WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NATHAN HOCHGESANG, ***Applicant***

vs.

LOS ANGELES DODGERS,
ACE AMERICAN INSURANCE;
ADMINISTERED BY SEDGWICK,
Defendants

Adjudication Number: ADJ18296957
Santa Ana Office

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact and Order issued by the workers compensation administrative law judge (WCJ) on May 20, 2025, wherein the WCJ found that applicant's date of injury pursuant to Labor Code[1] section 5412 is March 22, 2024, that defendant failed to establish the statute of limitations defense, that the medical reporting of Panel Qualified Medical Evaluator (PQME), Dr. Mark Hellner, M.D. is not substantial evidence and that the court will allow the parties an opportunity to agree on an Agreed Medical Evaluator (AME) in orthopedics, absent which, the WCJ will appoint a regular physician per section 5701.

Defendant alleges that the WCJ erred in finding the date of injury per section 5412 is March 22, 2024 versus December 3, 2006, and asserts that applicant's claim is barred by the statute of limitations. Defendant further alleges that the existing record should be further developed by returning to Dr. Hellner pursuant to *McDuffie v. L.A. County Metro. Transit Auth.,* (2002) 67 Cal.Comp.Cases 138.

Applicant filed an Answer.

The WCJ issued a Report and Recommendation (Report) recommending denial of the petition.

We have considered the allegations of the Petition for Reconsideration (Petition), the Answer and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt

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

and incorporate, except as noted below, we will grant reconsideration, amend paragraph 3 of the Findings and Order to provide that applicant's first date of knowledge of his claimed injury pursuant to Labor Code section 5412 is March 22, 2024, and otherwise affirm the Findings and Order.

I.

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

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

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 June 25, 2025 and 60 days from the date of transmission is Sunday, August 24, 2025. The next business day that is 60 days from the date of transmission is Monday, August 25, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, August 25, 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

[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.

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 June 25, 2025, and the case was transmitted to the Appeals Board on June 25, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on June 25, 2025.

II.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue.

Here, the WCJ made findings relating to employment, claimed date of injury, and the statute of limitations. Thus, as the WCJ's decision contains final threshold findings, we treat the Petition as one for reconsideration.

However, when the petitioner challenging a decision also disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the interlocutory issues raised by the petition under the removal standard applicable to non-final decisions. Thus, we will apply the removal standard to our review of defendant's contention that the WCJ erred in not ordering that the parties utilize Dr. Hellner to further develop the record. (See *Gaona, supra*.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) For the reasons stated below, as well as in the WCJ's report, we are not persuaded that substantial prejudice or irreparable harm will result as a result of the findings and order of the WCJ that appointment of an AME or regular physician per section 5701 is warranted at this stage of the proceedings, and that the existing physician will be unable to properly supplement the existing medical record.

Defendant contends that the WCJ erred in failing to further develop the medical record with the existing QME Dr. Heller, and instead ordered the parties to seek an AME or have a section 5701[3] physician in orthopedics appointed by the WCJ.

As stated by the WCJ in his Opinion:

> In *McClune vs. Workers' Comp. Appeals Bd*., 63 Cal. Comp. Cases 261, the court of appeal held that "where the medical evidence is in conflict, the WCAB does not exceed its statutory powers when it grants reconsideration to direct the taking of additional evidence." Additionally, in *Tyler v. Workers' Comp. Appeals Bd*., 62 Cal. Comp. Cases 924, it is noted that Labor Code Section 5701 and 5906 authorize the WCJ to obtain additional medical evidence at any time during the proceeding.
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> The reporting of Dr. Mark Hellner lacks substantial medical evidence as it fails to address the issue of causation of injury, but instead causation of impairment and or apportionment. (Exhibit C, D, E, and F). (See *Georgia-Pacific Crop. v. Workers' Comp. Appeals Bd.* (*Byrne*) (1883) 144 Cal.App.3d. 72 [48 Cal. Comp. Cases 443]; *Garza Workmen's*
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> *Comp. App. Bd*. (1970) 3 Cal.3d 312, 317 [35 Cal. Comp. Cases 500, 503] (finding a medical expert's opinion or report that is based on incorrect or inadequate facts, conjecture or an erroneous examination or legal theory or that is beyond the physician's expertise is not substantial medical evidence).)
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> The court does not believe that Dr. Hellner could adequately remedy his reporting based on the substance and the lack thereof regarding his opinions and applicant's counsel attempts to remedy the record, which Dr. Hellner failed to do so.

