Similarly, in *Dickow v. Workmen's Comp. Appeals Bd.* (1973) 34 Cal.App.3d 762 [38 Cal.Comp.Cases 664] (*Dickow*), applicant filed an application for workers' compensation benefits on October 21, 1960 for injury alleged from 1951 to 1954. Applicant alleged exposure to dust and fumes while he worked as a service mechanic. Applicant was found to be permanently and totally disabled on October 10, 1960, but the Workers' Compensation Appeals Board (WCAB) applied benefit rates available in 1954 based on applicant's last date of injurious exposure, rather than those available in 1960. The Court in *Dickow* noted that when applicant left his employment with defendant in 1954, he was not aware of any medical problems. (*Id*. at p. 764.) However, he developed shortness of breath in 1959. On October 10, 1960, applicant was examined by a physician who first "diagnosed petitioner as being totally and permanently disabled by virtue of a disease in his lungs." (*Ibid.*) In reversing the WCAB, the Court of Appeal noted that applicant, "became disabled in 1960 and not in 1954," and further noted that if applicant "had filed a claim for injury to his lungs in 1954 he would not have been awarded any indemnity because he was not disabled at that time." (*Id.* at p. 764.) Once again, the development of applicant's disability in 1959 and 1960 coincided with applicant's receipt of medical advice as to the work-relatedness of his condition in 1960. It was not until applicant had both disability and knowledge of its industrial causation that he filed a claim for workers' compensation benefits, for which benefits were available at the rates then in effect.

Defendant cites to *Van Voorhis v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 81 [39 Cal.Comp.Cases 137] (*Van Voorhis*), for the proposition that "compensation is measured by the applicant's earning capacity at the time he incurred his compensable disability." (Petition, at p. 14:12.) In *Van Voorhis*, applicant filed an application seeking benefits resulting from hearing loss sustained from 1937-1963, but only discovered to be industrially related in 1971. The WCAB awarded calculated applicant's wages based on the date of injury as defined by section 5412, rather than applicant's wages at the "time of the injury" as set forth in the wage calculation section of 4453 as it then existed. The Appeals Board's decision had the net effect of reducing indemnity paid from maximum PD rates to minimum PD rates, and significantly reducing the award of indemnity. The Court of Appeal annulled and remanded, observing that section 4453 requires earnings be taken at the time of injury, not the "date of injury," and that "the compensation must be measured by the applicant's earning capacity as it existed at the time he incurred his compensable disability." (*Van Voorhis, supra*, at p. 87). Defendant relies on *Van Voorhis* for the

proposition that, "once the compensable disability occurs, the substantive rights of the employee or those claiming under him for the disability cannot be reduced or enhanced." (Petition at p. 15:1.) However, we have previously noted that the holding in *Van Voorhis* concerned the calculation of applicant's wages, rather than application of disability rates. (See *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Hosey)* (2017) 82 Cal.Comp.Cases 414 [2017 Cal. Wrk. Comp. LEXIS 25].) Moreover, the holding in *Van Voorhis* was premised on former section 4453, which calculated weekly wages based on when compensable disability occurred, or "at the time of the injury." (*Van Voorhis, supra*, at pp. 83-89.) However, the legislature subsequently amended section 4453(d), to require that benefits be calculated "according to the limits in this section in effect on the date of injury," rather than at the "time of the injury." (Lab. Code, § 4453(d); see *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 446-447 [76 Cal.Comp.Cases 701].) Accordingly, we are not persuaded that *Van Voorhis* requires that indemnity rates be fixed as of the first date of compensable disability.

