

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

EDELMIRA DE LEON, *Applicant*

vs.

**JEFFREY A. KAPLAN; BANKERS' STANDARD INSURANCE C/O ACE PRIVATE
RISK, administered by ESIS, *Defendants***

**Adjudication Number: ADJ12378634
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.

Applicant seeks reconsideration¹ of the Findings and Order (F&O) issued on January 31, 2022 wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant failed to prove that she sustained injury arising out of and in the course of employment (AOE/COE) to her back, neck, hands, right upper extremity, left arm, and shoulders while employed by defendant as a housekeeper during the period June 29, 2018 to June 29, 2019; and that the alleged injury is not compensable as it was not reported "until subsequent to Applicant's termination" and applicant had not demonstrated that any "of the exceptions listed under Labor Code² section 3600(a)(10)" applied herein. The WCJ thus ordered applicant "[a] take nothing on her application" and held that "no compensation would be owed, even if such injuries had occurred."

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

¹ Applicant filed the Petition for Reconsideration on her own behalf while still represented. It appears that she subsequently dismissed her attorneys.

² All further statutory references will be to the Labor Code unless otherwise indicated.

We have considered the allegations in the Petition and the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

FACTS

On July 19, 2019, applicant filed an Application for Adjudication of Claim (Application) alleging that, while employed by defendant as a general laborer during the period from June 29, 2018 through June 29, 2019, she sustained injury AOE/COE to the neck, back, trunk/waist, legs right upper extremity, left arm, shoulders, hands, headaches, stress, and nervous system.

On August 6, 2019, defendant issued a denial notice. (Exhibit A)

The parties proceeded with discovery, retaining Kerrie Pratt, D.C. as the chiropractic panel Qualified Medical Evaluator (PQME). Dr. Pratt evaluated applicant on November 7, 2019, and issued a corresponding report, as well as two supplemental reports, dated February 16, 2020, and June 26, 2020. (Exhibits 1-3.)

In her November 7, 2019 report, Dr. Pratt opined that “given [applicant’s] repetitive and frequent work duties as a housekeeper involving lifting, bending, carrying, and prolong[ed] posturing of her neck” she suffered a “cumulative trauma work-related injury.” (Exhibit 3, p. 12.) Dr. Pratt noted, however, that “more objective information was required[,] including the MRI scans and the Electrodiagnostic studies to establish the extent of impairment, disability, apportionment, causation and future medical care, if any[.]” (*Ibid.*)

Thereafter, Dr. Pratt received and reviewed various diagnostics, including an EMG/NCS of the bilateral upper and lower extremities and an MRI of the lumbar spine. (Exhibit 2, p. 3.) In her February 16, 2020 report, Dr. Pratt opined that applicant sustained injury AOE/COE to the cervical spine resulting in an 8% whole person impairment (WPI) using the DRE method, 13% WPI to the lumbar spine due to loss of range of motion and a “spinal disorder[,]” 1% WPI to each shoulder, due to loss of range of motion, and an additional 3% WPI due to pain related impairment causing restricted activities of daily living (ADLs). (*Id.* at pp. 8-9.) For the cervical and lumbar spine, Dr. Pratt apportioned 25% of the impairment to the cumulative injury and the remaining 25% to preexisting arthritis. For the bilateral shoulders, the impairment was attributed 100% to the cumulative injury.

In her June 26, 2020 supplemental report, Dr. Pratt noted that medical reports concerning treatment for applicant's cumulative injury, including reports from Dr. Pharm and applicant's physical therapist, were not provided for review. As such, there was no change in her opinions.

On September 4, 2019, defendant filed a Declaration of Readiness to Proceed to a priority conference. The matter proceeded to trial on February 9, 2021, and November 9, 2021.

At trial, issues set for determination included injury AOE/COE, temporary disability, attorney's fees, and the applicability of the post-termination defense under section 3600(a)(10). Defendant's sole exhibit was the denial notice. There was no stipulation that applicant was terminated. Applicant submitted as evidence, the reports of Dr. Pratt. During trial, defendant testified, in relevant part, as follows:

Mr. Kaplan testified that she was terminated because they lost confidence in her. He stated that they sent her a severance agreement, Mr. Kaplan testified that after Ms. De Leon was terminated, she emailed him asking why she had been terminated.

He explained that she may have mentioned that she should not put her finger in water after she cut her finger which occurred about a month earlier than her termination, but that was not an issue later.

Applicant testified in relevant part as follows:

[S]he started working for Jeffrey Kaplan in June of 2018. ...She does remember that she did sign documents, but she does not know what she signed. She does not remember if she read the documents. She reads very little English.

Ms. De Leon testified that she did have a conversation with Mr. Kaplan when she cut her finger. She explained that it was a deep cut, and they terminated her. She stated that Cornelius told her to get out of the house. He told her she had to do her duties despite the cut to her finger. She stated that this is when she had a 10-minute conversation with Mr. Kaplan.

