WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHRIS ROCHA *Applicant*

vs.

UNILAB CORPORATION, CIGA, BY ITS SERVICING FACILITY, INTERCARE HOLDINGS INSURANCE SERVICES, INC. FOR LUMBERMENS MUTUAL CASUALTY COMPANY, IN LIQUIDATION; QUEST DIAGNOSTICS INCORPORATED, TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendants*

Adjudication Number: ADJ3246274 (VNO 0470442)
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to further study the factual and legal issues in this case.[1] This is our Opinion and Decision After Reconsideration.

Defendant Travelers Property Casualty Company (Travelers) seeks reconsideration of the Finding of Fact and Order (F&O) issued on May 4, 2021, wherein the workers' compensation administrative law judge (WCJ) found that: (1) applicant while employed from September 1, 1995 through May 1, 2003 sustained an injury to her shoulders, elbows, and wrists; (2) applicant's date of injury is May 1, 2003; and (3) Travelers Property Casualty Company of America constitutes "other insurance" pursuant to Insurance Code section 1063.1. The WCJ issued an order dismissing CIGA as a party defendant without prejudice.

Travelers contends that the WCJ's opinion as to both the date of injury per Labor Code section 5412[2] and the period of liability per section 5500.5 were not supported by the evidence. As a result, Travelers further contends that that they are not "other insurance" for the purpose of

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[1] Commissioner Lowe signed the Opinion and Order Granting Petition for Reconsideration dated October 24, 2022. As Commissioner Lowe no longer serves on the Appeals Board, a new panel member has been substituted in her place.

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

shifting liability from CIGA and that CIGA is properly joined as it is a covered claim pursuant to Insurance Code section 1063.1.

We did not receive an answer from applicant or CIGA.

We received a Report and Recommendation (Report) from the WCJ, and an Amended Report. Both recommend denial of Traveler's Petition for Reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report. Based on our review of the record, as our decision after reconsideration, we will rescind the F&O, and substitute new findings that the date of injury per section 5412 is May 14, 2002; that the period of liability per section 5500.5 is May 14, 2001 through May 14, 2002; that the claim is a covered claim pursuant to Insurance Code section 1063.1 and CIGA is properly joined; and that the issue of whether Travelers should be dismissed for lack of coverage during the period of liability is deferred.

BACKGROUND

Applicant initially claimed injury on October 22, 2002 to the left and right wrists. The claim was accepted, and benefits were provided. At trial, the parties stipulated that applicant, while employed during the period September 1, 1995 to May 1, 2003, as a phlebotomist for Unilab Corporation and, thereafter, Quest Diagnostics Incorporated, sustained injury arising out of and in the course of employment to her shoulders, elbows and wrists.

Eventually applicant was referred to orthopedist Vic Osborne, M.D., for an initial orthopedic consultation on April 25, 2002. (Defense Exhibit B.) In the history, he noted that her employer referred her to US Healthworks where she had treated for her right and left wrists since March 22, 2002. She was working modified duty at the time of the evaluation with Dr. Osborne, but the restrictions were not outlined in this report. She was diagnosed with bilateral carpal tunnel syndrome and apparent left ulnar nerve entrapment. Dr. Osborne states, "it appears that this patient did sustain an injury to her upper extremities arising out of and caused by her industrial exposure." (*Id.* p. 5.) The only other treatment report admitted into evidence is the report of Dr. Osborne dated September 19, 2002, wherein he found applicant to be permanent and stationary. (Defense Exhibit C.) However, as relevant here is the notation that applicant had carpal tunnel release surgery on May 14, 2002.

The only evidence submitted to support indemnity payments at any time in this claim is a benefit notice authored by ESIS, the third party administrator for Lumbermens, the liquidated carrier. (Defense Exhibit D.) The notice dated June 7, 2004, notes that temporary disability had been paid from May 14, 2002 through May 30, 2002.

Applicant was referred to an Agreed Medical Evaluator (AME), Dr. Jeffrey Berman, who evaluated applicant for the first time on April 17, 2006. AME Dr. Berman attributes applicant's injury to the upper extremities to repetitive activities at work. (Applicant Exhibit 1.) He noted that she last worked in 2005.

Over the years, applicant was evaluated by AME Dr. Berman several more times. Relevant to the analysis here, in a supplemental report dated November 19, 2018, he was asked to address whether there was apportionment between two cumulative injuries dated May 14, 2001 to May 14, 2002 and May 31, 2002 to May 1, 2003. (Applicant Exhibit 6.) He opined that there were not two separate periods but one long period of cumulative injury noting that, "her condition had not stabilized by May 14, 2002 as the surgery was done at that time. Ultimately, it would not make sense that a continuous trauma would end on May 14, 2002 only to start with a new period of May 31, 2002." (*Id.* at 2.) He does not discuss her job description prior to injury nor her modified work restrictions post injury. He also does not discuss an end date to the period of exposure to injury and does not explicitly indicate that 2003 was the last year of injurious exposure.

