

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **SAMUEL POLANCO,**

5 *Applicant,*

6 **vs.**

7 **WEST COAST DRYWALL AND PAINT,**

8 *Defendant.*

Case No. **ADJ8067791**
(San Bernardino District Office)

**OPINION AND ORDER DENYING
PETITION FOR RECONSIDERATION**

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10 Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ)
11 Findings and Order of March 13, 2014, wherein it was found that the "defendants had a valid post-
12 termination defense pursuant to Labor Code Section 3600(a)(10) and as such the applicant's claim is
13 barred." The WCJ thus ordered that the applicant take nothing by way of his workers' compensation
14 claim. In this matter, the applicant claims that, while employed during a cumulative period ending on
15 June 10, 2011, he sustained industrial injury to his back, head, eye, wrist, hand, right shoulder, right
16 elbow, right knee, feet, heart, and in the form of sleep disorder. By claiming a cumulative injury ending
17 on June 10, 2011, it appears that applicant is claiming that June 10, 2011 was his last date of injurious
18 exposure, not his Labor Code section 5412 date of injury.

19 Applicant contends that the WCJ erred in finding that his claim was barred as a Labor Code
20 section 3600(a)(10) post-termination claim. Applicant argues that the exception to the post termination
21 defense codified at Labor Code section 3600(a)(10)(D), exempting the post-termination defense when
22 "[t]he date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or
23 layoff," applies to this case. We have received an Answer from the defendant¹, and the WCJ has filed a
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26 ¹ In this matter, the parties stipulated that "the employer's workers' compensation carrier was CNA Claims Plus." CNA
27 Claims Plus appears to be the insurer's claims administrator, and not the actual carrier. In the further proceedings, the parties
should identify the actual insurance carrier. (*Coldiron v. Compuware Corp.* (2002) 67 Cal.Comp.Cases 289 [Appeals Board
en banc].)

1 Report and Recommendation on Petition for Reconsideration.

2 We find that applicant established an exception to the post-termination defense because his date
3 of injury, as specified in Labor Code section 5412, was subsequent to the date that applicant was given
4 notice of termination. We therefore grant reconsideration, rescind the Findings and Order of March 13,
5 2014, and return this matter to the trial level to determine whether the applicant established that he
6 sustained industrial injury.

7 Labor Code § 3600(a)(10) states, in pertinent part, that:

8 "Except for psychiatric injuries governed by subdivision (e) of Section
9 3208.3, where the claim for compensation is filed after notice of
10 termination or layoff, including voluntary layoff, and the claim is for an
11 injury occurring prior to the time of notice of termination or layoff, no
12 compensation shall be paid unless the employee demonstrates by a
preponderance of the evidence that one or more of the following
conditions apply:

13 ***

14 (D) The date of injury, as specified in Section 5412, is subsequent to the
date of the notice of termination or layoff."

15 Labor Code section 5412 states that:

16 "The date of injury in cases of occupational diseases or cumulative
17 injuries is that date upon which the employee first suffered disability
18 therefrom and either knew, or in the exercise of reasonable diligence
19 should have known, that such disability was caused by his present or
prior employment."

20 As explained in the case of *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153
21 Cal.App.3d 327, 336 [49 Cal.Comp.Cases 224]:

22 "The term 'disability' as used in section 5412 is, of course, to be given the same meaning as elsewhere in
23 the [Workers' Compensation] Act [citations], i.e., an impairment of bodily functions which results in the
24 impairment of earnings capacity. (*Marsh v. Industrial Acc. Com.* (1933) 217 Cal. 338, 344 [19 I.A.C.
25 159]; see *Associated Indem. Corp. v. Ind. Acc. Com.* (1945) 71 Cal.App.2d 820, 824 [10 Cal.Comp.Cases
26 295]; 2 Hanna, [Cal. Law of Employee Injuries and Workmen's Compensation (2d ed., 1983 rev.)] §
27 13.01, p. 13-2.) Accordingly, where an employee suffers from a cumulative injury or occupational

1 disease, there is a 'date of injury' only at such time as the employee suffers an impairment of bodily
2 functions which results in the impairment of earnings capacity.”

3 “A 'disability' under the Workmen's Compensation Law connotes an inability to work.”
4 (*Herrera v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 257 [34 Cal.Comp.Cases 382].) In
5 *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998 [69
6 Cal.Comp.Cases 579], the Court of Appeal made clear that neither medical treatment nor modified work
7 restrictions without wage loss, in and of themselves, are sufficient to constitute “disability” for purposes
8 of Labor Code section 5412. As explained in *Rodarte*, Labor Code section 5412 requires compensable
9 disability, either temporary or permanent. Permanent disability is not compensable until it is ratable.
10 Except in the case of insidious, progressive diseases, a disability is not ratable until it is permanent and
11 stationary. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56
12 Cal.Comp.Cases 631].)

13 Applicant was terminated on June 10, 2011. However, as admitted by defendant in its Answer,
14 “During the course of employment, the applicant signed timecards every week confirming that he was
15 not suffering from an industrial injury.” Thus, it is uncontested that applicant did not suffer wage loss as
16 a result of his injury, and was thus not temporarily disabled, until after notice of termination.
17 Additionally, the only evidence of permanent disability in the record is the February 2, 2013 report of
18 qualified medical evaluator orthopedist Kambiz Hannani, M.D., who found that the applicant had
19 reached permanent and stationary status. Thus, applicant first sustained disability after his notice of
20 termination.

21 Accordingly, applicant's date of injury pursuant to Labor Code section 5412 was after the
22 June 10, 2011 of notice of termination. Therefore, pursuant to Labor Code section 3600(a)(10)(D), the
23 post-termination defense does not bar applicant's claim. (*Seco Industries, Inc. v. Workers' Comp.*
24 *Appeals Bd. (Brown)* 66 Cal.Comp.Cases 1232, 1233 [writ denied]; *Pizza Pasta Kitchen v. Workers'*
25 *Comp. Appeals Bd. (Francescon)* (1999) 64 Cal.Comp.Cases 813, 814 [writ denied].) We therefore grant
26 reconsideration, rescind the Findings and Order of March 13, 2014, and return this matter to the trial
27 level to determine whether the applicant established that he sustained industrial injury.

1 We note that it is unclear whether applicant is claiming industrial injury to the psyche. Although
2 psyche is not listed as a claimed body part in the stipulations included in the trial's Minutes, the applicant
3 introduced the report of psychiatrist Jason H. Yang, M.D. into evidence, and the issue of the Labor Code
4 section 3208.3(e) post-termination defense was listed as an issue at trial. We note that the exceptions to
5 the post-termination defense for psychiatric injuries differ from the exceptions for physical injuries.
6 (Compare Labor Code § 3208.3, subd. (e)(5) with Labor Code, § 3600, subd. (a)(10)(D).) To the extent
7 that the applicant is raising a claim for injury to psyche, the defendant may raise the post-termination
8 defense codified at Labor Code section 3208.3(e) in the further proceedings. We take no position on this
9 issue.

10 For the foregoing reasons,

11 **IT IS ORDERED** that reconsideration of the Findings and Order of March 13, 2014 is hereby
12 **GRANTED.**

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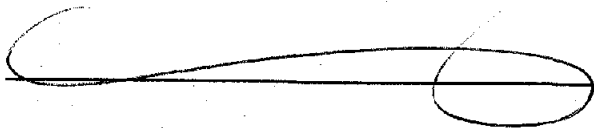
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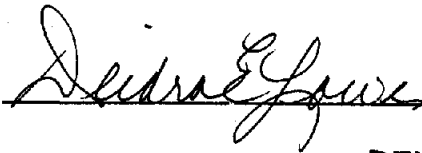
1 IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers'
2 Compensation Appeals Board that the Findings and Order of March 13, 2014 is hereby **RESCINDED**
3 and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with
4 the opinion herein.

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6 **WORKERS' COMPENSATION APPEALS BOARD**

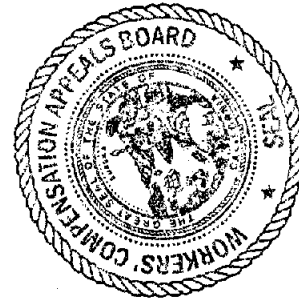
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10 **MARGUERITE SWEENEY**

11 **I CONCUR,**

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14 **DEIDRA E. LOWE**



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18 **RONNIE G. CAPLANE**

19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

20 **MAY 28 2014**

21 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED ON THE**
22 **FOLLOWING PAGE AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL**
23 **ADDRESS RECORD.**

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26 **DW/ebc**

27 **POLANCO, Samuel**

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SAMUEL POLANCO
LOUIS BERMEO
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