WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ARIGA DAVODYAN, *Applicant*

vs.

PRINTOGRAH, INC., dba GOTPRINT;
NATIONAL UNION FIRE INSURANCE COMPANY,
administered by GALLAGHER BASSETT SERVICES, *Defendants*

PHYSICAL REHABILITATION SERVICES, INC.,
ARBI MIRZAIANS D.C., *Lien Claimant*

Adjudication Number: ADJ13441476
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Lien claimant Physical Rehabilitation Services, Inc., Arbi Mirzaians D.C. (lien claimant) seeks reconsideration of the Findings and Order (F&O) issued on April 25, 2025 by a workers' compensation administrative law judge (WCJ). The WCJ found that applicant's claim of cumulative trauma injury while employed during the period November 10, 2015 through March 25, 2020 was barred by the post-termination defense (Lab. Code, § 3600(a)(10)); that the employer furnished no medical treatment; that the primary treating physician was Arbi Mirzaians, D.C.; and, that defendant was not frivolously litigating with misrepresentation to the Court. The WCJ also found and ordered that the initial examination of Dr. Mirzaians dated March 16, 2022, was a medical-legal examination for which defendant is liable, including penalties and interest; and, that all other dates of services provided by Dr. Mirzaians are not found to be medical-legal or constitute reasonable and necessary medical treatment.

Lien claimant contends that the WCJ failed to make a finding as to the cumulative trauma date of injury pursuant to Labor Code[1] section 5412, and that a claim filed after termination of employment is not barred when an applicant's section 5412 date of injury is "subsequent to the date of the notice of termination or layoff." (Lab. Code, § 3600(a)(10)(D).) Lien claimant contends that applicant did not have the concurrence of compensable disability and knowledge of the industrial causation of her cumulative trauma injury necessary until after the March 16, 2022 evaluation by her treating physician which occurred after her last date of employment, March 25, 2020 and after the date of termination on June 30, 2020. In the alternative, petitioner requests that the matter be returned for further development of the record.

Defendant filed an Answer to Lien Claimant's Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny the petition.

We have reviewed the record in this matter, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. For the reasons stated herein, we grant reconsideration and return this matter to the trial level for further proceedings consistent with this decision.

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

[1] All further references are to the Labor Code unless otherwise noted.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on June 6, 2025, and 60 days from the date of transmission is August 5, 2025. This decision is issued by or on August 5, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on June 6, 2025, and the case was transmitted to the Appeals Board on June 6, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on June 6, 2025.

II.

Applicant bears the burden of proof to establish that their injury arose out of and in the course of employment pursuant to section 3600. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291, 297 [80 Cal.Comp.Cases 489].) Whether an employee's injury arose out of and in the course of his employment is a question of fact to be determined based on the circumstances presented in each case. (*Id.* at p. 296.) Although the applicant bears the initial burden, the determination of compensability "is to be liberally construed *in favor of awarding benefits*." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 732-733 [48 Cal.Comp.Cases 326], italics in the original, citing Lab. Code, § 3202.) Lien claimant stands in

the shoes of applicant for purposes of establishing compensability for the claim and thus, defendant's potential liability for medical-legal and/or medical treatment costs.

The specific issue raised is whether applicant's claim would have been barred by section 3600, subdivision (10):

> (10) Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is **filed after notice of termination or layoff**, including voluntary layoff, **and the claim is for an injury occurring prior to the time of notice of termination or layoff,** no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
>
> > (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
> >
> > (B)The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
> >
> > (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
> >
> > (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.

(Lab. Code, § 3600(10), bold added.)[2]

Therefore, defendant held the initial burden to establish its "post-termination defense" to applicant's claim, i.e., the claim for compensation was filed after the notice of termination or layoff *and* the claim is for an injury occurring before the time of notice of termination or layoff. (See Lanning v. Baywood Interiors, Inc., 2012 Cal. Wrk. Comp. P.D. LEXIS 520, *6-7; *Hart v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 961, 963 (writ den.).)[3] Once defendant can produce substantial evidence to meet its initial burden, then the burden of proof shifts to

[2] Please note this is not a defense to *compensability* as an injury may still arise out of and in the course of employment and still be barred by the post-termination defense of section 3600, subdivision (10); the defense is to the *liability* for the compensation. (Lab. Code, § 3600(10) ["no compensation shall be paid..."].)

[3] See section 5705 ["burden of proof rests upon the party or lien claimant holding the affirmative of the issue"]; *Industrial Indem. Co. v. Industrial Acci. Com.* (1952) 108 Cal.App.2d 632, 636 [1952 Cal. App. LEXIS 1719] ["defense was an affirmative one and the burden was on petitioner"].

applicant to establish an exception to the post-termination defense under subdivisions (10)(A) through (D). (*Ibid*.)

Although no findings of fact were issued by the WCJ regarding whether defendant met its initial burden of proof to establish the post-termination defense, we are persuaded that defendant did meet their burden of proof that the application for adjudication in this matter was filed after applicant's date of termination, and that applicant's claim is for an injury occurring while employed for defendant prior to the date of termination.

There were also no findings of fact issued by the WCJ regarding whether or not lien claimant, standing in the shoes of applicant, met its burden of proof to establish whether or not any of the exceptions to the post-termination defense applied in this case, including the most obviously relevant exception in this matter under subdivision (10)(D), i.e., that the section 5412 date of injury in this cumulative trauma injury case post-dated the date of termination notice. Although the WCJ identified this exception in the Report as an issue raised by lien claimant on reconsideration, the WCJ did not comment on the actual section 5412 date of injury. (Report, pp. 3-4.)

Section 5412 states that "[t]he date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.) Thus, determination of a section 5412 "date of injury" is a two-part analysis: 1) when did the employee first suffer a compensability disability from a cumulative trauma injury; and, 2) when did the employee know, or in the exercise of reasonable diligence should have known that the compensable disability was caused by his or her employment. (See *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579].)

Compensable disability can be either temporary or permanent disability; compensable permanent disability requires a "ratable permanent disability" (*Rodarte, supra,* at p. 1004 citing *Chavira v. Workmen's Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474-475), and "[g]enerally...does not arise until the injured worker's condition becomes permanent and stationary." (*Stratton v. San Diego Chargers* 2014 Cal.Wrk.Comp.P.D. LEXIS 697 citing *Dept. of Rehabilitation v. Workers' comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281, 1292 [68 Cal.Comp.Cases 831] and Cal. Code Regs., tit. 8, § 10152.)

Whether applicant knew or should have known that her compensable disability was industrially related is generally a question of fact to be determined by the trier of fact. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53]; *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].) It is not enough to show that applicant was aware of her injuries, without showing that she was aware that her injuries were industrially caused. (*Johnson, supra*, 163 Cal.App.3d at 473.)

> We glean from these authorities the rule that an applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in [their] employment ***and [their] disability.***

(*Johnson, supra*, 163 Cal.App.3d at 473, bold/italics added)

In the Opinion on Decision, the WCJ stated that there was no testimony from applicant and no medical reports "or evidence establishing disability of the applicant prior to her termination." (Opinion on Decision, pp. 1-2; see Report, p. 3.)[4] Consequently, the record appears to be insufficient to determine either question. Regardless, we would not interpose our own findings regarding the subdivision (10)(D) exception without running afoul of the parties' rights to due process. (*Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584] citing *Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158.)

Next, the WCJ made no findings of fact, nor issued any orders related to the exception in subdivision (10)(A), i.e., the employer's prior notice of injury, but concluded in the Opinion on Decision that it should *not* apply in this case. (F&O, pinion on Decision, pp. 1-2.) The WCJ relied on the testimony of defendant's witness at trial, Kristina Keshishyan, the human resources director for defendant employer of roughly 400 employees. (Minutes of Hearing and Summary of Evidence

[4] While reviewing the record in this case, we discovered that **applicant's deposition was taken on June 30, 2021 by defendant herein, and the transcript is in EAMS**. It is unclear from the record whether the deposition transcript was produced to lien claimant or served on lien claimant, but it is clearly not identified in any of lien claimant's medical reports. (Lien Claimant Exhs. 3-9.) This is a post-merits lien trial where it would be unusual for an applicant to appear for testimony, and where applicant's testimony was never taken at trial because her claim was resolved by compromise and release. (Compromise & Release (C&R), Order Approving, April 24, 2023.)

(MOH), February 7, 2025, p. 6.) Ms. Keshishyan testified that employees report work injuries to their direct supervisor and then that report comes to her. (*Ibid.*) She testified that she did not receive notice that applicant was claiming that she was unable to work. (*Id*. at p. 5.) Ms. Keshishyan also questioned applicant's supervisor, Arvin Vartanian, who told her he did not know about any injuries. (*Ibid.*) Ms. Keshishyan denied even the possibility that applicant could have reported her work injuries to any of the 14 to 15 other supervisors employed by defendant employer, or that any supervisor could have failed to report an employee's report of injury to her. (*Id.*, at p. 6.)

