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**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

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| **ROBERT HURLEY,**<br><br>***Applicant,***<br><br>**vs.**<br><br>**SACRAMENTO KINGS; VANCOUVER GRIZZLIES; TIG,**<br><br>***Defendants.*** | **Case No. ADJ7926189**<br>**(Santa Ana District Office)**<br><br>**OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION** |

Defendant seeks reconsideration of the January 10, 2014 Findings And Award of the workers' compensation administrative law judge (WCJ) who found that applicant sustained cumulative industrial injury to numerous body parts while working for defendants Sacramento Kings (Kings) and Vancouver Grizzlies (Grizzlies) as a professional basketball player during the period January 1, 1993 through July 1, 1998, causing 81% permanent disability and need for future medical treatment. The WCJ further found that defendant failed to prove that compensation is barred by the statute of limitations and that defendant is "estopped to raise the statute of limitations defense."

Defendant contends that the WCJ incorrectly utilized the 1997 Permanent Disability Rating Schedule (1997 PDRS) instead of the 2005 Permanent Disability Rating Schedule (2005 PDRS) to rate applicant's permanent disability, that the WCJ should have found that applicant's claim is barred by the statute of limitations set forth in Labor Code sections 5400 and 5405, and that the WCJ relied upon medical reporting that is not substantial evidence to support his findings.[1]

An answer was received from applicant. The WCJ provided a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied.

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[1] Further statutory references are to the Labor Code.

Reconsideration is granted. Applicant's permanent disability should have been determined using the 2005 PDRS, and the case is returned to the trial level for that purpose, including development of the record on the issues of permanent disability and apportionment as appropriate, further proceedings and a new decision by the WCJ in accordance with this decision. The entire January 10, 2014 Findings And Award is rescinded as our Decision After Reconsideration in order to avoid bifurcation of the issues, but in doing so we express no opinion on defendant's other contentions and they should be addressed again by the WCJ as part of the new decision. Either party may timely seek reconsideration of the new decision if aggrieved.

## BACKGROUND

Applicant participated in more than 269 games while employed by the Kings and Grizzlies as a professional basketball player from January 1, 1993 through July 1, 1998. Most of the games occurred in California. Defendant does not contest WCAB jurisdiction in its petition, but contends that compensation is barred by the statute of limitations, and that the medical reporting relied upon by the WCJ is not substantial evidence. Defendant also contends that the WCJ incorrectly used the 1997 PDRS instead of the 2005 PDRS to rate applicant's permanent disability, and we agree with this last contention.

Orthopedist Michael Einbund, M.D., and neurologist Kenneth Nudleman, M.D., were selected by applicant to provide medical reporting as Qualified Medical Evaluators (QMEs). Orthopedist Harry Marinow, M.D., and neurologist Scott Haldeman, M.D., were selected to serve as defendant's QMEs. The issues of permanent disability and apportionment were tried along with other issues in the case on September 5, 2013. Numerous reports by the QMEs were received into evidence at trial, along with applicant's testimony, the transcript of his August 9, 2012 deposition, and personnel records and documents concerning the two employers and applicant's claim. Following the trial, the WCJ issued his decision as described above.

In his Report, the WCJ explained why he determined that the 1997 PDRS applied, writing as follows:

> "The Defendants conten[d] the 2005 PDRS should have been used. However, the Court found that the 1997 PDRS was applicable because the Defendants were required to provide notice per Labor Code § 4061. The

Appeals Board in Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn; Republic Indemnity Company of America, (2006) 71 Cal.Comp.Cases 783 (Appeals Board en banc) held that the 1997 PDRS should be used to rate permanent disability for injuries prior to January 1, 2005 where any one of the three exceptions described in Labor Code § 4660(d) has been established. Labor Code § 4660(d) provides in pertinent part that for injuries arising before January 1, 2005, the 2005 PDRS shall apply when: 'there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.'

"One of the exceptions, however, was triggered because the Defendants were required to provide notice per § 4061. The unrebutted evidence is that on at least [more than one] separate occasions, the Applicant was on paid injured reserve status, and the Defendants paid salary continuance in lieu of temporary disability. When the Applicant returned to regular duty after each injury, the Defendants were required to provide notice under Labor Code § 4061. As provided in pertinent part by 8 CCR § 9814: 'In relation to periods of temporary disability, where an employer provides salary or other payments in lieu of or in excess of temporary disability indemnity, the claims administrator or employer shall comply with the notice requirements of this article which apply to temporary disability.'

