

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

RICHARD LOWE, *Applicant*

vs.

SAN MATEO COUNTY TRANSIT DISTRICT, PSI, *Defendants*

**Adjudication Numbers: ADJ12963083, ADJ13167130
Stockton District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted the Petition for Reconsideration filed by applicant in order to study further the legal and factual issues raised therein. This is our Opinion and Decision after Reconsideration.

Applicant sought reconsideration of the Findings of Fact, Award, Order (F&O) issued on April 9, 2021 in the above captioned matters by a workers' compensation administrative law judge (WCJ). The WCJ dismissed ADJ13167130 with prejudice "per stipulation." In ADJ12963083, the WCJ found that applicant was employed as a bus operator for San Mateo County Transit District (defendant) during the period March 2, 2005 and May 7, 2015, and that applicant's claim for cumulative injury to his hearing arising out of and in the course of his employment for defendant is barred by the statute of limitations. The WCJ ordered that applicant take nothing by way of his hearing loss claim in ADJ12963083.

Applicant contends that neither his wife nor he possessed the requisite skills and/or expertise pursuant to *City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, to determine whether his hearing loss was a cumulative trauma injury caused by his employment; and, that it was not until the July 31, 2019 report of the otolaryngologic panel qualified medical evaluator (PQME) Geoffrey Smith, M.D. that applicant learned that his hearing loss injury was caused by his employment.

Defendant filed an Answer to Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration/Removal (Report), recommending that the petition be denied.

We have reviewed the record in this matter, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. It is our decision after reconsideration to rescind the F&O and replace it with our findings of fact that applicant's date of injury pursuant to Labor Code¹ section 5412 is July 31, 2019 and therefore applicant's claim for cumulative trauma injury to his hearing was timely filed on January 29, 2020.

FACTUAL AND PROCEDURAL BACKGROUND

It is not disputed that applicant filed his claim for cumulative injury hearing loss on January 29, 2020, after he retired from his employment as a bus driver for defendant San Mateo County Transit District (San Mateo). (See Application for Adjudication, January 29, 2020.) The claim went to trial on February 11, 2020 for the adjudication of issues including injury arising out of and in the course of employment and defendant's affirmative defense of the statute of limitations. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 11, 2020, p. 3.)

The admitted evidence was applicant's testimony (MOH/SOE, pp. 4-7); the deposition transcript of Richard Lowe from June 13, 2019 (Lowe Deposition) (Joint Exh. FF); a description of applicant's job from defendant (Joint Exh. GG); medical records from Hearing Resource Center of San Mateo (Hearing Resource Center) (Joint Exh. DD) and Hearing Resource Center audiologist Katherine R. Salkin Au.D (Joint Exh. EE); a 2-page report from Kaiser dated November 1, 2017 (Joint Exh. CC); and, two reports from the otolaryngologic qualified medical evaluator (QME) Geoffrey A. Smith, M.D., F.A.C.S. (Joint Exhs. AA, dated September 12, 2019 and BB, dated July 31, 2019).

Applicant testified that he worked for defendant as a bus driver from March 2005 to May 2015, when he was close to retirement age and had a back injury that was getting worse. (MOH/SOE, p. 4.) According to defendant's "Job Analysis," applicant was subjected to "[n]ormal to high" noise as part of his working conditions "depending upon traffic and passengers" and including "audible alerts." (Joint Exh. GG, p. 4.) Applicant never lost any time from work as a result of his hearing loss, and did not retire from work as a result of his hearing loss. (MOH/SOE, p. 4.) Applicant testified in his deposition that he had a "slight ringing" while still working as a truck driver for his previous employer, Berkeley Farms, but that he first noticed a "gradual ringing in his ears approximately one year after employment" for San Mateo. (*Id.* at pp. 4, 6; Joint Exh.