(Opinion, pp. 7-8.)

III.

Finally, we amend paragraph 3 of the Findings and Order to provide that applicant's first date of knowledge of his claimed injury pursuant to Labor Code section 5412 is March 22, 2024, only to clarify that any finding of injury to specific body parts has been deferred, and otherwise affirm the Findings and Order. Based on our review of the record, we agree with the WCJ's determination that the evidence supports that per section 5412, applicant's first date of knowledge of his claimed date of injury is March 22, 2024. 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

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[3] **Section § 5701 states, in pertinent part:**

…The appeals board may also from time to time direct any employee claiming compensation to be examined by a regular physician. The testimony so taken and the results of any inspection or examination shall be reported to the appeals board for its consideration. (Cal. Lab. Code §5701.)

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 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 symptoms. (*Johnson, supra,* at p. 471, citing *Chambers, supra,* at p. 559.)

In this case, defendant failed to meet its burden of proving that (1) applicant had knowledge sufficient to establish that he either knew, or in the exercise of reasonable diligence should have known, that he had sustained disability as a result of his employment at the time his career ended on December 3, 2006, when applicant's career ended; and that (2) applicant's injury had caused disability as of December 3, 2006. (See Lab. Code, § 5412; see also *Federal Insurance Co. v. Workers' Comp. Appeals Bd.* 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257].

Thus, we agree with the WCJ that applicant's first knowledge of his claimed industrial injury per section 5412 is March 22, 2024, based on the initial reporting of the QME Mark Hellner, M.D. (Exhibit F).

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the decision of May 20, 2025, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that Findings and Order of May 20, 2025 is AFFIRMED except it is **AMENDED** as follows:

FINDINGS OF FACT

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3. Applicant's first date of knowledge of his claimed injury pursuant to Labor Code section 5412 is March 22, 2024.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ PAUL KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 25, 2025

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

NATHAN HOCHGESANG
BOBER PETERSON
PRO ATHLETE LAW

LN/md

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

Defendant, LOS ANGELES DODGERS; ACE [AMERICAN] INSURANCE; ADMINISTERED BY SEDGWICK filed a verified Petition for Reconsideration of the Findings and Order dated May 20, 2025. Defendant asserts that this WCJ erred in his findings of date of injury, failure to find applicant's claim being barred by the statute of limitations, and the record should be developed by returning to PQME Hellner.

STATEMENT OF FACTS

NATHAN HOCHGESANG while employed during the period of 06-01-2004 through 12-03-2006 as a professional athlete, Occupational Group Number 590, by the LOS ANGELES DODGERS, whose workers' compensation insurance carrier was Ace American Insurance, administered by Sedgwick, claims to have sustained injury arising out of and occurring in the course of employment to his neck, shoulders, back, spine, hips, elbows, wrists, hands, fingers, legs, ankles, feet, toes, and injury in the form of chronic pain.

This matter proceeded to trial before the undersigned to address the issues of injury arising out of and in the course of employment, earnings, permanent disability, apportionment, need for further medical treatment, attorney fees, statute of limitations, subject matter jurisdiction.

The undersigned made findings that there is subject matter jurisdiction over applicant's claim with the Los Angeles Dodgers, the date of injury pursuant to Labor Code section 5412 is March 22, 2024, that defendant failed to establish the statute of limitations defense, that the reporting of Dr. Mark Hellner lacks substantial medical evidence, and that the record cannot be adequately developed with Dr. Mark Hellner. The court also provided the parties an opportunity to agree on an Agreed Medical Examiners in orthopedics prior to appointment of a regular physician in accordance with Labor Code Section 5701 and deferred the remaining issues.

Defendant filed a Petition for Reconsideration of the court's findings, that the date of injury is December 3, 2006, that applicant's claim is barred pursuant to Labor Code section 5405 as not being timely, and that the parties should be allowed an opportunity to return to PQME Hellner to develop the record.

DATE OF INJURY

Labor Code section 5412 sates in pertinent part that: "the date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." As noted in the Opinion on Decision, based on record provided, the first reporting of cumulative injuries and disability is the report of Dr. Mark Hellner, dated March 22, 2024. (Defendant Exhibit F).

Therefore, the undersigned found that the date of injury pursuant to Labor Code section 5412 is March 22, 2024.

