

No. B291548

**IN THE
SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF CALIFORNIA**

[Division One]

FIRST FOURSQUARE CHURCH OF VAN NUYS,
Petitioner,

v.

**WORKERS' COMPENSATION APPEALS BOARD
and JACQUELINE AUSTIN,**
Respondents.

WCAB Case Number ADJ2307991
Hon. S. Michael Cole

**CALIFORNIA WORKERS' COMPENSATION INSTITUTE'S
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITIONER FIRST FOURSQUARE CHURCH OF VAN
NUYS**

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I. CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rule of Court 8.208

Name of Interested Entity or Person	Nature of Interest
First Foursquare Church of Van Nuys	Petitioner – employer
Cypress Insurance Company	Petitioner – carrier
Berkshire Hathaway Homestate Companies	Petitioner – adjusting agency
Workers’ Compensation Appeals Board	Respondent – court
Jacqueline Austin	Respondent – injured worker
California Workers’ Compensation Institute	Amicus Curiae
Guide One Insurance	Co-defendant in companion case
California Insurance Guarantee Association	Co-defendant in companion case
SafeCo Insurance Company	Co-defendant in companion case
Travelers Insurance Company	Co-defendant in companion case

Respectfully submitted,

August 21, 2018

/s/ Ellen Sims Langille
Ellen Sims Langille, General Counsel
Counsel for *amicus curiae* CWCI

II. CERTIFICATION OF COMPLIANCE

I, Ellen Sims Langille, swear that I have read the within Amicus Curiae Brief and know the contents thereof; that the within brief contains 2,887 words exclusive of tables, signature blocks, and this certificate, based on the automated word count of the computer word-processing program; that I am informed and believe that the facts stated therein are true and on that ground allege that such matters are true; and that I make such verification as an officer of the California Workers' Compensation Institute.

Respectfully submitted,

August 21, 2018

/s/ Ellen Sims Langille
Ellen Sims Langille, General Counsel
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V. INTRODUCTION

Cumulative trauma injuries are a tricky business. For decades, the Appeals Board has struggled in its efforts to define the injury date for CT claims. In this case, the Appeals Board got it wrong.

The complexity of CT injuries stems from the nature of the identification of, the definition of, and the liability for a CT claim – all of which are covered in the Labor Code by multiple, interlocking statutes, each of which must be separately understood and yet interpreted together. This amicus brief provides a succinct explanation of the several interconnected rules applicable to CT claims and concludes that the Appeals Board has erred in its interpretation of rules for finding a CT date of injury.

Certainly, the Appeals Board's findings on questions of fact may not be disturbed on appeal.¹ But at issue in this case is the Appeals Board's interpretation of the law. When a workers' compensation decision rests on the Board's erroneous

¹ Lab. C. §§5952, 5953; *see also Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal. 3d 658.

interpretation or application of the law, the reviewing court will annul the decision.² The Board’s conclusions on questions of law are reviewed *de novo*.³

VI. LEGAL ARGUMENT

A. Cumulative Trauma Injuries are Governed by Labor Code Sections 3208, 3208.1, and 5412.

1. CALIFORNIA LAW RECOGNIZES BOTH SPECIFIC AND CUMULATIVE INJURIES.

California Labor Code section 3208 defines “injury” as any injury or disease arising out of the employment.⁴

Under section 3208.1, an injury may be either: (a) specific, occurring as the result of one incident or exposure that causes disability or need for medical treatment; or (b) cumulative, occurring as repetitive mentally or physically traumatic activities

² *Matea v. Workers’ Comp. Appeals Bd.* (2006) 144 Cal. App. 4th 1335, 1444; *Boehm & Associates v. Workers’ Comp. Appeals Bd.* (1999) 76 Cal. App. 4th 513, 515-516.

³ *Benson v. Workers’ Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535, 1542-1543.

⁴ Lab. C. §3208. Unless otherwise indicated, all statutory references are to the Labor Code.

extending over a period of time, the combined effect of which causes any disability or need for medical treatment.⁵

2. LABOR CODE SECTION 5412 DEFINES THE DATE OF A CUMULATIVE TRAUMA INJURY AS THE CONCURRENCE OF THE EMPLOYEE'S "DISABILITY" AND "KNOWLEDGE" OF INDUSTRIAL CAUSATION.

Section 3208.1 mandates that the date of a cumulative injury shall be determined under section 5412.⁶ Indeed, much of the mystery surrounding cumulative trauma has been legislatively alleviated by Labor Code section 5412, which provides the express requirements for a finding of a date of injury for cumulative claims:

The date of injury in cases of...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 [or her] present or prior employment.⁷

Put simply, section 5412 defines the date of injury for a cumulative trauma claim as the date that the employee has both

⁵ Lab. C. §3208.1.

