WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARY HESS ELKS, ***Applicant***

vs.

SHARP HEALTHCARE;
ACE AMERICA INSURANCE COMPANY, ADMINISTERED BY ESIS, INC.,
Defendants

Adjudication Number: ADJ11091494
San Diego District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant Sharp Healthcare, insured by Ace America Insurance Company, administered by ESIS, Inc. (defendant) seeks reconsideration of the September 30, 2021 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that applicant's claim was not barred by the statute of limitations.

Defendant contends that compensation is barred by Labor Code sections 5400 and 5405, and that the date of injury per section 5412 is June 9, 2014.[1]

We have received an Answer from the applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed in the Report, which we adopt and incorporate, and for the reasons below, we will affirm the F&A.

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

FACTS

Applicant claimed injury to the bilateral wrists, fingers, hands, and carpal tunnel syndrome, while employed as a registered nurse by defendant from August 17, 2009 to June 1, 2017. She alleged that she was injured due to repetitive use of the upper extremities.

Applicant has been an employee of Sharp Hospital since 1979. (September 21, 2021 Minutes of Hearing and Summary of Evidence (Minutes), at 6:18.) Applicant initially worked in the cardiovascular unit, but transferred to the "Coumadin Clinic" in 2004, where she worked until 2017. (*Id*. at 7:15.)

On May 3, 2000, applicant was evaluated by Kenneth Villa, M.D., for possible carpal tunnel syndrome, with presenting complaints of numbness and tingling in the upper extremities for four months. (Ex. 1, report of Qualified Medical Examiner (QME) Alexander Caligiuri, D.C., dated January 23, 2018, p.7.) Dr. Villa diagnosed mild right carpal tunnel syndrome, and prescribed conservative treatment. (*Ibid.*)

In 2009, applicant consulted with primary care physician Dr. Rathbun, and reported complaints of numbness in her hands. (Minutes, at 7:22.) Dr. Rathbun advised applicant she had carpal tunnel syndrome, and gave applicant exercises and splints to wear at night. Thereafter, the problem went away. (*Ibid.*) Applicant missed no time from work and was given no restrictions.

On June 9, 2014, applicant returned to Dr. Rathbun with renewed complaints of moderate right wrist stinging/shooting discomfort. Applicant described her pain as "periodic depending on her activities." (Minutes, at 11:22.) Applicant reported wearing wrist splints at night, with numbness in the fingers of the right hand, not as bad as it used to be. (Ex. G, report of Brent Rathbun, M.D., dated June 9, 2014, p.1.) Dr. Rathbun advised applicant to see Occupational Medicine as her hand and wrist complaints were "clearly work related." (*Id*. at p.4.)

On January 19, 2017, Gene Heard, M.D. interpreted x-ray studies of applicant's bilateral wrists as normal. (Ex. 1, report of QME Alexander Caligiuri, D.C., dated January 23, 2018, p.6.) On February 8, 2017, Bradford H. Stiles, M.D. evaluated applicant for carpal tunnel syndrome, noting applicant was not experiencing significant pain, but recurrent numbness in both hands, right greater than left. *(Ibid.)*

On June 6, 2017, applicant completed the employer's "Accident Reporting and Treatment" form, specifying injury to the bilateral wrists and hands. (Ex. 11, Accident Reporting and Treatment Form, dated June 6, 2017.) On June 7, 2017, applicant completed a DWC-1 claim form,

claiming injury to the bilateral hands, wrists and fingers, asserting a date of injury of January 17, 2017. (Ex. 4, DWC-1 Claim Form dated June 7, 2017.)

On June 28, 2017, defendant denied liability for the claimed injury. (Ex. B, Notice Regarding Denial of Workers' Compensation Benefit, dated June 28, 2017.)

On October 4, 2017, applicant completed an additional DWC-1 claim form. On October 5, 2017, defendant again issued a denial notice. (Ex. A, Notice Regarding Denial of Workers' Compensation Benefit, dated October 5, 2017.)

On October 10, 2017, applicant underwent right carpal tunnel release. (Ex. 2, records from Neurosurgical Medical Group dated January 5, 2018, p.30.)

