

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

SALVADOR PINEDA, *Applicant*

vs.

**OWENS CORNING ROOFING AND ASPHALT, LLC;
ACE INSURANCE COMPANY, administered by GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ13520237
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the Findings & Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on July 7, 2022. The WCJ found that while employed through the period ending July 6, 2020, as a machine operator by defendant, applicant "sustained injury arising out of and in the course of employment," but did not sustain "psyche/stress"² injury, and that applicant's claim for benefits is barred by Labor Code section 3600(a)(10).³

Applicant contends that the section 5412 date of injury is after applicant's termination date and therefore the section 3600(a)(10) defense does not apply, and that applicant's claim is presumed compensable pursuant to section 5402.

We received an Answer from defendant. We also received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

After our review of the record and for the reasons discussed below, we will rescind the F&O and substitute a new Findings of Fact that finds that applicant sustained injury arising out of

¹ Commissioner Snellings was on the panel that issued the order granting reconsideration. He was unavailable to participate in this decision, and another panelist was appointed in his place.

² Stress is not a body part and should not be pled as one; it is a potential cause of injury.

³ Unless otherwise stated, all further statutory references are to the Labor Code.

and occurring in the course of employment to his neck, right and left shoulder, right and left wrist and hand, and back and defers the issue of injury to other body parts; that the section 5412 date of injury is September 1, 2020; and that the post termination defense does not apply.

I.

Applicant was employed by defendant performing manual labor for over thirty years and claims a cumulative injury to his neck, back, arm, hands, fingers, psyche, and stress, for the period of July 6, 2020, through July 5, 2020. (Minutes of Hearing and Summary of Evidence (MOH), May 26, 2022, p. 2, lines 3-6; p. 4, lines 7-8.)

Defendant terminated applicant effective August 11, 2020. Applicant's last day of work was July 6, 2020. (Defendant Exhibit C, PDF p. 3.)

On August 24, 2020, applicant filed an Application for Adjudication of Claim (Application), signed August 17, 2020, along with a partially completed DWC-1 claim form dated August 24, 2020.

Applicant treated with Kim Torres, D.C., from September 1, 2020, through September 9, 2021. (Applicant Exhibit 3; Joint Exhibit A, p. 31.) The applicant also treated with Arlen Green, D.O., from November 4, 2020, through November 2, 2021. (Exhibit 2.)

The claim was denied on November 23, 2020. (Defendant Exhibit B.)

On March 15, 2021, panel qualified medical evaluator (PQME) Michael D. Smith, M.D., evaluated the applicant. Dr. Smith's report includes a patient history of:

[Applicant] states that during the course of his employment, he gradually developed pain in his neck, bilateral arms, shoulders, hands, fingers and lower back. He is also claiming that he developed stress and insomnia throughout his employment. He attributes his symptoms to the repetitive nature of his job duties. The patient continued working his usual and customary duties, hoping the pain would subside.

The patient was employed with Owens Corning Roofing & Asphalt for approximately 32 years. Throughout his employment, he was exposed to working on his feet for long periods and in a fast-paced environment.

In his line of work, he would lift or carry rolls of roofing and materials for asphalt. He operated forklifts to organize materials and would often be instructed to cover his co-workers shifts or breaks. In addition, he would clean his work area and shovel tar. Physically this included standing, walking, sitting, reaching, pushing, pulling, gripping, grasping, bending, stooping, squatting, carrying, climbing, and lifting up to 50 pounds.

He claims he gradually developed the pain of his neck, arms, shoulders, hands, wrists, fingers and low back. [Applicant] denies reporting his symptoms to management and would self-treat with over-the-counter medication.

He proceeded to work his regular duties until July of 2020, when he was laid off. The patient claims he was laid off because he tested positive for [an illegal substance]; however, he denies using the drug.

(Joint Exhibit A, p. 2-3.)