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

FF, Lowe Deposition, pp. 19-21.) It was only after about a year after starting work for San Mateo that his wife complained that he could not hear her. (MOH/SOE, p. 4.) He wore a hearing aid in his left ear in 2009. (*Id.* at p. 6.) The tinnitus in his ears got worse, like “screaming in both ears with multiple tones.” (*Ibid.*) He complained of bilateral tinnitus “for the past 15+ years” in May 2014 on his first visit to Hearing Resource Center, i.e., approximately 2009. (Joint Exh. DD, Hearing Resource Center records, p. 3, May 27, 2014 visit.)

Applicant requested earplugs from his employer “early on” because his job was like “working in a tube with kids screaming,” but a supervisor told him he was not permitted to wear earplugs or anything in or over their ears. (MOH/SOE, p. 4.) He did not report any hearing loss to his employer or continue to request ear protection for fear of losing his job. (*Id.* at p. 5.)

Applicant testified at trial that Hearing Resource Center first diagnosed him with hearing loss as the employer did not provide any hearing tests. (MOH/SOE, p. 5.; see Joint Exh. DD, Hearing Resource Center records, May 27, 2014 – January 11, 2016.) Hearing Resource Center records do not discuss causation of applicant’s hearing loss but do remark that his “noise exposure” was “25+ years truck driving, bus driving, firing range (right handed rifle shooter).” (Joint Exh. DD, p. 4, record for May 27, 2014.) Applicant also obtained a concealed carry permit in approximately 2019 and owns three guns which he shoots “occasionally.” (MOH/SOE, p. 6.) In addition, in May 2014, applicant’s speech discrimination results from his “significant” hearing loss showed a “significant decrease in understandability since his last test in 2010.” (Joint Exh. DD, p. 4, record for May 27, 2014.)

On November 1, 2017, applicant attended an “adult audiology evaluation” at Kaiser Permanente Medical Group with audiologist Marilyn M. Dixon-Brown. (Joint Exh. CC, pp. 4-5.) He reported constant, audible tinnitus for 15 years, i.e., since 2002, and noise exposure from “truck driver and fire arms for many years...” (*Ibid.*)

On July 31, 2019, QME Dr. Smith issued an Otolaryngologic Qualified Medical Evaluation finding that applicant suffers from a “[b]ilateral neurosensory loss of hearing and tinnitus” that is worse on the left than on the right, caused by “asymmetrical loud noise exposure, both recreationally and at work.” (Joint Exh. BB, pp. 17-18.) Dr. Smith apportioned applicant’s hearing loss 50% to recreational loud noise trauma from his shooting hobby and prior noise exposure and 50% to his work as a bus driver for San Mateo. (*Id.* at p. 19.) Dr. Smith was provided with

additional medical records but his opinion did not change. (Joint Exh. AA, Supplemental Report, September 12, 2019.)

Applicant had a prior workers' compensation claim with his previous employer, Berkeley Farms, for a 1999 injury to his back, and has a pending claim with this employer for a 2014 right torn elbow tendon injury. (MOH/SOE, p. 5.) Applicant had an attorney for the 1999 injury claim, and has an attorney for the pending 2014 tendon claim. (*Ibid.*)

The WCJ found pursuant to the parties' stipulation that there were no periods of temporary disability claimed in this case and no medical treatment provided in this claim. (F&O, Finding of Fact no. 6.) The WCJ also found that applicant's cumulative injury claim for hearing loss was barred by the statute of limitations, and ordered that applicant take nothing by way of his claim for hearing loss injury. (F&O, Finding of Fact no. 7, Order.) The WCJ found applicant to be a credible witness stating, "In this case, Applicant was found to be a credible witness on his own behalf." (F&O, Opinion on Decision, p. 3.) In addition, the WCJ explained the finding and order as follows:

The statute of limitations defense for a cumulative trauma injury or occupational disease is the same as that for a specific injury. Employees generally have one year from the date of injury to file an application for adjudication when benefits are not provided. The date of injury for occupational diseases and CT injuries for the purposes of the statute of limitations is defined by LC 5412.

Per LC 5412, "[T]he date of injury in cases of occupational disease or cumulative injury is that date upon which the employee first suffered disability ... and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." So the date of an occupational disease or a cumulative trauma injury requires the concurrence of two elements: (1) compensable disability, and (2) knowledge of industrial causation. These elements present questions of fact to be determined by the appeals board, with the burden of proof resting with the employer.

