

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

GUADALUPE GUTIERREZ, *Applicant*

vs.

**HILLS OF ETERNITY/HOME OF PEACE MANAGEMENT GROUP; AMERICAN
FAMILY HOME INSURANCE COMPANY; INSURANCE COMPANY OF THE WEST,
*Defendants***

**Adjudication Numbers: ADJ10656667, ADJ10656647, ADJ13080462
San Francisco District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Defendants American Family Home Insurance Company (AFH) and Insurance Company of the West (ICW) seek reconsideration of the Joint Findings of Fact, Awards, and Order (F&O) issued on November 23, 2022, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) at all relevant times, applicant was employed as a groundskeeper by defendant employer Hills of Eternity/Home of Peace Management Group; (2) defendant was insured against compensation liability by defendant AFH during the calendar year 2014, and by defendant ICW during the calendar year 2015; (3) in ADJ10656667, on April 12, 2015, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his back; (4) in ADJ10656647, during the period ending April 12, 2015, applicant sustained injury AOE/COE to his back; (5) in ADJ13080462, applicant did not meet his burden of proving injury AOE/COE; (6) the Labor Code section 5500.5 period of liability for compensation owed in connection with the injury in ADJ10656647 is to be based on coverage during the 365-day period ending April 12, 2015; and (7) issues of benefit administration and contribution with respect to the injury identified in ADJ10656647 are deferred, with Appeals Board jurisdiction reserved.

The WCJ issued (1) an award in ADJ10656667 in favor of applicant and against defendant Hills of Eternity/Home of Peace Management Group and defendant ICW of future medical care reasonably required to cure or relieve from the effects of the injury; and (2) an award in

ADJ10656647 in favor of applicant and jointly and severally against defendant Hills of Eternity/Home of Peace Management Group, defendant AFH, and defendant ICW, of permanent disability benefits, attorney's fees, and future medical care.

The WCJ ordered applicant take nothing in ADJ13080462.

Defendant AFH contends that the WCJ erred in ADJ10656647 by failing to find that the last date of applicant's injurious exposure under Labor Code¹ section 5500.5 and the date of injury under section 5412 was in April 2016.

Defendant ICW contends that the WCJ erred in ADJ10656647 by deferring the issues of benefit administration and contribution.

We received an Answer from ICW.

We received a Report and Recommendation on Petitions for Reconsideration (Report) from the WCJ recommending that the Petitions be denied.

We have reviewed the contents of the Petitions, the Answer, and the Report. Based upon our review of the record, and for the reasons stated below, as our Decision After Reconsideration, we will rescind the F&O and substitute findings in ADJ10656647 that (1) the section 5500.5 period of injurious exposure is the period ending on April 27, 2016; (2) the section 5412 date of injury is February 3, 2020; (3) the section 5500.5 period of liability for compensation owed is to be based on coverage during the 365-day period ending on April 27, 2016; and (4) all other issues are deferred; we will substitute an award in ADJ10656647 in favor of applicant and against defendant Hills of Eternity/Home of Peace Management Group and defendant ICW jointly and severally; and we will return the matter for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On November 22, 2016, applicant filed an Application for Adjudication of Claim (Application) in ADJ10656647, alleging that he sustained cumulative injury to the back during the period of April 12, 2014 through April 12, 2015. (Application, November 22, 2016.)

On February 22, 2017, the WCJ ordered that defendant AFH be joined as a party in ADJ10656647. (Order Joining Party Defendant, February 22, 2017.)

On October 21, 2019, the WCJ held a hearing at which it was noted for the record that applicant was electing to proceed against defendant AFH. (Minutes of Hearing, October 21, 2019.)

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

On August 3, 2022, the matter proceeded to trial of the following issues:

1. Injury AOE/COE as to ADJ10656647 and ADJ13080462.
2. Labor Code section 5412 date of injury as to ADJ10656647.
3. Liability pursuant to Labor Code section 5500.5 as to ADJ10656647.
4. Entitlement to further medical care as to ADJ10656647 and ADJ13080462.
5. Permanent disability, including apportionment, as to all three cases.
6. Attorney fees as to all three cases.
7. As to ADJ10656667, defendant ICW's claim of credit for an alleged overpayment of temporary disability indemnity in the amount of \$202.72.

(Minutes of Hearing, August 3, 2022, p. 3:30-47.)

The WCJ admitted an exhibit entitled AME Report from William Campbell, dated February 3, 2020, into evidence.

The AME Report from William Campbell, date February 3, 2020 states:

DIAGNOSIS

1. Left lower extremity lumbar radiculopathy, status post L5-S 1 decompression fusion with subsequent revision foraminotomy.

...

Causation

It appears to me the patient has spent almost four decades working for the same employer and performing laborious work. In discussing with him his experience over the years, it appears he's had multiple, too numerous to count, specific injuries for which he would always just continue to try to work through them. He states he only reported the injuries that seemed major to him.

Given this, I think it most practical and accurate to simply consider him as having been injured by way of cumulative trauma throughout his exposure of almost forty years with a significant specific injury of 1/1/15 and 4/12/15.

As such, it is my opinion, the patient's need for treatment, periods of temporary disability, current symptoms and level of permanent disability with regard to the lumbar spine should be accepted as meeting AOE/COE criteria and of industrial origin relative to DOI 1/1/15 and 4/12/15 on a specific basis as well as cumulative trauma throughout his exposure of almost forty years.

(Ex. 1, AME Report from William Campbell, February 3, 2020, pp. 21-22.)

In the Opinion on Decision, the WCJ states:

Applicant worked as a cemetery groundskeeper for the defendant employer, which was insured by defendant American Family Home Insurance Company ("AFH")

through the end of 2014 and by defendant Insurance Company of the West (“ICW”) in 2015.

...

The master file, ADJ10656667, arises from an admitted specific injury on April 12, 2015, for which ICW furnished benefits and does not dispute applicant’s right to further medical care . . . ADJ10656647 is a claimed period of cumulative trauma (CT) during the period ending April 12, 2015. Thus, in addition to determining compensability as to both disputed claims, I was asked to make findings as to the Labor Code section 5412 “legal” date of injury and the concomitant section 5500.5 period of liability with respect to the CT, assuming it is industrial.

...

Documentary Evidence

Joint exhibits 1-5.

These exhibits relate to the involvement in these cases of Agreed Medical Evaluator (AME) William Campbell, D.O.[fn] The earliest report is found in exhibit 1 and dated February 3, 2020. According to the AME, applicant hadn’t worked since April 27, 2016. He described two specific incidents in which his lower back was injured: one on January 1, 2015, the other on April 12, 2015. Dr. Campbell commented that “it appears he’s had multiple specific injuries for which he would always just continue to try to work through them. He states he only reported the injuries that seemed major to him.” The doctor was provided with treatment records beginning with diagnostic imaging reports from April and June 2015 (regular progress reports begin in December 2015 and go through October 2018).

...

Dr. Campbell issued one last report shortly after the second deposition, dated February 18, 2022 (joint exhibit 5) . . . Dr. Campbell noted that he was asked to specifically consider whether applicant’s job duties were, in fact, less demanding (and therefore not injurious) between November 3, 2015, and April 27, 2016, even though he had been released to full duty. He pointed to some instances during that period when applicant apparently told the treating doctor that he was not lifting coffins at work; at other times, the treatment reports allege that he was performing his job without limitations. On this basis, Dr. Campbell reiterated that the treating physician’s work status determinations are the most reliable indicator. As such, given that all of the work restrictions were lifted beginning November 3, 2015, the AME continued to find that the injurious exposure continued through April 27, 2016.

...

3. *What is the date of injury in ADJ10656647?*

...

Under section 5412, the date of injury in a CT claim falls on the earliest concurrence of disability and the employee’s knowledge that the disability is industrially caused. Here, applicant alleges that he was injured during the period ending April 12, 2015, and I find this date to be consistent with the evidence. According to Dr. Key’s initial report in exhibit 10 (as well as the subsequent

medical-legal reports based partly thereupon), applicant was at work on April 12 when he suffered an onset of back pain significant enough for him to seek care. Although it is unclear whether he immediately began missing work, the work restrictions Dr. Key imposed when she saw him five days later were so severe that it is safe to presume that the condition became disabling right away, on the 12th (particularly in light of her comment about the return of his leg “dragging”). By the same token, given the circumstances of the symptom onset and the way applicant described the incident to Dr. Key and the subsequent evaluators, I find that he formed the necessary level of knowledge regarding the cause of his disability on the same day.

(Opinion on Decision, pp. 1-13.)

In the Report, the WCJ states:

In AFH’s petition, it asserts that I should have adopted Dr. Campbell’s opinion that applicant had injurious exposure until April 2016. It also alleges that my decision was based, in part, on a “conclusion that applicant was in fact not working full duty” during the period after November 2015. Finally, AFH contends that applicant lacked knowledge of his disability, within the meaning of section 5412, until Dr. Campbell opined as to the CT period. On this basis, it seeks to have the CT period in ADJ10656647 extended through April . . . 2016, which would, of course, remove AFH completely from the section 5500.5 period of liability.[fn]

ICW, in its separate petition, argues that, in light of a section 5500.5 election allegedly made by applicant during a hearing in 2019, I should not have deferred issues of benefit administration and contribution, but instead should have found AFH solely liable for the CT.

...

Turning to ICW’s contention, there appears to be no basis for awarding benefits in ADJ10656647 solely against AFH, regardless of any election previously made. . . Moreover, even if one of the two carriers is elected against under section 5500.5, subdivision (c), the other carrier is not relieved of liability. Applicant would be within his rights to elect, in which case the elected-against carrier will administer on behalf of all liable parties, subject to supplemental contribution proceedings. ICW’s contention that AFH “should be ordered solely liable at this time with respect to benefit administration and contribution” is without basis.

(Report, pp. 5-10.)

DISCUSSION

A cumulative trauma injury is defined by section 3208.1 as “occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or the need for treatment.”

Based on the reporting of AME Dr. Campbell, the WCJ found that applicant suffered cumulative injury to his back in ADJ10656647, and neither defendant AFH nor defendant ICW disputes this finding.

However, defendant AFH contends that the WCJ should have found that the last date of applicant's injurious exposure under section 5500.5 and the date of injury under section 5412 were in April 2016.

As to the last date of injurious exposure, section 5500.5 limits liability for a cumulative injury to employers who employed the injured worker during the year immediately preceding either the last date of injurious exposure or the section 5412 date of injury, whichever occurred first. (§ 5500.5(a).)

Here, AME Dr. Campbell specifically considered the question of whether applicant's exposure ended on November 3, 2015 or April 27, 2016, and opined that April 27, 2016 was the more accurate end date. (Jt. Exh. 5, at p. 8; Opinion on Decision, pp. 5-6.) He based his opinion on medical records of applicant's work status which showed that after November 3, 2015 all of applicant's work restrictions remained lifted until April 27, 2016. (*Id.*)

Given that AME Dr. Campbell's reporting—and the evidence on which it relied—is uncontroverted, we discern no good reason to reject it. Hence we conclude that applicant's last date of injurious exposure was April 27, 2016. (*See Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

Section 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 either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.” (§ 5412.)

For purposes of determining the date of a cumulative injury, it is not assumed that a worker has knowledge that a disability is job-related without medical confirmation, unless the nature of the disability and the worker's qualifications are such that he or she should have recognized the relationship. (*City of Fresno v. Workers' Comp. Appeals Bd., (Johnson)* (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53].) Whether an employee knew or should have known their disability is industrially related is generally a question of fact to be determined by the trier of fact, i.e., the WCJ. (*Johnson, supra*; *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104]; *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33

Cal.Comp.Cases 722]; *Alford v. Industrial Accident Com.* (1946) 28 Cal.2d 198 [11 Cal.Comp.Cases 127].)

Where permanent disability results from cumulative trauma, the injury occurs not at the time of exposure, but at the time the cumulative effect of the injury resulting from the exposure has ripened into disability. (See *Federal Insurance Co. v. Workers' Comp. Appeals Bd.* 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257].)

As used in section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463 [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].) Medical treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to Labor Code section 5412, but it may be evidence of compensable permanent disability. (*Rodarte, supra*, 119 Cal.App.4th at p. 1005.)

In this case, the parties framed the issue of the section 5412 date of injury for trial but the F&O includes no finding thereon. (Minutes of Hearing, August 3, 2022, p. 3:30-47.) Nevertheless, in the Opinion on Decision, the WCJ concluded that the section 5412 date of injury was April 12, 2015 because applicant experienced a specific injury on that date, and, therefore, must "have formed the necessary knowledge regarding the cause of his disability on the same day." (Opinion on Decision, p. 13.)

However, we have explained that for an injury resulting from cumulative trauma, the date of injury is determined based upon the date that the worker's cumulative injury has ripened into disability *and* the worker either knows or has reasonable grounds to know the disability was caused by employment. (See § 5412; *Federal Insurance Co., supra*.)

