WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CHARLES MONTIERTH, *Applicant*

vs.

CITY OF SAN DIEGO, PERMISSIBLY SELF-INSURED, *Defendant*

Adjudication Number: ADJ9137744
San Diego District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by defendant. This is our Opinion and Decision after Reconsideration.

Defendant seeks reconsideration of the Findings and Award issued by a worker's compensation administrative law judge (WCJ) on February 14, 2019. The WCJ found in pertinent part that: (1) during the period from August 19, 1974 through April 11, 2013, while employed as a Police Officer II by the City of San Diego, applicant sustained injury arising out of and in the course of employment to his back, heart, hypertension and skin (cancer); (2) applicant's permanent and stationary date is November 14, 2017; (3) the injury to applicant's skin in the form of skin cancer is an insidious progressive disease, and pursuant to *Gen. Foundry Service v. Worker's Comp. Appeals Bd*. (*Jackson*) (1986) 42 Cal.3rd 331 [51 Cal.Comp.Cases 375], jurisdiction is reserved over permanent disability; (4) applicant's injury caused a tentative permanent disability of 71%, entitling applicant to 449.25 weeks of disability indemnity payable at the rate of $290 per week in the total sum of $130,282.50, payable commencing November 14, 2017, and thereafter to a life pension at the statutory rate subject to the increases of Labor Code section 4659(c)[2], less credit to defendant for sums, if any, previously paid on account thereof, and less the attorney's fee

[1] Commissioners Lowe and Sweeney, who were on the panel that issued the order granting reconsideration, no longer serve on the Appeals Board. Other panelists have been assigned in their place.

[2] All subsequent statutory references are to the Labor Code unless otherwise indicated.

awarded herein; and (4) applicant will require further medical treatment to cure or relieve from the effects of this injury.

Defendant contends that the finding that applicant's skin injury was an insidious and progressive disease subject to a reservation of jurisdiction pursuant to *Jackson, supra,* is not justified because the reporting of the qualified medical evaluator (QME) Cindy Chen, M.D., indicates to a reasonable degree of medical certainty that it is more likely than not that applicant will not have further disability and thus, applicant's injury is not progressive in nature.

We received an Answer from applicant. We received a Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the record, and considered the allegations in the Petition and Answer, and the contents of the WCJ's Report. Based on our review of the record, as our decision after reconsideration, we will affirm the WCJ.

FACTUAL BACKGROUND

In her September 5, 2016 report, Dr. Cindy Chen provided the following diagnoses: (1) history of basal cell carcinoma on applicant's right upper neck in 2008, and on the left upper forehead in 2016; (2) history of malignant melanoma of the left flexor forearm; and (3) actinic keratoses on his face and forearm, industrially caused. Dr. Chen further noted that applicant does not currently require further treatment for his melanoma but that he does require periodic skin surveillance in the future. (Ex. 4.)

In her deposition on August 15, 2017, Dr. Chen reaffirmed that applicant will require periodic monitoring and surveillance in order to detect recurrences of applicant's skin cancer. However, the doctor requested additional time to review medical journal articles to determine whether it was reasonably probable that applicant's melanoma would recur, thereby causing an increase in applicant's permanent disability. (Ex. 6.)

Following review of two medical articles as well as statistics from the National Cancer Institute, Dr. Chen issued a second report dated November 14, 2017. In her report, she concluded that "although patients with a primary melanoma have a higher risk for developing a subsequent primary melanoma as compared to the general population, the mortality and morbidity rates of the subsequent primary melanoma as are actually lower than the first primary melanoma. With this in mind, [applicant]'s malignant melanoma does not constitute a progressive disease process. Thus, my opinions from my initial QME report stand unchanged." (Ex. 3, p. 3.)

Following this report, Dr. Chen was reexamined by way of deposition on April 17, 2018. In response to questioning by applicant's counsel, Dr. Chen acknowledged that there is a reasonable medical probability that applicant will develop a subsequent primary melanoma, and that his risk for such recurrences is more than eight times the general population. Dr. Chen further testified that if applicant is diagnosed with invasive melanoma, there is a reasonable medical probability that his impairment, pursuant to the AMA Guides, will increase, given the increased morbidity and mortality for invasive melanomas. In response to questioning by defendant's attorney, Dr. Chen testified that it is more likely than not that applicant will not have additional disability as a result of the malignant melanoma. (Ex. 3.) [3]

At the hearing on September 5, 2018, the issue of whether applicant's skin cancer constitutes an insidious progressive disease in accordance with *Jackson, supra,* thereby justifying reservation of jurisdiction over permanent disability, was submitted together with other non-disputed issues. (Minutes of Hearing [MOH], 9/5/18, p.3.)

Applicant testified in pertinent part as follows:

Direct Examination:

> Dr. Kleker has been been the applicant's dermatological doctor for about a year and a half. He sees the doctor twice a year and last saw the doctor on July 21, 2018. At that last visit, Dr. Kleker took off various lesions and biopsied them. They were determined to be cancerous. His next appointment with Dr. Kleker is 12/1/18. He believes that future medical treatment will consist of future cancer treatments which will include the burning [sic] of the lesions. At almost every treatment, the applicant has had some form of [removal of the lesions] performed.
>
> In Dr. Kleker's report, there is reference to various discussions he had about taking future precautions. Applicant admitted he tries to follow the precautions as much as possible, including minimizing midday sun exposure, applying sunscreen, using) hats, and wearing protective clothing. Applicant tries to alter his activities of daily living as much as possible to avoid injurious sun exposure.

Cross Examination:

> Applicant recalls having met with [the PQME] Dr. Chen. She asked him about his recreational activities and he believes he told her about his golf playing. He admits he has had to reduce the number of times that he plays golf per week and also admits that some of these reductions were due to his back injury.

[3] As discussed further herein, this statement by Dr. Chen does not contradict the other elements of her testimony, since it is the significantly greater risk of recurrence of applicant's melanoma and potential for increased disability that brings this case within the ambit of the *Jackson* doctrine.

He is not sure of the exact dates when he was diagnosed with melanoma. It may have been back in March of 2013. When he was first diagnosed with melanoma, he decreased his golf playing. After he had melanoma surgery, he stopped playing golf for approximately a month period of time and then cut back to 2 to 3 times per week. Prior to being diagnosed with melanoma he played more golf, however his back problems have been increasing, which has also interfered with his ability to play golf. He had back surgery which he believes was done after having been diagnosed with melanoma.

He has received advice about the application of sunscreen as well as wearing a broad-brimmed hat. Most of the doctors have given him that same advice since his diagnosis. He denies having any other recreational activities. After his melanoma procedures, he recalls periods where he has not played golf or done any yard work. He denies, however, that wearing a hat or using sunscreen has prevented him from playing golf or doing yard work. (MOH, 9/5/18, pp.4-6.)

DISCUSSION

The following elements of Dr. Chen's opinion appear to be undisputed: (1) applicant's melanoma will require lifelong surveillance and monitoring; (2) there is a reasonable probability that applicant will develop a subsequent primary melanoma, as his risk for such recurrence is more than eight times higher than the risk to the general population for developing a melanoma; and (3) if and when applicant is diagnosed with a subsequent melanoma, there is a reasonable medical probability that his impairment will increase. (Exhs. 3-6.)

Based on these factors, and for the reasons discussed below, we conclude that the WCJ was justified in reserving jurisdiction over permanent disability in this case, notwithstanding the jurisdictional limits of sections 5410 and 5804.

Jackson, *supra*, addressed the issue of when jurisdiction over permanent disability may be reserved in the case of an insidious and progressive disease. The applicant was exposed to asbestos while working as a molder for the period from 1952 to 1981, which exposure caused the development of asbestosis. The WCJ found that Jackson's lung disease was caused at least in part by exposure to work and that the disease was progressing and not yet stationary. The WCJ found that Jackson was not entitled to temporary disability benefits but was entitled to an advance of permanent disability. Following a petition for reconsideration however, the WCJ determined that Jackson's disease was not stationary for a permanent disability rating and that Jackson should receive temporary total disability benefits from the date he left his job. The Appeals Board agreed with the WCJ, finding that applicant's condition was not yet stationary and that he incurred wage

loss, since he was no longer able to work at his old job and had not been provided with alternative work. Therefore, the Appeals Board ordered total temporary disability payments to continue indefinitely. (*Id*., p. 334.)

The Court of Appeal remanded the case to the Appeals Board holding that the Appeals Board should consider a progressive disease permanent when either: (1) "the disability is total and further deterioration would be irrelevant for rating purposes," or (2) "the prognosis of the disease is sufficiently ascertainable to make a rating determination." (*Jackson*, *supra*, 42 Cal.3d at pp. 334-335.)

The Supreme Court reversed the Court of Appeal and remanded the case to the Appeals Board. The Court noted that the Labor Code does not define the term permanent disability, although Rule 9735 (Cal. Code Regs, tit. 8, § 9735) states that "disability is considered permanent after the employee has reached maximum improvement or his condition has been stationary for a reasonable period of time." The Court observed that this definition is inadequate when it is applied to a progressive occupational disease, stating: "*The reference to 'maximum improvement' obviously refers to the classical concept of 'injury' which envisions a traumatic incident resulting in corporal injury with a period of healing to a point of greatest improvement. The term does not envision an insidious, aggressive disease process that results from a remote, undramatic work exposure and is of little or no use in determining the status of such condition*… The Board rule for permanent disability, therefore, is not very helpful… except to suggest that the condition is not permanent and stationary because of its progressive nature." (citing *Piedemonte v. Western Asbestos* (1981) 46 Cal.Comp.Cases 475, 478; italics added.) The Court found that the Appeals Board clearly has the power to continue its jurisdiction beyond the five-year period on the issue of permanent disability in the case of insidious progressive diseases, noting that on remand, "the Board may tentatively rate Jackson's known permanent disability and order advances based on a tentative rating. The Board may then reserve its jurisdiction for a final determination of permanent disability when either: (1) [applicant]'s condition becomes permanent and stationary, or (2) his permanent disability is total and further deterioration would be irrelevant for rating purposes." (*Jackson*, *supra*, pp. 331-338.)

In *Ruffin v. Olson Glass C*o. (1987) 52 Cal.Comp.Cases 335, the Appeals Board en banc declined to reserve jurisdiction over permanent disability in two cases, an injury to the applicant's back in one case and to applicant's knee in the other. The Appeals Board held that the applicants'

orthopedic injuries in these cases were not insidious progressive diseases within the meaning of *Jackson*. The Appeals Board concluded based on *Jackson* that the characteristics of an insidious progressive disease are: (1) that it is caused by a "remote" and "undramatic" work exposure—one that is likely to be undetected at the time, or if detected, the significance is likely to be unappreciated; (2) that the disease worsens over time, but at a rate so gradual that it is well established before becoming apparent[4]; and (3) that it has a "long latency period" between exposure to the risk and the onset of symptomatology. Noting that the *Jackson* court, citing *Piedemonte*, considered mesothelioma as an example of an insidious progressive disease, the Appeals Board held that to adopt a definition of an insidious progressive disease as argued by the applicants with respect to their orthopedic injuries would be to expand the exception to the limitations contained in sections 5410 and 5804 to a multitude of cases involving routine trauma to the spine and extremities, thus nullifying the effect of the statutory limitations. (*Id*., pp. 341-342.)

We believe the factors set forth in *Ruffin* are consistent with a finding of insidious progressive disease in the present case. Applicant's cancer was "caused by a 'remote' and 'undramatic' work exposure"—in this case, applicant's cumulative environmental exposure while employed as a police officer for the period from August 19, 1974 through April 11, 2013. Furthermore, Dr. Chen found that applicant's risk of developing a subsequent primary melanoma is more than eight times higher than the risk to the general public of developing a melanoma, and if applicant does develop a subsequent primary melanoma, it is reasonably probable that additional permanent disability will result. (Ex. 5.) For the reasons discussed below, we do not conclude that it is necessary for the medical evidence to show with 100% certainty that applicant's cancer will worsen in order to support a reservation of jurisdiction over permanent disability; instead, the potential for such worsening as described by Dr. Chen is sufficient.

Moreover, in *Piedemonte*, *supra,* 46 Cal.Comp.Cases 475, cited by the court in *Jackson*, *supra*, the Appeals Board en banc determined that although applicant had sustained an industrial injury while working as an asbestos worker in the form of "pleural asbestosis," the injury was not

[4] We construe this phrase to refer generally to the nature of insidious diseases, including those insidious diseases that have the potential to worsen at an indeterminate rate or time.

yet permanent and stationary and had not yet caused any temporary or permanent disability. (*Id*., p. 478.) In discussing the evidence in the case, the Appeals Board stated:

> We do not disagree that there is supporting evidence of no permanent disability. There is also, however, evidence on the progressive nature of applicant's industrial condition. Dr. Levine, on whom the trier of fact relied, and Dr. Cosentino, the other reporting medical specialist herein, both agree that applicant's asbestosis condition *may progress to either a carcinoma or pleural asbestosis*. Dr. Levine, in fact, already finds pleural asbestosis. On the issue of the potential progression of the disease, the evidence is not only substantial but in concurrence, albeit to varying degrees. Based on the above, and for the reasons hereinafter discussed, the Board agrees with the applicant's position that the issue of permanent disability can and should be deferred. (Id.; italics added.)