Defendant argues that "There is no doubt the Applicant in this case had the knowledge of injury and disability required by Labor Code Section §5412 when his career ended. Therefore, the Applicant's date of injury pursuant to Labor Code §5412 should be on December 3, 2006, when the Applicant's career as a professional baseball player ended." (Defendant Petition for Reconsideration, page 5). Nonetheless, there is no "medical" evidence provided that there was a cumulative trauma disability on December 3, 2006.

Further, it must be noted that before determining the proper date of injury, the WCJ must utilize expert medical opinion. (*See Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) However, in this matter, the only medical evidence addressing the issue of whether applicant sustained a cumulative injury is the report from QME Dr. Hellner, dated March 22, 2024. (Defendant Exhibit F).

STATUTE OF LIMITATIONS

Defendants have raised the issue of Statute of Limitations pursuant to Labor Code section 5405. Labor Code section 5405 states:

> "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.
> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished."

Here, the undersigned found that there is nothing in the record indicating that defendant paid any benefits on the cumulative trauma claim per subsections (b) and (c) of Labor Code section 5405. Further, this claim was denied by defendant. (Defendant Exhibit A). Yet, defendant argues that defendant did in fact provide applicant's benefits in the form of medical treatment. (Petition for Reconsideration, page 7) A review of the team records does not indicate that applicant sustained any cumulative trauma injuries. (Joint Exhibit 1). Moreover, defendant denied all liability for applicant's claim of injury in part because of: "no medical evidence to support a cumulative trauma injury." (Defendant Exhibit A) This denial is dated November 30, 2023. (Defendant Exhibit A). Under defendant's own admission, there was no evidence of applicant's cumulative trauma injury as of November 30, 2023.

Based on section 5412, the statute of limitations on a cumulative injury claim does not begin to run until the worker suffers disability and has knowledge that the disability was caused by his or her employment. (*Lozano v. Workers' Comp. Appeals Bd.,* (2015) 236 Cal. App. 4th 992, fn. 5 [Cal.Comp.Cases 407]; *Western Growers Ins. Co. v.*

Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227 [58 Cal.Comp.Cases 323]; see also *Hamilton v. Asbestos Corp., (*2000) 22 Cal.4th 1127, fn. 9.) Otherwise stated, the section 5412 date of injury is the date that the injured worker had disability and knew or should have known that the disability was caused by an industrial injury.

> The purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury. (*J. T. Thorp v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 340 - 341 [49 Cal. Comp. Cases 224].)

Here, as indicated in the Opinion on Decision, applicant provided unrebutted credible testimony that he was never told of his right to file a workers' compensation claim until 2023. (MOH/SOE page 6, lines 19-21). Applicant filed his Application for Adjudication of a Claim on October 3, 2023. (EAMS DOC ID 48444103). As discussed above, applicant's date injury under Labor Code section 5412 is March 22, 2024, the date upon which applicant first suffered disability therefrom and knew, that such disability was caused by his prior employment. Since applicant filed his claim within a year that he first found out about his right to file a cumulative trauma injury, the statute of limitations does not apply.

DEVELOPMENT OF THE RECORD

The undersigned found that the reporting of Dr. Mark Hellner lacked substantial medical evidence as it failed to address the issue of causation of injury, but instead addressed causation of impairment and or apportionment. (Exhibit C, D, E, and F). (See *Georgia-Pacific Crop. v. Workers' Comp. Appeals Bd. (Byrne)* (1883) 144 Cal.App.3d. 72 [48 Cal. Comp. Cases 443]; *Garza Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal. Comp. Cases 500, 503] (finding a medical expert's opinion or report that is based on incorrect or inadequate facts, conjecture or an erroneous examination or legal theory or that is beyond the physician's expertise is not substantial medical evidence).) The undersigned does not believe that Dr. Hellner could adequately remedy his reporting based on the substance and the lack thereof regarding his opinions and applicant's counsel attempts to remedy the record, which Dr. Hellner failed to do so.

Pursuant to *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138, the preferred procedure for developing a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case, including by utilizing the existing QMEs to the extent possible. However, the existing physician was provided an opportunity to cure the record and failed to do so. (Defendant Exhibits D, E & F). Therefore, a selection of an AME should be considered by the parties. If the parties cannot agree on an AME, than the undersigned can appoint a physician to evaluate the applicant pursuant to Labor Code section 5701.

RECOMMENDATION

It is respectfully recommended that the defendant's Petitions for Reconsiderations be denied.

Date: June 25, 2025

Juan Cervantes
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE