

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

**RAYMOND PENROSE, *Applicant***

**vs.**

**DENVER GOLD, NORTH RIVER INSURANCE COMPANY, ADMINISTERED BY  
CRUM AND FORSTER; NEW YORK JETS, ARMOUR RISK MANAGEMENT  
(C/O ONE BEACON); DENVER GOLD, CALIFORNIA INSURANCE GUARANTEE  
ASSOCIATION FOR HOME INSURANCE, IN LIQUIDATION; DENVER BRONCOS,  
TRAVELERS INSURANCE; DENVER BRONCOS, SELF-INSURED, *Defendants***

**Adjudication Number: ADJ7912629  
Santa Ana District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

On January 20, 2023, we issued a Notice of Intention (NIT) to amend our June 12, 2018 Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration to defer the issues of the permanent and stationary date, permanent disability, apportionment, the correct rating schedule, and attorney's fees. We further provided notice of our intention to rescind the April 12, 2019 Findings and Award (F&A), and to substitute Findings of Fact that (1) the date of injury pursuant to Labor Code section 5412 was March 20, 2014; (2) based on the date of injury under section 5412, section 4660.1 requires that applicant's impairment be assessed under the AMA Guides, 5th Edition, and the impairment rated pursuant to the 2005 Permanent Disability Rating Schedule (PDRS); (3) applicant's earnings warranted the maximum 2014 permanent disability indemnity rates; (4) applicant would not be entitled to the 15 percent increase; (5) applicant was permanent and stationary on March 20, 2014; (6) deferring the issues of permanent disability and the COLA adjustment pursuant to Labor Code section 4659(c); (7) deferring the issue of attorney fees. We received timely responses to the NIT from both applicant and defendant. Having considered those responses, and having completed our review of the record, we now issue our Decision After Reconsideration.

## **BACKGROUND**

We adopt and incorporate the Background discussion from our January 20, 2023 NIT. Briefly, the workers' compensation administrative law judge (WCJ) issued an initial decision in this matter on March 20, 2018, finding that applicant, while employed as a professional athlete from April 8, 1976 to February 1, 1985, sustained industrial injury to his neck, back, upper extremities, lower extremities, head, and in the form of a sleep disorder. The WCJ determined that compensation was not barred by the running of the statute of limitations; that applicant became permanent and stationary on December 31, 1986; and that applicant sustained 83.25 percent disability as rated under the 1997 Permanent Disability Rating Schedule (PDRS).

We granted defendant's Petition for Reconsideration on June 12, 2018, and affirmed the WCJ's findings regarding the statute of limitations, the permanent and stationary date, and permanent disability as rated under the 1997 PDRS. We returned the matter to the trial level for further decision on the issue of the date of injury pursuant to Labor Code section 5412, the commencement date of COLA adjustments under Labor Code section 4659(c), and attorney fees.

The WCJ issued Findings and Award (F&A) on April 12, 2019, determining in relevant part that applicant's Labor Code section 5412 date of injury ended in 2014, that applicant was entitled to permanent disability at 2014 rates, and that the cost of living adjustment of Labor Code section 4659(c) applied commencing January 1, 2004, with a concomitant award of permanent disability and adjusted attorney fees.

Defendant North River Insurance Company (defendant) seeks reconsideration of the April 12, 2019 F&A, contending that the section 5412 date of injury is in 2011; that the indemnity rates applicable when applicant first sustained compensability disability are appropriate, rather than the rates as of the 5412 date of injury; that the cost of living adjustment (COLA) benefits of section 4659(c) are inapplicable; and that the attorney fees were calculated in error. (Petition for Reconsideration (Petition), May 6, 2019, at p. 2.)

On January 20, 2023, following a complete review of the record, we served the parties with notice of our intention to amend our prior decisions. The NIT initially noted our ongoing original jurisdiction in this matter, and concluded that it was error to affirm the permanent and stationary date, and that applicant's injury was subject to the 2005 Permanent Disability Rating Schedule (PDRS). We provided notice of our intention to amend our June 12, 2018 Opinion and Order Granting Petitions for Reconsideration and Decision after Reconsideration to rescind and

substitute a new March 20, 2018 Findings and Award deferring the issues of applicant's Permanent and Stationary date (Findings of Fact No. 5), permanent disability (Findings of Fact No. 6), apportionment (Findings of Fact No. 7), and attorney fees (Findings of Fact No. 15), and further deferring the issue of the applicable rating schedule (Findings of Fact No. 10).

We further provided notice of our intention to rescind the WCJ's April 12, 2019 Findings and Award, and substitute a new Findings and Award in order to reflect that applicant's date of injury was March 20, 2014 (Finding 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).

Pursuant to the issuance of the NIT, we also provided the parties with the opportunity to respond. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].) On February 9, 2023, defendant filed its Response to Notice of Intent to Submit for Decision by WCAB (Defendant's Response), averring the medical-legal dispute resolution procedures set forth in section 4062.2 apply herein, and requesting the issuance of QME panels in orthopedics and neurology. (Defendant's Response, February 9, 2023, at p. 2:7.) Defendant further asserts that applicable compensation rates are set on the first date of "compensable disability," and that any disability should be awarded at the rates applicable in 1985. (*Id.* at p. 2:14.)