On November 8, 2017, applicant *in propria persona* filed an Application for Adjudication. (Ex. 5, Application for Adjudication, dated November 8, 2017.)

On January 9, 2018, applicant underwent left carpal tunnel release. (Ex. 1, report of QME Alexander Caligiuri, D.C., dated January 23, 2018, p.8.)

On January 23, 2018, QME Alexander Caligiuri, D.C. evaluated applicant. The QME noted applicant's work history, as well as her prior claims to the bilateral feet in 2004 and 2005, and her slip and fall accident in 2016. (Ex. 1, report of QME Alexander Caligiuri, D.C., dated January 23, 2018, p.8.) Regarding the claimed bilateral upper extremity injury, the QME stated:

> Ms. Elks performed manually intensive work as a clerical/administrative nurse which included a significant amount of typing. The applicant reports, and the medical records reviewed, indicate that the applicant developed pain within her wrists and tingling within her hands as a result of these manual activities. The applicant credibly reports that her work activities significantly increased with respect to the repetitive manual component of her work requirements between during January, 2017. Ms. Elks credibly states that the symptoms which she had within her wrists and hands increased in intensity as a result it stands to reason, and it is supported by the medical literature, that the increased demand of manual activities which occurred during January, 2017 would have served to intensify the applicant's subjective complaints relative to her wrists and hands. (*Id*. at p.10.)

With respect to the various dates of injury listed in the claim forms, Dr. Caligiuri observed:

> Regardless of whether or not the applicant selected the most appropriate or most accurate date of her cumulative trauma injury, the biomechanics of the applicant's usual and customary work activities which she performed between 08/17/09 and 06/01/17 are pathophysiologically consistent with her subjective complaints as well as consistent with her objective findings which support a

> diagnosis of bilateral carpal tunnel syndrome. Although the medical records document that these complaints/conditions were present before 08/07/09 as a result of the applicant's work activities, there is no doubt that the applicant's work activities which she performed between 08/17/09 and 06/01/17 contributed to her carpal tunnel complaints/conditions. (*Id*. at p.12.)
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> Along those lines, as illustrated above, the applicant's work activities, which included manual tasks such as typing, definitely contributed to her symptomatology, need for medical treatment, and need for labor disability. That being the case, and once again appreciating that the biomechanics of the applicant's work activities which she performed between 08/17/09 and 06/0l/17are pathophysiologically consistent with carpal tunnel syndrome, and recognizing the references from the current medical literature which document an association between carpal tunnel syndrome and the types of manual activities which the applicant performed during this time period, the undersigned examiner puts forth a supported conclusion to state with reasonable medical probability that the applicant's bilateral carpal tunnel syndrome is causally related to the subject industrial injury of CT 08/17/09 - 06/01/17, arising out of and through the course of employment with Sharp Healthcare. (Ex. 1, report of QME Alexander Caligiuri, D.C., dated January 23, 2018, p.13.)

The parties proceeded to trial on September 21, 2021. They stipulated in relevant part that applicant claimed injury to her bilateral wrists, hands, fingers and carpal tunnel while employed from August 17, 2009 to June 1, 2017. Among the issues raised were injury arising out of and in the course of employment (AOE/COE), whether the claim was presumptively compensable per section 5402, and "Statute of Limitations and failure to timely report the claim." (Minutes, at 3:1.) Applicant testified to her history of employment with defendant starting in 1979, and to the onset of carpal tunnel symptoms. (*Id*. at 7:22; 11:15.) In 2009, applicant was evaluated by Dr. Villa for complaints of numbness in her hands, but the intermittent pain was "not enough to warrant surgery." (*Id*. at 11:15.) The symptoms returned in 2014, at which time applicant sought treatment with primary care physician Dr. Rathbun, who advised her that her symptoms were clearly work-related. (*Id*. at 12:6.) When the symptoms receded, applicant decided not to file a workers' compensation claim, "because it was not an issue and it resolved quickly." (*Id*. at 8:10.) In 2017, applicant attended her annual physical, wherein her doctor recommended she be seen by an occupational doctor for her carpal tunnel symptoms. After several sessions of physical therapy, applicant's "wrists got better." (*Id*. at 8:20.) In early 2017, applicant received two round of bilateral wrist injections, and underwent diagnostic studies. At the time, applicant again decided not to file