Applicant's counsel amended the Application to extend the cumulative trauma to May 1, 2003, on December 24, 2018. CIGA filed a Petition for Dismissal on July 25, 2019, arguing that as of February 2003, once Unilab was purchased by Quest Diagnostics, Quest's carrier Travelers would be "other insurance" pursuant to Insurance Code section 1063.1. CIGA then filed a Petition for Joinder on June 22, 2020, attempting to join Quest Laboratories and its insurance carrier Travelers as party defendants based on the extension of the period of cumulative injury through May 1, 2003. Travelers and applicant objected to CIGA's petition. A notice of intent to join Travelers issued and, over Traveler's objection, Travelers was joined on July 29, 2020.

On May 4, 2021, the matter proceeded to trial in ADJ3246274 on the following issues: "1. Date of injury, pursuant to Labor Code section 5412; 2. Period(s) of injurious exposure pursuant to Labor Code section 5500.5; 3. CIGA's petition for dismissal pursuant to Insurance Code section 1063.1 dated June 22, 2020." (Minutes of Hearing, May 4, 2021, 2:21-25.)

The parties stipulated that applicant sustained injury to her shoulders, elbows, and wrists while employed as a phlebotomist during the period of September 1, 1995 to May 1, 2003, while working for Unilab Corporation and, thereafter, Quest Diagnostics. The parties further stipulated to coverage for Unilab Corporation as CIGA, by its servicing facility Intercare Holdings Insurance Services, Inc., for Lumbermens Mutual Casualty Company in liquidation, from November 10, 1999 through February 25, 2003. Likewise, the parties admitted that Travelers had workers' compensation coverage for Quest Diagnostics Incorporated from February 26, 2003 through December 31, 2003. (*Id.* 2:10-18.)

The F&O issued on May 4, 2021. CIGA was ordered dismissed as a party defendant without prejudice.

In the Amended Report, the WCJ reasoned that there was one long cumulative trauma based on AME Dr. Berman's opinion because applicant did not stabilize between the date of surgery and the time a second cumulative trauma period may have started. Citing to *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 238 [58 Cal. Comp. Cases 323], the WCJ concluded that the correct dates for determining injurious exposure pursuant to section 5500.5 is the beginning of employment through May 1, 2003 "based on the first report of Dr. Brourman." (Amended R&R, p. 4.) The WCJ further opined that defendant Travelers had to prove that applicant had knowledge of an ongoing trauma per *Herring v. Stanford University* (ADJ3193455; ADJ3923827) 2009 Cal. Wrk. Comp. P.D. LEXIS 521.

DISCUSSION

Travelers argues that the WCJ erred in finding that the period of injurious exposure pursuant to section 5500.5 is through May 1, 2003 and that the date of injury is also May 1, 2003. We agree.

A cumulative trauma injury is defined by section 3208.1 as "occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or the need for treatment." Based on the reporting of both Dr. Osborne and Dr. Berman, applicant suffered cumulative injury to her bilateral upper extremities. This is not disputed.

The issue here is determining liability for applicant's injury as currently pled. To make this determination, the date of injury for a cumulative injury is determined by section 5412, and the

period of liability per section 5500.5 is addressed separately. That is, the last date of injurious exposure is only one of the limiting factors in section 5500.5 and does not affect the determination of date of injury under section 5412. For the purposes of CIGA's petition to dismiss *in this claim*, whether there are separate cumulative trauma injuries is irrelevant to whether CIGA is properly joined and whether this is a "covered claim."

The date of injury as defined by section 5412 is the 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." 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]; *Nielsen v. Workers' Comp.* Appeals Bd. (1985) 164 Cal.App.3d 918, 927 [50 Cal.Comp.Cases 104]; *Chambers v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 556, 559 [33 Cal.Comp.Cases 722].)

For the purposes of section 5412, disability is either temporary or permanent. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998, 1002-1004, 1005-1006 [69 Cal.Comp.Cases 579]; *Chavira v. Workers' Comp. Appeals Bd*. (1991) 253 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].) Disability has been defined as "an impairment of bodily functions which results in the impairment of earnings capacity." (*J.T. Thorp v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 327, 336 [49 Cal.Comp.Cases 224].)

An employer has the burden of proving that an employee knew or should have known that their disability was industrially caused. (*Johnson, supra*, at p. 471, citing *Chambers*, *supra*, 69 Cal. 2d at p. 559.) In general, an employee is not charged with knowledge that their disability is job-related without medical evidence to that effect. (*Johnson*, *supra*, at p. 473; *Newton v. Workers' Comp. Appeals Bd.* (1993) 17 Cal.App.4th 147, 156, fn. 16 [58 Cal.Comp.Cases 395].) Still, the filing of a claim form has been found to be evidence of knowledge that the claimed injury was industrially related. (*Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102 [53 Cal.Comp.Cases 502].)

