WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOE GAMBOA, ***Applicant***

vs.

SAINT GOBAIN CONTAINERS, INC.; TRAVELERS CASUALTY PROPERTY COMPANY OF AMERICA, ***Defendants***

Adjudication Number: ADJ11791173
Fresno District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

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 stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 26, 2021

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

JOE GAMBOA
LAW OFFICES OF GARY J. HILL
LAURA CHAPMAN & ASSOCIATES

abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation:	Machine Operator
Age at Injury:	55
Date of Injury:	CT 8/19/1978 to 12/31/2013
Parts of Body Alleged Injured:	Left shoulder, bilateral knees, bilateral hearing loss
Manner in Which Injury Alleged Occurred:	Repetitive overhead work with left arm, repetitive climbing up and down catwalk and noise exposure.
2. Identity of Petitioner:	Defendant
Timeliness:	The Petition was timely filed on 2/24/21
Verification:	The Petition was Verified.
3. Date of Award:	2/5/21

4. Petitioner contends:

a. Applicant failed to prove that his claimed injuries arose out of or occurred during the course of his employment.

b. The applicant’s claim is barred by the Statute of Limitations.

c. The undersigned erred in not admitting Dr. Rubenstein's QME report dated 4/13/20 which was not obtained until after the close of discovery at the MSC.

II
FACTS

The applicant worked for the employer for over 35 years. As part of his job, he was requiredto activate a machine by raising just his left arm overhead every 15 minutes to hit a button. He was also required to repetitively walk up and down a catwalk. (Exh. B, Dr. Graham QME report, 7/16/19, pg. 2.)

The applicant had a history of recurrent gout in his right knee for which he had received treatment from his personal physician and had been taken off work on or around 5/10/11. (Exh. B, pg. 2.) In relation to his right knee gout, the applicant had been counseled by his treating physician on alcoholism and its relation to gout. He was told he needed to quit drinking alcohol and modify his nutrition to control his gout. (Exh. B, pg. 3.)

The applicant retired on 12/31/13 and filed an Application for Adjudication of claim on 12/21/18, alleging injury due to cumulative trauma to his left shoulder, bilateral knees, and bilateral hearing loss.

For his orthopedic injuries, the applicant was evaluated by Dr. Scott Graham as the QME. In his report dated July 16, 2019, Dr. Graham diagnosed applicant with left shoulder chronic impingement syndrome, rule out rotator cuff tear and bilateral patella femoral chondromalacia. (Exh. B, pg. 10.) The doctor opined that "within a reasonable degree of medical probability ... this claimant's left shoulder condition and bilateral knee conditions are resultant from CT with date of injury 12/23/14, his last day of work." (Exh. B, pg. 11) The doctor went on to state, "In the process of formulating opinions pertaining to causation, the medical examiner takes into account numerous factors. These include the mechanism of injury, the type of temporal onset of symptoms, the history given by the examinee, the response to various treatments, the physical examination findings, radiographic findings and the results of other pertinent objective tests, knowledge of the overall health of the individual, and other pertinent information including the examiner's experience, knowledge, and training." *(Ibid.)*

In response to defendant's request for clarification, the doctor explained that with regards to his knees, the applicant's impairment was based upon bilateral chondromalacia of the patella, which is a mechanical wear and tear phenomenon resultant from his 35 years of employment, which required him to walk up and down catwalks repetitively. The applicant's gout is an episodic condition for which this claimant appears to have been only occasionally affected by. As there was no impairment provided for his gout, there should be no apportionment for this condition. (Exh. A, Dr. Graham QME report, 9/20/19, pg. 1.)

For his claimed hearing loss, the applicant was evaluated by Dr. Ronald Rubenstein as the QME. In his report dated 12/5/19, the doctor stated the applicant has a bilateral sensorineural hearing loss which is compatible with cumulative noise exposure. (Exh. E, Dr. Rubenstein report, 12/5/19, pg. 2.) In his supplemental report, the doctor further noted that from applicant's description of his work, it was sufficiently loud to cause hearing loss and it was probably likely that ear plugs alone are not sufficient for the level of noise created by this machinery. (Exh. D, Dr. Rubenstein report, 12/12/19, pg. 1.)

In response to inquiry from defendant, the doctor stated that he could find no other cause for applicant's hearing loss other than cumulative noise exposure. He noted frequently this develops over time and becomes progressive which was not unusual. The doctor did note that the large change in his hearing loss over the last two years was remarkable but he had seen people whose hearing loss changed rapidly over two years without any other cause. Unless some precipitating cause can be shown, the doctor opined he had nothing else to attribute it to except the cumulative noise exposure. (Exh. C, Dr. Rubenstein report, 1/7/19, pg. 1.)

The matter proceeded to trial on the issues, among others, of injury AOE/COE, statute of limitations, aches and knowledge by applicant of workers' compensation injury/process. At trial, the applicant testified he was aware of his employer's policy that he was to report an injury. (MOH/SOE, 11/12/20, 4:25) The applicant testified that prior to his retirement, he sought treatment for his left shoulder, right and left knee problems, that he discussed his job duties with his doctor and he knew that his job duties were related to his problems with his shoulder and knees. (*Id.* at 5:2 - 10.) The applicant also testified that it was not until after he retired that he became aware of the nature of a cumulative trauma injury and that he might have a possible right to file a claim against his employer for his injuries. (*Id*. at 5:16 - 18.) The applicant further testified that he had told his supervisor, Laura, about the problems he was having with his left shoulder and knees but she did not offer to give him a claim form or send him to a doctor. (*Id*. at 5:12 - 5.) Prior to his retirement, he had not sought treatment for his hearing loss. (*Id*. at 6:7 - 8.)

At trial, defendant sought to introduce into evidence a supplemental report from QME, Dr. Rubenstein dated 4/13/20, which had been obtained after the close of discovery at the MSC on 3/4/20. Upon questioning, Defendant's attorney stated that the supplemental report was issued for the purpose of the doctor reviewing annual audiology tests taken during the applicant's employment. Since these audiology tests had been had been within the possession and control of the employer during the entire pendency of Applicant's claim, the undersigned found no good cause to allow evidence to be admitted that could not have been obtained prior to the close of discovery with due diligence.

Based upon the opinions of the QME's and the applicant's testimony, the undersigned found that Applicant had sustained an injury to his left shoulder, bilateral knees and hearing loss arising out of and occurring in the course of his employment and that defendant had failed to meet their burden of proof that the claim was barred by the Statute of Limitations. Based upon Dr. Graham's opinion that Applicant's condition was not yet at maximum medical improvement, Defendant was ordered to provide "Yorkers' compensation benefits and the issues of permanent disability and attorney fees were deferred. It is from these findings and order that Defendant seeks reconsideration.

III
DISCUSSION

Defendant asserts that applicant's claimed injury to his left shoulder is not supported by the medical evidence. Applicant testified at trial and during his deposition that he sought treatment for his left shoulder prior to his retirement. (MOH/SOE, 11/12/20, 5:2 - 4; Exh. 1, Applicant's Deposition Transcript, 12/9/19, 18:12:18 - 24.) Defendant claims that Applicant's testimony is inconsistent with the medical records which do not document treatment prior to his retirement.

However, Defendant fails to acknowledge that Applicant also testified during his deposition that he could not remember the nan1e of the doctor who had treated his left shoulder. (Exh. 1, pg. 70:18 - 22.) Without the name of the doctor the parties would not have been able to subpoena those records and is not proof that they do not exist. The mere fact that the applicant was unable to recall the name of the doctor from whom he had previously received treatment does not make his testimony inconsistent with the prior medical reporting.

The applicant provided Dr. Graham with a history of being required to activate a machine by raising just his left arm overhead every 15 minutes to hit a button during the course of his 35 years of employment. (Exh. B, pg. 2.) Based upon the doctor's experience, knowledge and training as well as other factors, the doctor determined within a reasonable degree of medical probability the applicant's left shoulder condition is the result of a CT through the last day applicant's worked. (Exh. B, pg. 11.)

With regards to the applicant's left knee, defendant contends that the applicant has failed to meet his burden of proof due to a lack of medical evidence. Defendant fails to take into consideration the medical evidence of Dr. Graham's opinion that applicant's bilateral chondromalacia of the patella, which is a mechanical wear and tear phenomenon, resulted from the applicant's 35 years of employment during which he was required to walk up and down catwalks repetitively. (Exh. A, pg. 1.) Defendant's contentions regarding the applicant's right knee are only related to his recurrent gouty arthritis. It is not disputed that this is a non-industrial condition and Dr. Graham did not provide any impairment related to this condition. (Exh. A, pg. 1) The fact that the applicant also suffered from non-industrial gout does not preclude the diagnosis of chondromalacia provided by the QME.

Defendant contends that absent a showing of hearing loss during the time period of applicant's employment precludes a finding of industrial causation. Dr. Rubenstein provided a diagnosis of bilateral sensorineural hearing loss that was compatible with the years of cumulative noise exposure from working with loud machinery. (Exh. E, pg. 1.) The doctor reviewed applicant's prior medical reports which included a prior hearing test. The doctor questioned the applicant about other sources of noise exposure and concluded that the noise exposure during the course of applicant's employment was sufficient to cause hearing loss even with the use of ear plugs. (Exh. D, pg. 1.) The fact that the doctor did not identify any other causes to account for the applicant's hearing loss is not an admission that he does not know the root of applicant's problem as suggested by defendant. While the doctor expressed that applicant's large change in his hearing loss over the last two years was remarkable, he also noted that there was no question that he had seen people whose hearing loss changed rapidly over two years without any other cause. (Exh. C, pg. 1.)

Defendant further contends that because Dr. Rubenstein failed to review audiology tests performed during the course of applicant's employment, his reports do not constitute substantial medical evidence. However, as is noted below, the alleged tests were within the possession and control of the defendant who failed to produce the tests or provide them to the doctor for his review. The doctor noted that audiograms from the time of applicant's employment or earlier might provide for apportionment of his loss to preexisting causes or other factors. (Exh. D, pg. 1.) The doctor does not indicate that these prior tests would affect his opinion with regards to industrial causation.

Defendant asserts that applicant's claim is barred by the Statute of Limitations under Labor Code section 5405(a) which requires that proceedings be commenced for the collection of benefits within one year of the date of injury.

The date of a cumulative injury under Labor Code section 5412 "is that date upon which the employee first suffered disability therefrom and either new, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." "Disability" in this context means either temporary or permanent disability. (*State Comp. Insurance Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998, 1003 [69 Cal.Comp.Cases 579, 582] (internal citations omitted).)

Courts have found that "an applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53, 57].) The absence of medical advice confirming industrial causation is "one important circumstance which is to be considered together with the other circumstances in determining in a particular case whether the applicant should reasonably have known his or her injury was industrially caused," *(Nielsen v. Workers' Comp. Appeals Bd*. (1985) 164 Cal.App.3d 918, 930 [50 Cal.Comp.Cases 104, 113]; *Olson v. Gelson's Mkt*., 2012 Cal. Wrk. Comp. P.D. LEXIS 530)

In this case, there is no evidence that the applicant suffered either permanent or temporary disability more than one year prior to the filing of an Application for Adjudication of Claim. Defendant appears to be asserting that because the applicant testified that he self-modified his work, he had suffered disability. In *SCIF v. WCAB* (*Rodarte*) (2004) 69 CCC 579, the Court of Appeals held that modified work alone is not a sufficient basis to determine temporary disability, as actual wage loss is required for TD. The court also held that medical treatment alone is not disability, but may be evidence of compensable PD. Here, the only self-modification of work that applicant testified to was placing a cushion on the steel plate so he would not be directly hitting his knees. (MOH/SOE, 11/12/20, 6:2 - 4.) This type of self-modification of work is not sufficient to support a finding of permanent disability.

While the applicant had suffered pain in his right knee as early as 2011, he was diagnosed with acute gouty arthritis. The medical record reflects that on 9/9/11 the applicant was advised by his doctor that his gout was related to alcohol and diet. In *Kalomiros v. Agilent Technologies (aka Varian, Inc*.), 2011 Cal. Wrk. Comp. P.D. LEXIS 576, the Board found that defendant had failed to meet their burden to prove that an applicant knew or should have known of the industrial origin of his pulmonary disease sufficient to trigger the running of the one-year Statute of Limitation when a prior examining doctor led him to believe that his condition was not industrially related. Similarly, in this case, when his treating doctor advised the applicant that his gouty arthritis was caused by alcohol and diet, it would be reasonable that the applicant did not know that his condition was industrially caused. Even if the applicant had discussed with his doctors how his work duties might affect his gouty arthritis, this is not the diagnosis that Dr. Graham found to be industrially caused. There is no evidence in this case that the applicant was advised by a medical expert that his bilateral chondromnalacia of the patella was caused by his employment at any time more than a year prior to the filing of his Application.

In *Reynolds v. WCAB* (1974) 39 CCC 768, the California Supreme Court held that an employer may not raise the statute of limitations defense if it knew that an employee's injury was industrially related, but failed to provide the employee with the required notices. Subsequently, the California Supreme Court added to the rule set forth in *Reynolds* in *Kaiser Foundation Hospitals, Permanente Medical Group v. WCAB* (*Martin*) (1985) 50 CCC 411 and held that the statute of limitations would be tolled by the breach of an employer's duty to notify only if the employee is prejudiced by the breach. The employee would be prejudiced if he had no knowledge that his injury might be covered by workers' compensation before he receives notice from the employer.

In this case, the applicant testified that he told his supervisor that he was having problems with his shoulder and his knees prior to his retirement but his supervisor never provided him with a claims form and did not offer him medical treatment. In addition, the employer provided the applicant with a cushion for his knees after the applicant told his supervisor that his doctor had recommended it. (MOH/SOE, 11/12/20, 5:21 - 6:5.) The defendant notes that the applicant did not call any witnesses at trial to substantiate his alleged conversations with his supervisor but the court notes that the defendant failed to call any witnesses to rebut the applicant's testimony. The court found the applicant to be a credible witness.

The defendant contends that the applicant had sufficient knowledge of the workers' compensation process and procedures for reporting his injury based upon the fact that he had prior industrial injuries. The Court of Appeals had held that general awareness of the workers' compensation system and past experience with the workers' compensation system was not by itself sufficient to prove knowledge of potential eligibility for a particular injury. (*Ciga v. WCAB* (*Carls*) (2008) 73 CCC 771, 777-78.) In this case, none of the applicant's prior injuries resulted in him filing an Application for Adjudication of Claim but appear to have been for medical treatment only. It also does not appear that any of the prior industrial injuries were the result of a cumulative trauma as opposed to a specific injury. The applicant testified that he told his supervisor about the prior injuries in the same manner in which he did for the problems he was having for his shoulder and his knees.

Defendant contends that the undersigned erred in failing to admit into evidence Dr. Rubenstein's report dated 4/13/20. Pursuant to Labor Code section 5503(d)(3), "Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." Discovery was closed on 3/4/20 at the MSC. At that time, defendant did not object to discovery being closed or raise the issue of the admissibility of an additional report from Dr. Rubenstein. For the first time on the day of trial, Defendant sought to have this report admitted into evidence.

Upon questioning, the defendant admitted that the annual audiology tests that Dr. Rubenstein had been asked to review had been in the possession of the defendant throughout the pendency of the applicant's claim. While the court does have the discretion to develop the record, this discretion is weighed against the parties' duty to complete discovery with due diligence. The defendant did not offer any explanation as to why this evidence could not have been obtained with due diligence prior to the close of discovery. The court's duty to develop the record is not to be used to rescue a party that fails to produce evidence ty the time of the MSC. Defendant contends that without reviewing the prior audiology reports, Dr. Rubenstein's reports do not constitute

substantial medical evidence. However, Dr. Rubenstein only commented that without prior audiograms he could not apportion applicant's loss to a preexisting cause or other factors. The doctor does not indicate that he is unable to determine industrial causation of injury without any earlier audiograms. It is defendant's burden to prove apportionment. A WCJ may not exercise his or her duty to develop the record if doing so unfairly would reward a party who, due to his or her own negligence, cannot meet the burden of proof. (*Quintero v. PBC Holding Corp. dba Commercial Cleaning Systems*, 2015 Cal. Wrk. Comp. P.D. LEXIS 610)

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

Date: 3/10/21

/s/ Debra Sandoval
Debra Sandoval
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE