WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DAVE PARKER, *Applicant*

vs.

CALIFORNIA ANGELS aka LOS ANGELES ANGELS; ASSOCIATED INDEMNITY CORPORATION, administered by ALLIANZ RESOLUTION MANAGEMENT; ROGERS BLUE JAYS PARTNERS aka TORONTO BLUE JAYS; CONTINENTAL CASUALTY COMPANY, administered by CNA CLAIMPLUS, INC.; MILWAUKEE BREWERS; NATIONAL UNION FIRE INSURANCE COMPANY, administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Numbers: ADJ13474651; ADJ8651899
Santa Ana District Office

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
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 14, 2024, wherein the WCJ found in pertinent part that applicant's claims are barred by the doctrine of res judicata because applicant previously settled a case involving the same employers, similar injuries, and the same body parts.

Applicant contends that he is entitled to med-legal reporting and that the WCJ erred in finding that his claim is barred by res judicata.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will grant the Petition, rescind the Findings and Order issued on August 14, 2024, and return the matter to the WCJ for further proceedings consistent with this decision.

BACKGROUND

In case number ADJ8651899, applicant claimed injury to various body parts, while employed by defendants as a professional baseball player, during the period from February 1, 1970 to October 2, 1991. Applicant settled case number ADJ8651899 by way of a Compromise and Release (C&R), which was fully executed on March 7, 2017.

The only med-legal report in FileNet at the time of the C&R is from Stephen M. Weiss, M.D., Agreed Medical Evaluator (AME) in orthopedics, dated September 9, 2013. (Exhibit G, AME report of Dr. Stephen Weiss, dated September 9, 2013.) Dr. Weiss diagnosed: chronic pain bilaterally to the low back, shoulders, elbows, wrists, hips, and ankles; as well as Hallux rigidus, left great toe; and Parkinson's disease, deferred to neurology. (Exhibit G, AME report of Dr. Weiss, dated September 9, 2013, pp. 18-19.)

In addition to Dr. Weiss, applicant was previously evaluated by two AMEs: Charles Glatstein, M.D., in neurology, who issued two reports (Exhibit E, Dr. Glatstein's AME report, September 10, 2013; Exhibit D, Dr. Glatstein's report, June 30, 2014) and Mark H. Hyman, M.D., in internal medicine (Exhibit C, Dr. Hyman's AME report, September 11, 2013).

Dr. Glatstein diagnosed applicant with headaches, Parkinson's disease, and sleep disorder. (Exhibit E, Dr. Glatstein's AME report, September 10, 2013, p. 7.) He concluded that applicant sustained a CT injury resulting in headaches, the sleep disorder, and the Parkinson's disease. (*Id*., pp. 11-12; Exhibit D, Dr. Glatstein's supplemental AME report, June 30, 2014, p. 9.) In his discussion of Parkinson's disease, Dr. Glatstein also referenced literature regarding several conditions, including Parkinson's disease, a second variety of post-traumatic Parkinsonism, and a Parkinson-like syndrome, which is associated with repeated episodes of head trauma. (Exhibit E, Dr. Glatstein's AME report, September 10, 2013, p. 9.)

Applicant was also evaluated by Dr. Hyman on September 11, 2013, who diagnosed the following: metabolic-type syndrome, hypertension, diabetes, hypercholesterolemia, obesity, gout, headaches, gastroesophageal reflux disease, helicobacter pylori infection, and aortic stenosis. (Exhibit C, Dr. Hyman's AME report, September 11, 2013, p. 7)

On March 7, 2017, when the parties settled by way of C&R, they used DWC-WCAB form 10214(c), revised November 2008. The body parts being settled were described in Paragraph No. 1 as "198 head," "398 upper extremities," "498 trunk," "598 lower extremities," and "700 multiple parts." (C&R, ¶ 1, p. 3.) The date of injury was February 1, 1970 to October 2, 1991. (*Id*.)

Paragraph No. 3 states:

> This agreement is limited to settlement of the body parts, conditions, or systems and for the dates of injury set forth in Paragraph No. 1 and further explained in Paragraph No. 9 despite any language to the contrary elsewhere in this document or any addendum.

(C&R, ¶ 3, p. 5.)

