WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CANDELARIA BUSTAMANTE, *Applicant*

vs.

KOOS MANUFACTURING, INC.; SAFETY NATIONAL CASUALTY, administered by TRISTAR, *Defendants*

Adjudication Number: ADJ13384253
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Order (F&O) issued on December 20, 2022, wherein the workers' compensation administrative law judge's (WCJ) found that (1) while employed by defendant as a sewing machine operator during the period May 29, 2019 through May 29, 2020, applicant sustained injury arising out of and in the course of employment to her cervical spine, bilateral wrists, lumbar spine, and bilateral feet; (2) defendant's Exhibit D, Selected Records from Koos Company, is admitted into evidence; and (3) all other issues are deferred pending further discovery.

Defendant contends that (1) the evidence fails to establish that applicant sustained industrial injury; (2) the WCJ erroneously determined applicant's date of injury; and (3) the WCJ failed to determine the issues of whether applicant's claim is barred by the post-termination and statute of limitations defenses.

We did not receive an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the contents of the Petition and the Report. Based upon our review of the record, and for the reasons stated below, as our Decision After Reconsideration, we will affirm the WCJ except that we will amend the F&O to find that the date of injury pursuant to Labor Code

section 5412[1] is July 6, 2020, and that defendant failed to establish the claim is barred by the post-termination or statute of limitations defenses.

FACTUAL BACKGROUND

On July 9, 2020, applicant filed an application for adjudication, alleging that she sustained cumulative injury to the neck, back, hands, arms, shoulders, left foot and left leg while employed by defendant as a machine operator during the period of May 29, 2019 through May 29, 2020. (Application for Adjudication, July 9, 2020, pp. 1-9.)

On September 8, 2022, the matter proceeded to trial of the following issues:

1. Injury arising out of and in the course of employment.
2. Attorney Fees.
3. Defendant alleges the claim is barred under Labor Code Section 3600(a)(10) as a post-termination filing.
4. Defendant alleges the claim is barred by the statute of limitations.

(Minutes of Hearing and Summary of Evidence, September 8, 2022, p. 2:18-23.)

The WCJ admitted an exhibit entitled Notice of Separation dated May 13, 2020, into evidence. (*Id*., pp. 4:22-5:5.) It states that applicant was notified of termination of her sewing machine operator position on May 13, 2020. (Ex. J, Notice of Separation dated May 13, 2020, p. 1.)

In the Opinion on Decision, the WCJ states:

> **AOE/COE**:
> . . .
> The Court accepts Dr. Yuri Falkinstein's medical reports as substantial medical evidence and accepts his medical finding that applicant sustained an industrially related cumulative trauma injury arising out of and occurring in the course of employment during the period May 29, 2019 through May 29, 2020.
>
> **Post-Termination defense**:
> Pursuant to Labor Code 5412, 5500.5, and 3208.1 the date of injury of the cumulative injury is the date upon which the employee first suffered disability therefrom and knew that such disability was caused by her employment. In the present matter, applicant first had both disability and knowledge her disability was work related when she was first examined by Dr. Renee Kohanim on July 6, 2020 and told her physical complaints were caused by an industrial cumulative trauma injury. No evidence was submitted to show applicant had lost time from work prior

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

to her termination or that applicant was provided work restrictions prior to being examined Dr. Renee Kohanim on July 6, 2020.

The Court finds the affirmative defense under Labor Code 3600(a)(10) of a post-termination filing does not apply as the applicant became aware she sustained an industrial cumulative trauma injury after she was terminated.

(Opinion on Decision, pp. 2-3.)

In the Report, the WCJ states:

At Trial Ms. Bustamante testified she worked at Koos Manufacturing for 20 years beginning in 1999 and last worked on May 29, 2020. Ms. Bustamante credibly testified, she sewed together sides of pants and other clothing using the sewing machine all day. Ms. Bustamante credibly testified, she first developed pain in her bilateral ribs, bilateral shoulders, left leg, left foot, back and neck in 2013, but she did not report her complaints to anyone at work. Ms. Bustamante credibly testified, her symptoms became worse over time while she was working at Koos Manufacturing.

At Trial Defendant called Ms. Bustamante's former supervisor Martin Quispe as a witness. Martin Quispe credibly testified, Ms. Bustamante never reported an injury to him. Martin Quispe credibly testified, that towards the end of Ms. Bustamante's employment at Koos Manufacturing, Ms. Bustamante's would be expected to sew between 90 and 110 pieces of clothing per hour. Martin Quispe testified Ms. Bustamante completed her work like any other sewing machine operator, and Ms. Bustamante did not complain about the work assigned to her.

After reviewing all Exhibits including the Panel QME reports of Dr. Yuri Falkinstein, the orthopedic report of Dr. Arash Yaghoobian, the primary treating physician reports of Dr. Renee Kohanim, and the selected records from Ms. Bustamante's personal physicians at Grant Medical Clinic, La Libertad Medical Clinic, and Watts Health Center; the Court accepted Dr. Yuri Falkinstein' s medical reports as substantial medical evidence and accepted his medical finding that Ms. Bustamante sustained an industrially related cumulative trauma injury to her cervical spine, bilateral wrists, lumbar spine, and bilateral feet that arose out of and occurred in the course of employment during the period May 29, 2019 through May 29, 2020.

. . .

No evidence was submitted to show Ms. Bustamante had lost time from work prior to her termination or that Ms. Bustamante was provided work restrictions prior to being examined Dr. Renee Kohanim on July 6, 2020. Ultimately, the Court found the affirmative defense under Labor Code 3600(a)(l 0) of a post-termination filing does not apply as Ms. Bustamante became aware she sustained an industrial cumulative trauma injury after she was terminated.

. . .

> Defendant Safety National Casualty administered by Tristar argues Ms. Bustamante's physical complaints cannot be believed; however, multiple physicians examined Ms. Bustamante in this matter and no physician raised the concern that applicant is malingering or that her physical complaints are not credible.
>
> Defendant also argues applicant's claim is barred per Labor Code 3600(a)(10) because she did not report her alleged cumulative trauma injury prior to her termination; however, no evidence was submitted to show Ms. Bustamante knew she had sustained an industrially related cumulative trauma injury prior to being informed ed by Dr. Renee Kohanim on July 6, 2020. No evidence was submitted to show Ms. Bustamante had lost time from work as a result of the cumulative trauma injury or that Ms. Bustamante was provided work restrictions prior to being examined Dr. Renee Kohanim. Labor Code 3600(a)(10) does not apply in this matter because Ms. Bustamante's was not made aware her physical complaints were the result of an industrially related cumulative trauma injury until after her termination.
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> (Report, pp. 2-3.)

DISCUSSION

Defendant first contends that the evidence fails to establish that applicant sustained injury. Defendant specifically argues that applicant's testimony concerning her symptomatology and work history are not reliable, rendering her injury claim unsupported.

The WCJ weighed the witnesses' testimony and found applicant's testimony to be credible. (Opinion on Decision, p. 1; Report, p. 2.) We accord this credibility determination great weight because the WCJ had the opportunity to observe applicant's demeanor while testifying. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318–319 [35 Cal.Comp.Cases 500].) Although we may reject the WCJ's credibility determination where we detect contrary evidence of considerable substantiality, our review of the record does not reveal testimonial or documentary evidence warranting such a rejection. (*Id*.; see also Report, p. 3 (stating that multiple physicians examined applicant and none raised a concern regarding applicant's credibility in reporting her symptoms).)

Accordingly, we are unable to discern support for defendant's contention that the evidence fails to establish that applicant sustained injury.

We next address defendant's contention that the WCJ erroneously determined applicant's date of injury.

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

> [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.)

For purposes of determining the date of a cumulative injury, it is not assumed that a worker has knowledge that a disability is job-related without medical confirmation, unless the nature of the disability and the worker's qualifications are such that he or she should have recognized the relationship. (*City of Fresno v. Workers' Comp. Appeals Bd.,* (*Johnson*) (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53].) Whether an employee knew or should have known their disability is industrially related is generally a question of fact to be determined by the trier of fact, i.e., the WCJ. (*Johnson, supra*; *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104]; *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33 Cal.Comp.Cases 722]; *Alford v. Industrial Accident Com.* (1946) 28 Cal.2d 198 [11 Cal.Comp.Cases 127].)

Notably, and contrary to defendant's position that the "WCJ determined the date of injury was 05/29/2019 to 05/29/2020," the period of exposure to cumulative injury under section 5412 is separate and distinct from the date of injury. (Petition, p. 11.) In particular, where permanent disability results from cumulative trauma, the injury occurs not at the time of exposure, but at the time the cumulative effect of the injury resulting from the exposure has ripened into disability. (See *Federal Insurance Co. v. Workers' Comp. Appeals Bd*. (*Johnson*) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257].)

As used in section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavira v. Workers' Comp. Appeals Bd*. (1991) 235 Cal.App.3d 463 [56 Cal. Comp. Cases 631]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998[69 Cal. Comp. Cases 579].) Medical treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to Labor Code section 5412, but it may be evidence of compensable permanent disability. (*Rodarte*, *supra*, 119 Cal.App.4th at p. 1005.) Likewise, modified work is not a sufficient basis for finding compensable temporary disability, but it may be indicative of a compensable permanent disability, especially if the worker is permanently precluded from returning to customary job duties. (*Id*.)

In this case, the WCJ found that applicant's injurious exposure occurred during the period of May 29, 2019 through May 29, 2020, but did not issue a formal finding as to the section 5412 date of injury. (F&O.) Nevertheless, the WCJ concluded that applicant did not become aware that she had both disability and knowledge that her disability was work-related until July 6, 2020, when she was examined by Dr. Kohanim and informed that her complaints were caused by an industrial cumulative trauma injury. (Opinion, p.2; Report, p. 2.) Since the record does not show that applicant knew she had an injury which could give rise to a workers' compensation claim until July 6, 2020, the WCJ correctly determined that date to be the date of injury.

Accordingly, we are unable to discern merit to defendant's argument that the WCJ erroneously determined the date of injury. Since the WCJ issued no formal finding as to the date of injury, however, we will amend the F&O to find that the section 5412 date of injury is July 6, 2020.

We turn next to defendant's contention that the WCJ failed to determine the issues of whether applicant's claim is barred by the post-termination and statute of limitations defenses.

Although the parties framed those issues for trial, the WCJ issued no formal findings on them. (Minutes of Hearing and Summary of Evidence, September 8, 2022, p. 2:18-23; F&O.)

The post-termination defense is set forth in section 3600(a)(10):

> Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
>
> (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
> (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
> (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
> (D) *The date of injury*, as specified in Section 5412, *is subsequent to the date of the notice of termination* or layoff.
>
> (§ 3600(a)(10) [emphasis added].)

The post-termination defense is an affirmative defense and defendant, as the party asserting it, has the burden of proof. (§ 5705.)

In this regard, we have explained that the date of injury in this case is July 6, 2020. The record also shows that applicant was terminated on May 13, 2020. (Ex. J, Notice of Separation dated May 13, 2020, p. 1.) Since applicant's injury was subsequent to her termination, we concur with the WCJ that the post-termination defense is inapplicable under section 3600(a)(10)(D). (Report, pp. 1-2.)

Accordingly, we are unable to discern support for the argument that the WCJ failed to determine the issue of the post-termination defense. Since the WCJ issued no formal finding on the issue, however, we will amend the F&O to find that defendant failed to establish the post-termination defense of section 3600(a)(10).

We turn next to defendant's contention that the WCJ failed to determine the issue of whether applicant's claim is barred by the statute of limitations. Specifically, applicant argues that applicant's claim is barred because she knew in 2013 that she had back, shoulders, arms, left leg and left foot symptoms related to her work but did not report her claim until July 9, 2020.

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.)

"Limitations provisions in the [workers'] compensation law must be liberally construed in favor of the employee unless otherwise compelled by the language of the statute, and such enactments should not be interpreted in a manner which will result in a loss of compensation." (*Blanchard v. Workers' Comp. Appeals Bd*. (1975) 53 Cal.App.3d 590, 595 [40 Cal.Comp.Cases 784] (internal citations omitted).)

We previously explained that applicant did not become aware that she had sustained an injury for which he could file a workers' compensation claim until July 6, 2020, and the pleadings record shows that she filed her claim on July 9, 2020. (Application for Adjudication, July 9, 2020, p. 1.) Since applicant's claim was filed within the one-year statutory period, it was timely.

Accordingly, we are unable to discern support for defendant's argument that the WCJ erroneously failed to determine the issue of the statute of limitations defense. Since the WCJ issued no formal finding on the issue, however, we will amend the F&O to find that defendant failed to establish applicant's claim is barred by the statute of limitations defense.

Accordingly, we will affirm the F&O of the WCJ, except that we will amend to find that the section 5412 date of injury is July 6, 2020, and that defendant failed to establish that the claim is barred by either the post-termination or statute of limitations defenses.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that the Findings and Order issued on December 20, 2022 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

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4. The date of injury pursuant to section 5412 is July 6, 2020.

5. Defendant failed to establish applicant's claim is barred by the post-termination defense.

6. Defendant failed to establish applicant's claim is barred by the statute of limitations defense.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 9, 2026

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

CANDELARIA BUSTAMANTE
JCR LAW GROUP
NIGEL SCOTT BAKER, ESQ

SRO/*kl*

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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