In this regard, the record lacks evidence that applicant knew or should have known that he had suffered cumulative injury which resulted in disability until February 3, 2020, when AME Dr. Campbell reported that his back injury was most accurately described to be the result of cumulative trauma from almost forty years of injurious exposure. (Jt. Ex. 1, AME Report from William Campbell, February 3, 2020, pp. 21-22.)

Accordingly, we will substitute findings in ADJ10656647 that the section 5500.5 period of injurious exposure is the period ending on April 27, 2016, and the section 5412 date of injury is February 3, 2020. And, since the last date of injurious exposure was April 27, 2016, we will

substitute a finding that the section 5500.5 period of liability for compensation owed is to be based on coverage during the 365-day period ending on April 27, 2016.

Defendant ICW contends that the WCJ should not have deferred the issues of benefit administration and contribution because applicant's election to proceed against defendant AFH under section 5500.5(c) precludes it from liability.

Section 5500.5(c) provides:

In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the appropriate time period set forth in subdivision (a), the employee making the claim, or his or her dependents, may elect *to proceed against any one or more of the employers*. Where such an election is made, the employee must successfully prove his or her claim *against any one of the employers named*, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits. If, during the pendency of any claim wherein the employee or his or her dependents has made an election to proceed against one or more employers, it should appear that there is another proper party not yet joined, the additional party shall be joined as a defendant by the appeals board on the motion of any party in interest, but the *liability of the employer shall not be determined until supplemental proceedings are instituted*. Any employer joined as a defendant subsequent to the first hearing or subsequent to the election provided herein shall not be entitled to participate in any of the proceedings prior to the appeal board's final decision, nor to any continuance or further proceedings, but may be permitted to ascertain from the employee or his or her dependents such information as will enable the employer to determine the time, place, and duration of the alleged employment. *On supplemental proceedings, however, the right of the employer to full and complete examination or cross-examination shall not be restricted.*

(§ 5500(c) [Emphasis added].)

Thus, an "employee may obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability." (*Colonial Ins. Co. v. Industrial Acc. Com. (Pedroza)* (1946) 29 Cal.2d 79, 82 [11 Cal.Comp.Cases 226].)

Here, even though applicant elected to proceed against defendant AFH, the WCJ is correct that his election under section 5500.5(c) may not serve to relieve another insurer from liability. (Minutes of Hearing, October 21, 2019; Report, p. 9.)

Accordingly, we are unable to discern merit to defendant ICW's contention that the WCJ erred in ADJ10656647 by deferring the issues of benefit administration and contribution.

Having determined the merits of the Petitions, we note that (1) the WCJ found that defendant AFH insured the employer, Hills of Eternity/Home of Peace Management Group, during the calendar year 2014; and (2) we found that the last date of injurious exposure and the last date of the one-year-period of insurer liability was April 27, 2016. This record places the period of liability outside the year that defendant AFH provided insurance and thus fails to support the liability award against defendant AFH.

Accordingly, we will substitute an award in ADJ10656647 in favor of applicant and against defendant Hills of Eternity/Home of Peace Management Group and defendant ICW jointly and severally.

In doing so, we note that defendant ICW retains its procedural rights under section 5500.5 to identify the insurer, if any, which insured the employer during the calendar year 2016, and to seek to join that insurer to the proceedings for purposes of recovering contribution or other offsets to its liability herein.

Accordingly, we will substitute a finding that defers all other issues in ADJ10656647; and we will return the matter to the trial level for further proceedings consistent with this decision.

Accordingly, as our Decision After Reconsideration, we will rescind the F&O and substitute findings in ADJ10656647 that (1) the section 5500.5 period of injurious exposure is the period ending on April 27, 2016; (2) the section 5412 date of injury is February 3, 2020; (3) the section 5500.5 period of liability for compensation owed is to be based on coverage during the 365-day period ending on April 27, 2016; and (4) all other issues are deferred; we will substitute an award in ADJ10656647 in favor of applicant and against defendant Hills of Eternity/Home of Peace Management Group and defendant ICW jointly and severally; and we will return the matter for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings of Fact, Awards, and Order issued on November 23, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