In the report, Dr. Smith reviewed applicant's deposition transcript as well as medical records beginning on October 3, 2011. (Joint Exhibit A, pp. 15-27.) PQME Dr. Smith diagnosed cervical strain (disc disease), lumbar strain (disc disease), right and left rotator cuff syndrome, and rule out bilateral carpal tunnel syndrome. (Joint Exhibit A, p. 37.) For causation the doctor states "neck, right and left shoulder, right and left wrist and hand, and back symptoms, impairment and associated disability are the result of the cumulative work trauma from 7/6/19 to 7/6/20," and the "findings are consistent with the injuries claimed by the applicant." (Joint Exhibit A, p. 38.)

On April 21, 2021, Dr. Smith issued a supplemental report after reviewing diagnostic testing. "Based on these test results, I am recommended that the patient be evaluated for possible lumbar disc surgery, right and left rotator cuff repair and bilateral carpal tunnel releases." (Joint Exhibit B, PQME Michael D. Smith, M.D., April 21, 2021, pp. 1;3.)

At trial on May 26, 2022, applicant testified through a Spanish interpreter that he began working for defendant on May 23, 1988, and described job duties for the position of "relief." (MOH, p. 4, lines 7-8.) In the last year at Owens Corning, he worked one week for three days, 12 hours each day and the next week it would be four days. (MOH, p. 4, lines 23-25.) He first noticed the neck injury at work, but he didn't pay any attention to it and that was in mid-2019. (MOH, p. 5, lines 12-13.) He did not pay attention to his back problem. He didn't tell anybody. He thought it was fatigue. He first noticed problems around 2019, but he doesn't remember exactly. (MOH, p. 5, lines 15-17.) He first noticed pain in the arm in the last year that he worked. The complaints in the arm were "simply pain." That was in the left-shoulder area. His right arm also hurts, but mostly in the left. The right arm hurts in the bicep area. (MOH, p. 5, lines 19-21.)

When he first worked, he did a lot of manual work. He used his hands a lot. He first noticed pain in his hands and fingers around 8 or 10 years ago. He never told anyone at work about his hands and fingers. (MOH, p. 5, lines 22-25.) He recalls being taken off work for approximately two weeks between 2019 and 2020. He was taken off work because he "was feeling somewhat

stressed”. It was partly because of work and he was not feeling well. He was feeling pressure at work because “the work itself pressures you” and partly because of the supervisors. (MOH, p. 6, lines 17-20.) On cross exam he testified he last worked in July 2020 when he was terminated. (MOH, p. 7, lines 17-18.) He testified if he had not been terminated for cause, “maybe, yes” he would have filed a workers’ compensation claim. (MOH, p. 8, lines 4-5.)

Defense witness Jacob Ritter worked for defendant as human resources leader for a little over two years. (MOH, p. 9, lines 13-14.) Witness Ritter testified the applicant never reported a work injury. (MOH, p. 9, lines 21-22.) With respect to applicant’s termination, he noted that applicant was not immediately terminated; instead, it took place over several weeks, and included a “continued employment agreement,” repeat testing, and an appeal process. (MOH, p. 9, line 13 – p. 10, line 8.)

II.

A.

To be compensable, an injury must arise out of and occur in the course of employment (AOE/COE). (Lab. Code, § 3600.) The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers’ Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5, 5705.) Medical evidence that industrial causation was reasonably probable, although not certain, constitutes substantial evidence for finding injury AOE/COE. (*McAllister v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) “That burden manifestly does not require the applicant to prove causation by scientific certainty.” (*Rosas v. Worker’s Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

The issue of industrial causation “may run a gamut from the blatantly obvious to the scientifically obscure.” (*Peter Kiewit Sons v. I.A.C. (McLaughlin)* (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].) “[T]he 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.” (*Id.*; see *City & County of San Francisco v. I.A.C. (Murdock)* (1953) 117 Cal.App.2d 455, 459 [18 Cal.Comp.Cases 103].)

A cumulative injury is defined as one “occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any

disability or need for medical treatment,” and the date of a cumulative injury shall be the date determined under section 5412. (Lab. Code, § 3208.1.)

Employer liability, however, is limited to those employers who employed the employee during the one year “immediately preceding either the date of injury, as determined pursuant to section 5412, or 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).)

