

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**PATRICIA VERA, *Applicant***

**vs.**

**BUMBLE BEE FOODS;  
ACE AMERICAN INSURANCE COMPANY as administered by ESIS, *Defendants***

**Adjudication Number: ADJ10924076  
Santa Ana District Office**

**OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration in this matter to study the factual and legal issues.<sup>1</sup> This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings And Order After Reconsideration (F&O) issued by the workers' compensation administrative law judge (WCJ) on October 22, 2018, which finds in pertinent part that applicant did not sustain injury arising out of and in the course of employment (AOE/COE) in the form of internal/high blood pressure or orthopedically, while employed by defendant as a quality control inspector from May 24, 1995 through May 8, 2017; and that "applicant's post-termination claim is not compensable."

Applicant contends that her case is not barred by the statute of limitations under the exceptions in Labor Code section 3600(a)(10)(B) and (D)<sup>2</sup>; and that she met her burden of proof by way of substantial evidence to show that she sustained injury or alternatively, that the medical record should be developed further.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Reconsideration (Report), which recommended that the Petition be denied.

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<sup>1</sup> Commissioner Lowe, who was on the panel that granted reconsideration, no longer serves on the Appeals Board. Another panelist is appointed in her place.

<sup>2</sup> Unless otherwise stated, all further references to statute are to the Labor Code.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&O and substitute a new F&O, which finds that compensation for applicant's claimed of injury is not barred by section 3600(a)(10)(D) and defers all other issues.

## FACTS

Previously, the WCJ issued a findings and order on May 31, 2018, finding that applicant did not sustain injury AOE/COE and that her post-termination claim was not compensable. Applicant sought reconsideration, and on August 28, 2018, we issued our Opinion and Decision after Reconsideration (Opinion), rescinding the May 31, 2018 decision and returning the matter to the WCJ.

We make no change to the substance of our previous Opinion, but we highlight the following. In our Opinion, we noted that the WCJ had only addressed the exception found in section 3600(a)(10)(B), and returned the matter to the WCJ to address whether the date of injury is subsequent to the notice of applicant's termination or layoff from employment and whether the claim was compensable under section 3600(a)(10)(D). We also advised that if the WCJ determined that the injury claim was compensable, the parties could obtain a medical opinion from a Panel Qualified Medical Evaluator (PQME) or Agreed Medical Evaluator (AME) to address whether the claimed injury was caused by applicant's employment with defendant. (§ 5701; § 5906; *Tyler v. Workers' Comp. Appeals Bd. (Tyler)* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McDuffie v. L.A. County Metropolitan Transit Authority (McDuffie)* (2002) 67 Cal.Comp.Cases 138, 141-143.)

Although we do not make any changes to our previous Opinion, we add the following by way of background.

On June 30, 2017, applicant filed an Application for Adjudication of Claim (Application) claiming injury to her head, neck, shoulders, legs, nervous system and high blood pressure caused by employment as a quality control inspector for defendant from May 24, 1995 through May 8, 2017.

Applicant sought medical treatment from Dimitri Sirakoff, D.O., who reported on August 21, 2017 that applicant worked as a quality controller for defendant from May 24, 1995 until she was terminated on May 8, 2017. (Ex. 3, pp. 1-2.) Her job duties included collecting, opening,

pressing, draining and evaluating cans of fish, which involved walking, standing, bending, squatting, kneeling, twisting, grasping, pushing, pulling, reaching, lifting and carrying weight up to 50 pounds. She developed pain in her head, neck, shoulders, back, legs and knees, and also had complaints of high blood pressure and stress from anxiety. (*Ibid.*)

Dr. Sirakoff examined applicant's head, cervical, thoracic, and lumbar spines, shoulders, and knees and reported that applicant's diagnoses included sprain of the cervical, thoracic, and lumbar spines, muscle strain of the shoulders and upper arms, and sprain of the knees. (*Id.*, p. 6.) He indicated that based on her history and complaints, and in light of his findings and the mechanism of injury, applicant's orthopedic injuries resulted from cumulative trauma at work as a quality controller from May 24, 1995 to May 8, 2017 and that she was temporarily totally disabled through October 5, 2017. (*Id.*, p. 8.) He requested authorization for chiropractic treatment, an internal medical consultation, specified medications, and x-rays of applicant's shoulders and cervical, thoracic and lumbar spines, and copies of applicant's medical and evidentiary records. (*Id.*, pp. 6-8.)

On August 30, 2017, applicant and defendant proceeded to an expedited hearing and the WCJ ordered defendant to authorize medical treatment with Dr. Sirakoff. She noted that he was a physician in defendant's Medical Provider Network (MPN).

On February 26, 2018, the parties proceeded to trial. Applicant raised the issues of whether her injury arose out of and in the course of employment (AOE/COE) and liability for self-procured medical treatment. Defendant raised the issue of section 3600(a)(10) "post-termination defense." (Feb. 26, 2018 Minutes of Hearing / Summary Of Evidence (SOE).)

Applicant testified in relevant part as follows. She worked for defendant for almost 24 years. (*Id.*, p. 5, lines 2-3.) For the first 12 to 14 years, she worked in production and would grab metal carts, put fish pieces in, and lift and put them on a conveyor belt. During the last 12 years, she worked in quality control, and collected cans of cooked fish from baskets which she opened and weighed for inspection. (*Id.*, p. 5, lines 4-23.) She lifted and carried boxes with 24 cans of fish that weighed 12 pounds per box. (*Id.*, p. 5, line 24 to p. 6, line 4.) She gave breaks to employees in other departments, and picked up boxes weighing 30 pounds and put them on the conveyor belt. (*Id.*, p. 6, lines 5-17 and p. 7, lines 17-18.) Sometimes she picked up and carried very heavy boxes that had 24 to 48 or even 36 to 60 cans, and she took 40 to 60 boxes of bad product to the second floor lab for checking, and carried 2 boxes of 24 cans up the stairs and 50

feet. (*Id.*, p. 6, lines 10-25.) In the pressing department, she carried 5 pound metal bowls for straining and analyzing the liquid in cans of fish. (*Id.*, p. 7, lines 1-4.) She lifted 25 to 28 pound boxes and 38 pound baskets used for checking the product; she also reached overhead and cleaned lab areas. (*Id.*, p. 7, lines 11-23.)

She further testified that due to her work for defendant, she suffered pain and the areas affected included her head, shoulders, arms, hips, legs, ankle, high blood pressure, lack of sleep and insomnia. (*Id.*, p. 7, lines 23-25.) “[H]er belief prior to being terminated [was] that her work caused her physical injuries.” (*Id.*, p. 9, lines 14-15.) Although she was aware of the procedures for reporting injuries, she did not do so. (*Id.*, pp. 9-10.) She was not told by a physician before she was terminated that her injuries were work related. (*Id.*, p. 10, lines 16-18.)

Following our return of the matter to the WCJ, the parties appeared at a status conference on September 17, 2018 before the WCJ, and the matter was resubmitted on the existing record.

The WCJ issued the F&O on October 22, 2018, and we granted reconsideration to further study the factual and legal issues on January 10, 2019.

## DISCUSSION

Preliminarily, we note that we only consider applicant’s claimed injury as to her orthopedic complaints, as there is no medical opinion in the current record as to whether applicant sustained industrial injury internally or in the form of hypertension.<sup>3</sup>

As we explained in our previous Opinion, an applicant need only show that one of the exceptions in section 3600(a)(10) applies. In that decision, we considered the exception in subsection (B) and concluded that it did not apply because the record did not contain medical records prior to the notice of termination or layoff that contained evidence of any orthopedic treatment. We rescinded the previous findings and orders and returned the matter to the WCJ to consider the exception under section 3600(a)(10)(D).

Subdivision (D) provides that compensation is not barred as post-termination if the date of injury under section 5412 is subsequent to the date of notice of termination or layoff. Section 5412 defines the date of injury for a cumulative injury as “that date upon which the employee first

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<sup>3</sup> As pointed out in our previous Opinion, it appears that applicant was treated for hypertension as early as October 17, 2016, which potentially implicates section 3600(a)(10)(B), but there is no medical evidence regarding industrial causation. We note however, that claimed injury to a single body part is sufficient for the analysis under sections 5412 and 3600(a)(10)(D).

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 from repetitive mental or physical activities at work over a period of time, which causes any disability or 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 and / or compensable permanent disability, which may be shown by the need for medical treatment or modified work. (*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; *City of Fresno v. Workers’ Comp. Appeals Board (Johnson)* (1985) 163 Cal.App.3d 467, 469-471; *Butler, supra*, 153 Cal.App.3d at pp. 336-343.) The date of injury may be established by showing that the employee had the training, knowledge or qualifications to know that the disability was caused by employment, or by the date the employee received such expert medical or legal advice. (*Johnson, supra*, 163 Cal.App.3d at pp. 471-473.) Findings regarding cumulative injury and the date of injury must be based on substantial evidence such as medical opinion and testimony considering the entire record. (*Garza v. Workmen’s Comp. App. Bd. (Garza)* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *Austin, supra*, 16 Cal.App.4th at pp. 233-241; *Johnson, supra*, 163 Cal.App.3d at pp. 470-473.)

In her Petition, applicant contends that she did not know that her disability was related to work until informed by Dr. Sirakoff, and that the date of injury is subsequent to her termination under section 3600(a)(10)(D).

Although the WCJ noted that applicant testified that she believed her physical injuries and disability were work related, here, there is no medical evidence regarding applicant’s orthopedic complaints and applicant’s belief does not establish knowledge of orthopedic injury and disability caused by work. Applicant did not receive medical advice that work caused orthopedic injury and temporary total disability until Dr. Sirakoff’s report dated August 21, 2017. Even assuming that orthopedic injury and disability from arduous work may be common knowledge,<sup>4</sup> the medical record and advice prior to applicant’s termination from employment was that disability, if any,

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<sup>4</sup> See *Nielsen v. Workers’ Comp. Appeals Bd. (Nielsen)* (1985) 164 Cal.App.3d 913, 930-931 [50 Cal.Comp.Cases 104].

was not from orthopedic or musculoskeletal injury. Therefore, the date of injury for the claimed injury is August 21, 2017, subsequent to notice of applicant's termination or layoff from employment. Accordingly, the exception in section 3600(a)(10)(D) applies to applicant's claimed injury, and we will find that her claimed injury is compensable.

We are unable to determine which orthopedic body parts are compensable based on the lack of medical evidence and the use of the umbrella term "orthopedic," so that although we conclude that applicant sustained industrial orthopedic injury, we will not make a finding of injury to a specific body part. Upon return, as suggested in our previous Opinion, we recommend that the parties develop the medical record and obtain a medical opinion from a PQME or AME addressing injury arising out of and in the course of employment.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order After Reconsideration issued by the WCJ on October 22, 2018 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Patricia Vera while employed during the period from May 24, 1995 through May 8, 2017, as a quality control inspector, at Santa Fe Springs, California, by Bumble Bee Foods, whose workers' compensation carrier was ACE American Insurance Company, administered by ESIS, claims injury arising out of and in the course of employment to her orthopedic and internal/high blood pressure.
2. Applicant's date of injury pursuant to Labor Code section 5412 is August 21, 2017 and her post-termination claim of injury is compensable under section 3600(a)(10)(D).
3. All other issues are deferred.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

**I CONCUR,**

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



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

**October 28, 2024**

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

**PATRICIA VERA  
LAW OFFICES OF JESSE MARINO, APC  
HEFLEY LAW, PC**

**AS/ara**

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