WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALVINA BARRIOS, *Applicant*

vs.

AEROTEK/ALLEGIS GROUP; ACE AMERICAN INSURANCE COMPANY, ADMINISTERED BY ESIS; COLLINS TECHNOLOGIES (CURTISS-WRIGHT CORPORATION); TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendants*

Adjudication Numbers: ADJ8113559; ADJ8119670; ADJ8119246; ADJ8113640
Marina Del Rey District Office

OPINION AND DECISION
AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant Travelers Property Casualty Company of America (Travelers) seeks reconsideration of the February 6, 2020 Findings of Fact & Award (F&A) wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a welder from March 1, 2004 through May 16, 2007, sustained industrial injury to the neck, back, bilateral upper extremities (shoulders and wrists), pulmonary system (lungs and respiratory system) and gastrointestinal system. The WCJ awarded temporary and permanent disability and found the need for future medical care.

Travelers contends that the WCJ improperly relied on the opinions of the Agreed Medical Evaluator (AME) from a consolidated case, that Travelers did not agree to the AME, that various treating physician reports are not substantial medical evidence, that the statute of limitations bars compensation, and that applicant is attempting to "re-litigate" injuries resolved by a prior settlement.

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[1] Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

We have received an Answer from applicant, and from co-defendant ACE American Insurance, administered by ESIS (ACE/ESIS). The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the answers filed by applicant and ACE/ESIS, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&A.

FACTS

In 1998, applicant was hired by staffing agency Aerotek, who placed her with various companies as an assembler and welder. (Ex. F, Report of AME Stephen Brourman, M.D., dated May 21, 2012, at p. 2.) In March, 2004, Aerotek placed applicant with Collins Technologies also known as Curtiss-Wright Corporation (Collins), as an assembler and welder. Applicant worked at Collins for approximately four months before being hired directly by Collins as an employee on September 11, 2004. (Petition, at 2:16; Minutes of Hearing and Summary of Evidence (Minutes), dated July 6, 2017 at 8:18.) Applicant's job at Collins involved welding, soldering and gluing layers of material together. (Minutes, at 8:22.) Applicant testified that she was exposed to fumes from the glue and the welding. (*Id*. at 9:1.)

On December 27, 2005, applicant claimed injury to the low back and extremities while repositioning her chair while working at Collins, then insured by Travelers. Applicant's claim was designated case no. ADJ237362.

Applicant continued to work for Collins until May 15, 2007. (Petition, at 2:20.) Applicant did not work again until 2009. (Minutes, at 11:8.)

On September 29, 2008, QME John Santaniello, M.D. evaluated applicant's claim for orthopedic injury with Collins, and diagnosed a lumbosacral spine strain/sprain with spondylosis, without impairment. (Ex. T, report of QME John Santaniello, M.D., dated September 29, 2008, p. 7.) Following a record review on April 7. 2009, Dr. Santaniello identified 8% whole person impairment, with apportionment. (Ex. U, report of QME John Santaniello, M.D., dated April 7. 2009.)

Applicant returned to work for Aerotek from October 12, 2009 to December 8, 2009. Aerotek placed applicant with L3 Communications in essentially the same position as at Collins, although the position at L3 also involved wrapping metal bars. (Petition, at 2:21; Ex. F, report of

AME Stephen Brourman, M.D., dated May 21, 2012, at p. 3; Minutes, at 9:13; 11:10.) Applicant experienced increased pain in her hands from working with the metal bars until her last day of work on December 8, 2009. (Minutes, at 10:22.)

On July 12, 2010, applicant resolved case no. ADJ237362 by way of Compromise and Release, with respect to the orthopedic injuries claimed on December 27, 2005 while employed by Collins.

