WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CINDY CHEN, *Applicant*

vs.

DTG OPERATIONS, insured by ACE AMERICAN INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ17614232
Pomona District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the January 16, 2025 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that defendant's "Statute of Limitations defense fails" since applicant was unaware her pain was caused by work "until she was referred to a doctor by her attorney" and defendant did not provide a DWC-1 form or post "required information informing applicant of her rights and remedies regarding workplace injuries." (F&O, pp. 1-2.)

Defendant contends that applicant was aware her injury was work related on March 24, 2020, or earlier, but did not file the Application for Adjudication of Claim (Application) until April 25, 2023, which is in excess of the statute of limitations under Labor Code[1] section 5405(a). (Petition, p. 21.)

We have not received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition) be denied.

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

We have considered the Petition and have reviewed the record in this matter. Based upon the Report, which we adopt and incorporate herein, and the reasons discussed below, we will deny the Petition.

FACTS

Applicant claimed that while employed by defendant as a bus driver during the period from July 1, 2008 through March 7, 2020, she sustained an injury arising out of and in the course of employment (AOE/COE) to her bilateral ears, eyes, shoulders, arms, wrists, hands, fingers, hips, legs, feet, and toes as well as her teeth, back, chest, and psyche. The Application was filed on April 25, 2023.

Shortly thereafter, a denial notice was issued by defendant alleging passage of the statute of limitations under section 5405, lack of substantial medical evidence of injury AOE/COE, and the post termination defense under section 3600(a)(10). (Exhibit A, p. 1.)

On April 11, 2008, applicant sought treatment with chiropractor, Wendy Hon Chow. (Exhibit C, p. 92.). Over the course of several years, Dr. Chow diagnosed applicant with sciatica, lumbar radiculitis, lumbar myospasm, neuritis, lumbalgia, and myofascitis. (*Id.* at pp. 10, 18, 28, 34, 50-51, 55, 59, 79, 82, 88.) Applicant was taken on and off work by Dr. Chow on several occasions. (*Ibid*.) Within her reports, however, Dr. Chow did not specify that applicant's employment was the cause of her injury and/or symptoms.

On November 12, 2024, the matter proceeded to trial solely on the issue of the applicability of the statute of limitations defense under section 5405(a).

At trial, applicant confirmed that she last worked for defendant in March of 2020. (Minutes of Hearing and Summary of Evidence (MOH & SOE), p. 2, lines 14-15.) She also testified to receiving treatment from Dr. Chow and Dr. Chow signing off on her EDD form but failing to "tell her that her injury was from work." (*Id*. at pp. 4-5.) She further testified that she was "given no training on how to report a work injury" and did "not recall seeing any postings about workers' compensation at the employer's site." (*Id*. at p. 2.) She noted that "nobody asked her if the pain was work related" and "there was no employer investigation." (*Id.* at p. 3.)

On January 16, 2025, the WCJ issued a Findings and Order which held, in relevant part, that the statute of limitations defense did not apply to applicant's case since she was unaware her pain was caused by work "until she was referred to a doctor by her attorney" and defendant failed

to provide a DWC-1 form and did not post "required information informing applicant of her rights and remedies regarding workplace injuries." (F&O, pp. 1-2.)

DISCUSSION

I.

Preliminarily, 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, 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 under the Events tab 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 February 12, 2025, and 60 days from the date of transmission is April 13, 2025, which is a Sunday. The next business day that is 60 days from the date of transmission April 14, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision was issued by or on April 14, 2025, so that we have timely acted on the petition as required by section 5909(a).

[2] 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.

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 constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on February 12, 2025, and the case was transmitted to the Appeals Board on February 12, 2025. 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 February 12, 2025.

II.

Turning now to the Petition, defendant contends that the statute of limitations defense under section 5405(a) applies herein. Statute of limitations is an affirmative defense upon which the defendant carries the burden of proof. (Lab. Code, § 5409.) This means defendant must provide evidence which establishes 1) the date of the cumulative injury per statutory and case law, and 2) that applicant filed the claim more than one year after this date. Section 5405(a) states in relevant part that: "[t]he period within which proceedings may be commenced for the collection of the benefits…is one year from any of the following: [¶] (a) The date of injury."

Section 3208.1(b) defines a cumulative injury 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(b).) Section 3208.1(b) further provides that "[t]he date of a cumulative injury shall be the date determined under Section 5412." (*Ibid*.)

Section 5412 states, in relevant part, that the date of injury for cumulative injury and occupational disease cases 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." (Lab. Code, § 5412.) Pursuant to *City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53], "[w]hether an employee knew or should have known his disability was industrially caused is

a question of fact." 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. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556, 559 [33 Cal.Comp.Cases 722].) That burden is not met merely by showing the employee knew they had some symptoms. (*Ibid*.) Generally speaking, an employee is not charged with knowledge that their disability is job-related without medical advice to that effect, unless given "the nature of the disability and the applicant's training, intelligence and qualifications," they should have recognized the relationship. (*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].) "The medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acc. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].) "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.)