Ms. De Leon testified she does not recall the exact date that she cut her finger, but she believes that it was in late April, or early May of 2019. She did report her finger being cut. She told Cornelius about her injury to her back. He didn't care about her and he didn't listen. Ms. De Leon confirmed she did ask for treatment, but Cornelius did not listen. Ms. De Leon stated that she asked for treatment for her pain and this was for something other than her finger, but Cornelius didn't listen. She said that she asked Cornelius for a day off to seek medical treatment. Cornelius responded that he needed to get approval from Mrs. Kaplan. Ms. De Leon stated that she did go for treatment in around the month of May to her private doctor. She stated that

this was Dr. Lee and that she sees Dr. Lee at an office on 117th and Hawthorne, but she doesn't know the name of the medical facility...

Ms. De Leon testified that other than her finger, she did not report any injury to Mr. Kaplan because Cornelius said they weren't to report any injuries to Mr. Kaplan. She did report her finger injury to Mr. Kaplan because Cornelius had been ill and Mrs. Kaplan said they were to communicate directly with Mr. Kaplan.

Ms. De Leon testified that her doctor allowed to [sic] taking her off work, but she told her doctor not to take her off work because she was still working. Ms. De Leon confirmed she was still working without restrictions prior to her termination.

When asked when she first saw a doctor after her termination, Ms. De Leon responded that because she kept going to her doctor that she was already going to, she continued to see her doctor because she was having pain in her leg and back.

(Minutes of Hearing and Summary of Evidence (MOH & SOE), November 9, 2021, pp. 3-5.)

On January 31, 2022, the WCJ issued the F&O. It is from this F&O that applicant seeks reconsideration.

DISCUSSION

Turning now to the merits of the Petition, the WCJ concluded that applicant failed to report her injury prior to termination. However, there is nothing in the evidentiary record which provides confirmation of 1) applicant's termination, or 2) the termination date. As explained in *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), a decision "must be based on admitted evidence in the record" (*Id.* at p. 478) and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, at pp. 473, 475.) As required by section 5313

and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Id.* at p. 475.) This “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Id.* at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Further, the WCJ concluded that applicant did not fall under any of the exceptions listed under section 3600(a)(10). As relevant here, section 3600(a)(10) states, that:

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.

We note that the initial burden in asserting a post-termination bar to compensation, an affirmative defense, rests with the defendant, who must establish that the claim for compensation was filed after a notice of termination and that the claim is for an injury occurring prior to notice of termination or layoff. (Lab. Code, § 5705.) Defendant must meet this burden by a preponderance of the evidence, and this requires “evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth.” (Lab. Code, § 3202.5) As noted above, defendant has failed to meet this burden as the record contains no evidence confirming applicant’s alleged date of termination.

Additionally, applicant alleges a cumulative injury and section 5412 states, in relevant part, that the date of injury for cumulative injury is the “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.) 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 refers to 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].) Pursuant to *City of Fresno v. Workers’ Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53], “[w]hether an employee knew or should have known his disability was industrially caused is a question of fact.” 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. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 556, 559 [33 Cal.Comp.Cases 722].) This burden is not met by a mere showing that the employee knew they had some symptoms. (*Ibid.*) Generally speaking, an employee is not charged with knowledge that their 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,” they should have recognized the relationship. (*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].) “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].) “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.)

Here, the issue of the date of injury pursuant to section 5412 was not raised by the parties or addressed by the WCJ. As such, we are unable to address the applicability of any exceptions under section 3600(a)(10). Further discovery is necessary, and a finding of the date of injury is a prerequisite to this analysis.

We observe that applicant testified at trial that she sought treatment while she was still working for defendant. However, since no medical records were provided to Dr. Pratt and no treatment records were submitted into evidence, we are unable to consider whether subdivision

(a)(10)(B) applies. Nonetheless, as explained above, the section 5412 date of injury must be determined first.

Lastly, the WCJ in her F&O alleged that applicant did not provide sufficient or credible evidence to establish injury AOE/COE; however Dr. Pratt, in her initial report of November 7, 2019, opined that “given [applicant’s] repetitive and frequent work duties as a housekeeper involving lifting, bending, carrying, and prolong[ed] posturing of her neck” she suffered a “cumulative trauma work-related injury.” In addition, in her June 26, 2020 supplemental report, Dr. Pratt indicated that medical reports concerning applicant’s treatment of the cumulative injury, including reports from a Dr. Pharm and applicant’s physical therapist, were not provided for review. Given that Dr. Pratt has not reviewed all relevant medical records, we believe such review in the form of further discovery is necessary.

As the parties are well aware, the WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers’ Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.) The Appeals Board has a constitutional mandate to ensure “substantial justice in all cases” and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404.) Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 (Appeals Bd. en banc).) Where the record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. L.A. County Metro. Transit Authority, supra*, at p. 142.) If the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, the selection of an agreed medical evaluator (AME) by the parties should be considered, or alternatively, the WCJ may appoint a regular physician.

Accordingly, we rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order dated January 31, 2022 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 5, 2026

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

**EDELMIRA DE LEON
ALBERT AND MACKENZIE
RENZI LAW**

RL/cs

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