WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CLAUDIA VILLARRUEL DE MUNDO, *Applicant*

vs.

DISPLAY PRODUCTS, INC.; TRAVELERS; SECURITY NATIONAL COMPWEST; ZENITH; *Defendants*

Adjudication Numbers: ADJ10991851, ADJ10991853
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant Zenith seeks reconsideration of the Joint Findings of Fact and Award (F&A) issued on May 24, 2021, wherein the workers' compensation administrative law judge (WCJ) found in ADJ10991851 that (1) ADJ10991851 is subsumed by case number ADJ10991853; and in ADJ10991853 that (2) applicant sustained injury arising out of and in the course of employment to her cervical spine, left shoulder and right shoulder; (3) the injury caused permanent disability of 20% equal to 75.50 weeks of indemnity payable at the rate of $230.00 per week in the amount of $16,136.62 less credit for amounts paid by defendant and less attorney's fees; (4) applicant is in need of further medical treatment to cure or relieve from the effects of the industrial injuries herein; (5) based upon the guideline for awarding attorney's fees in Section 10775 of the Rules of Practice and Procedure and in Index N.1.140 of the Manual of Practice and Procedure, a reasonable attorney fee is found to be $2,420.49 arising from permanent disability; (6) the date of injury pursuant to Labor Code section 5412 is determined to be 8/17/2012 to 9/22/2017; (7) defendants Compwest and Zenith are liable based on the determination of date of injury herein pursuant to Labor Code section 5500.5.

The WCJ issued an award in ADJ10991853 in favor of applicant and against defendants in accordance with the findings.

Defendant Zenith contends that the WCJ erred by (1) finding that the date of injury pursuant to Labor Code section 5412 is August 17, 2012 to September 22, 2017; (2) mistyping the

weekly rate of permanent disability benefits in the F&A; and (3) failing to allocate liability between itself and defendant Compwest.

We did not receive an Answer.

We have reviewed the contents of the Petition and the Report. Based upon our review of the record, and for the reasons stated below, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&A and substitute new findings that applicant sustained cumulative injury to the cervical spine, left shoulder and right shoulder during the period up to September 22, 2017; that the issue of the Labor Code section 5412 date of injury is deferred; that the issue of the Labor Code section 5500.5 period of liability is deferred; and that all other issues are deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

BACKGROUND

On December 10, 2020, the matter proceeded to trial in ADJ10991851 on the following issues:

1. Injury arising out of and in the course of employment.
2. Permanent disability.
3. Need for further medical treatment.
4. Attorney fees.
5. What is the date of injury pursuant to Labor Code section 5412?
6. Which defendant is liable pursuant to Labor Code section 5500.5?

(Minutes of Hearing and Summary of Evidence, December 10, 2020, p. 4:2-9.)

The parties stipulated that applicant claims injury to her neck, left hand, left shoulder, and left upper extremity while employed as an assembler by Display Products, Inc., during the period August 17, 2012 to September 22, 2017; and that the employer's workers' compensation carriers were Travelers between the period of September 30, 2012 to September 30, 2013, Security National between the period of September 30, 2013 to September 30, 2015, Zenith Insurance Company between the period September 30, 2015 to September 30, 2016, and CompWest between the period of September 30, 2016 to September 30, 2017. (*Id*., p. 3:12-18.)

In the Report, the WCJ states:

> The AME report of Dr. Jeffrey Berman dated 11/15/2018 was jointly offered into evidence by all parties present at trial. This was the only exhibit offered into evidence at trial.
> . . .

The AME Dr. Jeffrey Berman opined that although applicant reported a date of injury of 7/3/2013 that that injury was really a cumulative trauma. Dr. Berman states "I understand there is a claim of injury of 7/13/2013, for the same body parts as reflected in the letter by the parties. It should be noted that the records reflect not a specific mechanism but a continuous trauma." (See Exhibit X at page 19) Dr. Berman goes on to opine that there is only one continuous trauma date of injury ending 9/22/2017. He explains, "I do not believe that there is evidence to conclude with reasonable medical probability that there would be 2 periods of continuous trauma. I am concluding this is a continuum with continuous trauma that is responsible for this current condition that relates to the neck and left shoulder and to a lesser extent, the right shoulder." (See Exhibit X at page 19)

. . .

Defendant is correct that there is a discrepancy between the Joint Opinion on Decision and Joint Findings of Fact regarding the weekly PD rate. The WCJ would like to take this opportunity to correct this clerical error and the Petition for Reconsideration should be granted in part to correct this clerical error. The Findings of Fact regarding ADJ10991851 (MF) should be amended to read as follows:

3. The injury caused permanent disability of 20% equal to 75.50 weeks of indemnity payable at the rate of $213.73 per week in the amount of $16,136.62 less credit for amounts paid by Defendant and less attorney fees.

. . .

For the parties clarification, the Findings of Fact regarding ADJ10991851 (MF) should be amended to read as follows:

7. Defendants Compwest and Zenith are liable based on the determination of the date of injury herein pursuant to Labor Code section 5500.5. Based on the coverage information provided by the parties, Defendant, Compwest, is designated as the administrator of the Award. All Defendants rights to seek reimbursement are hereby reserved. The Board also reserves jurisdiction in the event of a dispute. (Report, pp. 2-7.)

DISCUSSION

Defendant Zenith first contends that the WCJ erred by finding that the date of injury pursuant to Labor Code section 5412 is August 17, 2012 to September 22, 2017.

Here, the WCJ found the Labor Code section 5412 date of injury based upon applicant's alleged exposure to cumulative trauma during the period of August 17, 2012 to September 22, 2017, and the reporting of Dr. Berman. (Minutes of Hearing and Summary of Evidence, December 10, 2020, p. 3:12-18; Report, pp. 2-3.)

However, the period of cumulative trauma does not determine the date of injury under Labor Code section 5412. Hence, we will explain the difference between the date of injury based

upon exposure, here up to September 22, 2017, the Labor Code section 5412 date of injury, and the Labor Code section 5500.5 period of liability below.

Labor Code 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.)

"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.)[1] "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.)

For example, in *Western Growers*, applicant originally suffered an industrial injury of depression. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th. 227, 235.) He was off work due to his injury and never fully recovered from his depression before returning to work. (*Id.*) He remained under a doctor's care the entire time. (*Id.*) Therefore,

[1] 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 v. City of Vista* and *Newberry v. San Francisco Forty Niners* persuasive given that the case currently before us involves similar legal issues.

applicant in that case suffered from a single cumulative injury. (*Id*.) Similarly, a football player sustained one cumulative trauma extending throughout his professional football career when he played for a few different teams when his cumulative injury periods were linked by periods when he received medical treatment for the injured body parts including surgeries, knee aspirations and lumbar epidural blocks. (*Newberry v. San Francisco Forty Niners* (Mar. 14, 2017, ADJ7369276 et. al.) [2017 Cal.Wrk.Comp. P.D. LEXIS 143, *32].)

The Appeals Board decides the issue of whether a cumulative injury exists, and substantial medical evidence must support the finding of industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Here, the record shows that Dr. Berman determined that applicant sustained cumulative injury up to September 22, 2017. (Report, p. 6.) Accordingly, we will substitute a new finding that applicant sustained cumulative injury to the cervical spine, left shoulder and right shoulder during the period up to September 22, 2017.

Next, "[t]he 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 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.)

On some occasions, a worker may not satisfy the knowledge component until there is medical evidence that the injury was industrial even if they had filed a claim form prior "where the applicant lacks sufficient knowledge of the industrial causation of a disability at the time of the filing of a claim form," especially when the medical condition is difficult to diagnose. (*Raya v. County of Riverside* (2024) 89 Cal. Comp. Cases 993, 1007, citing *Modesto City Schools Workers' Comp. Appeals Bd. (Finch)* (2002) 67 Cal.Comp.Cases 1647; *ExpoServices/San Francisco Expo Servs. v. Workers' Comp. Appeals Bd. (Cratty)* (2004) 69 Cal.Comp.Cases 260; *Johnson*, *supra*, 163 Cal.App.3d 467; *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 927-928.)

Medical evidence is necessary to establish when an applicant has first suffered a disability resulting from cumulative injury. (See *Johnson*, *supra*, at p. 473.)

In this case, the WCJ did not determine when applicant (1) had knowledge sufficient to establish that she either knew, or in the exercise of reasonable diligence should have known, that her disability was caused by her employment; and (2) first suffered disability based upon medical evidence indicating when the cumulative effect of her injury ripened into disability. (See Lab. Code, § 5412; see also *Federal Insurance Co. v. Workers' Comp. Appeals Bd*. 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257].

Because the WCJ did not make the factual determinations necessary to set the Labor Code section 5412 date of injury, we conclude that the record on that issue requires further development.

Accordingly, we will substitute a finding that defers the issue of the Labor Code section 5412 date of injury. (See *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261] (finding that the Appeals Board has the discretionary authority to develop the record when appropriate to fully adjudicate the issues); see also Lab. Code § 5313.)

Labor Code section 5500.5(a) states that liability for cumulative injury is limited to the employer who employed the employee in the year preceding the "date of injury." This "date of injury" is either the last date of injurious exposure or the date of injury under Labor Code section 5412. (Lab. Code, § 5500.5.) The earliest of these two dates is the one that sets the one-year period of liability. The liable employer is then the employer that employed applicant during that last one-year period. (*Id.*)

We have explained that the last date of injurious exposure was September 22, 2017, and that the record requires further development as to the issue of the Labor Code section 5412 date of injury. Hence, upon further development of the record, the WCJ may determine the one-year period of liability under Labor Code section 5500.5(a) and then allocate liability between the defendant insurers based thereon. Accordingly, we will defer the issue of the Labor Code section 5500.5 period of liability.

Defendant Zenith further contends that the WCJ erred by mistyping the weekly rate of permanent disability benefits and failing to allocate liability between itself and defendant Compwest.

However, because the record requires further development on the issues of the Labor Code section 5412 date of injury and the Labor Code 5500.5 period of liability, we will defer these and all other issues.

Accordingly, we will defer all other issues and return the matter to the trial level for further proceedings consistent with this decision.

Accordingly, as our Decision After Reconsideration, we will rescind the F&A and substitute new findings that applicant sustained cumulative injury to the cervical spine, left shoulder and right shoulder during the period up to September 22, 2017; that the issue of the Labor Code section 5412 date of injury is deferred; that the issue of the Labor Code section 5500.5 period of liability is deferred; and that all other issues are deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings of Fact and Award issued on May 24, 2021 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

(ADJ10991851)

1. ADJ10991851 is subsumed by Case Number ADJ10991853(MF).

(ADJ10991853) (MF)

2. Applicant sustained injury arising out of and in the course of employment to her cervical spine, left shoulder and right shoulder during the period up to September 22, 2017.

3. The issue of the Labor Code section 5412 date of injury is deferred.

4. The issue of the Labor Code section 5500.5 period of liability is deferred

5. All other issues are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 3, 2025

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

CLAUDIA VILLARRUEL DE MUNDO
CHERNOW AND PINE
COMPWEST
LAW OFFICES OF LESTER FRIEDMAN
NATALIE KAPLAN
WOOLFORD & ASSOCIATES

SRO/bp

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