

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

LAUREEN CRISCI, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

**Adjudication Number: ADJ7261956
San Jose District Office**

OPINION AND DECISION AFTER RECONSIDERATION

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

Applicant seeks reconsideration of the Findings and Order as Amended (F&O) issued on April 14, 2021, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a corrections officer on June 2, 2009, applicant sustained injury to her low back, knees, right shoulder and psyche, and claims to have sustained injury to her upper extremities; (2) applicant's petition for subsequent injuries trust fund (SIBTF) benefits was not timely pursuant to *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80]; and (3) all other issues are moot.

The WCJ ordered that applicant take nothing on her petition for SIBTF benefits.

Applicant contends that the record fails to establish that she knew or reasonably could have known of a substantial likelihood of her entitlement to SIBTF benefits until on or about March 29, 2018.

We did not receive an Answer.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the contents of the Petition and the Report. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&O, substitute findings that applicant's petition for SIBTF benefits was timely and that defer all other issues, and we will return the matter to the trial level for further proceedings consistent with this decision.

¹ Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been substituted in her place.

FACTUAL BACKGROUND

On August 26, 2015, the parties filed an executed compromise and release (C&R) as to the following case numbers: ADJ7261956, alleging a specific injury of June 2, 2009 to the bilateral knees, shoulders, ankle, and psyche; ADJ7259809, alleging cumulative injury for the period from March 7, 1988 to June, 2, 2009, to the head, neck, skin, teeth/jaw/mouth, bilateral knees, and cardiovascular system; and ADJ135007, alleging a specific injury of January 2, 1996 to the neck, shoulders, head, and teeth/mouth. (C&R, August 26, 2015, pp. 1-4.)

Also on August 26, 2015, the WCJ issued the order approving the C&R, awarding applicant the sum of \$200,000.00 on her three cases, less permanent disability advances and attorney's fee. (Order Approving, August 26, 2015, p. 1.)

On July 25, 2016, applicant filed an application for SIBTF benefits, alleging that she sustained injury to the knees, shoulders, ankle, psyche, and head on June 2, 2009, and that she had prior permanent disability to the neck and right shoulder. (Application for SIBTF Benefits, July 25, 2016, pp. 1-2.) The proof of service does not show that the application was served upon SIBTF. (*Id.*, p. 3.)

On January 31, 2017, applicant filed a copy of the previously-filed application for SIBTF benefits. (Application for SIBTF Benefits, January 31, 2017, pp. 2-3.)

On June 7, 2017, applicant filed a substitution of attorney, substituting Andrew Shaffer for Thomas Boyle as her attorney of record. (Substitution of Attorney, June 7, 2017.)

On October 30, 2017, applicant filed another application for SIBTF benefits, alleging that she sustained injury to the knees, right shoulder, and psyche on June 2, 2009, and that she had prior permanent disability to the knees, psyche and neck. (Application for SIBTF Benefits, October 30, 2017, pp. 1-2.) The proof of service shows that the application was served upon SIBTF. (*Id.*, p. 3.)

On January 25, 2021, the matter proceeded to trial of the following issues:

1. Eligibility for SIBTF benefits pursuant to Labor Code section 4751
 2. Credits
 3. Timeliness issue pursuant to the *Talcott* case
- (Minutes of Hearing and Summary of Evidence, January 25, 2021, pp. 2:20-23.)

The WCJ admitted exhibits entitled Report from Dr. Newman dated March 29, 2018, and Report from AME Dr. Warbritton dated July 2, 2014, into evidence.

The Report from Dr. Newman dated March 29, 2018 states:

Analysis of Determination of Applicant's Eligibility for SIBTF Benefits:

Determination of the Total Work Impairment from the Subsequent Injury 06-2-2009:

Psyche: 9% WPI, per the psyche report from Dr. Whyman.

Lumbar Spine: 5% WPI.

Left Upper Extremity: 5% WPI

Right Upper Extremity: 25% WPI.

Pain-Related Impairment: 3% WPI. Region: Right Shoulder:

Left Knee: 30 % WPI.

Right Knee: 30 % WPI.

Determination of the Total Impairment Pre-Existing the Subsequent Injury:

Cervical Spine: 25% WPI.

Left Hand Loss of Grip Strength: 18% WPI.

Right Hand Loss of Grip Strength: 18% WPI.

Psych: 3% WPI.

Internal Medicine: Yet to be determined.

Conclusions on Threshold Issues and Determination of the Applicant as Eligible for SIBTF Benefits:

The applicant has greater than 5% WPI not modified by age or occupation that stems from the subsequent injury and effects the right upper extremity. The applicant has significant pre-existing disability that affects the left upper extremity.

The applicant also has 5% WPI not modified by age or occupation that stems from the subsequent injury and effects the left upper extremity. The applicant has significant pre-existing disability that affects the right upper extremity.

With consideration of the impairment/disability in the lumbar spine and the left upper extremity, the right upper extremity, the pain related impairment, the left knee impairment, the right knee impairment and psyche impairment/disability, the applicant also has greater than 35% WPI, without modification for age and occupation , them stems from the subsequent injury.

The applicant meets all Threshold criteria.

(Ex. 3, Report from Dr. Newman. March 29, 2018, pp. 44-45.)