a workers' compensation claim "because she started conservative treatment and the injections worked." (*Id*. at 14:2.) In June, 2017, applicant decided to file the instant claim when her hands became numb, and she experienced trouble driving and difficulty sleeping due to pain in her wrists. (*Id*. at 9:16.) Applicant testified that "[p]rior to June 2017, applicant never missed work, no modified duty was assigned, and she was given no permanent disability." (*Id*. at 10:13.) Applicant received carpal tunnel release surgeries in late 2017 and early 2018, and this was the first time she lost time from work due to her injuries. (*Id*. at 9:22.)

The WCJ issued the F&A on September 30, 2021, finding in pertinent part that applicant had sustained injury AOE/COE to the bilateral wrists, hands, fingers, and carpal tunnel syndrome, and that compensation was not barred by the statute of limitations. (F&A, Finding of Fact Nos. 2 and 4.) In the Opinion on decision, the WCJ observed that medical evidence of industrial causation was unrebutted in the record. (F&A, Opinion on Decision, p.10.) Regarding the statute of limitations, the WCJ observed that pursuant to section 5405 the period for commencement of proceedings is one year from the date of injury, last payment of indemnity, or last provision of medical treatment. The WCJ further observed that the date of injury for cumulative trauma claims is set forth in section 5412, which requires the concurrence of knowledge of injury, its industrial causation, and disability arising therefrom. (*Id*. at pp.11-12.) The WCJ determined that while applicant had the requisite knowledge of the work-relatedness of her injuries as early as 2009, the evidence did not establish disability arising from the injury prior to applicant's first carpal tunnel release surgery in 2017. Accordingly, the WCJ set the date of injury at October 10, 2017, the date applicant first had both disability in the form of compensable temporary disability following surgery, and knowledge of its industrial causation. (*Id*. at p.13.) Because the application for adjudication was filed on November 9, 2017, the commencement of proceedings for collection of benefits was within one year of the date of injury, and the claim was not barred by the limitations period of section 5405. (*Ibid.*)

In its Petition, defendant contends that compensation is barred under section 5400 because applicant failed to report the injury within 30 days of her medical evaluation with Dr. Villa on May 3, 2000, or her evaluations by Dr. Rathbun in 2009 and 2014. (Petition at pp.3-4.) Defendant asserts that compensation is similarly barred under section 5400 because applicant failed to report the injury within 30 days of her medical appointment with Dr. Rathbun in January, 2017, diagnostic testing in February, 2017, or the series of wrist injections in March, 2017. Defendant further

contends that the date of injury as described in section 5412 was as early as 2000, and no later than June 9, 2014, when applicant was told by her treating physicians that her wrist complaints were industrially related. (Petition, at 5:5.) Because the date of injury was no later than June 9, 2014, and proceedings for collection of benefits were not commenced until November 9, 2017, defendant contends compensation is barred by section 5405. (Petition, at 6:24.)

The WCJ's Report observes that the date of injury pursuant to section 5412 requires the concurrence of disability with knowledge of its work-relatedness, with disability defined as either compensable temporary or permanent disability. (Report, at p.7.) The WCJ notes that while applicant's knowledge of the industrial origins of her injury under section 5412 were evident as early as 2009, applicant did not sustain compensable temporary or permanent disability until her first carpal tunnel surgery in October, 2017. The first time applicant sustained wage loss due to temporary disability was October 10, 2017, at which time applicant had compensable disability and knowledge of its industrial etiology. The date of injury under section 5412 was thus fixed at October 10, 2017, a date within one year of the filing of the application on November 9, 2017.

DISCUSSION

Defendant contends that compensation is barred by the statutes of limitations contained in sections 5400 and 5405. The running of the statute of limitations is an affirmative defense, and the burden of proving it has run, therefore, is on the party opposing the claim. (Lab. Code § 5409; *Kaiser Found. Hosps. Permanente Med. Grp. v. Workers' Comp. Appeals Bd.*, 39 Cal. 3d 57, 68, fn. 8 [50 Cal.Comp.Cases 411].)

