WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

TERRANCE MARTINEZ, *Applicant*

vs.

MK ROOFING, INC.;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ9191050
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration[1] to study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 24, 2021. The WCJ found, in relevant part, that 1) on April 13, 2012, while employed by defendant as an outside salesperson, applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to his back; 2) even if an industrial injury occurred on April 13, 2012, as applicant was aware of the occurrence and did not report any injury until after his termination, no compensation is owed pursuant to Labor Code section 3600(a)(10)[2]; and 3) per section 5405, the November 18, 2013 commencement of the claim exceeded the statutory maximum and barred recovery for an April 13, 2012 injury claim. Based on these findings, the WCJ ordered that applicant take nothing by way of his claim.

Applicant contends, in essence, that he proved by a preponderance that he sustained a back injury, his injury is not barred by the post-termination defense, and defendant did not meet their burden of proof with respect to the statute of limitations defense.

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[1] Commissioner Lowe, who was on the panel that granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Workers' Compensation Appeals Board. Another panel member has been assigned in her place.

[2] All section references are to the Labor Code, unless otherwise indicated.

The defendant has not submitted an Answer.

The WCJ submitted a Report and Recommendation on Petition for Reconsideration (Report), recommending applicant's Petition be denied.

We have considered the Petition and the contents of the Report with respect thereto. Based on our review of the record and 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

We will briefly review the relevant facts.

Applicant filed an Application for Adjudication of Claim (Application) claiming an injury to his back while employed by defendant as a truck driver/sales on April 13, 2012.

On December 26, 2013, defendant issued a denial letter denying the claim as section 3600(a)(10) precludes compensation for injuries claimed after a notice of termination or layoff without an applicable exception.

Applicant worked for defendant from about December 2011 to December 11, 2012. (Minutes of Hearing/Summary of Evidence (MOH/SOE), dated September 25, 2019, at p. 4:20-21.) Defendant terminated the applicant for cause. (MOH/SOE, dated June 22, 2021, at p. 4:6-8.)

According to a treatment report dated November 29, 2013, applicant complained of having consistent dull pain in his low back and cramping in his leg due to lifting and standing too long when he previously came in on May 27, 2005. (Applicant's Exhibit #3, Treatment Report by Lily Li, L.Ac, dated November 29, 2013.) Applicant obtained treatment at Bright Acupuncture Clinic two to four times a month with his last session on November 29, 2013. (*Id*.) Applicant sought treatment with Lily Li, L.Ac at Bright Acupuncture Clinic on November 29, 2013. (*Id*.)

On July 12, 2017, applicant was evaluated by Talal Malhis, M.D., at PIH Health. (Applicant's Exhibit #1, Records from PIH Health, dated July 12, 2017, at p. 1.) Dr. Malhis noted applicant was being referred by Dr. Gregory Galbreath for the back pain he has had for five years (*Id*.) Dr. Malhis reviewed an x-ray of the lumbar spine which showed severe degeneration of all discs. (*Id*.) Dr. Malhis recommended applicant obtain an MRI of the lumbar spine. (*Id*. at p. 5.)

Applicant was evaluated by orthopedic surgery panel qualified medical evaluator (QME), Lee Silver, M.D., who issued two reports dated January 15, 2018 and April 2, 2018. As of April 2, 2018, the QME found that applicant's claimed injury was caused by his employment, but did

not find that applicant had reached maximum medical improvement. (Applicant's Exhibit #6, Report of Dr. Lee Silver, dated April 2, 2018, at p. 5.)

On September 25, 2019, parties proceeded to trial on the issues of injury AOE/COE, whether the statute of limitations defense applies, and whether the post-termination defense applies. After several days of trial and testimony from applicant and defendant's witness, Frank Manteleone, the WCJ ordered the matter submitted for decision as of June 30, 2021.

DISCUSSION

I.

We now turn to the merits of the case.

Our system is based on medical evidence. (*Peter Kiewit Sons v. I.A.C.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188]; (*City & County of San Francisco v. I.A.C.* (*Murdock*) (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].)

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d*); Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) Medical evidence is required if there is an issue regarding the compensability of the claim. (Lab. Code, §§ 4060(c)(d), 4061(i), 4062.3(l).) A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (*2005*) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) "[T]he 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." (*McLaughlin*, *supra*, 234 Cal.App.2d at p. 839 ["[i]n a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation"].)

The requirement for expert medical evidence exists throughout workers' compensation proceedings, including determination of temporary disability, permanent disability, apportionment, and causation of injury. (See e.g., *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579]*; County of San Bernardino v. Workers' Comp. Appeals Bd.* (*Nelson-Watkins*) (2018) 83 Cal. Comp. Cases 1282 (writ denied) [applicant's correlation of symptoms with work exposures insufficient to establish knowledge her condition was caused by employment]; *Hughes Aircraft Company v. Workers' Comp. Appeals Bd.* (*Zimmerman*) (1993) 58 Cal.Comp.Cases 220 (writ denied) [general medical advice that work stress was depleting applicant's immune system insufficient to confer knowledge for purposes of section 5412]; see also *Zenith Insurance Co. v. Workers' Comp. Appeals Bd.* (*Yanos*) (2010) 75 Cal. Comp. Cases 1303 (writ denied) [statute of limitations does not begin to run prior to applicant's knowledge she had sustained a cumulative trauma and that injury was work-related].)

In the instant case, the QME evaluated applicant on January 15, 2018. After examining applicant and reviewing the medical reports that defendant provided, the QME found industrial causation. (Applicant's Exhibit #6, at pp. 4-5.) However, we note the QME has not reviewed the subpoenaed records from PIH Health nor the records from Bright Acupuncture Clinic, where applicant was seen for his low back pain. In his report, Dr. Silver also noted applicant initially sought medical attention with his general practitioner, Dr. Reyes, and that clarification regarding the actual date of injury could possibly be obtained by obtaining records from Dr. Reyes. (*Id.* at p. 4.) Without review of all the relevant medical records, Dr. Silver's opinions are not based on an accurate medical history and consequently, are not substantial medical evidence. Once the record has been appropriately developed, the WCJ will, in turn, need to review the medical-legal reporting and determine whether the QME reporting constitutes substantial evidence. (*Lamb*, *supra*, 11 Cal. 3d at p. 281; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525] [relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions].)

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] ["The principle of allowing full development of

the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims."]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]*; Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

II.

Although we acknowledge the WCJ's reservations regarding applicant's lack of credibility, the WCJ's determination is not dispositive. We generally accord great weight to a WCJ's findings on the credibility of witnesses as the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].) When a WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight by the Board and rejected only on the basis of contrary evidence of considerable substantiality. (*Lamb*, *supra*, 11 Cal.3d 274; *Garza*, *supra*, at p. 318.) It has long been recognized, however, that evidence from a lay witness on an issue requiring expert opinion is not substantial evidence, and medical proof is required when issues of diagnosis, prognosis, and treatment are beyond the bounds of ordinary knowledge. (*Murdock*, *supra*, 117 Cal.App.2d at p. 459.) The Appeals Board is empowered on reconsideration to resolve conflicts in the evidence, to make its own credibility determinations, and to reject the findings of the WCJ and enter its own findings on the basis of its review of the record. (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908.)

Here, to ensure that the QME has a complete and factually accurate record of applicant's injury and medical treatment history, it is necessary for the WCJ to further develop the record. Although the QME found an industrial injury, it is unclear the extent to which that finding was based on applicant's credibility. The QME should be afforded the opportunity to address causation in light of the trial testimony, as well as the WCJ's credibility determinations in the WCJ's Opinion on Decision and the WCJ's Report. It is necessary to return to the QME for an opinion on how, or if at all, the WCJ's credibility determination may affect the QME's opinion on injury.

III.

We now turn to the issue of whether the post-termination defense under section 3600(a)(10) applies. The WCJ found applicant's claim to be barred by section 3600(a)(10), which provides in pertinent part that:

> (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.

(Lab. Code, § 3600(a)(10).)

The initial burden in asserting a post-termination bar to compensation, an affirmative defense, rests with a defendant, who must establish that the claim for compensation was filed after a notice of termination or layoff, including voluntary layoff, and that the claim is for an injury occurring prior to the time of notice of termination or layoff. (Lab. Code, §§ 3600(a)(10), 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.)

