

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS
FROM: W. JOSEPH TRUCE
DATE: April 29, 2003
RE: **IMPORTANT DECISION: DETERMINATION OF DATE OF INJURY IN CUMULATIVE TRAUMA INJURIES**

Chuck Maki of our Ventura office has obtained an excellent Opinion and Decision After Reconsideration as to the continuing controversy as to the date of injury in continuing trauma cases.

The Board's Opinion and Decision After Reconsideration in the case of Earl Dowling¹ (enclosed) contains an excellent discussion of the controversy created by the Court of Appeal in the case of Western Growers v. Workers' Compensation Appeals Board (Austin) (1993) 16 Cal. App. 4th 227; 58 CCC 223.

As many of you know, the Court of Appeal in the Western Growers case somewhat muddied the waters in determining the actual date of injury in cumulative trauma cases.

The controversy occurs every time that the applicant files a cumulative trauma case which involves different insurance carriers and different periods of coverage.

The question that arises in these cases is whether or not we are dealing with just one continuing trauma injury or a series of continuing trauma injuries, each ending with a need for medical treatment and/or disability.

The court in Western Growers indicated that a simple need for medical treatment did not necessarily qualify as a **date of injury** of a cumulative trauma case and pursuant to Labor Code Sections 3208.1 and 5412, a need for medical treatment must also be accompanied by "**disability.**"²

In the enclosed decision, the Board acknowledged that there can be a cumulative injury pursuant to Labor Code §3208.1 before there is a "**date of injury**" pursuant to Labor Code §5412.

¹As this is a panel decision of the Appeals Board, it can be cited pursuant to Labor Code §5703.

²Labor Code §3208.1 purports to define cumulative injury as disability or need for medical treatment. Labor Code §5412 (a statute of limitations section) defines the date of injury as the concurrence of disability and the knowledge that the disability is work-related.

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RE: DETERMINATION OF DATE OF INJURY

April 29, 2003

Page 2

In the Earl Dowling case the applicant alleged one long continuing trauma case which encompassed both our client (the Sierracin Corporation) and the State Compensation Insurance Fund. As Sierracin was the last employer, Labor Code §5500.5 technically imposed the liability only on Sierracin, as the imposition of liability in a continuing trauma case only goes back one year.

However, in his Petition for Reconsideration to an adverse Findings and Award by the Trial Judge, Chuck argued that the “**date of injury**” should be found to be during the State Fund period (and not the Sierracin period) as before the applicant was hired by our employer, the applicant already had a need for medical treatment and surgery, and also had to change his work habits such as taking frequent breaks, etc as a result of his injury and this also constituted **disability**.

In reversing the Trial Judge and finding injury only against the State Compensation Insurance Fund, the Board stated in relevant part as follows:

“Consistent with the medical record therefore, and pursuant to Labor Code §3208.1, Labor Code §5412, and Western Growers (supra), we conclude that applicant sustained an industrial cumulative injury ending at the end of applicant’s period of employment by Norjen...” (Norjen is the State Fund insured).

WJT:dab
Attach - Dowling case

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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. VEN 117021

EARL DOWLING,

Applicant,

vs.

NORJEN, INC., STATE COMPENSATION
INSURANCE FUND,

Defendant(s).

OPINION AND
DECISION AFTER
RECONSIDERATION

On July 2, 2002, we granted reconsideration in order to further study the issues raised by defendant Sierracin Corporation's Petition for Reconsideration. We have completed our study.

One or more of the original panelists is no longer with the Appeals Board. Accordingly, a reassignment to a new panel was required.

The following is our Decision After Reconsideration.

I.

Defendant Sierracin Corporation (hereinafter, "Sierracin") sought reconsideration of the Findings and Award of April 11, 2002, as amended by the Order Amending Findings and Award of April 19, 2002, wherein the trial-level workers' compensation administrative law judge (WCJ) found, inter alia, that applicant had sustained cumulative industrial injury to his bilateral wrists and hands while employed as a tool maker (1) by Norjen, Inc. ("Norjen"), insured by State Compensation Insurance Fund (SCIF), during the period from July 1, 1996 to April 2, 1999, and (2) by Sierracin, permissibly self-insured, during the period from April 12, 1999, to December

1 31, 1999, resulting in permanent disability of 48%.

2 In its Petition for Reconsideration, Sierracin contended that the WCJ erred in determining
3 that applicant's "date of injury" pursuant to Labor Code section 5412 and *Western Growers v.*
4 *Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227 [58 Cal.Comp.Cases 323]
5 was January 4, 2000, in that applicant had sought medical treatment, had been advised to have
6 surgery, and had been advised that his condition was work-related, while he was employed by
7 Norjen. In *Western Growers, supra*, the Court of Appeal held that, pursuant to Labor Code
8 section 5500.5, the insurer on the "date of injury" is liable for all periods of disability caused by
9 that injury, and that the trial-level WCJ had erred in assigning partial liability to the employer's
10 carrier at the time of the applicant's second period of disability.
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12 We are also in receipt of co-defendant Norjen/SCIF's Answer to Petition for
13 Reconsideration, filed with the Workers' Compensation Appeals Board (WCAB) on May 15,
14 2002.
15

16 II.

17 In his report on reconsideration ("report"), the WCJ recommended that we affirm his
18 trial-level decision.

19 After a review of the record, we must disagree.

20 III.

21 Applicant's compensation claim was dated November 8, 1999. His application for
22 adjudication of claim against both Sierracin and Norjen, filed on or about January 7, 2000,
23 alleges that he sustained industrial injury to his hands and wrists (carpel tunnel syndrome) while
24 employed as a tool maker from 1996 to 1999.
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26 In his Opinion on Decision of April 11, 2002, the WCJ explained why he found
27 cumulative injury with a date of injury of January 4, 2000:

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“Based upon applicant’s testimony and a review of the entire medical record, it is found that applicant sustained injury to his bilateral wrists and hands, arising out of and occurring in the course of employment during the period of 4-12-1999 to 12-31-1999, by Sierracin Corporation, and for the period of 7-01-1996 to 4-02-1999, by Norjen, Incorporated.

“Based on the holding in *Western Growers*, the concurrence of disability and knowledge would have been 1-04-2000, the date applicant first suffered time lost from work.” (Opinion on Decision, April 11, 2002. p. 1; emphasis added.)

IV.

Hearing in this matter commenced on September 29, 2000. Applicant testified that:

“From July 1996 to April 1999, he was employed by Norjen as a tool builder. His job involved making form mold for aircraft composite structures. His job exclusively involved handwork, although he also used hand tools. He would also use a press to remove excess liquid and air from the parts he was building. At Norjen he worked eight hours per day, five days per week.

“In April 1999, he started working at Sierracin. *His job at Sierracin was essentially the same as at Norjen*, except that he was making smaller-sized parts. Making smaller-sized parts made no difference in either the way or the amount of time he would use his hands.

“While working at Norjen in 1996, he did have problems of pain and numbness in both hands and wrists. He saw Dr. Beddoe, who prescribed Motrin. *He lost no time from work at Norjen, but his symptoms did become progressively worse, as the numbness would become more frequent, last longer, and the pain would wake him at night in 1997.* He did not see a doctor regularly. From July 1st, 1996, to April the 2nd, 1999, he lost no time from work due to either his hands or wrists and continued doing his regular job. *From July 1996 to April 1999, although he did not see a doctor regularly, he did see Drs. Miller, Borelli, and Prescott, who recommended surgery to both wrists.* He did not have surgery before he left Norjen.

“While working at Sierracin between April 12th, 1999, and January 4th, 2000, the symptoms in his hands and wrists did get worse, as they would wake him at night, since the Motrin did not take care of the pain. The numbness in both hands and wrists did get worse, to the point he could not drive more than five minutes with either hand.

“On January 4th, 2000, Dr. Prescott did the first surgery, with the second being February 29th, 2000. He lost two weeks from work following each surgery. Prior to January 4th, 2000, he lost no time from work due to either hand or either

1 wrist. Prior to his surgeries, the only treatment had been the Motrin prescribed by
2 Dr. Beddoe. While working at Norjen, Dr. Miller did perform an EMG.

3 *“Even though surgeries were recommended, he did not have his*
4 *surgeries while working at Norjen, due to his fear of doctors, as well as the fact*
5 *that he was looking for other work.* He did not have his surgeries after he started
6 work at Sierracin, until he could no longer go on, as he was a probationary
7 employee.

8 “He is still employed at Sierracin, having returned to work following his
9 surgeries on March 16th, 2000. His only treatment at present is Motrin three
10 times per day, as prescribed by Dr. Beddoe. On a day-to-day basis at work, he
11 notes a loss of strength and a dexterity in both hands. He will note occasional
12 pain in the webbing between the thumb and first finger on both hands, but the
13 Motrin does help. The last doctor he saw was Dr. Miller in mid-September 2000.

