

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

ROBERT ROBERTS, *Applicant*

vs.

**THE PERKINS AND WILL GROUP;
SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ7065881
San Francisco 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 Robert Roberts. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the October 22, 2021 Amended Findings of Fact and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant's claim for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits was untimely and that, therefore, the issue of whether applicant is 100% disabled is moot.

Applicant contends that he did not have subjective knowledge of his substantial likelihood of entitlement to SIBTF benefits until 2018 and that his SIBTF claim was filed less than eight months after he gained that knowledge.

We received an answer from SIBTF. We received and reviewed applicant's supplemental brief. WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964) states that supplemental petitions, pleadings, or responses shall be considered only when specifically requested or approved by the Appeals Board. We accept and review applicant's supplemental brief.

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, the supplemental brief and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we affirm the October 22, 2021 Amended Findings of Fact and Order.

FACTS

As the WCJ stated in his Report,

Applicant sustained neck, right shoulder, internal, and sleep injuries while employed by The Perkins and Will Group as an IT administrator during the period ending on September 14, 2009. Applicant had a prior injury at the same employer on December 7, 2007 to the back, psyche, and sexual dysfunction, and settled that case by Stipulations with Request for Award on November 14, 2012 at 41% permanent disability. Applicant also settled his September 14, 2009 claim by Stipulations with Request for Award on November 14, 2012 for 53% permanent disability.

On August 2, 2019, applicant filed an application in the present matter for SIBTF benefits. Thereafter, applicant underwent medical evaluations in 2019 and 2020 by Dr. Ramin Shiva (Applicant's Exhibits 1 and 4), Dr. Allan Kipperman (Applicant's Exhibit 2), and Dr. Christopher Chen (Applicant's Exhibit 3) for orthopedic, psychiatric, and internal medicine issues. The doctors generally opined that as a result of applicant's combined injuries and preexisting medical conditions, applicant's ability to recover from his injuries was hindered, and he was precluded [] from most jobs and the ability to compete in the labor market. (Opinion on Decision dated October 22, 2021, pp. 2-4.)

The matter proceeded to trial on July 13, 2021 on the issues of whether applicant's claim for SIBTF benefits is barred by a statute of limitations and whether applicant is 100% disabled for purposes of SIBTF benefits. Applicant testified at trial that he did not become aware of the existence of the SIBTF until shortly after December 20, 2018. (Minutes of Hearing and Summary of Evidence for the Trial on July 13, 2021, p. 5, lines 4-10.) He also testified that at the time he settled his cases in late 2012, he was aware that he had injuries in 2007 and 2009 that had resulted in permanent disability, and that he was represented by an attorney at the time. (*Id.* at p. 7, lines 35-38.)

I found that the applicant did not file his claim against SIBTF within a reasonable time from when he knew or should have known that he had a probable claim, and that his claim was thus barred as untimely. Accordingly, I found that the question of whether applicant is 100% disabled was moot. (Opinion on Decision and Findings of Fact and Order dated October 22, 2021.)

As a result of my findings, applicant has petitioned for reconsideration, arguing that I erred in taking applicant's representation into account when I found that he should have known about his eligibility for SIBTF benefits. In the petition for reconsideration, applicant's counsel pointed to applicant's testimony at trial that he had no knowledge of the SIBTF or his potential eligibility and asserted that I incorrectly applied *Subsequent Injuries Fund v. Workmen's Comp. App. Bd.*, (*Talcott*), (1970) 2d Cal. 3d 56. (Report, pp. 1-7.)

DISCUSSION

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.)

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].)

Here, the WCJ analyzed the second prong of the *Talcott* test: whether applicant's SIBTF application was filed within a reasonable time after applicant learned from the Board's finding on the issue of permanent disability that SIBTF has probable liability. (Opinion on Decision, p. 10.) The WCJ found that by the time of the 2012 Stipulations and Award, applicant should have known

of his likelihood entitlement to SIBTF benefits and did not find applicant credible when he testified at trial that he did not know about the existence of the SIBTF at the time. The WCJ found applicant had imputed knowledge because he was represented by counsel in the 2012 Stipulations and Award. (Report, pp. 4-5.)

We agree that the knowledge standard here is constructive knowledge and not subjective knowledge as applicant contends. (*Talcott, supra*, 2 Cal.3d at p. 66 [matter remanded to the WCAB to resolve the factual issue of whether applicant “must reasonably have been deemed to know” prior to five years from the date of injury that there was a substantial likelihood the injured worker was entitled to subsequent injuries benefits]; *Pullum, supra*, 2 Cal.3d at p. 80 [matter remanded for a determination whether injured worker “knew or reasonably should have known” prior to the expiration of the five-year period that there was substantial likelihood of his entitlement to subsequent injuries benefits]; *Woodburn, supra*, 2 Cal.3d at p. 83 [whether the injured worker “should reasonably be deemed to have known” prior to the time his proceeding against the SIBTF would have been barred is a question of fact].)

However, we disagree with the WCJ that the second prong of the *Talcott* test applies. Here, applicant’s first injury occurred on December 7, 2007 and his second injury was a cumulative trauma injury ending on September 14, 2009. Both injuries were settled by Stipulations and Award on November 14, 2012; the 2007 injury for 41% permanent disability and the cumulative trauma injury ending on September 14, 2009 for 53% permanent disability. (Report, pp. 1-2; Petition, pp. 2:22-3:5.) Both injuries were settled by Stipulations and Award within five years of the injury. That is, within five years of the date of both injuries, applicant knew or could reasonably be deemed to know of his substantial likelihood of entitlement to subsequent injuries benefits. His 53% permanent disability award met the 35% subsequent injury SIBTF eligibility threshold and the combined permanent disability between the 2007 and 2009 injuries met the 70% threshold for SIBTF benefits. (Lab. Code, § 4751.) As such, applicant had five years from the date of the subsequent injury in 2009 to file a claim for SIBTF benefits. (*Talcott, supra*, 2 Cal.3d at p. 65; *Adams, supra*, 2020 Cal. Wrk. Comp. P.D. LEXIS 216.) Applicant filed his SIBTF claim on August 2, 2019, ten years after the subsequent injury date. Thus, we agree that applicant’s SIBTF claim is untimely.

Accordingly, we affirm the October 22, 2021 Amended Findings of Fact and Order.

For the foregoing reasons,

IT IS ORDERED that applicant Robert Roberts's Petition for Reconsideration of the October 22, 2021 Amended Findings of Fact and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 11, 2023

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

**ROBERT ROBERTS
LAW OFFICES OF NADEEM MAKADA
OFFICE OF THE DIRECTOR, LEGAL, UNIT**

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