WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEANETTE LIRA, *Applicant*

vs.

COTTAGE HEALTH SYSTEM, PSI, administered by GALLAGHER BASSETT; SANSUM SANTA BARBARA MEDICAL; ZURICH AMERICAN INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ9198656; ADJ9192994
Santa Barbara District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendants Cottage Health System (Cottage Health) and Sansum Santa Barbara Medical, insured by Zurich North American Insurance Company (Zurich) both seek reconsideration of the October 18, 2024 First Amended Joint Findings of Fact and Award (F&A), wherein the presiding workers' compensation administrative law judge (PWCJ) found in Case No. ADJ9198656 that applicant, while employed as a phlebotomist by Cottage Health System from August 1, 2009 to January 3, 2011, sustained industrial injury to her bilateral upper extremities, neck, gastrointestinal system, and in the form of Complex Regional Pain Syndrome (CRPS). The PWCJ found that applicant's disability was permanent and total, without apportionment. The PWCJ further found in Case No. ADJ9192994 that applicant, while employed as a phlebotomist by Sansum Santa Barbara Medical from March 19, 2001 to July 17, 2006, sustained industrial injury to her bilateral upper extremities, neck, gastrointestinal system, and in the form of CRPS. The PWCJ found that applicant's disability was permanent and total, without apportionment. The PWCJ awarded 100 percent disability in each case, less attorney fees.

Cottage Health contends that the PWCJ erred in finding that the closeness in time between the two cumulative trauma periods supports a finding of one continuous trauma period. Cottage Health further contends the reporting of the Agreed Medical Evaluator (AME) and the Qualified

Medical Evaluator (QME) do not conclude that applicant's injuries were inextricably intertwined, and that the PWCJ's findings of average weekly wages were based on applicant's speculative testimony.

Zurich contends the evidentiary record supports the existence of but one cumulative injury, rather than the two injuries identified in the Findings of Fact.

We have received an Answer from applicant. The PWCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied on the merits.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (PWCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will rescind the F&A and substitute new Findings of Fact that applicant sustained but one cumulative injury from March 19, 2001 to January 3, 2011. We will return this matter to the trial level for further proceedings to address both the period of liability pursuant to Labor Code[1] section 5500.5 and the date of injury pursuant to section 5412.

FACTS

In ADJ9198656, applicant claimed injury to her bilateral upper extremities, neck, gastrointestinal system, skin, and in the form of CRPS, while employed as a phlebotomist by defendant Cottage Health System, permissibly self-insured, from August 1, 2009 to January 3, 2011. Defendant admits injury to the bilateral upper extremities, neck, and gastrointestinal system but disputes injury to the skin and in the form of CRPS.

In ADJ9192994, applicant claimed injury to her bilateral upper extremities, neck, gastrointestinal system, skin, and in the form of CRPS, while employed as a phlebotomist by defendant Sansum Santa Barbara Medical, insured by Zurich North American Insurance, from March 19, 2001 to July 17, 2006. Defendant admits injury to the bilateral upper extremities, but disputes injury to the neck, gastrointestinal system, skin, and in the form of CRPS.

The parties to both cases have appointed Chester Hasday, M.D., as the AME in orthopedic medicine, and Jeffrey Hirsch, M.D., as the QME in internal medicine. Applicant has retained

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

vocational expert David Van Winkle, while Cottage Health has retained Meyers Vocational Consulting.

On June 19, 2024, the parties proceeded to trial, and framed issues of, in relevant part, parts of body, permanent disability, and apportionment. The PWCJ heard testimony from applicant and from defense witness Jenni-Marie Peterson, and ordered the matter submitted for decision as of August 1, 2024.

On October 18, 2024, the PWCJ issued his F&O, determining in relevant part, that in ADJ9198656, applicant's average weekly earnings were $800 per week, and that applicant sustained permanent and total disability without apportionment. In ADJ9198656, the PWCJ found that applicant's average weekly earnings were $800 per week, and that applicant sustained permanent and total disability without apportionment. The PWCJ's Opinion on Decision found that applicant sustained one continuous trauma from March 19, 2001 to January 3, 2011, based on the closeness in time between the two injuries pleaded, and the credible opinions of the medical-legal evaluators that the two pleaded cumulative injuries were inextricably intertwined. The PWCJ calculated applicant's wages based on her earning capacity of $800 per week and observed that applicant developed CRPS as a result of undergoing numerous carpal tunnel surgeries.

Defendant Cottage Health's Petition contends the closeness in time of the two pleaded cumulative injury periods does not justify a finding of a single continuous trauma; that the medical-legal evaluators did not conclude applicant's injuries were inextricably intertwined; and that the PWCJ relied on speculative testimony with respect to applicant's earning capacity.

Defendant Zurich's Petition asserts error in the PWCJ's determination that applicant sustained permanent and total disability arising out of both pleaded injuries. Zurich contends the applicant should receive a single award of permanent and total disability.

The PWCJ's Report notes that the F&A provides for a single award issued jointly as to ADJ9198656 and ADJ9192994. The PWCJ also observes that while AME Dr. Hasday did provide the parties with percentages of causation attributable to each claimed injury, the AME also opined that applicant sustained a single over-arching cumulative injury. The PWCJ also noted clerical error in the finding of fact with regard to the determination that defendant provided "all" medical treatment, but otherwise recommends we deny both pending Petitions.

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. (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.
>
> (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 5, 2024, and 60 days from the date of transmission is Saturday, January 4, 2025. The next business day that is 60 days from the date of transmission is Monday, January 6, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, January 6, 2025, so that we have timely acted on the petition as required by Labor Code 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

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

> 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.

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 5, 2024, and the case was transmitted to the Appeals Board on November 5, 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 5, 2024.

II.

We begin our discussion with the issue of the number and nature of injuries sustained, which are questions of fact for the WCJ or the WCAB. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323] (*Austin*).)

Cottage Health's Petition contends the evidence does not support a finding of one continuous trauma, because "[t]he closeness in time between two cumulative trauma periods does not justify a finding of one continuous trauma period." (Cottage Health Petition, at p. 4:3.) Cottage Health directs our attention to *Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd.* (*Coltharp*) 35 Cal.App.3d 329 [38 Cal.Comp.Cases 720] as controlling authority. In *Coltharp*, applicant sustained injury in March, 1969, resulting in hospitalization of seven or eight days, followed by a return to work. Applicant sustained a subsequent slip and fall injury in August, 1969, and required additional hospitalization and ultimately back surgery. The court in *Coltharp* held that because there were separate traumatic injuries, albeit to the same part of the body, separate applications were required for each injury. (*Id.* at pp. 342-343.)

Applying the reasoning in *Coltharp* to the instant matter, Cottage Health notes that the proximity in time of the two claimed cumulative injuries is an inappropriate consideration in determining the number and nature of the injuries. (Cottage Health Petition, at p. 7 :4.) Rather, and "consistent with the holding in *Coltharp*, the Applicant here sustained two distinct cumulative trauma injuries and periods of disability." (*Id.* at p. 7:10.)

Zurich's Petition contends that it was error for the PWCJ to enter Findings of Fact that applicant sustained percent permanent and total disability in each of the two pleaded cases herein, because such a finding would exceed the limit of 100 percent disability per injury described in section 4664(c)(2). (Zurich Petition, at p. 3:13; Lab. Code, § 4664(c)(2).) Accordingly, Zurich asserts the Findings of Fact should reflect a single cumulative injury.

In *Austin*, *supra*, 16 Cal.App.4th 227, the court held that continuing treatment between two periods of temporary disability constituted one cumulative trauma injury. Therein, applicant sustained work-related psychiatric injury resulting in a period of temporary disability in June 1985. Applicant returned to work the following month but continued to receive ongoing medical treatment in the form of therapy. In 1991, applicant was again psychiatrically hospitalized. The *Austin* court considered whether applicant's two periods of temporary disability required a finding of separate injuries and observed that the analysis required consideration of "the events leading to the injury, the medical history of the claimant, and the medical testimony received." (*Id.* at p. 234-235.) However, after specifically considering the analysis in *Coltharp*, the court in *Austin* ultimately rejected the assertion that applicant sustained more than one cumulative injury, noting:

> *Aetna* [*Coltharp*] is distinguishable from this case. Here Austin had only one continuous compensable injury. Unlike [*Coltharp*], Austin's two periods of temporary disability were linked by the continued need for medical treatment. The two periods of temporary disability were not "distinct" as was the case in [*Coltharp*], nor were they instigated by separate specific incidents.

(*Austin, supra*, at p. 237.)

