WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA GUTIERREZ, *Applicant*

vs.

OMEGA EXTRUDING OF CALIFORNIA;
OLD REPUBLIC INSURANCE COMPANY administered by
GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ10356751

Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Defendant seeks reconsideration of the March 18, 2019 Findings And Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found in relevant part that while employed as a packer by defendant from October 1, 2014 through March 23, 2016, applicant sustained industrial injury to her neck, back, left shoulder, left finger and right foot and did not sustain industrial injury to her left foot, hands, right shoulder, right wrist, right fingers, and in the form of headaches, stress, psyche, insomnia and vision; that applicant was temporarily disabled from April 7, 2016 to December 1, 2016; that the date of injury "per Labor Code secs. 5412 and 5500.5 is 3/23/2015 – 3/23/2016"; that applicant's claim was not barred as a post-termination claim; and that the industrial injury resulted in 12% permanent disability after 30% apportionment of the cervical and lumbar spine disability.

[1] Commissioners Lowe and Sweeney, who were on the panel that granted reconsideration, no longer serve on the Appeals Board. Other panelists were appointed in their place.

Defendant contends that it met its burden to show that applicant's injury should be barred as a post-termination claim because the finding that the right foot was industrially injured is not supported by substantial medical evidence and applicant's only treatment before her last date of work was to her right foot, and because applicant knew that her claimed injury was industrial prior to her last day of work; that the medical evidence only supports industrial injury to applicant's cervical and lumbar spines and left shoulder; and that applicant was not entitled to temporary disability because she "voluntarily removed herself from the market."

We did not receive an answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) and recommended that defendant's Petition for Reconsideration be dismissed or denied.

We have considered the allegations of the Petition and the contents of the Report, and we have reviewed the record. For the reasons discussed below, we will affirm the F&A, except that we will amend it to find that applicant sustained industrial injury to her neck, back and left shoulder and that applicant's Labor Code section 5412 date of injury is April 7, 2016, and to defer the issues of injury to other body parts, permanent disability, apportionment, and attorney's fees.

PROCEDURAL AND FACTUAL BACKGROUND

Applicant claimed injury to her neck, shoulders, wrists, hands, fingers, back, waist, legs and feet, and headaches, stress, psyche, insomnia and vision, while employed as a packer for defendant from October 1, 2014 to March 23, 2016. Applicant's Application for Adjudication of Claim (Application) was dated March 31, 2016, and filed on or about April 1, 2016.

Applicant obtained treatment from Renee Kohanim, D.C., who issued a report dated April 7, 2016, indicating that in September 2015 applicant began experiencing pain in her neck, back, shoulders, wrists, left hand, left pinky finger, legs and feet from constant and repetitive work as a packer, and that applicant was terminated on March 23, 2016. (Exhibit 7.) Dr. Kohanim's diagnoses included lumbar spine sprain, left shoulder, wrist and hand sprain, left 5th finger deformity, left foot sprain, depression, insomnia and cephalgia or headaches. Dr. Kohanim further reported that applicant was limited to modified work and requested authorization for treatment including x-rays and physical therapy.

In reports dated May 9, and June 9, 2016, Dr. Kohanim indicated that x-rays had been taken including the right foot, and the diagnoses included heel plantar spur, lumbar spine grade 1 anterolisthesis at L4-5, and left shoulder sprain/strain. (Exhibits 5 and 6.) Dr. Kohanim reported that applicant had been looking for work with her disability without any luck, and that she should remain off work from May 9, 2016, to June 20, 2016, and continue recommended treatment.

In reports dated July 11, August 11, and September 15, 2016, Dr. Kohanim indicated that the diagnoses included heel spur, lumbar spine minimal disc protrusion, and left shoulder acromioclavicular osteoarthritis and tendonosis. (Exhibits 2, 3 and 4.) Dr. Kohanim reported that applicant should remain off work until October 25, 2016, and continue treatment.

In a final report dated December 1, 2016, Dr. Kohanim indicated that applicant's complaints included the left foot; medical records reviewed included x-ray of the right heel and MRIs of the lumbar spine and left shoulder. (Exhibit 1, pp. 2-4; 13-14.) Dr. Kohanim also summarized the examination findings, treatment and past reporting. Dr. Kohanim's diagnoses included left heel spur, lumbar spine minimal disc protrusion, left shoulder acromioclavicular osteoarthritis and tendonosis, left 5th digit deformity and cephalgia. Applicant was permanent and stationary, and her whole person impairment (WPI) for her lumbar spine is 8%, her left shoulder is 1%, her bilateral wrists and ankles are 0%, 2% is for her pain and total WPI using the Combined Values Chart (CVC) is 11%. Dr. Kohanim apportioned 80% of the lumbar spine and left shoulder disability to the industrial injury and 20% to underlying degenerative changes.
(Exhibit 1, pp. 6-19.)

Applicant was also evaluated by panel Qualified Medical Evaluator (QME) Gary Brazina, M.D.

In a report dated February 14, 2017, Dr. Brazina summarized applicant's records which included a prior worker's compensation claim with another employer alleging cumulative injury to the right shoulder, arm and elbow from September 9, 2008 to September 9, 2009. (Exhibit B, pp. 3-7.) His review included a neurological consultation report dated August 29, 2011 that indicated that applicant's diagnoses included ruling out cervical disc herniation causing or contributing to right upper extremity radicular pain and posterior neck and upper mid-back pain; a report by an agreed medical examiner dated February 16, 2012 that indicated that applicant's diagnosis was right shoulder tendinitis with small rotator cuff tear and right elbow epicondylitis, and that she had 12% WPI which was apportioned 50% to cumulative trauma and 50% to specific

injury; a progress note dated December 27, 2012 that documented that applicant complained of neck, left arm and elbow pain to her finger tips after a fall injuring her left elbow 15 days before; and other progress notes that indicated that on March 21, 2013, applicant had headaches, left lower back pain and dizziness for a month, and that on June 19, 2013, applicant had left low back pain for a month and injured her left foot in a fall 4 months ago, and that applicant had complaints of left big toe pain on September 23, 2013, left foot pain on October 9, 2013, and back pain for a week on March 25, 2014. (Exhibit B, pp. 20-30.)