Section 5403 provides:

> The failure to give notice under Section 5400, or any defect or inaccuracy in a notice is not a bar to recovery under this division if it is found as a fact in the proceedings for the collection of the claim that the employer was not in fact misled or prejudiced by such failure. (Lab. Code § 5403.)

Accordingly, the burden rests with the defendant to establish the employer was misled or prejudiced by the failure of timely reporting under section 5400. Noting the difficulties in proving prejudice, the California Supreme Court has observed, "[d]ismissals under section 5403 are rare because of the broad constructive notice provisions of section 5402 and the employer's heavy burden of proving prejudice for lack of notice." (*Kaiser Found. Hosps., supra,* 39 Cal. 3d 57, 68.)

Here, defendant has not substantively addressed the issue of whether the employer was in some way misled or prejudiced for want of notice of the claim. Defendant interposes no witness testimony on the issue, marshals no documentary evidence, and offers no specific argument on this point. Defendant has therefore not proven prejudice for lack of notice of any injury prior to June 1, 2017, and has not carried the burden of establishing that compensation is barred under section 5400.

We further observe that "the number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB." (*Western Growers Insurance Company v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227 [58 Cal.Comp.Cases 323].) Here, the parties stipulated to one period: August 17, 2009 to June 1, 2017. While defendant contends that the section 5412 of injury was as early as 2000 or as late as June 9, 2014, defendant does not seek to withdraw from its stipulation that there was one cumulative injury from August 17, 2009 to June 1, 2017 and it did not raise the issue at trial. The WCJ determined that applicant sustained one injury, a cumulative trauma between August 17, 2009 and June 1, 2017. (F&A, Findings of Fact Nos. 1 and 2.) Moreover, the unrebutted reporting of QME Dr. Caligiuri supports this determination. Defendant does not challenge these findings, or assert that there is more than one injury, or that the cumulative trauma period was interrupted at some time prior to 2017. (*See Western Growers*, *supra,* 16 Cal.App.4th 227; *Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd. (Coltharp)* (1973) 35 Cal.App.3d 329 [38 Cal.Comp.Cases 720].) Defendant interposes no witnesses, offers no contrary medical or documentary evidence, and has submitted no legal argument that would contest the claimed period of injurious exposure.

Thus, the only injury identified in these proceedings and supported in the evidentiary record ended on June 1, 2017, at which point applicant was required to provide written notice to her employer of the claimed injury. (Lab. Code § 5400.) Applicant's June 6, 2017 "Accident Reporting and Treatment" form lists the claimed injury, as does the June 7, 2017 DWC-1 claim form. Both documents serve to provide notice to the employer of a claimed injury, satisfying the notice requirement of section 5400. (Applicant's Ex. 11, Accident Reporting and Treatment form, dated June 6, 2017; Joint Ex. 4, DWC-1 Claim Form, dated June 7, 2017.) Accordingly, and because written notice was provided to the employer within 30 days of a claimed injury, defendant has not carried the burden of establishing that compensation is barred under section 5400.

Defendant further contends that compensation is barred by section 5405, because the date of injury as defined in section 5412 was more than one year prior to the commencement of proceedings for collection of benefits. Defendant avers:

> The medical records and the testimony provided by applicant indicate that applicant had disability per Labor Code §5412 from the carpal tunnel injury prior to [October 10, 2017], going back to at least January 9, 2014 when she was provided wrist splints and discussed potential surgery with Dr. Rathbun and arguably back on August 17, 2009 when nerve conduction studies indicated carpal tunnel syndrome. Disability found on either of those dates would indicate that applicant failed to timely file an Application for Adjudication within the one-year statute of limitations per Labor Code §5405. (Petition, at 3:19.)

