

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

EVELYN PEREZ, *Applicant*

vs.

**ANTELOPE VALLEY HOSPITAL,
permissibly self-insured, administered by ATHENS ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ16130330
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order (F&O) issued on October 15, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) from September 1, 2011 through May 18, 2018, applicant was employed as a registered nurse by defendant; (2) applicant sustained injury arising out of and in the course of employment (AOE/COE) to her cervical spine, lumbar spine, bilateral shoulders, bilateral wrists, and bilateral feet, with the court making no finding as to the issue of whether applicant sustained injury to other body parts; (3) applicant's Labor Code section 5412¹ date of injury is June 18, 2019; and (4) applicant's claim is time-barred under section 5405.

The WCJ ordered that applicant take nothing on her claim.

Applicant contends that the WCJ erroneously found that the section 5412 date of injury is June 18, 2019, and that her claim is untimely.

We received an Answer.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons stated below, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&O and substitute new findings that the section 5412 date of injury is May 24, 2022; that applicant's claim is timely pursuant to section

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

5405; and that the issue of whether applicant sustained injury to other body parts is deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

BACKGROUND

On June 25, 2024, the matter proceeded to trial on the following issues:

1. Injury arising out of and in the course of employment; however, injury AOE/COE for non-orthopedic body parts is deferred.
2. Date of injury per Labor Code Section 5412 with Applicant contending the date is November 21, 2022, and Defendant contending that the date is November 15, 2016.
3. Defendant raises the statute of limitations as to all currently or previously pled body parts.
(Minutes of Hearing, June 25, 2024, p. 2:2-3:3.)

The parties stipulated that applicant claims injury to her cervical spine, thoracic spine, lumbar spine, bilateral shoulders, bilateral wrists, bilateral feet, teeth, and in the form of headaches and sleep disorder while employed during the period of September 1, 2011 through May 18, 2018. (*Id.*, p. 2:9-12.)

The WCJ admitted exhibits entitled PTP Initial Report of Andrew Mooney, DC, dated May 24, 2022, and AME Report of Michael Luciano, M.D., dated May 29, 2023, into evidence. (*Id.*, p. 3:1-10.)

The Report of Dr. Mooney states:

As she continued to work, in or around 2016, Mrs. Perez reports that she developed a gastrointestinal condition which she attributes to the stress of the job as well as the use of medications for her neck and back pain.

In or around 2017, Mrs. Perez received one injection to each of the neck and low back that did not provide any significant relief of her symptoms. The neurosurgeon recommended surgery; however, she declined to undergo surgical intervention at that time.

...

Mrs. Perez reports that the severity of her symptoms worsened to the point where she could no longer tolerate working. She went to a gastroenterologist due to the severity of her gastrointestinal condition who placed her on temporary total disability on 05/18/2018.

Mrs. Perez remained under the care of her primary care physician who extended her temporary total disability until her benefits ended. She then formally resigned on 06/18/2019.

Mrs. Perez has since formally retired and is receiving her pension.

She remained under the care of her primary care physician who referred her for short courses of chiropractic treatment and physical therapy over the years. Mrs. Perez also reports period visits with her gastroenterologist.

Due to the lack of resolve of her symptoms, Mrs. Perez retained legal counsel to assist with filing a claim of industrial injury and was subsequently referred to this office to fulfill that role.

...

DIAGNOSTIC IMPRESSION:

1. Cervical Spine Strain / Sprain with Myalgia (S13.4XXA and M79.1)
2. Cervical Spine Disc Displacement (M50.20)
3. Cervical Spine Radiculitis (M54.12)
4. Right Shoulder Arthralgia (M25.519)
5. Left Shoulder Arthralgia (M25.519)
6. Lumbar Spine Strain / Sprain with Myalgia (S33.5XXA and M79.1)
7. Lumbar Spine Disc Displacement (M51.26)
8. Lumbar Spine Radiculitis (M54.16)
9. Right Metatarsalgia (M77.4)
10. Left Metatarsalgia (M77.4)
11. Reported Gastritis (K29.90) [Deferred to Appropriate Specialist]
12. Reported Jaw Pain and Bruxism (R68.84 & G47.63) [Deferred to Appropriate Specialist]

...

