

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

KAREN HANSON, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Numbers: ADJ9203367, ADJ9203458
Oxnard District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant Karen Hanson seeks reconsideration of the September 6, 2024 Findings and Orders, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant's application for Subsequent Injuries Benefits Trust Fund (SIBTF) is untimely.

Applicant contends that her SIBTF application was timely filed because it was filed within five years of the date of injury of her cumulative trauma per Labor Code, section 5412.¹ (§ 5412.)

We have received an answer from SIBTF. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration and amend the September 6, 2024 Findings and Orders to conclude that applicant's SIBTF claim is timely.

FACTS

As the WCJ stated in his Report:

Applicant, KAREN HANSON, aged 57 on the last date of injurious exposure while employed as a deputy sheriff by the County of Ventura, sustained an injury arising out of and in the course of employment during the period of continuous trauma from 15 June 1980 to 12 June 2013 to her bilateral

¹ All further statutory references are to the Labor Code unless otherwise indicated.

knees, back and circulatory system (hypertension.) This case, which Applicant’s attorney identifies as the “subsequent industrial injury” was resolved by way of Stipulation with Request for Award which was approved on 22 June 2017.

The Stipulation with Request for Award and Award were based on the medical report of Dr. Alan Gross dated 06 June 2016. No subsequent medical reports were introduced into evidence, and it appears that there was no attempt to obtain medical reporting from 22 June 2017 and 10 December 2020, when applicant’s new attorney filed the Petition for SIF benefits.

Thereafter, defendant SIF twice sought to dismiss the Petition for SIF benefits before this case was set for this trial on the issue as to whether the SIF claim here was subject to dismissal based on the Statute of Limitations.

This trial was only set on the Statute of Limitations as the parties needed a determination on that issue first before conducting further discovery. (Report, p. 2.)

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on September 19, 2024, and 60 days from the date of transmission is November 18, 2024. This decision is issued

by or on November 18, 2024, so that we have timely acted on the petition as required by section 5909(a).

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 19, 2024, and the case was transmitted to the Appeals Board on September 19, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 19, 2024.

II.

There are four Supreme Court cases that provide guidance on the issue of timeliness of 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:

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 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 a reasonable time after applicant learns from the WCAB's findings on the issue of permanent disability that SIBTF has probable liability. (*Adams v. Subsequent Injuries Benefits Trust Fund* (June 22, 2020, ADJ7479135) [2020 Cal. Wrk. Comp. P.D. LEXIS 216].)²

In *Riedo v. Subsequent Injuries Benefits Trust Fund* (ADJ7772639, October 21, 2022) [2022 Cal. Wrk. Comp. PD LEXIS 303], a different Appeals Board panel, with two of the same Commissioners assigned here, addressed the issue of how to determine the date of injury in a cumulative trauma injury in a SIBTF case.

SIBTF cites to *Dow Chemical Co. v. Workers' Comp. Appeals Bd. (Quick)* (1967) 67 Cal. 2d 486, 493 [62 Cal. Rptr. 3d 757, 32 Cal.Comp.Cases 431] for the proposition that the date of injury in a cumulative trauma injury in a SIBTF case is the ending date of the cumulative trauma injury. (Answer, p. 8:11-16.) The *Quick* court stated:

Accepting the guidance of the *Beveridge* case, we adopt a similar rule here which fixes what is by necessity a constructive date on which, for the purposes of subsequent injury statutes, a cumulative injury will be deemed to have been incurred. That date is the last day of the period in which the WCAB finds that cumulative injury was received by repetitive exposure to stress or other cause; **or, if disability does not appear until yet a later date, the time when the employee becomes disabled.** (*Quick, supra*, 67 Cal. 2d at p. 493; emphasis added.)

Section 5412 became effective on January 1, 1948 and section 3208.1 became effective on January 1, 1969. (§§ 3208.1, 5412.) Both sections were amended in 1973 to clarify that the date of injury in cumulative trauma injuries is determined under section 5412. (*Ibid.*) The *Quick* decision was issued in 1967, before the 1973 statutory amendments. Furthermore, the *Quick* decision relied on *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal. App. 2d 592 [346 P. 2d 545], which erroneously applied section 5411, the date of injury in specific injury cases, to a cumulative trauma injury. It has since been well established that the date of injury in a cumulative trauma injury is determined in accordance with section 5412, and we conclude so as such.

² Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].) A California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 (Appeals Board en banc).) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

Section 5412 requires (1) the existence of a disability, and (2) actual or constructive knowledge that the disability was caused by employment. (*Riedo, supra*, at pp. 6-7.)