Dr. Brazina further reported that a Workers' Compensation Claim Form dated October 20, 2015, indicated that applicant allegedly sustained a specific injury at Omega on October 20, 2015, and that the cumulative injury from October 2014 through March 23, 2016 at Omega was alleged in a claim form dated March 30, 2016. (Exhibit B, p. 10.) Dr. Brazina also described a medical report dated December 1, 2015, signed by Jose Robles, P.A., which indicated that applicant had right heel pain when she began walking in the morning and a right foot calcaneal spur was diagnosed. He summarized a doctor's first report of occupational injury dated December 3, 2015, by Lauren Trainor, D.O., that indicated that applicant had onset of right foot pain 15 days ago that was not associated with an incident at work, that applicant specifically noted pain at the heel and increased pain with weight-bearing and was on her feet all day, that nonindustrial right heel strain and possible plantar fasciitis was diagnosed, and that applicant was referred to her own doctor and released to regular work. He noted that an occupational injury status report by Dr. Trainor dated December 3, 2015, indicated that applicant was cleared to return to full duty and a report dated December 21, 2015, by Jose Robles, P.A., indicated that applicant had a foot x-ray and complained of right heel pain that traveled up her leg and the assessment was calcaneal spur. Dr. Brazina also summarized Dr. Kohanim's medical reports and records reviewed. (Exhibit B, pp. 31 to 42.)

During his evaluation, applicant stated by way of history that she gradually developed pain in her neck, mid and lower back, shoulders, left wrist and fingers 4 and 5, and right foot due to repetitive duties at work. (Exhibit B, p. 42.) In October 2015, applicant was working at a faster pace on a large order that had to be finished, and she developed pain in the shoulders, left wrist and fingers 4 and 5. She did not report her symptoms at work because she was afraid, she would be terminated, and she went to her primary care doctor on one occasion who said that her pain was due to repetitive duties at work. She noticed pain in her right heel towards the end of 2015, and she informed her supervisor and was sent to the industrial clinic. The doctor indicated that the right

heel pain was nonindustrial and referred applicant to her primary care doctor. At work, applicant packed plastic bags into boxes ten hours a day, five days a week, and had to stand, walk, sit, reach, pull, push, grip, grasp, bend, stoop, squat, carry and lift up to 60 pounds. Applicant was laid off from Omega in March 2016, and she retained legal representation and was referred to Dr. Kohanim and other doctors for treatment. Her current complaints included pain in the neck, back, shoulders, left wrist, hand and fourth and fifth fingers, and the right foot. (Exhibit B, pp. 42-45.)

Dr. Brazina reported that applicant's condition was permanent and stationary and that the "Diagnoses" were cervical sprain strain, lumbar sprain strain, DDD L-S spine and SLAP lesion shoulder. (Exhibit B, p. 51.) Dr. Brazina explained that the MRI scan of the lumbar spine showed degenerative arthritic changes and spondylitic changes, and that the MRI scan of the left shoulder was consistent with a SLAP lesion and synovial cyst adjacent to the anterior labrum and subacromial cyst of the humeral head. Under "Causation" Dr. Brazina stated that,

> I defer to the trier of fact to opine as to whether this is a post-termination claim, as there is a contested cumulative trauma disorder from the period of October 1, 2014, through October 23, 2016. The patient was terminated on March 29, 2016. Therefore, I defer to the trier of fact with regard to this being a post-termination claim. Additionally, there is no evidence submitted to show the patient treated during this continuous trauma disorder claim other than for her foot, which was felt to be nonindustrial in nature and she received no treatment for the remaining body parts during the continuous trauma claim. The patient received only chiropractic care and acupuncture based on the medical records provided. (Exhibit B, p. 51.)

Dr. Brazina further reported that applicant's WPI was 5% for the cervical spine and 5% for the lumbar spine, and that there was no additional impairment for the shoulders, wrists, hands and fingers. (Exhibit B, pp. 51-52.) Dr. Brazina apportioned 30% of the cervical and lumbar spine disability to degenerative arthritis and apportioned 60% of the impairment to the prior industrial injury because applicant had prior impairment to the lumbar spine and shoulder and spondylolisthesis and degenerative arthritic changes in the lumbar spine, and the agreed medical examiner apportioned 50% to cumulative injury and 50% to specific injury. Dr. Brazina explained that this resulted in 20% impairment for the cumulative injury to the cervical and lumbar spine caused by defendant. Dr. Brazina also reported that applicant should be provided heel cups for

her plantar fasciitis, and that no further treatment was indicated on an industrial basis. (Exhibit B, pp. 52-53.)

In a report dated June 19, 2017, Dr. Brazina indicated that he had received and reviewed Dr. Kohanim's report dated December 1, 2016. (MOH, def. ex. A, pp. 2-5.) Dr. Brazina also reviewed records that indicated cervical spine x-rays showed moderate osteoarthritis at multiple levels, lumbar spine x-rays showed spondylolisthesis at L4 and L5, x-rays of the ankle showed a 4-mm spur on the plantar aspect, and the right foot had a small calcaneal spur. Dr. Brazina indicated that his opinion had not changed. (Exhibit A, pp. 1-2.)

The parties first proceeded to trial on May 16, 2018. In relevant part, the issues raised were injury arising out of and in the course of employment (AOE/COE); temporary disability; permanent disability; apportionment; post-termination; presumption under Labor Code section 5402; and date of injury under Labor Code section 5412.

