WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DONALD KLINICKE, *Applicant*

vs.

JONES LANG LASALLE; LM INSURANCE CORPORATION, administered by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ17633031
Santa Barbara District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and/or Removal and the contents of the Report and Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto.[1] Based on our review of the record, and for the reasons stated below, we will grant reconsideration, amend the WCJ's decision to include a finding of Labor Code[2] section 5412 date of injury of August 14, 2023 and to amend Findings of Fact number four (4) to find that applicant's claim is not barred by the post-termination defense. We will otherwise restate and affirm the WCJ's decision for the reasons stated in the WCJ's Report and Opinion on Decision, both of which we adopt and incorporate, as quoted below.

I.

Former 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, 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.

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[1] Deputy Commissioner Schmitz, who was on the panel that issued a prior decision in this matter is unavailable to participate further in this decision. Another panel member was assigned in her place.

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

(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.

Under 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 November 18, 2024, and 60 days from the date of transmission is January 17, 2025. This decision is issued by or on January 17, 2025, so that we have timely acted on the petition as required by section 5909(a).

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 November 18, 2024, and the case was transmitted to the Appeals Board on November 18, 2024. 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 18, 2024.

Next, we address the type of remedy being sought. We remind defense attorney that it is imporper to file a Petition for Removal from a clearly final order. Counsel is expected to know the difference between a final and non-final order and seek only the appropriate remedy. Doing

otherwise wastes judicial resources and may be found to be sanctionable under section 5813. Future compliance with the WCAB's rules is expected. We will treat defendant's petition as one seeking reconsideration.

II.

As relevant here, section 3600(a)(10) states, that:

> 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(a)(10), emphasis added.)

The initial burden in asserting a post-termination bar to compensation, an affirmative defense, rests with the defendant, who must establish that the claim for compensation was filed after a notice of termination and that the claim is for an injury occurring prior to the time of notice of termination or layoff. (Lab. Code, § 5705.) Defendant must meet this burden by preponderance of the evidence, and this requires "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code, § 3202.5)

In this case, applicant claims a cumulative injury. Section 5412 sets the date of injury for cumulative injury and occupational disease cases, as "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, to determine the date of applicant's cumulative injury, there must exist a concurrence of disability and knowledge that it was caused by employment. Disability means either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579] (*Rodarte*).)

Knowledge requires more than an uninformed belief. "Whether an employee knew or should have known his 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*).) While an employer's burden of proving the statute of limitations has run can be met by presenting medical evidence that an injured worker was informed a disability was industrially caused, "[t]his burden is not sustained merely by a showing that the employee knew he had some symptoms." (*Id.* at p. 55.) The fact that a worker had knowledge of disease pathology does not necessarily mean that they knew, or should have known, that they had disability caused by the employment. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631]; *Rodarte, supra,* 119 Cal.App.4th at p. 998.) An injured worker's suspicion that an injury is work-related is not sufficient to establish the date of injury on a cumulative injury. An injured worker will not be charged with knowledge that a disability is job-related without medical advice to that effect, unless given "the nature of the disability and the applicant's training, intelligence and qualifications," he or she should have recognized the relationship. (*Johnson, supra*, 163 Cal.App.3d at p. 473.) 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 Acc. Com. (McLaughlin)* (1965) 234 Cal. App. 2d 831, 839 [30 Cal. Comp. Cases 188].) Moreover, it is employer's burden of proof that the employee knew or should have known their disability was industrially caused. *(Johnson, supra*, at p. 471, citing C*hambers v. Workers' Comp. Appeals Bd., supra*, 69 Cal. 2d at p. 559.) That burden is not sustained merely by a showing that the employee knew they had symptoms. (*Johnson, supra*, at p. 471, citing *Chambers, supra*, at p. 559.)

For the reasons stated in the Report and Opinion on Decision, we agree that the WCJ correctly identified the section 5412 date of injury in this case is August 14, 2023, based on the report of primary treating physician (PTP) Alan Moellekan, M.D. (Applicant's Exhibit 7, at p. 4.) We will amend the WCJ's decision to add a finding in this regard.

We also agree with the WCJ that applicant's claim is not barred by the post termination defense. However, we find there is no need to apply any of the section 3600(a)(10) exceptions where defendant did not meet its burden of affirmatively establishing that applicant's claim was filed after notice of termination. In fact, defendant did not present any documentary evidence or testimony regarding notice of termination. At trial, applicant gave conflicting testimony regarding

his separation from employment. He testified that he retired (Minutes of Hearing and Summary of Evidence (MOH/SOE), 9/4/24, at p. 6:8-9) and that he was terminated (MOH/SOE, 6:13-15). Likewise in its Petition for Reconsideration, defendant argues both that applicant "retired" "[taking] himself out of the job market" (Petition for Reconsideration, at 3:4-5) and that applicant was "terminated." (Petition for Reconsideration, at p. 3:7.) In fact, if applicant voluntarily retired, then the post-termination bar would not apply. (*CJS Co. v. Workers' Comp. Appeals Bd. (Fong)* (1999) 74 Cal.App.4th 294, 298 [64 Cal.Comp.Cases 954].) Regardless, it was defendant's burden to prove that there was in fact a notice of termination and it did not do so. Accordingly, we will amend Findings of Fact number 4 to state that that applicant's claim is not barred by the post termination defense without any reference to the exceptions. Nevertheless, we note that had defendant established notice of termination, applicant would have qualified for exception (B)[3] and possibly (D).[4]

Next, we turn to the substantiality of the evidence relied upon. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416–17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.).) For the reasons stated by the WCJ in the Report, we find that opinions of PTP Dr. Moelleken and panel qualified medical evaluator (PQME) Valerie Lyon, M.D., to be substantial medical evidence which supports the finding of injury arising out of and occurring in the course of employment (AOE/COE).

Moreover, we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. *(Garza v. Workmen's Comp.*

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[3] See the treatment records from Central Cost Orthopedics. (Defendant's Exhibit C.)

[4] If the alleged termination occurred on April 5, 2023 (pursuant to applicant's testimony, one year following applicant's right shoulder surgery in April 5, 2022, see MOH/SOE, 9/4/24, at 6:11-12), then the section 5412 date of injury (August 14, 2023) was subsequent to the alleged April 5, 2023 date of the notice of termination.

Appeals Bd. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.) Defendant argues that applicant's testimony was impeached regarding a previous injury to his right shoulder 40 years ago, whether Dr. Moelleken asked him about previous workers' compensation injuries, and other similar inconsistencies. We are not persuaded that any of the alleged inconsistencies are germane to the issue of causation.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the October 16, 2024 Findings of Fact and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 16, 2024 Findings of Fact and Order is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. It is found that the claim is not barred by the post termination defense.

* * *

6. The Labor Code section 5412 date of injury is August 14, 2023.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 17, 2025

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

DONAL KLINICKE
LAW OFFICES OF JOSEPH E. LOUNSBURY
KWAN & ASSOCIATES

PAG/*cs*

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

ON PETITION FOR RECONSIDERATION AND NOTICE OF TRANSMITTAL

I.

INTRODUCTION

1.	Applicant's Occupation:	In Dispute
	Date of birth:	[]
	Date(s) of Injury:	April 4, 2018 – April 4, 2022
	Parts of Body Injured:	In Dispute
	Manner in Which Injury Occurred:	In Dispute.
2.	Identity of Petitioner:	Defendant
	Timeliness:	The Petition is timely.
	Verification:	The Petition for Reconsideration is verified.
	Service:	The Petition was served on all parties.
3.	Date of Issuance of Order:	October 16, 2024
4.	Petitioner's Contentions:	1) The WCJ erred in finding 1) the claim not barred by the Statute of Limitations, 2) the claim not barred by the post termination defense and 3) finding injury AOE/COE.

II.

FACTS

The case proceeded to trial on September 4, 2024, and September 18, 2024, on the issues of AOE/COE, Statute of Limitations, and Post-Termination Defense.

On October 16, 2024, a Finding of Fact and Order and Opinion on Decision issued from which this defendant filed a Petition for Reconsideration as to findings #1 finding injury AOE/COE, #3 that the claim was not barred by the post termination defense and, #4 that the claims was not barred by the Statue of Limitations.

The Finding of Fact and Order stated:

1. "It is found that Donald Klinicke, born [], while employed during the period April 4, 2018, through April 4, 2022, at Santa Maria, California, by Jones Lang LaSalle, sustained an injury arising out of and in the course of employment to bilateral shoulders, bilateral knees, bilateral hips, lumbar spine, bilateral hands, bilateral wrists, and right elbow.

2. At the time of the injury, the employer's workers' compensation carrier was LM Insurance Corporation, administered by Gallagher Bassett.
3. It is found that the claim is not barred by the Statute of Limitations.
4. It is found that the claim meets the exception to the post termination defense and is not barred.
5. It is found that further development of the medical record is needed as to the conditions of high blood pressure, shortness of breath, hearing loss, and arthritis, with additional QME panels needed in ENT and Internal and a supplemental report from the QME Dr. Lyon. These conditions are reserved and deferred.

III.

ORDER

a. Further development of the medical record per Finding of Fact #5."

In this case the Applicant was claiming a continuous trauma injury from April 4, 2018, to April 4, 2022, to his bilateral shoulders, bilateral knees, bilateral hips, lumbar spine, high blood pressure, shortness of breath, hearing loss, arthritis, bilateral hands, bilateral wrists and bilateral elbows.

DWC-1 was filed dated April 26, 2023. An application dated April 28, 2023, was filed May 1, 2023.

The applicant was evaluated by primary treating physician Dr. Alan Moelleken on August 14, 2023 (Exhibit 7 EAMS #48081533), who found industrial causation for the injuries claimed. The parties also proceeded to QME Dr. Valerie Lyon who issued one medical report dated May 3, 2024 (Exhibit 8 EAMS ID #51814995) and gave deposition testimony (Exhibit 9 EAMS ID #53670590) who also found industrial causation to the claimed body parts. Based on these opinions it was found the applicant sustained injury to lumbar spine, bilateral shoulders, bilateral hips, bilateral knees, bilateral hands, right elbow, and bilateral wrists.

The case previously proceeded to trial on September 11, 2023, on a discovery issue involving a QME panel issue. A Finding of Fact issued after which defendant filed a Petition for Removal or in the alternative Reconsideration. That Petition was denied November 29, 2023.

Following the completion of the QME, deposition of the QME, and a compensable report of the PTP, defendant still continues to deny the claim.

From October 16, 2024, Finding of Fact, Order and Opinion on Decision, the Defendant now files a Petition for Reconsideration (PTR) to the finding of injury AOE/COE, that the claim is not barred by either the post termination defense nor Statute of Limitations.

IV.

DISCUSSION:

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to *Smales v. WCAB* (1980) 45 CCC 1026, the Report and Recommendation cures those defects.

This case involves a continuous trauma injury. The defendant argues that the claim is barred by the Statute of Limitation and post termination defense.

The date of injury for cumulative trauma claims pursuant to Labor Code, § 5412, "…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 defendant would argue that the applicant had knowledge of the workers compensation system as he had previously filed a claim (PTR page 9). However, that does not equate to knowledge that he had a continuous trauma claim. They argue he discussed filing a claim with his doctor (PTR at p.9). Again, that does not establish knowledge of his continuous trauma claim as to all of the claimed parts of body.

At no time have defendant produced evidence of compensable disability before the medical report of PTP Dr. Moelleken of August 14, 2023 (Exhibit 7 EAMS #48081533). That was the first time the applicant suffered compensable disability. The date of injury was found to be that date August 14, 2023, with knowledge and compensability established at the time of that evaluation.

The claim and application had been filed in April and May 2023 as such the claim was deemed timely.

Regarding the post-termination defense, Defendant is arguing the claim was retaliatory (PTR at p. 11) There was no reliable evidence found to substantiate that claim. They argue applicant had negative feelings toward the employer and that would support a retaliatory filing (PTR at p. 11). Based on that contention only applicants with positive thoughts about the employer would have valid claims. Their argument is without merit.

At no time during the trial did the defendant even produce evidence of termination. There was no termination letter, no employer witness, nothing except the testimony of the applicant who said he was terminated a little over a year after he had shoulder surgery. What they did produce was medical records establishing that the applicant had treated during his employment for some of the claimed body parts to include the shoulder. That in of itself defeats the post termination defense to this continuous trauma claim.

Also, the defendant argued, the applicant had a conversation with the employer about a potential workers compensation claim. If so, why didn't they provide him with a claim form? The applicant testified they never provided him with a claim form (MOH/SOE of September 18, 2024, at page 3 lines 21-22). Again, their argument is without merit.

As to the issue of AOE/COE, both the unrebutted PTP report of Dr. Moelleken and the QME report and deposition testimony of the QME found industrial injury. The QME did request further records before issuing a final report, however at no time did the QME indicate that was on the issue of industrial causation as to all body parts. She did not have all the records as to the applicant's prior injury to the right shoulder and she was unaware of a cancer diagnosis in the pelvis. It is also notable that the applicant was unaware of any pelvic tumor (MOH/SOE of September 18, 2024, at page 4 lines 1-3). What about as to all the body parts that were found industrial? The defendant would argue that the mere request for additional medical records as to any body part(s) or condition means that all the opinions are incomplete. After questioning by the Defendant Applicant attorney asked the QME in her deposition of June 7, 2024, at page 38 lines 3-10 (EAMS ID #53670590):

"With regard to whether applicant's injuries that you mentioned in your report of the shoulders, elbows, hips, knees, feet, hands, thoracic and lumbar spine, do you believe that those injuries are, at least in part, caused by the cumulative trauma?

A. Yes, from this employer.

Q. Yes.

A. Yes."

Based on the medical reports and deposition testimony, industrial causation was established for the bilateral shoulders, bilateral knees, bilateral hips, lumbar spine, bilateral hands, bilateral wrists, and right elbow.

As to the conditions of high blood pressure, shortness of breath, hearing loss, and arthritis, pursuant to *Tyler v. WCAB* 56 Cal App 4th 389, 65 Cal. Rptr. 2nd 431, 62 Cal Comp. Cases 261 (1997),

McClune v WCAB 62 Cal App 4th 1117, 72 cal. Rptr. 2nd 898, 63 Cal Comp. Cases 261 (1997) and *McDuffie v Los Angeles Metropolitan Transit Authority* 67 Cal Comp. Cases 138, (Appeals Board en banc) (2002), there was a need for development of the medical record.

This applicant has had a finding of industrial injury since August 2023. The applicant last worked April 2022. The defendant continues to deny the claim and this applicant has been without benefits for years. Injury AOE/COE was established, and opinions of industrial causation should stand.

V.

RECOMMENDATION

* * *

This case was transmitted to the Reconsideration Unit on November 18, 2024.

DATE:11/18/2024

Deborah Rothschiller
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

* * *

FACTS

Applicant is claiming a continuous trauma injury from April 4, 2018, to April 4, 2022, to his bilateral shoulders, bilateral knees, bilateral hips, lumbar spine, high blood pressure, shortness of breath, hearing loss, arthritis, bilateral hands, bilateral wrists and bilateral elbows.

DWC-1 was filed dated April 26, 2023. An application dated April 28, 2023, was filed May 1, 2023.

The case proceeded to Trial on the issues of AOE/COE, Statute of Limitations, and Post-Termination Defense.

The applicant testified that he was terminated about a year after having shoulder surgery. No termination letter was offered, and no other witnesses testified besides the applicant.

The applicant was evaluated by primary treating physician Dr. Alan Moelleken on August 14, 2023. The parties also proceeded to QME Dr. Valerie Lyon who issued one medical report and gave deposition testimony.

STATUTE OF LIMITATIONS (SOL)

Section 5405 provides that the "…period within which proceedings may be commenced…is one year from…(a) The date of injury. (b) The expiration of any period covered by payment [of temporary disability indemnity]. (c) The last date on which any [medical treatment] benefits were furnished. Defendant holds the burden of proof as to whether a claim is barred by the Statute of Limitations (Lab. Code, §§ 5409, 5705.)."