"The Applicant was on the injured reserve list during the 1994 season when he sustained lower back injuries and missed at least five games. (Applicant Exhibit A, report of Dr. Michael Einbund dated September 6, 2012, page 3). The Applicant testified he was on the injured reserve list during the 1997 season when he strained his abductor muscle and he missed approximately five games over two weeks. (MOH/SOE 12:18-20.) During the 1998 season, the Applicant sustained a Grade II ankle sprain and missed two weeks of work as a result. (Defendants' Exhibit H, report of Harry Marinow, MD dated August 7, 2012 at page 5.) The Applicant testified that while on the injured reserve, he treated with the team doctors, and he received his regular wages per the terms of his employment contract. (MOH/SOE 14:22-24.)

"The Applicant sought treatment with the team training physicians on numerous occasions, and they provided him with relief so that he could continue to play in games and participate in practices. He experienced frequent exacerbations and aggravations to his joints and musculature. The team doctors prescribed medications to cover the pain and aid in his recovery. (Applicant Exhibit A, report of Dr. Michael Einbund dated September 6, 2012, page 3). The 1997 PDRS thus applies because the Defendants were required to provide notice, as the medical care the Applicant received involved more than first aid, and the resulting injuries and salary continuation required that the appropriate notices be sent per Labor Code § 4061...

"The Defendants contend that public policy favors extending application of the 2005 PDRS to this matter. However, Labor Code § 4660 provides that for compensable injuries occurring before 2005, the 1997 PDRS shall apply when the employer is required to provide notice required by § 4061.

Based on the plain meaning of the statute, the circumstances triggering the exception applied before January 1, 2005, and the percentage of permanent disability is to be calculated using the 1997 PDRS that was in effect on the date of the injury."

## DISCUSSION

The WCJ is correct in writing in his Report that the 1997 PDRS should be used to rate the permanent disability caused by injuries occurring prior to January 1, 2005, when one of the three exceptions described in section 4660(d) has been established.[2] He also is correct that under the rules of the Administrative Director, payment of "salary or other payments in lieu of or in excess of temporary disability indemnity" can trigger the obligation to provided notice pursuant to section 4061(a). (Cal. Code Regs., tit. 8, § 9814.) Our disagreement with the WCJ is with his view that the third section 4660(d) exception applies in this case because the employer was required to provide section 4061 notice to the applicant prior to January 1, 2005.

Section 4061(a) provides that notice regarding permanent disability indemnity is to be provided to the injured worker "with *the last payment* of temporary disability indemnity." (Emphasis added.) If a defendant is not obligated to make the last payment of temporary disability indemnity until after January 1, 2005, the section 4660(d) exception to the use of the 2005 PDRS does not apply.[3] (*Tanimura & Antle v. Workers' Comp. Appeals Bd.* (*Lopez*) (2007) 157 Cal.App.4th 1489 [72 Cal.Comp.Cases 1579]; *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (*Cugini*) (2008) 159 Cal.App.4th 483 [73 Cal.Comp.Cases 81]; cf. *Vera v. Workers' Comp. Appeals Bd.* (2007) 154 Cal.App.4th 996 [72 Cal.

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[2] Section 4660(d) provides in pertinent part as follows: "For compensable claims arising before January 1, 2005, the [2005 PDRS] shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker."

[3] Section 4061(a) provides in pertinent part as follows: "Together with the last payment of temporary disability indemnity, the employer shall, in a form prescribed by the administrative director pursuant to Section 138.4, provide the employee one of the following:

(1) Notice either that no permanent disability indemnity will be paid because the employer alleges the employee has no permanent impairment or limitations resulting from the injury or notice of the amount of permanent disability indemnity determined by the employer to be payable...

(2) Notice that permanent disability indemnity may be or is payable, but that the amount cannot be determined because the employee's medical condition is not yet permanent and stationary..."

Comp. Cases 1115]; *Chang v. Workers' Comp. Appeals Bd.* (2007) 153 Cal.App.4th 750 [72 Cal.Comp.Cases 921]; *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd.* (*Chang*) (2007) 151 Cal.App.4th 148 [72 Cal.Comp.Cases 582].)