Generally, proceedings before the Workers' Compensation Appeals Board ("WCAB") are commenced by the filing of an application. (Lab. Code § 5500; Cal. Code Regs., tit. 8, § 10450.) The time limitations for commencing proceedings are set forth in California Labor Code section 5405:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
> (a) The date of injury.
> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

Thus, an applicant must commence proceedings with the WCAB within one year of (1) the date of injury or (2) the expiration of the period covered by the employer's last payment of disability indemnity or (3) the date of the last furnishing by the employer of medical, surgical or hospital treatment. (*J.T. Thorp v. Workers' Comp. Appeals. Bd.* (1984) 153 Cal.App.3d 327 [49 Cal.Comp.Cases 224].)

In cases involving an alleged cumulative trauma injury, the date of injury is governed by Labor Code section 5412, which holds:

> 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. (Lab. Code § 5412.)

The Court of Appeal has defined "disability" per section 5412 as "either compensable temporary disability or permanent disability," noting that "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 [59 Cal. Comp. Cases 579].)

Regarding the "knowledge" component of section 5412, whether an employee knew or should have known his disability was industrially caused is a question of fact. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53].) An employee is not charged with knowledge that his or her disability is job-related without medical advice to that effect. (*Johnson, supra,* at 473; *Newton v. Workers' Co. Appeals Bd.* (1993) 17 Cal. App. 4th 147 [58 Cal.Comp.Cases 395].)

The WCJ determined the section 5412 date of injury to be October 10, 2017. (F&A, Opinion on Decision, p.13.) The WCJ observed that the 'knowledge' requirement of section 5412 was satisfied as early as 2009, when applicant was evaluated by her private physician Dr. Rathbun, for her wrist-related complaints. (*Ibid.*; September 21, 2021 Minutes, at 7:22.) Noting that the 'disability' requirement of section 5412 requires either compensable permanent or temporary disability, the WCJ observed the first compensable wage loss due to the injury as supported in the record was the period of temporary disability following applicant's carpal tunnel release surgery on October 10, 2017. (Ex. 2, records from Neurosurgical Medical Group dated January 5, 2018, p.30.) The concurrence of preexisting knowledge, and the first compensable temporary disability, fixed the section 5412 date of injury as October 10, 2017. (F&A, Opinion on Decision, p.13.)

The gravamen of defendant's argument is that applicant's treatment in 2009 and again in 2014 indicated the existence of permanent disability. (*Rodarte, supra*, 119 Cal.App.4th 998.) Defendant further observes that Dr. Rathbun's June 9, 2014 report indicated applicant was considering surgery for her carpal tunnel syndrome, and that it was "highly unlikely an injured worker would consider surgery if they were not suffering disability as defined by Labor Code §5412 at the time of the evaluation." (Petition at 5:26.)

In evaluating this contention, we are guided by the admonition of the Court of Appeal, that "…the purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her

injury." (*J. T. Thorp v. Workers' Comp. Appeals Bd., supra,* 153 Cal.App.3d 327, 341.) The date of injury requirements of section 5412 ensure that the statute of limitations does not begin to run prior to the *emergence of a disability*, and the accompanying knowledge of its work-relatedness.

Here, applicant did receive treatment for her bilateral hands and wrists on multiple occasions. However, applicant further testified that the pain was "on and off and not enough to warrant surgery." (*Id*. at 11:14.) Applicant did not file a claim for benefits, and there is no record of any time lost from work, permanent disability or permanent work restrictions prior to 2017. In 2009, applicant sought additional medical treatment with Dr. Rathbun, who advised applicant she had carpal tunnel syndrome and prescribed home exercises and nighttime wrist splints. (*Id*. at 7:22.) Applicant also underwent EMG/NCV studies. However, applicant filed no claim for benefits, lost no time from work, and was assigned no permanent disability or permanent work restrictions. Applicant testified that she did not believe the symptoms were "that big of an issue," and that her "complaints went away." (*Id*. at 8:5.) Again, on June 9, 2014, applicant sought medical treatment with Dr. Rathbun for her bilateral wrists, and instituted a treatment plan involving conservative treatment. (Minutes, at 11:18; Ex. G, report of Brent Rathbun, M.D., dated June 9, 2014, p.4.) Applicant was again advised that her carpal tunnel syndrome was work-related. However, applicant testified the pain would come and go, and was a "semi-nonissue," and did not interfere with her work. (Minutes at 12:16.) The WCJ found applicant's testimony to be fully credible, and we accord to the WCJ's determination the great weight to which it is entitled. (Report, at p. 4; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal. 3d 312, 319 [35 Cal. Comp. Cases 500].) The record thus reflects no filing of a claim, no findings of permanent disability, no permanent work restrictions, and no time lost from work.

