WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PAMELA HUGHES, *Applicant*

vs.

TOP ROBIN VENTURES, INC.;
CIGA for RELIANCE INSURANCE (in liquidation); SCIF; ZENITH, *Defendants*

Adjudication Number: ADJ7763838; ADJ6605314
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 19, 2025

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

CIPOLLA & BHATTI
CHERNOW, PINE & WILLIAMS

PAG/bp

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

1.	Findings and Order	02/12/2025
2.	Identity of Petitioner	Defendant Zurich
3.	Verification	Yes
4.	Timeliness	Petition is timely
5.	Petition for Reconsideration Filed	03/06/2025
6.	Petitioner's Contentions:	

1. By the order, decision or award, the Board acted without and/or in excess of its powers.
2. The evidence does not justify the Findings of Fact.
3. The Findings of Fact do not support the Order**.**

This matter came on for trial before the undersigned on December 4, 2024 regarding formal adjudication of injury AOE/COE and the §5412 date of injury. Related to the determination of the §5412 date of injury, defendant Zurich raised the statute of limitations. The matter was submitted on the documentary record – no testimony was received. Parties filed extensive pre-trial briefing, which was reviewed and considered. Findings and Order issued on February 12, 2025. This was served by mail on the same date.

Defendant Zurich has filed a timely verified petition for reconsideration of the Findings and Order. Petitioner essentially reiterates its contentions in pre-trial briefing that defendant CIGA should have been sufficiently on notice of applicant's cumulative trauma claim as of the issuance of the December 15, 2009 report of Dr. Nelson, and that therefore, its cumulative trauma application should have been barred by the statute of limitations.

II FACTS

Case ADJ6605314 is an admitted specific injury of May 14, 1999, wherein applicant slipped and fell, sustaining injury. At the time, the defendant employer was insured by Reliance Insurance, which unfortunately became insolvent and went into liquidation on October 3, 2001. CIGA hasadministered this claim since that time.

During the pendency of that claim, the parties agreed to utilize the services of Dr. Russell Nelson, M.D. as Agreed Medical Examiner. Based on the reporting of Dr. Nelson, on April 27, 2011, CIGA filed an application for adjudication of claim in case ADJ7763838, claiming a May 14, 1999, to August 1, 2006 cumulative trauma injury to the same body parts and naming subsequent insurers SCIF[1]

1 SCIF has since been dismissed by agreement.

and Zenith as party defendants. In so doing, CIGA sought and is ultimately seeking reimbursement from Zenith for monies expended in payment of the joint Compromise and Release, as well as medical treatment and other expenses. In response, Zenith has argued that case ADJ7763838 was not timely filed, and that therefore, Zenith does not owe any reimbursement to CIGA through the vehicle of the cumulative trauma case.

The determination of the §5412 date of injury necessarily decides the issue of whether the application in case ADJ7763838 was timely filed, or if instead, the same is time-barred by the statute of limitations as set forth in Labor Code §5405.

III
DISCUSSION

In the instant matter, defendant Zenith is taking the position that the December 15, 2009 report of Dr. Nelson (Exhibit X1) sufficiently put CIGA on notice of the existence of a cumulative trauma claim so as to establish that same date as the §5412 date of injury. Zenith argues that CIGA is a sophisticated party, and that therefore, the language in Dr. Nelson's report was sufficient to place it on notice of the potential existence of applicant's cumulative trauma injury.

At the outset, the Court must address and correct a misleading statement that Zenith makes in its Petition. On page 5 at line 3, defendant states, "If, for any reason, CIGA was not sure what the AME meant by the term "cumulative trauma," CIGA had a duty to timely investigate per Title 8, California Code of Regulations §10109." This is precisely the problem; the AME did not use the term "cumulative trauma". That term does not appear anywhere in the December 15, 2009 report. Dr. Nelson's report[2] simply says the following, on page 22, in full:

> ""As for apportionment, it is clear that she had a specific injury. *There have been clear periods of trauma after this.* This includes a period where her symptoms were significantly absent after her first operation. In the joint letter, a deposition has been alluded to and I realize that it has not yet been forwarded to our office. I believe, at this time, I will defer her apportionment discussion until I receive her deposition and am able to compare her thoughts on her injuries and trauma to the current records. At that time, *I will issue a supplemental on the apportionment status between continuous traumas and specific injury.*" (*emphasis* added).

There is no causation section. There is no discussion of any separate cumulative trauma mechanism of injury. This is the sum total of the references to anything other than applicant's specific acute injury of May 14, 1999.

This is precisely why the Court found that this report was not sufficient to provide §5412 "knowledge" of a defined cumulative trauma injury. Although the doctor references "periods of trauma", he does not elaborate further as to what "periods" means, what "trauma" means, which dates are in question, and what the causes or potentially industrial etiology is of that "trauma". In

[2] Exhibit X1

fact, the doctor defers further discussion on this point pending review of the applicant's deposition testimony where he will then be "able to compare her thoughts on her injuries and trauma to the current records."

This passage is meaningless. In isolation, it does not provide sufficient information to place any party on notice of the particular existence of a bounded, industrial cumulative trauma claim. Although one could certainly draw such an inference, it cannot be said that this passage provides the requisite knowledge to fix the date of injury for purposes of Labor Code §5412 and the statute of limitations.

It is certainly unusual that a separate claim would be independently filed by a defendant. However, if the claim is not being filed by the applicant herself, the filing party still steps into her shoes for purposes of the timeliness of the application.

In the instant case, the first medical report which clearly and unequivocally set forth the existence of a separate cumulative trauma injury was the later Nelson report[3]of November 17, 2010. This is the first and only report that describes a defined period of industrial cumulative trauma after applicant returns to work from her operation. Thus, the parties cannot be charged with knowledge of cumulative trauma until the issuance of Dr. Nelson's November 17, 2010 report.

Defendant Zurich portrays its situation as if the failure of its statute of limitations defense necessarily signifies that Defendant CIGA will prevail on its reimbursement petition; this is not so. The reimbursement petition and many other companion issues were specifically deferred so as to allow the Court to address the threshold questions of the Labor Code §5412 date of injury and the Labor Code §5405 statute of limitation defense. Based upon the evidence submitted, the Court has determined that the Labor Code §5412 date of injury is November 17, 2010, the date of Dr. Nelson's second report[4]. With CIGA having filed the cumulative trauma application (ADJ7763838) on April 27, 2011, the filing was timely.

IV
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that applicant's Petition for Reconsideration be DENIED.

DATE: 3/18/2025

Adam D. Graff
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

TRANSMITTED TO RECON: 3/19/2025

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[3] Exhibit C
[4] Exhibit C

OPINION ON DECISION

BACKGROUND:

Pamela Hughes, [. . .], while employed during the period May 14, 1999, to August 1, 2006, as a waitress/assistant manager, at Valencia, California, by Top Robin Ventures, Incorporated/Red Robin, claims to have sustained injury arising out of and in the course of employment to her cervical spine, thoracic spine, lumbar spine, psyche, bilateral upper extremities, and bilateral lower extremities.

Case ADJ6605314 is an admitted specific injury of May 14, 1999, wherein applicant slipped and fell, sustaining injury. At the time, the defendant employer was insured by Reliance Insurance, which unfortunately became insolvent and went into liquidation on October 3, 2001. CIGA has administered this claim since that time.

During the pendency of that claim, the parties agreed to utilize the services of Dr. Russell Nelson, M.D. as Agreed Medical Examiner. Based on the reporting of Dr. Nelson, on April 27, 2011, CIGA filed an application for adjudication of claim in case ADJ7763838, claiming a May 14, 1999, to August 1, 2006 cumulative trauma injury to the same body parts and naming subsequent insurers SCIF[1] and Zenith as party defendants. In so doing, CIGA sought and is ultimately seeking reimbursement from Zenith for monies expended in payment of the joint Compromise and Release, as well as medical treatment and other expenses. In response, Zenith has argued that case ADJ7763838 was not timely filed, and that therefore, Zenith does not owe any reimbursement to CIGA through the vehicle of the cumulative trauma case.

The parties raised many issues for trial, the majority of which have been Ordered deferred so as to adjudicate the threshold question of the proper Labor Code §5412 date of injury for case ADJ7763838. The determination of the §5412 date of injury will necessarily decide the issue of whether the application in case ADJ7763838 was timely filed, or if instead, the same is time-barred by the statute of limitations as set forth in Labor Code §5405.

INJURY AOE/COE and PARTS OF BODY

Based upon the medical evidence introduced, with particular consideration given to both the reporting of AME Dr. Nelson (Exhibits X1, C, H, and I) and the reporting of AME Dr. David Friedman (Exhibit G), which the Court finds to be substantial regarding the issue of injury AOE/COE, the Court finds that in both cases ADJ7763838 and ADJ6605314, applicant has sustained injury arising out of and in the course of employment to her cervical spine, thoracic spine, lumbar spine, psyche, bilateral upper extremities, and bilateral lower extremities.

§5412 DATE OF INJURY/STATUTE OF LIMITATIONS

Labor Code §5412 provides that "the date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and

[1] SCIF has since been dismissed by agreement.

either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." In other words, in order to fix the date of injury, there must be a confluence of both disability, and the actual or essentially constructive knowledge that the disability was caused by applicant's employment.

The WCAB recently addressed the interplay of the Labor Code §5412 date of injury and the Labor Code §5405 statute of limitations in the very comprehensive panel decision of *Geoffrey Raya v. County of Riverside, PSI*, 2024 Cal. Wrk. Comp. P.D. LEXIS 79. This decision is essentially a treatise on the various components of Labor Code § 5412, and how the date of injury then affects the application of the Labor Code §5405 statute of limitations. The Court has carefully reviewed this decision, as well as authorities cited within.

> "The 'date of injury' is a statutory construct which has no bearing on the fundamental issue of whether a worker has, in fact, suffered an industrial injury… [T]he 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." (*J.T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)*, 153 Cal.App.3d 327, 341.)

The purpose of Labor Code §5412 is thus to preserve an injured worker's right to file a claim despite the passage of time, so long as they are reasonably unaware that their medical condition may be related to work. Such a rule balances the equities between allowing an injured worker a reasonable opportunity to file a claim once requisite knowledge is gained, and still fixing an endpoint after which an employer may consider a matter closed due to abandonment.

In the instant matter, defendant Zenith is taking the position that the December 15, 2009 report of Dr. Nelson (Exhibit X1) sufficiently put CIGA on notice of the existence of a cumulative trauma claim so as to establish that same date as the §5412 date of injury. Specifically, on page 2 of the report, Dr. Nelson describes the mechanism of injury as, "On May 14, 1999, while at work, the patient slipped on a puddle of water in the dry storage room…" From there, Dr. Nelson describes applicant's history of treatment and the worsening of her condition, which he then details through a medical record review.

In the discussion section that follows, beginning on page 22, Dr. Nelson states, "Pamela presents today for evaluation of work related injuries that date back to May of 1999. She was employed for 10 years as a server and hourly manager for Top Robin Ventures when she had an acute injury May 14 of 1999…" There is no separate "causation" section in the report; the only other section relevant to this inquiry comes in the "apportionment" section on page 25. That section is reproduced here, in full:

> "As for apportionment, it is clear that she had a specific injury. There have been clear periods of trauma after this. This includes a period where her symptoms were significantly absent after her first operation. In the joint letter, a deposition has been alluded to and I realize that it has not yet been forwarded to our office. I believe, at this time, I will defer her apportionment discussion until I receive her deposition and am able to compare her thoughts on her injuries and trauma to the current

records. At that time, I will issue a supplemental on the apportionment status between continuous traumas and specific injury."

Although the doctor references "periods of trauma", he does not elaborate further as to the dates in question, much less the causes or potentially industrial etiology of that trauma. In fact, the doctor defers further discussion on this point pending review of the applicant's deposition testimony and states that he will issue a supplemental report on apportionment between "continuous traumas and specific injury".

Without more, especially in the absence of dates or other "bookend" events that would define a specific period of trauma, this passage does not provide sufficient information to place any party on notice of the particular existence of a bounded, industrial cumulative trauma claim. Although one could certainly draw such an inference, it cannot be said that this passage provides the requisite knowledge to fix the date of injury for purposes of Labor Code §5412 and the statute of limitations.

The missing pieces were not filled in until Dr. Nelson issued his report of November 17, 2010 (Exhibit C). In that report, at page 2, Dr. Nelson states, "[i]n summary, there is clearly a continuous trauma that occurs *after she returns to work from her first operation*. This continuous trauma has a gap in it due to her cancer treatment but, basically, *extends to her next operation in 2005*." (*emphasis* added). In contrast to the first report, this passage provides a defined period of cumulative trauma after applicant returns to work from her operation. This is the first medical report submitted into evidence which satisfies the knowledge prong of Labor Code §5412.

The parties thus cannot be charged with knowledge of cumulative trauma until the issuance of Dr. Nelson's November 17, 2010 report. As disability pre-existed the report, the confluence of knowledge and disability occurred as of the November 17, 2010 report. Accordingly, the Court finds that the Labor Code §5412 date of injury is November 17, 2010.

CIGA filed the application for adjudication of claim in case ADJ7763838 on April 27, 2011. This is within the one year period from the §5412 date of injury allowed pursuant to Labor Code §5405. The Court finds that the application filed in case ADJ7763838 is timely filed and is not barred by the statute of limitations.

Date: 02/12/2025

Adam D. Graff
Workers' Compensation Administrative Law Judge