Finally, we observe 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. I.A.C. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. I.A.C. (George)* (1954) 125 Cal.App.2d 201, 203 [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.

1.

Although in the trial minutes applicant claimed a cumulative injury for the period ending July 5, 2020, in the F&O the WCJ found the periods of employment and injury ending one day later, on July 6, 2020. (MOH, p. 2, lines 3-6; F&O, page finding 1.)

The July 6, 2020, date is supported by the personnel records, specifically the “Employee Notification Form” dated August 11, 2020, which notes the “[l]ast day worked” was July 6, 2020. (Exhibit C, PDF p. 3.) Dr. Smith states the “neck, right and left shoulder, right and left wrist and hand, and back symptoms, impairment and associated disability are the result of the cumulative work trauma from 7/6/19 to 7/6/20,” and the “findings are consistent with the injuries claimed by the applicant.” (Joint Exhibit A, PQME Michael D. Smith, M.D., March 21, 2021, p. 38.) At trial, applicant testified “he last worked in July 2020.” (MOH, p. 7, lines 17-18.)

After review, we are unable to identify any evidence contrary to the last day of work of July 6, 2020, which is well supported. Therefore, we agree with the WCJ that applicant’s last day of work, and corresponding last day of occupational exposure, is July 6, 2020.

2.

It is axiomatic that in determining if there is an industrial injury it is necessary to identify the body part or parts injured. The California Supreme Court long ago confirmed the “Constitution,

in our opinion, authorizes *compensation for injury to the body* of the workman, including every part thereof, natural or artificial, which is essential to its proper functioning.” (*Pacific Indem. Co. v. I.A.C.* (1932) 215 Cal. 461, 465, emphasis added.)

A finding of injury without finding a single body part that has caused the need for medical treatment or disability is unhelpful and creates confusion for defendants as to the obligation to provide benefits. “Awards of the board ‘are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals.’ [Citations.] Accordingly, they must be sufficiently certain to permit enforcement....” (*Toccalino v. Workers’ Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 557 [47 Cal.Comp.Cases 145].)

Although the WCJ found the applicant sustained injury arising out of and occurring in the course of employment, the WCJ did not include a finding of the body parts injured.

Dr. Smith stated, the “neck, right and left shoulder, right and left wrist and hand, and back symptoms, impairment and associated disability are the result of the cumulative work trauma from 7/6/19 to 7/6/20,” and the “findings are consistent with the injuries claimed by the applicant.” (Joint Exhibit A, PQME Michael D. Smith, M.D., March 21, 2021, p. 38.)

The Primary Treating Physician’s Progress Reports (PR-2) from Kim Torres, DC, covering October 1, 2020, through September 9, 2021, all list industrial conditions from cumulative injury occurring July 6, 2019, through July 6, 2020, for the thoracic, lumbar, left shoulder, right shoulder, left carpal tunnel, and right carpal tunnel. (Applicant Exhibit 3.) The Secondary Treating Physician’s Progress Reports from Arlen Green, D.O., covering November 4, 2020, through November 2, 2021, also document industrial thoracic and lumbar spine cumulative injury. (Applicant Exhibit 2.) Dr. Green completed a Doctor’s First Report of Occupational Injury or Illness finding that thoracic and lumbar sprain/strain with muscle spasm was “consistent with the patient’s account of injury” for the July 6, 2019, through July 6, 2020, period. (Applicant Exhibit 2, PDF pp. 13-14.)

That these body parts were injured is amply supported by the medical record and applicant’s trial testimony of symptoms in his neck, back, and upper extremities beginning after decades of manual labor for defendant. (MOH, p. 4-6.)

On the record before us substantial medical and testimonial evidence supports that there is a cumulative injury to the neck, right and left shoulder, right and left wrist and hand, and back. As

such, we will find that applicant sustained injury AOE/COE to these body parts and defer the issue of injury to any additional body parts.

3.

An applicant has the burden of establishing an industrial injury by a preponderance of the evidence. (Lab. Code, §§ 3202.5, 5705.) The defendant, however, bears the burden of proof to establish affirmative defenses such as the post termination defense provided for in section 3600(a)(10). This is because the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705.)

Here, applicant established an industrial injury by a preponderance of the evidence. We therefore turn to defendant's burden under the post termination defense.

The post termination defense applies where the claim is filed after notice of termination, *and the claim is for an injury occurring prior to the notice of termination*. If defendant establishes these necessary facts, compensation is not paid unless the employee demonstrates by a preponderance that one or more of four qualifying conditions apply. (Lab. Code § 3600(a)(10).)

In this case defendant terminated applicant effective August 11, 2020. To apply the post termination defense defendant has the burden of proving that injury occurred prior to the applicant's *notice* of the termination.

There appears to be no direct evidence of when applicant received notice of his termination. There is a chronology of events in the personnel file which includes an entry for August 11, 2020, that states: "I spoke to [applicant] (he requested we did not bring him into the plant to terminate). He said he would call me to meet up, so he could give me the signed separation statement." (Defendant Exhibit C, PDF p. 34.) It appears separation documents were sent to the applicant via UPS on August 11, 2020, however, there also appears to be no confirmation of either delivery or receipt. (Defendant Exhibit C, PDF p. 35-39.) At trial applicant testified that "[a]fter being terminated from Owens Corning, he doesn't remember how long it took for him to file a workers' compensation claim." (MOH, p. 8, lines 3-4.)

From the evidence provided we discern applicant received notice of his termination when contacted by an unnamed person regarding termination on August 11, 2020, as indicated in the personnel file chronology. This is consistent with applicant having the separation documents mailed to him instead of coming in. This is also consistent with applicant having filed his workers' compensation claim after he received notice of termination. Having established notice of

termination on August 11, 2020, the next step is determining if the injury occurred prior to this notice.

In the F&O the WCJ found injurious exposure during the period ending July 6, 2020, but did not specifically discuss the date of injury per section 5412. (F&O, p. 1, finding 1.) In the Report the WCJ implies the section 5412 date of injury was prior to termination by stating:

In the light of the entire record in the instant case, after examining the totality of the testimony, medical evidence and documentary evidence presented, Applicant's lack truthfulness and lack of credibility, [it] is the undersigned Judge's opinion that while Applicant was employed by Defendant, prior to his date of termination, he was aware his impairment and associated disability were industrially related, and he failed to report his industrial injuries to his employer.

(Report, page 7.) This analysis, however, does not appropriately determine the section 5412 date of injury.

“The date of injury in cases of occupational diseases or cumulative injuries is the 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.) Thus, the date of injury per section 5412 is a specific day and may or may not be the same day as the end date of industrial exposure or liability established by sections 3208.3 and 5500.5.

Either compensable temporary disability or permanent disability is required to satisfy section 5412, and medical treatment alone is not disability, but it may be evidence of compensable permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005-1006 [69 Cal.Comp.Cases 579].)

To determine the date of applicant's cumulative injury, there must exist a concurrence of disability and knowledge that it was caused by employment. Knowledge requires more than an uninformed belief. “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].) “[A]n 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.” (*Johnson, supra*, at p. 473.)

As digested by Dr. Smith in his reporting, applicant was first placed on temporary total disability for the industrial injury by chiropractor Torres on September 1, 2020. (Joint Exhibit A, p. 31.) Temporary disability status was confirmed on October 1, 2020, when chiropractor Torres continued applicant off work for the injury through November 13, 2020. (Applicant Exhibit 3, PDF p. 58.). Either compensable temporary disability or permanent disability is required to satisfy section 5412. (*Rodarte, supra*, at pp. 1005-1006.) Here the first instance of disability, in this case temporary disability, occurred September 1, 2020, which is therefore the earliest date at which there could be a congruence of the disability and knowledge required to establish the date of injury pursuant to section 5412.

Turning to knowledge, we note applicant performed manual work for over thirty years, required the use of a translator, and that there is nothing to suggest “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.” This is especially true with a cumulative injury because “the medical cause of an ailment is usually a scientific question.” (*McLaughlin, supra*, p. 839.) We must therefore look to see when applicant obtained “medical advice” to the effect that he had sustained a cumulative injury or “recognized the relationship between” his employment and his disability. (*Johnson, supra*, at p. 473.)

