

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

ELIZABETH ARBOGAST, *Applicant*

vs.

**CALIFORNIA HIGHWAY PATROL,
legally uninsured, administered by
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ9509417
Riverside District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration¹ 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 the worker's compensation administrative law judge (WCJ) on August 15, 2017. The WCJ found in pertinent part that: (1) while employed as a California Highway Patrol officer during the period from August 13, 1984 through May 13, 2014, applicant sustained injury arising out of and in the course of employment in the form of ovarian cancer, hernia, peripheral neuropathy, and to her colon; (2) applicant has an insidious progressive disease; and (3) applicant is in need of further medical treatment to cure or relieve her from the effects of the industrial injury. The WCJ awarded applicant further medical treatment and attorneys' fees.

In its Petition, defendant contends that the medical record does not justify a finding that applicant's ovarian cancer is an insidious progressive disease. Defendant also contends that it was error for the judge to fail to specifically reserve jurisdiction even though the judge found the injury to be an insidious progressive disease.

¹ Commissioners Brass, Lowe and Sweeney, who were on the panel that issued a prior decision in this matter, no longer serve on the Appeals Board. Other panelists have been assigned in their place.

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 considered the record and the allegations of the Petition and Answer and the contents of the WCJ's Report. Based on our review of the record, we will affirm the WCJ but will amend the award to include a reservation of jurisdiction over permanent disability.

BACKGROUND

While employed as a California Highway Patrol officer during the period from August 13, 1984 through May 13, 2014, applicant sustained injury arising out of and in the course of employment in the form of ovarian cancer, hernia, peripheral neuropathy and to the colon.

Applicant was examined by James Padova, M.D., as a qualified medical examiner (QME) in oncology and by Rosabel Young, M.D., as a QME in neurology.

In his initial report of October 1, 2014, Dr. Padova noted that applicant's work history beginning in 1984, but especially from 1992 through 2005, included many activities that applicant believed regularly exposed her to diesel exhaust fumes from idling commercial vehicles and trucks while she was performing her commercial inspection activities, and also was exposed to other hazardous materials while attending to vehicular and residential fires. (Exhibit 6, Report of James Padova, M.D., October 1, 2014, p. 5.)

Commenting on the relationship between applicant's work exposures and her ovarian cancer, Dr. Padova wrote the following:

In regards to chemical exposures, epidemiologic as well as experimental studies have suggested a possible relationship between endocrine disrupting herbicide - like chemicals and other chemical agents such as butadiene found in burning rubber products and benzene derivatives found in diesel fuel and exhaust, that may be linked to ovarian tumors in both human and animal studies. There are other polycyclic carcinogenic aromatic hydrocarbons such as dimethyl benzantracene, which can be present in burning residential or other structure fires and also at vehicular fires and have clearly induced ovarian neoplasms experimentally in animals as well. Since I do believe it is more likely than not that [applicant] has been exposed to such chemicals during her employment with a California Highway Patrol, especially in diesel exhaust and fumes, as well as probable exposures to burning rubber products when an attendance at vehicular fires, I would consider employment with a California Highway Patrol as being causatively related to her [cancer] on a presumptive basis. (Ex. 6, pp.8-9.)

In his supplemental report of February 6, 2017, Dr. Padova stated that:

As you know, Ms. Arbogast's initial disease is that of a Stage III C clear-cell ovarian cancer with a bulky intra-abdominal tumor which required extensive surgery, followed by intra-peritoneal chemotherapy and systemic chemotherapy. This cancer condition should be considered an insidious disease process since I believe there is at least a 50% chance that the cancer can recur within 5-7 years after the initial surgery. For this reason, periodic surveillance continues to be necessary in order to detect any possible early recurrence. Clearly, it is within reasonable medical probability that the cancer could return, and if so, future additional impairment may result. (Ex. 1, p. 2.)

In her report of November 21, 2016, Dr. Young noted that “clear cell ovarian cancer has a high risk of recurrence” and therefore “[applicant] should be allowed frequent visits to the oncologist and endocrinologist.” (Exhibit 7, Report of Rosabel Young, M.D.. November 21, 2016.)

On July 19, 2017, the parties proceeded to trial. They stipulated in pertinent part that: (1) while employed during the period August 13, 1984 through May 13, 2014 as a California Highway Patrol officer, applicant sustained injury arising out of and in the course of employment in the form of ovarian cancer, hernia, peripheral neuropathy and to the colon; (2) there is permanent disability of 29%; and (3) there is a need for further medical treatment to cure or relieve applicant from the effects of her industrial injury. The issues were as follows: (1) permanent disability; (2) attorney fees; and (3) applicant’s motion to reserve jurisdiction over permanent disability beyond the five-year statute due to an insidious and progressive disease process. (Minutes of Hearing & Summary of Evidence, July 19, 2017, (MOH) p. 2.)

Applicant testified as follows:

[She] is employed as a CHP Traffic Officer and has been for the last 32 years.

