WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOHNNIE SCHWARK, *Applicant*

vs.

SUBSEQUENT INJURY BENEFITS TRUST FUND, *Defendant*

Adjudication Number: ADJ10348745
(Santa Barbara District Office)

OPINION AND ORDER GRANTING PETITIONS FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant and Defendant Subsequent Injuries Benefits Trust Fund (SIBTF) have each filed separate petitions for reconsideration[1] with regard to a workers' compensation administrative law judge's (WCJ) Findings and Award of June 3, 2024, wherein it was found that applicant's preexisting permanent disability and the permanent disability caused by applicant's May 1, 2013 subsequent industrial injury caused permanent disability of 94%. It was also found that, "Defendant has failed to meet their burden of proof to show the claim was unreasonably filed and is untimely filed and the claim is not barred by the statute of limitations."

Applicant contends in its Petition that the WCJ erred in finding overall permanent disability of only 94%, arguing that applicant's pre-existing permanent disability combined with the permanent disability caused by the subsequent industrial injury constituted permanent total (100%) disability. SIBTF, for its part, contends that the overall permanent disability found by the WCJ was too high. SIBTF also contends that the WCJ erred in not finding that applicant's claim for SIBTF benefits was barred by the statute of limitations and that applicant's recovery should be reduced by a proportional share of social security disability benefits received by the applicant.

[1] Applicant initially made his contentions in a letter to the WCJ purporting to be a request for correction of a clerical error, which the WCJ correctly treated as a Petition for Reconsideration. Afterwards, applicant filed a formal Petition for Reconsideration in which he made the same arguments as in the purported request for correction of clerical error. We treat the original letter as a petition for reconsideration and the later petition a supplemental petition pursuant to Appeals Board Rule 10964 (Cal. Code Regs., tit. 8, § 10964.)

SIBTF has filed an Answer to the applicant's Petition and the WCJ has filed a separate Report and Recommendation on Petition for Reconsideration (Report) addressing the respective petitions.

As explained below, while we affirm the WCJ's finding that applicant's claim for SIBTF benefits was timely filed, we will grant both petitions in order for the evidentiary record to be developed on the issue of overall permanent disability and for the issues raised in both petitions to be more fully analyzed by the WCJ.

With regard to both parties' contentions regarding permanent disability, we will grant reconsideration and amend the decision to defer the issue pending further development of the record. With regard to applicant's contention that the overall rating should have incorporated a cervical spine rating of 23% WPI rather than the 8% WPI utilized by the WCJ, as noted in the WCJ's report, qualified medical evaluator orthopedist Peter M. Newton, M.D. initially stated that applicant had 8% cervical WPI but then in a later report opined that applicant had 23% cervical WPI without adequate explanation of the impairment level or why he changed his reasoning.

As the WCJ wrote in her Report:

> He did provide an explanation for the 8% impairment to the cervical spine in his October 4, 2021, report on page 74. He again referenced 8% on page 23 of his January 8, 2023, report; but then goes on to state that would have been assigned in 2011. The applicant did have subsequent surgeries. For further confusion, in the Impairment Rating Report on page 30 he notes the spinal fusions and provides 13% WPI. Based on the only explanation supporting 8% WPI, the impairment found was 8%. Otherwise, further development of the record could be appropriate.

(Report on Applicant's Petition at p. 4.)

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) In accordance with that mandate, we will grant reconsideration and amend the WCJ's decision to defer the issue of permanent disability so that the record may be further developed, and the issue reanalyzed.[2] Since

[2] Because we defer these issues, there is no current award of benefits. Our amended decision deletes the Award.

we defer the issue of permanent disability on this basis, we need not reach SIBTF's contentions regarding permanent disability or any reduction in liability for permanent disability. The defendant should develop its evidence on this issue, present its arguments to the WCJ, and the WCJ should reanalyze these issues. We express no opinion on the ultimate resolution of these issues.

With regard to defendant's contention regarding the statute of limitations, we will affirm the WCJ's findings for the reasons stated in the WCJ's Report on SIBTF's Petition, which we quote below:

> One of defendant's contention is that the WCJ erroneously failed to find that the Petition for SIBTF benefits was untimely.
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> There is no statute of limitations governing SIBTF claims, however the Application may be untimely. The Appeals Board has stated in the recent decision of ***KEN JENSEN vs SIBTF*** **ADJ9489540:**
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> > "We observe that the burden of proof rests upon the party holding the affirmative of the issue, and all parties shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (§ 5705; *Lantz v. Workers' Comp. Appeals Bd*. (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd*. (*Obernier*) (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289].) "Preponderance of the evidence" is defined by section 3202.5 as the "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." (§ 3202.5.)
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> In this regard, there are four Supreme Court cases that provide guidance for establishing that an applicant failed to timely file a SIBTF claim. (*Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd*. (*Talcott*) (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80]; *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd*. (*Pullum*) (1970) 2 Cal.3d 78 [35 Cal.Comp.Cases 96]; *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd.* (*Woodburn*) (1970) 2 Cal.3d 81 [35 Cal.Comp.Cases 98]; *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd.* (*Baca*) (1970) 2 Cal.3d 74 [35 Cal.Comp.Cases 94].) The Supreme Court in *Talcott*, the seminal case on this issue, provided:
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> We should, in the absence of statutory direction and to avoid an injustice, prevent the barring of an applicant's claim against the Fund before it arises. Therefore, we hold that where, prior to the expiration of five years from the date of injury, an applicant does not know and could not reasonably be

> deemed to know that there will be substantial likelihood he will become entitled to subsequent injuries benefits, his application against the Fund will not be barred—even if he has applied for normal benefits against his employer—if he files a proceeding against the Fund within a reasonable time **after he learns from the board's findings** on the issue of permanent disability that the Fund has **probable liability**. (*Talcott*, *supra*, 2 Cal. 3d at p. 65 [Emphasis added].)
>
> We interpret the holding in *Talcott* to mean that if applicant knew or could reasonably be deemed to know that there will be a substantial likelihood of entitlement to subsequent injuries benefits before the expiration of five years from the date of injury, then the limitation period to file a SIBTF claim is five years from the date of injury. However, if applicant did not know and could not reasonably be deemed to know that there was a substantial likelihood of entitlement to subsequent injuries benefits before the expiration of five years from the date of injury, then the limitation period to file a SIBTF claim is a reasonable time after applicant learns from the WCAB's findings on the issue of permanent disability that SIBTF has probable liability. (*Talcott*, *supra*; see also *Adams v. Subsequent Injuries Benefits Trust Fund* (June 22, 2020, ADJ7479135) [2020 Cal. Wrk. Comp. P.D. LEXIS 216].)"

Utilizing the rationale in *Jensen*, applicant's date of injury is May 1, 2013, and the case was settled along with other cases by way of Joint Order Approving Compromise & Release on April 1, 2020, without final reports.

In light of the absence of a final determination as to applicant's permanent disability, applicant was not on *Talcott* notice of a claim for SIBTF benefits within five years of injury, therefore the record fails to establish that applicant knew or reasonably could have known that there was a substantial likelihood of his entitlement to SIBTF benefits within five years of injury.

As to *Talcott's* second criterion, defendant contends that applicant did not file the Application for SIBTF benefits until June 5, 2023, more than three years after settling his industrial injury claim and more than 10 years after the date of injury. (PFR at p 2 lines 12-17)

Defendant's argument assumes that applicant knew or should have of his likely entitlement to SIBTF benefits because he received a final determination of his permanent disability by way of a Compromise & Release without addressing whether or when applicant had knowledge of facts that could likely establish his entitlement to SIBTF benefits. The Compromise & Release did not reference any percentages of permanent disability for each injury. Instead, it states that "…The Applicant understands he has the right with final evaluations with Dr. Lundeen under GBS claim and QME Gjerdrum under Zurich claim and wishes to proceed with this settlement. …" (Exhibit A at page 9 EAMS ID #51002105)

With no final medical reporting how would the applicant know or even could have known that there will be a substantial likelihood of entitlement to subsequent injuries benefits?