Furthermore, the Court of Appeal has stated, "[A]n applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and the applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." *City of Fresno v. WCAB (Johnson)* (1985) 50 CCC 53, 57-58. See also *Sperry Corp. and Gab Business Services, Inc. v. WCAB (Malkowski)* (1988) 53 CCC 333 (writ denied); *CBS v. WCAB (White)* (1979) 44 CCC 777 (writ denied); *City of Los Angeles v. WCAB (Calvert)* (1978) 43 CCC 1280.

Medical opinion may or may not be necessary to determine if the applicant knew or should have known that the employer bore responsibility for an industrial injury. Reasonable inferences may be drawn when necessary. The applicant clearly understood the workers compensation litigation process, had knowledge through discussions with his wife and prior injuries that he had a hearing disability that was work related. The applicant had been given a hearing aid for his left ear which he purposely did not wear to work in order to hide the fact that he was suffering from a hearing disability. The employer therefore did not have notice of any hearing issues until the claim form was filed. The claim was denied timely as it was not filed until four years after the applicant's retirement.

The applicant also had ample time after his retirement to file a claim. He could have possibly defended his delay at that time indicating that he was fearful of the employer's retaliation for filing a claim. He instead waited four additional years after his retirement to file a claim. This is found to be unreasonable and not credible.

After review of all of the evidence presented at trial, it is found that the defendants have successfully presented their Statute of Limitations defense to the court and the claim is found to be barred.

(F&O, Opinion on Decision, pp. 5-6.)

The Report in this case summarizes the Opinion on Decision, does not provide any further legal discussion, and fails to cite to specific, admissible evidence in the record to support the factual conclusions allegedly supporting the WCJ's decision.

Testimony revealed that the applicant knew that his hearing loss was getting worse as he continued to drive the bus. He described his typical day as "working in a tube full of screaming kids". He discussed his hearing problems with his wife. She too asserted that it was an industrial hearing loss. Pursuant to Labor Code Section 5412, he knew or in exercise of reasonable diligence should have known that his disability was caused by his past and present employment.

The applicant has a long history of medical treatment from varying facilities and audiologists. He had already been given a hearing aid for his left ear in 2009, and had long-standing tinnitus. Medical records describe that his hearing loss continued to decrease to the point that he was recommended hearing aids in both ears. The applicant was told that his condition was industrially related when he was receiving treatment at the Hearing Resource Center. This was before his retirement from the work force. As well, the applicant testified that he personally decided that his hearing loss was related to work back in 2014.

...

In the present matter the evidence demonstrates that along with being told at the Hearing Resource Center that his hearing loss was industrially related, the

applicant and his wife knew that his hearing loss was getting worse the longer he worked without ear protection. The very nature of his disability and the applicant's training, intelligence and qualifications rendered him with knowledge that his hearing problems were industrially related. The applicant was very familiar with the Worker's Compensation system and could have filed a claim at any time as well as upon his retirement from employment.

(Report, pp. 3-4.)

DISCUSSION

The statute of limitations is an affirmative defense, and therefore, the burden of proof rests with defendant. (Lab. Code, §§ 5409, 5705.) An applicant has one year to file an application for adjudication from: (a) The date of injury. (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650)... (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600)...were furnished." (Lab. Code, § 5405.) "If statutes of limitation are subject to conflicting interpretations, one beneficial and the other detrimental to the employee, section 3202 requires that they be construed favorably to the employee. (*Colonial Ins. Co. v. Ind. Acc. Com.* (1945) 27 Cal.2d 437 [164 P.2d 490].)" (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53].)

In this case, it is undisputed that no medical treatment or benefits were furnished to applicant from defendant. Therefore, the issue for adjudication here related to the statute of limitations was whether applicant filed his claim for cumulative injury hearing loss within one year of his "date of injury" under section 5405, subdivision (a).

Applicant claims a CT injury which is defined "as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury shall be the date determined under Section 5412." (Lab. Code, § 3208.1(b).) Therefore, the determination of applicant's "date of injury" is governed by section 5412. Section 5412 states:

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.