On February 14, 2023, applicant filed a Petition in Response to Notice of Intent (Applicant's Response), averring that pursuant to Labor Code sections 5803 and 5804, the Workers' Compensation Appeals Board (WCAB) is without jurisdiction to rescind, alter or amend a prior decision more than five years from the date of injury.<sup>1</sup> (Applicant's Response, February 14, 2023, at p. 5:2.) Applicant specifically contends we lack the jurisdiction to make changes to the June 12, 2018 Findings of Fact, including the permanent and stationary date, and percentage of disability as rated under the 1997 PDRS. Applicant asserts that we previously affirmed the applicability of the 1997 PDRS, and that defendant's failure to challenge that determination resulted in a waiver of the issue. (*Id.* at p. 7:24.) Applicant also avers that section 4660.1, which requires that injuries occurring on or after January 1, 2013 be rated under the 2005 PDRS, is inapplicable, because it specifies when the injury "occurs" rather than the date of injury under

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise stated.

section 5412. (*Id.* at p. 8:18.) Finally, applicant asserts the deposition testimony of Dr. Einbund is not substantial evidence of the permanent and stationary date. (*Id.* at p. 9:24.)

## **DISCUSSION**

### **I.**

We first address the threshold issue of our continuing jurisdiction. Our January 20, 2023 NIT explained that pursuant to *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 [2006 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), once reconsideration has been granted, the Appeals Board has the power under Labor Code sections 5906 and 5908 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. (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]; *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases. 98]; *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Sowell)* (1943) 58 Cal.App.2d 262, 266–267 [8 Cal.Comp.Cases 79].)

We further noted that the WCAB continues to maintain original jurisdiction in this matter. (Lab. Code, § 5300.) In the exercise of this jurisdictional authority, we provided notice to the parties of our intention to rescind and replace the March 29, 2018 Findings of Fact with respect to the permanent and stationary date and the applicability of the 1997 permanent disability ratings schedule (PDRS), as well as the April 12, 2019 Findings of Fact in its entirety. (January 20, 2023 NIT, p. 15.)

Applicant’s Response contends that pursuant to section 5804, we no longer have the jurisdiction to alter or amend a prior award of compensation. (Applicant’s Response, at 4:2.) Applicant specifically avers that we are without jurisdiction to amend the previously identified permanent and stationary date, the application of the 1997 PDRS, or the finding of 83.25 percent permanent disability. (*Id.* at p. 5:16; 6:20.)

Labor Code section 5804 provides, in relevant part, that “[n]o award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years and any counterpetition seeking other relief filed by the adverse party within 30 days of the original petition raising issues in addition to those raised

by such original petition.” (Lab. Code, § 5804.) Thus, an award of compensation may not be disturbed beyond five years from the date of injury. However, the operation of section 5804 is *predicated on a final award of compensation*. The Court of Appeal has explained:

Labor Code, section 5803, provides in essence that the commission has continuing jurisdiction over its awards; and section 5804 of said code provides that no award of compensation shall be rescinded, altered, or amended after five years from the date of the injury.

It is settled that the jurisdiction of the commission to rescind, alter or amend an award under Labor Code, sections 5803 and 5804, is not affected or destroyed, provided such award is rescinded, amended or altered within five years from the date of injury (*Sutton v. Industrial Acc. Com.*, 46 Cal.2d 791, 795-797 [298 P.2d 857]); and the commission’s jurisdiction to make an award for new and further disability under Labor Code, section 5410, is not impaired, provided application thereof has been filed with the commission within five years from the date of injury. (*Gobel v. Industrial Acc. Com.*, 1 Cal.2d 100 [33 P.2d 413]; *Westvaco etc. Corp. v. Industrial Acc. Com.*, 136 Cal.App.2d 60 [288 P.2d 300].) We are not confronted herein, however, with either an attempt or proceeding to rescind, alter or amend any award under section 5803, or with an attempt or proceeding to collect compensation for new and further disability under section 5410. On the contrary, we are simply confronted with the question of whether the commission can make a first award more than five years after the date of injury where application therefor has been timely filed and where the commission has failed to find on a tendered issue. (*Douglas Aircraft Co. v. Industrial Acc. Com.*, 31 Cal.2d 853, 855-856 [193 P.2d 468]; see also *Sprague v. Industrial Acc. Com.*, 46 Cal.2d 414, 417 [296 P.2d 548].)

*Douglas Aircraft Co. v. Industrial Acc. Com.*, *supra*, further makes it clear that, where the commission fails to find on an issue raised as to permanent disability, said issue remains open and undetermined; and that under such circumstances, the subsequent award, even though made more than five years after the date of the injury, constitutes the first decision of the commission upon such issue and is, therefore, jurisdictionally justified by the rule of the *Gobel* case.

(*Lockheed Aircraft Corp. v. Industrial Acci. Com. (Vacho)* (1960) 183 Cal.App.2d 361, 363-364, [25 Cal.Comp.Cases 155, 156-157] (*Vacho*).)