The court in *Rodarte*, while considering similar issues involving the extent to which medical treatment and work restrictions might indicate the existence of permanent disability, noted that while modified work alone is not a sufficient basis for compensable temporary disability, "a modification may indicate a permanent impairment of earning capacity, especially if the worker is never able to return to the original job duties. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., supra,* 119 Cal. App. 4th 998, 1005.) Here, none of applicant's treatment in 2000, 2009 or in 2014 resulted in permanent work restrictions, compensable time lost, permanent disability, or an inability to return to original job duties.

Applicant filed the first disability claim on June 7, 2017. (Joint Ex. 4, DWC-1 Claim form dated June 7, 2017.) The first evidence in the record of compensable temporary disability, permanent disability, or medical treatment came in the form of time lost from work following carpal tunnel release surgery on October 10, 2017. (Ex. 2, records from Neurosurgical Medical Group dated January 5, 2018, p.30.) The concurrence of compensable disability with knowledge of its industrial causation fixes the section 5412 date of injury as October 10, 2017. Accordingly, we agree with the WCJ that the application for adjudication filed on November 8, 2017 was within one year of the date of injury of October 10, 2017, and was thus timely.

In summary, we find that applicant filed her claim for benefits within 30 days of the last day of the cumulative trauma ending June 1, 2017, the only injury sustained in the evidentiary record. We further note that defendant has not addressed the issue of whether the employer was prejudiced by a dilatory filing, and has therefore not met its evidentiary burden under section 5403. We also conclude that applicant's treatment prior to 2017 was not sufficient to indicate the existence of compensable permanent disability for the purposes of section 5412. Defendant has not carried its burden of establishing that proceedings for the collection of benefits were instituted more than one year from the date of injury as defined by section 5405. We affirm the F&A, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the **DECISION AFTER RECONSIDERATION** of the Workers' Compensation Appeals Board, that the Findings and Award dated September 30, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 15, 2022

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

MARY HESS ELKS
LAW OFFICE OF PHILIP M. COHEN
TROVILLION, INVEISS & DEMAKIS

SAR/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Nature of Petition

Defendant, Sharp HealthCare, has filed a timely, properly verified Petition for Reconsideration, on recognized standard statutory grounds, from the trial court's September 20, 2021 Findings & Award. Applicant has not filed a timely answer to the defendant's petition; however, the statutory time in which to do so has not elapsed. By that decision, the workers compensation Judge (WCJ) found in relevant part that applicant sustained injury arising out of and in the course or employment to bilateral wrists, fingers, hands and carpel tunnel syndrome, defendant timely denied the claim, and that this claim was not barred by the statute of limitations.

Defendant contends the WCJ erred in that (1) the evidence does not justify the findings of fact; and (2) the findings of fact do not support the Award.

Specifically, Defendant argues the WCJ was incorrect in her interpretation of the law and asserts the injury was not reported within the statute of limitations.

The WCJ gives the following details including a statement of facts and a discussion of the law applicable thereto.

Statement of Facts

Applicant, Mary Hess Elks, born March 23, 1955, while employed during the period August 17, 2009 through June 1, 2017, as a registered nurse, occupational group number 311, at San Diego, California, by Sharp HealthCare, alleges she sustained injury arising out of and in the course of employment to her bilateral wrists, fingers, hands, and carpel tunnel syndrome.

On November 9, 2017, applicant through her counsel of record filed an application for adjudication of alleging cumulative trauma arising out of and in the course of employment to her bilateral wrists, fingers, hands and carpel tunnel syndrome.

Defendant denied applicant's claims and asserted the affirmative defenses of AOE/COE and the statute of limitations per Labor Codes §5405 5400. Applicant asserts defendant failed to issue a timely denial and the matter is presumed compensable.