(Lab. Code, § 5412.)

The determination of a section 5412 “date of injury” is therefore a determination of the *nexus* of a two-part factual analysis: first, when did the employee first suffer a compensability disability from a CT injury; and, second, when did the employee know, or in the exercise of reasonable diligence should have known, that the compensable disability was caused by employment. (See *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579].)

Here, and although the WCJ discussed section 5412 in the Opinion on Decision and the Report, the WCJ did not determine or issue a finding of fact in this cumulative injury claim as to applicant’s section 5412 date of injury. (See F&O, Findings of Fact 1-8, Order.) Instead, the WCJ generally states that applicant knew or should have known that his hearing loss was caused by his employment and therefore could have and should have filed his claim “at any time as well as upon his retirement from employment.” (Report, p. 4.) The WCJ reached this conclusion based on applicant’s testimony that “he believes” he was told at the Hearing Resource Center that his hearing loss was industrially related; that the applicant and his wife knew his hearing loss was getting worse the longer he worked without ear protection; and, that applicant was very familiar with the Worker’s Compensation system. (F&O, Opinion on Decision, pp. 5-6; Report, pp. 3-4.)

As an initial matter, the WCJ failed to address the obvious fact that in this case, there was no evidence of ratable permanent disability until the initial QME evaluation report on July 31, 2019. (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1004 [69 Cal.Comp.Cases 579]; *Chavira v. Workers’ Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474-475 [56 Cal.Comp.Cases 631].)

Next, even assuming *arguendo* applicant’s hearing loss and/or tinnitus were permanent and stationary prior to the initial QME evaluation report, we do not agree with the WCJ or the dissenting opinion that there is substantial evidence in the current record that applicant knew or should have known under section 5412 that his cumulative trauma hearing loss injury caused a disability and/or was compensable under the workers’ compensation laws until that initial QME evaluation report.

Whether an employee knew or should have known his or her disability is industrially related is generally a question of fact to be determined by the trier of fact, i.e., the WCJ. (*Johnson, supra*, 163 Cal.App.3d at p. 471; *Nielsen v. Workers’ Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104] (*Nielsen*); *Chambers v. Workmen’s Comp. Appeals Bd.* (1968) 69

Cal.2d 556 [33 Cal.Comp.Cases 722] (*Chambers*); *Alford v. Industrial Accident Com.* (1946) 28 Cal.2d 198 [11 Cal.Comp.Cases 127] (*Alford*.)

We glean from these authorities the rule that an applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability.

(*Johnson, supra*, 163 Cal.App.3d at p. 473.)

The current record in this case is simply lacking in evidence that the "nature of disability" in this case *or* applicant's "training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability" under *Johnson* or *Nielsen*.

The WCJ's conclusion that applicant must have known he sustained a *disability* resulting from a job-related *cumulative trauma injury* because he and his wife knew that he had hearing related symptoms is not enough for defendant to meet its burden of proof. (See *Johnson, supra*, 163 Cal.App.3d at 471, citing to *Chambers, supra*, and *Pacific Indem. Co. v. Industrial Acc. Comm.* (1950) 34 Cal.2d 726.). In addition, applicant did not need miss any work as a result of his symptoms and did not retire from his job because of those symptoms. He therefore had no reason to believe that his symptoms resulted in any "disability" under the workers' compensation laws by something called "a cumulative trauma injury" *until* he was informed of those facts by the QME in this case on July 31, 2019. No employee is required to guess as to whether any particular symptom, illness, or injury is industrial or not, and "a layman's mistaken diagnosis...is not fatal to a claim for workers' compensation benefits [citation]..." (*Nielsen, supra*, 164 Cal.App.3d at p. 931.)