In this case applicant claims cumulative injury incurred as a result of injurious exposure during the period through July 1, 1998. However, the date of applicant's cumulative injury under section 5412 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." Here, the WCJ determined that applicant did not have knowledge of the cumulative injury claim until 2011, which is within one year of the date the claim was filed.[4] The plain language of section 4660(d) cannot be construed to require a defendant to provide notice to an injured worker about an injury claim that has not yet come into existence. (Civ. Code, § 3530 ["That which does not appear to exist is to be regarded as if it did not exist."]; Civ. Code, § 3531 ["The law never requires impossibilities."].)

In that the cumulative injury claim did not exist when applicant was on the injured reserve list in 1994, 1996 and 1998 as described by the WCJ in his Report, defendant had no obligation to provide applicant with a section 4061(a) notice regarding the cumulative injury at those times. In that the cumulative injury claim did not come into existence until 2011, defendant had no obligation to serve any notices concerning that injury claim prior to January 1, 2005. Thus, the third exception to the use of the 2005 PDRS described in section 4660(d) does not apply to the cumulative injury in this case, and no other exception has been shown to apply.

Accordingly, the WCJ's January 10, 2014 decision based upon the 1997 PDRS is rescinded and the case is returned to the trial level for a new decision on the issue of permanent disability using the 2005 PDRS.[5] In order to assure that the new decision is based upon substantial evidence, the record

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[4] This is why the WCJ concluded that compensation is not barred by the statute of limitations, as discussed in his Report and Opinion on Decision.

[5] The issue of permanent disability includes the question of apportionment. (*Kleemann v Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274 [70 Cal.Comp.Cases 133]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc); cf. *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565].)

should be developed as appropriate. The "principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims." (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].)

When the medical record requires further development:

> "[T]he preferred procedure is first to seek supplemental opinions from the physicians who have already reported in the case. If the supplemental reports or depositions of the previously reporting physicians cannot or do not sufficiently develop the record, an agreed medical evaluator (AME) may be considered. Finally, if none of these options succeeds or is possible, the WCJ or the Board may then appoint a medical examiner." (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

The January 10, 2014 Findings And Award is rescinded and the case is returned to the trial level for development of the record, further proceedings and a new decision by the WCJ using the 2005 PDRS in accordance with this decision.

For the foregoing reasons,

**IT IS ORDERED** that defendant's petition for reconsideration of the January 10, 2014 Findings And Award of the workers' compensation administrative law judge is **GRANTED**.

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**IT IS FURTHER ORDERED** as the Decision After Reconsideration that the January 10, 2014 Findings And Award of the workers' compensation administrative law judge is **RESCINDED**, and the case is **RETURNED** to the trial level for development of the record, further proceedings and a new decision by the workers' compensation administrative law judge in accordance with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**MARGUERITE SWEENEY**

**I CONCUR,**

DEIDRA E. LOWE

DEPUTY

RICK DIETRICH

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

APR 01 2014

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

**ROBERT HURLEY**
**RONALD MIX**
**ADELSON TESTAN BRUNDO & JIMENEZ**

**JFS/abs**

STATE OF CALIFORNIA
**Division of Workers' Compensation**
**Workers' Compensation Appeals Board**

**CASE NUMBER: ADJ7926189**

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| **ROBERT HURLEY** | **-vs.-** | **VANCOUVER GRIZZLIES and SACRAMENTO KINGS; TIG, administered by ZENITH INSURANCE COMPANY,** |

**WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE:** **Richard Brennen**

**DATE: February 18, 2014**

Adelson, Testan, Brundo, Novell & Jimenez
By: Jamiyl Shabrami
Petitioner and Attorney for Defendant

Law Offices of Ronald Mix
By: Ronald Mix
Attorney for Applicant

# REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

I.

## INTRODUCTION

The Applicant, Robert Hurley, born on June 28, 1971, while employed as a Professional Basketball Player, Occupational Group No. 590, at various locations in California, by the Defendants, the Sacramento Kings from 1993 to 1998, and by the Vancouver Grizzlies from 1997 to 1998, filed an application for adjudication of claim alleging cumulative trauma to the neck, back,

both shoulders, wrists, hands, fingers, hips, knees, ankles, feet, toes, post-traumatic head syndrome, headaches, and sleep apnea.