Noting that there was the potential for applicant's condition to progress to disabling diseases, including mesothelioma, a form of cancer, the Appeals Board concluded that the applicant's condition was not yet permanent and stationary, and that the medical evidence "indicates the condition is potentially progressive and may yet result in significant permanent disability." The Appeals Board determined that since the issue of permanent disability remained unresolved, it may be determined at any time in the future when applicant's condition warranted, and the parties could then present evidence and move to a hearing. The Appeals Board further held that the five year limitation period in section 5804 would not preclude determination of the issue at a later time because there was no decision to be altered or amended, and under section 5410, the proceedings had been instituted within the five years from the date of injury. Therefore, the Appeals Board found that applicant's condition was not yet permanent and stationary, applicant was awarded medical treatment, and the issue of permanent disability was deferred. (*Piedemonte*, *supra*, 46 Cal.Comp.Cases 475, pp. 482-483.)

We find the analyses in *Jackson* and *Piedemonte* to be particularly instructive to the present case, since reservation of jurisdiction was found to be justified in those cases based on medical evidence that indicated applicant's condition—asbestosis in both cases-- could *potentially* progress to a more serious disabling condition, including cancer. In the present case, applicant has already been diagnosed with skin cancer, and his condition may recur, requiring lifetime monitoring and potentially causing increased disability.

The *Jackson* doctrine has been applied to reserve jurisdiction in other cases involving cancer. In *Sandoval v. California Highway Patrol*, 2015 Cal. Wrk. Comp. P.D. LEXIS 404. 2015, an Appeals Board panel found that applicant's bladder cancer was an insidious progressive disease,

permitting extension of jurisdiction beyond the five-year limitation of section 5804. Applicant's bladder cancer was found to be "insidious" based on the opinion of the agreed medical examiner that the cancer could develop or recur at a distant time from the initial instigating cause, and it was progressive since applicant's condition required lifetime monitoring and invasive testing and had a high rate of recurrence, and treatment for applicant's bladder cancer would result in progressive disability. (*Id*., pp. 8-10; see also *Hazelbaker v. Cal. Highway Patrol* 2020 Cal. Wrk. Comp. P.D. LEXIS 325 [applicant's prostate cancer constituted an insidious and progressive disease process, per *Jackson*, and the only medical evidence established that it was reasonably probable that applicant's cancer would progress, justifying a reservation of jurisdiction]; *Lockheed Martin v. Workers' Comp. Appeals Bd.* (*DeSoto*) (2003) 68 Cal.Comp.Cases 1878, 1879-81 (writ den.) [reserving jurisdiction over permanent disability where applicant's thyroid cancer was caused by exposure to carcinogenic chemicals at work and constituted an insidious and progressive disease similar to the lung disease caused by exposure to asbestos in *Jackson*].) The Appeals Board has also applied the *Jackson* doctrine to cases involving diseases other than cancer. (See *Travelers v. Workers' Comp. Appeals Bd*. (*Gonzales*) 2014 Cal.Wrk.Comp. P.D. LEXIS 497 [applicant's industrially-related Valley Fever was an insidious progressive disease]; *County of Marin v. Worker's Comp. Appeals Bd*. (*Carter*) (2001) 66 Cal.Comp.Cases 1533 (writ den.) [applicant's industrially-related hepatitis C was an insidious progressive disease]; *Paglialonga v. City of Irvine*, 2012 Cal. Worker's Comp. PD LEXIS 150 [applicant's industrially-related hepatitis C was an insidious progressive disease]; *Gault v. Americana Vacation Clubs* (2018) 84 Cal.Comp.Cases 112 [effects of applicant's long-term antibiotic treatment required to treat an industrially-related knee infection constituted an insidious progressive disease justifying reservation of jurisdiction].)

We find the analyses in *Jackson* and *Piedemonte* to be instructive in the present case, since reservation of jurisdiction was found justified in those cases based on medical evidence that indicated applicant's condition—asbestosis in both cases-- could potentially progress to a more serious disabling condition, including cancer. Here, applicant has already been diagnosed with skin cancer, and his condition may recur, requiring lifetime monitoring and potentially causing increased disability.

Based on the foregoing, we agree with the WCJ's finding that applicant's cancer is an insidious progressive disease.

Accordingly, we affirm the Findings & Award.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the workers' compensation administrative law judge on February 14, 2019 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 21, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

CHARLES MONTIERTH
O'MARA & HAMPTON
SAN DIEGO DEPUTY CITY ATTORNEY

RLN/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*