Here, no testimony was taken at trial and only two exhibits were admitted at trial: (1) an objection letter from SIBTF to an appointment with a Qualified Medical Evaluator, and (2) the medical report of Alan M. Gross dated June 6, 2016. (Minutes of Hearing and Summary of Evidence date July 24, 2024.) Dr. Gross's report discusses the existence of an industrial cumulative trauma injury as well as the existence of an industrial specific injury. "One can certainly state there is significant treatment throughout the years she worked and there is a basis for a continuous trauma claim. In addition, there is a basis for a specific injury as described by the patient." (Applicant Exhibit 2, Dr. Gross report dated June 6, 2016, p. 20.) The first notation of a disability associated with applicant's cumulative trauma injury in Dr. Gross's report is a medical progress report dated August 27, 2013:

8/27/13 - Progress Notes. The patient is seen for orthopaedic consultation at the request of the worker's compensation insurance carrier regarding her bilateral knees. According to her there were severe work related cumulative factors that eventually resulted in her current symptoms. Over the past 33 years she has worked for the sheriff's department. She had one specific episode in early 2000 when she sustained a work related injury to her left knee. She was treated with physical therapy and since then her left knee pain never really resolved. Her most recent injury was to her right knee which she had surgery on in 6/13. [*sic*] She feels better after her right knee surgery but her left knee has been more painful since she is compensating for the right. She presently complains of constant pain in her bilateral knees with minimal popping and she has occasional locking and catching in the left knee. She is now seen for the possibility of cumulative trauma to her bilateral knees. The assessment is pain knee; osteoarthritis (degenerative joint disease) knee. It is felt that she sustained cumulative trauma to her bilateral knees. She is to use medication and steroid injection and is to get an MRI scan of the left knee. She is temporarily totally disabled. (Applicant Exhibit 2, Dr. Gross report dated June 6, 2016, p. 10.)

As such, applicant first suffered disability as a result of a cumulative trauma injury in August 2013. However, there is no evidence in the record showing that applicant had constructive knowledge that her knee pain was the result of an industrial cumulative trauma injury, except for

Dr. Gross's June 6, 2016 report.³ The "burden of proving that the employee knew or should have known rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms." (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471.) Generally, "an applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*Id.* at p. 473.) In *Johnson*, the court held that applicant's *belief* that his employment caused his disability does not charge him with knowledge that his disability was work related because applicant did not have the training or qualifications to make that determination. (*Id.* at p. 473.) Accordingly, we conclude that applicant's cumulative trauma date of injury is June 6, 2016. She filed her application for SIBTF benefits within 5 years of her date of injury, on December 10, 2020, making it timely.

We disagree with the WCJ that applicant stipulated to a date of injury of June 12, 2013. (Report, p. 4.) The Stipulations with Request for Award lists a cumulative trauma injury from June 15, 1980 to June 12, 2013. (Stipulations with Request for Award for ADJ9203367.) It does not state a stipulation to a date of injury of June 12, 2013. Furthermore, although the Application for Subsequent Injuries Fund Benefits indicate a date of injury of June 12, 2013, a WCJ has authority to amend the pleadings to conform to proof. (Application for Subsequent Injuries Fund Benefits dated December 10, 2020; Cal. Code Regs., tit. 8, § 10517.)

Finally, although the WCJ did not make an award of attorney's fees, we note that attorney's fees was an issue at trial and that the parties agreed to 25% in attorney's fees. (Minutes of Hearing and Summary of Evidence dated July 24, 2024.) Attorney's fees are governed by section 4903 and WCAB Rule 10844 and an appropriate analysis needs to be made with respect to this issue.

Accordingly, we grant reconsideration and amend the September 6, 2024 Findings and Orders to conclude that applicant's SIBTF claim is timely.

³ The Stipulation with Request for Award on file include a medical report from Jeffrey F. Caren dated March 3, 2017 opining on applicant's industrial hypertension, but the date of this report is later than Dr. Gross's report, making applicant's SIBTF claim still timely.

For the foregoing reasons,

IT IS ORDERED that applicant Karen Hanson's Petition for Reconsideration of the September 6, 2024 Findings and Orders is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 6, 2024 Findings and Orders is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. APPLICANT, KAREN HANSON, aged 57 years on the alleged date of injury, while employed as a deputy sheriff at Ventura, California by the COUNTY OF VENTURA, sustained an injury arising out of and in the course of said employment during the period of continuous trauma from 15 June 1980 through 12 June 2013.
2. The date of injury of applicant's continuous trauma per Labor Code, section 5412, is June 6, 2016.
3. Applicant filed her application for SIBTF benefits on December 10, 2020, within 5 years of her cumulative trauma date of injury.
4. Applicant's application for SIBTF benefits is timely.
5. The issue of attorney's fees is deferred.

ORDERS

There are no orders at this time.

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

November 18, 2024

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

**KAREN HANSON
GHITTERMAN GHITTERMAN & FELD
OD LEGAL – LOS ANGELES**

LSM/oo

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