⁶ *Ibid.* "The date of a cumulative injury shall be the date determined under Section 5412." *See Chavez v. Workers' Comp. Appeals Bd.* (1973) 31 Cal. App. 3d 5 (section 5412 is controlling in determining the date of injury in cumulative trauma cases).

⁷ Lab. C. §5412.

disability and knowledge of industrial causation. Ultimately, liability will be imposed on the carrier covering the employment in the year prior to the date of injury under section 5412⁸ -- *i.e.*, the date applicant first suffered disability and knew that her problems were work-related.

The requirement for the concurrence of “disability” and “knowledge” under section 5412 plays an important role in the instant case. While neither the WCJ nor any party disputed that applicant had the requisite *knowledge* under section 5412, the question of whether -- and when -- she had the requisite *disability* under section 5412 is the essence of the dispute.

⁸ Lab. C. §5500.5. Section 5500.5 does not establish the length of or the time frame for cumulative trauma, but only the period of liability. *San Diego Gas & Electric v. Workers’ Comp. Appeals Bd. (Williams)* (2007) 72 Cal. Comp. Cases 501, 502–504 (writ denied) (employee, who suffered a cumulative back and neck injury from performing heavy work, had a date of injury under section 5412 when he first suffered disability, even though he had not performed heavy work during the last several years of his employment prior to this date).

3. THE “DISABILITY” PRONG UNDER SECTION 5412 IS SATISFIED BY COMPENSABLE TEMPORARY DISABILITY OR COMPENSABLE PERMANENT DISABILITY.

There are two aspects of these several statutory principles that must be emphasized. First, either temporary or permanent disability will satisfy the “disability” prong of section 5412.⁹ Secondly, the Appeals Board has held in an en banc decision that only *compensable* disability may give rise to a separate injury under §3208.1.¹⁰ In other words, for the incident or period of exposure to qualify as a separate injury, it must itself have caused time lost from work for which disability benefits would be payable, and not merely a need for medical treatment.¹¹

⁹ *Chavira v. Workers’ Comp. Appeals Bd.* (1991) 235 Cal. App. 3d 463, 474 (for purposes of applying §5412, disability can include temporary disability or permanent disability).

¹⁰ *Ferguson v. City of Oxnard* (1970) 35 Cal. Comp. Cases 452 (en banc); *see also Bechtel Corp. v. Workers’ Comp. Appeals Bd. (Davis)* (1989) 54 Cal. Comp. Cases 447 (writ denied); *Travelers Property Casualty v. Workers’ Comp. Appeals Bd. (Wright)* (2000) 65 Cal. Comp. Cases 884 (writ denied).

¹¹ 1 Cal. Workers’ Compensation Law & Practice §4:84 (James Publishing, © 2016); 2 Cal. Workers’ Compensation Law §14.13 (Rassp & Herlick, 7th ed. LexisNexis).

4. IN A CUMULATIVE TRAUMA CLAIM, THE FACT OF INJURY
MUST BE DISTINGUISHED FROM THE DATE OF INJURY.

A distinction is drawn between the time that the right to file a claim accrues and the time when it is barred. Under section 3208.1, any disability or need for medical treatment may give rise to a separate cumulative injury for which an applicant may file a claim, but the statute of limitations does not commence to run upon such an injury until compensable disability has occurred.¹²

The fact of injury and the date of injury are not equivalent. Thus, it is possible that an employee may sustain a cumulative industrial injury before she has a legally cognizable date of injury, where that cumulative injury has caused no temporary or permanent disability but has resulted in a need for medical treatment.¹³

That is what happened in this case.

¹² *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal. App. 4th 998, 1005.

¹³ 2 Hanna Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed.), §24.03[6][a]. See *Ferguson, supra*, 35 Cal. Comp. Cases at 457 (en banc) ("Thus it may be that an employee's activities have given rise to the occurrence of a separate injury and thus the accrual of a right of action, in that the activities or their cumulative effect have caused a need for medical treatment. However, if the employment activities have not yet caused "disability," there has been no 'date of injury' as defined by the proviso of Labor Code Section 3208.1....")

B. The Absence of a Compensable Disability During Applicant’s Employment at First Foursquare Church Precludes a Finding That She Sustained a Cumulative Trauma Injury During That Employment.

1. NO CUMULATIVE INJURY DATE MAY BE FOUND IN THE ABSENCE OF A COMPENSABLE DISABILITY.

A cumulative injury occurs only when the injury has ripened into a disability.¹⁴ An oft-stated maxim in workers’ compensation cases is that separate episodes of trauma do not constitute an injury *unless and until there is disability*. According to the Supreme Court: “A number of cases have held that where disability results from continuous cumulative traumas or exposures, the injury occurs not at the time of each distinct, fragmented exposure or trauma, but at the time the cumulative effect of the injuries has ripened into disability.”¹⁵

¹⁴ *Federal Insurance Co. v. Workers’ Comp. Appeals Bd. (Johnson)* (2013) 221 Cal. App. 4th 1116, 1130.

¹⁵ *Fruehauf Corp. v. Workers’ Comp. Appeals Bd.* (1968) 68 Cal. 2d 569, 576. *See also Beveridge v. Industrial Acc. Com.* (1959) 175 Cal. App. 2d 592, 595 [cumulative strain of employee’s work effort causing preexisting back condition to become disabling]; *Dow Chemical Co. v. Workmen’s Comp. App. Bd.* (1967) 67 Cal. 2d 483, 493 [date of injury for carpenter with series of back injuries is date of disability]; *Johnson, supra*, 221 Cal. App. 4th at 1130 [cumulative injury occurs only when injury has ripened into disability].

This maxim that a CT injury has not occurred until and unless the effect has “ripened into disability” has recently been confirmed by the published decision in *Tripplett v. Workers’ Comp. Appeals Bd.*, where the Court of Appeal held that the cumulative injury occurred at the employee’s retirement, rather than during any particular event, and that the cumulative injury had not yet “ripened into disability” during his earlier employment.¹⁶

2. THE EVIDENCE IN THIS CASE DEMONSTRATED THAT APPLICANT DID NOT SUSTAIN DISABILITY RELATED TO HER CT INJURY DURING HER EMPLOYMENT AT FIRST FOURSQUARE CHURCH.

Based on the evidence presented in these cases, including testimony during multiple trial dates plus reams of medical and medical-legal evidence, the WCJ came to one, unequivocal finding of fact: applicant did not have any temporary or permanent disability until after she stopped working at First Foursquare Church.

¹⁶ *Tripplett v. Workers’ Comp. Appeals Bd.* (2018) __ Cal. App. 5th __ [G054825], 83 Cal. Comp. Cases 1175, 2018 Cal. App. LEXIS 652 (filed 6/28/18, certified for pub. 7/24/18; premature pet. for rev. filed, 8/1/18 (S250315)).

With respect to the continuous trauma injury herein (ADJ2307991) **there is no evidence that applicant sustained any compensable time lost until after her last day of work for First Four Square Church in December 1995....** There is no evidence in the record to show that any treating or evaluating physician concluded that applicant had industrially caused permanent disability **until well after her last day of work with First Four Square Church.**¹⁷

Because it is undisputed that the evidence in this case does not support a finding that applicant had any disability “until well after” her employment at First Foursquare Church had ended, applicant did not meet the “disability” prong of §5412 during her employment at First Foursquare Church. Thus, no CT “date of injury” may properly be applied against that employment.¹⁸

¹⁷ Findings & Award, dated 2/26/18, p. 9 (p. 137 of Exhibits to Petition for Writ of Review) (emphasis added).

¹⁸ To the extent that (pursuant to *Rodarte*) applicant’s work restrictions qualify as evidence of a permanent disability prior to her last day of work at First Foursquare Church, it must be recognized that that such disability existed since at least 1993, which would thus become the date of injury for the cumulative trauma. See, e.g., *CIGA v. Workers’ Comp. Appeals Bd. (Morodomi)* (2009) 74 Cal. Comp. Cases 1167. But even in *Rodarte*, the Court of Appeal explained that section 5412 requires “compensable disability,” and that permanent disability is not compensable until it is ratable (*i.e.*, permanent and stationary). The evidence in the instant case demonstrates that applicant’s work restrictions do not qualify as a compensable permanent disability. See *Chavira, supra*, 235 Cal. App. 3d at 473.

C. While This Case Presents a Legal Question of First Impression, the Appeals Board Has Correctly Applied The Relevant Analytical Framework in Prior Cases, And Erred In Failing To Do So Here.

Despite diligent research, *amicus curiae* has located no binding authority or precedent addressing the specific question of whether the mere fact of a change of employment may serve as the basis of finding the ending date of a cumulative trauma claim under the provisions of section 5412. Thus, the legal question presented by this case appears to be one of first impression.

As explained in detail above, the analytical framework governing cumulative trauma injuries include multiple, interlocking statutes, including sections 3208, 3208.1, and 5412. While the Appeals Board has incorrectly applied these statutes to the facts in this case, it has properly interpreted these statutes in other cases.

The case of *Hull v. County of Tulare*¹⁹ is illustrative of the concurrent applications of these several rules. The facts in *Hull*

¹⁹ *Hull v. County of Tulare* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 235. While not binding, panel decisions of the Appeals Board are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language. See *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal. App. 3d 1260, 1264 fn. 2.

were straightforward: The employee had carpal tunnel surgery in 2002 and was taken off work, during which time the employer was covered by AIG. He returned to work until his last day of employment in 2010, during coverage by CorVel. The Appeals Board carefully applied the rules, as follows:

- The Appeals Board first concluded that the injuries were controlled by *Western Growers*, and found that applicant had sustained a single cumulative trauma injury because his medical treatment was continuous through 2010.
- Next, applying section 5412, the Appeals Board found that the date of injury under section 5412 was in 2002, the date applicant first suffered disability.
- Finally, turning to section 5500.5(a), specifying that liability for a cumulative trauma injury is limited to the last year preceding the date of injury or the last date of exposure to the hazards of employment, whichever occurs first, the Appeals Board found liability against AIG.

Compared to the facts in the instant case, the *Hull* case is *almost* exactly the same -- with the important exception that applicant herein did not sustain any disability during her employment at First Foursquare Church. Applying the lessons

from *Hull* to the instant case, because applicant's medical treatment was continuous over a period of 24 years, a single cumulative trauma injury must be found. Under section 5412, the date of injury for that single cumulative trauma is CT-2007, the date applicant first suffered disability pursuant to the WCJ's own findings. Application of section 5500.5(a) would follow, but may be reserved for further proceedings on remand.

In a different case, *American Home Assurance v. Workers' Comp. Appeals Bd. (Mancia)*,²⁰ the Appeals Board considered a cumulative trauma with coverage by Travelers from 3/2003 through 5/7/04, and AHA from 5/8/04 through 4/10/06. The evidence showed that the injured worker first had complaints of pain in April 2004 for which she received treatment and diagnostic studies. She was given a brace, a wrist splint, medications, and started on physical therapy at that time. She was also released to modified work with restrictions and provided with a helper/assistant for the remainder of her employment. However, she did not miss any time from work until she was

²⁰ *American Home Assurance v. Workers' Comp. Appeals Bd. (Mancia)* (2014) 79 Cal. Comp. Cases 1438 (writ denied).

placed on temporary total disability (TTD) effective 4/11/06. The Appeals Board held that the injured worker had knowledge under section 5412 in 2004; however, there was no disability at that time because she had continued to work without a break until 4/10/06. Accordingly, the Appeals Board upheld the WCJ's finding that the date of injury was 4/11/06, her first date of compensable disability and time off work.²¹

An additional example is found in *Gamez v. Circa Corp.*, in which the WCJ had found a cumulative trauma date of injury based on when the injured worker was placed on modified duty; the Appeals Board reversed. Because the injured worker had neither claimed nor received temporary disability indemnity, and because the medical evidence was silent as to permanent disability, the Appeals Board held that there was insufficient

²¹ *Id.* at 1441. See also *Gallo of Sonoma v. Workers' Comp. Appeals Bd. (Jenssen)* (2011) 76 Cal. Comp. Cases 696 (writ denied) (holding that DOI was date employee was taken off work and began to receive TTD indemnity, representing first date of conjunction of knowledge and disability for purposes of §5412).

evidence to establish a date of injury for purposes of section 5412.²²

Despite these cases (and many others) demonstrating that the Appeals Board knows how to interpret the “knowledge and disability” requirements of section 5412, the Appeals Board in this case simply got it wrong. Given the WCJ’s finding, undisturbed by the Appeals Board, that applicant herein had no definitive disability **until well after her last day of work with First Four Square Church,**²³ no date of injury under section 5412 may be assigned during her employment at First Foursquare Church.

VII. CONCLUSION

It appears that the WCJ and Appeals Board got all of the facts right, but applied the law incorrectly. Where there is a continuing injury, where there is continuing need for medical treatment, and even where there is actual knowledge of industrial causation, the cumulative trauma date of injury for

²² *Gamez v. Circa Corp* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 94.

²³ Findings & Award, dated 2/26/18, p. 9 (p. 137 of Exhibits to Petition for Writ of Review) (emphasis added).

purposes of section 5412 does not occur until there is also disability.

Because the Appeals Board erred in this case by identifying a cumulative trauma date of injury in the absence of a finding of disability, the decision below is invalid and should be reversed.

Respectfully submitted,

August 21, 2018

/s/ Ellen Sims Langille
Ellen Sims Langille, General Counsel
Counsel for *amicus curiae* CWCI

VIII. CERTIFICATE OF SERVICE

I certify that on August 21, 2018, I electronically filed the foregoing

**AMICUS CURIAE BRIEF OF CALIFORNIA WORKERS'
COMPENSATION INSTITUTE IN SUPPORT OF
PETITIONER FIRST FOURSQUARE CHURCH**

with the Clerk of the Court for the First District Court Of Appeal by
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I certify that all participants in the case are registered
TrueFiling users and that service will be accomplished by the
appellate TrueFiling system.

Respectfully submitted,

August 21, 2018

/s/ Ellen Sims Langille
Ellen Sims Langille, General Counsel
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