The parties utilized the PQME process. Applicant presented herself to PQME Dr. Caligiuri for examination. On January 23, 2018, Dr. Caligiuri issued a report rendering the opinion applicant

sustained an injury arising out of employment her bilateral wrists, fingers, hands and carpel tunnel syndrome.

The parties proceeded to regular hearing on September 21, 2021. At Trial, the parties raised as issues for adjudication: (1) injury arising out of and in the course of employment AOE/COE, (2) parts of body injured, (3) attorney fees, (4) timely denial of claim and (5) statute of limitations (Labor Code section 5405).

The relevant evidentiary record consisted of medical reports of: PQME Dr. Caligiuri (Applicant Exhibit 1), Dr. Ratbun (Defendant Exhibit G), Dr. McClurg (Joint Exhibits 1 and 2), Dr. Vicky Lynn Young (Joint Exhibit 3), denial letters, accident report (Applicant Exhibit 11) as well as the testimony of the Applicant.

Discussion

The WCJ has carefully considered defendant's contentions, but she does not agree they warrant a different decision on the issues presented. Taking into account applicant's credible testimony and the entire record, the WCJ finds the evidence shows Applicant sustained injury arising out of and in the course or employment to her bilateral wrists, fingers, hands and carpel tunnel syndrome, defendant timely denied the claim, and applicant's claim is not barred by the statute of limitations.

Injury AOE/COE

First, it is well established that the burden of proving injury AOE/COE rests with the employee and must be met by a preponderance of the evidence. (LaTourette v. WCAB, (1998) 63 CCC 253, 255).

Labor Code §3202.5 states:

> "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. 'Preponderance of the evidence' means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of evidence."

Here, the facts alleged by Applicant can clearly be substantiated by the evidence presented to this WCJ. The evidence presented establishes an injury occurred while working for defendant,

Sharp HealthCare. The medical report of the panel QME, Dr. Caligiuri dated January 23, 2018 (Applicant Exhibit 1), indicates industrial causation to her bilateral wrists, fingers, hands, and carpel tunnel syndrome.

Applicant's unrebutted testimony regarding how the alleged injury occurred is consistent throughout the medical reporting as well as at the trial. There is no evidence presented by either testimony or medical reporting indicating that Applicant has not sustained injury arising out of and in the course of employment to her bilateral wrists. Rather, defendant relies upon the affirmative defense of statute of limitations.

In this case, Applicant alleges that during the course and scope of her employment with Sharp HealthCare, she sustained injury to her bilateral wrists, fingers, hands, and carpel tunnel syndrome. Defendant argues applicant did not have an injury arising out of and in the course of employment. In this case, defendant failed to provide any medical evidence to support its argument the injury did not occur during employment. Having had the opportunity to observe the demeanor of the Applicant and to assess her credibility, along with the documentary evidence, the workers' compensation judge (WCJ) concluded applicant met her burden of proof on the causation issue presented. Specifically, great weight was given to the totality of the testimony presented in this case along with a thorough review of the evidence. The WCJ determined Applicant's testimony clearly established industrial causation to injury to her bilateral wrists, fingers, hands, and carpel tunnel syndrome. Therefore, based on the evidence presented at trial including the medical reports and the credible testimony of the applicant, Applicant has met her burden of proof to establish industrial injury to her bilateral wrists, fingers, hands, and carpel tunnel syndrome.

Defendant's Denial was timely per Labor Code section 5402

Applicant asserts defendant untimely denied the claim and therefore, it is presumed compensable under Labor Code section 5402. Based upon the documentary evidence, the WCJ found the defendant issued a timely denial.

California Labor Code section 5402 spells out the employer's responsibility once an employee files a workers compensation claim form. Specifically, the employer has 90 days after presentation of the completed claim form to issue a denial. However, if after 90 days the claims administrator fails to issue a decision, the injury shall be deemed compensable.

That is not what occurred in this case.

