The Court of Appeal in *State of California, Subsequent Injuries Fund v. Industrial Acci. Com. (Busch)* (1962) 198 Cal.App.2d 818, 827 [27 Cal.Comp.Cases 14], has further observed:

> The power of original decision invested in the [WCAB] is unrestricted by any limitations of time other than that set forth by sections 5400-5412 of the Labor Code. The [WCAB] therefore can make a valid decision on an original claim any number of years after the injury if the original proceedings are commenced within the time prescribed by section 5405, and quite apart from a consideration of a waiver of the statute."
>
> (*Id.* at p. 827.)

Hence, we maintain the "power of original decision" because there has been no prior award of compensation that has become final. While the March 20, 2018 F&A was an initial Award, our June 12, 2018 Opinion and Order rescinded the WCJ's findings on the issues of the date of injury, indemnity due, and COLA, and deferred those issues to additional proceedings. (Opinion and Order, dated June 12, 2018, at 15:8.) The WCJ's April 12, 2019 F&A, which entered findings of fact pursuant to our return of the matter to the trial level, was accomplished pursuant to the Board's ongoing original jurisdiction. We now exercise that same jurisdiction based on defendant's timely petition for reconsideration of the April 12, 2019 F&A, and our subsequent grant of reconsideration on May 30, 2019. (Lab. Code, § 5903; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182 [260 Cal.Rptr. 76]; see also *Gonzales v. Industrial Acc. Com.* (1958) 50 Cal.2d 360, 363–364 [23 Cal.Comp.Cases 91].)

Additionally, we note that the cases cited in Applicant's Response for the proposition that we lack jurisdiction at this juncture all involve *finalized awards*, not subject to timely appeal or reopening. In *Dept. of Education v. Workers' Comp. Appeals Bd. (Gill)* (1993) 14 Cal.App.4th 1348 [18 Cal.Rptr.2d 900], section 5804 precluded amendment or alteration in 1991 of a final award of compensation for a 1970 injury that became final on June 27, 1975. (*Id*. at p. 1351.) Similarly in *Harold v. Workers' Comp. Appeals Bd. (1980)* 100 Cal.App.3d 772 [45 Cal.Comp.Cases 77], the WCAB lacked jurisdiction in 1977 to alter an award for a 1971 injury award that was timely reopened with a final award of compensation issuing in 1975. Here, there has been no final award of compensation made.

Applicant further cites to *Westvaco Chlorine Products Corp. v. Industrial Acci. Com. (Johnson)* (1955) 136 Cal.App.2d 60, 63 [288 P.2d 300, 302] (*Johnson*), as prohibiting rescission,

alteration or amendment of an award more than five years from the date of injury. Applicant contends that under *Johnson*, the WCAB has no jurisdiction to address issues previously decided within five years of the date of injury. (Applicant's Response, at p. 4:4.) However, *Johnson* is also instructive for its discussion of the Board's jurisdiction as it relates to the issuance of an *original* award of compensation. In *Johnson*, applicant sustained injury on March 25, 1946, for which an award of 36 percent issued on May 25, 1948. On November 14, 1949, applicant timely petitioned for new and further disability, and on June 5, 1950, the Industrial Accident Commissioner (IAC) issued findings that applicant's condition was not stationary, deferring a findings of both temporary and permanent disability. (*Id*. at p. 61.) Applicant subsequently filed another Petition for New and Further Disability in 1953, and after various hearings, the IAC issued its final determination as to permanent disability and related issues on February 1, 1955. In evaluating the issue of whether the IAC maintained jurisdiction to act on applicant's claim more than five years from the date of injury, the Court of Appeal noted that the IAC's deferral of disability issues in its June 5, 1950, left the question of permanent disability "open and undetermined." (*Id*. at p. 68.) The IAC maintained its jurisdiction to decide the question of disability more than five years from the date of injury, because applicant's petition for new and further disability was filed prior to the expiration of the statutory period, but also because "the action of the commission in impliedly setting aside its original order left in existence *no order* of permanent disability which could bar the commission from considering the petition for new and further disability filed within the statutory period." (*Id*. at p. 68, italics added.) In *Johnson*, as here, integral components of a final award of compensation remained outstanding and undecided, allowing the IAC to continue to exercise its original jurisdiction and to decide the case more than five years from the date of injury.

Applicant contends the individual Findings of Fact with respect to the permanent and stationary date, percentage of disability, and the applicable PDRS are no longer subject to alteration or amendment pursuant to section 5804. (Applicant's Response, at 5:15; 6:20.) However, we are not persuaded that these individual findings of fact can, either individually or in the aggregate, be reasonably characterized as a final award of compensation subject to section 5804 because of the inherent interdependencies between the legal issues that were deferred and those that we affirmed. Our June 12, 2018 Opinion on Decision deferred the issue of the correct date of injury pursuant to section 5412. (Opinion on Decision, dated June 12, 2018, at p. 12:15.) The determination of the appropriate rating schedule rests in part on a determination of the date of

injury. (Lab. Code, §§ 4660; 4660.1.) Additionally, as is discussed with respect to both Applicant's Response and Defendant' Response, *infra*, the section 5412 date of injury sets the appropriate indemnity rates for disability arising out of a claimed injury. (*Chevron U.S.A. v. Workers' Comp. Appeals Bd. (Steele)* (1990) 219 Cal.App.3d 1265, 1269-1271 [55 Cal.Comp.Cases 107].) The date of injury further informs the application of possible COLA increases pursuant to section 4659(d). (*Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701].) Thus, and given the interdependency of the deferred and affirmed issues, we do not agree that the findings of the Permanent and Stationary date, appropriate rating schedule or percentage of permanent disability exist independently of a completed, finalized award of compensation as contemplated by section 5804.[2] We further believe that our affirmation of the permanent and stationary date, correct rating schedule and percentage of permanent disability was in error, as the issues which we deferred necessarily relate to and inform the balance of the decision.

In summary, we agree with applicant that section 5804 bars amendment or alteration of final awards of compensation more than five years from the date of the injury. In the absence of a *final award of compensation*, however, the WCAB may continue to exercise its original jurisdiction more than five years from the date of the injury. Here, we conclude that because there has been no final award of compensation, we continue to exercise our original jurisdiction in this matter, and retain the authority to alter or amend our prior findings. (*Vacho, supra,* at pp. 363-364; *Busch, supra,* at p. 827.)

II.

We next turn to the issue of the date of injury. Following our May 30, 2019 grant of reconsideration to study the legal and factual issues in this case, we carefully reviewed the record in its entirety. Based on our review, we are persuaded that March 20, 2014 is the correct date of injury pursuant to section 5412. Our January 20, 2023 NIT observes:

> The WCJ determined that "for purposes of LC 5412, the cumulative trauma ending date is 2014." (April 12, 2019 Findings of Fact, No. 1.) Defendant avers the correct date of injury was either in 1986, or no later than the date of the filing of the application in 2011. (Petition, at 22:14.)

[2] For example, in the absence of a final determination of indemnity, the parties to the matter would be unable to obtain the entry of judgment on the Award or the issuance of execution thereon in the Superior Court pursuant. (Lab. Code, § 5806.)

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

> 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.

"The 'date of injury' is a statutory construct which has no bearing on the fundamental issue of whether a worker has, in fact, suffered an industrial injury…the 'date of injury' in latent disease cases 'must refer to a period of time rather than to a point in time.' (Citation.) The employee is, in fact, being injured prior to the manifestation of disability…[T]he 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. (Butler)* (1984) 153 Cal.App.3d 327, 341 [49 Cal.Comp.Cases 224].)

