

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

BERNARDINA ORELLANA, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

**Adjudication Number: ADJ7665104
Santa Barbara District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION AND
DECISION AFTER RECONSIDERATION**

Applicant Bernardina Orellana seeks reconsideration of the April 28, 2023 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant is not entitled to Subsequent Injuries Benefits Trust Fund (SIBTF) benefits because applicant did not meet the 5% permanent disability threshold for the subsequent injury.

Applicant contends that the WCJ erred in considering the September 29, 2020 report of Joseph R. Ambrose, Qualified Medical Evaluator (QME) for purposes of applicant's SIBTF claim, who assigned a 19% whole person impairment (WPI) to applicant's right ankle.

We received an answer from SIBTF. 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, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration, rescind the April 28, 2023 Findings and Order, and return this matter to the trial level for further consideration consistent with this Opinion.

FACTS

As the WCJ stated in his Report,

Among other industrial claims, applicant sustained a specific industrial injury on April 29, 2010. The parties agreed to Alan Gross, M.D., to evaluate applicant in the capacity of an AME [Agreed Medical Evaluator].

Dr. Gross found applicant did sustain a right ankle injury but found no ratable impairment. He did provide a work restriction.

The claims were resolved by way of Compromise & Release (C&R) with an Order Approving Compromise and Release (OACR) being issued on February 4, 2015.

Subsequent to the filing of a SIBTF claim, applicant was evaluated by Joseph R. Ambrose, D.C. in the capacity of a QME.

An Opinion on Decision and Findings of Fact and Award issued on April 28, 2023, finding Applicant did not qualify for SIBTF benefits because she had failed to present evidence to meet the 5% threshold of impairment as required by Labor Code §4751.

Applicant filed the instant Petition for Reconsideration contending she did meet her burden of proof on that issue based on the medical reporting of Joseph Ambrose, D.C. (Report, p. 2.)

DISCUSSION

The WCJ opined that applicant could not rely on Dr. Ambrose's opinion because applicant negotiated a settlement in the underlying matter against the employer based on the medical findings of Dr. Gross and although Dr. Gross provided applicant with work restrictions, he did not find any ratable permanent impairment. (Report, pp. 2-3.) We do not see that the compromise and release entered between applicant and her employer was based on the medical findings of Dr. Gross. In fact, the compromise and release specifically states that, "The following issues are in dispute. [*sic*] Nature and extent of permanent disability, the need for further medical treatment, the reasonableness and necessity of self-procured medical expenses and apportionment." (Defendant Exhibit A, Joint Compromise & Release, Addendum A, ¶ A.) Thus, applicant is not bound by Dr. Gross's opinion.

However, we call into question whether Dr. Ambrose's opinions are substantial evidence. Dr. Ambrose opined that applicant's preexisting conditions: (1) neck and upper back with bilateral arm pain, (2) mid back, (3) low back with bilateral leg pain, (4) bilateral shoulders, (5) bilateral elbows, (6) bilateral wrists and hand pain, (7) bilateral hip, (8) bilateral knees, and (9) left foot and ankle, reached permanent and stationary status on April 28, 2010, one day prior to the specific

industrial injury. (Applicant Exhibit 10, Dr. Ambrose's report dated September 29, 2020, pp. 5-7, 17.) The contemporaneous medical records, which Dr. Ambrose summarizes, however, show otherwise.

Steven Dosch, M.D., opined that applicant's right forearm, shoulder and neck, and hand became permanent and stationary on November 12, 2008. (Applicant Exhibit 10, Dr. Ambrose's report dated September 29, 2020, p. 38, ¶ 32.) However, on May 6, 2011, Dr. Dosch noted that applicant's right shoulder needed more treatment, recommended surgery, and opined applicant's right shoulder would reach maximum medical improvement three months after surgery. (Applicant Exhibit 10, Dr. Ambrose's report dated September 29, 2020, pp. 46-47, ¶¶ 78, 80.) Furthermore, applicant underwent a left knee arthroscopic partial medial meniscectomy in or near August 2010, after the subsequent industrial injury of April 29, 2010. (Applicant Exhibit 10, Dr. Ambrose's report dated September 29, 2020, p. 43, ¶ 61.) Applicant underwent a second left knee arthroscopic partial medial meniscectomy in February 2011 and was deemed permanent and stationary at that point. (Applicant Exhibit 10, Dr. Ambrose's report dated September 29, 2020, pp. 4, 506, ¶ 76, 92.)

Moreover, applicant sustained her preexisting injuries from 2008 to 2009. (Applicant Exhibit 10, Dr. Ambrose's report dated September 29, 2020, pp. 4-5.) Dr. Ambrose examined her on July 26, 2019, ten years later, but did not take into account the passage of time with respect to applicant's orthopedic conditions. (Applicant Exhibit 10, Dr. Ambrose's report dated September 29, 2020, p. 2.)

More importantly, it appears that applicant's SIBTF claim is untimely. In *Adams v. Subsequent Injuries Benefits Trust Fund* (June 22, 2020, ADJ7479135) [2020 Cal. Wrk. Comp. P.D. LEXIS 216], we held:

In light of these four Supreme Court decisions [*Talcott, supra*, 2 Cal.3d 56; *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]] 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 SIBT claim is a reasonable time after applicant learns from the WCAB's findings on the issue of permanent disability that SIBTF has probable liability.

Here, applicant's subsequent date of injury to her right ankle is April 29, 2010. (Defendant Exhibit C, Application for SIBTF.) On August 1, 2011, Dr. Gross issued an AME report, which was served on applicant's attorney, delineating applicant's preexisting injuries to her bilateral shoulders, left knee, neck, right shoulder, right elbow, wrist and hand from 2007 to 2009. (Applicant Exhibit 1, Dr. Gross's report dated August 1, 2011, pp. 2-3.) Thus, we return this matter to the trial level to determine whether applicant had knowledge within five years of the date of the subsequent injury of the substantial likelihood of entitlement to subsequent injuries benefits. If she did, then then the limitation period for applicant to file a SIBTF claim is five years from the date of injury, or April 29, 2015. Applicant filed her SIBTF claim on April 23, 2019. (Defendant Exhibit C, Application for SIBTF.)

Accordingly, for the reasons explained above, we grant reconsideration, rescind the April 28, 2023 Findings and Order, and return this matter to the trial level for further consideration consistent with this Opinion.

For the foregoing reasons,

IT IS ORDERED that applicant Bernardina Orellana’s Petition for Reconsideration of the April 28, 2023 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the April 28, 2023 Findings and Order is **RESCINDED** and that this matter is **RETURNED** to the trial court for further proceedings.

WORKERS’ COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 10, 2023

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

**BERNARDINA ORELLANA
GHITTERMAN, GHITTERMAN & FELD
OFFICE OF THE DIRECTOR LEGAL**

LSM/pc

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