The Defendants, by and through counsel, filed a timely and verified Petition for Reconsideration. The Applicant, by and through counsel, filed an Answer.

With regards to the January 13, 2014 Findings and Award, the Defendants contend:

1. The 1997 permanent disability rating schedule (PDRS) should have been used because the Defendants were not required to provide notice under Labor Code § 4061(a).
2. Legislative policy supports application of the 2005 PDRS.
3. The Application for Adjudication of Claim was barred by the statute of limitations.
4. The Defendants were not estoppel to assert the statute of limitations defense.
5. The Applicant's PQME reports were not substantial medical evidence.

For the reasons set forth below, the Defendants' Petition should be denied.

II.

## FACTS

The Applicant, Robert Hurley, experienced most of his cumulative trauma injury within the State of California while playing for the Sacramento Kings and Vancouver Grizzlies. During the course of his career, he played over 269 professional basketball games, with the majority being played in California. Pursuant to Labor Code §§ 5300 and 5301, the Workers' Compensation Appeals Board has jurisdiction to hear and determine this matter because it has jurisdiction over all claims for compensation that involve industrial injuries that occur within the state of California.

Both the Applicant and the Defense Qualified Medical Evaluators found that the Applicant sustained cumulative trauma injury arising out of, and in the course his employment with the Sacramento Kings and Vancouver Grizzlies. The physical demands of playing professional basketball produced stress and strain on the Applicant's musculoskeletal system.

(Applicant Exhibit 1, report of Dr. Michael Einbund dated August 6, 2012, page 4). The Applicant annually played 82 regular-season games, eight to ten preseason games, and up to 20 postseason games. He averaged five regular practices a week, and three games per week. He experienced multiple episodes of jamming and jarring injuries during practice and in games. His duties required jumping, running, overhead reaching, repetitive use of both arms and hands, throwing and pushing, bending, twisting and turning, stooping and pivoting, and getting knocked down to the ground by other players. (Defense Exhibit H, report of Dr. Harry Marinow dated August 7, 2012, page 3).

The Applicant sustained numerous micro-traumas throughout his career, including ligament sprains and strains to various parts of his body. (Defense Exhibit H, report of Dr. Harry Marinow dated August 7, 2012, page 3). Before each season, he participated in a rigorous one month-long training camp. He experienced total body soreness and aching. He frequently collided with other players and sustained trauma to his head and body.

With regard to his lower extremities, the Applicant sustained cumulative trauma running up and down the basketball court, pivoting, and changing directions abruptly. He sustained trauma to his hips when falling to the ground or being bumped by other players. With regard to his upper extremities, he sustained cumulative trauma when he collided with other players, while repetitively shooting baskets, as well as from reaching at various levels below and above the shoulder level. (Applicant Exhibit A, report of Dr. Michael Einbund dated September 6, 2012, page 3).

Based on the above evidence, as well as the Applicant's credible testimony, and the medical reports of Dr. Michael Einbund (dated Aug. 6, 2012, March 15, 2013, and July 3, 2013), and Dr. Kenneth Nudleman, M.D. (dated August 8, 2012 and February 15, 2013) the Court found the applicant sustained a cumulative trauma injury. In accordance with the rating of the disability evaluation specialist, the level of permanent disability awarded was 81%, with a life pension payable thereafter. Future medical care, reimbursement of reasonable and necessary medical-legal expenses, and attorney fees of 15% of the permanent disability indemnity and the present value of the life pension awards were awarded.

III.

## DISCUSSION

*1) The 1997 PDRS applies because the notice requirements of Labor Code §4061 were triggered.*

The Defendants content the 2005 PDRS should have been used. However, the Court found that the 1997 PDRS was applicable because the Defendants were required to provide notice per Labor Code § 4061. The Appeals Board in Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn; Republic Indemnity Company of America, (2006) 71 Cal.Comp.Cases 783 (Appeals Board en banc) held that the 1997 PDRS should be used to rate permanent disability for injuries prior to January 1, 2005 where any one of the three exceptions described in Labor Code § 4660(d) has been established. Labor Code § 4660(d) provides in pertinent part that for injuries arising before January 1, 2005, the 2005 PDRS shall apply when: "there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker."

One of the exceptions, however, was triggered because the Defendants were required to provide notice per § 4061. The unrebutted evidence is that on at least separate occasions, the Applicant was on paid injured reserve status, and the Defendants paid salary continuance in lieu of temporary disability. When the Applicant returned to regular duty after each injury, the Defendants were required to provide notice under Labor Code § 4061. As provided in pertinent part by 8 CCR § 9814: "In relation to periods of temporary disability, where an employer provides salary or other payments in lieu of or in excess of temporary disability indemnity, the claims administrator or employer shall comply with the notice requirements of this article which apply to temporary disability."

The Applicant was on the injured reserve list during the 1994 season when he sustained lower back injuries and missed at least five games. (Applicant Exhibit A, report of Dr. Michael Einbund dated September 6, 2012, page 3). The Applicant testified he was on the injured reserve list during the 1997 season when he strained his abductor muscle and he missed approximately five games over two weeks. (MOH/SOE 12:18-20.) During the 1998 season, the Applicant sustained a

Grade II ankle sprain and missed two weeks of work as a result. (Defendants' Exhibit H, report of Harry Marinow, MD dated August 7, 2012 at page 5.) The Applicant testified that while on the injured reserve, he treated with the team doctors, and he received his regular wages per the terms of his employment contract. (MOH/SOE 14:22-24.)

The Applicant sought treatment with the team training physicians on numerous occasions, and they provided him with relief so that he could continue to play in games and participate in practices. He experienced frequent exacerbations and aggravations to his joints and musculature. The team doctors prescribed medications to cover the pain and aid in his recovery. (Applicant Exhibit A, report of Dr. Michael Einbund dated September 6, 2012, page 3). The 1997 PDRS thus applies because the Defendants were required to provide notice, as the medical care the Applicant received involved more than first aid, and the resulting injuries and salary continuation required that the appropriate notices be sent per Labor Code § 4061.

*2) Legislative policy supports application of the 1997 PDRS.*

The Defendants contend that public policy favors extending application of the 2005 PDRS to this matter. However, Labor Code § 4660 provides that for compensable injuries occurring before 2005, the 1997 PDRS shall apply when the employer is required to provide notice required by § 4061. Based on the plain meaning of the statute, the circumstances triggering the exception applied before January 1, 2005, and the percentage of permanent disability is to be calculated using the 1997 PDRS that was in effect on the date of the injury.

*3) The statute of limitations defense was not proven.*

There was insufficient evidence to show that the Applicant was aware of his right to file for workers' compensation before June 22, 2011. For cumulative trauma injuries, Labor Code § 5412 defines the date of injury as the 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.

Petitioner contends that because the Applicant received treatment for his injuries throughout his basketball career, he should have known about his right to file a workers' compensation claim.

However, there was no evidence that the Applicant possessed training or background sufficient to allow him to arrive at knowledge of the industrial nature of his disability on his own. Absent medical confirmation, ordinarily a mere employee hunch that a condition is job related will not by itself, without medical substantiation, trigger the knowledge component. (City of Fresno v. Workers' Comp. Appeals Bd. (Johnson) (1985) 163 Cal.App.3d 467, 50 Cal.Comp.Cases 53, 55.) The first time that the Applicant received medical substantiation that he sustained work related cumulative trauma was when Dr. Michael Einbund evaluated the Applicant on August 6, 2012. Dr. Einbund indicated that the applicant's symptoms and disability were secondary to continuous trauma sustained during his career as a professional basketball player for the Sacramento Kings and the Vancouver Grizzlies. (Applicant's Exhibit 1, report of Dr. Michael Einbund dated August 6, 2012, at page 41).

The Applicant credibly testified he first learned of the right to file a workers' compensation claim through a friend, Anthony Avent, who contacted him in the spring of 2011. (MOH/SOE September 5, 2013 at 12:12-13). The Applicant filed his claim for cumulative trauma on June 22, 2011, within the one year from his knowledge. Before speaking with his friend, the Applicant was unaware of his workers' compensation rights, and he had no knowledge about cumulative trauma injuries. (MOH/SOE September 5, 2013 at 14:6-8). In the absence of direct knowledge, the next question is whether or not the Applicant should have known of the industrial causation of his injuries, or whether such knowledge may be imputed.

