WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VIOLETA PALEO, *Applicant*

vs.

SEENAGER; ZURICH AMERICAN INSURANCE, administered by CREATIVE RISK SOLUTIONS; PACIFICA SENIOR LIVING; UNITED WISCONSIN INSURANCE; TRION SOLUTIONS, INC., LCF PSLM PAYROLL, LLC, administered by NEXT LEVEL ADMINISTRATORS, *Defendants*

Adjudication Number: ADJ16177467
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Pacifica Senior Living/Trion Solutions, Inc., LCF PSLM Payroll, LLC, insured by United Wisconsin Insurance Company, administered by Next Level Administrators (Pacifica), seeks reconsideration of the April 29, 2024 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a caregiver from November 18, 2019 to March 23, 2022, sustained a single cumulative injury to her bilateral knees, and that the last year of injurious exposure pursuant to Labor Code[1] section 5500.5 was March 23, 2021 to March 23, 2022.

Pacifica contends that applicant sustained two separate cumulative injuries corresponding to her employments with Pacifica and with prior employer Seenager, Inc., insured by Zurich American Insurance (Seenager). In the alternative, Pacifica contends the date of injury pursuant to section 5412 was December 2, 2019.

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

We have received an Answer from applicant and from Seenager. 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 contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant the Petition, rescind the F&A, and substitute new findings of fact that applicant sustained a single cumulative injury. We will also defer the issues of the last date of injurious exposure, the date of injury pursuant to section 5412, and the issue of liability pursuant to section 5500.5, and return the matter to the trial level for further proceedings and decision by the WCJ.

FACTS

Applicant claimed injury to her bilateral knees while employed by Seenager and Pacifica Senior Living from November 18, 2019 to March 23, 2022. Both employers deny liability for applicant's claimed injury.

The parties have selected Paul Murphy, M.D., to act as the orthopedic Qualified Medical Evaluator (QME).

The parties proceeded to trial on April 10, 2024, and framed issues including the "period of injurious exposure as between Seenager and Pacifica Senior Living," injury arising out of and in the course of employment, and the need for future medical care. (Minutes of Hearing and Summary of Evidence (Minutes), dated April 10, 2024, at p. 2:21.) Defendant Seenager alleged there to be a single cumulative injury, with a period of liability pursuant to section 5500.5 that relieved Seenager of liability for applicant's claim. Pacifica asserted applicant's cumulative injury ended January 2, 2021, and that applicant's job duties at Seenager primarily caused her injury.

The applicant testified that she worked with Seenager delivering packages for Amazon to people's homes and businesses from 2018 to mid-2020. (Minutes of Hearing and Summary of Evidence, dated April 10, 2024, at p. 4:19.) Thereafter, applicant worked for Pacifica Senior Living from October, 2020 to June, 2022. (*Id.* at p. 5:11.)

The WCJ permitted the parties to file post-trial briefing, and ordered the matter submitted for decision on April 24, 2024.

On April 29, 2024, the WCJ issued her F&A, finding in relevant part that applicant sustained but one cumulative injury from November 18, 2019 to March 23, 2022, and that the last year of injurious exposure was March 23, 2021 to March 23, 2022. (Finding of Fact Nos. 1 & 2.) The WCJ's decision did not include a finding of date of injury pursuant to section 5412.

Pacifica's Petition avers applicant "testified at both her deposition and at AOE/COE Trial that her knee issues began while working as a delivery driver," and that applicant "told PQME Dr. Murphy that she attributed her injury to repetitive work duties, which entailed lifting and carrying heavy packages, climbing stairs while making deliveries, and repetitive foot movements while driving." (Petition, at p. 3:1.) Thus, Pacifica contends applicant sustained one injury while employed by Seenager, and a separate injury while employed by Pacifica.

In the alternative, Pacifica contends the date of injury pursuant to section 5412 was December 2, 2019, the date when applicant sustained disability and knew that it was caused by her employment as a delivery driver, as evidenced by her report of injury to her supervisors. (*Id.* at p. 3:26.)

Applicant's Answer avers the medical record including the QME reports support the existence of a single cumulative injury. (Applicant's Answer, at p. 5:8.)

Defendant Seenager's Answer similarly contends there to be but one cumulative injury, based in part on the fact that applicant had a period of concurrent employment with both companies, and because applicant's job duties were similar as between both employments. (Seenager Answer, at p. 5:20.) Seenager also notes that the QME reporting supports the existence of a single injury. Seenager avers the date of injury per section 5412 to be either the date of the first report from QME Dr. Murphy on March 23, 2022, or the date applicant filed her claim form, May 17, 2022. (*Id.* at p. 8:18.) In either event, Seenager contends liability pursuant to section 5500.5 would rest with Pacifica.

The WCJ's Report notes that applicant's last injurious exposure with Seenager was in January, 2021, while her last injurious exposure with Pacifica was either March 23, 2022 when applicant filed a claim form, or May 17, 2022, applicant's last date of employment. In either event, Pacifica would be liable for the single cumulative injury.

DISCUSSION

We begin our discussion by noting that there is no dispute that applicant sustained an industrial injury. The uncontested reporting of QME Dr. Murphy establishes a cumulative injury, and neither party challenges the WCJ's finding of injury herein. (Finding of Fact No. 1; Opinion on Decision, at p. 4.)

The parties have placed in issue the number and nature of the injuries sustained. Applicant claims one cumulative injury from November 18, 2019 to March 23, 2022. Applicant testified she was employed by Seenager from 2018 to approximately mid-2020, and by Pacifica from approximately October, 2020 through June, 2022. (Minutes, at p. 2:21.)

Seenager avers applicant sustained but one injury. (Seenager Answer, at p. 5:20.) Pacifica claims applicant sustained a separate, prior injury while employed with Seenager. (Petition, at p. 3:1.)

The number and nature of the injuries sustained are questions of fact for the WCJ. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323] (*Austin*); see also Lab. Code, § 3208.2.) "In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events." (*Austin*, *supra*, at p. 234.) The question of whether repetitive traumatic activities caused injury or a need for medical treatment can only be established with substantial medical evidence. It has long been recognized that evidence from a lay witness on an issue requiring expert opinion is not substantial evidence, and medical proof is required when issues of diagnosis, prognosis, and treatment are beyond the bounds of ordinary knowledge. (*City & County of San Francisco v. Industrial Acc. Com.* (*Murdock*) (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].) As with any decision by a WCJ, a decision on the number and nature of injuries must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); see *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) Moreover, the WCJ and the Board are not bound by the parties' pleadings and may conform them to the evidence presented in the record. (Cal. Code Regs., tit. 8, §10517.)

Here, the WCJ found applicant sustained a single cumulative injury spanning her employment with both Seenager and Pacifica. (Finding of Fact No. 1.) In the Opinion on Decision, the WCJ explained that QME Dr. Murphy found that applicant sustained a cumulative injury as a result of repetitive standing, walking, climbing, kneeling, squatting and lifting for both employers. (Opinion on Decision, at pp. 5-6.) The Report further notes applicant's testimony that her work activities for Pacifica were "not significantly more or different than the ones for Seenager…she lifted people, not packages, the weights were equivalent; and 90% of her work required that she be on her feet." (Report, at p. 4.) Based on applicant's testimony, the description of her job duties and physical requirements of both positions, as well as the QME's causation analysis, the WCJ determined there to be but one cumulative injury spanning both employments. (Finding of Fact No. 1; Opinion on Decision at pp. 5-6.)

Based on our independent review of the entire record, including the applicant's testimony, the reporting of QME Dr. Murphy, and the pleadings of the parties, we concur with the WCJ's determination that applicant sustained a single cumulative injury from November 18, 2019 to March 23, 2022.

The parties have also raised the issue of the "period of injurious exposure" pursuant to section 5500.5. The WCJ has determined this period to be the last year applicant worked for Pacifica, from March 23, 2021 to March 23, 2022. (Finding of Fact No. 2.) We note, however, that Seenager has also raised section 5500.5 generally and asserted applicant's employment was "outside the last year of injurious exposure for the actual date of injury or cumulative trauma for Labor Code section 5412." (Minutes, at p. 3:1.) Seenager thus avers it has no *liability* pursuant to section 5500.5.

Section 5500.5 provides that for claims of cumulative injury filed or asserted after January 1, 1981, liability is limited to the applicant's employers in the one-year period prior to *either* "the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury," *or* the date of injury as determined pursuant to section 5412, *whichever occurs first*. (Lab. Code, § 5500.5(a).)

In cases involving an alleged cumulative injury, the date of injury is governed by section 5412, which holds:

> 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.)

The Court of Appeal has defined "disability" per section 5412 as "either compensable temporary disability or permanent disability," noting that "medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579].)

Regarding the "knowledge" component of section 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*).)

In framing the present issues for decision, the parties appear to have conflated the last *date of injurious exposure* with the *one-year period of liability* described in section 5500.5. To determine the one-year period of liability of section 5500.5, the WCJ must determine the last date of injurious exposure *and* the date of injury pursuant to section 5412. The *period of liability* will be the one-year period preceding the earlier of the two dates. (Lab. Code, § 5500.5(a); see also *Austin, supra*, 16 Cal.App.4th at p. 239.)

Here, the parties framed the issue of the period of injurious exposure, and the WCJ has entered a corresponding finding of the last year of injurious exposure. (Finding of Fact No. 2.) However, the relevant determination necessary to establish a one-year period of liability under section 5500.5 is not the last year of injurious exposure. Rather the WCJ must determine two separate dates: the last date of injurious exposure and the section 5412 date of injury. Only once the last date of injurious exposure and the section 5412 date of injury have been identified can the WCJ determine the one-year period of liability preceding the earlier of the two dates.

Accordingly, we will grant the Petition, rescind the F&A, and substitute new findings of fact that applicant sustained a single cumulative injury from November 18, 2019 to March 23, 2022. We will further defer the issues of the last date of injurious exposure, the date of injury pursuant to section 5412, and the period of liability pursuant to section 5500.5. Upon return of this matter to the trial level, the WCJ should make three determinations: (1) the last date of injurious

exposure, (2) the date of injury pursuant to section 5412, and (3) the one-year period of liability preceding the earlier of the two dates, pursuant to section 5500.5(a). Any person aggrieved by the WCJ's determination may thereafter seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of April 29, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of April 29, 2024 is **RESCINDED,** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant sustained injury arising out of and in the course of employment to her bilateral knees while employed by Seenager, Inc., and Pacifica Senior Living, from November 18, 2019 to March 23, 2022.
2. The issue of the last date of injurious exposure pursuant to Labor Code section 5500.5(a) is deferred.
3. The issue of the date of injury pursuant to Labor Code section 5412 is deferred.
4. The issue of liability pursuant to Labor Code section 5500.5(a) is deferred.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 15, 2024

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

VIOLETA PALEO
LAW OFFICES OF MANUEL J. RODRIGUEZ, JR.
LAW OFFICES OF PAUL C. HERMAN
PARK GUENTHART

SAR/abs

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