WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ESTES BANKS, *Applicant*

vs.

CINCINNATI BENGALS, permissibly self-insured; FREMONT INDEMNITY, in liquidation, administered by CIGA for the OAKLAND RAIDERS, *Defendants*

Adjudication Number: ADJ9085187
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant Cincinnati Bengals seek reconsideration of the February 18, 2020 Findings & Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional football player, sustained industrial injury to his neck, back, bilateral shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet, and toes, and did not sustain injury to his vision, head, jaw, internal systems, psyche, teeth/dental, and sleep. The WCJ found, in pertinent part, that the statute of limitations did not bar compensation for applicant's claim, and that permanent disability was payable at rates in effect in 2015.

Defendant contends that applicant's date of injury ended in 1969 and that applicant's claim is barred by the statute of limitations. Defendant also contends the WCJ awarded permanent disability at an incorrect rate. Defendant contends in the alternative that if the date of injury occurred in 2015, then all of applicant's medical reporting is inadmissible.

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[1] Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Deputy Commissioner Schmitz, who was previously a member of this panel, is currently unavailable. Other panelists have been appointed in their place.

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

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below we will rescind and restate the F&A to include a finding of a date of injury of February 13, 2015; that applicant became permanent and stationary on February 13, 2015; that the claim is not barred by the statute of limitations of Labor Code[2] section 5405; that applicant's injuries caused 72 percent permanent disability; and that cost of living adjustments (COLAs) per section 4659(c) commence January 1, 2016.

FACTS

Applicant claimed injury to his head, vision, jaw, neck, back, bilateral shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet, toes, and injury to his internal systems, psyche, teeth/dental, and sleep [disturbance] while employed as a professional football player by defendant Cincinnati Bengals from 1968 through 1969, and the Oakland Raiders in 1967. The Cincinnati Bengals deny all liability for the claimed injury.

Applicant obtained medical evaluations from David Kim, M.D., in orthopedic medicine, Ted Greenzang, M.D., in psychiatry, Kenneth Nudleman, M.D., in neurology, Jens Dimmick, M.D., in internal medicine, and Michael Wells, DDS, in dentistry. Defendant obtained medical evaluations from David Reiss, M.D., in psychiatry, Charles Glatstein, M.D., in neurology, and Jonathan Green, M.D., in internal medicine.

On June 13, 2019, the parties proceeded to trial and framed issues including, in relevant part, injury arising out of and in the course of employment, earnings, permanent disability, whether compensation is barred by the statute of limitations, the date of injury as described in section 5412, whether the date of injury sets indemnity rates, and whether indemnity accrues from the permanent and stationary date. (Minutes of Hearing and Summary of Evidence (Minutes), dated June 13, 2019, at p. 3:4.) The WCJ heard applicant's testimony, and ordered the matter submitted.

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

The WCJ issued Findings and Award on November 9, 2019, but finding good cause, rescinded the decision on November 21, 2019, noting the need for clarification from the parties as to their respective positions with respect to the correct date of injury and proper weekly rate of payment of permanent disability. (Order Rescinding Findings and Award, dated November 21, 2019.)

On January 15, 2020, the parties returned to trial, offered verbal argument, and clarified the record. The WCJ ordered the matter submitted for decision. (Minutes of Hearing, dated January 15, 2020, at p. 1:19.)

On February 18, 2020, the WCJ issued her F&A, determining in relevant part that applicant sustained injury arising out of and in the course of employment to the neck, back, bilateral shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet, toes, and did not sustain injury to his vision, head, jaw, internal systems, psyche, teeth/dental, and sleep. (Finding of Fact No. 1.) The WCJ found that the permanent and stationary date was November 1, 1969, and that applicant's claim was not barred by the statute of limitations. The WCJ awarded 72 percent disability, at the indemnity rates available in 2013, commencing November 1, 1969.