In contrast, *Chevron U.S.A. v. Workers' Comp. Appeals Bd. (Steele)* (1990) 219 Cal.App.3d 1265, 1269-1271 [55 Cal.Comp.Cases 107] (*Steele*) concluded that the concurrence of knowledge and disability under section 5412 sets the statutory rate of indemnity benefits. In *Steele,* applicant sustained injury in the form of asbestosis, for which an award issued on September 28, 1976. However, on August 12, 1987, applicant was diagnosed with mesothelioma, and thereafter filed a claim for additional benefits. The WCJ determined that the mesothelioma was a separate disease with a separate date of injury, and awarded benefits at the rates available in 1987, despite applicant not having worked for the employer since September 15, 1975. The decision was affirmed by the WCAB and, and the employer petitioned for a writ of review with the Court of Appeal. (*Id*. at p. 1268-9.) The Court analyzed the decisions in *Gonzalez, supra*, *Dickow, supra*, and *Van Voorhis, supra*, and concluded:

> After review of the above discussed authorities, it is irrefutable that the "date of injury" for determining the relevant statute of limitations, as well as the statutory rate of indemnity benefits, in latent occupational disease cases, is the date of concurrence of disability and knowledge. Thus, we are left to determine whether one period of exposure to a harmful substance, such as asbestos, can result in more than one "injury" or "disease" and, therefore, more than one date of injury under section 5412. The law is express that there can be no compensable injury until there is disability. (§ 5412; *Argonaut Mining Co. v. Ind. Acc. Com., supra*, 104 Cal.App.2d at

> p. 31.) The fact of injury (exposure) and the date of injury (disability), by definition, are not equivalent in cases involving the latent effects of an occupational disease. (See §§ 5411, 5412; 2 Hanna, Cal. Law of Employee Injuries and Workmen's Comp. (2d rev. ed. 1990) § 18.03[6], pp. 18-21; cf. *J.T. Thorp, Inc. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 327, 343-344 [200 Cal.Rptr. 219].)
>
> (*Steele, supra*, at 1271.)

Reasoning that the fact of the injury (i.e. injurious exposure) under certain circumstances may result in more than one date of injury, the Court of Appeal upheld the WCJs determination that applicant had sustained two distinct injuries, with benefits payable at the appropriate rates for each date of injury under section 5412. (*Id.* at p. 1271; see also *General Dynamics Corp. v. Workers' Comp. Appeals Bd. (Anderson)* (1999) 71 Cal.App.4th 624 [64 Cal.Comp.Cases 515].) While we acknowledge defendant's argument that *Steele* fixes indemnity rates to the date of onset of disability, we find the argument unpersuasive in light of the unambiguous language of *Steele* which sets the *concurrence* of knowledge and disability under section 5412 as the appropriate date for determining benefit rates. (Defendant's Petition, at p. 16:10; *Steele, supra,* at p. 1271.)

VII.

In summary, we have previously provided notice of intention to affirm our June 12, 2018 Opinion and Order Granting Petitions for Reconsideration and Decision after Reconsideration except to amend the March 20, 2018 Findings and Award, to find that the issue of applicant's Permanent and Stationary date is deferred (Finding of Fact No. 5); that the issues of permanent disability, apportionment, and attorney's fees are deferred (Findings of Fact Nos. 6, 7, 15); and that the issue of the applicable rating schedule is deferred (Finding of Fact No. 10). We have further provided notice of our intention to rescind the WCJ's April 12, 2019 Findings and Award, and substitute a new Findings and Award reflecting that applicant's date of injury was March 20, 2014 (Findings of Fact No. 1); that applicant's disability must be rated using the AMA Guides, pursuant to section 4660.1 (Finding of Fact No. 2); that applicant's Permanent and Stationary date is March 20, 2014 (Finding of Fact No. 5); and that the issues of permanent disability, COLA adjustment, and attorney fees are deferred (Findings of Fact Nos. 6 & 7). We continue to exercise our original jurisdiction because there has been no prior final award of compensation. We further conclude that

the evidentiary record supports a finding that the permanent and stationary date is March 20, 2014, that the date of injury is March 20, 2014, and that the 2005 PDRS is applicable to the rating of disability in this matter. We also conclude that the date of injury pursuant to section 5412 will set the appropriate indemnity rates for applicant's injury.