Knowledge of injury cannot be imputed to the applicant, even if there was a workers' compensation claim form from April 20, 1995. (Defendants' Exhibit A.) The Applicant testified he did not recognize the 1995 claim form when shown to him at the trial on September 5, 2013. (MOH/SOE September 5, 2013 at 15:4-6). The 1995 unsigned claim form references only a specific injury, but does not mention body parts, and makes no mention of cumulative trauma. The 1995 claim form is not sufficient to impute knowledge regarding the industrial nature of Applicant's injuries.

*4) The Defendants are estopped to raise the statute of limitations because they did not advise the Applicant, as required per the Reynolds decision, of his rights to workers' compensation benefits.*

Applicant testified he was never provided with a claim form with respect to his injuries sustained while employed as a basketball player. He was not informed that he could object to the findings of the team doctor or that he could request to be evaluated by a Qualified Medical Evaluator. (MOH/SOE at 12:2-7). There was no evidence in the record, other than the 1995 unsigned claim form, that an employer representative advised the Applicant about his workers' compensation rights prior to 2011.

Petitioner contends that Applicant's involvement in a December 12, 1993 near fatal motor vehicle accident driving home after a game played for the Sacramento Kings demonstrates Applicant should have known about his workers' compensation rights. The Defendants, however, never provided the Applicant with a claim form following the 1993 accident, nor did it advise him of his potential right to workers' compensation benefits.

The Defendants' failure to inform the Applicant of his potential right to workers' compensation tolled the statute of limitations. In Reynolds v. WCAB (1974) 12 Cal.3d 726, 117 Cal.Rptr. 79, 39 Cal.Comp.Cases 768 the Supreme Court held that an employer is estopped to assert the one-year statute of limitations as a defense if the employer knows that an employee's injury is industrially related, but fails to provide the employee with the required notices. The Reynolds notice was required, even if Mr. Hurley received constant medical attention for numerous injuries suffered while he was a basketball player. Since the Applicant sustained many micro-traumas the Defendants also had ample opportunities to provide the workers' compensation claim forms and notices.

The Defendants failed to carry their burden of demonstrating that the Applicant knew, or in the exercise of reasonable diligence should have known, that his employment as a professional basketball player for the Sacramento Kings and Vancouver Grizzlies caused his cumulative trauma. The statute of limitations is an affirmative defense. (Labor Code, § 5409.) The Defendants had the burden of proof with regarding to showing the claim was time barred. (Lab. Code, §5705). In construing the evidence in the manner most favorable to the employee pursuant to

Labor Code § 3202, the cumulative trauma claim should not be barred by the statute of limitations, and the Defendants are estopped to raise the statute of limitations as a defense. (Labor Code § 5405.)

*5) Substantial medical evidence supports the apportionment by Dr. Einbund and Dr. Nudleman.*

The Applicant's QME Dr. Einbund apportioned 75% of the left shoulder and left knee impairment to continuous trauma. (Applicant's Exhibit 1, pages 42, 46.) The Applicant's QME Dr. Jeffrey Nudleman apportioned 50% of the post-traumatic head syndrome to continuous trauma. (Applicant's Exhibit 4 at page 5.) With regard to the remaining injured parts of body, Dr. Einbund indicated there was no apportionment. The Defendants' QME, Dr. Marinow, on the other hand, apportioned 20% for all body parts to varying activities such as playing golf, being an NBA scout, owning a race horse, and the natural progression of aging. However, the Applicant testified that none of his post career activities were as arduous, physically demanding, or strenuous as playing basketball on a professional level. Dr. Marinow did not explain how or why the other activities could have caused the applicant's current disability. Based on the Applicant's credible testimony, as well as on the well-reasoned and thorough medical reports of Dr. Einbund and Nudleman, the Court the apportionment determinations of Dr. Einbund and Nudleman are more persuasive and are substantial medical evidence.

IV.

## RECOMMENDATION

Based on the foregoing, it is respectfully recommended that the Petition for Reconsideration filed by the Vancouver Grizzlies and Sacramento Kings Petition be denied.

DATE: 2/17/2014

Richard Brennen

**Richard Brennen**
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

**SERVICE ON THE**
**PARTIES LISTED BELOW:**

ON: 2/18/2014

BY: S. Carino

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