14 “CROSS-EXAMINATION BY MR. LAKE:

15 “He left Norjen in April 1999, starting to work at Sierracin one or two
16 weeks later. During the time he was off between jobs, he noted no change in his
17 physical condition.

18 “While working at Sierracin, his complaints of pain and numbness in both
19 wrists and both hands did increase. At Sierracin, he did work eight to ten hours
20 per day, five days per week, although his duties would have been the same as at
21 Norjen. He was paid a salary at Norjen.

22 “While working at Norjen, he did not alter his work duties due to the pain
23 in his hands and wrists.

24 *“He still has the same symptoms he was having on his date of hire at*
25 *Sierracin on April 12th, 1999.* He is still employed at Sierracin and his
26 complaints are a loss of grip with pain and numbness in both hands, which he will
27 note at night, if he uses his hands too much in the day.

CROSS-EXAMINATION BY MR. MAKI:

“He could recall his deposition being taken in Mr. Maki’s office following
his first surgery in January 2000. He was not represented by counsel at the time of
his deposition.

“He did testify in his deposition that his work at Norjen was more
strenuous than at Sierracin and that he did have to stop and rest his hands from
time to time. While working at Norjen, Dr. Borelli, Dr. Miller, and Dr. Prescott
all recommended surgery. The surgeries performed in January and February of
2000 were those surgeries as recommended by Dr. Prescott a year earlier.

1 "He is presently employed at Sierracin and he is able to repetitively and
2 forcefully grip and grasp as required by his job. After performing his work-related
duties, he will note pain in his wrists at night.

3 "When he saw Drs. Borelli and Prescott in 1998, they indicated his
4 symptoms were due to the type of work he was doing. He did not report any
5 injury while working at Norjen, as he wanted to treat with his family doctor.
6 While working at Sierracin, he did report his injury after he had made a request
7 for a leave of absence.

8 "He did not have surgery in early 1999, even though recommended by
9 the doctors, as he was looking for another job and did not wish to do so wearing a
10 cast or after having had surgery.

11 REXCROSS-EXAMINATION BY MR. LAKE:

12 "From the date of his hire at Sierracin up to the time of his surgery, his
13 symptoms did increase.

14 "He filed no Workers' Compensation claim while working at Norjen. Due
15 to pain in his hands, he would take breaks while working at Norjen. He also took
16 breaks while working at Sierracin due to the increase in his symptoms.

17 "He still has symptoms following his surgeries, but they have not
18 increased since September 1st, 2000, while working at Sierracin. His pains now
19 will not wake him at night, as they did while working at Sierracin." (Minutes of
20 Hearing, September 29, 2000. pp. 5-7; emphasis added.)

21 V.

22 Labor Code section 5500.5 provides in pertinent part that liability for cumulative injury is
23 limited to those employers who employed the insured worker for a period of [one year]
24 immediately preceding either the date of injury, as defined pursuant to Labor Code section 5412,
25 or the last date on which the employee was employed in an occupation exposing him or her to the
26 hazards of the occupational disease or cumulative injury, whichever occurs first. Labor Code
27 section 5412, in turn, provides that the date of injury in cumulative injury cases is the date on
which the employee first suffered *disability and* either knew or should have known that the
disability was caused by his or her present or prior employment.

By contrast, Labor Code section 3208.1 defines a cumulative injury as an injury
"occurring as repetitive mentally or physically traumatic activity extending over a period of time,

1 the combined effect of which causes *any disability or need for medical treatment*. The date of
2 the cumulative injury shall be the date determined under [Labor Code] Section 5412.”
3 (Emphasis added.)

4 Although section 3208.1 incorporates section 5412 by reference, these two Labor Code
5 sections do not provide identical standards. The section 3208.1 definition of cumulative injury is
6 disability *or* the need for medical treatment. Section 5412 (a statute of limitations) is invoked by
7 disability *and* knowledge that the disability is work-related. Thus, there can be a “cumulative
8 injury” (§3208.1) before there is a “date of injury” (§5412).

9 In that regard, we also note that section 5412 is contained in Chapter 2--Limitation of
10 Proceedings, and that, pursuant to Labor Code section 5409, also contained in Chapter 2, “[t]he
11 running of the period of limitations prescribed in [Chapter 2] is an affirmative defense and
12 operates to bar the remedy and not to extinguish the right of the employee.”

13 VI.

14 Labor Code sections 3208.1 and 5412 are additionally problematic because the Labor
15 Code does not define the term “disability” in the context of workers’ compensation.

16 The Court of Appeal determined in *Perry v. Workers’ Comp. Appeals Bd.* (1977) 66
17 Cal. App. 3d 887 [42 Cal. Comp. Cases 126, 128] that, pursuant to workers’ compensation case
18 law, disability is (1) actual incapacity to perform the tasks usually encountered in one’s
19 employment, and the wage loss resulting therefrom, and (2) physical impairment of the body. In
20 *P.M. Assoc. v Workers’ Comp. Appeals Bd. (Wagner)* (2000) 65 Cal. Comp. Cases 878 (writ
21 den.), mere symptoms reported to the worker’s doctor and employer did not constitute
22 “disability” pursuant to Labor Code section 5412.

23 VII.

24 The Labor Code section 3208.1 definition of cumulative injury also contemplates that a
25 “need for medical treatment” may occur in the absence of concurrent temporary disability.

26 In *Zenith Ins. Co. v. Workers’ Comp. Appeals Bd. (Impastato)* (1998) 63
27 Cal.Comp.Cases 495 (writ. den.), the WCAB found that the date of a workers’ cumulative

1 industrial injury, pursuant to Labor Code sections 3208.1 and 5412, was July 19, 1992, through
2 July 19, 1993. in that (a) applicant had first received medical treatment for her injuries in July
3 1993. and (b) applicant's earning capacity was impaired beginning on July 19, 1993. because her
4 bodily functions were impaired on that date by the requirement that she wear bilateral wrist
5 splints, at an ergonomically modified work station.

6 In *Allianz Ins. Group v. Workers' Comp. Appeals Bd. (Hinojosa)* (1999) 64
7 Cal.Comp.Cases 83 (writ den.), the WCAB held that the applicant's period of cumulative injury
8 ended on the date when applicant had impairment of earning capacity within the meaning of
9 Labor Code section 5412, when on that date applicant sought medical treatment (including
10 splints prescribed for use while working) and knew that her disability from bilateral carpal tunnel
11 syndrome was caused by her employment, even though she continued to perform her usual and
12 customary job duties.

13 In *American Bridge v. Workers' Comp. Appeals Bd. (Lee)* (1995) 60 Cal.Comp.Cases
14 869 (writ den.), the WCJ properly found that applicant's "date of injury" under Labor Code
15 sections 3208.1 and 5412 was the date on which the applicant first needed medical treatment for
16 his cumulative injury, although applicant did not suffer temporary disability until some time
17 thereafter. (But see also *Rasmussen v. Workers' Comp. Appeals Bd. [Gates]* [1999] 64 Cal.
18 Comp. Cases 1395 [writ den.])

19 VIII.

20 In the present matter, the trial-level WCJ concluded that, pursuant to Labor Code section
21 5412, there must be actual time lost from work (which he equated with "disability") in order to
22 find a "date of injury." Thus, he did not find a "date of injury" until January 4, 2000.

23 We conclude, however, that applicant's "date of injury" was March 1999.

24 As set forth above, applicant testified that he experienced painful symptoms while
25 employed by Norjen, that he received medical treatment/advice regarding those symptoms.
26 beginning with the Motrin prescribed by Dr. Randy Beddoe, and that he was forced by his
27 condition to take breaks while working due to the pain in his hands. Applicant further testified.

1 however, that he lost no time from work by reason of these symptoms. (See Section IV, *supra*.)

2 On January 5, 1999, Dr. Lawrence Borelli, an orthopedist to whom applicant had been
3 referred by his regular physician, Dr. Beddoc, reported that applicant had a five-year history of
4 numbness in both arms, worse over the last year, and that applicant had experienced episodes of
5 dropping. Applicant had a nerve conduction study and an EMG. Dr. Borelli found, inter alia,
6 moderate to severe bilateral carpal tunnel syndrome. *He recommended wrist splints and steroid*
7 *injections. Dr. Borelli also reported that he had informed applicant that his injury was work-*
8 *related*, which is consistent with applicant's testimony (see Section IV, *supra*). (Report of
9 Lawrence Borelli, M.D., January 5, 1999 [Applicant's Exhibit 1], pp. 1-2.)

10 Thereafter, applicant saw Dr. Alex Prescott for a second opinion. Dr. Prescott made
11 finding similar to those of Dr. Borelli, and he "*instructed*" applicant to obtain wrist splints. He
12 also reported that he discussed the "treatment options" with the applicant. This statement is
13 consistent with applicant's testimony that his doctors had advised surgery prior to his leaving his
14 employment with Norjen (see Section IV, *supra*). (Report of Alex Prescott, M.D., March 18,
15 1999 [Applicant's Exhibit 1], p. 1.)