On November 5, 2018, the parties returned to trial. Applicant testified in relevant part as follows:

She worked as a packer at Omega for about a year beginning in 2015. (Summary of Evidence (SOE), p. 6, lines 14-25.) She assembled about 30 boxes a day that were different sizes and packed the boxes with different size plastic bags, which were used at supermarkets or department stores. The plastic bags came from a machine and conveyor belt, and she grabbed about a thousand bags a day and checked if the bags were torn and could hold weight. At times the machine ran fast, and she had to work faster. She would pack ten plastic bags into a packet and pack about ten packets into a box, and then tape the box using a tape gun and place a sticker with information on the box. Most of the time she would have to push the bags into the box to close it. The smallest box weighed 35 pounds and some boxes weighed 60 pounds. She lifted and stacked boxes in rows five to six lines high on a pallet and did two pallets a day. She also cleaned her area, swept and emptied trash, and she was on her feet all day and sometimes had to bend over or kneel. (SOE, p. 7, line 1 to p. 9, line 21.)

She had a prior workers' compensation claim in 2009 and claimed injury to her right shoulder, elbow and arm. (SOE, p. 10, lines 10-13.) From her work for defendant, she is claiming that she injured her neck, back, shoulders, hands, and right ankle and foot and that she did not claim these injuries before. She reported the right ankle and foot pain to Lilly Lopez with Human Resources at Omega, and Lopez was sarcastic and made fun of her. Lopez said that applicant knew

that the job required repetitive work, and that she could not have a chair because the work was not a sitting job. Applicant did not ask for a chair. She complained about right ankle and foot pain a second time and was sent to the industrial clinic, and the doctor said nothing was wrong and she was sent back to work and worked in pain. She did not complain about her neck, back and hand at the industrial clinic because her ankle bothered her the most. The industrial clinic was not Crown City Medical Group, which were her personal doctors. In 2016 before applicant was laid off, a foot specialist said that her pain was related to work. She did not discuss other parts of her body with the foot specialist. About two months after she was laid off from work, she retained counsel and was referred to a doctor, and no doctor previously told her that her neck, back, shoulders, wrists, hands and legs complaints were related to work. (SOE, p. 10, line 12 to p. 12, line 9.)

She is claiming headaches from work, which began around February 2016. (SOE, p. 12, lines 9-11.) She attributed her headaches to the pressure at work when the plastic bags were much bigger, heavier and slippery and would not fit in the box, and there was more work and a quicker pace. She was also pressured by her supervisor, Jaime Ramirez, who frequently watched her and told her to do things faster several times a day. She told Ramirez that bags coming out of the machine were not glued, and Ramirez told Raul Sanz, the machine operator, to fix the machine. Sanz did not fix the machine and told Ramirez that applicant shut the machine down, and Ramirez would blame, scold and scream at her. During the last three months, this happened every four to five hours, and she worked twelve hours a day from 7:00 to 7:00. She told Sanz that the machine needed to be fixed and he ignored her, and she told Ramirez, and Sanz denied that he was told, and argued, yelled, and laughed at her. Sanz did not like her very much, complained about her and said that she would be laid off, which made her cry. The incidents with Ramirez and Sanz happened a lot in the last three months, and she developed headaches three to four months before her layoff. (SOE, p. 12, line 12 to p. 15, line 20.)

She is also claiming insomnia and difficulty sleeping, and she still suffers from these problems and with headaches almost every day. (SOE, p. 15, lines 19-22.) She never reported these problems to work because she was afraid that she would be terminated, and the fear was stressful to her. When she complained of foot pain, the lady said that the job was not for applicant, so she did not complain about the other symptoms. No doctor told her problems were due to work, and no one said she could file a claim. (SOE, p. 15, line 23 to p. 16, line 5.)

On February 4, 2019, they returned to trial. Applicant testified in relevant part as follows:

She denied knowing what disability is or that she had disability until she was told by the doctor referred by her attorney. (February 4, 2019 SOE, p. 2, lines 16-19.) The doctor told her that she had a bone spur and had injured her shoulder, wrist, finger and knee from the repetitive work. (SOE, p. 2, lines 18-21.) Her prior workers' compensation case settled for $20,000, and she had claimed injuries to the right shoulder, arm and elbow, psyche and sleep. The dates of injury included a specific injury, and applicant also claimed injury from repetitive duties, and she did know about cumulative trauma. She was evaluated by a neutral doctor who recommended work restrictions and limiting lifting to less than 25 pounds. (SOE, p. 3, lines 4-12.)

The notice of layoff from work at Omega was on March 26, 2016, and Lopez laid applicant off on March 29, 2016, and the next day she retained counsel. (SOE, p. 3, lines 22-25.) She was working full-time and doing her regular duties through her last day at Omega. She was referred by her attorney to Dr. Kohanim, a chiropractor, who asked applicant if she wanted to be placed on state disability, and she responded that she did. Her private doctors since 2011 were Crown City Medical Group, and she did not recall back and left arm complaints in March 2014. She could not recall if she had treatment for the right heel in December 2015, but she did have right heel treatment at Crown City Medical Group in January 2016. She was sent to the company clinic for right heel complaints in December 2015, and she reported all her complaints and was told that the right heel was nonindustrial. She could not recall her deposition testimony that she thought her complaints were due to work in February 2015. She took approximately five days off from work for her complaints before she was laid off. She wore lumbar and wrist supports at work, and she purchased the wrist supports. (SOE, p. 4, line 1 to p. 5, line 20.)