JOINT FINDINGS OF FACT

1. At all relevant times herein, applicant GUADALUPE GUTIERREZ, born _____, was employed as a groundskeeper (Occupational Group 491) in Colma, California, by defendant HILLS OF ETERNITY/HOME OF PEACE MANAGEMENT GROUP.
2. The defendant employer was insured against compensation liability by defendant AMERICAN FAMILY HOME INSURANCE COMPANY during the calendar year 2014 and by defendant INSURANCE COMPANY OF THE WEST during the calendar year 2015.
3. At all relevant times herein, applicant's pre-injury earnings were sufficient to entitle him to the maximum statutory permanent partial indemnity weekly rate.
4. In WCAB Case No. ADJ10656667, on April 12, 2015, applicant sustained injury, arising out of and occurring in the course of the employment identified in Finding of Fact No. 1, to his back.
5. In WCAB Case No. ADJ10656647, applicant sustained injury arising out of and occurring in the course of the employment identified in Finding of Fact No. 1 to his back. The Labor Code section 5500.5 period of injurious exposure for this injury is the period ending on April 27, 2016.
6. In WCAB Case No. ADJ10656647, the Labor Code section 5412 date of injury is February 3, 2020.
7. The Labor Code section 5500.5 period of liability for compensation owed in connection with the injury identified in Finding of Fact No. 5 is to be based on coverage during the 365-day period ending April 27, 2016.
8. Applicant is entitled to reasonable and necessary further medical treatment to cure or relieve from the effects of the injury identified in Finding of Fact No. 4.
9. Applicant is entitled to reasonable and necessary further medical treatment to cure or relieve from the effects of the injury identified in Finding of Fact No. 5.

10. The permanent disability arising from the injury identified in Finding of Fact No. 5 is inextricably intertwined with any disability arising from the injury identified in Finding of Fact No. 4.

11. In accordance with Finding of Fact No. 10, defendants did not meet their burden of proof with respect to apportionment of disability between or among multiple industrial injuries.

12. Defendants did not meet their burden of proof with respect to non-industrial apportionment of disability.

13. In connection with the injury identified in Finding of Fact No. 5, applicant became entitled to payments of permanent partial disability indemnity on December 10, 2017.

14. The injury identified in Finding of Fact No. 5 has resulted in 46 percent permanent partial disability.

15. Any permanent disability resulting from the injury identified in Finding of Fact No. 4 is not subject to a separate award.

16. Defendant INSURANCE COMPANY OF THE WEST did not meet its burden of proof with respect to its claim of credit in the amount of \$202.72.

17. Applicant's attorney is entitled to a reasonable fee of 15 percent of all indemnity awarded to applicant hereby.

18. In WCAB Case No. ADJ13080462, applicant did not meet his burden of proof with respect to injury AOE/COE.

19. In WCAB Case No. ADJ10656647, all other issues are deferred, with Appeals Board jurisdiction reserved.

AWARDS

IN WCAB CASE NO. ADJ10656667, AWARD IS MADE in favor of applicant GUADALUPE GUTIERREZ against defendants HILLS OF ETERNITY/HOME OF PEACE MANAGEMENT GROUP and INSURANCE COMPANY OF THE WEST of future medical care reasonably required to cure or relieve from the effects of the injury herein, in accordance with Finding of Fact No. 8.

* * *

IN WCAB CASE NO. ADJ10656647, AWARD IS MADE in favor of applicant GUADALUPE GUTIERREZ and against defendants HILLS OF ETERNITY/HOME OF

PEACE MANAGEMENT GROUP and INSURANCE COMPANY OF THE WEST, jointly and severally, of:

a) **permanent partial disability** of 46 percent in accordance with Finding of Fact No. 14, entitling applicant to 243 weeks of disability indemnity at the weekly rate of \$290 in accordance with Finding of Fact No. 3, starting December 10, 2017 in accordance with Finding of Fact No. 13, in the total sum of \$70,470, less all sums heretofore paid on account thereof and less \$10,570.50 payable to DURARD, MCKENNA & BORG, in accordance with Finding of Fact No. 17, as attorney fees, said fees to be commuted from the far end of the award if necessary with jurisdiction reserved as to such commutation; and

b) **future medical care** reasonably required to cure or relieve from the effects of the injury herein, in accordance with Finding of Fact No. 9.

ORDER

In accordance with Finding of Fact No. 18, **IT IS HEREBY ORDERED** that applicant take nothing by way of the claim in WCAB Case No. ADJ13080462.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 14, 2026

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

**GUADALUPE GUTIERREZ
DURARD MCKENNA & BORG
ALBERT AND MACKENZIE
LAUGHLIN FALBO LEVY & MORESI**

SRO/*kl*

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