16 These medical reports, and the problems and procedures they describe, preceded the
17 beginning of applicant's employment with Sierracin in April 1999.

18 These reports are also consistent with the later (December 2, 1999) report of Dr.
19 Benjamin E. Lesin:

20 "Mr. Dowling's present work activities have not increased his disability or his
21 need for surgery.

22 "Mr. Dowling has had bilateral carpal tunnel syndrome for several years, which
23 has been documented with electrodiagnostic studies performed December 9, 1998.
24 He began working for Sierracin in approximately April of 1999; thus, clearly, he
25 had significant carpal tunnel syndrome before he began his employment at
26 Sierracin. *Furthermore, he has required surgery before his employment at*
27 *Sierracin*, which he should undergo under the insurance coverage for NORJEN,
Inc., where he had worked for three years before returning to work at Sierracin
Corporation. Causation is clearly the responsibility of NORJEN, Inc., and there is
no basis for apportionment. There is no evidence of any underlying condition."
(Report of Benjamin E. Lesin, M.D., December 2, 1999, pp. 7-8.)

1 Thus, the record reflects that, by March 1999, applicant had suffered disability (Lab.
2 Code §§3208.1, 5412), in that he had been diagnosed with carpal tunnel syndrome, had been
3 instructed to wear splints, and, although he did not take time off from work, he had been forced
4 to stop and rest his hands from time to time while working. (*Allianz [Hinojosa], supra;*
5 *American Bridge, supra.*) The record further reflects that, by March 1999, applicant had a need
6 for medical treatment (Lab. Code §3208.1) for his disability, in that non-steroidal anti-
7 inflammatory drugs had been prescribed, and splints, steroid injections, and surgery had been
8 recommended. By March 1999, applicant also had knowledge that his disability was work-
9 related (Lab. Code §5412), in that he had been informed by Dr. Borelli that this disability was
10 caused by his employment.

11 Thus, the requirements of both Labor Code section 3208.1 and Labor Code section 5412
12 had been met by March 1999, applicant's last month of employment with Norjen.

13 Consistent with the medical record, therefore, and pursuant to Labor Code section
14 3208.1, Labor Code section 5412, and *Western Growers, supra*, we conclude that applicant
15 sustained an industrial cumulative injury ending at the end of applicant's period of employment
16 by Norjen.

17 Accordingly, as our Decision After Reconsideration, we will find that applicant sustained
18 cumulative trauma through March 31, 1999, and return the matter to the trial level for all further
19 proceedings and decisions.

20 For the foregoing reasons,

21 **IT IS HEREBY ORDERED**, as our **DECISION AFTER RECONSIDERATION**, that
22 the Findings and Award of April 11, 2002, and the Order Amending Findings and Award of
23 April 19, 2002, be, and the same hereby are, **RESCINDED**, and that the following decision be
24 **ENTERED** in its place:

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FINDINGS AND AWARD

- 1. Applicant Earl Dowling, born February 8, 1948, sustained cumulative industrial injury to his bilateral wrists and hands while employed as a tool maker during the cumulative period from July 1, 1996, to March 31, 1999.
- 2. All other issues are deferred, and jurisdiction is reserved.

IT IS FURTHER ORDERED that this matter be RETURNED to the trial level for all further proceedings and decisions regarding the remaining issues by the trial-level workers' compensation administrative law judge.

WORKERS' COMPENSATION APPEALS BOARD

[Handwritten signature of William K. O'Brien]

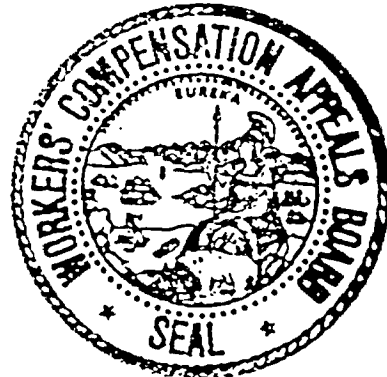
WILLIAM K. O'BRIEN

I CONCUR.

[Handwritten signature of James C. Cuneo]

JAMES C. CUNEO

NOT PARTICIPATING
NEIL P. SULLIVAN DEPUTY



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 26 2003

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD INCLUDING LIEN CLAIMANTS.

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