

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

THOMAS FUTTERER, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFTIS TRUST FUND, *Defendants*

**Adjudication Numbers: ADJ7529887, ADJ6968183, ADJ1857813¹
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Thomas Futterer.² This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the December 28, 2022 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a firefighter, did not have an actual labor disabling disability at the time of subsequent industrial injuries he sustained from April 14, 1986 to July 6, 2010 (ADJ7529887, ADJ6968183).

Applicant contends that he was permanently partially disabled stemming from a December 23, 1989 (ADJ1857813) industrial injury, which occurred prior to the subsequent compensable injuries mentioned above, thereby meeting the prior "permanently partially disabled" requirement of Labor Code³ section 4751. Applicant further contends that his prior permanent partial disability is labor disabling.

¹ ADJ6968183 and ADJ1857813 have been consolidated in ADJ7529887, which became the master file. (Minutes of Hearing and Summary of Evidence (MOHSOE) dated May 8, 2018 and December 13, 2022.)

² Deputy Commissioner Garcia was on the panel that issued the order granting reconsideration but is not available to participate. Another panel member was appointed in her place.

³ All statutory references are to the Labor Code unless otherwise noted.

We have reviewed defendant Subsequent Injuries Benefits Trust Fund's (SIBTF's) Answer. SIBTF contends that applicant does not have a prior permanent partial disability because his December 23, 1989 industrial injury was completely rehabilitated.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be granted for further study to provide clarification and guidance on whether a prior award of permanent disability in and of itself is sufficient to meet the requirement of a prior labor disabling disability.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, and for the reasons discussed below, we affirm the December 28, 2022 Findings and Order.

The Supreme Court in *Ferguson* held that the "previous disability or impairment" contemplated by section 4751 must be actually labor disabling. (*Ferguson v. Industrial Acci. Com.* (1958) 50 Cal.2d 469, 477; internal quotations omitted.) The court in *Ferguson* and *Moyer v. Workmen's Comp. Appeals* (1972) 24 Cal.App.3d 650, 658 define labor disabling as impairment of earning capacity or diminished ability to compete in the open labor market.

The issue here is whether a prior award of permanent disability automatically establishes that the disability is labor disabling. We agree with the WCJ that it does not. The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of workmen's compensation contemplated by our Constitution." (*Patterson* (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 475.) The purpose is to encourage disabled persons to be hired and employers to hire them. (*Ferguson, supra*, at p. 474-475.) This purpose is not served with an employee who although was awarded a prior permanent disability is no longer labor disabled at the time of the subsequent injury.

The medical evidence demonstrates that applicant was rehabilitated from his December 23, 1989 injury involving a ruptured biceps tendon. (See Report, p. 10.)

Applicant, however, testified at trial that after his 1989 injury, he experienced pain from the elbow to the thumb and had a range of motion problem and weakness that never went away. (Minutes of Hearing/Summary of Evidence dated May 18, 2018, p. 9:21-25.) Applicant testified that he chose to stay working at a slower fire house because he never fully recovered from the ruptured bicep injury. (*Id.* at p. 6:3-6.) He also testified that the residuals of this injury held up his

ability to promote to paramedic, captain, or other positions. (*Id.* at p. 6:9.) He stayed working at the slower fire house for over 20 years. (*Id.* at p. 6:15-17.)

Although applicant's un rebutted testimony that he purposefully stayed working at the slower fire house for over 20 years because of his injury provides evidence that his earning capacity was impaired and that his ability to compete in the open labor marker was diminished, there is no objective evidence supporting such and the medical evidence, as outlined in the Report, belies this point. Instead, the medical records indicate that applicant made an excellent recovery from his 1989 injury and he was no longer labor disabled by the time of the subsequent injury.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 28, 2022 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 29, 2026

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

**THOMAS FUTTERER
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE, LLP
OFFICE OF THE DIRECTOR LEGAL
LOS ANGELES CITY ATTORNEY
THOMAS COGNATA**

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*