We are also not convinced that applicant's prior workers' compensation claims for specific, orthopedic injuries somehow gave him specialized knowledge into workers' compensation laws. There is no evidence in this record that applicant is somehow a sophisticated user of the workers' compensation system, nor any attempt to establish that he is. We also note that no one asked applicant *when* he first consulted an attorney for the hearing loss claim and/or *why* he did so, even though applicant was present at trial and available to respond to those highly relevant inquiries. There is no evidence that applicant has any training in audiology or other medical training or

certifications, *or* any other specialized knowledge or education to bring him within a class of injured worker with the type of “training, intelligence and qualifications” that would remove the need for appropriate medical advice that their “disability is job related.” (*Johnson, supra*, 163 Cal.App.3d at p. 473.)

In addition, defendant contested compensability in this case, which is the logical response of a party when an injury is not clearly related to the employment at issue. If a sophisticated defendant such as the City of San Mateo cannot determine whether the injury is compensable, we will not hold an injured worker responsible for that determination. We therefore do not agree with the WCJ that this is one of those easily defined injuries where there can be little debate as to causation *without* appropriate medical advice. (See *Nielsen, supra*, 164 Cal.App.3d at pp. 929-931.)

Finally, we do not agree with the WCJ or the dissent that applicant’s testimony that he “believes” he was told of an industrial connection by someone at the Hearing Resource Center is substantial evidence that he knew or should have known his disability was job-related under section 5412, *especially* because applicant did not identify who it “might” have been that told him, or whether it was a medical professional with the expertise to render an opinion about the relative causation of a *cumulative trauma injury* to his hearing given all the noise exposure found in this case. Moreover, there is nothing in the records from the Hearing Resource Center that can confirm that any medical professional rendered any opinion on causation whatsoever. We note defendant’s questioning of applicant during trial regarding the June 18, 2014 visit to audiologist Rebecca Marulescu at the Hearing Resource Center. (MOH/SOE, February 11, 2021, p. 7; see Joint Exh. EE, Audiology Reports, p. 27.) Defendant asked applicant whether his wife questioned the audiologist or a doctor if his hearing loss was work-related, and applicant testified that he had no memory of that. (*Ibid.*) Applicant also testified that he was not asked at Kaiser if his hearing issues were work-related. (*Ibid.*)

Applicant’s credible testimony also should have triggered the WCJ’s inquiry into equitable tolling of the statute of limitations under *Permanente Medical Group v. Workers’ Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 64 [50 Cal.Comp.Cases 411] and *Reynolds v. Workmen’s Comp. Appeals Bd. (Reynolds)* (1974) 12 Cal.3d 762 [39 Cal.Comp.Cases 768].² However, there is no discussion nor findings related to this issue. Applicant testified that he requested earplugs from his employer “early on” in his employment because his job was like “working in a tube with kids screaming,” but a supervisor told him he was not permitted to wear earplugs or anything in or over their ears. (MOH/SOE, p. 4.) In addition, exposure to “normal to high” noise is identified by defendant as part of applicant’s work environment, and therefore, defendant cannot claim ignorance as to the significance of applicant’s complaint to his supervisor. (See Joint Exh. GG, p. 4.) Applicant testified that this employer, despite subjecting its employees as part of their work environment to “normal to high” noise, did not conduct hearing tests. (MOH/SOE, p. 5.; see Joint Exh. DD, Hearing Resource Center records, May 27, 2014 – January 11, 2016.) There is no evidence in the record regarding whether applicant was given a physical prior to his employment with defendant and whether it included a hearing test; whether a certain level of hearing was required for the job of bus driver and, if so, why no hearing tests were conducted or required by the employer.

² The filing of a petition for reconsideration gives the Appeals Board the authority to address all issues, including those not specifically raised. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 (Appeals Bd. en banc) (Lab. Code, §§ 111(a), 5300, 5301; 5309, 5310, 5906, 5908.) As a result, a grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]), and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Ind. Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

An employer is required to provide a claim form to an employee within one day of notice or knowledge of an alleged work injury. (Lab. Code, § 5401(a).) An employer can receive “notice or knowledge of an alleged work injury” via service by the injured worker or someone on his/her behalf. (Lab. Code, § 5400.) “Service” includes, “[k]nowledge of an injury, obtained from any source, on the part of an employer...or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts...” (Lab. Code, § 5402(a).) Thus, the duty of notification arises when the employer has “...*actual or constructive knowledge* of any work-related injury...” (*California Insurance Guarantee Association v. Workers’ Comp. Appeals Bd. (Carls)* (2008) 163 Cal.App.4th 853, 863-864, fn. 8 quoting [73 Cal.Comp.Cases 771] *Permanente Medical Group v. Workers’ Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 64 [50 Cal.Comp.Cases 411], emphasis added in *Carls*.)