Regarding the **cervical spine, bilateral shoulders, lumbar spine and bilateral feet**; based upon Labor Codes 4663 and 4664, it is my professional medical opinion that 100% of Mrs. Perez's disability/impairment is compensable with and directly attributable to her cumulative industrial exposure while employed at Antelope Valley Hospital.

...

DISCUSSION:

I find that Mrs. Perez's presentation of the facts of her work duties and incident of injury relating to her claimed industrial injuries as viable and medically reasonable. Based on the narrative provided to me at the initial evaluation, Mrs. Perez sustained a cumulative trauma which involves her cervical spine, bilateral shoulders, lumbar spine and bilateral feet while performing her usual and customary occupational duties as a registered nurse.

Mrs. Perez . . . narrates a history of pain and aggravations over the course of her employment. Mrs. Perez has sought significant treatment on her own with chiropractors, physical therapists, neurosurgeons, podiatrists and internal medicine specialists.

(Ex. 2, PTP Initial Report of Andrew Mooney, DC, May 24, 2022, pp. 2-3, 13-14.)

The AME Report of Dr. Luciano states:

The April 21, 2016 report of Chiropractor Dewald indicates the patient stated she worked as a nurse and did heavy lifting which she felt caused gradual onset of pain. Therefore, it is the opinion of the undersigned that, per the available medical records, the patient appears to have first become aware that her symptoms may be work-related in 2016.

...

Upon receipt of the patient's complete medical records, which would include the records of her private insurance, the date the patient first experienced disability can be addressed.

...

When the patient was evaluated by the undersigned on November 21, 2022, she stated she stopped working in May 2018 due to gastrointestinal issues and subsequently retired in 2019.

Based on the patient's history and review of records previously provided to the undersigned, from an orthopedic perspective, it is the opinion of the undersigned that the patient has been temporarily partially disabled (capable of modified duties as outlined in the undersigned's report from the November 21, 2022 date of evaluation) since she retired in 2019, with no periods of temporary total disability. (Ex. 4, AME Report of Michael Luciano, M.D., pp. 7-8.)

At trial, applicant testified that she had diagnostic testing performed at Antelope Valley Neuroscience, including x-rays and an MRI of her low back. These were reviewed by Dr. Misra Mukesh, who never took her off work or imposed work restrictions on an orthopedic basis. (Further Minutes of Hearing and Summary of Evidence, August 13, 2024, pp. 3, 5.)

Applicant further testified that her podiatrist, Dr. Andrew Katz, prescribed orthotics but did not advise that they were required as a result of a repetitive work injury and did not take her off work or impose work restrictions. Her gastroenterologist took her off work in May 2018. (*Id.*)

In the Opinion on Decision, the WCJ states:

Applicant testified that . . . [s]he stopped working due to her health issues and collected state disability benefits.[fn]

She received self-procured medical treatment prior to her last day of work. She began treating with Dewald chiropractic in 2016 and specifically told the doctor that she does a lot of lifting as part of her patient care and that this was gradually causing injury to her back. Although Dewald did not specifically suggest or advise her to consider this as a workers' compensation claim, she did think that her problems were work related.[fn]

...

When applicant went to work, she had to perform her usual and customary duties.[fn]

...

Applicant's testimony was credible, and unrebutted.

...

[T]o fix the date of injury, there must be a confluence of both disability, and the actual or essentially constructive knowledge that the disability was caused by applicant's employment.

In post-trial briefing, applicant essentially argues that this did not happen until applicant was evaluated by AME Dr. Luciano on November 21, 2022, as Dr. Luciano both found a cumulative trauma injury and determined that applicant was capable of returning to modified duties. This is because although Dr. Mooney explicitly found a cumulative trauma injury as of his initial report of April 24, 2022 (Exhibit X2), he did not explicitly provide work restrictions and instead noted that applicant was retired.

...

Applicant last worked on May 18, 2018, when she went off work due to gastrointestinal issues, which, incidentally, she also apparently attributed[fn] to work exposure.

...

Using June 18, 2019 as applicant's §5412 date of injury, the statute of limitations to file a claim would run as of June 18, 2020. The Court takes judicial notice of applicant's DWC-1 Claim form, EAMS doc ID #41347448, as well as her application for adjudication of claim, EAMS doc ID #41347446. Both of these documents are dated May 4, 2022, which is nearly 2 years following the expiration of the statute of limitations.

(Opinion on Decision, pp. 3-7.)

In the Report, the WCJ states:

As set forth in the Court's opinion on decision, in his report of May 29, 2023 (Exhibit X4), AME Dr. Luciano opined that applicant first suffered disability as of her retirement[fn] in 2019. Specifically, Dr. Luciano states:

"Based on the patient's history and review of records previously provided to the undersigned, from an orthopedic perspective, it is the opinion of the undersigned that the patient has been temporarily partially disabled (capable of modified duties as outlined in the undersigned's report from the November 21, 2022 date of evaluation) since she retired in 2019, with no periods of temporary total disability." (emphasis added, Exhibit X4 at pg 7).

...

Although in many cases, disability precedes knowledge, with knowledge satisfied first, the remaining piece of the §5412 puzzle is disability, which, per the AME opinion, occurred no later than June 18, 2019. Accordingly, the Court found that

the Labor Code §5412 date of injury was June 18, 2019, the date of applicant's retirement, when knowledge and disability converged.
(Report, pp. 2-5.)

DISCUSSION

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. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part:

- (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.

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 12, 2024 and 60 days from the date of transmission is January 11, 2025. The next business day that is 60 days from the date of transmission is Monday, January 13, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, January 13, 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

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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. 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 12, 2024, and the case was transmitted to the Appeals Board on November 12, 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 Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 12, 2024.

II.

Applicant first contends that the WCJ erroneously found that the section 5412 date of injury is June 18, 2019.

Section 5412 defines the date of injury for a cumulative injury claim as follows:

[T]hat date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.
(§ 5412.)

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*); *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].)

The employer has the burden of proving that the employee knew or should have known their disability was industrially caused. (*Johnson, supra*, at p. 471, citing *Chambers 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 some symptoms. (*Johnson, supra*, at p. 471, citing *Chambers, supra*, at p. 559.) In general, an employee is not charged with knowledge that their disability is job-related without medical advice 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].) "Thus, the

determination of knowledge is an inherently fact-based inquiry, requiring an individualized analysis in each case.” (*Raya v. County of Riverside* (2024) 89 Cal.Comp.Cases 993, 1006.)

On some occasions, a worker may not satisfy the knowledge component until there is medical evidence that the injury was industrial even if they had filed a claim form prior “where the applicant lacks sufficient knowledge of the industrial causation of a disability at the time of the filing of a claim form,” especially when the medical condition is difficult to diagnose. (*Raya v. County of Riverside* (2024) 89 Cal.Comp.Cases 993, 1007, citing *Modesto City Schools Workers' Comp. Appeals Bd. (Finch)* (2002) 67 Cal.Comp.Cases 1647; *ExpoServices/San Francisco Expo Servs. v. Workers' Comp. Appeals Bd. (Cratty)* (2004) 69 Cal.Comp.Cases 260; *Johnson, supra*, 163 Cal.App.3d 467; *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 927-928.)

In the present case, the WCJ found that the section 5412 date of injury is June 18, 2019 based upon Dr. Luciano’s reporting that “from an orthopedic perspective, . . . the patient has been temporarily partially disabled (capable of modified duties as outlined in the undersigned's report from the November 21, 2022 date of evaluation) since she retired in 2019, with no periods of temporary total disability.” (Report, p. 4 [Emphasis in original].)

But Dr. Luciano also reported that applicant told him that she “stopped working in May 2018 due to gastrointestinal issues and subsequently retired in 2019.” (Ex. 4, AME Report of Michael Luciano, M.D., pp. 7-8.) Dr. Mooney too reported that applicant told him that she was placed on disability on May 18, 2018, for a gastrointestinal condition and resigned her position when her benefits expired on June 18, 2019. (Ex. 2, PTP Initial Report of Andrew Mooney, DC, May 24, 2022, p. 3.)

