WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL LINCOLN, *Applicant*

vs.

CINCINNATI REDS and ST. LOUIS CARDINALS, ACE AMERICAN INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.; PITTSBURG PIRATES, TRAVELERS INDEMNITY COMPANY, successor in interest by merger to GULF INSURANCE COMPANY; PITTSBURG PIRATES, FAIRMONT INSURANCE, administered by ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ10630875; ADJ15700993
Anaheim District Office

OPINION AND ORDER DENYING PETITIONS FOR RECONSIDERATION

Defendants Travelers Indemnity Company and Ace American Insurance Company seek reconsideration of our Opinion and Order Granting Petitions for Reconsideration and Decision After Reconsideration issued on June 17, 2024, wherein we affirmed the workers' compensation administrative law judge's (WCJ) findings in relevant part that (1) applicant sustained injury to his left shoulder, right elbow, lumbar and cervical spine, both knees and both ankles arising out of and in the course of employment (AOE/COE) during the periods of February 1, 1999 through May 2, 2004, while employed by the St. Louis Cardinals, insured by Ace, and the Pittsburgh Pirates, insured by Travelers (ADJ15700993), and during the period February 5, 2008 through November 1, 2010 while employed by the Cincinnati Reds, insured by Ace (ADJ10630875), and did not sustain injury to his abdominal area or his right shoulder; (2) as to ADJ10630875, applicant was temporarily partially disabled from November 1, 2010 through June 13, 2012, and benefits are payable at the rate of $1,539.71, less credit for earnings during that period, with the parties to calculate the amount owing, with jurisdiction reserved to the WCJ in the event of a dispute; (3) as to ADJ15700993, applicant was temporarily totally disabled from December 22, 2005 through January 1, 2007, and benefits are payable at the rate of $1,539.71, with the parties to calculate the amount owing and jurisdiction reserved to the WCJ in the event of a dispute; (4) as to ADJ10630875, the injury caused permanent disability of forty percent (40%) payable at the rate of $290.00 per week for 201 weeks for a total of $58,290.00, less attorney fees; (5) as to

ADJ15700993, the injury caused permanent disability of twenty percent (20%) payable at the rate of $290.00 per week for 90.25 week for a total of $26,172.50, less attorney fees; (6) there is legal apportionment; (7) applicant is in need of further medical care to cure or relieve from the effects of the industrial injury; and (8) the claim is not barred by the statute of limitations; except that we amended the findings in case number ADJ15700993 to find that the Labor Code section 5412 date of injury was November 2, 2016.

Travelers contends that we erroneously (1) failed to find error in the WCJ's finding that applicant's period of injurious exposure in case number ADJ15700993 ended on May 2, 2004; and (2) found that applicant's Labor Code section 5412 date of injury in case number ADJ15700993 was November 2, 2016.

Ace also contends that we erroneously found that applicant's Labor Code section 5412 date of injury in case number ADJ15700993 was November 2, 2016.

We received Answers from applicant.

We have reviewed the contents of the Petitions and the Answers. Based upon our review of the record, and for the reasons stated below and in the June 17, 2024 Opinion and Order Granting Petitions for Reconsideration and Decision After Reconsideration, which we adopt and incorporate herein, we will deny the Petitions for Reconsideration.

Former Labor Code 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, Labor Code 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 Labor Code 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 July 17, 2024, and 60 days from the date of transmission is September 15, 2024. The next business day that is 60 days from the date of transmission is September 16, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on September 16, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to our review of the record, we did not receive a Report and Recommendation by a workers' compensation administrative law judge, and no other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with the notice of transmission required by Labor Code section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on July 17, 2024.

We turn first to Travelers' contention that we failed to find error in the determination that that the period of injurious exposure in case number ADJ15700993 ended on May 2, 2004. We observe that if this had been Travelers' sole contention, we would have dismissed it for the reasons discussed below.

It is well settled that where a party fails to prevail on a petition for reconsideration, the Appeals Board will not entertain a successive petition by that party unless the party is newly aggrieved. (*Goodrich v. Industrial Acc. Com.* (1943) 22 Cal.2d 604, 611 [140 P.2d 405, 8

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

> 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.

Cal.Comp.Cases 177]; *Ramsey v. Workmen's Comp. Appeals Bd.* (1971) 18 Cal.App.3d 155, 159 [95 Cal.Rptr. 558, 36 Cal.Comp.Cases 382]; *Crowe Glass Co. v. Industrial Acc. Com.* (*Graham*) (1927) 84 Cal.App. 287, 293-295 [258 P. 130, 14 IAC 221].) As stated in our en banc opinion in *Navarro v. A&A Framing* (2002) 67 Cal.Comp.Cases 296, 299:

> The general rule is that where a party has filed a petition for reconsideration with the Board, but the party does not prevail on that petition for reconsideration, the petitioning party cannot attack the [Appeals] Board's action by filing a second petition for reconsideration; rather, the petitioning party must either be bound by the [Appeals] Board's action or challenge it by filing a timely petition for writ of review.

Here, Travelers' previous petition for reconsideration challenged the WCJ's finding that "the end date to applicant's period of injurious exposure in case number ADJ15700993 [was] May 2, 2004." (Opinion and Order Granting Petitions for Reconsideration and Decision After Reconsideration, June 17, 2024, p. 9.) Since the Petition before us reiterates Travelers' challenge to that finding, Travelers is not newly aggrieved and its successive Petition is improper. (*Goodrich v. Industrial Acc. Com*., *supra*, 22 Cal.2d 604, 611.)

Accordingly, to the extent that Travelers' Petition raises a successive challenge to the end date of the period of injurious exposure in case number ADJ15700993, it is subject to dismissal.

We next address Travelers' and Ace's arguments that we erroneously found that applicant's Labor Code section 5412 date of injury in case number ADJ15700993 was November 2, 2016. They argue that since applicant knew he was temporally disabled from work in or about 2004, his Labor Code section 5412 date of injury must be in or about 2004. (Travelers' Petition, p. 4:2-4; Ace's Petition, p. 6:24-26.)

But as we explained, the date of injury for a cumulative trauma that results in permanent injury occurs not at the time of exposure, but at the time the cumulative effect of the injury resulting from the exposure has ripened into permanent disability. (Opinion and Order Granting Petitions for Reconsideration and Decision After Reconsideration, June 17, 2024, p. 10 (citing *Federal Insurance Co. v. Workers' Comp. Appeals Bd*. (*Johnson*) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257].) Since the record before us shows that applicant knew he had been injured and temporarily disabled from work but not that he knew before November 2, 2016 that he had sustained cumulative injury which caused him permanent disability, the record is insufficient to establish a date of injury in or about 2004.

Accordingly, we discern no merit in the Petitions.

Accordingly, we will deny the Petitions.

For the foregoing reasons,

IT IS ORDERED that Defendants Travelers' and Ace's Petitions for Reconsideration of our June 17, 2024 Opinion and Order Granting Petitions for Reconsideration and Decision After Reconsideration are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 13, 2024

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

MICHAEL LINCOLN
LEVITON, DIAZ & GINOCCHIO
BOBER, PETERSON & KOBY
DIMACULANGAN & ASSOCIATES
CHERNOW, PINE AND WILLIAMS

SRO/*cs*

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

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL LINCOLN, *Applicant*

vs.

CINCINNATI REDS and ST. LOUIS CARDINALS, ACE AMERICAN INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.; PITTSBURG PIRATES, TRAVELERS INDEMNITY COMPANY, successor in interest by merger to GULF INSURANCE COMPANY; PITTSBURG PIRATES, FAIRMONT INSURANCE, administered by ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ10630875; ADJ15700993
Anaheim District Office

OPINION AND ORDER GRANTING PETITIONS FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Travelers Indemnity Company and Defendant Ace American Insurance Company seek reconsideration of the First Amended Joint Findings and Award issued on April 2, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant sustained injury to his left shoulder, right elbow, lumbar and cervical spine, both knees and both ankles arising out of and in the course of employment (AOE/COE) during the periods of February 1, 1999 through May 2, 2004, while employed by the St. Louis Cardinals, insured by Ace, and the Pittsburgh Pirates, insured by Travelers (ADJ15700993), and during the period February 5, 2008 through November 1, 2010 while employed by the Cincinnati Reds, insured by Ace (ADJ10630875), and did not sustain injury to his abdominal area or his right shoulder; (2) there is jurisdiction; (3) as to ADJ10630875, applicant was temporarily partially disabled from November 1, 2010 through June 13, 2012, and benefits are payable at the rate of $1,539.71, less credit for earnings during that period, with the parties to calculate the amount owing, with jurisdiction reserved to the WCJ in the event of a dispute. Applicant's counsel is entitled to fifteen percent (15%) fees of the amount owing. As to ADJ15700993, the applicant was temporarily totally disabled from December 22, 2005 through January 1, 2007, and benefits are payable at the rate of $1,539.71, with the parties to calculate the amount owing and jurisdiction reserved to the WCJ in the event of a dispute. Applicant's counsel is entitled to fifteen percent (15%) fees of the amount owing; (4) as to ADJ10630875, the injury caused permanent disability of forty percent (40%)

payable at the rate of $290.00 per week for 201 weeks for a total of $58,290.00, less attorney fees; (5) as to ADJ15700993, the injury caused permanent disability of twenty percent (20%) payable at the rate of $290.00 per week for 90.25 week for a total of $26,172.50, less attorney fees; (6) there is legal apportionment; (7) applicant is in need of further medical care to cure or relieve from the effects of the industrial injury; (8) the claim is not barred by the statute of limitations; (9) the reasonable value of services rendered by applicant'[s] attorney as to ADJ10630875 is $8,743.50, and as to ADJ15700993 is $3,925.87, with applicant's attorney also entitled to fifteen percent of the retroactive temporary disability benefits owing.

Travelers contends that the WCJ erroneously (1) failed to appoint an administrator; (2) failed to strike the reports of applicant's physician Dr. Wood; and (3) set the end date to applicant's period of injurious exposure in case number ADJ15700993 as May 2, 2004.

Ace contends that the WCJ erroneously (1) found subject matter jurisdiction; (2) found applicant entitled to temporary disability benefits; and (3) failed to find the claim in case number ADJ15700993 barred by the statute of limitations.

We received an Answer from applicant.

We received a Report and Recommendation on Travelers' Petition for Reconsideration (Report on Travelers' Petition) and a Report and Recommendation on Ace's Petition for Reconsideration (Report on Ace's Petition) from the WCJ. Both Reports recommend that the Petitions be denied.

We have reviewed the contents of the Petitions, the Answer, and the Reports. Based upon our review of the record, and for the reasons set forth in the Reports as discussed below, we will grant reconsideration, and, as our Decision After Reconsideration, we will affirm the First Amended Joint Findings and Award, except that we will amend to find that applicant's Labor Code section 5412 date of injury in case number is ADJ15700993 is November 2, 2016.

FACTUAL BACKGROUND

On November 2, 2016, applicant filed an application for adjudication, alleging cumulative injury to the head, upper extremities, lower extremities, musculoskeletal system and multiple other body parts during the period of February 11, 1999 through November 7, 2010. (Application for Adjudication, November 2, 2016, pp. 1-9.)

Also on that date, applicant filed a fee disclosure statement pertaining to his attorney's fee agreement. (Fee Disclosure Statement, November 2, 2016.)

In the First Amended Opinion on Decision, the WCJ states:

STATUTE OF LIMITATIONS

The Applicant credibly testified that he became aware that he could file a workers' compensation claim in California in 2016. The Application was filed in 2016. Therefore, the claims are not barred by the Statute of Limitations.

DATE OF INJURY

Based upon Dr. Wood's reporting, deposition transcript and a review of the record which includes the applicant's testimony, it is found that the applicant sustained two (2) separate cumulative trauma injuries. The applicant had a period where he was injured on a cumulative trauma basis, went off work, sustained a period of temporary disability, required medical treatment and then returned to his usual and customary duties. There is not one cumulative trauma injury as claimed by the applicant as there was a period between 2006 and 2008 where he did not play professional baseball and stopped work due to his injury and then recovered sufficiently to return to professional baseball. Likewise, there was not only one continuous trauma period as claimed by defendants from February 5, 2008 through November 1, 2010, although this does appear to be the time period for the second continuous trauma. This is similar to a Western Growers situation. This is supported as stated above by the medical record and the applicant's testimony.

Based upon a review of the record and the reporting of Dr. Wood it is found that the applicant sustained a continuous trauma injury from February 1999 through May 2, 2004 and a second continuous trauma injury from February 5, 2008 through November 1, 2010. Consistent with Labor Code Section 5500.5, going back one year from the first period of the continuous trauma the applicant was playing for the Pittsburg Pirates and the St. Louis Cardinals. The parties stipulated that the Minnesota Twins would be outside the period of the continuous trauma, he played for them from February 11, 1999 through February 3, 2011.

For the second continuous trauma he was employed by the Cincinnati Reds.
(First Amended Joint Opinion on Decision, pp. 1-2.)

In the Report on Travelers' Petition, the WCJ states:

The parties raised as issues, injury arising out of and in the course of employment, parts of body injured, permanent and stationary date, permanent disability, apportionment, further medical care and attorney fees. Defendants asserted that the Statute of Limitations would bar the claim, that there was an exemption pursuant to Labor Code Section 3600.5, raised Labor Code Section 5500.5 and that a reciprocity defense would apply pursuant to 3600.5(b). The cases were consolidated.

. . .

As no issue had been raised as to whom should administer the award, no finding was made in that regard and the two teams for the first period of the continuous trauma were the St. Louis Cardinals and the Pittsburgh Pirates. As to the second continuous trauma, as stated above, the only team that the applicant played for during his last year of employment was the Cincinnati Reds.

. . .

As to petitioner's first issue that ACE should be named as the administrator of both awards this was never raised as an issue and the defendants can deal with this issue themselves. In the alternative a supplemental proceeding may be held if necessary. However, this does not appear to be an issue for reconsideration. . . .

The reports [of]Dr. Wood were not struck as they constitute substantial evidence. Defendant asserts that the reports are not substantial evidence as the doctor did not support a correct date of injury. Defendants believe that the first continuous trauma period may have ended in September of 2005 "or later" Page 3, lines 23 through 24 of the petition for reconsideration. They believe that the doctor did not review the history and surgical reporting of Dr. Paletta, that the doctor did not have an accurate knowledge of the applicant's assignments and rehabilitation while with the Cardinals and request that the record be developed. They do not appeal any of the other findings.

In order for a medical report to be substantial evidence the medical opinion must be based upon reasonable medical probability (McAllister v. WCAB (1968) 33 CCC 660) Dr. Wood 's reports of July 2 , 2022 and December 7, 2002 (Court X - EAMS DOC ID 47418572, 47418573) and deposition transcripts of December 1, 2022 and June 1, 2023 (Court Y - EAMS DOC ID 47418570, 47418571) do take into consideration the applicant's activities, medical history and his reports do show a review of the medical reports and records that he was provided with The doctor's findings are not speculative and the doctor does offer his reasoning. Per Garza v. WCAB (1970) 35 CCC 500 consideration is given to the entire record and the entire medical report. The doctor's finding of two separate continuous trauma injuries accurately reflects the facts in this case. The applicant has a complicated history of numerous surgeries and numerous periods of being off work in-between surgeries. Petitioner asserts that per Labor Code Section 5412 that the first continuous trauma date potentially ends in 2005 or later. They base their argument upon the applicant not having any lost earnings in 2004 and 2005 and that he performed modified duties. As such they assert that the continuous trauma period ending date for the first continuous trauma period would not have been when he had surgery in April 2004. Defendants are correct that the ending date may not be accurate, but respectfully that would put the ending date back to April of 2004 and when he had right elbow surgery and not May of 2004. Per the applicant's testimony (Minutes of Hearing and Summary of Evidence dated January 11, 2024 page 4, lines 6 through 8 the Applicant had surgery in either the fall or April of 2004. Dr. Wood's report of July 20, 2022 page 40, paragraph 3 (EAMS DOC ID No. 47418572, provides a history of the applicant having surgery in 2004 and that he did not play for three years.

Labor Code Section 5412 states that the date of injury for a cumulative trauma injury is the 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. The applicant did have disability in 2004. Respectfully, the applicant not having wage loss does not preclude that he would have had compensable permanent disability at the time of the surgery and during his recovery. He was paid wages pursuant to a contract, not wages for actually being able to perform his work duties during the recovery period. While he attempted to perform some duties in training, he was not able to return to his usual and customary duties. He had significant work restrictions and trying to perform those duties appear to have aggravated his condition leading to another surgery. Labor Code Section 5412 is in fact satisfied by the facts in this case. Labor Code Section 3208.1 notes that an injury may either be specific or a continuous trauma injury. A continuous trauma injury is defined as occurring due to repetitive traumatic activities over a period of time, the combined effect of which causes any disability or need for medical treatment.

For a continuous trauma one then looks to Labor Code Section 5412 to determine the date. Per Dr. Wood's deposition transcript dated December 1, 2022 page 20, lines 16 through 20 (EAMS DOC ID 47418571) there were two separate continuous trauma injuries and he indicated those dates in his reports and per his deposition testimony. Once again this needs to be based upon reasonable medical probability.
. . .
The applicant has had numerous injuries, had an injury while working for the St. Louis Cardinals and Pittsburgh Pirates, attempted to return to his usual and customary duties , could not for years and then many years later was able to return to his usual and customary duties as a pitcher.

The parties had numerous opportunities to develop the record and conducted two depositions. The doctor was consistent in his findings, wrote a well reasoned report and his findings were not speculative.
. . .
The facts do support an ending date for the first continuous trauma when the applicant had surgery in 2004. The applicant did report for spring training as defendants state, but he was unable to pitch and unable to perform his usual and customary duties. There is a discord in arguing that there would be no injury if he could do some activities at training. He could still perform some function and have permanent disability and work restrictions. This is perhaps evidenced of his injuring or reinjuring himself attempting to return to competitive throwing but does not negate a prior injury. Defendants assert that the doctor only determined the date of injury after his review of EAMS. There is nothing to indicate that this is fact contributed to his findings.

The Decision was based upon the range of evidence and the record which included but was not limited to the deposition transcripts and reports of Dr. Wood. There is substantial evidence to support date of injury found.
(Report on Defendant Travelers Indemnity Company's Petition, pp. 2-5.)

In the Report on Ace's Petition, the WCJ states:

The Applicant credibly testified to having his contract forwarded to him in California and that he signed the contract in California. Petitioner asserts that the applicant was not credible in his testimony. Per **Garza v. WCAB** (1970) 35 CCC 500 the determination of credibility lies with the trier of fact. Mr. Lincoln credibly testified that he had his mail forwarded, that in the off season he was generally at his father's house in California. At the time when the Reds first offered a contract (MOH, SOE January 11, 2024 page 5, lines 15 through 17) the Applicant was in Sacramento when he accepted the offer and signed in Long Beach at his father's home. While the contract may have been sent to Tennessee initially, the contract was then forwarded to California where the Applicant was with family and executed in California. Petitioner has no expectation of where the contract will be executed for their professional players as they mail the contracts all over the country and it is not unexpected that the Applicant may sign his contract in the state where he grew up, resides during the off season, and ultimately returned to after he could no longer play. It seems inaccurate to state that the Applicant "carried his contract across California's state line to vest California with jurisdiction. (Page 4, lines 8 through 10 of the Petition for Reconsideration dated April 26, 2024) The Applicant had sufficient contacts with California and executed the contract in his home state. This confers jurisdiction. The Reds do not require that the contracts only be executed in Ohio, as stated above, they send contracts throughout the nation. Respectfully, the record does support that a contract of hire was made in California. Per the Minutes of Hearing and Summary of Evidence dated April 13, 2022, page 7, lines 21 through 22, the first contract was signed at his father's house and he was in California during that time as his wife's father was ill. Admittedly he wasn't sure where the second contract was signed, but he believed all of his contracts were signed in California. The Applicant has sufficient contacts with California and continues to reside in California. Therefore, respectfully, it was appropriate to find jurisdiction. This also takes into consideration Labor Code Section 3202.

Petitioner also asserts that pursuant to Labor Code Section 5305 that the Applicant must not only have a contract formed within California but there must also be injurious exposure. The Applicant testified to playing in California during a period of the continuous trauma claims. While case law is clear that paying taxes in California does not confer jurisdiction, it does establish that games were played in California and the Applicant testified to paying California taxes for the earnings that he had in California. Substantial evidence supports that the Applicant accepted the offer of employment in California and that the contract was executed in California. Labor Code Section 5305 was not intended to limit jurisdiction but to extend the same.

Petitioner asserts as to ADJ15700993, with a date of injury of February 1, 1999 through May 2, 2004, that the claim is barred by the Statute of Limitations. They assert that the Applicant had knowledge of industrial injuries given his prior surgeries and the medical records. Knowledge of an injury without knowing that he could file a claim in California should not bar the claim for filing more than one year post the last date of his injurious exposure with the St. Louis Cardinals. The Applicant credibly testified that it was not until 2016 that he found out that he could file a claim in California (MOH, SOE April 13, 2022 lines 20 through 21). Petitioner's argument is that the Applicant knew that he was injured as he received treatment and somehow should have known he could file a claim in California. Likewise, the employer knew that he was injured and no evidence was offered that they advised him of any rights as to his injuries whether those rights lay in California or elsewhere.

. . .

Temporary disability benefits were found to be owed from December 22, 2005 through January 1, 2007 and again from November 1, 2010 through June 13, 2012. This was based upon the reporting of Dr. Wood which was found to be substantial evidence. Petitioner does not dispute the medical period found but asserts that the Applicant's contracts were paid even when he was off and disabled so that there was no loss of earnings. They assert that there were no off season earnings and after he could no longer play that he had no earnings so there is no wage loss. The Applicant was unable to perform his usual and customary duties and even though he attempted to stay in shape, he would still be entitled to temporary partial disability at the least, when he was attempting to rehab himself. As to the initial period found of December 22, 2005 through January 1, 2007 he was not under any contract with any team. The Applicant testified that his contract was up in December of 2005 with the St. Louis Cardinals (MOH/SOE January 11, 2024 page 4, lines 9 through 11). Therefore, contrary to petitioner's assertion there was no contract that was paid out at that time. His social security earnings show that in 2006 he had earnings of $231.00 and in 2007 earnings of $336.00 (Exhibit Court Z dated March 3, 2023). There were lost wages. While it is correct there was no guarantee of an offer being made, the Applicant was still found to be temporarily disabled by Dr. Wood for that period and it is supported by his surgeries and rehabilitation. It is speculative to say that as the Applicant did not have earnings during the off season that he was not temporarily disabled either on a total or partial basis. At his level of play, his earnings, and the requirement to stay in shape it is not untenable that during the off season he would not seek other employment. Likewise, analogizing to the odd lot doctrine, what professional baseball would be available during the off season? In any event he was unable to perform his usual and customary duties or modified duties during that time period as a pitcher. In regards to the period of temporary disability found from November 1, 2010 through June 13, 2012, this was based upon the medical findings of Dr. Wood and took into consideration the entire record. The Applicant's last contract with the Cincinnati Reds ended when he could no longer play. However, please note that in the Findings and Award that jurisdiction was reserved as insufficient evidence was offered as to earnings by either party. It was further ordered that the record was to

be developed. Respectfully, the period of temporary disability found is supported, but the amount owed is still at issue. Based upon the social security earnings information offered, the Applicant did have wage loss during both periods of temporary disability found and a portion may be for temporary partial disability. The Applicant maintaining some level of fitness is not sufficient to defeat temporary disability. In order to perform the duties of a professional athlete, which was his usual and customary job, he had to perform at such a high level that minor working out while rehabbing does not indicate he was able to perform as a professional athlete.
(Report on Defendant Ace's Petition, pp. 3-5.)

DISCUSSION

We turn first to Travelers' contention that the WCJ erroneously failed to determine which workers' compensation carrier should be appointed as administrator of the awards herein.

Issues not raised at the trial level cannot ordinarily be raised for the first time on reconsideration. (See *Cottrell v. Workers' Comp. Appeals Bd*. (1998) 63 Cal.Comp.Cases 760, 761 [writ den.] ["[i]t is improper to seek reconsideration on an issue not presented at the trial level"]; *Sonoma County Office of Education v. Workers' Comp. Appeals Bd.* (*Pasquini*) (1998) 63 Cal.Comp.Cases 877 [writ den.]; *Paula Insurance Co. v. Workers' Comp. Appeals Bd.* (*Diaz*) 62 Cal.Comp.Cases 375 [writ den.].)

Here, as stated by the WCJ in the Report on Travelers' Petitition, the parties did not raise the issue of which workers' compensation should be appointed as administrator for trial and it is not properly before us now. (Report on Travelers' Petition, p. 3.) In addition, and as the WCJ also stated, the parties may resolve the issue or raise it for trial at a later proceeding. (*Id*.)

Accordingly, we decline to consider the issue of which carrier should be appointed administrator of the awards.

We next address Travelers' contention that the WCJ erroneously failed to strike the reports of applicant's physician Dr. Wood. Specifically, Travelers argues that the reports fail to constitute substantial medical evidence on the grounds that they fail to support a correct date of injury, fail to show that Dr. Wood reviewed the history and surgical reporting of Dr. Paletta, and failed to show that Dr. Wood had an accurate knowledge of the applicant's assignments and rehabilitation.

To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en

banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

Here, as stated in the Report on Travelers' Petition, Dr. Wood's reports of July 2, 2022, and December 7, 2022, and deposition transcripts of December 1, 2022, and June 1, 2023, were framed in terms of reasonable medical probability and based on pertinent facts and on an adequate examination and history. (Report on Travelers' Petition, pp. 3-5.) In addition, Travelers had multiple opportunities to obtain Dr. Wood's testimony regarding his review of the medical record as well his knowledge of applicant's assignments and rehabilitation and did not obtain any testimony suggesting that his reporting is based upon an inadequate medical history or ungermane facts. (*Id.*, p. 5.)

Accordingly, we are unable to discern error in the WCJ's decision not to strike the reports of Dr. Wood.

We next address Travelers' contention that the WCJ erroneously set the end date to applicant's period of injurious exposure in case number ADJ15700993 as May 2, 2004.

Here, as stated in the Report on Travelers' Petition, although applicant's history of exposure is complicated, Dr. Wood's finding as to the first period of exposure is consistent with the medical record. (Report on Travelers' Petiiton, pp. 3-4.) Accordingly, we are unable to discern error in the WCJ's setting the end date of injurious exposure in case number ADJ15700993 as May 2, 2004.

Having reviewed the record as to applicant's period of injurious exposure, we note that the WCJ made no formal finding as to the Labor Code section 5412 date of injury in case number ADJ15700993.

Labor Code section 5412 defines the date of injury for a cumulative injury claim as:

> [T]hat 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.
> (Lab. Code § 5412.)

For purposes of determining the date of a cumulative injury, it is not assumed that a worker has knowledge that a disability is job-related without medical confirmation, unless the nature of the disability and the worker's qualifications are such that he or she should have recognized the relationship. (*City of Fresno v. Workers' Comp. Appeals Bd., (Johnson)*, (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53].) Whether an employee knew or should have known his or her disability is industrially related is generally a question of fact to be determined by the trier of fact, i.e., the WCJ. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson), supra*; *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104]; *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33 Cal.Comp.Cases 722]; *Alford v. Industrial Accident Com.* (1946) 28 Cal.2d 198 [11 Cal.Comp.Cases 127].)

The date of injury for a cumulative trauma that results in permanent injury occurs not at the time of exposure, but at the time the cumulative effect of the injury resulting from the exposure has ripened into disability. (See *Federal Insurance Co. v. Workers' Comp. Appeals Bd*. (*Johnson*) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257]; Lab. Code § 5412.)

More specifically, the date of injury under Labor Code section 5412 is separate and distinct from the period of injurious exposure to cumulative injury under Labor Code section 5500.5, which permits liability to be apportioned between multiple employers for periods of employment within one year of either the date of injury, or the last date of injurious exposure, whichever occurs first.

In this case, the record shows that applicant's injurious exposure occurred during the period of February 1, 1999 through May 2, 2004, and that he did not become aware that he had an injury for which he could file a workers' compensation claim until 2016. (Report on Travelers' Petition, pp. 3-4; First Amended Joint Opinion on Decision, p. 1.) The record further shows that the application for adjudication and fee disclosure statement were filed on November 2, 2016. (Application for Adjudication, November 2, 2016, p. 1; Fee Disclosure Statement, November 2, 2016.)

Hence, because the record does not show that applicant knew he had an injury which could give rise to a workers' compensation claim until November 2, 2016, we deem that date to be the date of injury herein.

Accordingly, we will amend the First Amended Joint Findings and Award to find that the Labor Code section 5412 date of injury in case number ADJ15700993 is November 2, 2016.

Next, we address Ace's contention that the WCJ erroneously found subject matter jurisdiction.

Labor Code section 3600.5(a) provides that, "[i]f an employee who has been hired or is regularly working in the state receives personal injury by accident arising out of and in the course of employment outside of this state, he or she, or his or her dependents, in the case of his or her death, shall be entitled to compensation according to the law of this state.

Labor Code section 5305 provides:

> The Division of Workers' Compensation, including the administrative director, and the appeals board have jurisdiction over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state. Any employee described by this section, or his or her dependents, shall be entitled to the compensation or death benefits provided by this division.

The burden of establishing that a contract of hire was made in California rests with applicant, who has the affirmative of the issue. (Lab. Code § 5705; Lab. Code § 3202.5.) The question in determining whether Labor Code section 5305 applies to a contract of hire is whether the acceptance took place in California. (*Aetna Casualty and Surety Co. v. Workers' Comp. Appeals Bd.* (*Salvaggio*) (1984) 156 Cal.App.3d 1097, 1103 [203 Cal.Rptr. 396, 49 Cal.Comp.Cases 447]. A contract of employment is governed by the same rules applicable to other types of contracts, including the requirements of offer and acceptance. (*Reynolds Electrical & Engineering Co. v. Workmen's Comp. Appeals Bd*. (*Egan*) (1966) 65 Cal.2d 429 [31 Cal.Comp.Cases 415].) Where parties have agreed in writing upon the essential terms of a contract, there is a binding contract even though a formal one is to be prepared and signed later. (*Commercial Casualty Insurance Company of Newark, New Jersey v. Indus. Acc. Comm*. (*Porter*) (1952) 110 Cal.App.2d 83 [17 Cal.Comp.Cases 84].)

In California, the formation of a contract of hire, standing alone, is sufficient to confer jurisdiction over an industrial injury that occurs outside the state. "[T]he creation of the [employer-employee] status under the laws of this state is a sufficient jurisdictional basis for the regulation of that relationship within this state and the creation of incidents thereto which will be recognized within this state, even though the relation was entered into for purposes connected solely with the rendition of services in another state." (*Alaska Packers Asso. v. Industrial Acci. Com*. (*Palma*)

(1934) 1 Cal.2d 250, 256 [34 P.2d 716, 1934 Cal. LEXIS 358], affd. (1935) 294 U.S. 532 [55 S. Ct. 518, 79 L. Ed. 1044, 20 I.A.C. 326] (*Palma*). Hence, where the only connection of the employment and injury to California was the fact that the employee signed a contract of employment in California, sufficient contact with California is shown to warrant the application of California workers' compensation law. (See *Palma*, *supra*, at p. 252; *Benguet Consol. Mining Co. v. Industrial Acci. Com*. (1939) 36 Cal.App.2d 158, 159 [97 P.2d 267, 1939 Cal. App. LEXIS 28]; *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23, 32-33 [2013 Cal. Wrk. Comp. LEXIS 2]; *Jackson v. Cleveland Browns* (December 26, 2014, ADJ6696775) [2014 Cal. Wrk. Comp. P.D. LEXIS 682].)

In *Bowen v. Workers' Comp. Appeals Bd*. (1993) 73 Cal.App.4th 15 [64 Cal.Comp.Cases 745], for example, the court of appeal determined that a contract of hire between a player and a major league baseball team was formed in California, conferring California jurisdiction, notwithstanding the need for the contract to be ratified by the baseball Commissioner. Citing the St. Clair workers' compensation treatise, the court of appeal observed:

> [T]he fact that there are formalities which must be subsequently attended to with respect to such extraterritorial employment does not abrogate the contract of hire or California jurisdiction. Such things as filling out formal papers regarding the specific terms of the employment or obtaining a security clearance from the federal government are deemed 'conditions subsequent' to the contract, not preventing it from initially coming into existence.
> (*Bowen*, *supra*, at p. 22.)

Here, as stated by the WCJ in the Report on Ace's Petition, applicant credibly testified that he "was in Sacramento when he accepted the offer and signed in Long Beach at his father's home." (Report on Ace's Petition, p. 3.) In the absence of evidence of considerable substantiality warranting rejection of the WCJ's determination as to the credibility of this testimony, we conclude that applicant accepted the offer in California. (See *Garza v. Workmen's Comp. App. Bd* (1970) 3 Cal.3d 312, 317-319 (finding that a credibility determination made at the trial level is entitled to great weight and may not be rejected without evidence of considerable substantiality).)

Accordingly, we are unable to discern merit to Ace's contention that the WCJ erroneously found subject matter jurisdiction.

We next address Ace's contention that the WCJ erroneously found applicant entitled to temporary disability benefits.

Here, as stated in the Report on Ace's Petition, the periods for which applicant was found entitled to temporary disability benefits are consistent with applicant's medical history of surgeries and rehabilitation. (Report on Ace's Petition, pp. 4-5.) Hence, we conclude that the WCJ correctly determined that applicant is entitled to temporary disability benefits in an amount to be calculated by the parties. (*Id.*, p. 5.)

Accordingly, we are unable to discern merit to Ace's contention that the WCJ erroneously found applicant entitled to temporary disability benefits.

We next address Ace's contention that the WCJ erroneously failed to find the claim in case number ADJ15700993 barred by the statute of limitations.

It is well established that the burden of proof rests upon the party holding the affirmative of the issue, and all parties shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (Lab. Code § 5705; *Lantz v. Workers' Comp. Appeals Bd*. (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (*Obernier*) (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289].) "Preponderance of the evidence" is defined by section 3202.5 as the "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." (Lab. Code § 3202.5.)

Pursuant to Labor Code section 5405:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following: (a) The date of injury. …
> (Lab. Code § 5405.)

Here, as we have explained, the record shows that (1) applicant did not become aware that had sustained an injury for which he could file a workers' compensation claim until 2016; and (2) applicant filed his claim in 2016. We therefore conclude that his claim was timely. Accordingly, we discern no merit to Ace's argument that case number ADJ15700993 is barred by the statute of limitations.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will affirm the First Amended Joint Findings and Award, except that we will amend to find

that applicant's Labor Code section 5412 date of injury in case number is ADJ15700993 is November 2, 2016.

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration of the Joint Findings and Award issued on April 2, 2024 are **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the First Amended Joint Findings and Award issued on April 2, 2024 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

10. Applicant's Labor Code section 5412 date of injury in case number is ADJ15700993 is November 2, 2016.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 17, 2024

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

MICHAEL LINCOLN
LEVITON, DIAZ & GINOCCHIO
BOBER, PETERSON & KOBY
DIMACULANGAN & ASSOCIATES
CHERNOW, PINE AND WILLIAMS

SRO/*cs*

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