Therefore, the employer in this case may have had constructive, if not *actual knowledge* of a potential work-place injury and thus had the duty to notify applicant of his workers’ compensation rights at that time. However, there were no findings by the WCJ and no evidence in the record to establish whether the required notices and a DWC-1 claim form were ever provided to applicant. The Supreme Court found in *Reynolds* that “when an employer fails to perform its statutory duty to notify an injured employee of his workers’ compensation rights, and the injured employee is unaware of those rights from the date of injury through the date of the employer’s breach, then the statute of limitations will be tolled until the employee receives actual knowledge that he may be entitled to benefits under the workers’ compensation system.” (*Martin, supra*, 39 Cal.3d at p. 63 citing to *Reynolds, supra*.) Thus, “...the remedy for breach of an employer’s duty to notify is a tolling of the statute of limitation if the employee, without that tolling, is prejudiced by that breach.” (*Martin, supra*, 39 Cal.3d at 64.) “An employee would be prejudiced without the tolling if he has no knowledge that his injury might be covered by workers’ compensation before he receives notice from the employer.” (*Ibid.*)

Please note that in the context of establishing an applicant’s knowledge for purposes of equitable tolling, “...prejudice means ignorance, and ignorance is presumed until the employee is given the requisite notice or otherwise gains *actual knowledge* that [s]he may be entitled to workers’ compensation.” (*Carls, supra*, 163 Cal.App.4th at 860 citing *Martin, supra*, 39 Cal.3d at 65, 67, fn. 8, emphasis added.) *Actual knowledge* of the “...potential eligibility for a particular injury...” cannot be proven by showing an injured worker’s “...general awareness of the existence

of the workers' compensation system..." or "...past experience with workers' compensation..." (*Carls, supra*, 163 Cal.App.4th at 863 referencing *Reynolds, supra*.)

A WCJ's decision must be based on admitted evidence (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*)), and must be supported by substantial evidence (Lab. Code, §§ 5903, 5952 (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]; *Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]). Further, the Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Accordingly, given that the WCJ's decision in this case (ADJ12963083) to bar applicant's claim based on the statute of limitations is not based on admitted evidence or substantial evidence, it must be our decision after reconsideration to rescind the F&O and return this matter to the trial level for further development of the record consistent with this decision. We affirm the WCJ's decision to dismiss applicant's claim in ADJ13167130 pursuant to the parties' stipulation.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award, Order issued on April 9, 2021 in the above captioned matters by a workers' compensation administrative law judge is **RESCINDED** and this matter (ADJ12963083) is **RETURNED** to the trial level for further proceedings consistent with this decision **EXCEPT** that was **AFFIRM** the Finding of Fact that "ADJ13167130, per stipulation is dismissed with prejudice."

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I DISSENT (See Dissenting Opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 6, 2026

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

**RICHARD LOWE
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC, INC.
SAN MATEO COUNTY TRANSIT DISTRICT
AGM LAW OFFICES**

AJF/mc

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

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent from the majority opinion that defendant did not meet its burden to establish that applicant's claim in ADJ12963083 for cumulative injury to his hearing is barred by the statute of limitations. As a result, it would be my decision after reconsideration to affirm the Findings of Fact, Award, Order (F&O) issued on April 9, 2021 in the above captioned matters by a workers' compensation administrative law judge (WCJ).

I concur with the WCJ that pursuant to Labor Code³ section 5412, there is substantial evidence in the record that applicant knew or should have known that his hearing loss injury and tinnitus was caused by his job driving a bus for defendant while still employed for defendant, and that applicant could therefore have filed a claim during his employment and/or after his retirement in 2015 but chose not to file a claim for his hearing loss injury. (F&O, Opinion on Decision, pp. 5-6; Report, pp. 3-4.) As a consequence of applicant's choice, his claim for his hearing loss injury is barred by the one-year statute of limitations in section 5405, subdivision (a).