On December 15, 2011, applicant filed case no. ADJ8113559, alleging injury on December 8, 2009 to the back, waist, right hip, right leg, bilateral upper extremities, lungs and throat, eyes, internal system, gastrointestinal system, neck, shoulders, ears, nose and throat, both shoulders, and wrists, while employed as a welder by Aerotek. Applicant also filed case no. ADJ8113640, alleging injury from October 12, 2009 to December 7, 2009, to the back, waist, wrist, right hand, right leg, bilateral upper extremities, lungs and throat, eyes, internal system, gastrointestinal system, neck, shoulders, right hip, ears, nose and throat, while employed as a welder by Aerotek.

On December 20, 2011, applicant filed case no. ADJ8119670, claiming injury to the back, wrists, right hip, neck, right leg, bilateral upper extremities, lungs and respiratory system, eyes, internal system, gastrointestinal system, shoulders, and ears, nose, and throat while employed as a welder by defendant Collins, from March 1, 2004 to May 16, 2007. Applicant also filed case no. ADJ8119246, claiming injury to the same body parts as in ADJ8119670, while employed by Collins from December 28, 2005 to May 15, 2007.

Applicant and ACE/ESIS agreed to Steven Brourman, M.D., as their orthopedic AME. On May 21, 2012, Dr. Brourman evaluated applicant, but indicated additional records would be necessary before the physician could offer a medical-legal opinion. On July 9, 2012, Dr. Brourman offered his opinions on impairment following submission of records, but again deferred on apportionment pending receipt of additional records. (Ex. E, report of Steven Brourman, M.D. dated July 9, 2012.)

On August 14, 2012, applicant self-procured medical treatment with internist Cranford L. Scott, M.D. Dr. Scott reviewed applicant's job duties at both Collins and Aerotek, diagnosed fibromyalgia and glue fume exposure, and prescribed medication. (Ex. 21, report of Cranford Scott, M.D., various dates, p. 43.)

On January 29, 2013, AME Dr. Brourman again reviewed extensive records as well as applicant's job duties for both Collins and L3 Communications. (Ex. D, report of AME Steven Brourman, M.D., dated January 29, 2013, p. 22.) Dr. Brourman acknowledged applicant's prior workers' compensation claim, as well as her history of multiple surgeries. Dr. Brourman concluded that 30% of applicant's low back, lower extremity, and upper extremity conditions arose out of the 2005 injury sustained at Collins. The AME opined that the remaining 70% of the low back, lower extremity, and upper extremity conditions were attributable to the claimed cumulative trauma between March 1, 2004 and May 15, 2007. Applicant's employment with Aerotek and L3 Communications was felt to be noncontributory. (*Id*. at p. 24.)

Dr. Cranford Scott issued a reevaluation report on May 28, 2013, which included a full clinical exam and a review of records. Dr. Scott discussed applicant's job duties for Collins from 2004 through May, 2007, and also applicant's brief return to work as a welder in 2009. (Ex. 21, report of Cranford Scott, M.D., dated May 28, 2013, p. 5.) Applicant was diagnosed, in relevant part, with a history of tracheal stenosis and an airway inhalation injury secondary to toxic fume exposure to welding, soldering, solvents and glue. (*Id*. at p. 7.) Dr. Scott described applicant's levels of permanent disability without apportionment to nonindustrial factors. (*Id.* at p. 9)

The parties to the claims filed against Collins selected John Santaniello, M.D., who had acted as the QME on applicant's earlier 2005 claim, to again act as QME with respect to applicant's 2007 claims. Dr. Santaniello issued a report on July 7, 2014, following a clinical examination of applicant and a review of the medical record. The QME determined applicant had a pre-existing low back injury and had sustained no injury to the neck, thoracic spine or bilateral shoulders. The QME identified no impairment the bilateral elbow, hands and wrists other than a pain add-on. Causation of the upper extremities injury was attributed to applicant's work at L3 Communications. (Ex. V, report of QME John Santaniello, M.D., dated July 7, 2014, p. 42.)

On August 18, 2014, the deposition of AME Dr. Brourman was taken by Travelers who was not a party to the AME Agreement. (Ex. H, transcript of the deposition of AME Steven Brourman, M.D., dated August 18, 2014, at 6:17.) The transcript indicates the parties had a significant discussion prior to going on the record. Upon going on the record, Dr. Brourman agreed there were "ambiguities" in the record regarding symptom onset, and that he would reevaluate applicant and issue a supplemental report addressing both the claimed carpal tunnel condition, and evidence regarding a motor vehicle collision and apportionment. (*Id*. at 5:8.)

In a report of January 26, 2015, Dr. Brourman issued his findings in response to the questions raised by the parties at deposition. Specifically addressing the issue of causation, Dr. Brourman reiterated his opinion that applicant's disability arose from her employment with Collins, rather than Aerotek/L3 Communications:

> To begin with, she only worked for a few months at Aerotek and she did not lift more 5-6 pounds. She also noted that her low back pain has been unchanged since 2005 and her low back did not get any worse in 2009, although she thinks that is might have become worse in 2007. She has noted no change in her right upper extremity complaints since she was last seen here, but she does have evidence of nerve dysfunction and that could have gotten worse, hence she will be sent for updated electrodiagnostic testing. At the present with the information at hand, I do not see evidence of new or further disability pertaining to the brief period of work that she performed at Aerotek from 10/12/09 to 12/07 /09.

(Ex. C, Report of AME Steven Brourman, M.D., dated January 26, 2015, at p. 22.)

Dr. Brourman issued a supplemental report on February 23, 2015, that reflected updated clinical findings for applicant's bilateral upper extremities. The AME assessed whole person impairment bilaterally, noting that "[t]he patient's current level of disability calculation has essentially remained unchanged from July 9, 2012, with the exception of the right shoulder and right elbow impairment ratings." (Ex. B, Report of AME Steven Brourman, M.D., dated February 23, 2015, at p. 43.)

Following receipt of these reports, Travelers issued a written request to Dr. Brourman to review the reporting of QME Dr. Santaniello, M.D. Dr. Brourman opined in a report of June 1, 2015 that the submitted records did not cause him to change his opinion. (Ex. A, report of AME Steven Brourman, M.D., dated June 1, 2015, pp. 2-3.)

Dr. Brourman issued a final report on March 14, 2016, noting clerical error in the causation and apportionment discussion of his report of February 23, 2015, and that in his opinion, applicant's injury arose out of her employment with Collins Technologies, and not Aerotek. (Ex. G, report of AME Steven Brourman, M.D., dated March 14, 2016, p. 2.)

The parties proceeded to trial on March 30, 2017. The four pending cases were ordered consolidated. (Minutes of Hearing and Order of Consolidation, dated March 30, 2017, at 3:2.) Travelers objected to the consolidation because they did not participate in the AME agreement with Dr. Brourman, and instead were relying on the reporting of QME Dr. Santaniello. (*Id*. at 3:8.)

Trial was continued to July 6, 2017, at which time Travelers objected to the admissibility of the reporting of Cranford Scott, M.D., on the grounds that the doctor did not discuss alleged toxic exposure while applicant worked at L3 Communications for Aerotek. (Minutes, at 7:13.) Applicant testified to her vocational history, including her placements by Aerotek with Collins and later with L3 Communications, her various job duties and exposures. The WCJ ordered the matter submitted, but later vacated the order at the parties' joint request to allow for further settlement discussions. (Further Order re Submission, dated December 13, 2017.) The matter was once again submitted for decision following notice from the parties that settlement was not then possible.

On February 7, 2020 the WCJ issued four separate decisions. In ADJ8119670, the WCJ found that applicant sustained injury AOE/COE while employed by Collins to the neck, back, bilateral upper extremities (shoulders and wrists), pulmonary system (lungs and respiratory system) and gastrointestinal system, but not to the right hip, right leg or internal system (other than gastrointestinal system), ears, nose, or throat. (February 6, 2020 F&A, Findings of Fact, Nos. 7 and 8.) The WCJ awarded temporary and permanent disability, awarded attorney fees, and found a need for further medical care. In the Opinion on Decision, the WCJ explained that the findings of injury, temporary and permanent disability, and apportionment were based on the findings of AME Dr. Brourman and Dr. Scott. (February 6, 2020 F&A, Opinion on Decision, pp. 2-3.)