Upon return of this matter to the trial level, the WCJ may wish to conduct a conference wherein the parties are encouraged to seek amicable resolution of their differences and to institute a discovery plan. (Cal. Code Regs., tit. 8, § 10758.).

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that that the Opinion and Order Granting Petitions for Reconsideration and Decision after Reconsideration issued by the Workers' Compensation Appeals Board on June 12, 2018 is **AFFIRMED** except that it is **AMENDED** as follows:

> IT IS ORDERED that the petitions of applicant and of defendant North River Insurance Company for reconsideration of the March 20, 2018 Findings And Award And Orders of the workers' compensation administrative law judge are GRANTED.
>
> IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 20, 2018 Findings And Award And Orders of the workers' compensation administrative law judge is RESCINDED and the following is SUBSTITUTED therefor:

FINDINGS OF FACT

1. Craig Penrose born [], was employed as a professional athlete, during the period April 8, 1976 through potentially February, 1985 by the following teams with the following coverage: From April 8, 1976 to October 10, 1977 by the Denver Broncos (April 8, 1976 to October 10, 1977 insured by Travelers; and October 11, 1977 to February 1, 1980 Broncos PSI), by the New York Jets from November 1, 1982 to May 25, 1983 (insured by Armour Risk Management, formerly One Beacon), by the Arizona Wranglers from November 1, 1982 to May 25, 1983 (insurance company unknown for period November 1982 to February 1, 1983; thereafter, from February 1, 1983 to February 1, 1984 by North River Insurance Company), by the Denver Gold from May 26, 1983 to February 1, 1985 (insurance carrier North River Insurance from May 26, 1983 to February 1, 1984 and Home insurance in liquidation from February 1, 1984 to February 1, 1985).
2. Based on applicant's credible testimony at trial that he signed two of his contracts in California utilizing a California agent and following a review of the record, the Court finds that she does have subject matter jurisdiction over this case for the entire cumulative trauma period pled.
3. Based on applicant's testimony at trial, the Court finds that applicant did enter into an employment contract with the Wranglers in December 1982.

4. Based on the medical opinion of Dr. Einbund, the Court finds injury to the neck, back, upper and lower extremities as well as the head. Based on the medical opinion of Dr. Nudleman, the Court finds applicant also developed a sleep disorder on an industrial basis.
5. The issue of when applicant became Permanent & Stationary is deferred.
6. The issue of permanent disability is deferred.
7. The issue of apportionment is deferred.
8. Based on the medical opinion of Dr. Einbund and Dr. Nudleman, the Court finds there is a need for future medical care to cure or relieve the effects of the industrial injury.
9. The Court orders issues of liability for self-procured medical treatment and liens deferred and off-calendar.
10. The issue of the applicable permanent disability rating schedule is deferred.
11. The Court finds that applicant's right to file a claim is not barred by the Statute of Limitations.
12. Based on applicant's uncontroverted testimony that his last game was in May 1984, the Court finds the liability period for the cumulative trauma injury under Labor Code section 5500.5 to be from May, 1983 to May 1984. The issue of the date of injury under Labor Code section 5412 is deferred.
13. In regards to Labor Code Sections 3600.5(a) and (b), this issue becomes moot insofar as the applicant signed his contracts for the Denver Broncos and the Arizona Wranglers in California.
14. In regards to Insurance Code Sections 1063.1(c)(1)-(12) and 1063.2, the Court finds that per Insurance Code Section 1063.1 that CIGA is dismissed as a party defendant due to the "other insurance" during the cumulative trauma period of injury.
15. The issue of attorney's fees is deferred.

ORDERS

IT IS ORDERED that the issue of liability for self-procured medical treatment and liens is deferred and off-calendar.

IT IS FURTHER ORDERED that CIGA be dismissed with prejudice.