The record does not reflect that applicant has been provided with indemnity or medical treatment by defendant for his injury and therefore, neither § 5405(b) nor § 5405(c) is applicable. Accordingly, the relevant date for the running of the statute of limitations is the date of injury pursuant to § 5405(a).

The date of injury for cumulative trauma claims pursuant to Labor Code, § 5412 "…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."

Although the period of liability for cumulative trauma claims is limited to the last year of injurious exposure per § 5500.5, the actual date of injury under § 5412 may be different than applicant's last date of work. (Lab. Code, § 5500.5.)

Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323] states, "Pursuant to section 5412, the date of a cumulative injury is the date the employee first suffers a 'disability' and has reason to know the disability is work related." 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. (Butler)* (1984) 153 Cal.App.3d 327, 336 [49 Cal.Comp.Cases 224].)." Disability can be either temporary or permanent. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 253 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].) Medical treatment alone is not disability, although it may be evidence of permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005-1006 [69 Cal.Comp.Cases 579].) Whether there is temporary or permanent disability indicating the date of cumulative injury is a question of fact, which must be supported by substantial evidence. (Austin, supra, 16 Cal.App.4th at pp. 233-235.)

The date of injury for applicant's continuous trauma claim is August 14, 2023, when the applicant was evaluated by Dr. Moelleken (Exhibit 7) who found the applicant temporary partially disabled. This is when the applicant had evidence of compensable disability and would have knowledge that the cause that his disability was work related. Applicant filed an Application for Adjudication of Claim May 1, 2023 and DWC-1 claim form April 26, 2023, and thus his claim is not barred by the statute of limitations.

The defendant would argue that based on the records of Central Coast at page 20 where it says he will discuss the surgery with his employer and wife and get back with the doctor, that he knew at that time his shoulder condition was work related and notified his employer. However, if in fact, the applicant did discuss it with the employer, the unrebutted testimony of the applicant was that the employer never provided him with a claim form. The employer would have also had a duty to investigate. The statute would have been tolled by their failure to do so.

This claim is not barred by the Statute of Limitations.

POST TERMINATION DEFENSE

Labor Code § 3600(a)(10)(B)

" (A) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in § 3602, § 3706, and § 4558, shall, without regard to negligence, exist against an employer for any injurysustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

…(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:

…(B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury."

The post-termination defense will not bar a claim if the employee establishes the existence of medical records before the notice of termination or layoff that contain evidence of the injury. This was discussed in Torrance Co. v. Workers' Comp. Appeals Bd. (Constanza) (2011) 77 Cal. Comp. Cases 197 where the Court stated:

"The WCJ recommended that reconsideration be denied. In her report, the WCJ pointed out that Applicant's credible and unrebutted testimony was that he had obtained medical treatment in 2006 and 2007 for his injuries prior to his termination. Applicant's testimony was corroborated by medical reports in existence prior to the termination. Therefore, the WCJ found that the Labor Code § 3600(a)(10)(B) exception to the post-termination claim defense was applicable to Applicant's claims filed after he was terminated."

The WCAB denied reconsideration and adopted and incorporated the WCJ's report. The WCAB noted that Applicant's testimony that he injured his back on the job in 2006 and saw a Kaiser physician in 8/2006 for pain was corroborated by Kaiser records that came into existence prior to Applicant's termination on 2/20/2008. Since medical records containing evidence of Applicant's specific back injury existed prior to the date he was terminated, the WCAB agreed that the Labor Code § 3600(a)(10)(B) exception to the post-termination claim defense was applicable.

Additionally, the WCAB pointed out that Applicant credibly testified that he first learned about the possibility that he had incurred CT injury to his back as a result of work activities after he received notice of his termination. Although Applicant testified that he experienced symptoms of pain while working, he further testified without rebuttal that he took no time off work because of those symptoms. It was not until 2/25/2008, after the delivery of the notice of termination, that Applicant was declared by his primary treating physician, Dr. S. M. Golam Hossain, to be TD. Because the date of Applicant's CT injury as specified in Labor Code § 5412 was subsequent to the date of the notice of termination because Applicant did not incur disability with knowledge of its cause until after he was terminated, the WCAB found that the Labor Code § 3600(a)(10)(D) exception to the post-termination claim defense also applied, citing *State Comp. Ins. Fund v. W.C.A.B. (Rodarte)* (2004) [119 Cal. App. 4th 998, 14 Cal. Rptr. 3d 793] 69 CCC 579.

Further the medical records do not need to establish industrial causation of the injury; they only need to provide evidence of a pretermination injury. Post-termination medical reports may be used to establish industrial causation.

In *Marquez Auto Body, Mid-Century Ins. v. Workers Compensation Appeals Bd.*
(1996) 61 Cal. Comp. Cases 408, the Appeals Board stated:

> "Labor Code section 3600, subdivision (a)(10)[Deering's] provides that where the claim for compensation is filed after notice of termination and the claim is for an injury occurring before such notice, no compensation shall be paid except under the limited circumstances. One such circumstance is where the employee's medical records, existing prior to the notice of termination, "contain evidence of the injury.' (Lab. Code, § 3600, subd. (a)(10)(B)[Deering's].) The plain wording of the exception requires the medical records contain only evidence of "the injury,' not evidence of industrial causation. To read the statute as urged by the petitioner would result in denial of claims simply because the injured worker and treating doctor were unaware of possible industrial causation or the doctor's report was incomplete. It is true that before compensation can be paid there must be evidence of industrial causation, but that evidence need not appear in the pre-existing medical records themselves. The record here contains substantial evidence of an industrial causation as found by the board both in the medical reports and the extensive testimony of the applicant, co-workers and the employer."

Here, there are multiple medical reports and records existing prior to applicant's alleged termination which contain evidence of injury. Those include reports from Central Coast Orthopedics. Applicant testified he was terminated a little over a year after his right shoulder surgery which was performed on April 5, 2022. No documentary evidence was offered by either party pertaining to the termination. The defendant did not offer a termination letter, or employer testimony.

Based on the above, the applicant meets the exception to the post termination defense.

AOE/COE

Applicant is claiming a continuous trauma injury from April 4, 2018, to April 4, 2022, to his bilateral shoulders, bilateral knees, bilateral hips, lumbar spine, high blood pressure, shortness of breath, hearing loss, arthritis, bilateral hands, bilateral wrists and bilateral elbows.

Based on the credible testimony of the applicant together with the documentary evidence of the medical report of QME Valerie Lyon D.C. dated May 3, 2024 and the QME deposition testimony of June 7, 2024, in addition to the medical report of Alan Moelleken M.D. dated August 14, 2023, it is found that the applicant sustained injury to his lumbar spine, bilateral shoulders, bilateral hips, bilateral knees, bilateral hands, right elbow, and bilateral wrists.

As to the conditions of high blood pressure, shortness of breath, hearing loss, and arthritis, pursuant to Tyler v. WCAB 56 Cal App 4th 389, 65 Cal. Rptr. 2nd 431, 62 Cal Comp. Cases 261 (1997), McClune v WCAB 62 Cal App 4th 1117, 72 cal. Rptr. 2nd 898, 63 Cal Comp. Cases 261 (1997) and McDuffie v Los Angeles Metropolitan Transit Authority 67 Cal Comp. Cases 138, (Appeals Board en banc) (2002), there is a need for development of the medical record. In the deposition of QME Dr. Lyons, the QME agreed an ENT would be needed to opine on the allegation of hearing loss. The QME also needed additional medical records to opine on the arthritic allegation. An additional QME panel is also needed to opine on the allegations of high blood pressure and shortness of breath. As to the conditions of high blood pressure, shortness of breath, hearing loss, and arthritis those are reserved and deferred.

EXHIBITS

The defense counsel made a motion to admit pages 16, 68, 69, 75, 76, and 81 of applicant's deposition transcript dated September 20, 2023, which were marked for ID only. Those pages are admitted into evidence as Defendants F.

DATE: 10/16/2024

Deborah Rothschiller
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE