WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAUL GARCIA ALVARADO*, Applicant*

vs.

MAGIC LAUNDRY SERVICES, INC., AVITUS, INC. and AMERICAN ZURICH INSURANCE COMPANY, administered by GALLAGHER BASSETT; INTERNATIONAL GARMENT FINISH and EVEREST NATIONAL INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.*, Defendants*

Adjudication Numbers: ADJ11255137 ADJ9566360

Marina del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant IGF ("defendant") seeks reconsideration of the Findings of Fact and Award (F&A) of July 15, 2024, wherein the workers' compensation judge (WCJ) found in relevant part that applicant sustained a continuous trauma ending on April 27, 2014, arising out of and during the course of employment (AOE/COE) while employed for defendant. Defendant contends that the end date of the continuous trauma should be December 7, 2015.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant defendant's Petition for Reconsideration. Our order granting the Petition is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code[1] section 5950 et seq.

I.

Preliminarily, we note the following in our review.

Applicant claimed injury to his neck, back, both upper extremities, both lower extremities, both knees, and both ankles while employed by IGF as a laborer during the period from January 1, 1999, through April 27, 2014 (ADJ9566360).

Applicant also claimed injury to his neck, left shoulder, bilateral arms, bilateral wrists, bilateral hands, bilateral fingers, back, bilateral legs, bilateral knees, bilateral ankles and bilateral feet, while employed by Avitus as a laborer during the period from August 8, 2014, through December 7, 2015 (ADJ11255137).

Orthopedic qualified medical examiner (QME) Steven W. Meier, M.D., evaluated applicant on June 15, 2017. Dr. Meier examined applicant, took a history, and reviewed the medical record. In his report the doctor noted that applicant said he had worked for "International Garments Inc." [International Garment Finish (IGF)] as a laundry sorter during the period from 1999 through April of 2014, and that he worked as a laundry sorter for "Maggie Laundromat" [Magic Laundry Services, Inc. (Avitus)] from August 2014 to August 2015. (Joint Exh. ZZ, Steven W. Meier, M.D., June 15, 2017, p. 17.) In the "Causation" section of his report Dr. Meier stated, "I have found no evidence to demonstrate that Mr. Garcia [applicant] sustained an industrial continuous trauma during the time of his employment as a laundry sorter at International Garment Finish Inc." (Joint Exh. ZZ, p. 18.) In response to correspondence from applicant's counsel, Dr. Meier submitted a supplemental report, wherein he stated, "Since my last 06/15/2017 report, additional medical records, [including diagnostic studies/images] pertaining to this examinee were neither submitted nor reviewed." (Joint Exh. YY, Steven W. Meier, M.D., November 1, 2017, p. 2.) He later stated that:

> Based on the job duties that he described and documentation of symptoms emerging in his spine and lower extremities contemporaneous with this employment, it is within a reasonable degree of medical probability that work duties at Magic [sic] Laundromat [Avitus] have contributed to Mr. Alvardo's claimed injuries.

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

(Joint Exh. YY, p. 4.)

After reviewing the February 21, 2019 permanent and stationary report from treating physician Michael Solomon, D.C., Dr. Meier submitted another supplemental report stating that, " ... [I]t has become clear that a significant contributing factor to Mr. Alvarado's spinal condition is diffuse idiopathic skeletal hyperostosis or 'DISH' which within a reasonable medical probability has also been affected by his work duties over the years." (Joint Exh. XX, Steven W. Meier, M.D., August 20, 2019, p. 3.) The doctor then assigned factors of cervical, thoracic, and lumbar spine whole person impairment, and regarding apportionment he explained:

> It is my opinion that, regarding the cervical spine, thoracic spine, and lumbosacral spine, 50% of impairment is due to diffuse idiopathic skeletal hyperostosis (DISH)/degenerative disc disease, 45% due to industrial continuous trauma sustained while working for International Garment Finish, and 5% due to subsequent continuous trauma working for Magic [sic] Laundromat [Avitus].

(Joint Exh. XX, p. 7.)

The parties proceeded to trial on September 21, 2020. The trial was continued to November 16, 2020, for applicant's testimony. The two cases were consolidated. The issues submitted in both cases were injury AOE/COE, section 3600(a)(10) post termination defense, and the application of the section 5402(b) presumption.[2] (See Minutes of Hearing and Summary of Evidence (MOH/SOE) September 21, 2020, pp. 3-4.) On January 27, 2021, the WCJ issued Findings and Award in case ADJ9566360, finding in relevant part that applicant sustained a continuous trauma AOE/COE while employed by IGF to his cervical spine, thoracic spine, and lumbosacral spine. On January 27, 2021, the WCJ also issued Findings and Award in case ADJ11255137, finding in relevant part that applicant sustained a continuous trauma AOE/COE while employed by Avitus/ Magic Laundry Services, Inc. to his cervical spine, thoracic spine, and lumbosacral spine.

Defendant IGF filed a Petition for Reconsideration of the January 27, 2021 F&A. On April 15, 2021, the Appeals Board issued an Opinion and Order granting reconsideration for further study. On April 10, 2024, the Appeals Board issued an Opinion and Decision After Reconsideration , wherein we rescinded the F&As of January 27, 2021, and returned the cases to

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

the WCJ for a decision that includes the section 5412(b) date of injury. The Appeals Board also recommended that the WCJ address the section 3600 (a)(10) post-termination defense, and the section 5402(b) presumption.

The WCJ held a further hearing on May 23, 2024 on the issue of date of injury under sections 5412 and 5500.5. Defendant IGF contended that the date of injury is December 7, 2014, to December 7, 2015. (5/23/2023 MOE/SOE, pp. 2-3.) The WCJ submitted the case without taking any additional evidence. On July 15, 2024, the WCJ issued Findings of Fact and Award, finding in relevant part that applicant sustained a continuous trauma injury ending on April 27, 2014, while employed at IGF, arising out of and in the course of employment to his cervical spine, thoracic spine and lumbosacral spine and that all other body parts are deferred in case ADJ9566360. On the same date in case ADJ11255137, the WCJ found in relevant part that applicant sustained a continuous trauma injury during the period of August 8, 2014, through December 7, 2015, while employed at Magic Laundry Services, Inc., arising out of and in the course of employment to his cervical spine, thoracic spine and lumbosacral spine and that all that additional body parts are deferred.

II.

Former 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 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 August 21, 2024 and 60 days from the date of transmission is Sunday, October 20, 2024. The next business day that is 60 days from the date of transmission is Monday, October 21, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[3] This decision is issued by or on Monday, October 21, 2024, so that we have timely acted on the petition as required by section 5909(a).

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

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on August 21, 2024, and the case was transmitted to the Appeals Board on August 21, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 21, 2024.

III.

Section 3208.1 provides that an injury may be either cumulative or specific. No cumulative injury can occur without disability. (*Van Voorhis v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 81, 86-87 [39 Cal.Comp.Cases 137]; *Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd.* (*Coltharp*) (1973) 35 Cal.App.3d 329, 342-343 [38 Cal.Comp.Cases 720].) A cumulative injury is one that occurs as "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." (Lab. Code, § 3208.1.)

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

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

"The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].) "[I]f an employee becomes disabled, is off work and then returns to work only to again become disabled, there is a question of fact as to whether the new disability is due to the old injury or whether it is due to a new and separate injury." (*Id*. at p. 234.) However, "[t]he general rule is that where an employee suffers contemporaneous injury to different body parts over an extended period of employment, the employee has suffered one cumulative injury." (G*ravlin v. City of Vista* (Sept. 22, 2017, ADJ513626) 2017 Cal.Wrk.Comp. P.D. LEXIS 413, *16.)[4] "If, however, the employee's occupational activities after returning to work from a period of industrially-caused disability are *not* injurious—i.e., if any new period of temporary disability, new or increased level of permanent disability, or new or increased need for medical treatment result solely from an *exacerbation* of the *original* injury—then there is only a *single* cumulative injury." (*Id.*at p. *24.)

"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." (Lab. Code, § 5412.) Whether an employee knew or should have known his disability was industrially caused is a question of fact. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53] (*Johnson*); *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 927 [50 Cal.Comp.Cases 104]; *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556, 559 [33 Cal.Comp.Cases 722].)

The employer has the burden of proving that the employee knew or should have known their disability was industrially caused. (*Johnson*, *supra*, at p. 471, citing *Chambers v. Workers' Comp. Appeals Bd.*, *supra*, 69 Cal. 2d at p. 559.) That burden is not sustained merely by a showing that the employee knew they had some symptoms. (*Johnson*, *supra*, at p. 471, citing *Chambers*, *supra*, at p. 559.) In general, an employee is not charged with knowledge that their disability is

[4] Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).) We find the reasoning in *Gravlin* persuasive given that the case currently before us involves similar legal issues.

job-related without medical advice to that effect. (*Johnson*, *supra*, at p. 473; *Newton v. Workers' Comp. Appeals Bd.* (1993) 17 Cal.App.4th 147, 156, fn. 16 [58 Cal.Comp.Cases 395].) "Thus, the determination of knowledge is an inherently fact-based inquiry, requiring an individualized analysis in each case." (*Raya v. County of Riverside* (2024) 89 Cal. Comp. Cases 993, 1006.)

Section 5500.5 states in pertinent part that liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1981, shall be limited to those employers who employed the injured worker during a period of one year immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the employee was employed in an occupation exposing them to the hazards of the occupational disease or cumulative injury, whichever occurs first. (Lab. Code, § 5500.5(a).)

At trial, defendant IGF contended that the date of injury should be December 7, 2014 to December 7, 2015, which appears to be a date of injury based on section 5500.5, that is, the last date on which the employee was exposed to the hazards of the injury. But, applicant's last date of employment with IGF was in April 2014, so necessarily defendant is arguing that it should be based on applicant's last year of employment with Magic. This argument is necessarily premised on a finding that there is just one period of cumulative injury.

While we agree that the WCJ properly found that applicant had sustained injury AOE/COE but based on the record before us, the issue of whether there is one or two cumulative trauma injuries requires further study. Moreover, the issue of the date of injury pursuant to section 5412 also requires further study because determination of the date requires that the issue of whether there was one or two periods of cumulative trauma be determined.

IV.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com.* (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com.* (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for

reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal. 2d 360, 364) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650]) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra,* at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Section 5901 states in relevant part that:

> "No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …"

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to sections 5950 et seq.

V.

Accordingly, we grant defendant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the Findings and Award of July 15, 2024 is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 21, 2024

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

RAUL GARCIA ALVARADO
WACHTEL LAW
SCHLOSSBERG & UMHOLTZ
CHONG LEGAL GROUP

JMR/mc

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