The WCJ's Opinion on Decision discussed the applicability of the statute of limitations of section 5405 by first addressing the date of injury under section 5412. The WCJ noted that the record established the existence of permanent disability dating to 1969, but that applicant "had no knowledge of the connection to a continuing trauma until he was so informed by Dr. Kim." (Opinion on Decision, at p. 7.) Regarding the nature of the injury sustained, the WCJ found the medical reporting of Dr. Kim to be substantial evidence of injury to the neck, back, bilateral shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet, toes. With respect to the claimed psychiatric injury, the WCJ found the reporting of defense evaluator Dr. Reiss to be the more persuasive, over that of Dr. Greenzang, and thus determined that applicant did not sustain an industrial psychiatric injury. (*Id.* at p. 9.) With respect to the claimed neurologic injury, the WCJ found no neurologic injury based on the reporting of both Dr. Nudleman and Dr. Glatstein, and based on Dr. Green's reporting, no industrial injury to applicant's internal systems. (*Id.* at p. 10.) Finally, the WCJ found the dental reporting in evidence unpersuasive, and determined that any claimed teeth/dental/jaw injuries were nonindustrial in nature. (*Id.* at p. 11.) Based on the rating of the industrially-injured body parts, the WCJ awarded 72 percent disability, with indemnity payable

commencing following the permanent and stationary date of November 1, 1969, pursuant to section 4650(b)(2), payable at the rates available when applicant's disability arose. (*Id.* at p. 12.)

Defendant's Petition contends the date of injury herein was in 1969 based on the concurrence of permanent disability established in the medical record, and applicant's testimony at trial that he knew his pain and disability arose out of his industrial exposures. (Petition, at p. 4:1.) Defendant further asserts that applicant discussed his football injuries with his personal physicians more than one year prior to filing the instant claim in 2013. (*Id.* at p. 4:18.) Under either analysis, defendant avers compensation is barred pursuant to the statute of limitations of section 5405. Defendant further contends the award of permanent disability should be payable at rates in effect based on a date of injury in 1969. In the alternative, defendant contends that if the date of injury is 2015 as determined by the WCJ, then all of applicant's medical reporting was obtained in violation of section 4062.2 and is inadmissible. Defendant urges that we grant reconsideration and find that compensation is barred under section 5405. In the alternative, defendant contends that "[i]f [a]pplicant were entitled to permanent disability and life pension benefits, they would be owed at the rate in effect in 1969 pursuant to Labor Code section 4453.5." (*Id.* at p. 10:18.) Finally, defendant seeks rescission of the award of permanent disability insofar as the WCJ's decision was based on medical reporting obtained outside the section 4062.2 medical dispute resolution process.

DISCUSSION

I.

Defendant's Petition first contends that Labor Code section 5412 did not apply to cumulative trauma cases until 1973 and is not applicable to a case involving a player whose employment ended in 1969. (Petition, at p. 3:4.) Initially, we note that section 5412 was enacted in 1947 and encompassed "occupational diseases," and was amended in 1973 only to add the term "cumulative injuries" to the statute. We thus agree with the WCJ's observation that "[e]ven before the amendment of Labor Code Section 5412, the courts held a continuing trauma injury was defined as arising upon the confluence of disability plus knowledge of industrial causation," and that "the amended Labor Code Section 5412 in effect codified existing statutory interpretation." In *Chavez v. Workmen's Comp. Appeals Bd.* (1973) 31 Cal.App.3d 5 [38 Cal.Comp.Cases 174], the court of appeal applied the codified section 5412 to its analysis of applicant's claimed "cumulative trauma" injury to the low back, ending March 3, 1970. In so doing, the court applied

a long line of California jurisprudence requiring the existence of industrial disability and actual or imputed knowledge that the disability was occupationally related. (*Id.* at p. 14.) Accordingly, we find no merit in defendant's assertion that section 5412 does not apply to applicant's claimed injury ending in 1969.

II.

Defendant next contends applicant's date of injury "ends" in 1969 and that his claim is barred by the statute of limitations. (Petition, at p. 3:1.)

Generally, proceedings before the Workers' Compensation Appeals Board ("WCAB") are commenced by the filing of an application. (Lab. Code § 5500; Cal. Code Regs., tit. 8, § 10450.) The time limitations for commencing proceedings are set forth in section 5405:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
> (a) The date of injury.
> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

Thus, an applicant must commence proceedings with the WCAB within one year of (1) the date of injury or (2) the expiration of the period covered by the employer's last payment of disability indemnity or (3) the date of the last furnishing by the employer of medical, surgical or hospital treatment. (*J.T. Thorp v. Workers' Comp. Appeals. Bd.* (*Butler*) (1984) 153 Cal.App.3d 327 [49 Cal.Comp.Cases 224] (*Butler*).) The statute of limitations is an affirmative defense, and the defendant has the burden of proof. (Lab. Code, § 5409; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Martin*) (1985) 39 Cal.3d 57, 67, fn. 8 [50 Cal.Comp.Cases 411] (*Martin*).)

In cases involving an alleged cumulative injury, the date of injury as described in section 5405(a) is governed by Labor Code 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.)

In addition to its applicability to section 5405(a), the date of injury under section 5412 is an integral consideration with respect to various workers' compensation benefits. (Lab. Code, §§ 4658, 4660 et seq.) In *Argonaut Mining Co. v. Ind. Acc. Com. (Gonzalez)* (1951) 104 Cal.App.2d 27 [16 Cal.Comp.Cases 118] (*Gonzalez*), the court held that in addition to identifying the date of injury for purposes of the operation of the statute of limitations, section 5412 "also sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right." (See also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) 219 Cal.App.3d 1265 [55 Cal.Comp.Cases 107] (*Steele*).)

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].)

Here, defendant contends that applicant had disability sufficient for purposes of establishing a section 5412 date of injury because "[a]pplicant's QME, Dr. David Kim, determined Applicant had ratable permanent disability to his cervical spine at the time he was Permanent and Stationary in 1969." (Petition, at p. 3:21.) However, Dr. Kim's opinions on the existence of disability were made in deposition on January 14, 2019, approximately 50 years after the end of applicant's professional football career. (Ex. G, Transcript of Deposition of David Kim, M.D., dated January 14, 2019.) Thus, Dr. Kim's opinions were necessarily retroactive in nature.

In addition, applicant testified that he sustained a series of both major and minor physical injuries during the course of each football season. This included a sprained ankle while playing for the Raiders and a hamstring injury while playing for the Bengals. (Minutes of Hearing and Summary of Evidence, dated October 1, 2015, at pp. 6-7.) The applicant testified that every day during practice he sustained repeated blow to the head, that he experienced "bumps and bruises" and "strains and sprains" during practices games. (*Id.* at p. 8.) Applicant sustained hundreds of "contacts" with other players each practice, and that he was "hit every day that he played, day after

day." (Minutes of Hearing and Summary of Evidence, dated October 1, 2015, at p. 6; Minutes, at p. 6:1.) Notwithstanding these injuries, however, applicant did not seek further medical treatment and "went on with his life," after being cut from the Bengals roster in 1969. (Minutes of Hearing and Summary of Evidence, dated October 1, 2015, at p. 10.)

The medical record thereafter identifies no *contemporaneous* reporting of either compensable temporary or permanent disability, or permanent modified duties or other medical treatment suggesting the existence of permanent disability. (*Rodarte, supra*, 119 Cal.App.4th at p. 1006.) In addition, applicant disavowed any work limitations over the course of his career. (Minutes, at p. 5:24.)

"The purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury." (*Butler, supra*, 153 Cal.App.3d 327, 341.) That is, *the employee must understand that he has sustained an injury resulting in disability for there to be corresponding knowledge that the disability is work-related*. Defendant's contention that we should rely on Dr. Kim's assessment in 2019 of the existence of permanent disability in 1969 attempts to substitute a retroactive medical opinion approximately 50 years after the fact in place of applicant's *contemporaneous understanding* he had sustained an injury resulting in temporary or permanent disability. While applicant may have understood that he had sustained injuries causing pain during the course of his professional football career, the record does not establish the existence of contemporaneous temporary or permanent disability. Accordingly, we are not persuaded that applicant had the disability in 1969 necessary for the attachment of a date of injury under section 5412.

In addition to compensable disability, a section 5412 date of injury requires a determination of when the employee knew or should have known his disability was industrially caused, which 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 *Johnson*, applicant, a long-term employee of the City of Fresno, experienced chest pain on December 21, 1980, and was subsequently hospitalized with a myocardial infarction. (*Johnson, supra*, 163 Cal.App.3d at p. 469.) Applicant entertained the belief that his condition was work-related in early 1981, but a medical examination conducted in June, 1981, concluded that applicant's heart problems were nonindustrial. In July, 1981, the City provided applicant with the appropriate notices regarding his workers' compensation rights. However, applicant did not file his claim for workers'

compensation benefits until July 9, 1982. The WCJ found applicant's claim was not barred by the statute of limitations, and the WCAB affirmed. Following defendant's Petition for Writ of Review, the 5th District Court of Appeal began its analysis by observing that, "[w]hether an employee knew or should have known his disability was industrially caused is a question of fact." (*Id.* at p. 471.) The court pointed out that "[a]n employee clearly may be held to be aware that his or her disability was caused by the employment when so advised by a physician," but that "in some cumulative injury cases a medical opinion that the applicant's disability is work related is not necessary to support a finding that an applicant, in the exercise of reasonable diligence, should have known of that relationship." (*Id.* at pp. 472-473.) Synthesizing these principles, the *Johnson* court concluded that, "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." (*Id.* at 473.) Accordingly, and notwithstanding his suspicions of work-relatedness, Johnson was not charged with knowledge that his condition was work related. (*Ibid.*)

Shortly after the issuance of *Johnson*, the 6th District took up the case of *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104] (*Nielsen*). Therein, applicant worked generally as a welder, but three weeks before his last day worked, applicant had been assembling and disassembling heavy bottle racks. The applicant noted in these final three weeks the onset of radiating pain in his left leg. The applicant informed his foreman of the pain while still working and consulted two separate physicians, reporting in each instance that his injuries either arose out of work exposures or a nonindustrial "kick-fighting" incident. (*Nielsen, supra*, at p. 925). The first two physicians applicant consulted did not opine to industrial causation, and the *Neilsen* court held that if the applicant had relied upon those initial statements of nonindustrial causation the statute of limitations would not have run (*Id.* at p. 927-928). Regarding applicant's contention that medical advice was necessary to support "legal knowledge" for purposes of section 5412, the *Nielsen* court considered the recent decision in *Johnson,* which it termed "a bit overly expansive," but noted general agreement with the holding that "the absence of a medical opinion confirming industrial causation is but 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." (*Id.* at

p. 930). The *Nielsen* court concluded that the applicant "was of the opinion as of his first day off work that his injury was industrially caused and he himself suggested the possibility of both industrial and nonindustrial causes of his condition to the physicians who first treated him." (*Ibid.*) As such, the applicant had knowledge sufficient for purposes of section 5412 from the first day off work.

Here, the WCJ has carefully considered the issue of knowledge. The Opinion on Decision reviews the medical records submitted in evidence and concludes that "[t]here is no comment in the records …which reflects a definitive statement to Mr. Banks by a physician the pain and problems in his hip and knee were related to a continuing trauma at the [Bengals]." (Opinion on Decision, at p. 8.) The WCJ further observes that "Mr. Banks did give his football history to the doctors but there is no entry which clearly makes a connection between current complaints and prior activities." (*Ibid.)* Applicant testified to a lifetime of "aches and pains every day," but also that he strived to "to know the difference between a pain and an injury," and that as a result he "put his pain in his back pocket." (Minutes of Hearing and Summary of Evidence, dated October 1, 2015, at p. 6.) When applicant sought medical treatment for knee pain more than 30 years later at the University of Colorado, his treating physicians considered a broad range of potential causes, including applicant's football career many years previously, but offered no specific opinions with respect to a causal relationship. (Ex. K, Records of Univ. of Colorado, various dates, p. 135.) Following her review of the records, the WCJ concluded that because applicant's physicians "listed multiple possible causes for Mr. Banks' complaints ranging from football to metastatic cancer … [t]he records will not support the conclusion Mr. Banks had sufficient knowledge his orthopedic complaints were caused by a continuing trauma." (Report, at p. 6.) We agree with the WCJ's analysis.

Additionally, we discern no evidence in the record that applicant, a professional athlete who later worked in the garment industry, had any particular background or training in identifying a cumulative injury, or its relationship to work exposures. Rather, applicant testified without rebuttal that he was unaware of *what a cumulative trauma was* until so advised by his attorney in 2013. (Minutes, at p. 4:7.)

The first evidence of medical advice to the applicant that he had sustained a cumulative trauma attributable to his football career was the February 13, 2015 evaluation with orthopedist David Kim M.D. (Ex. 3, Report of David Kim, M.D., dated February 13, 2015.) Therein, Dr. Kim

identified a cumulative injury while applicant played professional football through 1969, and that in the physician's opinion, "the majority of Mr. Banks' orthopedic impairment is secondary to these industrial factors." (*Id.* at p. 46.) Dr. Kim's reporting provided applicant with the first medical advice as to the existence of a cumulative injury and its relation to his work activities while playing professional sports. (*Johnson, supra*, 163 Cal.App.3d at p. 473.)

Thus, the first compensable temporary or permanent disability in the evidentiary record is the February 13, 2015 report of Dr. Kim, which identified a cumulative injury and resulting permanent disability. The concurrence of knowledge and disability fixes the date of injury pursuant to section 5412 as February 13, 2015.

We observe, however, that while the WCJ's decision finds that compensation is not barred under section 5405 and the rating instructions contemplate a date of injury of February 13, 2015, there is no entry of a finding of fact with respect to the section 5412 date of injury.

Accordingly, as our decision after reconsideration, we will find a date of injury pursuant to section 5412 of February 13, 2015. Because applicant commenced proceedings for the collection of benefits within one year of the date of injury, compensation is not barred by section 5405. We will therefore affirm the WCJ's determination with respect to the statute of limitations.

III.

Defendant also contends that the WCJ awarded permanent disability indemnity at an incorrect rate. (Petition, at p. 7:26.) Defendant avers "[t]he date of injury in this case should be 1969 and as such, the [p]ermanent impairment shall be awarded pursuant to the law in effect in 1969." (*Id.* at p. 8:4.) We note, however, that the section 5412 date of injury "sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right." (*Steele, supra,* 219 Cal.App.3d at p. 1270.) Here, the date of injury of February 13, 2015 entitles applicant to permanent disability rates commensurate with the indemnity rates in effect at that time. (Finding of Fact No. 5; see also Lab. Code § 4658.) We will affirm the WCJ's findings with respect to the applicable indemnity rates, accordingly.

IV.

Defendant next contends that insofar as the date of injury was in 2015, "[a]pplicant medical reporting is all inadmissible for failure to comply with Labor Code section 4062.2." (Petition, at

p. 9:13.) Defendant avers that applicant's medical-legal reporting was self-procured outside the medical-legal dispute process set forth under section 4062.2, and as such cannot be relied upon as a basis for an award.

In *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 [2005 Cal. Wrk. Comp. LEXIS 3] (Appeals Bd. en banc) (*Simi*), the parties stipulated that applicant sustained a cumulative injury ending September 5, 2002.[3] (*Id.* at p. 218.) We held that because the legislature did not provide a medical-legal procedure for cases occurring prior to the effective date of SB899, "section 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which AME and QME medical-legal reports are obtained in cases involving represented employees." (*Id.* at p. 221.)

Conversely, in our significant panel decision in *Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 [2006 Cal. Wrk. Comp. LEXIS 313 (writ den.) (*Ward*), we held that pursuant to section 4060(c), disputes regarding compensability with respect to a claimed cumulative injury ending June 8, 2005, that is, after the effective date of SB899, were subject to the medical-legal procedure set forth in section 4062.2. In addition, because the injury occurred after the effective date of SB899, reports obtained pursuant to section 4064(d) would not be admissible. (*Id.* at p. 1314.)

Applying these principles in *Tanksley v. City of Santa Ana* (January 25, 2010, ADJ2005173) [2010 Cal. Wrk. Comp. P.D. LEXIS 74], a case involving a claimed cumulative injury from December, 2003, to December 2004, we held:

> *[T]he question of the process that applies to applicant's claim does not first require a finding of the date of injury.* Instead, for injuries that are claimed to have occurred prior to January 1, 2005, as alleged in this case, section 4062 as it existed before its amendment by SB 899 continues to provide the procedure by which medical-legal reports are to be obtained. (*Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584 [38 Cal. Rptr. 3d 914, 71 Cal.Comp.Cases 161] (*Nunez*); *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596 [38 Cal. Rptr. 3d 922, 71 Cal.Comp.Cases 155]; *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 (Appeals Board en banc);

[3] En banc decisions of the Worker's Compensation Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

c.f. *Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 (significant panel decision), 71 Cal.Comp.Cases 1900 (writ den.).)

(*Id.* at pp. 9-10.)

Our decision in *Tanksley* emphasized that the parties to a claim of injury occurring prior to January 1, 2005 should not be required to obtain a judicial determination as to the date of injury pursuant to section 5412 in order to determine the appropriate procedure by which to obtain medical-legal reporting. (*Ibid*.) Such a holding would be inconsistent with the California Constitutional mandate that the workers' compensation law "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., Article XIV, § 4.)

Here, applicant's claimed injury ending in 1969 predated the effective date in SB899 of January 1, 2005, and pursuant to our analysis in both *Simi, supra,* and *Tanksley*, *supra*, we discern no error in the WCJ's decision to admit into evidence the reporting of applicant's evaluating physicians.

Irrespective of the above analysis, however, we also agree with the WCJ's observation that the issue of the admissibility of the reporting was not timely raised at trial and that defendant may not now raise the issue for the first time. Arguments not raised at the trial level cannot ordinarily be raised for the first time on reconsideration. (*Cottrell v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 760, 761 (writ den.) ["[i]t is improper to seek reconsideration on an issue not presented at the trial level"].)

Under either analysis, we discern no error in the WCJ's decision to rely on the reporting of applicant's evaluating physicians.

V.

The WCJ has also determined that applicant's permanent and stationary date was November 1, 1969, based on the stipulation of the parties and the reports of Dr. Kim dated February 13, 2015 and August 3, 2018. (Finding of Fact No. 2.) In her Opinion on Decision, the WCJ observed that pursuant to section 4650(b)(2), permanent disability benefits commence following "the last date for which temporary disability indemnity was paid, or the date the employee's disability became permanent and stationary, whichever is earlier." (Lab. Code, § 4650(b)(2).) Thus, having determined that applicant became permanent and stationary on

November 1, 1969, and in the absence of compensable temporary disability indemnity, the WCJ awarded permanent disability benefits commencing November 1, 1969. (Finding of Fact No. 5.)

Dr. Kim's initial report of February 13, 2015 identified permanent disability, and opined that applicant's condition had reached maximal medical improvement. (Ex. 3, Report of David Kim, M.D., dated February 13, 2015, at p. 23.) Dr. Kim further opined:

> It is further this examiner's opinion that Mr. Banks reached a clinical plateau approximately three months after he discontinued his professional athletic activities. I am aware Mr. Banks underwent surgery to the right knee and left hip after his retirement, for which he may have required a period of temporary total or partial disability, as deemed necessary by the treating physician. Nevertheless, based on history and current available information, he has since returned to a clinical plateau and as such, is PERMANENT AND STATIONARY in this regard.

(*Id.* at p. 23.)

Dr. Kim subsequently provided the following deposition testimony:

> Q: Dr. Kim, with regard to the cervical spine, you found the applicant to have permanent impairment; is that correct?
> A: Yes.
> Q And you found cervical spine disability based on the DRE method; is that correct?
> A Yes.
> Q To the most reasonable medical probability, would that permanent disability have existed at the time you found the applicant to be permanent and stationary three months after he discontinued football in 1969?
> A That's what I said.
> Q That disability would have existed at the time he was permanent and stationary in 1969?
> A Yes.

(Ex. G, Transcript of the Deposition of David Kim, M.D., dated January 14, 2019, at pp. 6-7.) Dr. Kim similarly testified that applicant's permanent disability attributable to the right knee and right hip became permanent and stationary in 1969. (*Id.* at pp. 7-9.)

Any award, order or decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) In order to constitute substantial evidence, a medical opinion must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal

conclusion does not furnish a basis for a finding. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, we are not persuaded that Dr. Kim's opinion that applicant's injuries became permanent and stationary three months after discontinuing his professional athletic activities is supported by substantial evidence. (Ex. 3, Report of David Kim, M.D., dated February 13, 2015, at p. 23.) Dr. Kim offered this retroactive assessment in a report in 2015, approximately 46 years after the end of the period of alleged injurious exposure. In his report of February 13, 2015, the QME reviewed no medical records corresponding to applicant's time spent playing for the NFL. While Dr. Kim's August 3, 2018 report did review the submitted medical records, none antedated 2006. Thus, the QME's opinion was necessarily retroactive in nature, reached 46 years after the fact, and was accomplished without a review of *any* contemporaneous medical records. Moreover, the opinion lacks substantive explication as to the physician's reasoning or analysis. It is also unclear how the physician identified a three month time period, as opposed to any other interval, in which applicant's condition stabilized, and in any event, the physician does not describe how or why his opinions are supported in the medical record.

We acknowledge the difficulties in reaching medical conclusions decades after the claimed injurious exposure period. Here, however, we conclude that Dr. Kim's opinions regarding a permanent and stationary date in 1969 are not supported by substantial medical evidence. Rather, Dr. Kim's initial determination that applicant was permanent and stationary as of his evaluation of applicant in 2015 is the more cogent and persuasive assertion. (Ex. 3, Report of David Kim, M.D., dated February 13, 2015, at p. 23.) Dr. Kim's clinical evaluation of applicant and review of the history of injury as related by the patient, coupled with the physician's review of applicant's activities of daily living and diagnostic studies, provides a reasonable basis upon which the WCJ could conclude that applicant's condition had reached a permanent and stationary plateau. To constitute substantial evidence, "a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo, supra,* 70 Cal.Comp.Cases 604, 621.) Accordingly, we are persuaded that February 3, 2015 is the

first date in the record that identifies applicant's permanent and stationary status to a reasonable degree of medical probability.

In our en banc decision in *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 [2006 Cal. Wrk. Comp. LEXIS 35, 51-17], we held:

> Based on [section 5906 and 5908], it is settled law that 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 [218 P. 1009] [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 [270 P.2d 55] [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. (*Ibid.*; e.g., also, *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [261 P.2d 759] [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Sowell)* (1943) 58 Cal.App.2d 262, 266–267 [136 P.2d 633] [8 Cal.Comp.Cases 79].)

(*Pasquotto, supra,* at 238, fn. 7.)

Thus, our grant of reconsideration has the effect of "throwing open the entire record for review," including the determination of the commencement date of permanent disability indemnity, as well as the annual rate adjustment required under section 4659(c). (*George, supra,* 125 Cal.App.2d 201, 203.)

The date of commencement of permanent disability is the earlier of the last date of temporary disability indemnity, or the permanent and stationary date. (Lab. Code, § 4650(b)(2).) Here, the relevant date is applicant's permanent and stationary date of February 13, 2015. Accordingly, following our grant of reconsideration and our independent review of the record occasioned by defendant's Petition, we conclude that applicant's permanent disability indemnity payments commence as of the permanent and stationary date of February 13, 2015.

VI.

The parties have placed permanent disability in issue. (Minutes, at p. 3:9.) The WCJ has awarded 72 percent disability, which in turn triggers a life pension. (Lab. Code, § 4659(a).) Subdivision (c) of section 4659 applies to all injuries occurring on or after January 1, 2003, and

provides that an "employee who becomes entitled to receive a life pension or total permanent disability indemnity … shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the "state average weekly wage" as compared to the prior year. (Lab. Code, § 4659(c).)

The F&A determined that "cost of living adjustments do not apply to this date of injury." (Finding of Fact No. 8.) The WCJ explained in her opinion that "[a]pplicant is not entitled to a cost of living adjustment to his life pension because the date of injurious exposure in this case ends in 1969 … [t]he provisions for cost of living adjustment did not apply until January 1, 2003."

However, as is discussed above, the date of injury under section 5412 is an integral consideration with respect to various workers' compensation benefits. (Lab. Code, §§ 4658, 4660 et seq.) This is because "[t]he fact of injury (exposure) and the date of injury (disability), by definition, are not equivalent in cases involving the latent effects of an occupational disease." (*Steele, supra*, 219 Cal.App.3d at p. 1271.) Rather, "latent disease cases 'must refer to a period of time rather than to a point in time' … [t]he employee is, in fact, being injured prior to the manifestation of disability." (*J.T. Thorp v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327, 340 [49 Cal.Comp.Cases 224], citing *Fruehauf v. Workmen's Comp. Appeals Bd. (Stansbury*) (1968) 68 Cal.2d 569 [33 Cal.Comp.Cases 300].)

It is for these reasons that the statute of limitations, as well as various ancillary benefits such as the COLA increase of section 4659(c), *must reference a single date rather than a period of time*. For example, using the instant question of the applicable date for COLA benefits, a claimed cumulative injury from 2002 through 2004 would necessarily involve exposure occurring both prior and subsequent to the January 1, 2003 effective date for section 4659(c) rate adjustments. However, the date of injury under section 5412 "sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right." (*Gonzalez, supra,* 104 Cal.App.2d at p.31.) Accordingly, "it is irrefutable that the 'date of injury' for determining the relevant statute of limitations, as well as the statutory rate of indemnity benefits, in latent occupational disease cases, is the date of concurrence of disability and knowledge." (*Steele, supra*, 219 Cal.App.3d at p. 1271; *cf. Azurdia v. Int'l Union of Operating Engineers (*August 29, 2016, ADJ8196628) [2016 Cal. Wrk. Comp. P.D. LEXIS 414]; see also *Travelers Indemnity Co. v. Workers' Comp. Appeals Bd.* (*Zeber*) (2025) 90 Cal.Comp.Cases 373 (ordered published May 28, 2025).)

Here, the concurrence of applicant's knowledge and disability sets the date of injury pursuant to section 5412 as February 13, 2015. (See *Discussion II*, *infra*.) Because the date of injury occurred after January 1, 2003, applicant is entitled to the statutory increases specified in section 4659(c). Pursuant to our decision in *Brower v. David Jones Constr.(2017)* 79 Cal.Comp.Cases 550, an injured worker's COLAs commence on the January 1 after the injured worker became entitled to receive permanent disability indemnity without to whether the employer actually paid permanent disability. (*Id.* at p. 563.) We therefore conclude that the COLA adjustments specified by section 4659(c) commence on the January 1 following entitlement to permanent disability benefits, or January 1, 2016.

VII.

In summary, we are not persuaded that applicant sustained compensable temporary or permanent disability until Dr. Kim identified the existence of industrial permanent disability in his report of February 13, 2015. We thus conclude that the date of concurrence of knowledge and disability under section 5412 was February 13, 2015. We therefore agree with the WCJ that defendant has not met its burden of establishing that compensation is barred under section 5405. Because the section 5412 date of injury sets the corresponding indemnity rates, we will affirm the award of permanent disability at 2015 rates but amend the award to reflect that COLA adjustment per section 4659(c) commences January 1, 2016. In addition, we discern no error in the WCJ's admission into evidence of the reports of applicant's evaluating physicians. Finally, we conclude that the evidentiary record does not support a permanent and stationary date until applicant was evaluated by a medical-legal physician on February 13, 2015.

We will therefore rescind the F&A and enter new Findings of Fact that applicant's permanent and stationary date was February 13, 2015; that applicant's date of injury per section 5412 was February 13, 2015; that applicant sustained 72 percent permanent partial disability with entitlement to a life pension thereafter; and that COLA adjustment per section 4659(c) commences January 1, 2016; we will otherwise affirm but restate the WCJ's remaining findings of fact for purposes of clarity.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award and Order, issued on February 18, 2020, is **RESCINDED,** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Estes Banks, while employed during the period May 1, 1967 through September 1, 1969, as a professional football player, Occupational Group 590, at various locations, by the Cincinnati Bengals permissibly self-insured and self-administered, from 1968 through 1969 (and by the Oakland Raiders in 1967) sustained injury arising out of and in the course of his employment to his neck, back, bilateral shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet, toes, and did not sustain injury to his vision, head, jaw, internal systems, psyche, teeth/dental, and sleep.
2. The Workers' Compensation Appeals Board has jurisdiction over this claimed injury.
3. Applicant's earnings were sufficient to produce a permanent disability indemnity rate of $290.00 per week.
4. Applicant's permanent and stationary date was February 13, 2015.
5. The date of injury under Labor Code section 5412 was February 13, 2015.
6. Compensation is not barred by Labor Code section 5405.
7. Applicant's injuries caused permanent disability of 72 percent, equivalent to 465.25 weeks of indemnity payable at the rate of $290.00 per week beginning February 13, 2015, less credit for sums previously paid by defendant on account thereof, and less attorney's fees of $24,286.05 which shall be commuted from accrued benefits. Thereafter, applicant is entitled to a life pension payable at the initial rate of $92.77 per week, less a reasonable attorney's fee of 18 percent to be commuted as a lump sum from the side of the award.
8. Applicant is entitled to the statutory increase of section 4659(c) commencing January 1, 2016.
9. There is need for future medical treatment to cure or relieve from the effects of this injury.
10. The reasonable value of the services and disbursements of applicant's attorney is the sum of $24,286.05 plus 18 percent of the present value of the life pension awarded herein.

AWARD

AWARD IS MADE in favor of **ESTES BANKS** against the **CINCINNATI BENGALS**, permissibly self-insured, payable as follows:

a. Permanent disability pursuant to Paragraph 7, above;

b. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

ORDER OF COMMUTATION

c. **IT IS ORDERED** that the sum of $24,286.05 plus 18 percent of the value of the life pension awarded herein be commuted accrued permanent disability in order to pay attorney fees awarded herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 29, 2025

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

ESTES BANKS
BOBER, PETERSON & KOBY
GLENN, STUCKEY & PARTNERS

SAR/abs

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