In ADJ8119246, the WCJ dismissed the case as a duplicate filing. In ADJ8113640, the WCJ found no injury AOE/COE with Allegis/Aerotek from October 12, 2009 to December 7, 2009. In ADJ8113559, the WCJ found no injury AOE/COE by Allegis/Aerotek on December 8, 2009.

Travelers' Petition argues that "the court should not have admitted any of Dr. Brourman's AME reports against Travelers because Travelers was not a party to the AME process and had no role in selecting Dr. Brourman as AME or in drafting the joint letter or in deciding what medical records and other information should be sent for his review." (Petition, at 7:18.) Travelers further contends the reporting of Dr. Scott and Dr. Richlin are not substantial medical evidence, that applicant's claim is barred by the statute of limitations, and that applicant is attempting to "relitigate" body parts that were settled as part of the prior Compromise and Release agreement.

Applicant's Answer avers defendant waived the statute of limitations defense for failure to timely raise the issue, that the evidence relied upon by the WCJ was substantial, and that the reporting of QME Dr. Santaniello was obtained in violation of *Navarro v. City of Montebello*

(2014) 79 Cal.Comp.Cases 418 [2014 Cal. Wrk. Comp. P.D. LEXIS 41] (Appeals Board en banc) (*Navarro*). (Applicant's Answer, dated March 12, 2020.)

Defendant ACE/ESIS's answer contends that Travelers actively participated in the AME process, and that the reporting of QME Dr. Santaniello is inadmissible for failure of compliance with Labor Code[2] sections 4060, 4062 and 4067. (ACE/ESIS Answer, dated March 12, 2020, at 7:6.) ACE/ESIS further contends the reporting of AME Dr. Brourman, Dr. Scott and Dr. Richlin constitute substantial medical evidence, and that applicant worked for less than two months for Aerotek/L3 and did not lift more than 5-6 pounds. (*Id*. at 9:8.)

The WCJ's report observes that Travelers undertook the deposition of AME Dr. Brourman and requested and received supplemental reporting from the AME. (Report, at p. 11.) The WCJ further states that the issue of whether compensation is barred by the statute of limitations was waived when it was not timely raised. (*Id*. at p. 12.)

DISCUSSION

Applicant and ACE/ESIS aver that the reporting of QME Dr. Santaniello is not admissible because the physician served as the QME on applicant's prior claim of injury of December 27, 2005, a case which settled prior to the filing of the instant applications. (Order Approving Compromise and Release (ADJ237362), dated July 12, 2010.) Applicant and ACE/ESIS contend applicant was not required to return to Dr. Santaniello pursuant to section 4067, and to the extent that Dr. Santaniello reported on applicant's four pending cases, the QME was obtained in contravention of medical-legal procedure set forth in section 4062 and 4062.2 and *Navarro, supra,* 79 Cal.Comp.Cases 418. (Applicant's Answer at 9:15; ACE/ESIS Answer at 7:12.) However, the record reflects no concurrent objection to the selection of Dr. Santaniello, no request for replacement panel, and no request for hearing on the issue. Accordingly, and on the record before us, we discern no error in the WCJ's order admitting the reporting of the QME Dr. Santaniello.

Travelers contends there is no substantial medical evidence to establish injury AOE/COE. (Petition, at 7:9.) In support of this contention, Travelers asserts that it was error for the WCJ to admit the reporting of AME Dr. Brourman into evidence because Travelers was not a party to the AME process. (*Id*. at 7:18.) However, the WCJ ordered all four pending cases consolidated pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10396, which allows for

[2] All further statutory references are to the Labor Code unless otherwise stated.

consolidation of two or more related cases involving the same injured employee or multiple injured employees. (Cal. Code Regs., tit. 8, § 10396(a).) Subsection (e) provides that, "[a]ll relevant documentary evidence previously received in an individual case shall be deemed admitted in evidence in the consolidated proceedings and shall be deemed part of the record of each of the several consolidated cases." Dr. Brourman was the validly selected AME in two of the consolidated cases, and pursuant to Rule 10396, the reporting became a part of the record in all of the consolidated cases.