She was informed about reporting a work injury at the new employee orientation, at safety meetings, and from posters in the break room that were in Spanish and that she read. (SOE, p. 5, line 21 to p. 6, line 5.) She filed the previous workers' compensation claim after she was laid off, and the doctor said her right shoulder complaints were from work. She saw Dr. Kohanim two to three weeks after she was laid off from Omega, and she had 28 massage sessions, 32 acupuncture treatments, 25 sessions of electrical stimulation, and more than 24 visits. When she told Lopez about the right heel and foot complaints, they filled out paperwork and applicant was sent to the company clinic. After the company doctor said there was nothing wrong with applicant's foot, she went to Crown City Medical Group, and her doctor and the foot specialist said that she had a bone spur which was due to repetitive work. She reported it to Lopez the same day, and she mockingly

told applicant to look for a different job because they could not give her a chair. She also said she had no money for a doctor, and Lopez asked if applicant wanted the money from Lopez. She did not tell Lopez about the other claimed body parts because she had been mocked about her foot and was afraid of being laid off. She received the back brace from Omega when she started working; it was required, and she wore it every day. She bought and wore wrist braces when her wrists began hurting from closing the boxes, which were not prescribed by a doctor. (SOE, p. 6, line 6 to p. 9, line 4.)

The WCJ issued the F&A, defendant sought reconsideration, the WCJ issued the Report and we granted reconsideration to further study the factual and legal issues.

DISCUSSION

Labor Code[2] section 3600(a)(10) provides in part:

> 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 . . . (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.

Thus, except for psychiatric injury, an employee's claim for compensation due to injury caused by employment filed after notice of termination or layoff is not compensable under section 3600(a)(10) unless the employee establishes by a preponderance of evidence that one of the statute's exceptions apply. (§ 3600(a)(10); *Faulkner v. Workers' Comp. Appeals Bd.* (*Faulkner*) (2004) 69 Cal.Comp.Cases 1161.) One of the statute's exceptions that the employee may establish is the existence of medical records prior to the notice of termination or layoff from employment that contain evidence of the injury. (§ 3600(a)(10)(B); *Seco Industries v. Workers' Comp. Appeals Bd.* (*Brown*) (2001) 66 Cal.Comp.Cases 1232; *Cal. Comp. Ins. Co. v. Workers' Comp. Appeals*

[2] All further reference to statue is to the Labor Code unless otherwise stated.

Bd. (*Beneteau*) (1998) 63 Cal.Comp.Cases 1515; *Marquez Auto Body v. Workers' Comp. Appeals Bd.* (*Marquez*) (1996) 61 Cal.Comp.Cases 408.) Prior medical records need not contain evidence that the injury was caused by employment; causation may be established by substantial evidence such as medical opinion and testimony. (*Brown, supra*, 66 Cal.Comp.Cases 1232; *Beneteau, supra*, 63 Cal.Comp.Cases 1515; *Marquez, supra*, 61 Cal.Comp.Cases 408.)

Defendant contends that applicant's medical records and Dr. Brazina's report establish that during applicant's employment with Omega and prior to her layoff she only obtained treatment for her right heel and foot, which was nonindustrial. Defendant contends that the WCJ erroneously found that applicant's right heel and foot were industrially injured and that her claim regarding other injured body parts filed after the layoff was not barred by section 3600(a)(10).

We agree with defendant's contention that applicant's medical records indicate that she only had treatment for her right heel and foot during her employment at Omega and prior to being laid off. The medical reports dated December 1 and 21, 2015 and signed by Jose Robles, P.A., indicate that applicant had right heel pain with stepping and walking and was diagnosed with a right foot calcaneal spur. An x-ray report dated December 2, 2015 showed that applicant had a small right plantar calcaneal osteophyte. The industrial clinic reports by Dr. Trainor dated December 3, 2015 indicate that applicant had right foot pain that was not associated with an incident at work, and that she had increased pain with weight-bearing and was on her feet all day. An x-ray report dated December 3, 2015 showed a small plantar spur. Dr. Trainor diagnosed nonindustrial right heel strain and possible plantar fasciitis and referred applicant to her private physician for further treatment.

While QME Dr. Brazina reported that applicant's medical records indicated that she only had treatment for the right foot and not other body parts, and that it was "felt to be nonindustrial," we agree with the WCJ's discussion in her Report that Dr. Brazina was referring to the industrial clinic reports and not his own opinion that the treatment for the right foot was nonindustrial. Dr. Brazina further reported that applicant should be provided heel cups for plantar fasciitis with no further treatment indicated on an industrial basis. We interpret Dr. Brazina's recommendation for heel cups to be on an industrial basis, considering applicant's medical records and testimony that she had right heel and foot pain and was on her feet all day and performed arduous work at Omega. (See *Garza v. Workmen's Comp. App. Bd.* (*Garza*) (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500].) Moreover, the conclusion that applicant's right heel strain and possible

plantar fasciitis and treatment are nonindustrial was not explained by Dr. Trainor in the industrial clinic reports as reported by the WCJ. (*Escobedo v. Marshalls* (*Escobedo*) (2005) 70 Cal.Comp.Cases 604, 620-621.) Therefore, we disagree with defendant's contention that applicant's medical records and Dr. Brazina's report establish that applicant's right heel and foot injury and treatment are nonindustrial.

We also agree with the WCJ's Report that applicant apparently informed Omega about the right heel and foot injury due to work and was referred to the industrial clinic for treatment, and that this claim is not barred because Omega had notice of the injury before the layoff under the exception in section 3600(a)(10)(A). (*Brown, supra*, 66 Cal.Comp.Cases 1232.) Moreover, applicant's medical records indicate that she received treatment for the right heel and foot injury before the layoff, so that the exception in section 3600(a)(10)(B) applies. We note that this exception applies even if the medical records do not show that applicant received treatment for her right heel and foot on an industrial basis, because causation may be established by medical opinion from Dr. Brazina or another physician that is substantial evidence. (*Escobedo, supra*, 70 Cal.Comp.Cases at pp. 620-621; *Brown, supra*, 66 Cal.Comp.Cases 1232; *Beneteau, supra*, 63 Cal.Comp.Cases 1515; *Marquez, supra*, 61 Cal.Comp.Cases 408.)

We further note that Dr. Brazina's report does not indicate whether applicant has right foot impairment, even though Dr. Brazina reported that applicant has right foot pain and objective x-rays findings and needs heel cups on an industrial basis. Dr. Brazina also reported that applicant has cervical and lumbar spine impairment with no additional impairment for the shoulders, wrists, hands or fingers, but right foot impairment was not addressed. In addition, Dr. Kohanim's reports indicate that applicant's foot complaints and treatment sometimes involved the right foot and at other times the left foot.

In order to address the inconsistencies in the medical reporting regarding injury to the feet, so that it is consistent with the record and substantial evidence, further development of the record is necessary. Thus, upon return, further reporting is appropriate by Dr. Brazina or by way of another medical opinion as to whether the right and left foot injuries and treatment are industrial and if there is impairment. (*Place v. Workers' Comp. Appeals Bd.* (*Place*) (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Escobedo, supra*, 70 Cal.Comp.Cases at pp. 620-621; *McDuffie v. L.A. County Metropolitan Transit Authority* (*McDuffie*) (2002) 67 Cal. Comp. Cases 138, 141.)

We also note that the record includes the claim form dated October 20, 2015, which indicates that the date of injury, and when the employer first knew of the injury, is October 20, 2015. (Exhibit 23.) The claim form was apparently signed by applicant, but not signed on behalf of Omega. The WCJ reported that the claim form was among applicant's trial exhibits and the subpoenaed records from defendant's adjusting agency. The WCJ further reported that injury to the left hand caused by repetitive duties is alleged on the claim form, however, description of the injury and body part affected is written in Spanish. The claim form was included in the records reviewed by Dr. Brazina, which he described in his February 14, 2017 report. Dr. Brazina also reported that applicant had complaints regarding the left wrist, hand and fourth and fifth fingers, a swan neck deformity of the left fifth finger and no impairment. If the claim form was filed with Omega on or about October 20, 2015, then Omega had notice of the claim regarding the alleged injury and body part prior to applicant's layoff in March 2016, and the claim is not barred as found by the WCJ. (§ 3600(a)(10)(A); § 5401; *Brown*, *supra*, 66 Cal.Comp.Cases 1232.)

Another exception to the non-compensability of an injury claim filed after notice of termination or layoff from employment is that the date of injury for cumulative injury under section 5412 is subsequent to the date of notice of termination or layoff. (§ 3600(a)(10)(D); *The Torrance Company* DBA *The Holiday Inn City Center v. Workers' Comp. Appeals Bd.* (*Constanza*) (2011) 77 Cal.Comp.Cases 197; *Faulkner*, *supra*, 69 Cal.Comp.Cases 1161.)

Section 5412 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.

Cumulative injury occurs when the employee's repetitive mental or physical activities at work over a period of time causes disability or the need for medical treatment. (§ 3208.1; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323]; *J.T. Thorp, Inc., v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327, 332-333 [49 Cal.Comp.Cases 224].) Disability refers to compensable temporary disability or lost wages, or compensable permanent disability which may be shown by the need for medical treatment or modified work. (§ 5412; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998, 1003-1006 [69 Cal.Comp.Cases 579]; *Austin*, *supra*,

16 Cal.App.4th at p. 234; *Butler, supra*, 153 Cal.App.3d at pp. 336-343; *Constanza, supra*, 77 Cal.Comp.Cases 197; *Seco Industries v. Workers' Comp. Appeals Bd.* (*Brown*) (2001) 66 Cal.Comp.Cases 1232.) The date of injury for cumulative injury is when the employee knew or should have known that their disability was caused by employment. (§ 3208.1; § 5412; *City of Fresno v. Workers' Comp. Appeals Board* (*Johnson*) (1985) 163 Cal.App.3d 467, 469-471 [50 Cal.Comp.Cases 53]; *Butler, supra*, 153 Cal.App.3d at pp. 336-343.) The date of injury may be established by showing the date that the employee received expert medical or legal advice that the disability was caused by employment, or that the employee knew that the disability was caused by employment based on their training, qualifications or experience. (*Johnson, supra*, 163 Cal.App.3d at pp. 471-473; *Brown, supra*, 66 Cal.Comp.Cases 1232.) The findings regarding cumulative injury and the date of injury must be established by substantial evidence such as testimony and medical opinion considering the entire record. (*Garza, supra*, 3 Cal.3d at pp. 317-319; *Austin, supra*, 16 Cal.App.4th at pp. 233-241; *Johnson, supra*, 163 Cal.App.3d at pp. 470-473.)

Defendant contends that applicant's testimony establishes that she knew that her injuries and disability were caused by work before she was laid off, and that the date of injury is before the layoff and that her injury claim filed after the layoff is barred. Defendant contends that the WCJ erroneously found that the date of injury continued through April 7, 2016, which is after the layoff, and that the injury claim is not barred under section 3600(a)(10)(D).

We agree with the WCJ that the date of injury for the cumulative injury is when applicant was informed by Dr. Kohanim's April 7, 2016 report that the work at Omega had caused injury and compensable disability. (§ 5412; *Rodarte, supra*, 119 Cal.App.4th at pp. 1003-1006; *Johnson, supra*, 163 Cal.App.3d at pp. 471-473; *Brown, supra*, 66 Cal.Comp.Cases 1232.) The record indicates that prior to applicant's layoff from Omega, applicant only had treatment for right heel and foot complaints and was informed by the industrial clinic that the complaints were nonindustrial and released to regular duties and treatment with her personal physician. Although applicant testified that she was subsequently told by her personal physicians that her right heel and foot complaints were related to work prior to the layoff, the record does not establish that she missed work, performed modified work or had compensable disability due to her right heel and foot complaints. She was not informed that her work at Omega caused right heel and foot complaints or other injuries, a limitation to modified work and compensable disability until Dr.

Kohanim's April 7, 2016 report. (§ 5412; *Rodarte, supra,* 119 Cal.App.4th at pp. 1003-1006; *Johnson, supra,* 163 Cal.App.3d at pp. 471-473; *Brown, supra,* 66 Cal.Comp.Cases 1232.)