The term "disability" as used in section 5412 is "either compensable temporary disability or permanent disability," and, "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 their 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] *(Johnson)*.) An employee is not charged with knowledge that their disability is job-related without medical advice to that effect, unless the nature of the disability and the applicant's training, intelligence and qualifications are such that they should have recognized the relationship between the known adverse factors involved in their employment and their disability. (*Johnson, supra*, at 473; *Newton v. Workers' Co. Appeals Bd.* (1993) 17 Cal.App.4th 147 [58 Cal.Comp.Cases 395].)

In many cases applying section 5412, knowledge of industrial causation is not found until the applicant receives medical opinion expressly stating so, even where the applicant has indicated his or her belief that the disability is due to employment. (e.g. *Johnson, supra*, 163 Cal.App.3d 467, 471 (applicant believed heart problems were work related, but doctor said they were not); *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33 Cal.Comp.Cases 722] (despite applicant's testimony that work tired him, the Court reversed Appeals Board's determination that applicant failed to exercise reason able diligence to ascertain that disability originated with work); *Gleason v. Workers' Comp. Appeals Bd.* (2002) 67

Cal.Comp.Cases 1049 (writ den.) (no evidence that applicant, a nurse who believed she contracted cirrhosis of the liver from needle stick, knew about latency period of hepatitis C, so she was not charged with knowledge); *Modesto City Schools v. Workers' Comp. Appeals Bd. (Finch)* (2002) 67 Cal.Comp.Cases 1647 (writ den.) (doctor's report represents earliest knowledge, even though application was filed before the report). See also *Hughes Aircraft Co. v. Workers' Comp. Appeals Bd. (Zimmerman)* (1993) 58 Cal.Comp.Cases (writ den.) (statement by doctor that stress at work was depleting her immune system insufficient to find that applicant should have recognized the relationship between employment and disability); *Kaiser Foundation Health Plan v. Workers' Comp. Appeals Bd. (Bradford)* (1986) 51 Cal.Comp.Cases 355 (writ den.) (statement by doctor that back condition was aggravated by work not sufficient to charge applicant with knowledge).)

Further, "[t]he burden of proving that the employee knew or should have known rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms." (*Johnson, supra*, 163 Cal.App.3d 467, 471.) This is because "the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acci. Com.* (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].)

Here, applicant testified that he sustained a multitude of injuries over the course of his professional football career. (Transcript of Proceedings, dated August 15, 2017, at 33:14; see also Ex. 3, Report of Michael Einbund, M.D., dated March 20, 2014, pp. 11-16.) Applicant further underwent four surgeries to his bilateral knees. (Transcript of Proceedings, dated August 15, 2017, at 33:20.) However, the record demonstrates that none of these injuries were labor disabling prior to applicant's retirement in 1985. Applicant testified that he would return to his regular duties and gameplay following each injury or surgery. (Transcript of Proceedings, dated August 15, 2017, at 27:23; 28:14; 67:4.) Applicant's doctors prescribed no work restrictions. (*Id*. at 28:17.) Applicant continued to receive his regular salary during his treatment intervals. (*Id.* at 28:17; 67:21.) Applicant further testified that when he was released at the start of the 1985 season, it was for reasons unrelated to his physical condition. (Transcript of Proceedings, dated October 22, 2018, at 12:4.) Thus, the evidentiary record reflects a series of injuries over time, but that those injuries did not result in permanent work restriction, or an inability to continue playing professionally. The first documented evidence of compensable disability arising out of applicant's cumulative trauma claim is the QME reporting of March 19, 2014. (Ex. 8, Report of Kenneth Nudleman, M.D., dated March 19, 2014.)

With respect to the knowledge requirement of section 5412, defendant cites to applicant's trial testimony, wherein he indicated a subjective belief that within a year after his football career ended that he believed he had injuries related to the cumulative effect of his football career. (Petition, at 21:19.) However, as was noted in *Johnson, supra*, 163 Cal.App.3d 467, 471, absent expert medical advice,