In addition, section 4064(d) provides that "[a]ll comprehensive medical evaluations obtained by any party shall be admissible *in any proceeding* before the appeals board except as provided in Section 4060, 4061, 4062, 4062.1, or 4062.2." (Emphasis added.) Also, pursuant to section 4061(i), AME Dr. Brourman's reporting is admissible as a validly obtained comprehensive medical-legal opinion obtained in accordance with section 4062.2. (See *Lorenz v. Encino Hospital Medical Center* (August 21, 2014, ADJ7659456) [2014 Cal. Wrk. Comp. P.D. LEXIS 410].)[3]

Nor do we discern prejudice to Travelers by the admission of the AME reporting, because Travelers has actively engaged with AME Dr. Brourman as part of its discovery efforts. Travelers undertook the deposition of Dr. Brourman on August 18, 2014, attended by counsel for Travelers, ACE/ESIS and applicant. (Ex. H, Transcript of the Deposition of AME Steven Brourman, M.D., dated August 18, 2014, at 5:8.) The parties engaged in an off the record discussion and agreed that Dr. Brourman would review additional records including the QME reporting of Dr. Santaniello, reevaluate applicant, and issue supplemental reporting. (*Ibid.*) Following receipt of the specified records, Dr. Brourman issued supplemental reporting that reviewed and responded to the questions raised at deposition. (Ex. C, AME Report of Steven Brourman, dated January 26, 2015, at p. 22.) On April 29, 2015, Travelers again requested supplemental review and reporting from AME Dr. Brourman, whose report of June 1, 2015 responded to the issues raised by Travelers. (Ex. A, Report of AME Steven Brourman, M.D., dated June 1, 2015.)

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to *Lorenz v. Encino Hospital Medical Center* because it considered a similar issue.

Travelers has also opted to obtain QME reporting with Dr. Santaniello in its own cases pursuant to Labor Code sections 4062 and 4062.2, and that reporting was admitted into the record pursuant to the WCJ's consolidation order. Thus, the WCJ reviewed and weighed the various reports in evidence, including that of AME Dr. Brourman and that of QME Dr. Santaniello, and determined the reporting of Dr. Brourman to be the most well-reasoned and persuasive. (See also *Cahill Contractors v. Workers' Comp. Appeals Bd.* (2015) 80 Cal.Comp.Cases 815 [2015 Cal. Wrk. Comp. LEXIS 97] (writ denied); *Hunter v. Entertainment Partners* (May 9, 2016, ADJ7935179 [2016 Cal. Wrk. Comp. P. D. LEXIS 233.) "[I]t is well established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions." (*Place v Workmen's Comp. Appeals Board* (1970) 3 Cal. 3d 372, 378-379 [35 Cal.Comp.Cases 525, 529-530].)

We thus conclude that the reporting of AME Dr. Brourman was generally admissible in these consolidated proceedings, and that the WCJ retained the authority to evaluate each report admitted into evidence on its own merits, and to determine whether each report constituted substantial medical evidence. A WCJ is empowered to choose among conflicting medical reports and rely on that which they deem most persuasive, provided that the opinion is substantial evidence in light of the entire record. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476 [33 Cal.Comp.Cases 221]; *Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) On the record before us, we agree with the WCJ's determination that the reporting of AME Dr. Brourman is substantial medical evidence. Accordingly, we find no good cause to disturb the WCJ's findings on causation and nature and extent of the claimed injury based on the AME's medical-legal opinions.

Travelers further contends that the reporting of treating physician Cranford Scott, M.D., is not substantial medical evidence for failure to consider possible exposures sustained by applicant while working Aerotek/L3 Communications from October 12, 2009 to December 8, 2009. (Petition, at 10:16.) However, Dr. Scott was clearly aware of applicant's job duties as a welder at both Collins and Aerotek/L3 Communications. (See Ex. 21, report of Cranford Scott, M.D., dated August 13, 2012, p. 3.) Dr. Scott further noted that applicant's work as a welder Aerotek/L3 Communication was brief, and included a period of time when applicant was assigned to load metal bars when there was no further welding work available. (*Ibid.*) Dr. Scott also noted that

"following the correction of the subglottic stenosis with the crichotracheal corrective surgery, [applicant] had a resolution of her complaints of dyspnea and she no longer required any medications for her respiratory system since 2005." (Ex. 21, report of Cranford Scott, M.D., dated May 28, 2013, p. 8.) Additionally, Travelers did not raise its concerns with Dr. Scott, seek supplemental reporting, depose the physician, or seek a QME pursuant to section 4062.2. Accordingly, we find no error in the WCJ's reliance on the reporting of Dr. Scott.

Travelers further contends that the WCJ failed to consider its affirmative defense that compensation is barred by section 5405. (Petition, at 13:4.) The statute of limitations is an "affirmative defense" that is to be narrowly construed. (Lab Code, § 5409 ["The running of the period of limitations prescribed by this chapter is an affirmative defense and operates to bar the remedy and not to extinguish the right of the employee. Such defense may be waived. Failure to present such defense prior to the submission of the cause for decision is a sufficient waiver."]; *Bianco v. Industrial Acc. Com.* (1944) 24 Cal. 2d 584 [150 P.2d 806, 9 Cal. Comp. Cases 206] ["Statute of limitation should not be interpreted in a manner which will result in the right being lost before it accrues unless the language of the statute clearly compels such interpretation."].) The defense of the statute of limitations is waived if not timely raised because the failure to raise an issue at the earliest opportunity acts as a waiver of the issue. (Lab. Code, § 5409; *Hurwitz v. Workers' Comp. Appeals Bd. (Esposito)* (1979) 97 Cal.App.3d 854 [44 Cal.Comp.Cases 983]; cf. *U.S. Auto Stores v. Workers' Comp. Appeals Bd. (Brenner)* (1971) 4 Cal.3d 469 [36 Cal.Comp.Cases) 173; *Los Angeles Unified Sch. Dist. v Workers' Comp. Appeals Bd. (Henry)* (2001) 66 Cal.Comp.Cases 1220 (writ denied); *Hollingsworth v Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 715 (writ denied); *Sanchez v Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 485 (writ denied); *Sycamore Pharmacy, Inc. v Workers' Comp. Appeals Bd (Reynoso)* (1997) 62 Cal.Comp.Cases 1322 (writ denied); *Travelers Ins. Co. v. Workers' Comp. Appeals Bd. (Coker)* 45 Cal.Comp.Cases 535 (writ denied).)

All parties in workers' compensation proceedings retain their fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal. App. 4th 151, 157-158, [65 Cal. Comp. Cases 805].) Due process guarantees all parties the right to notice and a fair hearing. (*Rucker, supra*, at 157-158.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v.*

Workers' Comp. Appeals Bd. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at 157-158, citing *Kaiser Co. v. Industrial Acci. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [7 Cal. Rptr. 2d 66, 57 Cal.Comp.Cases 230].)

In *Rucker, supra,* 82 Cal.App.4th 151, the Court of Appeal found due process was violated when the WCJ's amended decision was based on a completely different theory than presented by the parties, without affording a chance for rebuttal. And in *Gangwish, supra,* 89 Cal.App.4th 1284, the Court of Appeal held that it was a denial of due process for the Appeals Board to base a final decision on a legal rationale that had not been raised by either party at a Mandatory Settlement Conference or at trial, since it deprived the losing party of the opportunity to address that issue in rebuttal.

Here, the application was filed on December 20, 2012. Travelers did not assert its statute of limitations defense in an Answer, or at any ensuing conference, or in the Pre-Trial Conference Statement completed by parties on February 29, 2016. It was not until the commencement of trial proceedings on March 30, 2017, four years after the application was filed, that Travelers raised the issue of the statute of limitations for the first time. Travelers' failure to raise an affirmative defense until the first day of trial effectively abrogates the parties' right to marshal rebuttal evidence or to respond meaningfully to the contention advanced. Moreover, Travelers offers no explanation for the delay in raising the issue. Accordingly, and on the facts before us, we discern no error in the WCJ's determination that the issue was waived.

Travelers further contends that applicant is precluded from bringing the instant claim under the doctrine of *res judicata*. (Petition, at 14:6.) However, the issue of claim preclusion[4] (*res*

[4] In *DKN Holdings, LLC v. Faerber* (2015) 61 Cal. 4th 813 [189 Cal. Rptr. 3d 809], the California Supreme Court noted that multiple equitable doctrines had been grouped under the term "res judicata," and clarified that "[t]o avoid future confusion, we will follow the example of other courts and use the terms 'claim preclusion' to describe the primary aspect of the res judicata doctrine and 'issue preclusion' to encompass the notion of collateral estoppel … It is important to distinguish these two types of preclusion because they have different requirements. Claim preclusion "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen, supra*, 28 Cal.4th at p. 896.) Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. (*Ibid.; In re Crow* (1971) 4 Cal.3d 613, 622 [94 Cal. Rptr. 254, 483 P.2d 1206]; *Teitelbaum Furs, supra,* 58 Cal.2d at p. 604.) If claim preclusion is established, it operates to bar relitigation of the claim altogether. Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. (*Mycogen, supra*, 28 Cal.4th at p. 896.) Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. (*Boeken, supra*, 48 Cal.4th at p. 797.) There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party."

judicata) is inapplicable in this matter, and even if defendant's assertion was viable, we would agree with the WCJ that Travelers waived its arguments when it failed to raise the issue at Mandatory Settlement Conference. (Report, at p. 12.)

Both claim preclusion (res judicata) and issue preclusion (collateral estoppel) are affirmative defenses, and the burden of raising and sustaining the issue rests with the party with the affirmative of the issue. (Lab. Code, § 5705 ["The burden of proof rests upon the party or lien claimant holding the affirmative of the issue."]; *Johnson v. Workers' Comp. Appeals Bd.* (1970) 2 Cal.3d 964 [35 Cal.Comp.Cases 362]; see *Morales v. Universal Furniture, American Home Assur. Co.* (September 25, 2017, ADJ634371) [2017 Cal. Wrk. Comp. P.D. LEXIS 591].)

Defendant avers that applicant is precluded from claiming a cumulative injury to overlapping body parts that were included in her prior claim of specific injury which resolved by way of Compromise and Release. (Travelers' Petition, at p. 14:6.) However, a bar to relitigating a claim under the doctrine of claim preclusion requires that the underlying claims involve the same cause of action.[5] Here, the claim previously settled by Compromise and Release involved a specific injury, rather than a cumulative injury, and alleged a different mechanism of injury. Defendant offers no substantial medical evidence or witness testimony that persuasively establishes that both claims arose out of the same cause of action. Accordingly, defendant's assertion of claim preclusion is inapplicable. Moreover, even were the assertion viable, we would reject it as having been waived. (*Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793, 1811-1812 [59 Cal.Comp.Cases 324].)

In summary, we find that the reporting of AME Dr. Brourman and treating physician Cranford Scott, M.D., were appropriately admitted into evidence and relied upon by the WCJ as the basis for finding injury with Collins, and that Travelers failed to timely raise the issues of the running of the statute of limitations and claim preclusion.

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[5] See footnote 3, *ante*.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 6, 2020 Findings of Fact & Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 6, 2024

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

ALVINA BARRIOS
PICCO & PRESLEY
SILVERII, CHEUNG & KUBIS
WOOLFORD & ASSOCIATES

SAR/abs

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