Drs. Luciano’s and Mooney’s reporting of applicant’s medical history is consistent with her own testimony that she was deemed disabled from work based upon the medical opinion of her gastroenterologist—and was never taken off work or subjected to work restrictions by any of her orthopedic medical providers. (Further Minutes of Hearing and Summary of Evidence, August 13, 2024, pp. 3, 5.) The WCJ found this testimony credible and un rebutted; and we accord this credibility determination great weight because the WCJ had the opportunity to observe the witness’s demeanor while testifying. (Opinion on Decision, p. 4; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers’ Comp. Appeals Bd. (Perez)* (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358].)

Because this record demonstrates that applicant was disabled from work as a result of her gastrointestinal condition, and because this record otherwise lacks evidence that applicant was taken off work or subjected to work restrictions as a result of any injury to her spine, shoulders, wrists or feet at any time up through June 18, 2019, we conclude that the finding that the section 5412 date of injury is June 18, 2019 is without support.

Applicant argues that there is no evidence that she knew or should have known that cumulative injury to her spine, shoulders, and feet had resulted in disability until Dr. Luciano told her as much on November 21, 2022. (Minutes of Hearing, June 25, 2024, p. 2:2-3:3; Opinion on Decision, p. 5.)

However, on May 24, 2022, Dr. Mooney reported that applicant “sustained a cumulative trauma which involves her cervical spine, bilateral shoulders, lumbar spine and bilateral feet while performing her usual and customary occupational duties as a registered nurse” and that she had a compensable “disability/impairment.” (Ex. 2, PTP Initial Report of Andrew Mooney, DC, May 24, 2022, pp. 2-3, 13-14.)

Hence, the record establishes that the date applicant first knew that she had sustained cumulative injury to her spine, shoulders, and feet and that the injury had resulted in disability is May 24, 2022. Accordingly, we will substitute a finding that applicant’s section 5412 date of injury is May 24, 2022.

Turning to applicant’s contention that the WCJ erroneously found her claim time-barred, we observe that section 5405 provides:

The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following: (a) The date of injury. ...
(§ 5405.)

In this regard, we have explained that the section 5412 date of injury is May 24, 2022, and the record shows that applicant filed her claim on May 4, 2022. (Report, pp. 4-5.) Thus, the claim is timely. Accordingly, we will substitute a finding that applicant’s claim is timely pursuant to section 5405.

Having determined the issues raised by the Petition, we note that the WCJ previously deferred the issue of whether applicant sustained injury AOE/COE to “non-orthopedic body parts.” (Minutes of Hearing, June 25, 2024, p. 2:2-3:3.) It follows that that issue remains pending.

Accordingly, we will substitute a finding that the issue of whether applicant sustained injury to other body parts is deferred.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&O and substitute new findings that the section 5412 date of injury May 24, 2022; that applicant's claim is timely pursuant to section 5405; and that the issue of whether applicant sustained injury to other body parts is deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, that the Petition for Reconsideration of the Findings and Order issued on October 15, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued on October 15, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. From September 1, 2011 through May 18, 2018, Evelyn Perez, born _____, was employed by Antelope Valley Hospital, as a registered nurse, occupational group number 311.
2. At the time of injury, the employer was permissibly self-insured, administered by Athens Administrators.
3. Applicant sustained injury arising out of and in the course of employment to her cervical and lumbar spine, bilateral shoulders, bilateral wrists, and bilateral feet.
4. Applicant's Labor Code section 5412 date of injury is May 24, 2022.
5. Applicant's claim is timely pursuant to Labor Code section 5405.
6. The issue of whether applicant sustained injury arising out of and in the course of employment to other body parts is deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 13, 2025

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

**EVELYN PEREZ
KHACHIKYAN LAW GROUP
LAW OFFICE OF STEPHANIE M. SMITH**

SRO/cs

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