WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MONTY RIECK, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

Adjudication Number: ADJ10242659
Santa Barbara District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant Subsequent Injuries Trust Fund (SIBTF) seeks reconsideration of the Findings and Award (F&A) issued on August 5, 2024, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant's petition for SIBTF benefits is timely.

Defendant contends that the record establishes that the petition for SIBTF benefits is untimely.

We received an Answer.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, we will deny the Petition.

FACTUAL BACKGROUND

On September 30, 2020, applicant and defendant Home Depot filed a signed Compromise and Release as to case numbers ADJ10242659, ADJ10383664, and ADJ10383102. (Signed Compromise and Release, September 20, 2020, p. 1.) In it, the parties asserted that applicant claimed April 24, 2015 injury to the head, neck, body systems, back, neurological, bilateral arms/elbows, bilateral upper extremities, internal, bilateral eyes, face, hernia, bilateral shoulders, bilateral knees, and bilateral lower extremities in ADJ10242659, but that all three of applicant's claims would be settled for $271,359.00, less permanent disability benefits advanced and attorney's fees, for a balance of $171,581.84. (*Id.*, pp. 3, 6.) The parties stated:

> THIS C&R RESOLVES INDEMNITY AND LUMP SUM OF THE LIFE PENSION FOR ALL INJURIES CLAIMED IN ADJ10242659, ADJ10383102, AND ADJ10383664
> . . .
> REASONS FOR COMPROMISE AND RELEASE
> There is a dispute regarding the nature and extent of injury, the duration of temporary disability, permanent disability, earnings, apportionment, and liability for self-procured medical treatment, medical-legal, mileage expenses, other claimed out-of-pocket" expenses, and claimed penalties on all species of benefits. To resolve all issues and avoid the hazards of delays of litigation, the parties make this settlement and agree to leave future medical care open as to the applicant's neck, bilateral knees, right Horner's Syndrome, Hypertension, Gastritis, and Constipation.
> (*Id*., pp. 7, 10.)

On October 2, 2020, the WCJ issued the Order Approving Joint Compromise and Release with Future Medical Care to Remain Open in ADJ10242659, ADJ10383664, and ADJ10383102. (Order Approving, October 2, 2020.)

On September 21, 2023, applicant filed a petition for SIBTF benefits, alleging that prior to his April 24, 2015 injury to the neck in ADJ10242659, he had a preexisting permanent disability resulting from "INJURY RIGHT KNEE 30% PD AWARD" and INJURY TO BACK 33% AWARD" in case numbers ADJ8082813 and ADJ1765825." (Petition for SIBTF Benefits, September 21, 2023, p. 2.)

On June 19, 2024, the matter proceeded to trial on the issue of "Statute of limitations pursuant to Labor Code Section 5410 or untimely filing of an SIF benefit." (Minutes of Hearing and Summary of Evidence, June 19, 2024, p. 3:2.)

At trial, the WCJ admitted an exhibit Report of QME Dr. Gjerdrum dated September 20, 2016, into evidence. (*Id.*, p. 3: 13-14.) Addressed solely to Helmsman Management Service, it states:

> The applicant's cervical spine is best described in the AMA Guides on page 392 and table 15-5 as DRE cervical category IV with 28% whole person impairment rating. This is because of the alternation of motor segment integrity with bilateral radiculopathy and is essentially equivalent to an arthrodesis at that level.
>
> Current impairment rating for the right knee is calculated in the following manner. Reference AMA Guides page 549, table 17-35, the applicant has constant pain which equals 10 points. He has 110 degrees of flexion which equals 22 points. He has a 5 degree lag which equals -2 points, and he has 5 degrees of AP laxity which equals 15 points and less than 5 degrees of AP laxity which equals 10 points.

Therefore, the applicant has a current rating of 55 points for the right knee. Referring to AMA Guides page 547 and table 17-33, 55 points equals a fair result which is equal to 20% whole person impairment. Therefore, objectively there has been no meaningful change in his impairment compared to his prior rating. In addition in regard to the
applicant's cervical spine 3% add-on for pain should be attributed to the cervical spine or neck, reference AMA Guides Chapter 18. Therefore, there is actually 31% whole person impairment for the cervical spine and 20% for the knee. Impairment rating for the left knee is pending.
(Ex. 3, Report of QME Dr. Gjerdrum, September 20, 2016, pp. 1, 21.)

