WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICK BROUSSARD, ***Applicant***

vs.

JOHN KIRBY; THE HARTFORD; OAK RIVER INSURANCE COMPANY adjusted by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Numbers: ADJ10809542 ADJ17227129
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Oak River Insurance Company seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings, Award and Notice of Intention of December 30, 2024, wherein it was found that while employed as a carpet cleaner during a cumulative period ending on August 2, 2017, applicant sustained industrial injury to his hearing, cervical spine, lumbar spine, shoulders, elbows, wrists, and in the form of bilateral carpal tunnel. As relevant to the instant Petition, it was found that "Pursuant to section 5500.5, the liability period is from August 2, 2016 to August 2, 2017." Defendant Hartford insured employer John Kirby until June 28, 2016, whereupon defendant Oak River provided coverage. Because Oak River was the sole carrier on the risk during the section 5500.5 liability period found by the WCJ, the WCJ issued a Notice of Intention stating, "As The Hartford did not provide workers' compensation coverage to defendant during the liability period, The Hartford shall be dismissed without prejudice within 35 days of the date that these Findings of Fact, Award, Notice of Intention, and Opinion on Decision is served."

Oak River contends that the WCJ erred in finding that the Labor Code section 5500.5 liability period was the one year preceding August 2, 2017 and in finding that applicant sustained industrial injury to the cervical and lumbar spine, shoulders, elbows and wrists. We have received answers from the applicant and from co-defendant The Hartford and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, we will grant reconsideration and amend the WCJ's decision only to add an express finding that applicant's Labor Code section 5412 date of injury was August 2, 2017 and to otherwise affirm the WCJ's decision for the reasons stated in the Report.

Preliminarily, we note that former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code 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 January 28, 2015 and 60 days from the date of transmission is Saturday, March 29, 2025. The next business day that is 60 days from the date of transmission is Tuesday, April 1, 2025.[1] (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Tuesday, April 1, 2025, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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

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[1] Monday, March 31, 2025 was Cesar Chavez Day.

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on January 28, 2025, and the case was transmitted to the Appeals Board on January 28, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on January 28, 2025.

Turning to the merits, since "date of injury" was specifically placed at issue at trial (Minutes of Hearing and Summary of Evidence of December 17, 2024 trial at p. 2) and the WCJ explained in the Opinion on Decision that "the date of injury is August 2, 2017…." (Opinion on Decision at p. 8), we will amend the WCJ's decision to include an express finding that the Labor Code section 5412 date of injury is August 2, 2017. We will otherwise affirm the WCJ's decision for the reasons stated by the WCJ in the Report, which we adopt, incorporate and quote below.

While Oak River cites to *California Ins. Guar. Ass'n v. Workers' Comp. Appeals Bd. (Morodomi)* (2009) 74 Cal.Comp.Cases 1167 (writ den.) and *Guerrero v. Wellpoint Health Network, Inc.* (2014) 2014 Cal. Wrk. Comp. LEXIS P.D. 712 (Appeals Bd. panel), neither case properly applied the holding of *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 CalApp.4th 998 which expressly states that the date of injury under section 5412 does not arise until an injured worker has sustained compensable temporary or permanent liability. A finding of compensable temporary disability requires wage loss and a finding of permanent disability (except in cases of progressive, insidious diseases) requires a ratable disability after a condition reaches permanent and stationary status. (*West Coast Drywall & Paint, Inc. v. Workers' Comp. Appeals Bd. (Polanco)* v. Workers' Comp. Appeals Bd. (2015) 80 Cal.Comp.Cases 1238, 1240-1241 [writ den.]; *McKeowen v. Cast* (2018) 2018 Cal. Wrk Comp. P.D. LEXIS 535 [Appeals Bd. panel]; *Torres v. Ades & Gersh Nurseries, Inc.* (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 561, *8 [Appeals Bd. panel]; *Knox v. Prime Healthcare* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 52, *8-9 [Appeals Bd. panel].) In this case, applicant did not sustain compensable temporary

disability until he was taken off work on August 2, 2017 and his condition did not become permanent and stationary until February 16, 2022. (March 1, 2023 of Peter J. Mandell, M.D. at p. 8.) We accordingly affirm the substance of the WCJ's decision for the reasons stated in the WCJ's Report, which we adopt, incorporate and quote below:

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION
AND NOTICE OF TRANSMISSION TO THE APPEALS BOARD

I.
INTRODUCTION

1.	Applicant's Occupation:	Carpet Cleaner
	Applicant's Age:	66
	Date of Injury:	Through August 2, 2017 (disputed by Petitioner)
	Parts of Body Inured:	Hearing, cervical spine, lumbar spine, shoulders, elbows, wrists, and in the form of carpal tunnel
2.	Identity of Petitioner:	Defendant Oak River Insurance Company
	Timeliness:	Yes
	Verification:	Yes
3.	Date of Findings and Award	December 30, 2024
4.	Defendant Oak River Insurance Company' Contentions:	The Findings should be set aside or there should be an order to develop the record because the date of injury pursuant to Labor Code section 5412 was earlier than August 2, 2017, and that there is no substantial evidence to support a finding of injury to the cervical spine, lumbar spine, shoulders, elbows, and wrists.