In this case, applicant submitted an accident report and a DWC-1 claim form dated June 7, 2017. (See accident report Applicant Exhibit 11 and DWC-1 claim form dated June 7, 2017 Joint Exhibit 4). Defendant issued a denial letter dated June 28, 2017 (See Defendant Exhibit B).

Applicant subsequently filed a second accident report and DWC-1 claim form on October 4, 2017 (Defendant Exhibit H and Defendant Exhibit D). Defendant issued a denial letter October 5, 2017 (Defendant Exhibit A).

Based upon the evidence presented, the employer timely rejected liability within the 90 days of both claim forms being filed.

<u>The Application was filed within the Statutory Period per Labor Code section 5412</u>

The defendant asserts the applicant's claim is bared by the statute of limitations. The statute of limitations is an affirmative defense, and therefore the burden of proof rests with defendant (Labor Code sections 5409, 5705).

In this case, the application for adjudication was filed on November 9, 2017. Petitioner asserts this is beyond the statutory period. Specifically, Petitioner/defendant asserts applicant had knowledge and belief that her injuries were industrially related in 2009 and this is when the statute of limitations period should commence. The WCJ disagrees and concludes that defendant has failed to bear its burden of proof on the affirmative defense of the statute of limitations.

The WCJ discusses below.

It is well established that an applicant has one year to file an application for adjudication from: (a) the date of injury, (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650), (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600)….were furnished (Labor Code section 5405).

In this case, no benefits were paid. Thus, in order to properly analyze the statute of limitations defense, the WCJ must first determine the date of injury. In the instant matter, Applicant filed a cumulative trauma claim. Per Labor Code section, 5405 (a)-(c) the determination of the "date of injury" for a CT claim is governed by Labor Code section 5412. Thus, the WCJ begins the analysis under Labor Code section 5412.

Labor Code section 5412 contains the definition of "date of injury" for a cumulative injury. The date of a cumulative injury is based on the concurrence of two elements: (1) compensable disability…and (2) knowledge of industrial causation…. Under Labor Code section 5412, the term

"disability" means either temporary or permanent disability. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631).

"Compensable disability" involves loss of time from work or compensable temporary disability. (*County of Los Angeles v. Workers' Comp. Appeals Bd. (Gregg)* (1982) 47 Cal.Comp.Cases 1215 (writ denied).) The Board reasoned that its result comported with both case law from the California Supreme Court and the statutory mandate of liberal construction. The Board aptly observed: "Any other conclusion penalizes the employee who through fortitude refuses to permit his condition to keep him from work until it reaches the point where continuing to work becomes impossible." (*Christians v. Cal. Casualty Indemnity Exchange* (1975) VN 38122, 3 Cal. Workers' Comp. Rptr. 114.)

Thus, an "injury" does not occur within the meaning of Labor Code section 5412 until it causes the applicant compensable temporary disability, i.e., lost time from work. This is so even if an applicant knew the injuries were caused by employment and that the symptoms worsened with the continued employment.

In this case, although applicant knew her complaints were the result of work as far back as 2009, mere knowledge is not the standard for the date of injury per Labor Code section 5412. [*Chambers v. WCAB*, 56 CCC, 631,641 (1991).] Rather, the standard is knowledge AND disability. "Disability" (as defined in Labor Code section 5412) is evidence that either there is a compensable "temporary disability" or "permanent disability."

In this case, defendant has failed to prove that applicant filed her claim more than one year after her injury. The evidence indisputably shows that applicant worked at Sharp HealthCare without lost time or wage loss. Applicant missed no work due to her carpel tunnel injury and no temporary disability or permanent disability related to applicant's CT claim was paid. Thus, although applicant had complaints and knowledge as far back as 2009, the first determination of compensable disability contained in the medical record appears to be her first surgery date of October 10, 2017.

Per the analysis above, applicant first had compensable disability on October 10, 2017 (the date of her first surgery). The Application was filed on November 9, 2017, within one year of petitioner's compensable disability. Thus, the application is not barred by the one year statute of limitations.

Recommendation

For the reasons discussed, it is respectfully recommended the Petition for Reconsideration be denied.

Dated: October 28, 2021

WADE D. DICOSMO
WORKERS' COMPENSATION JUDGE