In considering the criteria discussed in *Austin*, the PWCJ's determination of a single cumulative injury finds strong support in the evidentiary record. AME Dr. Hasday has repeatedly opined across five years of reporting and multiple depositions that he believes applicant sustained a single cumulative injury. (Ex. 11, Report of Chester Hasday, M.D., dated November 11, 2019, at p. 101.) Dr. Hasday has opined:

> This case has been pled as two distinct periods of continuous trauma. The first was from March 19, 2001 to May 24, 2006, when Pacific Diagnostic Labs was owned by Sansum Health Systems. The second period of continuous trauma was from August 1, 2009 to March 29, 2011 and was when Pacific Diagnostic Labs was owned by Cottage Health Systems. The applicant's job duties were identical from 1992 through her last day of employment other than periods of modification, as noted in the "History of Present Illness." At no time, in my opinion, did the applicant actually become at MMI during her first pied period

> of CT, as I do note the presence of a positive Tinel sign in 2003 and the fact that her right upper extremity remains symptomatic following her return to work, eventually overloading her left upper extremity as a compensable consequence. I therefore feel that there has been one overarching period of continuous trauma as opposed to two separately pled periods of continuous trauma with the starting date of March 19, 2001 through the applicant's last day of work on or about March 29, 2011.

(*Id.* at p. 101.)

Moreover, Dr. Hasday has opined that "at no time did any of her conditions become MMI [maximally medically improved] to the point that they could be ratable MMI and a separate period of impairment subsequent to that MMI report could be identified. Her conditions continually declined over time." (Ex. 7, Transcript of the Deposition of Chester Hasday, M.D., dated December 21, 2021, at p. 29:11.) Dr. Hasday has most recently reiterated this opinion in deposition testimony as follows:

> Q. So Dr. Hasday, she wouldn't have been MMI in 2009 for her carpal tunnel syndrome, right?
> A. I don't believe so, no.
> Q. Right. So she had continuing exposure all the way up through 2011 for that condition; yes?
> A. I believe past that point.

(Ex. 1, Transcript of the Deposition of Chester Hasday, M.D., dated April 1, 2024, at p. 7:2.)

Thus, the AME has concluded that applicant sustained a single overarching cumulative injury through at least 2011, with her condition gradually worsening over time. The AME has been chosen by the parties because of his expertise and neutrality, and the AME's opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) Moreover, applicant has confirmed that there was no change in her essential job duties or requirements between her employments with Sansum and Cottage Health. (*Minutes*, at p. 10:21.) In addition, the record establishes that applicant sought and received significant and ongoing medical treatment between the end of the first alleged cumulative injury period on July 17, 2006 and the beginning of the second claimed cumulative injury on August 1, 2009, including therapy, medical consultations, and surgical intervention. (Ex. 11, Report of Chester Hasday, M.D., dated November 11, 2019, at pp. 33-44.) Thus, when we consider "the events leading to the injury, the medical history of the claimant, and the medical testimony received," including the considered and

repeated opinions of the AME, coupled with applicant's continued need for medical treatment between the two claimed injury periods, we conclude that applicant sustained but one cumulative injury. (*Austin, supra,* at pp. 234-235.)

However, while we agree with the PWCJ's Report that applicant sustained a single cumulative injury from March 19, 2001 through January 3, 2011 (Report, at p. 1), we note that Findings of Fact determined that applicant sustained an injury through July 17, 2006 in ADJ9192994, and sustained *a separate injury* through January 3, 2011 in ADJ9198656. (Findings of Fact in ADJ9192994, Finding No. 1; Findings of Fact in ADJ9198656, Finding No. 1.) And in both instances, the Findings of Fact determined that applicant sustained 100 percent disability *arising out of each injury*. (Findings of Fact in ADJ9192994, Finding No. 5; Findings of Fact in ADJ9198656, Finding No. 5.) While the PWCJ explained in his report that "only one joint Award was issued," we note that the pleadings should conform to proof, and that that the Award and the Findings of Fact must both conform to the evidence. (See Cal. Code Regs., tit. 8, § 10517.) We will therefore grant Zurich's Petition and rescind the F&A, and substitute new joint findings of fact that applicant sustained a single cumulative injury from March 19, 2001 through January 3, 2011.

In so doing, we note that the parties have not placed in issue the liability period per section 5500.5, or the concomitant date of injury per section 5412. Section 5500.5 provides that "liability for occupational disease or cumulative injury claims … shall be limited to those employers who employed the employee during a period of [one year] immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first." (Lab. Code, § 5500.5(a).) In addition to being necessary to the liability analysis under section 5500.5, the section 5412 date of injury "sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right." (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) 268 Cal. Rptr. 699 [55 Cal.Comp.Cases 107].) Thus, the PWCJ must determine the section 5412 date of injury and the section 5500.5 period of liability as integral components to an Award herein. We return the matter to the trial level the parties to address these issues, accordingly.

Insofar as we find that applicant sustained a single cumulative injury, the contentions raised in Cottage Health's Petition regarding apportionment between multiple injuries under *Benson v.*

Workers' Comp. Appeals Bd. (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113] (*Benson*) are inapposite. (See Cottage Health Petition, at p. 7:16.)

Cottage Health also contends that the applicant's testimony with respect to her average weekly earnings capacity was speculative, and that the "[t]he key to determining AWW is not what the Applicant may have worked or even what hours she was available to work, but rather what she actually worked." (Cottage Health Petition, at p. 9:17.) However, to the extent that defendant argues that applicant's work was both "part time" and "sporadic," (Cottage Health Petition, at p. 9:14) we agree with the PWCJ that analysis of applicant's earning *capacity* under section 4656(c)(4) was warranted and appropriate. Moreover, the PWCJ found applicant's testimony in this regard to be fully credible, and we accord to the PWCJ's credibility determinations the great weight to which they are entitled. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) We decline to disturb the PWCJ's average weekly earnings calculations, accordingly.

In addition, the parties have stipulated that the employer has paid temporary disability at the weekly rate of $266.67 per week from April 26, 2011 to April 23, 2013. (Minutes, at p. 2:24.) The PWCJ's Opinion on Decision discusses why applicant is entitled to temporary disability based on her average weekly earnings of $800 per week, and also indicates that applicant is entitled to an additional period of temporary disability from January 4, 2011 to April 24, 2011. (Opinion on Decision, at p. 2.) However, we note that the F&A lacks a corresponding finding or award. We also note that while applicant is entitled to temporary disability at an increased rate based on her average weekly earnings, the aggregate temporary disability available under section 4656(d) is limited to 104 weeks. (Lab. Code, § 4656(c)(2).) We will therefore substitute a Finding of Fact that applicant is entitled to temporary disability at the weekly rate of $533.33 for the period April 26, 2011 to April 23, 2013, less credit for sums previously paid, less attorney's fees. We will also amend the starting date of the award of permanent and total disability to the day following the last date of payment of temporary disability, which is April 24, 2013. (See *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550 [2014 Cal. Wrk. Comp. LEXIS 69] (Appeals Bd. en banc).)

In summary, while we agree with the PWCJ that applicant sustained a single cumulative injury, we will grant reconsideration and rescind the F&A which found two separate injuries, and substitute joint findings of fact that reflect a single cumulative injury. We note that our finding of

a single cumulative injury will require a determination of the period of liability under section 5500.5, as well as the date of injury under section 5412, and we therefore return the matter to the trial level for further proceedings as the PWCJ deems necessary, and for the issuance of a corresponding Award.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of October 18, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of October 18, 2024 is **RESCINDED**, with the following **SUBSTITUTED** therefor**:**

JOINT FINDINGS OF FACT

(ADJ9198656 & ADJ9192994)

1. Applicant Jeanette Lira, while employed during the period March 19, 2001 to January 3, 2011, as a phlebotomist, Occupational Group No. 220, at Santa Barbara, California, by Sansum Santa Barbara Medical, and by Cottage Health System, sustained injury arising out of and in the course of employment to her bilateral upper extremities, neck, gastrointestinal system, and in the form of Complex Regional Pain Syndrome.
2. At the time of injury, Sansum Santa Barbara Medical was insured by Zurich North American Insurance, and Cottage Health System was permissibly self-insured.
3. At the time of the injury the employee's earnings were $800.00 per week, warranting a weekly rate of $533.33 for temporary disability and statutory for permanent disability.
4. It is found the employers have furnished some medical treatment.
5. Applicant is entitled to temporary disability at the weekly rate of $533.33 for the period April 26, 2011 to April 23, 2013, less credit for sums previously paid, less attorney's fees.
6. It is found that applicant's industrial injuries resulted in 100 percent permanent and total disability and that applicant is entitled to a lifetime weekly benefit in the amount of $533.33 subject to Labor Code §4658(d), and less attorney fees as provided below, commencing April 24, 2013.
7. It is found there is no legal basis for apportionment.
8. It is found there is a need for further medical treatment to cure or relieve the effects of the industrial injury.

9. It is found that applicant is entitled to be reimbursed for all out-of-pocket medical expenses related to this claim in an amount of be adjusted by the parties, subject to proof.
10. It is found applicant's attorney is entitled to attorney fees in the amount of be $156,355.82 out of the permanent disability to be commuted off of the side of the award, plus 15 percent of any additional accrued, unpaid temporary disability indemnity awarded herein.
11. It is found applicant is entitled to a Supplemental Job Displacement Benefit voucher.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the PWCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 6, 2025

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

JEANETTE LIRA
LAW OFFICE OF RANDMAA & BUIE
MAVREDAKIS PHILLIPS
TOBIN LUCKS

SAR/abs

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