She was diagnosed with cancer on May 14, 2014. She has had two surgeries to remove the cancer. The first surgery was on April 28, 2014 at Desert Regional Medical Center. She had a complete hysterectomy and appendectomy. There was cancer on her colon.

Following the surgery and the pathology report, she was diagnosed with cancer on May 14, 2014.

A second surgery was performed on July 2, 2014 at the City of Hope in Duarte. The omentum and 15 lymph nodes were removed. Carcinoma had spread to other body parts and beyond the ovaries.

She had chemotherapy at Desert Regional Medical Center for the first session. They had 14 IV sessions.

Her oncologist told her that she had an aggressive form of cancer with a five-year survival rate. She was given 33 percent or less. [*sic.*]

On November 3, 2014, she finished her chemotherapy treatments. She returned to work on January 23, 2015.

She continued to treat at Desert Regional Medical Center every three months. She had a lymphocele in her lower abdomen that has to be drained every two months.

The swelling of the lymphocele causes pain and urgency to use the bathroom.

She had been treating for cancer for three years. Her survival rate has not decreased.

She requires periodic screening for the rest of her life.

She treats with Dr. Amy Hakeem at Desert Regional Medical Center. (MOH, pp.3-4.)

DISCUSSION

Defendant contends that the medical record does not support a finding of an insidious progressive disease, since applicant's condition is permanent and stationary, and the mere probability of applicant's cancer recurring is not sufficient to make this finding, citing *Ruffin v. Olson Glass Co.* (1987) 52 Cal.Comp.Cases 335 [Appeals Board en banc] and *City of Los Angeles v. WCAB (Warren)* (2007) 72 Cal.Comp.Cases 244.²

Based on the medical record, 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 Labor Code sections 5410 and 5804³.

In *General Foundry Service v. Worker's Comp. Appeals Bd. (Jackson)* (1986) 42 Cal.3d 331 [51 Cal.Comp.Cases 375], the issue of when jurisdiction over permanent disability may be reserved in the case of an insidious and progressive disease. The applicant in *Jackson* was exposed to asbestos while working as a molder for the period from 1952 to 1981, which exposure caused

² *Ruffin* is addressed in more detail in the following discussion. In *Warren*, the Appeals Board held there was insufficient evidence to determine whether applicant's hairy cell leukemia was an insidious progressive disease and remanded the case for development of the record, noting that it was improper for the WCJ to have relied on Internet research to support his finding of an insidious progressive disease. (*Id.*, p. 247.)

³ Unless otherwise stated, all further statutory references are to the Labor Code.

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*, 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 Co.* (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 apparent⁴; 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 *Piedmonte*, 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 clearly “caused by a ‘remote’ and ‘undramatic’ work exposure”; she was exposed to vehicular fumes and fires, and her cancer had a long latency from the time of her exposures from 1992 to 2004 to her diagnosis in 2014. (Ex. 6, pp. 5 and 8-9; MOH, pp.3-4.) Furthermore, although it is not clear whether applicant’s cancer is currently worsening, Dr. Padova found there was at least a 50% chance that the cancer would recur, and if so, that future additional impairment may result. (Ex. 1, p. 2.) For the reasons discussed below, we do not find that it was necessary for the medical evidence to show with 100% certainty that applicant’s cancer will worsen in order to support a reservation of

⁴ We construe this phrase to refer generally to the nature of insidious diseases, including those insidious diseases, such as applicant’s post-traumatic head syndrome and CTE, that have the potential to worsen at an indeterminate rate or time.

jurisdiction over permanent disability; instead, the potential for such worsening as described by Dr. Padova is sufficient. (*Id.*)

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 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 noted:

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 ovarian cancer, and her 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. WCAB (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].)

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

Defendant also contends that it was reversible error for the WCJ to fail to reserve jurisdiction over applicant's permanent disability. We agree that a reservation of jurisdiction is warranted, and we will amend the award to include it. However, we do not find the WCJ's failure to do so to be a denial of due process as defendant argues, since the WCJ found an insidious progressive disease, which is the substantive basis for such an award. Furthermore, there is no showing of any prejudice to defendant as the result of this omission.

We note that although permanent disability was listed as an issue to be submitted, and the parties stipulated to 29%, there was no interim award of permanent disability. However, because we are reserving jurisdiction over permanent disability, and as it is unclear whether the permanent disability has been paid, we do not find it necessary to include an interim award of permanent disability and leave this issue for further proceedings at the trial level if necessary.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of July 13, 2017 is **AFFIRMED**, except that the award is **AMENDED** as follows:

AWARD

AWARD IS MADE in favor of **ELIZABETH ARBOGAST** against **CALIFORNIA HIGHWAY PATROL** of:

1. Further medical treatment to cure or relieve applicant from the effects of her injury, including but not limited to medical monitoring;
2. Attorney fees in the amount of \$5426.00;
3. Jurisdiction is reserved over permanent disability in accordance with finding number 2.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 5, 2023

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

**ELIZABETH ARBOGAST
O'MARA & HAMPTON
STATE COMPENSATION INSURANCE FUND**

RLN/abs

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