We are mindful that the WCJ has stated applicant’s testimony is “not deemed to be the most credible testimony” and that employer witness Ritter “was found to be credible.” (F&O, Opinion on Decision, pp. 1, 4.) We generally give the WCJ’s credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].)

Here, however, we are unable to determine how the WCJ’s credibility assessment affects the application of the law and facts to this case regarding date of injury. For example, the WCJ’s credibility assessment does not resolve any factual disputes as at trial both applicant and defense witness Ritter congruently testified applicant did not inform defendant of his injury before filing an Application, and witness Ritter did not testify as to applicant’s ability to recognize an industrial injury. Further, the question is not whether applicant may have associated pain with work activities, but rather if he should have recognized the relationship between his employment and his disability.

The WCJ discusses applicant's testimony regarding work activities and pain from over thirty years of manual labor with defendant and concludes "he was aware his impairment and associated disability were industrially related." (Report, p. 5-7.) To be clear, applicant's testimony through an interpreter to manual labor occurring over three decades without any evidence that his "training, intelligence and qualifications are such that applicant should have recognized" he sustained an industrial injury is insufficient to support a finding he had knowledge of an industrial injury without something more.

It is noteworthy that applicant's treatment records reveal various visits with physicians for back, elbow, and shoulder pain during the period from December 25, 2011, through June 9, 2017. These physicians do not appear to have found an industrial injury based on applicant's pain and/or work activities. None of the doctors reported an industrial injury nor completed a Doctor's First Report of Occupational Injury or Illness. (Joint Exhibit A, pp. 16-21, 22- 27.) We will not charge a lay applicant with knowledge of an industrial injury where contemporaneous physicians failed to identify injury.

Applicant filed an Application dated August 17, 2020, seeking workers' compensation benefits for his claimed injury. On this record, it could be that applicant reasonably gained the knowledge he could claim a work injury as of the date he signed the Application; alternatively, applicant's knowledge that he had a work injury can also reasonably be based on the date that he was evaluated by chiropractor Torres. In any event, the concurrence of knowledge and disability required by section 5412 occurred on September 1, 2020, when applicant was taken off work by chiropractor Torres. Therefore, September 1, 2020 is the section 5412 date of injury.⁴

Defendant's burden under section 3600(a)(10) is to show that applicant's injury occurred prior to his termination. As September 1, 2020, is after the applicant's termination on August 11, 2020, defendant has failed to meet its burden to establish a post termination defense.⁵

Nonetheless, we also note that with respect to the four conditions listed in section 3600(a)(10) and applicant's burden of proof, under subdivision 10(B), medical records existed

⁴ To the extent that applicant's claim of injury to the body part of psyche is deferred, even though section 3600(a)(10) refers to a separate analysis under section 3208.3, the section 5412 date of injury applies to the entire injury and not to individual body parts.

⁵ It appears defendant concedes the section 5412 date of injury occurred *after* applicant's notice of termination by stating that "[t]he compensable temporary disability is evidence of disability benefits paid by EDD starting on September 8, 2020. *There was a concurrence of knowledge and disability on or about September 8, 2020.*" (Answer, page 4, lines 7-9, emphasis added.)

prior to applicant's termination, and under subdivision 10(D), the date of injury under section 5412 is subsequent to applicant's termination. Therefore, we will find that defendant did not meet its burden to demonstrate a post-termination claim under section 3600(a).

4.

The WCJ found applicant did not sustain a psychiatric injury and stated "[a]fter reviewing the record as it relates to the alleged psych/stress claim, there is no medical evidence to establish applicant sustained a psych/stress claim arising out of and in the course of employment." (Opinion on Decision, p. 2.) It appears, however, the claim for psychiatric/stress injury was not specifically addressed in the Petition, Answer, or Report.

As early as September 1, 2020, applicant "complained of depression, stress, and insomnia," and chiropractor Torres included a "[p]sych [*sic*] component" under diagnoses. His "injuries were believed to be attributable to, and the direct result of, the work-related trauma that occurred from July 6, 2019 to July 6, 2020." (Joint Exhibit A, pp. 31-32.) The psychiatric component was carried forward as a diagnosis in the subsequent reporting. (Applicant Exhibit 3.)