Even if the record indicated that applicant had compensable disability due to right foot complaints and knew work at Omega caused the complaints before the layoff, the date of injury when applicant was informed that work caused other injuries and compensable disability is the date of Dr. Kohanim's April 7, 2016 report. (§ 5412; *Rodarte, supra,* 119 Cal.App.4th at pp. 1003-1006; *Steele, supra,* 219 Cal.App.3d at pp. 1267-1273; *Johnson, supra,* 163 Cal.App.3d at pp. 471-473; *Contreras, supra* 83 Cal.Comp.Cases 1575.) Although applicant apparently alleged injury to her left hand from repetitive work on the claim form dated October 20, 2015, the record does not show that applicant had treatment or advice by a doctor, time off from work, modified duties or compensable disability due to a left hand injury prior to the layoff. Her testimony that she wore wrist supports at work does not establish that she had compensable disability or knowledge of industrial causation because she also indicated that the wrist supports were purchased by her and not prescribed by a doctor. She also testified that she wore a back support at work that Omega supplied as a precautionary measure, and there was no showing that applicant had medical treatment or advice, time off from work, modified duties or compensable disability due to back complaints prior to the layoff. (§ 5412; *Rodarte, supra,* 119 Cal.App.4th at pp. 1003-1006; *Steele, supra,* 219 Cal.App.3d at pp. 1267-1273; *Johnson, supra,* 163 Cal.App.3d at pp. 471-473; *Contreras, supra* 83 Cal.Comp.Cases 1575; *Constanza, supra,* 77 Cal.Comp.Cases 197; *Brown, supra,* 66 Cal.Comp.Cases 1232.)

Therefore, the record and substantial evidence support the finding that the date of injury for the cumulative injury is April 7, 2016. (§ 3208.1; § 5412; *Rodarte, supra,* 119 Cal.App.4th at pp. 1003-1006; *Austin, supra,* 16 Cal.App.4th at p. 233-241; *Johnson, supra,* 163 Cal.App.3d at pp. 471-473.) Accordingly, substantial evidence supports the WCJ's findings that the date of injury is subsequent to applicant's layoff from employment at Omega in March 2016, and that the cumulative injury claim filed after the layoff is not barred under section 3600(a)(10). (§ 3600(a)(10)(D); § 5412; *Rodarte, supra,* 119 Cal.App.4th at pp. 1003-1006; *Austin, supra,* 16 Cal.App.4th at p. 233-241; *Johnson, supra,* 163 Cal.App.3d at pp. 471-473; *Constanza, supra,* 77 Cal.Comp.Cases 197; *Brown, supra,* 66 Cal.Comp.Cases 1232.)

Defendant contends that applicant knew about the cumulative injury and disability due to work before her layoff and Dr. Kohanim's report because she testified that she had knowledge

from her cumulative injury claim against her prior employer. However, applicant's knowledge from a prior cumulative injury claim against her former employer does not mean that applicant knew that her work at Omega caused cumulative injury and compensable disability without expert medical or legal advice. (*Calif. Ins. Guarantee Assn. v. Workers' Comp. Appeals Board* (*Carls*) (2008) 163 Cal.App.4th 853, 862-863 [71 Cal.Comp.Cases 771]; *Rodarte, supra*, 119 Cal.App.4th at pp. 1003-1006; *Johnson*, *supra*, 163 Cal.App.3d at pp. 471-473.) As we have explained, the record does not establish that applicant was informed that she had compensable disability caused by work until Dr. Kohanim's April 7, 2016 report.

Defendant also contends that applicant knew that she had compensable disability caused by work before she was laid off because applicant testified that she knew that her physical complaints were related to her job duties, and that she took approximately five days off work for her physical complaints. However, her testimony did not specify the physical complaints which led her to take days off from work. Her knowledge of physical complaints and compensable disability caused by work would not be established if she took days off for complaints that the WCJ found nonindustrial. (*Carls*, *supra*, 163 Cal.App.4th at pp. 862-863; *Rodarte*, *supra*, 119 Cal.App.4th at pp. 1003-1006; *Johnson, supra*, 163 Cal.App.3d at pp. 471-473.) Defendant further contends that applicant's use of wrist braces at work is additional evidence of compensable disability. However, as we have explained, there is no substantial evidence that applicant took days off from work or had modified duties, treatment by a doctor, or compensable disability due to her wrists or hands. (*Carls*, *supra*, 163 Cal.App.4th at pp. 862-863; *Rodarte*, *supra*, 119 Cal.App.4th at pp. 1003-1006; *Johnson*, *supra*, 163 Cal.App.3d at pp. 471-473.)

A decision must be based on substantial evidence such as medical opinion and testimony considering the entire record. (§ 5903; § 5952; *Garza*, *supra*, 3 Cal.3d at pp. 317-319.) A medical opinion relied upon is not substantial evidence if the opinion is based on incorrect facts, history or legal theory, or surmise, speculation, conjecture or guess and should be based on logical and persuasive reasoning in light of the entire record. (*Place*, *supra*, 3 Cal.3d at p. 378; *Escobedo*, *supra*, 70 Cal.Comp.Cases at pp. 620-621; *Garza*, *supra*, 3 Cal.3d at pp. 317-319.)

Defendant contends that Dr. Brazina's February 14, 2017 report limits industrial injury to applicant's cervical and lumbar spine and left shoulder indicated by the "Diagnoses." Defendant further contends that Dr. Brazina's report under "Causation" defers the post termination claim legal issue to the trier of fact and provides a medical opinion that there was no prior treatment

except the right foot which was nonindustrial. Defendant contends that the WCJ misinterpreted Dr. Brazina's report as deferring medical causation to the trier of fact, and that substantial evidence does not support the WCJ's finding that other body parts were industrially injured.

We disagree with defendant's contention that Dr. Brazina's February 14, 2017 report limits the industrial injury to applicant's cervical and lumbar spine and left shoulder set forth by the "Diagnoses." As we have explained, Dr. Brazina's report indicates that applicant should be provided heel cups for her plantar fasciitis on an industrial basis even though it is reported under "Work Restrictions" and not "Diagnoses." Therefore, Dr. Brazina's report does not limit the industrial injury to applicant's cervical and lumbar spine and left shoulder. (*Place, supra,* 3 Cal.3d at p. 378; *Garza, supra,* 3 Cal.3d at pp. 317-319; *Escobedo, supra,* 70 Cal.Comp.Cases at pp. 620-621.)

We agree that Dr. Brazina's report indicates that the industrial injury includes the cervical and lumbar spine under "Diagnoses" because cervical and lumbar spine impairment was apportioned to the continuous trauma at Omega. Dr. Brazina also reported that there was no additional impairment for the shoulders, and Dr. Brazina did not apportion shoulder impairment to the continuous trauma or address causation regarding shoulder injury. Nevertheless, the SLAP lesion shoulder reported under "Diagnoses" was considered industrial by Dr. Brazina, and this diagnosis is consistent with Dr. Brazina's reporting regarding applicant's left shoulder MRI and complaint of pain, no prior left shoulder injury or treatment, and the repetitive packing, lifting and arduous work by applicant. (*Place*, *supra,* 3 Cal.3d at p. 378; *Garza*, *supra,* 3 Cal.3d at pp. 317-319; *Escobedo*, *supra*, 70 Cal.Comp.Cases at pp. 620-621.) Considering that no additional impairment for both shoulders was reported, further reporting by Dr. Brazina or by way of another medical opinion should clarify whether applicant's right shoulder complaints are related to work performed at Omega as claimed or the previous right shoulder injury from work with the former employer. (*Place*, *supra,* 3 Cal.3d at p. 378; *Garza*, *supra*, 3 Cal.3d at pp. 317-319; *Escobedo*, *supra*, 70 Cal.Comp.Cases at pp. 620-621; *McDuffie*, *supra,* 67 Cal. Comp. Cases 138, 141.)

In addition, Dr. Brazina reported that there was no additional impairment of the wrists, hands or fingers but without addressing industrial causation. Dr. Brazina also reported that applicant had complaints regarding her left wrist, hand and fingers, and that she had a swan-neck deformity of the left fifth finger by exam. She apparently alleged injury to her left hand from the repetitious work at Omega on the claim form dated October 20, 2015, and testified that she

purchased and wore wrist braces at work because her wrists hurt. The record further indicates that applicant previously injured her right upper extremity from work with the prior employer. Further reporting by Dr. Brazina or another medical opinion should clarify whether applicant's complaints or injuries regarding her wrists, left hand and fingers are industrial as claimed considering the entire record. (*Place, supra*, 3 Cal.3d at p. 378; *Garza, supra,* 3 Cal.3d at pp. 317-319; *Escobedo, supra*, 70 Cal.Comp.Cases at pp. 620-621; *McDuffie, supra,* 67 Cal. Comp. Cases 138, 141.)

Accordingly, we agree with the WCJ's findings that applicant sustained industrial injury to her neck, back and left shoulder based on Dr. Brazina's opinion and the entire record. (*Place, supra*, 3 Cal.3d at p. 378; *Garza, supra*, 3 Cal.3d at pp. 317-319; *Escobedo, supra*, 70 Cal.Comp.Cases at pp. 620-621.) We will defer the issue of injury to other body parts and applicant's permanent disability.

Generally, temporary disability indemnity payments compensate an employee injured by work for lost wages during the period that the employee is temporarily disabled from performing work, undergoing treatment and is healing due to the work injury. (*Skelton v. Workers' Comp. Appeals Bd.* (*Skelton*) (2019) 39 Cal.App.5th 1098, 1105-1107 [84 Cal.Comp.Cases 795]; *Huston v. Workers' Comp. Appeals Bd.* (*Huston*) (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798].) Temporary disability indemnity payments are paid at the applicable statutory weekly rate until a temporarily disabled employee reaches maximum medical improvement or permanent and stationary status, returns to work, or is deemed able to return to work, subject to statutory limits. (§ 4453; § 4653; *Skelton, supra*, 39 Cal.App.5th at pp. 1106-1107; *Brower v. David Jones Construction* (*Brower*) (2014) 79 Cal.Comp.Cases 550, 560-562.)

Eligibility for temporary disability indemnity payments requires an employee to have earning capacity at the time of the injury and during the duration of temporary disability, which includes the ability, willingness, and opportunity to work. (*Gonzales v. Workers' Comp. Appeals Bd.* (*Gonzales*) (1998) 68 Cal.App.4th 843, 846-850 [63 Cal.Comp.Cases 1477].) An employee's removal from the open labor market for reasons other than the industrial injury may indicate unwillingness to work and lack of earning capacity. (*Gonzales, supra,* 68 Cal.App.4th at pp. 846-850.) The WCJ's findings regarding temporary disability status and entitlement to temporary disability indemnity payments must be based on substantial evidence. (*Skelton, supra*, 39 Cal.App.5th at p. 1105; *Huston, supra*, 95 Cal.App.3d at p. 870.)

Defendant contends that applicant testified that she performed her regular duties full-time until she was laid off from work, and that the WCJ's findings that applicant was temporarily disabled and entitled to the awarded temporary disability indemnity payments are not supported by substantial evidence. Defendant adds that applicant also testified that her chiropractor asked if she wanted to be certified for state disability and she responded that she did. Defendant contends that the WCJ's finding that applicant was temporarily disabled is based on her choice and not medical opinion, and that applicant was unwilling to work and voluntarily removed herself from the job market and was not temporarily disabled.

The WCJ found that applicant was temporarily disabled and entitled to temporary disability indemnity payments from April 7, 2016 through December 1, 2016 based on Dr. Kohanim's reports. Dr. Kohanim reported that applicant needed treatment for industrial injuries and was limited to modified work on April 7, 2016; that applicant, with her disability, was looking for work without success and was treating; that she should remain off work and was temporarily disabled on May 9, 2016; and that she received treatment and remained temporarily disabled until permanent and stationary on December 1, 2016. Although Dr. Brazina's report does not state whether applicant was temporarily disabled, Dr. Brazina indicated that Dr. Kohanim's reports were reviewed, and that applicant had reached permanent and stationary status by February 14, 2017. Dr. Brazina also reported that the industrial injury included applicant's lumbar spine and left shoulder, which were treated by Dr. Kohanim during the period of temporary disability. Dr. Brazina's report does not indicate that Dr. Kohanim's treatment was inappropriate, or that the limitation to modified work or temporary disability reported by Dr. Kohanim was incorrect.

Dr. Kohanim's reports regarding applicant's temporary disability status are consistent with the overall record and substantial evidence that applicant was temporarily disabled while undergoing treatment and healing from the industrial injury from April 7, 2016 until permanent and stationary on December 1, 2016. (*Garza*, *supra*, 3 Cal.3d at pp. 317-319; *Skelton*, *supra*, 39 Cal.App.5th at pp. 1105-1107; *Huston*, *supra*, 95 Cal.App.3d at pp. 868, 870.) Accordingly, we agree with the WCJ's finding that applicant was temporarily disabled and entitled to the temporary disability indemnity payments awarded from April 7, 2016 through December 1, 2016.

Although applicant testified that she performed her regular work duties full time until she was laid off from Omega as defendant contends, applicant further testified that she wore wrist and back supports and had pain while doing the work. We note that defendant also contends that

applicant's use of self-procured wrists supports and time off from work is evidence of temporary disability. (*Rodarte, supra*, 119 Cal.App.4th at pp. 1003-1006.) Applicant reported right heel and foot complaints from standing at work, and she received treatment and filed a claim form apparently alleging injury to her left hand from repetitious work. Her ability to do her regular work duties full time with wrists and back supports and worsening physical complaints may indicate temporary partial disability or temporary total disability after Omega ended the employment. (See *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (*Stroer*) 52 Cal.2d 417, 419-421 [24 Cal.Comp.Cases 144]; *Skelton*, *supra*, 39 Cal.App.5th at pp. 1106-1107; *Hardware Mutual Casualty Co. v. Workers' Comp. Appeals Bd.* (*Hargrove*) (1967) 253 Cal.App.2d 62, 64-66 [32 Cal.Comp.Cases 291].)

If temporary partial disability due to industrial injury prevents the injured employee from obtaining suitable work after the employment ends, or there is no showing by the employer that such work was available and offered, the temporary partial disability and wage loss may be total. (*Stroer, supra,* 52 Cal.2d at pp. 419-421; *Huston, supra,* 95 Cal.App.3d at p. 868; *Hargrove, supra,* 253 Cal.App.2d at pp. 64-66.) After she was laid off from work by Omega, Dr. Kohanim reported that applicant was limited to modified work due to the industrial injury. Dr. Kohanim subsequently reported that applicant looked for work with her disability and was unsuccessful, and that she should remain off work and was temporarily disabled until permanent and stationary on December 1, 2016. There was no showing by defendant that modified or suitable work after the layoff was available and offered. (*Stroer*, *supra,* 52 Cal.2d at pp. 419-421; *Huston, supra*, 95 Cal.App.3d at p. 868; *Hargrove, supra*, 253 Cal.App.2d at pp. 64-66.)

We also disagree with defendant's contention that because Dr. Kohanim asked applicant if she wanted to be certified for state disability and she responded that she did, applicant was unwilling to work, voluntarily removed herself from the job market, and was not temporarily disabled. The record shows that applicant worked at Omega with wrists and back supports and increasing physical complaints and was laid off work. Dr. Kohanim reported that applicant was limited to modified work due to the industrial injury, and that she looked for work with her disability without success and was temporarily disabled. Therefore, the layoff by the employer and disability due to the industrial injury resulted in applicant not working and not her unwillingness to work, voluntary removal from the job market or lack of earning capacity. (*Stroer, supra*, 52 Cal.2d at pp. 419-421; *Gonzales*, *supra,* 68 Cal.App.4th at pp. 846-850 *Huston, supra,*

95 Cal.App.3d at p. 868; *Hargrove*, *supra*, 253 Cal.App.2d at pp. 64-66.) Since Dr. Kohanim reported that applicant was limited to modified work and temporarily disabled and temporary disability benefits were denied by defendant, her request to be certified by Dr. Kohanim to receive state disability benefits was reasonable. (See Unemp. Ins. Code § 2629 and § 2629.1; *Calif. Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (*Karaiskos*) (2004) 117 Cal.App.4th 350, 357-358 [69 Cal.Comp.Cases 183].)

Accordingly, we affirm the F&A, except that we amend it to find that applicant sustained industrial injury to her neck, back and left shoulder and that applicant's section 5412 date of injury is April 7, 2016, and to defer the issues of injury to other body parts, permanent disability, apportionment, and attorney's fees.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued on March 18, 2019, by the WCJ is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Maria Gutierrez, while employed during the period from October 1, 2014 through March 23, 2016, as a packer, at Compton, California by defendant, Omega Extruding of California, insured by Old Republic, administered by Gallagher Bassett Services, Inc., sustained industrial injury to the neck, back and left shoulder. The issue of injury to other body parts is deferred.

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6. The issue of permanent disability is deferred.

7. The issue of apportionment is deferred.

8. Applicant is in need of further medical treatment to cure or relieve from the effects of industrial injury.

9. The issue of attorney's fees is deferred.

10. The date of injury under Labor Code section 5412 is April 7, 2016.

AWARD

b. The award of permanent disability is deferred.

e. The award of attorney's fees is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 12, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT

MARIA GUTIERREZ
LAW OFFICES OF TELLERIA, TELLERIA & LEVY
MICHAEL SULLIVAN & ASSOCIATES

PR/AS/mc

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