Chico (4/2/10 to 8/13/10). Thus, the pro-rata shares based on stipulated dates of employment are 60.4% for Chico and 39.6% for the Dodgers.
>
> (Report on Defendant's Petition, at p. 13.)

Pursuant to the WCJ's acknowledgement of computational error, and because we are deferring the issue of permanent disability, we will rescind Finding of Fact No. 15, which set defendant's pro rata liability, and return this matter to the trial level for further determination by the WCJ.

We also observe that section 5005 provides that upon approval of the underlying compromise and release, the WCJ "need not make a final actual determination of the potential liability of the employer or employers for that portion of the exposure being released." (Lab. Code, § 5005.) We have also previously held that, "[t]he internal references in Labor Code Section 5005 to Labor Code Section 5500.5 demonstrate an intended interrelationship between the two sections and suggest a statutory scheme for a procedure to facilitate resolution of litigation in multiple defendant cases." (*Greenwald v. Carey Distrib. Co.* (1981) 46 Cal.Comp.Cases 703, 713 [1981 Cal. Wrk. Comp. LEXIS 3275] (Appeals Board en banc).) Accordingly, the WCJ may wish to consider whether the allocation of liability pursuant to sections 5005 and/or 5500.5 is appropriately deferred to arbitration proceedings.

CONCLUSION

In summary, we agree with the WCJ's decision to rely on the reporting of applicant's treating physicians along with the QME in this matter, and do not find that applicant obtained the reporting in contravention of section 4062.2. We further affirm the WCJ's determination as to the date of injury pursuant to section 5412. We agree that applicant has not established that he is totally disabled "in accordance with the fact" pursuant to section 4662(b), but will defer the issue of whether applicant has established presumptive total disability under section 4662(a)(4). We conclude that the record at present does not adequately address the issue of whether applicant has sustained compensable psychiatric injury or sleep disorder, and we will return the matter to the

trial level for further development of the record. Similarly, we will defer the issue of earnings to allow for additional explication of the WCJ's reasoning in fixing a weekly amount. We will also defer the issue of whether applicant sustained injury in the form of chronic traumatic encephalopathy, and whether the condition is insidious and progressive warranting the reservation of jurisdiction over issues of permanent disability. Finally, we will defer the issue of the percentages of liability as they relate to the Chico Outlaws and the Los Angeles Dodgers.

Upon return of this matter to the trial level, we recommend the parties obtain appropriate medical-legal reporting to address the causation of applicant's alleged psychiatric injury, in compliance with section 3208.3(b). If actual events of employment are found to be predominant, the parties and the WCJ should further determine whether the alleged cumulative trauma injury, as distinguished from the assault and robbery incident of 2000, resulted in permanent disability. We further encourage the parties to address whether applicant has sustained chronic traumatic encephalopathy, and the relationship between CTE and applicant's traumatic brain injury, if any, and whether those conditions warrant the reservation of jurisdiction for an insidious progressive disease process. Finally, we encourage the parties to seek amicable resolution of these issues via mutually agreeable settlement.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on May 6, 2019 is **RESCINDED,** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant, Michael Rose, was employed from June 5, 1995 to September 2, 2010 as a professional baseball player, occupational group No. 590, by the Edmonton Capitals, Chico Outlaws, Los Angeles Dodgers, Colorado Rockies, Cleveland Indians, St Louis Cardinals, Tampa Bay Rays, Oakland Athletics, Kansas City Royals, Boston Red Sox, Arizona Diamondbacks, and Houston Astros.
2. Applicant sustained cumulative injury arising out of and in the course of his employment to his neck, back, both shoulders, right thumb and right middle finger, both hips, and ears, and in the form of traumatic brain injury and post-traumatic head syndrome.

3. There is insufficient evidence to establish California jurisdiction over Applicant's employment with the Edmonton Capitals.
4. Pursuant to Labor Code section 5412 the legal date of Applicant's cumulative trauma injury is September 16, 2013.
5. Applicant's claim is not barred by the one-year statute of limitations under Labor Code section 5405.
6. Applicant is in need of future medical treatment to cure or relieve from the effects of his injury.

ORDERS

a. The issue of applicant's weekly earnings is deferred.
b. The issue of temporary disability is deferred.
c. The issue of the body parts of psyche and sleep are deferred.
d. The issues of the permanent and stationary date, permanent disability, apportionment, and attorney fees are deferred.
e. The issues of the period of liability pursuant to Labor Code section 5500.5 as well as defendant's pro rata liability for the claim pursuant to Labor Code section 5005 are deferred.
f. The issue of the Appeals Board's reservation of jurisdiction over the claim pursuant to *General Foundry Serv. v. Workers' Compensation Appeals Bd.* (*Jackson*) (1986) 42 Cal.3d 331 [51 Cal.Comp.Cases 375] is deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 29, 2024

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

MICHAEL ROSE
GLENN, STUCKEY & PARTNERS
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK

SAR/abs

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