The comments in Paragraph No. 9 state:

> This agreement resolves all injuries as pled in the application for adjudication and identified in medical legal reports.
>
> Significant disputes between the parties exist as to injury AOE/COE, nature and extent, jurisdiction, and statute of limitations.
>
> Defendants reserve their right to seek contribution.

(C&R, ¶ 9 comments, p. 7.)

On March 9, 2017, an Order Approving Compromise and Release (OACR) issued in case number ADJ8651899.

Turning to the case before us (ADJ13474651), applicant filed an Application for Adjudication on August 7, 2020, claiming injury to the following body parts: "100 head - not specific," "110 brain," "841 nervous system - stress," and "842 nervous system - psychiatric/psych," while employed by defendants during the period from June 4, 1970 to November 4, 1991.

Since filing the instant matter, applicant was evaluated by Ted R. Greenzang, M.D., Qualified Medical Evaluator (QME) in psychiatry. In pertinent part, Dr. Greenzang diagnosed:

> AXIS 1
> 1. Depressive disorder not otherwise specified. (311)
>
> 2. Likely psychological factors affecting medical condition (316), depression and anxiety impacting upon his apparent diagnoses of diabetes mellitus and hypertension.
>
> 3. Possible cognitive disorder not otherwise specified. (294.9)
>
> AXIS II
> 1. Avoidant and obsessive personality traits.

AXIS III

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5. Parkinson's disease by history, etiology as determined by the appropriate evaluating medical practitioner.

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(Exhibit 5, QME report of Dr. Greenzang's, dated July 6, 2021, pp. 8-9.)

On September 9, 2013, the matter proceeded to trial on the following issues. Exhibits were entered into evidence, stipulations were recorded, issues were framed, and trial was continued.

1. Whether additional discovery is needed to determine if applicant's injury is identical to the injury in his prior claim.

2. Whether this claim is barred by the Statute of Limitations, latches, LC 3600(a)(10), res judicata, and/or LC 3600.5(d).

3. Whether CNA and the Blue Jays are exempt pursuant to LC 3600.5(c).

(Minutes of Hearing and Summary of Evidence (MOH/SOE), September 28, 2023 trial, p. 3.)

As relevant herein, the parties stipulated that:

1. Dave Parker, born [], while employed during the period 6-4-1970 to 11-4-1991, as a professional athlete, Occupational Group Number 590, by Pittsburgh Pirates; Cincinnati Reds; Oakland Athletics; Milwaukee Brewers; California Angels; Toronto Blue Jays; claims to have sustained injury arising out of and in the course of employment to brain and head.

(MOH/SOE, September 28, 2023 trial, p. 2.)

On May 2, 2024, the parties returned to trial. Applicant testified in pertinent part as follows. No other witnesses were called to testify.

The Applicant did not know when filing his workers' compensation claim that any of his current psychological problems were the result of cumulative trauma.

The Applicant did not know when filing this workers' compensation claim that any of his current neurological problems, aside from the Parkinson's Disease, were the result of cumulative trauma.

The Applicant did not know prior to filing the current workers' compensation claim, that any of his neurological problems, aside from the Parkinson's Disease, were the result of cumulative trauma.

The Applicant did recall he signed one or more of his contracts when he was physically in the state of California. The Applicant did not recall how many contracts he signed while playing in California.

The Applicant recalled having a previous workers' compensation case in California that was settled in 2017. The Applicant recalled that the case settled via Compromise and Release for settlement agreement.

The Applicant was shown the Compromise and Release identified as Defense Exhibit B. The Applicant did review this document previously. The Applicant was shown paragraph 1, on page 3, which listed body parts: Upper extremities, trunk, head, lower extremity, and multiple body parts. The Applicant did see in that paragraph where it said "198 head."

The Applicant understood that some of the body parts were settled in his last case. The Applicant was asked whether, with regard to his brain, it was his intention to settle the case for brain injury. The Applicant replied, no, he was just playing ball.

Looking at the Compromise and Release, he did not see the word "brain" listed in the paperwork. The Applicant looked at the Compromise and Release and did not see the words "neurological," "psych," or "stress" listed in paragraph 1, on page 3.

The Applicant did not have a neuropsychological evaluation in his prior case that settled in 2017. He did not have a psychological evaluation for stress for his prior case that settled in 2017.