I adopt and incorporate the Statement of Facts and Procedure from the majority herein, but I disagree with the majority that applicant's injury was "some exotic disease the causes of which might be obscure and debatable." (*Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 929 [50 Cal.Comp.Cases 104] (*Nielsen*)). Just as in *Nielsen*, this applicant was of the opinion that his injury was industrially caused within the first year of his employment with defendant. Applicant testified that he worked for defendant as a bus driver from March 2005 to May 2015. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 11, 2020, p. 4.) He had a "slight ringing" while still working as a truck driver for his previous employer, Berkeley Farms, but he first noticed a "gradual ringing in his ears approximately one year after employment" for San Mateo. (MOH/SOE, pp. 4, 6; Joint Exh. FF, Lowe Deposition, pp. 19-21.) Applicant requested earplugs from his employer "early on" because his job was like "working in a tube with kids screaming." (MOH/SOE, p. 4.) It was about a year after starting work for San Mateo that his wife complained that he could not hear her. (*Ibid.*) He wore a hearing aid in his left ear in 2009. (*Id.* at p. 6.) The tinnitus in his ears got worse, like "screaming in both ears with multiple tones." (*Ibid.*)

³ All further references are to the Labor Code unless otherwise noted.

The medical records also show that in May 2014, applicant complained of bilateral tinnitus on his first visit to Hearing Resource Center that had been bothering him since approximately 2009. (Joint Exh. DD, Hearing Resource Center records dated 2014-2016, p. 3, May 27, 2014 visit.) Hearing Resource Center records remark that applicant reported his “noise exposure” was “25+ years truck driving, *bus driving*, firing range (right handed rifle shooter).” (Joint Exh. DD, p. 4, record for May 27, 2014.) In addition, in May 2014, applicant’s speech discrimination results from his “significant” hearing loss showed a “significant decrease in understandability since his last test in 2010.” (*Ibid.*) These medical records evidence that applicant was fitted for hearing aids as a result of his hearing loss before he retired from his job as a bus driver for defendant. (See Joint Exh. DD, Hearing Resource Center records.)

Even so, applicant never reported any hearing loss to his employer and never again requested ear protection for fear of losing his job. (MOH/SOE, at p. 5.) I disagree with the majority that complaining about the noise on the bus, which is identified as part of his job duties (see Joint Exh. GG, p. 4), could be construed as sufficient section 5401 notice to the employer of a work-related injury. After his retirement in 2015, applicant still chose not to file a claim for what he knew to be a job-related hearing loss. In other words, applicant chose not to pursue a workers’ compensation claim for his hearing loss and must live with his choice. As stated by the WCJ in the Opinion on Decision,

The applicant also had ample time after his retirement to file a claim. He could have possibly defended his delay at that time indicating that he was fearful of the employer’s retaliation for filing a claim. He instead waited four additional years after his retirement to file a claim. **This is found to be unreasonable and not credible.**

(F&O, Opinion on Decision, p. 6, emphasis added.)

We give great deference to the credibility determinations of the WCJ because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505]; also see *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140-141.) Only evidence of considerable substantiality would warrant rejecting a WCJ’s credibility determination. (*Garza, supra*, 3 Cal.3d at 318-319.) I find no such evidence in the record of this case to overcome the WCJ’s determination that applicant’s explanation for why he waited four years after he retired to file the claim was “unreasonable and not credible.”

Accordingly, based on the Opinion on Decision, the Report and for the reasons stated in this Dissenting Opinion, it would be my decision after reconsideration to affirm the decision of the WCJ in this case that defendant met its burden of proof and that applicant's claim for hearing loss is barred by the one-year statute of limitations in section 5405, subdivision (a).

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 6, 2026

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

**RICHARD LOWE
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC, INC.
SAN MATEO COUNTY TRANSIT DISTRICT
AGM LAW OFFICES**

AJF/mc

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