WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EVELYN PEREZ, *Applicant*

vs.

ANTELOPE VALLEY HOSPITAL, permissibly self-insured, administered by ATHENS ADMINISTRATORS, *Defendants*
Adjudication Number: ADJ16130330
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration we issued on January 13, 2025, wherein we rescinded the workers' compensation administrative law judge's (WCJ) findings that (1) from September 1, 2011 through May 18, 2018, applicant was employed as a registered nurse by defendant; (2) applicant sustained injury arising out of and in the course of employment (AOE/COE) to her cervical spine, lumbar spine, bilateral shoulders, bilateral wrists, and bilateral feet, with the court making no finding as to the issue of whether applicant sustained injury to other body parts; (3) applicant's Labor Code section 5412[1] date of injury is June 18, 2019; and (4) applicant's claim is time-barred under section 5405; and substituted findings that the section 5412 date of injury is May 24, 2022; that applicant's claim is timely pursuant to section 5405; and that the issue of whether applicant sustained injury to other body parts is deferred; and we returned the matter to the trial level for further proceedings consistent with our decision.

Defendant contends that the evidence establishes that applicant's section 5412 date of injury is April 21, 2016, or, alternatively, a date before June 19, 2019.

We did not receive an Answer.

We have reviewed the Petition and the record. For the reasons stated below and in our January 13, 2025 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, which we adopt and incorporate herein, we will deny the Petition.

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

I.

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. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part:

> (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 in Events 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 10, 2025, and 60 days from the date of transmission is Friday, April 11, 2025. This decision is issued by or on Friday, April 11, 2025, so that we have timely acted on the petition as required by section 5909(a).

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 be notice of transmission.

Here, the Petition seeks reconsideration of our prior decision and therefore no report and recommendation was required to be filed by a workers' compensation administrative law judge. We find no other notice to the parties of the transmission of the case to the Appeals Board in EAMS. Thus, we conclude that the parties were not provided with the notice of transmission

required by Section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on February 10, 2025.

II.

Defendant contends that the evidence establishes that applicant's section 5412 date of injury is April 21, 2016, or, alternatively, a date before June 19, 2019.

Specifically, defendant argues that (1) the medical record shows that applicant had orthopedic complaints to her neck, back, and shoulders in 2016 that she believed were work-related; and (2) applicant was effectively disabled from work as a result of these orthopedic injuries as shown by an April 21, 2016 chiropractic finding that she had a limited range of motion of the spine, and a February 9, 2017 MRI finding evidencing that she had sustained disability. (Petition, pp. 5:12-7:2.)

Under section 5412, "[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 the 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 that there were some symptoms. (*Johnson*, *supra*, at p. 471, citing *Chambers*, *supra*, at p. 559.) In general, an employee is not charged with knowledge that the 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.)

The fact that an employee had knowledge of disease pathology does not necessarily mean that the employee knew, or should have known, that the disability had resulted from employment. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd*. (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579].) An injured employee's suspicion that an injury is work-related is not sufficient to establish the date of injury on a cumulative injury. An injured employee will not be charged with knowledge that a 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," the employee should have recognized the relationship. (*Johnson*, *supra*, 163 Cal.App.3d at p. 473.) This is because "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].)

In this case, defendant failed to meet its burden of proving that (1) applicant had knowledge sufficient to establish that she either knew, or in the exercise of reasonable diligence should have known, that she had sustained disability as a result of her employment by April 21, 2016, or, alternatively, a date before June 19, 2019; and (2) the cumulative effect of applicant's injury had ripened into disability as of April 21, 2016, or a date before June 19, 2019. (See Lab. Code, § 5412; see also *Federal Insurance Co. v. Workers' Comp. Appeals Bd*. 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257].

We previously explained that the evidence shows that applicant was never taken off work or subjected to work restrictions on an orthopedic basis, and that she was not disabled from work at all until May 2018, when she was taken off work based upon her gastrointestinal symptoms. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, January 13, 2025, p. 8.)

We also explained that the evidence shows that applicant sustained cumulative injury to her spine, shoulders, and feet which had ripened into disability as of May 24, 2022, when Dr. Mooney first reported that she had suffered cumulative trauma while working as a registered nurse and had been disabled as a result. (*Id.*, p. 9.)

Notably, the Petition fails to cite any medical reporting that applicant sustained cumulative injury to her spine, shoulders, and feet resulting in disability before May 24, 2022, and defendant's

argument that "applicant clearly knew [she had sustained orthopedic disability] on 5/24/22," is wholly consistent with our finding as to the Labor Code section 5412 date of injury. (Petition, p. 9:9-13.)

Moreover, in the absence of medical reporting before May 24, 2022 that applicant had sustained cumulative injury to the spine, shoulders, and feet resulting in disability, applicant's suspicion that she had a work-related injury is insufficient to establish a prior date of cumulative injury. (See *Johnson*, *supra*, 163 Cal.App.3d at p. 473.)

Similarly, we are aware of no evidence, and the Petition cites none, to show that applicant's training and qualifications as a registered nurse was such that she had or should have had knowledge that she sustained cumulative injury to the spine, shoulders, and feet which had resulted in disability.(*Id.*)

Hence, we are unable to discern merit to the Petition.

Accordingly, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued on January 13, 2025 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSE H. RAZO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 11, 2025

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

EVELYN PEREZ
KHACHIKYAN LAW GROUP, APC
LAW OFFICE OF STEPHANIE M. SMITH

SRO/*bp*

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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