On November 9, 2020, Dr. Green noted that "[d]ue to his repetitive job duties, [applicant] sustained cumulative trauma injury to his back, shoulders, right arm, and fingers. *He also developed stress due to the pressure at work.*" (Joint Exhibit A, p. 33, emphasis added.)

The WCJ, by contrast, only discusses two skeletal medical leave of absence forms from 2019 before concluding "there is no medical evidence to establish applicant sustained a psych/stress claim." (Opinion on Decision, pp. 1-2.) The WCJ does not discuss the 2020 and 2021 medical records which mention psychiatric/stress.

A claimed cumulative psychiatric injury is the exemplar of "a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*McLaughlin, supra*, p. 839.)

Here, there is medical evidence of a psychiatric injury in the form of limited reporting from chiropractor Torres and Dr. Green. What is missing is a substantial medical opinion addressing psychiatric injury. Until that opinion is obtained it is not possible to determine if there is an injury, the date of injury, nor what defenses, if any, may be applicable.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to

“ensure substantial justice in all cases.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall, supra*, at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

As there is no record of a psychiatric medical opinion in this matter, we will defer the issue of psychiatric injury and return this case to the WCJ to allow the parties an opportunity to develop the record and obtain a psychiatric/psychologic agreed medical evaluator (AME) or PQME.

B.

Applicant mistakenly asserts his claim is presumed compensable pursuant to section 5402(b)(1). Although if an issue is not raised at trial, it may be considered waived, it is appropriate to evaluate the presumption here.

“[A] presumption becomes operative at trial when the basic facts giving rise to the presumption are established by the pleadings, by stipulation, by judicial notice, or by evidence. [citations].” (*Gee v. Workers’ Comp. Appeals Bd.*, (2002) 96 Cal.App.4th 1418, 1425, 67 Cal.Comp.Cases 236.) “Whenever the presumption’s underlying conditions are established by the pleadings, stipulations, judicial notice, or evidence, the trier of **fact** *must* adopt the” presumption. (*Gee, supra*, at p. 1426, emphasis in original.) We therefore review this matter to determine whether the presumption’s underlying conditions are established.

Section 5402(b)(1) states that if “liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division.” Section 5401 clarifies that “a claim form *is deemed filed when it is personally delivered to the employer or received by the employer* by first-class or certified mail.” (Lab. Code, § 5401(c), emphasis added.)

The California Supreme Court has affirmed that “absent circumstances creating an equitable estoppel, the 90-day period for the employer to deny liability runs only from the date the worker files a claim form with the employer. (§ 5402, subd. (b).) Neither the WCAB nor this court can alter the clear statutory command.” (*Honeywell v. Workers’ Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24, 29 [70 Cal.Comp.Cases 97].) This is because “section 5402, subdivision (b)

is not ambiguous: it unequivocally gives the employer 90 days from “the date the claim form is filed under Section 5401” to investigate the claim.” (*Honeywell, supra*, at p. 35.)

We see no evidence addressing when the claim form was “personally delivered to the employer or received by the employer” as required by section 5401(c).

The Application was filed on August 24, 2020, along with a claim form. The proof includes service of the claim form “by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail.” Without engaging in extensive discussion of service by mail, we merely note we are unaware of any fact pattern in which the United States Postal Service delivers first class mail the same day it is posted.

Although the receipt of the claim form is not established by direct evidence, on November 23, 2020, defendant issued a denial of claim. (Defendant Exhibit B.) Even assuming *arguendo* that defendant received the claim form the day after service, August 25, 2020, the denial was issued by defendant on the 90th day, November 23, 2020, and is therefore timely.

Applicant improperly conflates filing with the district office as legally equivalent to filing with the employer under section 5401(c). This is not correct. Here, the presumption’s required underlying conditions are not established.

C.

“It is the responsibility of the parties and the WCJ to ensure that the record of the proceedings contains at a minimum, the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Board en banc).) As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at p. 475.)

