**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**HECTOR HERNANDEZ, *Applicant***

**vs.**

**KOOS MANUFACTURING INC; SAFETY NATIONAL CASUALTY administered by TRISTAR GROUP, *Defendants***

**Adjudication Number: ADJ14370367**
**Pomona District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Former Labor Code[1] section 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.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

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 17, 2024 and 60 days from the date of transmission is Saturday, November 16, 2024. The next business day that is 60 days from the date of transmission is Monday, November 18, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, November 18, 2024, so that we have timely acted on the petition as required by section 5909(a).

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 and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 17, 2024, and the case was transmitted to the Appeals Board on September 17, 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 17, 2024.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

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

> 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.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 18, 2024**

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

**HECTOR HERNANDEZ**
**EDWARD FIGAREDO**
**NIGEL SCOTT BAKER**

**PAG/*pm***

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

**REPORT AND RECOMMENDATION ON**
**PETITION FOR RECONSIDERATION**

## I.
## INTRODUCTION

| | | |
|---|---|---|
| 1. | Applicant's Occupation: | Tailor |
| | Applicant is Age: | |
| | Date of Injury: | cumulative 2/24/21 |
| | Parts of Body Injured: | neck, bilateral upper extremities, shoulders and upper back. |
| | Manner in which injury occurred: | repetitive work |
| 2. | Identity of Petitioner: | defendant |
| | Timeliness: | timely |
| | Verification: | verified |
| 3. | Date of Issuance of Order: | 8/15/24 |

4. Petitioner's Contentions:

A. APPLICANT ENJOYED HIS JOB, PERFORMED ALL TASKS AND PLANNED TO CONTINUE TO DO SO I-IAD I-IE I-IAD NOT BEEN LAID OFF IS INCONSISTENT WITH INDUSTRIAL INJURY

B. APPLICANT FILED CLAIM FOR UNFAIR TERMINATION AND TO HAVE HISJOB BACK IS NOT CONSISTENT WITH INDUSTRIAL INJURY

C. CONTEMPORANEOUS MEDICAL RECORDS DO NOT COMPORT WITH INJURY

D. EXCUSE THAT HE DID NOT SEEK TREATMENT DUE TO FINANCES UNSUPPORTED

E. EXCUSE THAT HE FEARED HE WOULD BE TERMINATED IF HE REPORTED AN INJURY IS CONTRADICTED

F. APPLICANT CONTRADICTS DEPOSITION TESTIMONY ABOUT SEEKING EMPLOYMENT IN THE SAME JOB

G. QME QUESTIONS APPLICANT'S CREDIBLITY

1. Legal Date of Injury is 2016 and Barred by Statute of Limitations

## STATEMENT OF CASE

Defendant petitions for reconsideration of the court's finding of AOE/COE based on the QME and treating doctors' findings of industrial injury on a cumulative trauma basis from applicant's work as a tailor for nearly 20 years due to alleged applicant's credibility issues. Defendant petitions for reconsideration that the statute of limitations did not bar the 2021 claim based on defendant's contention of an earlier date of injury in 2016 in spite of the doctor not finding the complaints to be industrial at that time.

## II
## FACTS

The applicant worked as a tailor for Koos Manufacturing and its predecessor from 1999 to 2020, operating a sewing machine which required him having to lift between 1200-2000 bundles of jeans in an eight hour period and to sometimes work overtime. (MOH/SOE 6/18/24 pg. 8:17.5-18; pg. 9:3.5-5 pg.9:6-10.5) I-le began to develop pain in his bilateral upper extremities, shoulders and neck in 2017. He told his Boss, Martin, who sent him to the employer clinic US Healthworks. The doctor noted that the applicant had been in pain over a year, had not missed time from work, and never had taken any medication and that the findings on exam and diagnosis "are not consistent with the injury reported by the patient." It was also noted that "The findings can not [sic] be possibly produced by natural progression of pre-existing conditions or aging." and "In conclusion, the preexisting condition more likely than not is causing the current symptoms and findings." (App. Ex. 5 US Health Works I 0/3/17 pg. 5, causation paragraph) The clinic discharged the applicant from care on October 4, 2017. (App. Ex 5, US Healthworks 10/4/17 report at) Applicant continued working full duties until the plant laid the applicant off due to the COVID-19 pandemic effective May 29, 2020, according to the layoff notice that issued on May 13, 2020. (Def. Ex. E) Applicant obtained an attorney and saw Dr. Dorian on Februmy 24, 2021, who found industrial injury and declared the applicant totally temporarily disabled (App. Ex. 4 Dr. Dorian 3/8/21 report for date of Exam 2/24/21 PDF pgs. 7-8 Causation paragraph) QME Dr. Kaveeshvm also opined that the