Here, the issue of the section 5412 date was not raised at trial. As such, we do not make a finding as to the section 5412 date. We discuss the issue only in response to defendant's contention that applicant's claim is barred by the statute of limitations as applicant had knowledge and compensable disability. The evidentiary record, however, does not disclose any particular training, background or experience that would enable applicant to identify a cumulative injury or to discern the industrial nature of her disability. Further, based upon the reporting from Dr. Chow, there is no evidence applicant knew or should have known her injury or symptoms were work related as Dr. Chow advised applicant not to return to work, but did not indicate in her reports that applicant's injury and/or symptoms were work related.

Lastly, in *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726, 729 [39 Cal.Comp.Cases 768], the court explained that: "The clear purpose of these rules is to protect and preserve the rights of an injured employee who may be ignorant of the procedures or, indeed, the very existence of the workmen's compensation law. Since the employer is generally in a better position to be aware of the employee's rights, it is proper that he should be charged with the responsibility of notifying the employee, under circumstances such as those existing here, that there is a possibility he may have a claim for workmen's compensation benefits." In *Reynolds*, the employer was precluded from raising a statute of limitations defense where the injured employee

suffered a heart attack at work and the employer did not provide notice of workers' compensation benefits. Similarly, here, applicant was injured at work, but defendant failed to notify applicant of her right to workers' compensation benefits despite numerous opportunities to do so. Accordingly, defendant's Petition is denied.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the January 16, 2025 Findings and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 14, 2025

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

CINDY CHEN
WPI LAW GROUP
MICHAEL SULLIVAN & ASSOCIATES

RL/*cs*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Cindy Chen, born [], while employed during the period of January 1, 2008, through March 7, 2020, as a courtesy bus driver, (occupational group number is deferred.), at Los Angeles, California, by DTG Operations, whose insurance carrier was Ace American Insurance Company administered by Sedgwick Claims Management, claims to have sustained injury arising out of and in the course and scope of her employment to bilateral ears, bilateral eyes, teeth, neck, bilateral arms, bilateral wrists, bilateral hands, bilateral fingers, back, chest, bilateral hips, bilateral shoulders, bilateral legs, bilateral feet, bilateral toes, and psyche.

The parties proceeded to trial on the sole issue of Defendant's Affirmative Defense of Statute of Limitations.

DEFENDANT has filed a timely Petition for Reconsideration, objecting to said decisions in the following particulars:

1. Petitioner contends that the undersigned erred by acting in excess of their powers;
2. Petitioner further contends that the undersigned erred insofar as the evidence did not justify the Finding of Fact.
3. Petitioner further contends that the undersigned erred insofar as the findings of fact do not support the Order, Decision or Award.

FACTS ON DISPUTED ISSUES

Applicant, Cindy Chen, was the only witness to testify at trial.

She had worked for the employer, DTG Operations (and its predecessor in interest, Hertz) since 2007, [Minutes of Hearing/Summary of Evidence, Nov. 12, 2024, p. 2 , ln. 14-15 & p. 3, ln. 16] as a bus driver. MOH/SOE 11/12/24, pg. 2 ln. 18.

She was given no training on how to report a workplace injury, nor could she recall ever seeing any workplace postings about workers' compensation at her employer's site. MOH/SOE 11/12/24, pg. 2, ln. 22-23. This testimony was un-rebutted.

She sought treatment for her neck and back in either 2013 or 2014, for her hips in 2016 and she could not recall when she first sought treatment for her legs. MOH/SOE 11/12/24, pg. 3, ln. 3-5. She was unsure if the pain in her legs, feet and toes was due to hard breaking. MOH/SOE 11/12/24, pg. 3, ln 20-24. She thought that the pain and numbness in her hands may have been due to using the steering wheel to turn the bus. MOH/SOE 11/12/24, pg.3, ln. 25 amended MOH

1/9/25, pg. 2, ln. 5-7. She believed that the back, hips, and neck pain was due to sitting and driving for long periods of time. MOH/SOE 11/12/24, pg. 4, ln. 1-3.

She saw a doctor several times throughout her employment and, when the pain got bad, her doctor would take her off work. MOH/SOE 11/12/24, pg. 3, ln. 8-11. No one ever inquired as to whether the pain she was experiencing was due to her work, [MOH/SOE 11/12/24, pg.3, ln. 1-3] and none of the doctors she saw told her that it was work related. MOH/SOE 11/12/24, pg. 3, ln. 5-6, pg. 4, ln. 25 – pg. 5, ln. 1.

Doctor Chow filled out EDD forms for the applicant, but Ms. Chen didn't recall reviewing them. MOH/SOE 11/12/24, pg. 4, ln. 6-10. She was not told by Dr. Chow what was on the forms. MOH/SOE 11/12/24, pg. 4, ln24-25. On each form – March 2020, October 2019, July 2019, October 2016, July 2016, September 2011, and January 2010 – Dr. Chow checked the box indicating that the applicant's complaints were not work related. Exhibit C, pg. 1-2, 21-22, 40-41, 52-53, 60-61, 75, 77, 86.

Applicant last worked at the employer on, or about, March 10 or 11, 2020, when she was taken off work by Dr. Chow. MOH/SOE 11/12/24, pg. 2, ln. 16-17. In May of 2020 she was laid off due to the Covid-19 shut down orders. MOH/SOE 11/12/24, pg. 2, ln. 18. She was contacted in about June or July of 2021 by her employer indicating she was eligible for rehire, although she did not return. MOH/SOE, pg. 2, ln. 18-20. The application was filed April 25, 2023.

DISCUSSION

The Statute of Limitations for Workers Compensation is found in Labor Code §5405, providing that a claim must be filed no later than one year from date of injury or last benefit. For an injury involving a continuous trauma, Labor Code §5500.5 provides, in part, that the date of injury runs from "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." Under Labor Code §5412, the date for determination of the Statute of Limitations is the date upon which the employee first suffered disability and either knew or should have known that such disability was caused by her employment. *Chavez v. WCAB* (1973) 39 CCC 174.

1. <u>The Burden is on the Defendant to Prove the Affirmative Defense of Statute of Limitations</u>

The burden of proving that a claim is barred by the Statute of Limitations belongs to the employer. *Sidders v. WCAB* (1988) 53 CCC 445. They did not meet that burden.

The court must view the evidence in a light most favorable to the applicant Labor Code §3202 and §3202.5. Workers' compensation cases are decided under a preponderance of the evidence standard. This simply means that the evidence presented was found to be more likely true than not. *Preponderance of the Evidence | Practical Law* (thomsonreuters.com); *https://ca.practicallaw.thomsonreuters.com/3-501-6607*. Here the only testimony given was that of the applicant. Cross-examination of the applicant did not succeed in contradicting her testimony on direct. Her testimony was not contradicted by any documentary evidence. The employer did not provide any witnesses to rebut the applicant's testimony. While the test, when weighing the evidence, is not the relative number of witnesses, but the relative convincing force of the evidence (Labor Code §3202.5) and the only evidence given is applicant's testimony and doctor's reports stating the symptoms are not work related, when viewed in the light most favorable to the applicant does not support barring the applicant's claim due to the Statute of Limitations.

2. Applicant Did Not Know Her Injury was Industrial Until She Filed the Claim

Applicant did miss various periods of work because of her injuries as evidenced by the EDD forms in Exhibit C. Thus, there may have been indication of disability under Labor Code §5412. As noted in *Chavez, supra,* however, it is a two prong test: Compensable Disability and Knowledge. An employee is not charged with knowledge just because they have symptoms. *Jordan Potash, Inc. v. WCAB (Ward)* 48 CCC 472 (1983) (*writ denied*). Applicants are not generally charged with knowledge of a cumulative trauma injury unless and until a doctor tells them so. *Northrop Grumman Corp. v. WCAB (Elachkar)* (2012) 77 CCC 187 (*writ denied*). Here, applicant's doctor was telling applicant that her symptoms were not work related. *Hughes Aircraft Co. v. WCAB (Zimmerman)* (1993) 58 CCC 220 (*writ denied*). It has long been recognized that 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; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal. App. 3d 988.

While applicant was aware that her work made those symptoms worse and thought work may have caused them, her doctor was telling her they were not due to work. *Id*. Applicant is not charged with second guessing a medical professional.

3. Defendant Did Not Provide the Requisite Notifications

Under Labor Code §3550 the employer is required to post notice regarding employees' workers' compensation rights. The employer has the burden of proving not only that the Statute of Limitations has run, but also to establish that the employee had actual notice of their workers' compensation rights. *Sidders supra* at 452. If the employer fails to provide notice of the employee's rights, then they are estopped from raising the Statute of Limitations as a defense. *Reynolds v. WCAB* (1974) 39 CCC 768, 770. Here, applicant testified that she was never given any training on how to report a workplace injury and never saw any postings at the worksite about workers' compensation rights. The employer did not bring any witnesses to rebut this testimony. Based on this, the employer cannot assert the Statute of Limitations against the applicant.

Further, this is bolstered by Exhibit C, page 71, which is a Sedgwick Claims Management form dated October 30, 2017 and signed by Dr. Chow. This implies that the employer may have had some knowledge that there was a work component to applicant's complaints. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." Ca Evid. Code, § 600, subd. (b). It is not incumbent upon an applicant to show that an inference in their favor is the only one that may be reasonably drawn from the evidence; the applicant need only show that the material fact to be proved may logically and reasonably be inferred from the circumstantial evidence. The mere fact that other inferences adverse to applicant might be drawn does not render the inference favorable to applicant too conjectural or speculative for consideration. *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 121. If defendant submitted the claim to their insurance and Sedgwick was administering the claim, then there were written notices that they were required to provide applicant. The selected portions of the personnel file did not have those notices.

When an employer breaches their duty to notify an applicant of their rights and the employee is unaware of those rights the Statute of Limitations is tolled.

CONCLUSION

For all the forgoing reasons the Petition for Reconsideration should be DENIED.

DATE: February 11, 2025

Amy Britt

WORKERS' COMPENSATION JUDGE