WCAB Rule 10759, states, in pertinent part: “Each exhibit listed must be clearly identified by author/provider, date, and title or type (e.g., “the July 1, 2008 medical report of John Doe, M.D. (3 pages)”). Each medical report, medical-legal report, medical record, or other paper or record having a different author/provider and/or a different date is a separate “document” and *must be listed as a separate exhibit.*” (Cal. Code Regs., tit. 8, § 10759(c), emphasis added.)

Here, Exhibit 3 *contains multiple reports* from chiropractor Torres, covering October 1, 2020, through September 9, 2021, *with duplicate reports* for December 1, 2020, January 4, 2021,

August 5, 2021. Exhibit 2 *contains multiple reports* from Dr. Green, DO, covering November 4, 2020, through November 2, 2021, *with duplicate entries* for January 11, 2021, and November 9, 2020. There is no doubt that this exhibiting fails to comply with WCAB 10759(c).

WCJs are not bound by statutory or common law rules of evidence or procedure. (Lab. Code, §§ 5300-5317, and 5700-5816; Cal. Code Regs., tit. 8, §§ 10300-10995.) The guidance provided by the Evidence Code, however, should be followed when necessary to afford a party due process of law. (See *Abron v. Workers' Comp. Appeals Bd.* (1973) 34 Cal.App.3d 232, 236 [38 Cal.Comp.Cases 591].) “It is the burden of the proponent of evidence to establish its relevance through an offer of proof or otherwise.” (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1165.)

The record contains the November 13, 2020 deposition of applicant (Exhibit A), consisting of 83 PDF pages and applicant's personnel file (Exhibit C), consisting of 241 PDF pages. There are treatment reports from an acupuncturist and a physical therapist to which no party nor the WCJ make any reference. In total, over 551 PDF pages were submitted as evidence, and the overall nature of this record has made review unnecessarily cumbersome.

To be clear, there is no inherent limit to the number of exhibits nor the total number of pages that may be offered into evidence. Proffers of evidence, however, should be made in good faith to help the trier of fact and parties create a substantial record. Exhibits should not be duplicative and should have an arguable relevance to an issue being tried. Proceeding to trial with evidence that is “indisputably incapable” of establishing a claim or defense may result in the imposition of sanctions. (*Torres v AJC Sandblasting* (2012) 77 Cal.Comp.Cases 113, 1121 (Appeals Board en banc).)

In any further proceedings, we recommend that the WCJ uniquely identify each individual exhibit sequentially to avoid confusion, decline to accept duplicate exhibits, and make inquiry of the proponent of the exhibit to establish the exhibit's arguable relevance to an issue being tried.

Finally, we also note it appears the correct name of the insurance company should be confirmed by defendant in any further proceedings. (See *Coldiron v. Compuware Corp.* (2002) 67 Cal.Comp.Cases 289 (Appeals Bd. en banc); Cal. Code Regs., tit. 8, §10390.)

III.

Accordingly, as our Decision After Reconsideration, we rescind the F&O and substitute a new Findings of Fact that finds that applicant sustained injury arising out of and occurring in the course of employment to his neck, right and left shoulder, right and left wrist and hand, and back and defers the issue of injury to other body parts; that the section 5412 date of injury is September 1, 2020; and that the post termination defense does not apply.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings & Order of July 7, 2022, is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. SALVADOR PINEDA, age 54, while employed during the period up to July 6, 2020, as a machine operator, Occupational Number in dispute, at Los Angeles, California, by OWENS CORNING ROOFING AND ASPHALT, LLC, sustained injury arising out of and occurring in the course of employment to his neck, right and left shoulder, right and left wrist and hand, and back.
2. The issue of injury to additional body parts is deferred.
3. Applicant's claim for benefits is not barred by Labor Code section 3600(a)(10).
4. The date of cumulative injury pursuant to Labor Code section 5412 is September 1, 2020.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 28, 2026

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

**SALVADOR PINEDA
SOLOV & TEITELL
WAI, CONNOR & HAMIDZADEH, LLP**

PS/oo

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