applicant's job duties as a tailor had caused cumulative trauma injury in four separate reports. (Jt. Ex I, Dr. Kaveeshvar report dated 8/31/21 pg. 38-39 Causation of Injury; Jt. Ex. I Dr. Kaveeshvar report 2/7/22 report pg. 8, last paragraph; Jt. Ex. I, 2/23/22 pg. 8 Causation paragraph; Jt. Ex. I, Dr. Kaveeshvar report 6/5/23, pg. 26 Causation of Injury paragraph) Parties went to trial on the limited issue of A OE/COE. The court found injury. Defendant filed a Petition for Reconsideration.

## III

Any alleged deficiencies in the Opinion on Decision are corrected by this Report on Reconsideration. Smales v. WCAB 45 Cal. Comp. Cases 1026.

There Findings and Order contained a typographical error with regard to the injury date of February 21, 2021, instead of the correct date of February 24, 2021. The court recommends reconsideration. should be granted to correct the typographical error but denied for all other reasons as set forth below.

## DISCUSSION

Contention 1. Inconsistencies in Applicant's Testimony and Medical Reports & Records Do Not Support Injury AOE/COE

A. APPLICANT ENJOYED HIS JOB, PERFORMED ALL TASKS AND PLANNED TO CONTINUE TO DO SO HAD HE HAD NOT BEEN LAID OFF IS INCONSISTENT WITH INDUSTRIAL INJURY

B. APPLICANT FILED CLAIM FOR UNFAIR TERMINATION AND TO HAVE HIS JOB BACK IS NOT CONSISTENT WITH INDUSTRIAL INJURY

C. CONTEMPORANEOUS MEDICAL RECORDS DO NOT COMPORT WITH INJURY

D. EXCUSE THAT HE DID NOT SEEK TREATMENT DUE TO FINANCES UNSUPPORTED

E. EXCUSE THAT HE FEARED HE WOULD BE TERMINATED IF HE REPORTED AN INJURY IS CONTRADICTED

F. APPLICANT CONTRADICTS DEPOSITION TESTIMONY ABOUT SEEKING EMPLOYMENT IN THE SAME JOB

G. QME QUESTIONS APPLICANT'S CREDIBLITY

**CREDIBILITY AND AOE/COE**

The court makes credibility determination of witnesses. ( Garza v. WCAB (1970) 3 Cal. 3d. 312, 318-319; 35 CCC 500, 504-505.) With regard to AOE/COE the California Supreme Comi stated that it has long been settled that for an injury to "arise out of employment" it must "occur by reason of a condition or incident of [the] employment." That is, the employment and the injury must be linked in some causal fashion, However, the causal connection between the employment and the injury need not be the sole cause of the injury; it is sufficient if the employment is a contributory cause. (Maher v, WCAB, (1983) 48 Cal. Comp. Cases at 326,329)

"The medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (Peter Kiewit Sons v. IAC (1965) 234 Cal. App. 2d 831, 839; 30 Cal. Comp. Cases 188) Although the mere "exacerbation" of a pre-existing condition is not an industrial injury, the acceleration, aggravation or lighting-up of a preexisting condition by an applicant's employment may constitute an industrial injury. (City of Los Angeles v. WCAB (Clark) (2017) 82 Cal. Comp. Cases 1404 writ den.) For the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. South Coast Framing v, WCAB (Clark) (2015) 61 Cal. 4th 291, 297-298; 80 Cal. Comp. Cases 489. Therefore, lay testimony is not sufficient to support a cumulative trauma injury and requires a medical opinion to determine whether the work is a contributing cause of the injury.

Here, the medical reports by both the Qualified Medical Evaluator Hirsh Kaveeshvar (in multiple reports) and the treating physician Saro Dorian found that applicant's job duties as a tailor which consisted of operating a sewing machine to produce 2000 to 1500 pieces of jeans per day from the beginning of applicant's employment in 1999 to the end of applicant's employment in 2020 respectively, with Koos Manufacturing (and its predecessor) resulted in a cumulative trauma orthopedic injury. (App. Ex. 4 Dr. Dorian 3/8/21 report for date of exam 2/24/21, causation paragraph; Jt. Ex 1, Dr. Kaveeshvar report dated 8/31/21 pg. 38-39 Causation of Injury; Jt. Ex.1 Dr. Kaveeshvar report 2/7 /22 report pg. 8, last paragraph; Jt. Ex. 1, Dr. Kaveeshvar report dated 2/23/22, pg. 8 Causation paragraph; Jt. Ex. 1, Dr. Kaveeshvar report 6/5/23, pg. 26 Causation of Injury paragraph) Also, Dr. Kaveeshvar noted abnormal objective findings in the nerve conduction studies of the upper extremities. (Jt. Ex. 1, Dr. Kaveeshvar 8/31/21 report at pg. 11, Upper extremity EMO; NCS 3/25/21; pg. 37 Test Results Upper Extremity) and cervical and lumbar MRIs (Dr. Kaveeshvar 6/5/23 report pg. 11, MRI of Cervical Spine and pg. 12 MRI Lumbar Spine (taken from Dr. Dorian's final report) Therefore, applicant met the burden of proof in proving industrial injury.

Defendant's contention that applicant's testimony did not support AOE/COE is misplaced. The court gave due weight to the applicant's testimony as applicable considering what is reasonable for a person to recall especially when testifying to events that happened some seven to eight years ago. However, the inconsistencies were not outcome determinative as the court focused on the medical evidence. If lay testimony alone is not sufficient to support a cumulative trauma injury than conversely, contradictory testimony alone is not enough to negate it.

In addition, this court after observing the applicant does not necessarily find that the applicant's inconsistencies came from a lack of credibility but simply due to the passage of time and . lack of sophistication in memory skills for precise recall. It was not lost to the court that the applicant is being asked to recall events that happened years ago. Nor was it lost on the court that this applicant lacked the sophistication to be able to spell his nan1e at the beginning of trial. (MOH/SOE pg 8:14-15.5.) This does not mean the applicant is not credible with regard to his name but only that he lacked.the sophistication to spell it. Similarly, he lacked the sophistication to recall the names and locations of the doctors with specificity. For example, when he was asked if he saw Dr. Kaveeshavar, he said no and confused him with his clinic doctor. (MOH/SOE pg. 12: 21-24) The more probative evidence is the medical reporting of the physicians especially the QME tasked under Labor Code Section 4060 to render an opinion on AOE/COE when there is objective findings to support it and not solely focusing on applicant's testimony in isolation.

While defense references the QME questioning the applicant's credibility, it is the court, not the doctor that makes the fact finding and credibility determinations. Even so, the QME still ultimately found injury. He stated,

> The applicant does have some credibility concerns as it relates to the reliability of his subjective complaints however because he has previous documentation of shoulder and upper extremity pain, objective evidence of injury (EMO findings, MRI and given his job description, I do believe it is within medical probability that he has had a degree of neck and shoulder injuries due to the repetitive activities as part of his usual and customary duties.

(Joint Ex 1 Dr. Kaveeshvar 2/7/22 report pg. 8, last paragraph)

As indicated above the doctor's opinion was based on objective findings. Applicant met his burden of proof through medical evidence in showing that work was a contributing cause through medical opinion. While defendant makes numerous arguments regarding instances of applicant's conduct not being consistent with industrial injury, this court did not find that it outweighed the objective findings of injury and medical evidence in support of injury.

