WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MICHAEL JONES, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, et al., *Defendants*

Adjudication Number: ADJ8521008
Marina Del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the "Findings of Fact & Order" (F&O) issued on July 8, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant failed to meet the threshold for obtaining Subsequent Injuries Benefits Trust Fund (SIBTF) benefits because applicant's subsequent industrial disability did not meet the 35% threshold pursuant to Labor Code[2] section 4751.

Applicant argues that the WCJ incorrectly relied upon language in a Compromise and Release (C&R) and did not issue a subsequent disability rating when determining whether applicant's disability reached the 35% threshold. Applicant further argues that substantial medical evidence establishes that his subsequent disability reached the 35% threshold.

We received an answer from SIBTF.

The WCJ filed a Report recommending that the Petition for Reconsideration be denied.

We have considered the allegations in the Petition for Reconsideration, the Answer, the contents of the Report, and we have reviewed the record. Based upon our review of the record, as

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[1] Commissioner Marguerite Sweeney, who was previously on the panel in this case, no longer served on the Board. Another panelist was appointed in her place.

[2] All future references are to the Labor Code unless noted.

our Decision After Reconsideration we will rescind the July 8, 2022 F&O and return this matter to the trial level for further proceedings.

FACTS

Applicant worked as an inventory control clerk when he sustained an admitted industrial injury on March 22, 2011, to his neck, low back, left knee, and left finger, and claims to have sustained industrial injury to his shoulders, internal system, cardiovascular system, and psyche, and in the form of hypertension, headaches, and sleep disorder. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 21, 2021, p. 2, lines 4-9; MOH/SOE, February 23, 2022, p. 2, lines 2-7.)

Applicant settled his claim of injury against the employer via C&R, which was approved on July 26, 2016. Thereafter, applicant sought benefits from SIBTF.

In her report, the WCJ stated that "Applicant sustained a prior industrial injury while working with impairment rating of 24% as agreed to by the parties." (Report, p. 7.) It is unclear where in the record this agreement exists. However, applicant did provide reporting from David Herskiaoff, M.D., from 1999, who noted a history of prior industrial injury to the left ankle, which resulted in work restrictions precluding applicant from prolonged standing, walking, and walking on uneven surfaces. (Applicant's Exhibit 7, Report of David Herskiaoff, M.D., August 9, 1999, p. 7.)

Applicant offered seven exhibits into evidence, including reports obtained specifically to address his claim of SIBTF benefits. However, the WCJ did not admit exhibits 2, 4, 5, or 6 into evidence commenting in her report that the exhibits did not constitute substantial medical evidence. (Report, p. 7.) No analysis of the reporting exists in the record and no orders regarding their admission issued.

The reporting of the qualified medical evaluators for the March 2011 injury are in evidence. Applicant was evaluated by Antoine Roberts, M.D., who evaluated applicant's orthopedic complaints and authored two reports in evidence. (Defendant's Exhibits A and B.) Dr. Roberts took the following history of subsequent injury:

> On March 22, 2011 examinee states he was involved in a motor vehicle accident which was a head-on collision. He states he struck his left knee on the dashboard of the vehicle at the time of the collision. He also hurt his left little finger, shoulder and lower back in this accident. He was evaluated at Kaiser Permanente health plan emergency room. He states he notified his supervisor when the areas

started hurting.

(Defendant's Exhibit A, Report of Antoine Roberts, M.D., April 30, 2014, p. 2.)

Dr. Roberts assigned 5% whole-person impairment (WPI) to applicant's neck, 11% WPI to the low back, and 8% WPI to the left knee. (*Id*. at p. 19.)

Applicant saw Jack Rothberg, M.D., Ph.D., for an evaluation of the psyche. (Applicant's Exhibit 3, Report of Jack Rothberg, M.D., Ph.D., August 7, 2015.) Dr. Rothberg assigned applicant a Global Assessment of Functioning (GAF) score of 55. (*Id*. at p. 23.)

Dr. Rothberg opined upon causation of applicant's injury to the psyche as follows:

> I do believe Mr. Jones experienced a psychiatric injury for the most part due to his physical injuries and the ensuing pain and disability. This is still a pre 2013 case so he would be entitled to additional permanent residuals on a psychiatric basis. There may have been some additional stresses directly from the employer because of the way he was treated. He certainly felt betrayed by their attitude and what he perceived as suspiciousness on their part regarding the authenticity of his symptoms. The QME certainly found significant findings with substantial permanent orthopedic limitations.

(*Id*. at p. 24.)

DISCUSSION

As explained in our en banc decision in Todd:

> SIBTF is a state fund that provides benefits to employees with preexisting permanent disability who sustain subsequent industrial disability. The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of [workers'] compensation contemplated by our Constitution." (*Subsequent Injuries Fund of the State of California v. Industrial Acci. Com*. (*Patterson*) (1952) 39 Cal. 2d 83 [244 P.2d 889, 17 Cal. Comp. Cases 142]; *Ferguson v. Industrial Acci. Com*. (1958) 50 Cal. 2d 469, 475 [326 P.2d 145]; *Escobedo v, Marshalls* (2005) 70 Cal. Comp. Cases 604, 619 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc).)
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> SIBTF is codified in section 4751, which 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.)