The WCJ clarified her conclusion in the Report:

> **Petitioner did not call the applicant as a witness, and there is a conflict between what the applicant is reporting to Dr. Mirzaians and what the defense witness reported.** Specifically, that the applicant had symptoms in 2017, went to see a doctor, whose name she couldn't recall and no medical reports were obtained from, and the defense witness' credible testimony that the applicant had not reported symptoms or injuries prior to her lay off. **Further**, **the medical legal report prepared by Dr. Mirzaians is conclusory and does not support a cumulative trauma injury.**

(Report, p. 4.)

First, the WCJ found Ms. Keshishyan to be a credible witness and at this time, we defer to this assessment. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505]; *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140-141.) However, we note that the WCJ's conclusion regarding the exception in subdivision (10)(A) was based in large part on statements made to Ms. Keshishyan by applicant's supervisor, i.e., hearsay. Although hearsay is admissible in workers' compensation cases, it should be "limited to situations 'when it is best calculated to ascertain the substantial rights of the parties [citation]...'" (*Fordyce v. WCAB* (1983) 149 Cal.App.3d 915, 926 (*Fordyce*) [48 Cal.Comp.Cases 904].)

On the other hand, the WCJ and the Appeals Board "'should receive as evidence and consider only the kind of relevant matter upon which responsible persons customarily rely in the conduct of serious affairs.'" (*Fordyce, supra.* at p. 927 quoting *Pick v. Santa Ana-Tustin Community Hospital* (1982) 130 Cal.App.3d 970, 980.) For example, Ms. Keshishyan's testimony that applicant *never* told another supervisor of her work injuries, and that no supervisor (including Mr. Vartanian), *ever* failed to report to her an employee's report of injury would necessarily require Ms. Keshishyan to speculate and guess, and therefore, is not testimony that responsible persons might customarily rely on as reliable evidence.

Next, and as noted above, although this is a post-merits lien trial in a case resolved through compromise and release, applicant's deposition was taken on June 30, 2021 and a transcript of that deposition was uploaded into EAMS. (See footnote 4, *supra*.)[5] Defendant had the opportunity to cross-examine applicant during that deposition. In addition, and contrary to the WCJ's assertion in the Report, lien claimant *did* request that the WCJ take judicial notice of the March 17, 2021 report of panel qualified medical evaluator (QME) Thomas Truong, D.C., *and* the WCJ granted that request. (MOH, February 7, 2025, p. 7:14-15.) Moreover, both the QME report and the January 3, 2023 report of Dr. Mirzaians were made part of the record of this case when the C&R was filed for WCJ approval and was therefore part of the record and available to the WCJ at the time of the February 7, 2025 trial. (Cal. Code Regs., tit. 8, § 10700; see C&R, at p. 7, Comments.)

In conclusion, it does not appear that all available evidence was introduced into the record, or that all issues under section 3600, subdivision (10) were adjudicated and/or determined adequately by the WCJ, and we cannot therefore conduct a meaningful review of the issues raised in the Petition for Reconsideration.

An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, § 10787; *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc).) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record." (*Hamilton, supra,* at p. 475.) In addition, the WCJ has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).) The WCJ "may not leave undeveloped matters which its acquired specialized knowledge should identify as

[5] Although applicant's deposition testimony is also considered hearsay evidence, it is available to the parties and to the WCJ when this matter is returned to the trial level and may be helpful given that this is a post-merits lien trial.

requiring further evidence." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264].)

Accordingly, we grant reconsideration as the record is not sufficient to review whether or not applicant's claim is barred by the post-termination defense, or whether an exception to the defense applies in this case. It is our decision after reconsideration to rescind the F&O in its entirety and return this matter to the trial for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Reconsideration of the Findings and Order issued on April 25, 2025 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on April 25, 2025 by a workers' compensation administrative law judge is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 5, 2025

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

PHYSICAL REHABILITATION SERVICES, INC., ARBI MIRZAIANS D.C.
AV MANAGEMENT COLLECTION LOS ANGELES
TESTAN LAW
RK LEGAL
MANAGEDMED

AJF/mc

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