**CONTENTION 2. LEGAL DATE OF INJURY IS 2016 AND BARRED BY THE STATUTE OF LIMITATIONS.**

Cumulative trauma injuries are governed by Labor Code Section 5412 which provides:

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. (Emphasis by court)

In applying Labor Code section 5412, cases have held that knowledge of industrial causation is not found until the applicant receives medical opinion expressly stating so, even where the applicant has indicated his or her belief that the disability is due to employment. (City of Fresno v, WCAB (Johnson) (1985) 163 Cal. App. 3d 467,471, 50 Cal. Comp. Cases 53)

"The burden of proving that the employee knew or should have known rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms." (Johnson, supra, 163 Cal. App. 3d 467, 471.) This is because "the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (Peter Kiewit Sons v. !AC (1965) 234 Cal. App. 2d 831,839; (30 Cal. Comp. Cases 188].)

Here, while the applicant believed his symptoms were work related and went to the employer clinic with complaints to the fingers, palm, wrist, shoulders, arms and neck in 2017, (App Ex. 5 Health Works Report 10/3/17, pg. I History of "Illness) the physician disagreed and stated, "the findings on exam and diagnosis are not consistent with the injury reported by the patient" and concluded "the preexisting condition more likely than not is causing the current symptoms and findings."1 It is unclear, how the applicant can be expected to have actual knowledge of an industrial injury when a physician has told him that it is not work related.

Therefore, it was not until February 24, 2021, that applicant obtained the actual knowledge that his complaints were industrially related as Dr. Dorian took note of the applicant's history as a sewing machine operator m1d found that that applicant's complaints were due to his job duties. In addition, there was compensable disability as Dr. Dorian declared the applicant totally temporarily disabled at that time. (App. Ex. 4, Dr. Dorian Report 2.24.21 report, PDF pg. 7, Work Status Section) Therefore, the concurrence of knowledge and disability happened on February 24, 2021.

Defendant did not meet the burden of proof in showing that the date of injury is 2016. While defendant contends that the applicant had actual knowledge in 2016, there is no evidence of actual knowledge without a medical report as lay testimony is not sufficient to prove industrial causation in a cumulative trauma case. Therefore, even if the applicm1t testified that he believed in 2016 that his complaints were industrial, no physician corroborated that belief in 2016. In fact, the physician issued a non-industrial opinion in 2017.

Likewise, nor was there any evidence of compensable disability in 2016 as it is not even known if 2016 is the year when applicant took a week off work. The 2017 US Health Works report noted that applicant had missed no time from work. (App Ex. 5 US health Works report 10/3/17 pg. 5 Causation ,i; Work Status Report 10/4/17, Patient Status; Discharge Status) As such, the employer's medical clinic reporting in 2017, refuted the allegation of the applicant being off in 2016 as of that date. (App Ex. 5 Health Works Report 10/3/17, pg. 5, Treatment Plan; Causation paragraphs). The court finds the medical reporting of 2017 to be more probative on the issue as it is closer in time to 2016 and would presumably be more accurate than applicant's trial testimony which was given some seven years later.

The purpose of Labor Code Section 5412 was to prevent a premature commencement of the statute of limitations so that it would not expire, J,T, Thorp v. WCAB (Butler) 153 Cal. App. 3d. 327, 341; 49 Cal. Comp. Cases 224. The applicant did not become aware of his injury until February 24, 2021, when Dr. Dorian found industrial injury. Applicant filed his claim on March 12, 2021, within one year and is timely.

## IV.
## RECOMMENDATION

It is respectfully requested that reconsideration be granted to correct the typographical error regarding the date of injury to February 24, 2021, instead of February 21, 2021, and denied in all other aspects.

**DATE: September 17, 2024**

**Monika Reyes**
**WORKERS' COMPENSATION JUDGE**