With respect to the issue of knowledge, here, it is undisputed that applicant filed a claim form alleging that her bilateral wrists were injured as the result of her employment on March 18, 2002. (Defense Exhibit A.) The medical record from Dr. Osborne seems to suggest that as of April 25, 2002, applicant was working with work restrictions on modified duty. (Defense Exhibit B.)

The record is silent as to the specific restrictions and whether there was any effect on her earning capacity. Nonetheless, as of May 14, 2002, the record reflects that applicant began receiving temporary disability indemnity payments following a surgery on the same date, suggesting that her condition had become labor disabling. Pursuant to *Rodarte*, the payment of temporary disability is evidence of disability for the purposes of section 5412.

Here, we disagree that defendant was required to prove that applicant had knowledge that her injury was an ongoing cumulative injury rather than a prior injurious process. First, in *Bassett-McGregor*, the court found that the claim form submitted as a specific injury was in fact enough to attribute knowledge to the applicant for section 5412. The applicant was able to prove that the date of the cumulative injury related back to the filing of the original claim form for a specific injury and was therefore not barred by section 5405. The facts are the same here, applicant filed a claim for a specific injury, later filed as an Application for cumulative injury, so knowledge remains hinged to the filing of the original claim form. That is, the date of injury did not move when applicant later learned that her injury was cumulative and not specific. Second, in this matter there was only one Application filed for one injury. For the purposes of section 5412 and section 5500.5, it is of no consequence whether there is an ongoing cumulative injury because applicant continued to work. Applicant is not tasked with knowing whether her injury is one or multiple, nor is it relevant to the inquiry here as to liability.

In this matter, the concurrence of knowledge and disability is May 14, 2002, when applicant was taken off work and paid temporary disability. Thus, we conclude that the correct date of injury under section 5412 is May 14, 2002.

Section 5500.5 determines employer liability for a cumulative injury. Liability is limited to the employers who employed the employee during the year immediately preceding, "either the date of injury, as determined by section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of occupational disease or injury, *whichever occurs first*." (Emphasis added.) Significantly, section 5500.5 does not determine the period of injurious exposure.

Here, the analysis of whether there are multiple periods of cumulative injury is unnecessary as there is only one claim filed, and there is nothing in section 5500.5 that requires more than one claim of injury. For the purposes of section 5500.5, the only relevant inquiry is the date of last injurious exposure and whether it pre-dates the section 5412 date of injury. Dr. Berman opines,

and the WCJ accepts, that there is one long cumulative trauma injury. Dr. Berman actually does not state when the last injurious exposure occurred nor what exactly the injurious exposure is. Per the reporting of the AME, and as corroborated by the temporary disability payments, applicant was on and off work until some point in 2005 when she apparently stopped working entirely. The choice of May 1, 2003 as the last date of injurious exposure does not have any support in the record apart from the pleadings, and in any event, as discussed above, we conclude that the section 5412 date of injury is May 14, 2002, which is earlier than applicant's last day of work. That is, in any scenario, the date of injury per section 5412 pre-dates the last date of injurious exposure and controls for the purposes of determining liability. Therefore, in this matter, the period of liability under section 5500.5 is from May 14, 2001 through May 14, 2002.

CIGA's liability is defined by Insurance Code section 1063.1 wherein CIGA's liability is limited to "covered claims." A "covered claim," pursuant to Insurance Code section 1063.1 (c)(9)(A) explicitly excludes "A claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured."

Based on the current record, Quest Corporation did not purchase Unilab until February 2003. The parties stipulated that Quest and Travelers did not have coverage until February 26, 2003. Thus, it appears that Quest Corporation and Travelers do not have any liability in this case, and there is no basis for dismissal of CIGA. CIGA remains a properly joined party, and CIGA's Petition for Dismissal is denied.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of May 4, 2021 is **RESCINDED** and that the following is **SUBSTITUTED** therefor.

FINDINGS OF FACT

1. Applicant, Chris Rocha, while employed during the period up to 2005, as a phlebotomist, occupational group number: 220, for Unilab Corporation and thereafter, Quest Diagnostics, Inc., sustained injury arising out of and in the course of employment to her shoulders, elbows and wrists.

2. Pursuant to Labor Code section 5412, applicant's date of injury is May 14, 2002.

3. The period of liability pursuant to Labor Code section 5500.5 is May 14, 2001 through May 14, 2002.

4. CIGA'S Petition to Dismiss dated June 22, 2020 is hereby denied as the claim remains a "covered claim" pursuant to Insurance Code section 1063.1.

5. CIGA's Petition to Join Party Defendant, date January 9, 2015, is denied.

6. The issue of whether Travelers should be dismissed is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISIONER

/s/ JOSEPH V. CAPURRO, COMMISIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 4, 2025

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

CHRIS ROCHA
MULLEN FILIPPI
BLITSTEIN YOUNG

TF/md

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