The Applicant filed a new claim because he was having pain and injury problems. The Applicant has new injuries to his brain. The Applicant did not have problems with anxiety and depression.

The Applicant **had problems with CTE**, and had some problems with forgetfulness.

The Applicant was shown Applicant's Exhibit 5 which was the 2021 report of Dr. Ted Greenzang. This was shared on the Lifesize screen so that Applicant could see it as well as the other parties.

The Applicant was shown the impression AXIS 1, which says "Depressive disorder." He did not recall being diagnosed with depression by Dr. Greenzang. He did not recall being diagnosed with anxiety and depression by Dr. Greenzang. Applicant did not recall being diagnosed with a cognitive disorder due to head injuries by Dr. Greenzang.

> The Applicant did not recall and did not think he was flown out to California for his prior CT claim that settled in 2017 for medical evaluations.
>
> He did not recall seeing an AME in internal medicine or an AME in orthopedics with Drs. Hyman and Weiss respectively. If he saw any doctors for the 2017 case, he would have been honest and provided trustable information.

(MOH/SOE, May 2, 2024 trial, pp. 3-4, emphasis added.)

DISCUSSION

I.

Former Labor Code section[1] 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on September 24, 2024, and 60 days from the date of transmission is Saturday, November 23, 2024. The next business day that is 60 days from the date of transmission is Monday, November 25, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, November 25, 2024, so that we have timely acted on the petition as required by section 5909(a).

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

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on September 24, 2024, and the case was transmitted to the Appeals Board on September 24, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 24, 2024.

II.

To be compensable, an injury must arise out of and occur in the course of employment. (Lab. Code, § 3600.) The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd*. (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.) Medical evidence that industrial causation was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Worker's Comp. Appeals Bd*. (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

It is well established that "there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].)

Section 3208.1 defines "injury" as follows:

> An injury may be either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b)

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

> "cumulative," occurring 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.)

As used in section 5412, "disability" means either compensable temporary disability or permanent disability. Medical treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to section 5412, but it may be evidence of compensable permanent disability. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [69 Cal.Comp.Cases 579].)

The "date of injury" in a cumulative injury case is the concurrence of first compensable injury and the date of the employee's knowledge of the injury's industrial relationship. Determination of the "date of injury" is a two-part analysis: 1) when did the employee first suffer a compensable disability from a cumulative injury; and 2) when did the employee know, or in the exercise of reasonable diligence should have known, that the compensable disability was caused by his or her employment. (Lab. Code, § 5412; *Rodarte, supra*.)

In general, an employee is not charged with knowledge that his or her disability is job-related without medical advice to that effect. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 473 [50 Cal.Comp.Cases 53]; *Newton v. Workers' Comp. Appeals Bd*. (1993) 17 Cal.App.4th 147, 156, fn. 16 [58 Cal.Comp.Cases 395].)

When deciding a medical issue, such as whether the applicant sustained a cumulative trauma injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905, 911 [46 Cal.Comp.Cases 913].) Generally, and especially in cases of cumulative injury, medical causation cannot be established without corroborating expert medical opinion. (*Peter Kiewit Sons v. Ind. Acc. Comm. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188].)

Therefore, the issues of the section 5412 date of injury for a claimed injury and whether applicant sustained injury to a body part must be determined by a medical evaluation. (Lab. Code, § 4060(c).)

III.

Contract principles apply to settlements of workers' compensation disputes. The legal principles governing compromise and release agreements are the same as those governing other contracts. (*Burbank Studios v. Workers' Co. Appeals Bd*. (*Yount*) (1982) 134 Cal.App.3d 929, 935.) For a compromise and release agreement to be effective, the necessary elements of a contract must exist, which includes the mutual consent of the parties. (Civ. Code, §§ 1550, 1565, 1580; *Yount, supra*.) There can be no contract unless there is a meeting of the minds and the parties mutually agree upon the same thing. (Civ. Code, §§ 1550, 1565, 1580; *Sackett v. Starr* (1949) 95 Cal.App.2d 128; *Sieck v. Hall* (1934) 139 Cal.App. 279, 291; *American Can Co. v. Agricultural Ins. Co*. (1909) 12 Cal.App. 133, 137.)