The report does not contain a proof of service. (*Id*., pp. 1-24.)

In the Report, the WCJ states:

Applicant resolved three (3) claims against Home Depot by way of Compromise & Release. A specific injury on December 8, 2011, a continuous trauma to numerous body parts including the back and knees and a specific injury on April 15, 2015.
. . .
The specific injury of April 15, 2015, is the Subsequent Industrial Injury upon which the SIBTF claim is predicated upon.
. . .
Defendant offered no direct evidence as to what applicant knew and when he knew it. Defendant never called applicant to testify nor produced any witness as it pertains when applicant had knowledge of his potential right to SIBTF benefits.
(Report, pp. 2-3.)

DISCUSSION

I.

Former Labor Code 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. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code 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 Labor Code 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 11, 2024 and 60 days from the date of transmission is November 10, 2024. The next business day that is 60 days from the date of transmission is Tuesday, November 12, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).) This decision is issued by or on Tuesday, November 12, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

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 11, 2024, and the case was transmitted to the Appeals Board on September 11, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 11, 2024.

II.

Defendant contends that the record establishes that the petition for SIBTF benefits is untimely.

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. (Lab. Code § 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." (Lab. Code § 3202.5.)

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:

> 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].)

As to *Talcott's* first criterion, defendant contends that applicant knew or could reasonably be deemed to know that there would be a substantial likelihood of entitlement to subsequent injuries benefits within five years of April 24, 2015, because (1) applicant's petition for SBITF benefits alleged that his prior workers' compensation cases demonstrated preexisting permanent disabilities in the amount of 33 percent and 30 percent, respectively; and (2) QME Dr. Gjerdrum's September 20, 2016 report stated that applicant's permanent disability "met the 35 percent threshold through multiplication by the 1.4 factor, and [that his] disabilities combined surpassed the 70 percent threshold." (Petition, pp. 4:14-15, 5:14-15.)

However, *Talcott* requires notice in the form of "[B]oard[] findings on the issue of permanent disability that the [SIBTF] has probable liability"; and, in the record before us, there are no findings as to permanent disability resulting from applicant's April 24, 2015 injury because that claim was settled in the absence of findings. (*Talcott*, *supra*., at p. 65; Signed Compromise and Release, September 20, 2020; Order Approving, October 2, 2020.) The parties' settlement agreement, moreover, cited the fact that the nature and extent of applicant's permanent disability were in dispute as grounds for their settlement. (Signed Compromise and Release, September 20, 2020, p. 10.)

Additionally, defendant's assertion that QME Dr. Gjerdrum's September 20, 2016 report could have provided applicant with notice substantially equivalent to actual Board findings of probable SIBTF liability is unsupported by the record. Dr. Gjerdrum's September 20, 2016 report does not state that applicant had 35 percent permanent disability, but that he had "31% whole person impairment for the cervical spine," and does not reference the 1.4 multiplier and or show that it was served upon applicant. (Ex. 3, Report of QME Dr. Gjerdrum, September 20, 2016, pp. 21, 1-24.)

Thus, the record is insufficient to establish that applicant was on notice that there was a substantial likelihood of entitlement to subsequent injuries benefits within five years of his April 24, 2015 injury.

Accordingly, we are unable to discern support for the argument that applicant knew or reasonably could be deemed to know that there was a substantial likelihood of entitlement to subsequent injuries benefits within five years of subsequent injury.

As to *Talcott's* second criterion, defendant contends that applicant did not file the petition for SIBTF benefits within a reasonable time after he knew or should have known from Board findings that there was a substantial likelihood of entitlement to such benefits.

Here, as we have explained, the record lacks findings on the issue of permanent disability resulting from subsequent injury. Additionally, the record lacks any other evidence as to when applicant acquired knowledge of probable SIBTF liability, thereby triggering the requirement to seek SIBTF benefits within a reasonable time. Notably, as stated in the Report, defendant never called applicant or any other witness to testify regarding when applicant acquired knowledge of his potential right to SIBTF benefits. (Report, p. 3.)

Accordingly, we are unable to discern support for the argument that applicant did not file the petition for SIBTF within a reasonable time after learning that he had a substantial likelihood of entitlement to SIBTF benefits.

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on August 5, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 12, 2024

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

MONTY RIECK
STOUT, KAUFMAN, HOLZMAN & SPRAGUE
OFFICE OF THE DIRECTOR – LEGAL UNIT

SRO/*cs*

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