In the instant case, applicant alleged an industrial injury occurred on April 13, 2012. Applicant testified he was terminated in December. (MOH/SOE, dated January 14, 2021, at p. 4:5.) He further testified he stopped working right about Christmas in 2012 or 2013. (*Id.* at p. 3:22-23.) Defendant's witness, Frank Monteleone, also testified that he believed applicant was terminated in 2012. (MOH/SOE, dated June 22, 2021, at p. 4:6.) Applicant's DWC-1 claim for an

April 13, 2012 date of injury was completed on October 30, 2013 and filed in the Electronic Adjudication Management System (EAMS) on November 18, 2013. There is no question as to the fact applicant was terminated. Thus, defendant has established that there was an actual termination and that applicant's claim for a specific injury was filed after a notice of termination or layoff.

Once the defendant has made the initial showing necessary to a post-termination defense, the burden shifts to applicant to establish one of the available exceptions listed in section 3600, subdivisions (a)(10)(A) through (D).

Here, applicant contends his injury is not barred by the post-termination defense of section 3600(a)(10). Applicant asserts the exception of subdivision (a)(10)(B) applies as applicant self-procured treatment with acupuncturist, Lily Li. (Petition, at pp. 8-9.) Applicant submitted into evidence a letter from acupuncturist Li, dated November 29, 2013, stating that applicant presented at Bright Acupuncture Clinic on May 27, 2005 with complaints to his low back and leg. The acupuncturist further stated that applicant treated two to four times a month and confirmed his last treatment session was on November 29, 2013. However, the actual treatment records spanning the period from May 27, 2005 through November 29, 2013 were not submitted into evidence. Although applicant submitted into evidence subpoenaed records from PIH, the only records from PIH admitted as Exhibit 1 reflect an office visit with Dr. Malhis on July 12, 2017. The records do not indicate a specific injury occurring in 2012 but do reference longstanding back issues for the past five years. Moreover, although applicant testified he went to see his doctor, Dr. Reyes, who he saw until about 2015, records have not been submitted. (MOH/SOE, September 25, 2019, at p.5:19-21.)

This matter must be returned for development of the record to obtain the complete records from Dr. Reyes, PIH, and Bright Acupuncture Clinic. These records are needed to fully adjudicate the issue of whether the post-termination defense per section 3600(a)(10) applies.

IV.

We will now address whether applicant's claim is barred by the statute of limitations.

Generally, the filing of an application commences proceedings before the WCAB. (Lab. Code, § 5500; Cal. Code Regs., tit. 8, § 10450.) The time limitations for commencing proceedings are set forth in section 5405 as follows:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
>
> (a) The date of injury.
>
> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
>
> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

(Lab. Code, § 5405.)

Thus, an applicant must commence proceedings with the WCAB within one year of (1) the date of injury; or (2) the expiration of the period covered by the employer's last payment of disability indemnity; or (3) the date of the last furnishing by the employer of medical, surgical or hospital treatment. (*J.T. Thorp v. Workers' Comp. Appeals. Bd.* (1984) 153 Cal.App.3d 327 [49 Cal.Comp.Cases 224].) The statute of limitations is an affirmative defense, and therefore, the burden of proof rests with defendant. (Lab. Code, §§ 5409, 5705.)

However, pursuant to section 5401(a), an employer has a duty to inform an injured employee of their workers' compensation rights when the employer has actual or constructive knowledge of a work-related injury. Failing to meet that duty equitably tolls the above time limits. (*Kaiser Found. Hosp. Permanente Medical Grp. v. Workers' Comp. Appeals Bd.* (1985) 39 Cal.3d 57, 66 [50 Cal.Comp.Cases 411]; *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726, 728 [39 Cal.Comp.Cases 768].)

At this time, we are unable to address the issue of whether the statute of limitations defense applies to the alleged April 13, 2012 injury. As previously discussed, the QME will need to review all relevant medical records as well as applicant's trial testimony, the WCJ's Opinion, and the WCJ's Report to re-address causation of the alleged injury. Once the QME issues a supplemental report, the WCJ will need to re-analyze whether the statute of limitations defense applies based on the new reporting.

Accordingly, we will rescind the F&O issued on August 24, 2021 and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings and Order of August 24, 2021 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 21, 2026

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

TERRANCE MARTINEZ
MOORE & ASSOCIATES
STATE COMPENSATION INSURANCE FUND

JL/abs

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