Since a compromise and release is a written contract, the parties' intention should be ascertained from the writing alone and, unless an absurdity is involved, the clear language of the contract governs its interpretation. (Civ. Code, §§ 1638, 1639; *TRB Investments, Inc. v. Fireman's Fund Ins. Co*. (2006) 40 Cal.4th 19, 27.) A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. (Civ. Code, § 1636; *TRB Investments, supra,* at 27; *County of San Joaquin v. Workers' Compensation Appeals Bd. (Sepulveda)* (2004) 117 Cal.App.4th 1180, 1184 [69 Cal.Comp.Cases 193].)

The plain language of the 2017 C&R describes the body parts being released at that time as 198 head, 398 upper extremities, 498 trunk, 598 lower extremities, and 700 multiple parts. (C&R, ¶ 1, p. 3 and ¶ 9, comments, p. 7.) The dates of injury covered by the settlement are during the period from February 1, 1970 to October 2, 1991. (C&R, ¶ 1, p. 3.) There is no evidence that this language was intended to include the brain, the nervous system as it relates to psych or stress, neurological problems aside from Parkinson's, or CTE.

Applicant testified that it was <u>not</u> his intention to settle the case for brain injury, neurological, psych, or stress. (MOH/SOE, May 2, 2024 trial, p. 4.) Moreover, applicant testified that he did not know that any of his neurological problems, aside from the Parkinson's Disease, were the result of cumulative trauma. (MOH/SOE, May 2, 2024 trial, p. 3.) Applicant testified that he has problems with CTE, and had some problems with forgetfulness. (MOH/SOE, May 2, 2024 trial, p. 4.) We note that CTE (chronic traumatic encephalopathy) is a brain disorder linked to repeated trauma to the head.

Here, the body parts are different in the two cases, as are the claimed dates of injury (June 4, 1970 to November 4, 1991 versus February 1, 1970 to October 2, 1991) and claimed section 5412 dates of injury. However, even if two claims happen to involve the same body parts and the same claimed dates of injury, that does not, in and of itself, cause the settlement in the earlier case to be res judicata.

First, if the section 5412 date of injury for a body part is after the date of the C&R, the parties could not have settled that body part. (See *Camacho v. Target Corp.* (2018) 24 Cal.App.5th 291, 301 [83 Cal.Comp.Cases 1014] ["[e]ven with respect to claims *within* the workers' compensation system, execution of the form does not release certain claims unless specific findings are made. [Citations.] [Emphasis in original.]"].) Moreover, the employer has the burden of proving that a claim is barred by an earlier compromise and release. (*Johnson v. Workers' Comp. Appeals Bd*. (1970) 2 Cal.3d 964, 975 [35 Cal Comp. Cases 362].) Defendant presented no medical evidence that describes injury to brain, to the nervous system as it relates to psych or stress, or neurological problems aside from Parkinson's as part of the settlement.

In *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418 (Appeals Bd. en banc), we held that when a subsequent claim of injury is filed, and even if the subsequent claim of injury involves the same parties and the same body parts, the injured worker has the right to be evaluated by a new QME with regard to the subsequently filed claim(s) of injury. (*Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418, 428 (Appeals Bd. en banc).)

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; *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 [62 Cal.Comp.Cases 924].) 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 (Appeals Bd. en banc).) The Appeals Board 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, 404 [65 Cal.Comp.Cases 264].)

An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall ". . . make and file findings upon all facts involved in the controversy[.]" (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66

Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*).) 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." (*Hamilton, supra*, at 475.) The purpose of this requirement is to enable "the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]" (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350].)

Accordingly, we grant applicant's Petition, rescind the Findings and Order issued on August 14, 2024, and return the matter to the WCJ for further proceedings consistent with this opinion. Upon return to the trial level, we recommend that the WCJ consider what further development of the record is appropriate with respect to applicant's claim of injury in case number ADJ13474651.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on August 14, 2024 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 25, 2024

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

DAVE PARKER
GLENN, STUCKEY & PARTNERS
LEWIS, BRISBOIS, BISGAARD & SMITH
COLLINSON, DAEHNKE, INLOW & GRECO
BOBER, PETERSON & KOBY

JB/*pm*

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