The preexisting disability may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (*Escobedo*, *supra*, 70 Cal. Comp. Cases at p. 619.) It must be "independently capable of supporting an award" of permanent disability, "as distinguished from [a] condition rendered disabling only as the result of 'lighting up' by the second injury." (Ferguson, supra, 50 Cal. 2d at p. 477.)

Furthermore, there is no specific statute of limitations with respect to the filing of an application against SIBTF; an application against the fund will not be barred "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, [] 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." (*Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd*. (*Talcott*) (1970) 2 Cal. 3d 56, 65 [84 Cal. Rptr. 140, 465 P.2d 28, 35 Cal. Comp. Cases 80].)

In a claim for SIBTF benefits, an employee must establish that a disability preexisted the industrial injury. (§ 4751.) Evidence of a preexisting disability may include prior stipulated awards of permanent disability or medical evidence. In order to be entitled to benefits under section 4751, an employee must prove the following elements:

> (1) a preexisting permanent partial disability;
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> (2) a subsequent compensable injury resulting in additional permanent partial disability:
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> (a) if the previous permanent partial disability affected a hand, an arm, a foot, a leg, or an eye, the subsequent permanent disability must affect the opposite and corresponding member, and this subsequent permanent disability must equal to 5% or [*582] more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee; or
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> (b) the subsequent permanent disability must equal to 35% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or the age of the employee;
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> (3) the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and
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> (4) the combined preexisting and subsequent permanent partial disability is equal to 70% or more. (§ 4751.)
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> Once the threshold requirements are met, section 4751 specifically provides that applicant "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 … ." (§ 4751; emphasis added.) "[E]ntitlement to SIBTF benefits begins at the time the applicant becomes entitled to permanent disability payments." (*Baker v. Workers' Comp. Appeals Bd*. (*Guerrero*) (2017) 13 Cal. App. 5th 1040, 1050 [220 Cal. Rptr. 3d 761, 82 Cal. Comp. Cases 825].)

(*Todd v. Subsequent Injuries Benefits Trust Fund*, (2020) 85 Cal. Comp. Cases 576, 580-582 (Appeals Board en banc).)

The WCJ shall ". . . make and file findings upon all facts involved in the controversy[.]" (§ 5313; see also, *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).)

Labor Code section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton*, *supra* at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and must be supported by substantial evidence. (§§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.)

To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

The WCJ rejected applicant's claim for SIBTF benefits because the WCJ found that applicant's subsequent industrial disability did not meet the 35% threshold. However, the WCJ made no findings of fact as to applicant's subsequent disability. Thus, the Findings of Fact do not support the F&O and we must rescind the decision.

1. Admission of Evidence

In determining whether to admit evidence, we are governed by the principles of Labor Code section 5908, which states that the appeals board "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." The right to present evidence implicates the right to due process. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 175 [36

Cal.Comp.Cases 93, 102]; *Pence v. Industrial Acci. Com.* (1965) 63 Cal.2d 48, 51 [30 Cal.Comp.Cases 207, 209].)

Here the WCJ issued no orders regarding the admission of multiple exhibits. In the Report, the WCJ states that she found these reports did not constitute substantial medical evidence. However, whether the report is substantial evidence is a determination regarding the *weight* of the evidence, not its *admissibility*. Furthermore, a determination of substantiality requires the WCJ to review an exhibit on the merits, which necessarily requires that it be entered into evidence.

Upon return the WCJ should articulate a legal basis for excluding any proffered exhibits. Furthermore, and to the extent that the WCJ concludes that an exhibit does not constitute substantial evidence, the WCJ should provide an analysis in support of that conclusion to aid the parties, and the Appeals Board in deciding that issue.

2. Failure to Rate the Subsequent Disability

Next, applicant correctly notes that the F&O fails to contain any finding as to applicant's subsequent permanent disability rating. The WCJ correctly notes in her report that the WCJ is not required to submit a rating issue to the Disability Evaluation Unit (DEU). (See *Blackledge v. Bank of America* (2010), 75 Cal. Comp. Cases 613, 624-625 (Appeals Board en banc).) However, when the WCJ exercises such discretion, it is incumbent upon the WCJ to provide the rating string so that the parties are on notice of how disability was calculated.

It would appear that applicant's subsequent disability may rate higher than 35%. Applicant's psychological disability alone appears to rate to 45% [14.01.00.00 - 23 - [8]32 - 214I - 41 - 45]. However, the WCJ did not address compensability of injury to the psyche, even though it was raised as an issue for trial. (See *Rolda v. Pitney Bowes, Inc.* (2001), 66 Cal.Comp.Cases 241, 245-246 (Appeals Board en banc) [requiring the psyche evaluator to list all factors causing psychological injury, address the percentage of causation that each factor contributes to psychological injury, list all factors causing psychological permanent disability, and address the percentage of causation that each factor contributes to permanent disability].) Without any findings of fact in the record, it is unclear upon what basis the WCJ found that applicant's subsequent injury did not meet the 35% threshold.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board 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].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id*. at p. 404.)

Accordingly, as our Decision after Reconsideration we will rescind the July 8, 2022 F&O and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED as our Decision After Reconsideration that the July 8, 2022 F&O is **RESCINDED**.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 17, 2025

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

MICHAEL JONES
LAW OFFICES OF BRUCE ROTH
OFFICE OF THE DIRECTOR LEGAL

EDL/oo

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