II.
BACKGROUND

Applicant sustained an injury to his hearing, cervical spine, lumbar spine, shoulders, elbows, wrists and in the form of carpal tunnel arising out of and in the course of his employment as a carpet cleaner for defendant during the period ending on August 2, 2017 (ADJ10809542). The Hartford provided workers'

compensation coverage to the employer through June 28, 2016, and then Oak River provided workers' compensation coverage. As the events discussed below were occurring, applicant claimed that on January 23, 2023, he sustained an injury to his left shoulder and back while employed by MV Transportation. (ADJ17227129). A few months after the date of the claimed injury in case number ADJ17227129, a Judge approved a $15,000.00 compromise and release resolving that claim with an acknowledgement that the injury had been denied and that there was a genuine, good faith issue and factual dispute that could bar applicant from receiving any benefits. (ADJ17227129, Order Approving Compromise and Release; ADJ17227129, Compromise and Release, p. 6.)

On June 13, 2016, Dr. Wesley Chan, a physician at US Healthworks, issued a Doctor's First report of Occupational Illness or injury stating in relevant part that applicant's repetitive job duties caused pain and swelling in applicant's right wrist. (Exhibit C, US Healthworks, p. 10.) Dr. Chan further stated that applicant should wear a splint, limit lifting to 10 pounds, and take a five minute stretch break every 60 minutes. (*Id.* at p. 12.)

On June 28, 2016, a physician at US Healthworks issued a report stating in relevant part that applicant was working modified duties, that applicant worked 48 hour a week, and that his job required prolonged standing or walking, kneeling, squatting, bending, stooping, climbing, and lifting, pushing or pulling up to 50 pounds. (Exhibit B, Concentra, pp. 90-93.)

On July 8, 2018, a report from US Healthworks reflected that applicant was working modified duty and that applicant had features of carpal tunnel, lateral epicondylitis, and ulnar nerve entrapment. (*Id.* at p. 82-87.)

On August 2, 2016, a report from US Healthworks reflected that applicant was wearing the splint at night and that and that a nerve conduction study revealed carpal tunnel. (Id. at p. 62.) The report further reflected that defendant was providing applicant with a helper to move furniture while applicant was on light duty. (*Ibid.*)

On August 19, 2016, US Healthworks released applicant to work with no restrictions. (*Id.* at pp. 42, 56.)

On September 19, 2016, a report from US Healthworks reflected that applicant saw an orthopedist who stated that if applicant's symptoms worsened he would be a surgical candidate. (*Id.* at p. 32.)

On October 19, 2016, a physical therapist at US Healthworks wrote a report stating that applicant was "now noticing pain in upper arm." (*Id.* at p. 29.)

On January 24, 2017, US Healthworks issued a report stating that an MRI had revealed a ganglion cyst with a tear of the TFCC. (*Id.* at p. 17.)

On February 15, 2017, US Healthworks issued a report stating that if applicant elected against surgery, he should continue on full duty. (*Id.* at p. 11.)

On February 27, 2017, Tanja Kujac, M.D., issued a report stating that applicant intermittently used a wrist splint. (Exhibit A, Report of Tanja Kujac, M.D., February 27, 2027, p. 2.) Dr. Kujac further stated, "[i]mpairment rating is calculated using AMA 5th Edition Guides. I have one them using the 5th Edition Guides, allow for 3% whole person impairment for nonsurgical symptomatic carpal tunnel syndrome. ROM of the right wrist was WNL so there was no WPI." (*Id.* at p. 6.)

On August 30, 2017, Susan Gutierrez, M.D., issued a report stating in relevant part that applicant had right wrist pain, that applicant was totally temporarily disabled, and that applicant "had not received adequate treatment at the time of the P and S report." (Exhibit Z, Report of Susan Gutierrez, August 30, 2017.)

On July 24, 2018, Barry Barron, M.D. issued a QME report stating in relevant part that applicant was exposed to the machine noise of carpet cleaners without hearing protection. (Exhibit 1, Report of Barry Barron, July 24, 2018.) Dr. Barron further stated that applicant's 25 years of employment with defendant caused hearing loss. (*Id.* at p. 6.)

On March 1, 2023, Peter Mandell, M.D., performed an agreed medical evaluation of applicant and issued a report. (Joint Exhibit 104 Report of Peter Mandell, March 1, 2023.) As relevant herein, Dr. Mandell stated that applicant reported that he developed problems with his cervical spine, lumbar spine, right shoulder and bilateral wrists while working for defendant. (*Id.* at p. 2.) Dr. Mandell further stated that applicant sought treatment and worked until August of 2017. (*Ibid.*) Dr. Mandell discussed applicant's work with MV Transportation as follows,

> he was off work completely until November of 2022, when he went to work for MV Transportation in San Leandro. They do paratransit work in the City. He would drive small buses. It was a physically heavy job because he would have to assist wheelchair bound patients, strap them in, and things of that sort. He's not sure what the maximum lifting was. Maybe it was 75 pounds or so. He worked about 30 hours a week. At first he was driving the big buses. He was driving the bus but was just in training. He did that for about six weeks. It was pretty much all classroom stuff. Then his employer said he really wasn't suited for that job. Then they put him on driving smaller vans and buses. He was driving the small buses for about a month, but he was having trouble doing even that. He was in training with that bus as well. The people at the office realized that he couldn't even do that job, he informs me. At that point he was put on light duty. He does office work, helping with paperwork and things like that.

> He was working about 30 hours a week. He is still doing that now. He doesn't think he can do even this job anymore. He is very, very clear about the fact that there have been no new injuries there.
> (*Id.* at p. 4, see also p. 7.)

Dr. Mandell continued, stating that applicant's work for defendant was a "heavy job" and that it was medically probable that applicant sustained a cumulative trauma to the cervical spine with radiculopathy to the upper extremities, bilateral shoulder tendinosis, bilateral elbow tendinosis, bilateral wrist tendinosis, bilateral carpal tunnel, and lumbar disc disease with radiculopathy to the lower extremities. (*Id.* at pp. 7-8.) Dr. Mandell also stated that on June 6, 2017, Dr. Gutierrez stated that applicant had right wrist pain, a limited range of motion of the right shoulder, and left shoulder bicipital tendinitis. *(Id.* at p. 15.)

On June 17, 2023, Dr. Mandell issued a report stating in relevant part that applicant's injurious exposure occurred during the period between February of 1997 and August of 2017. (Exhibit 103, Report of Peter Mandell, June 17, 2023, p. 1.)

On December 20, 2023, Dr. Mandell testified in relevant part that: applicant did not disclose the claimed January 12, 2023 injury at MV Transportation. (Exhibit 101, Deposition of Peter Mandell, December 12, 2023, p: 7:8-7:19.) He would need to review records to determine whether his previously expressed opinions would change. (*Id.* at pp. 7:20-8:9.) The claimed injury at MV Transportation could influence his opinions regarding causation. (*Id.* at p. 9:6-9:8.)

On March 23, 2024, Dr. Mandell issued a supplemental report stating in relevant part that applicant provided him with an incorrect history, and that he would change his opinion to reflect that 25% of applicant's impairments were caused by his work at MV Transportation and that the remainder was caused by a cumulative trauma at his prior job. (Exhibit 102, Report of Peter Mandell, March 23, 2024, p. 1.)

On December 17, 2024, the matter progressed to trial. As relevant herein, applicant testified that he worked for defendant from February 13, 1992 to August 2, 2017, and that his job required him to move furniture and rugs. He developed pain in his shoulders, wrists, and lower back. He also developed pain in his neck, arms, and elbows. The pain would worsen throughout the day and work week. He also noticed that his hearing was worsening. In 2016, he reported the injury and kept working. Modified duties were not provided, and he needed to keep his job because he was the sole provider. In 2017, he was taken off work because he could no longer do his job. He was not told which body parts were preventing him from working. He believes he reported an injury to his low back, arms, and carpal tunnel in 2016. It has been a while, and he does not recall filling out forms describing what body parts were injured. Between 2016 and his last day of work, he received treatment for all of the injured body parts. He started

treating with Dr. Gutierrez before his last day of work, but he could not recall how many times he saw her before he stopped working. In November of 2022, he started working as a trainee bus driver for MV Transportation and he did not have to do heavy lifting at that job. He had an injury to his back and left shoulder when he grabbed a passenger who tripped. He filed a claim and received a settlement. He is currently a grounds supervisor. He thinks he saw Dr. Mandell once and does not know if he told Dr. Mandell about the injury at MV Transportation. He had a lot going on because he was in pain and taking medication. He received a splint in 2016 and wore it, but he did not wear it 100% of the time. He never worked modified duties while working for defendant.

On December 30, 2024, The Findings and Award issued. In relevant part, it was determined that the date of injury pursuant to section 5412 was August 2, 2017 and that The Hartford did not provide coverage during the liability period.

On January 24, 2025, defendant Oak River filed its verified Petition for Reconsideration.

III.
DISCUSSION

DATE OF INJURY

In relevant part, Labor Code section 5500.5 states that the liability for cumulative injuries is one year preceding the 5412 date of injury, or one year from the "last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, *whichever occurs first*." (Lab. Code § 5500.5 (a), emphasis added.)