Jensen went on to state:

> "Section 4751 provides:
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> If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article; provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, and such latter permanent disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee, is equal to 5 percent or more of total, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or the age of the employee, is equal to 35 percent or more of total. (§ 4751.)
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> In *Ferguson v. Industrial Acc. Com*. (1958) 50 Cal.2d 469 [23 Cal.Comp.Cases 108], the Supreme Court held that the "previous disability or impairment" contemplated by section 4751 "'must be actually 'labor disabling,' and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751." (*Ferguson*, *supra*, at p. 477.) The Court further noted that "'the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith v. Industrial Acc. Com.* (1955) 44 Cal.2d 364, 367 [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability....'" (*Ferguson*, *supra*, (quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)
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> Under these authorities, defendant must establish that applicant knew or should have known that he had a labor disabling injury before he sustained

> the industrial injury giving rise to his application for SIBTF benefits—and that he failed to file the application within a reasonable time of obtaining such knowledge. Notwithstanding this burden, defendant "offered no evidence as to . . . when [applicant] knew or in the exercise of reasonable diligence should have known he had a potential to recover benefits from SIBTF." (Report, p. 3.)"
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> Here, defendant argues that the Application for SIBTF benefits was initially filed on a different DOI which was later dismissed. Then on June 5, 2023, files his Application for SIBTF benefits on this DOI. Should we find the Application is untimely because he initially filed an Application for a different DOI? Is that evidence of knowledge that applicant knew or should have known he had a potential to recover benefits from SIBTF as to this date of injury? It doesn't appear so.
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> The other contention as to timeliness is that the Application is 3 years from the settlement and 10 years from the date of injury. That alone does not establish evidence that the applicant knew or should have known of his potential to recover benefits from SIBTF.

(Report on SIBTF's Petition at pp. 3-6.)

For the foregoing reasons,

IT IS ORDERED that Applicant's and Defendant SIBTF's respective Petitions for Reconsideration of the Findings and Award of June 3, 2024 are **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of June 3, 2024 is **AMENDED** as follows:

FINDINGS OF FACT

1. Johnnie Schwark, age 45 on the date of the subsequent injury, while employed on May 1, 2013, as an account manager, Occupational Group No. 340, at Santa Barbara, California, by the Healthcare Services Group, sustained injury arising out of and in the course of employment to his cervical spine, right shoulder, and left shoulder.

2. At the time of the injury, the employee's earnings were $631.15 per week, warranting temporary disability rates of $420.77 for temporary and statutory for permanent disability.

3. No attorney fees have been paid in connection with the SIBTF case.

4. The parties stipulated that the subsequent industrial injury rates at 35% or greater before adjustment for age and occupation.

5. The parties stipulated that there exists pre-existing permanent disability capable of rating.

6. The parties stipulated that the 70% threshold is met.

7. The parties stipulated that the permanent disability start date is May 2, 2018.

8. The issue of overall permanent disability is deferred, with jurisdiction deferred.

9. The issue of the permanent disability caused by the subsequent industrial injury is deferred, with jurisdiction reserved.

10. The issue of offsets to liability is deferred, with jurisdiction reserved.

11. The issue of credit is deferred, with jurisdiction reserved.

12. Defendant has failed to meet their burden of proof to show the claim was unreasonably filed and is untimely filed and the claim is not barred by the statute of limitations.

13. The issue of attorney's fees is deferred, with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 6, 2024

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

JOHNNIE SCHWARK
GHITTERMAN, GHITTERMAN & FELD
DEPT OF INDUSTRIAL RELATIONS, OFFICE OF THE DIRECTOR-LEGAL UNIT

DW/oo

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