

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

ALEJANDRO MARTINEZ, *Applicant*

vs.

**MODERNO PORCELAIN WORKS; G&A OUTSOURCING, INC.; ZURICH
AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ17096552
San Diego District Office**

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

Defendant Zurich American Insurance Company (Zurich) seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of June 15, 2026, wherein it was found that while employed as a commercial porcelain fabricator during a cumulative period ending on November 21, 2021, applicant sustained industrial injury to his lungs and psyche causing temporary disability from October 12, 2022 to the present and continuing subject to the extended 240-week cap governed by Labor Code section 4656(c)(3)(H & I) and the need for further medical treatment. It was found that the one-year Labor Code section 5500.5 liability period was the one year preceding the last date of injurious exposure, which was found to be applicant's last day of work with the employer, November 21, 2021. It was also found that applicant's Labor Code section 5412 date of injury was September 2, 2022, and that defendant's statute of limitation defense failed because applicant's Application for Adjudication of Claim was filed on December 22, 2022, well within a year of that date. Zurich states in its Petition that its coverage began on September 16, 2021, just over two months before the end date of the liability period found by the WCJ. It appears that two other insurers had been joined into the case, but applicant elected to proceed against Zurich pursuant to Labor Code section 5500.5(c).

Zurich contends that the WCJ erred in (1) imposing liability against it because there was not substantial medical evidence that applicant sustained injurious exposure during its alleged period of coverage between September 16, 2021 and November 21, 2021, (2) finding a date of injury of September 2, 2022, arguing that the record supported an earlier date of injury, and that

the claim was thus barred by the Labor Code section 5405(a) statute of limitations, and in (3) finding temporary disability from October 12, 2022 to the present and continuing, arguing that the medical record does not support a continuous award of temporary disability and that the “TTD award is further undermined by the evidence that Applicant performed paid work as an IHSS care provider from July 2022 through November 2024.” We have received an Answer from the applicant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.¹

As explained below, we will affirm the finding that the Labor Code section 5500.5 liability period is the one-year period preceding November 21, 2021 and the findings that applicant’s Labor Code section 5412 date of injury is September 2, 2022 and that defendant did not prove its statute of limitations defense. However, we will grant reconsideration and amend the WCJ’s decision to find that applicant was temporarily totally disabled as of at least August 10, 2022 and find entitlement to temporary disability benefits from that date through February 1, 2024, 45-days after qualified medical evaluator pulmonologist Eli E. Hendel, M.D. December 18, 2023 report. We will defer the issue of any earlier or later periods of temporary disability.

I.

During the period from July 1, 2026 to July 13, 2026, Labor Code section 5909(a) 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(a).)

Here, the Petition for Reconsideration was filed on July 6, 2026, and 60 days from the date of filing is September 4, 2026. This decision is issued by or on September 4, 2026, so that we have timely acted on the petition as required by Labor Code section 5909(a).

II.

A. Last Date of Injurious Exposure

Labor Code section 5500.5(a) states in pertinent part, “liability for occupational disease or cumulative injury ... 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

¹ The Report is incorrectly captioned Report and Recommendation on Petition for Removal.

him ... to the hazards of the occupational disease or cumulative injury, whichever occurs first.” Applicant worked for defendant until November 21, 2021.

Zurich argues that liability cannot be imposed against it because applicant did not present substantial medical evidence that applicant sustained injurious exposure during its period of alleged coverage. In other words, while it is uncontested that applicant worked until November 21, 2021, Zurich complains that applicant did not prove that any industrial exposure between the period between September 16, 2021 and November 21, 2021 contributed to disability or the need for further medical treatment.

While Zurich is correct that a defendant may escape liability if it can show that a discrete period of employment was not injurious (*Scott Co. v. Workers’ Comp. Appeals Bd. (Stanley)* (1983) 139 Cal.App.3d 98, 104–105 [48 Cal.Comp.Cases 65]; *City of South San Francisco v. Workers’ Comp. Appeals Bd. (Johnson)* (2018) 20 Cal.App.5th 881, 892 [83 Cal.Comp.Cases 451]), Zurich is incorrect in suggesting that this it is applicant’s burden to show that a specific period of coverage was injurious. Rather, in order to remove a period of coverage from the Labor Code section 5500.5 liability period, it is the defendant’s burden to show that the period was not injurious. As explained in *Indus. Indem. Co. v. Workers’ Comp. Appeals Bd. (Pisciotta)* (1983) 145 Cal. App. 3d 480, 486-487 [48 Cal.Comp.Cases 559]:

The court in *Stanley* concluded that where substantial medical evidence indicated that the last date of *injurious* exposure was actually prior to the last date an employee worked with asbestos, the relevant date for purposes of liability pursuant to section 5500.5 was the last date of the period of injurious exposure which caused the asbestos-related disease. (*Id.*, at pp. 106-107.)

In *Stanley*, the applicant filed an application for workers' compensation benefits in 1979, alleging that he developed mesothelioma as a result of asbestos exposure in the course of employment with several employers from 1938 to 1970. The medical evidence consisted of the opinions of two physicians who reported that a peculiar feature of mesothelioma is a lengthy period between exposure to asbestos and the presence of a tumor. Both of the physicians agreed that it was extremely unlikely that any exposure to asbestos after 1963 (within 15 years of the tumor's appearance) contributed to the development of the tumor. Based on that evidence, the *Stanley* court affirmed the Workers’ Compensation Appeals Board's finding that the last date of injurious exposure for purposes of section 5500.5 was in 1963.

The facts in the instant case differ from *Stanley* because in this case the WCJ found that the medical evidence established only that exposure to asbestos

caused injury to applicant's lungs; the WCJ did not identify any particular period or periods of applicant's employment as being the exclusive period(s) of injurious exposure. In such a case, we conclude that the language of section 5500.5, subdivision (a) (which specifically provides that one of the two dates for determining section 5500.5 liability is "[the] last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease") is clear. This language authorizes finding that the *last date of occupational exposure to the disease-producing agent* asbestos, is the pertinent date of injury for the occupational disease asbestosis, in the absence of evidence that a different period of exposure was exclusively hazardous. Such a finding does not violate the causation requirement of section 3600 so long as the employee has established by substantial evidence that he has suffered industrial asbestosis from exposure in the course of employment to the disease-producing agent asbestos. As discussed by the Supreme Court in *City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371 [185 Cal.Rptr. 645, 650 P.2d 1162], section 5500.5 was originally enacted to codify the rule expressed in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79 [172 P.2d 884], that an employee claiming benefits for an occupational disease could recover against any one of successive employers whose employment contributed to the disease. The court held in *Colonial Ins. Co.*, that "in progressive occupational diseases, . . . the employee may, . . . obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer . . . even though the particular employment is not the sole cause of the disability." (*Id.*, at p. 82.) Pursuant to the *Colonial Ins. Co.* rationale and section 5500.5 as it exists today, we conclude that where the employee has established industrial asbestosis after a period of exposure to asbestos, the board is authorized ... to impose liability on those employers employing the employee within the last year of exposure to asbestos in the absence of substantial evidence demonstrating that a prior period of employment was the sole cause of the disease.

In this matter, defendant did not introduce substantial medical evidence that the period preceding its coverage was the sole cause of the industrial injury. To the contrary, Dr. Hendel testified that he could not definitively state when applicant first contracted silicosis (November 22, 2024 deposition at pp. 26-27) and suggests that applicant's entire period of employment may have been injurious. (November 22, 2024 deposition at pp. 29-31.)

Thus, the WCJ correctly found that the "last date on which the employee was employed in an occupation exposing him ... to the hazards of the occupational disease or cumulative injury" was November 21, 2021.

B. Knowledge of Industrial Injury

As noted above, Labor Code section 5500.5(a) sets the liability date as the earlier of the one-year period preceding the last date of injurious exposure and the Labor Code section 5412 date of injury. Section 5412 defines the date of injury in cumulative injury 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.)

With regard to the date that an injured worker “knew, or in the exercise of reasonable diligence, should have known” that a disability was industrial, in *City of Fresno v. Workers’ Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 472 [50 Cal.Comp.Cases 53], the Court of Appeal advised, “An employee clearly may be held to be aware that his or her disability was caused by the employment when so advised by a physician. Generally, until he receives such medical advice, he is not chargeable with knowledge of his condition and its relation to his work...”

Zurich argues that applicant was chargeable with knowledge of the industrial nature of the injury because he knew that he worked in a dusty environment and that he was told in the hospital in August of 2022 that his condition “could have been caused” by his work. However, we find that applicant’s main symptoms of difficulty with exertion were not obviously caused by exposure to silica, and applicant was actually initially referred to a cardiologist rather than a pulmonologist. (December 18, 2023 report of QME Hendel at p. 19.) Applicant was not given a definitive diagnosis of silicosis until October 12, 2022. (October 12, 2022 report of Dr. Lira.) The WCJ correctly found that applicant was not chargeable with knowledge of industrial causation until he first saw Dr. Lira. Applicant testified at trial that “Dr. Lira told him that his condition was caused by work. He was told this by Dr. Lira in approximately August of 2022.” (Minutes of Hearing and Summary of Evidence of March 16, 2026 trial at p. 3.) The record shows that applicant first saw Dr. Lira on September 2, 2022, just two days after August of 2022, and thus consistent with applicant’s testimony. Accordingly, we affirm the WCJ’s analysis that applicant’s date of knowledge of industrial causation was September 2, 2022.

C. Date of First Disability

As noted above, determination of the Labor Code 5412 date of injury requires the concurrence of disability and the date that of knowledge that the disability was industrial.

As explained in the case of *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 336 [49 Cal.Comp.Cases 224]:

“The term ‘disability’ as used in section 5412 is, of course, to be given the same meaning as elsewhere in the [Workers’ Compensation] Act [citations], i.e., an impairment of bodily functions which results in the impairment of earnings capacity. (*Marsh v. Industrial Acc. Com.* (1933) 217 Cal. 338, 344 [19 I.A.C. 159]; see *Associated Indem. Corp. v. Ind. Acc. Com.* (1945) 71 Cal.App.2d 820, 824 [10 Cal.Comp.Cases 295]; 2 Hanna, [Cal. Law of Employee Injuries and Workmen’s Compensation (2d ed., 1983 rev.)] § 13.01, p. 13-2.) Accordingly, where an employee suffers from a cumulative injury or occupational disease, there is a ‘date of injury’ only at such time as the employee suffers an impairment of bodily functions which results in the impairment of earnings capacity.”

Although Zurich argues for an earlier date of disability pointing to some symptoms that applicant had such as occasional shortness of breath, “[a] ‘disability’ under the Workmen’s Compensation Law connotes an inability to work.” (*Herrera v. Workmen’s Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 257 [34 Cal.Comp.Cases 382].) In *State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579], the Court of Appeal made clear that neither medical treatment nor modified work restrictions without wage loss, in and of themselves, are sufficient to constitute “disability” for purposes of Labor Code section 5412. As explained in *Rodarte*, Labor Code section 5412 requires compensable disability, either temporary or permanent. “[T]here is no compensable temporary disability until the worker suffers wage loss.” (*Rodarte*, 119 Cal.App.4th at p. 1003.) Permanent disability is not compensable until it is ratable. Except in the case of insidious, progressive diseases, a disability is not ratable until it is permanent and stationary. (*Chavira v. Workers’ Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].)

In this matter, it is not entirely clear when applicant first sustained compensable disability. Although Dr. Hendel opines in his December 18, 2023 report that applicant was temporarily disabled when he left work on November 21, 2021, he does not offer sufficient explanation to validate his opinion. It appears that applicant left work in November 2021 due to non-industrial cholecystitis. (December 18, 2023 report at p. 18.) Dr. Hendel does not adequately explain why applicant was disabled due to his industrial condition at this time.

However, applicant sought a chest x-ray in early April of 2022. In late June, 2022 he sought care from a cardiologist complaining of chest discomfort and shortness of breath “over the past couple of months.” (December 18, 2023 report at p. 18.) On August 10, 2022 these symptoms led applicant to the emergency room where he was hospitalized for approximately two weeks. (December 18, 2023 report at p. 19-30.) Thus, it is clear that by August 10, 2022, at the latest, applicant was unable to work and had sustained compensable temporary disability.

However, since the date of knowledge that this disability was industrial was not until September 2, 2022, the concurrence of disability and knowledge did not occur until that date, and thus applicant’s Labor Code section 5412 date of injury is September 2, 2022. We note that the WCJ found compensable temporary disability as of October 12, 2022, which she says is the first day applicant was taken off work by Dr. Lira. We do not see any evidence that Dr. Lira made any comments regarding applicant’s work status on that date, and applicant was already clearly temporarily disabled as of his multiple week hospitalization in August of 2022.

Since applicant filed his Application for Adjudication within a year of the September 2, 2022 date of injury, the claim is not barred by the statute of limitations. (Lab. Code, § 5405, subd. (c).)

III.

Since we find that applicant was temporarily disabled as of August 10, 2022 at the latest, we will amend the commencement date of applicant’s temporary disability to reflect that date. With regard to the finding of continuous temporary disability, we agree with Zurich that the record does not support a finding of temporary disability beyond a reasonable period after the issuance of Dr. Hendel’s December 18, 2023 report, which is the only report to address temporary disability.

Dr. Hendel opined in his December 18, 2023 report that applicant was then temporarily disabled. Although Dr. Hendel opined that applicant would likely continue to be temporarily disabled, at his November 22, 2024 deposition, Dr. Hendel left the question of continuing temporary disability to the discretion of applicant’s treating physicians. (November 22, 2024 deposition at p. 32.) Administrative Rule 9785(f)(8) requires a primary treating physician to issue a status report at least every 45 days. (Cal. Code Regs., tit. 8, § 9785, subd. (f)(8).) Although this rule is not applicable to qualified medical evaluators, we find 45 days a reasonable amount of time for temporary disability status to continue after a physician’s finding of then-current temporary

disability. We defer the issue of temporary disability after February 1, 2024 pending further development of the record. Similarly, we defer the issue of any periods of temporary disability preceding August 10, 2022 pending further development of the record.

Although the defendant also casts doubt on the temporary disability period based on “evidence” of applicant’s employment as a home health aid, the only evidence in the record was applicant’s testimony that he “stopped taking care of his son through IHSS in 2022.” (Minutes of Hearing and Summary of Evidence of March 16, 2022 trial at p. 4.) Accordingly, there is no evidence that applicant was employed during any periods for which we have found temporary disability.

For the foregoing reasons,

IT IS ORDERED that Zurich’s Petition for Reconsideration of the Findings and Award of June 15, 2026 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Findings and Award of June 15, 2026 is **AMENDED** as follows:

I STIPULATED FACTS

1. Alejandro Martinez, age 41 on the date of injury, while employed during the period of November 21, 2016, through November 21, 2021, as a commercial porcelain fabricator, Occupational Group No. 330, at El Cajon, California, by Moderno Porcelain Works and G and A Outsourcing, claims to have sustained injuring arising out of and the course of his employment to his lungs and psyche.

2. At the time of injury, the employer’s workers’ compensation carrier was Zurich American insurance company.

3. At the time of injury, the employee’s earnings were \$1,040.00, warranting indemnity rates of \$693.33 for temporary disability and \$290.00 per week for permanent disability.

4. The employer has furnished some medical treatment.

II FINDINGS OF FACT

1. Applicant sustained injury AOE/COE to his lungs and psyche.

2. The date of injury pursuant to Labor Code §5412 is September 2, 2022.

3. The Application for Adjudication of Claim was filed on December 22, 2022, within a year of the date of injury under Labor Code §5412.

4. The last year of injurious exposure pursuant to Labor Code §5500.5 is November 22, 2020 to November 21, 2021 (last date worked). Applicant was totally temporarily disabled from August 10, 2022 through February 1, 2024, less wages and less amounts paid by EDD, if any. The issue of any temporary disability prior to August 10, 2022 or after February 1, 2024 is deferred with jurisdiction reserved.

5. There is need for further medical treatment.

6. Statute of Limitations being an affirmative defense, the defense has failed to sustain their burden of proof on this issue and thus the claim is not barred by the Statute of Limitations.

7. Due to the contested nature of benefits and the claim, no penalties are due under Labor Code §4650(d).

AWARD

AWARD IS HEREBY MADE in favor of ALEJANDRO MARTINEZ
against ZURICH AMERICAN INSURANCE COMPANY as follows:

- A) Injury AOE/COE to the lungs and psyche.
- B) Total temporary disability from August 10, 2022 to February 1, 2024, less payments from EDD, if any and wages, if any.
- C) There is need for further/future medical treatment.
- D) Attorneys' fees are 15% of the amount of temporary disability awarded.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PAUL F. KELLY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 4, 2026

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

**ALEJANDRO MARTINEZ
ACOSTA LAW OFFICE
CHARLES ROBERTSON
DHCS SACRAMENTO**

DW/oo

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