In turn, section 5412 provides that, "the date of injury… [for] 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.) The Court of Appeal explained that, "either compensable temporary disability or permanent disability is required to satisfy section 5412. 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, 1005-1006.)

Additionally, a WCJ's decision on any issue, including date of injury, must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627.) 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 v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Also, the opinions of an agreed medical evaluator are to be followed unless there is good cause to set them aside because the parties presumably agreed upon that evaluator because of the doctor's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782.)

Here, applicant's date of injury hinges upon when applicant first experienced compensable impairment caused by his job duties. Defendant correctly argues that work restrictions and splints may be evidence of permanent disability. However, in this matter, neither the work restrictions nor the splint were evidence of permanent impairment. The work restrictions were lifted after approximately two months, and applicant then worked approximately one year in a position that required him to work over forty hours per week with prolonged standing or walking, kneeling, squatting, bending, stooping, climbing, and lifting, pushing or pulling up to 50 pounds. (Exhibit B, Concentra, pp. 90-93. 42-56.) Similarly, the splint was not evidence of compensable impairment because applicant was only using the splint "intermittently." (Exhibit A at p. 2.)

It is also true that the nerve conduction study could be evidence of compensable impairment, but Dr. Kujac stated that in February of 2017, there was "no WPI." (Id. at p. 6.) Moreover, Dr. Dr. Kujac's February 27, 2017 report is not substantial evidence because her opinions are unintelligible, contradictory, and unsupported. As her report was not substantial evidence, it cannot be the basis for the 5412 date of injury. Further, Dr. Kujac's failure to produce a report that constitutes substantial evidence is not a basis to develop the record because a determination could be reached based on the evidence presented. (*County of Sacramento v. WCAB (Estrada)* (1999) 68 Cal. App. 4th 142. [The Board's ability to order development of the record is not to be used as an avenue to rescue a party that does not produce substantial evidence].) Strong consideration was given to whether applicant suffered two injuries while employed by defendant. The first injury would have been limited to carpal tunnel, and the second would have included the additional body parts. The ultimate determination that there was only one injury was based on the AME's determination that there was a single injury since it is presumed correct and there was no substantial evidence to set that opinion aside. (Exhibit 103.)

PARTS OF BODY INJURED

Applicant bears the burden of proving injury AOE/COE. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302; Lab. Code, §§ 5705; 3600(a); *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc).) The Supreme Court of California has long

held that an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413.) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701.)

Here, the agreed medical evaluator stated that it was medically probable that that applicant's "heavy job" caused injury to applicant's cervical spine, lumbar spine, shoulders, elbows, and wrists. (Exhibit 104 at pp. 7-8.) This determination is supported by the description of applicant's job duties in Exhibit B. (Exhibit B at pp. 90-93.) Furthermore, Dr. Mandell considered applicant's subsequent employment and the subsequent claimed injury, yet still found applicant's employment with defendant caused injury. Accordingly, Dr. Mandell's opinions are more than adequate for applicant to meet the low burden of proving injury.

Based upon the above, I recommend denial of Defendant's Petition for Reconsideration.

IV.
NOTICE OF TRANSMISSION

Pursuant to Labor Code, Section 5909, the parties and the Appeals Board are hereby notified that this matter has been transmitted to the appeals board on date set out below.

For the foregoing reasons,

IT IS ORDERED that Defendant Oak River Insurance Company's Petition for Reconsideration of the Findings, Award and Notice of Intention of December 30, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Notice of Intention of December 30, 2024 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Rick Broussard, age 58 on the date of injury, while employed as a carpet cleaner by defendant during the period ending on August 2, 2017, sustained injury arising out of and in the course of his employment to his hearing, cervical spine, lumbar spine, bilateral shoulders, bilateral elbows, bilateral wrists, and in the form of bilateral carpal tunnel.

2. The Labor Code section 5412 date of injury is August 2, 2017.

3. Pursuant to section 5500.5, the liability period is from August 2, 2016 to August 2, 2017.

4. The Hartford did not provide coverage to defendant during the liability period.

5. The injury caused need for further medical treatment.

6. All other issues are deferred.

AWARD

AWARD IS MADE in favor of RICK BROUSSARD against OAK RIVER INSURANCE COMPANY of:

a. Future medical care to cure or relieve the effects of the injury.

NOTICE OF INTENTION

As The Hartford did not provide workers' compensation coverage to defendant during the liability period, The Hartford shall be dismissed without prejudice within 35 days of the date that these Findings of Fact, Award, Notice of Intention, and Opinion on Decision is served.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 1, 2025

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

RICK BROUSSARD
GEARHEART & SONNICKSEN
MICHAEL SULLIVAN & ASSOCIATES
LAKEESHA T. JEMERSON

DW/oo

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