WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRAIG MARKOWSKI, ***Applicant***

vs.

CEDARS-SINAI MEDICAL CENTER, Permissibly Self-Insured; SUBSEQUENT INJURIES BENEFITS TRUST FUND, ***Defendants***

Adjudication Number: ADJ6994280
Van Nuys District Office

OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION

Defendant Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award on SIBTF Benefits of April 21, 2022, wherein, as applicable to the instant Petition it was found that applicant had a pre-existing permanent disability of 42% at the time of his subsequent industrial injury, that the subsequent industrial injury caused permanent disability of 93% after apportionment, and that the subsequent industrial injury in combination with the pre-existing permanent disability caused permanent total (100%) disability. It was thus found that SIBTF's liability was the difference between an award of permanent total disability and an award of 93% permanent partial disability. In this matter, in a Compromise and Release approved on April 2, 2019, applicant settled his claims against the employer with regard to a February 20, 2008 industrial injury in exchange for $550,000.00.

SIBTF contends that the WCJ erred in (1) finding applicant entitled to SIBTF benefits, arguing that applicant did not have the requisite labor disabling permanent partial disability and in (2) calculating the combined disability caused the preexisting any labor disabling permanent disability and the subsequent industrial permanent disability. We have received an Answer from the applicant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

We are unable to properly evaluate SIBTF's contentions because the electronic file in this case is not complete. While the WCJ apparently relied on the March 30, 2011 report of internist

Gerald Markovitz, M.D. to find labor disabling internal permanent disability, this report is not in the electronic record. Although a file named "AME report of Gerald Markovitz MD dated 03.30.2011" and labeled as Exhibit 5 is listed in the electronic record, when this file is selected, the file actually contains a duplicate copy of Exhibit 4, a June 1, 2011 supplemental report. As we held in *Hernandez v. AMS Staff Leasing* (2011) 76 Cal.Comp.Cases 343, 346-350 (Appeals Board significant panel decision), it is the responsibility of the parties and the WCJ to ensure that the electronic file is complete. We therefore grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level to correct the electronic record. We additionally return this matter for further development of the record and reanalysis of whether applicant had labor disabling permanent disability at the time of the subsequent industrial injury pursuant to the authorities discussed below. Since we rescind on these bases, we do not decide the issue of whether the WCJ properly combined any pre-existing labor disabling permanent disability with the permanent disability caused by the subsequent industrial injury. SIBTF may raise this issue in the further proceedings at trial level.

Labor Code section 4751, which governs eligibility for SIBTF benefits, states as follows:

> 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.

In this case, the dispute centers on whether and the extent to which applicant was "permanently partially disabled" within the meaning of section 4751 at the time of his February 20, 2008 industrial injury.

As explained in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc), "the chief requirement for [SIBTF] benefits is that the condition must have been 'labor disabling' prior to the occurrence of the subsequent industrial injury. [Citations.]" The requirement for the existence of a prior "labor disabling" permanent disability under section 4751 is the same requirement that existed for apportionment of permanent disability under Labor Code section 4750 prior to the enactment of Senate Bill 899 (SB 899), effective April 19, 2004.

Prior to the enactment of SB 899, Labor Code section 4750 read:

> An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.
>
> The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed.

The approach to determining whether a worker was suffering a previous permanent disability for purposes of SIBTF liability under section 4751 is the same as the approach to determining whether a prior disability could be apportioned under former section 4750. (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 239-240 [43 Cal.Comp.Cases 310].) Under the statutory scheme in place prior to SB 899, "the liability of the [SIBTF] was correlated to the liability of the employer [under section 4750]." (*Id.*) Thus, if a disability was apportionable under former section 4750, and the other prerequisites for SIBTF liability were met, the applicant was entitled to SIBTF benefits. Conversely, "[i]f there can be no apportionment to preexisting disability under section 4750, there can be no [SIBTF] liability." (*Franklin*, 79 Cal.App.3d at p. 250.) Therefore, cases discussing whether permanent disability exists for purposes of apportionment under former section 4750 are also on point regarding whether permanent disability exists for the purposes of section 4751.

In addition to former Labor Code section 4750, under the statutory scheme in place prior to SB 899, former section 4663 also allowed apportionment to the natural progression of a pre-existing disease. (*Franklin*, 79 Cal.App.3d at p. 242.) Unlike apportionment under former section 4750, however, apportionment under former section 4663 was not correlated to the liability of the SIBTF. Thus, if disability was apportioned pursuant to former section 4663, and not pursuant to

former section 4750, the injured worker could not resort to SIBTF, since apportionment under former section 4663 did not implicate a labor disabling disability existing prior to the subsequent industrial injury. (*Franklin*, 79 Cal.App.3d at pp. 245-246, 248.)

On April 19, 2004, SB 899 went into effect. SB 899 contained far-reaching amendments to the California workers' compensation system. Among these changes, former Labor Code sections 4663 and 4750 were repealed, and a new Labor Code section 4663 was enacted to now provide that "Apportionment of permanent disability shall be based on causation." Thus, in contrast to the two narrow grounds for apportionment under former section 4750 (apportionment to a pre-existing labor disabling disability) and former section 4663 (apportionment to definable disability which would have resulted as a result of the natural progression of a non-industrial condition or disease), under current Labor Code section 4663, apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions is now permissible. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 616 [Appeals Board en banc].)

However, although SB 899 repealed the old apportionment statutes, Labor Code section 4751 governing SIBTF liability remained unaltered. Thus, even after SB 899, in order to qualify for SIBTF benefits, the employee must show that his or her disability was labor disabling prior to the subsequent industrial injury. (*Escobedo*, 70 Cal.Comp.Cases at p. 619.) "Accordingly, if an applicant's non-industrial pathology causes apportionable permanent disability … then [SIBTF] benefits will not be payable under section 4751 unless the applicant demonstrates that the pathology was causing permanent disability prior to the subsequent industrial injury." (*Id.*)

As explained in *Franklin, supra*, in order to qualify for benefits from the SIBTF, "The previous condition … must be actually 'labor disabling.' [Citation.] 'While the permanent partial disability need not have existed prior to work exposure [citation] nor need it be of industrial origin, known to the claimant at the time of the subsequent injury, or the subject of a prior rating [citation], or known to the employer [citation], nevertheless it must antedate the subsequent injury [citation] and it must be permanent in character [citations]. Although the prior disability need not be reflected in the form of loss of earnings, if it is not, it must be of a kind upon which an award for partial permanent disability could be made had it been industry caused. This is necessary to distinguish [it] from a "lighting up" aggravation, or acceleration of a preexisting physical condition where the employer is to be held liable for the whole. [Citations.]' [Citations.] Further, the preexisting disability need not have interfered with the employee's ability to work at his

employment in the particular field in which he was working at the time of the subsequent industrial injury. [Citations.] The ability of the injured to carry on some type of gainful employment under work conditions congenial to the preexisting disability does not require a finding that the preexisting disability does not exist. [Citation.]" (*Franklin*, 79 Cal.App.3d at pp. 237-238.) However, as explained below, attempts to impose liability on SIBTF under this congenial work setting doctrine must be strictly scrutinized.

"A preexisting disability cannot be established by a 'retroactive prophylactic work restriction' on the preexisting condition placed on the injured after the subsequent industrial injury in absence of evidence to show that the worker was actually restricted in his work activity prior to the industrial injury. (*Id.* at p. 238.) "The prohibition against 'retroactive prophylactic work restrictions' to establish a preexisting disability is not inconsistent with the fact that prophylactic restrictions are ratable factors of permanent disability stemming from the industrial injury. [Citation.] Applying a prophylactic work restriction retroactively creates 'a sort of factual or legal fiction of an otherwise nonexistent previous disability or physical impairment.'" (*Id.* quoting *Gross v. Workmen's Comp. Appeals Bd.* (1975) 44 Cal.App.3d 397, 404 [40 Cal.Comp.Cases 49].)

As noted above, the fact that applicant was working at the time of the subsequent injury does not preclude a finding that he was permanently disabled at the time of the subsequent injury. The previous disability need only "reasonably be expected to handicap an employee's ability in the general labor market to get and hold a new job, if once he should be displaced from the job he has had." (*Subsequent Injuries Fund v. Industrial Acc. Com. (Allen)* 56 Cal.2d 842, 846 [26 Cal.Comp.Cases 220].) However, as noted in *Ditler v. Workers' Comp. Appeals Bd.* (1982) 131 Cal.App.3d 803, 814-815 [47 Cal.Comp.Cases 492], "there is a great danger that the discredited prophylactic restriction doctrine may be resurrected in the guise of the 'congenial work setting' doctrine, which permits an employer to demonstrate by medical evidence that the preexisting condition, 'though it did not interfere with that work, was nevertheless disabling within the meaning of the statute.' [Citation.] Under this doctrine, apportionment would be theoretically possible … based on a retrospective medical opinion that a condition is 'labor disabling' even though asymptomatic and nondisabling in the employee's particular work. [Citation.] Because many of the same dangers that brought about the demise of the prophylactic work restriction doctrine exist under the congenial work setting doctrine, '[this] form of apportionment should be

scrutinized very carefully by the workers' compensation judges, the Appeals Board, and the courts to ensure that evidence supporting this type of apportionment is substantial.' [Citation.]"

Additionally, in determining whether applicant is entitled to SIBTF benefits, and in determining the amount of any benefits, the prior disability is measured as it existed at the time immediately prior to the subsequent industrial injury. (*Mercier v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 711, 714, 716, fn. 2 [41 Cal.Comp.Cases 205]; *Bookout v. Workmen's Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214, 222 [41 Cal.Comp.Cases 595]; *Hays v. Patten-Blinn Lumber Co.* (1959) 24 Cal.Comp.Cases 46, 48 [Industrial Accident Commission panel]; *Haendiges v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 233 [writ den.]; *Toma v. Workers' Comp. Appeals Bd.* (2014) 79 Cal.Comp.Cases 617 [writ den.].)

Although the matter is unclear, since the WCJ did not fully explain the basis behind his decision, it appears that the WCJ found that applicant was entitled to SIBTF benefits because there was apportionment to non-industrial factors. However, as explained *supra*, a finding of apportionment under current (or former) Labor Code section 4663 is not correlated to SIBTF liability. So while apportionment could previously be made only to labor disabling disability (former Labor Code section 4750) or to the natural progression of a pre-existing condition (former Labor Code section 4663), under current Labor Code section 4663 apportionment can be made to any factor causing permanent disability, including labor disabling conditions and the natural progression of a pre-existing condition, but also pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 616-619 [Appeals Board en banc].) Thus the existence of apportionable permanent disability under current Labor Code section 4663 is in no way tantamount to a finding that applicant had labor disabling permanent disability at the time of his industrial injury.

In fact, without deciding the issue, it appears that with regard to applicant's orthopedic permanent disability, agreed medical evaluator orthopedist Phillip Kantner, M.D. was apportioning to pathology or an asymptomatic prior condition. Dr. Kantner apportioned 25% of the orthopedic permanent disability to "prior industrially related accident which occurred in 1998 or 1999" (December 15, 2010 report at p. 48) but in the report states that this injury had "fully resolved" and that applicant was "asymptomatic" by the time of the subsequent industrial injury. (December 15, 2010 report at p. 4.)

With regard to the psyche, while the applicant did have documented complaints prior to the subsequent industrial injury, the record must be developed regarding applicant's actual level of labor disabling permanent disability at the time of the subsequent injury. Any medical opinion on the issue must the satisfy the standards set forth in *Ditler, supra*.

We are unable to give any guidance on the issue of any pre-existing labor disabling internal permanent disability given that Dr. Markovitz's March 30, 2011 report was not included in the electronic record.

Accordingly, we will rescind the WCJ's decision and return this matter to the trial level so that the electronic record can be corrected, and so that medical evidence may be developed on whether applicant had any labor disabling permanent disability at the time of his industrial injury and the amount of the labor disabling permanent disability measured as it existed immediately prior to the industrial injury. To the extent that there is a medical opinion of labor disabling permanent disability based on the congenial work setting doctrine, the evidence underlying the opinion must be very carefully scrutinized to ensure that it constitutes substantial medical evidence. The WCJ must then analyze the evidence and the law in an opinion complying with Labor Code section 5313 and determine whether applicant is entitled to section 4751 benefits and, if so, the precise amount of benefits due to the applicant. The foregoing is not intended to be a limitation regarding how the record may be developed or which issues need to be analyzed. Additionally, our summary of the law is not intended to be exhaustive. We express no opinion on the ultimate resolution of this matter.

For the foregoing reasons,

IT IS ORDERED that that Defendant Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the Findings and Award on SIBTF Benefits of April 21, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award on SIBTF Benefits of April 21, 2022 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ _KATHERINE WILLIAMS DODD, COMMISSIONER___

I CONCUR,

/s/ _JOSÉ H. RAZO, COMMISSIONER____________

/s/ _MARGUERITE SWEENEY, COMMISSIONER_

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 15, 2022

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

CRAIG MARKOWSKI
SPARAGNA & SPARAGNA
TIMOTHY KAFTEN
DEPARTMENT OF INDUSTRIAL RELATIONS, OFFICE OF THE DIRECTOR-LEGAL UNIT

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