The Report from AME Dr. Warbritton dated July 2, 2014 states:

Six years into her job, she filed a stress claim, and eight years into her job, she filed a cervical spine claim. Although a right shoulder injury claim was filed on January 2,1996, review of the medical file reveals that the primary problem was in the

cervical spine, and it is likely that there was no significant right shoulder impairment, at least as a result of this injury. Additionally, it should be acknowledged that over the next ten years, she sustained numerous minor injuries, but she also sustained a left knee injury on July 4, 2000 that required arthroscopic surgery. It would appear that this case did not result in any permanent disability award.

Of far more substantial importance, the patient sustained a specific injury on June 2, 2009, and this resulted in left knee, left ankle, and derivative injuries involving the contralateral right knee and right shoulder and proximal humerus. Although I have previously stated that the patient developed chronic pain syndrome, all parties must acknowledge that the patient sustained a severe comminuted fracture of the proximal humerus of the right dominant arm, and she underwent open reduction internal fixation on January 26, 2011, and she has experienced a rather totally satisfactory result. The only problem, at least with regard to the present examination, is that she does have a rather substantial limitation of motion. However, although she does have dramatic stiffness, her pain appears to be reasonably well controlled.

...

In summary, there is an 18% whole person impairment rating (WPI) referable to the right shoulder, a 30% whole person impairment rating (WPI) referable to right knee and a 20% whole person impairment rating (WPI) referable to left knee before apportionment.

...

With regard to the left knee, after considering the entirety of the medical evidence in this case, it is my opinion, to a degree of medical probability, that 10% of the whole person impairment described in this report is due to pre-existing nonindustrial medical conditions. It is also my opinion that 20% of the whole person impairment described in this report is due to subject specific industrial injury of July 4, 2000. The remaining 70% of the whole person impairment described in this report is due to the subject specific and cumulative trauma injuries of June 2, 2009.

With regard to the right knee, as noted previously, the patient has mild underlying degenerative osteoarthritis. There is little evidence for significant internal derangement, and the patient's arthritis is significantly less severe on the left side than on the right side. Nonetheless, considering that she worked for the county for over 22 years, it would appear that there probably is sufficient basis to support either a compensable consequence or a cumulative trauma cause of action. Therefore, after considering the entirety of the medical evidence in this case, it is my opinion, to a degree of medical probability that 40% of the whole person impairment described in this report is due to pre-existing nonindustrial medical conditions. The remaining 60% of the whole person impairment described in this report is a direct compensable consequence of the subject specific and cumulative trauma injuries of June 2, 2009.

With regard to the right shoulder; although the patient sustained a prior injury to the right shoulder in 1996, this injury- resolved. Therefore, it is my opinion, to a degree of medical probability, that 0% of the whole person impairment described in this report is due to pre-existing industrial and nonindustrial medical conditions. Rather, it is my opinion that 100% of the whole person impairment described in this report is a compensable consequence of the subject specific industrial injury of June 2, 2009.

After adjustment for age and occupation, a final probative permanent impairment rating may be derived in this case.

(Ex. 6, Report from AME Dr. Warbritton, July 2, 2014, pp. 13-17.)

In the Report, the WCJ states:

Talcott holds that where, as here, the SIBTF application is filed more than 5 years post injury (the date of injury is 6/2/2009, and the first conceivable filing date is 7/26/2016) the claim must be filed within a ‘reasonable time’ from that date on which Applicant knew or should have known that a possible SIBTF claim had merit. In this case, Dr. Warbritton’s report dated 7/2/2014 (Exhibit 6) provided the requisite knowledge.

...

This report provided a basis for a strong belief that an SIBTF claim would have a significant possibility of success. . . . [T]here is no evidence in the settlement that contributed to the Applicant’s knowledge of a potential SIBTF claim in any way. It certainly did not change the state of the medical evidence in any way.

...

Applicant points out, correctly, that the claim was first filed with the WCAB on 7/26/2016. If this were a case where an actual statute of limitations was in effect, this would represent a delay of just over two years from the date of first knowledge. If we use the filing of a worker’s compensation case against an employer as a rough guideline, this would be found to be an untimely filing, since generally filing dates based upon the date of first knowledge (such as a CT claim, for example) generally require filing within one year from the date of knowledge.

...

The first F&O was improperly served, and so it was rescinded and a second identical F&O was served on 4/14/2021. This Order held that the claim was untimely.

...

Applicant points out, correctly, that the Warbritton report, by itself, is not enough to prevail in a contested case for benefits. That is not the standard. . . .

(Report, pp. 2-3.)

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 [Emphasis added].)

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 was 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. (*Talcott, supra*; see also *Adams v. Subsequent Injuries Benefits Trust Fund* (June 22, 2020, ADJ7479135) [2020 Cal. Wrk. Comp. P.D. LEXIS 216].)²

Here, as stated in the Report, the WCJ reads *Talcott* to hold that, where applicant did not know and could not have been reasonably be deemed to have known that she had a substantial likelihood of entitlement to subsequent injuries benefits before five years from the date her injury have expired, then she has a reasonable time to file an SIBTF claim after learning that she has “a possible SIBTF claim” that has “significant possibility of success.” (Report, p. 2.) Based upon this reading, the WCJ concluded that Dr. Warbritton’s July 2, 2014 report put applicant on notice

² Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we may consider these decisions to the extent that we find their reasoning persuasive. (See *Guiron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

that she had a possible meritorious SIBTF claim, and the period for filing her application for SIBTF benefits began to run after she received the report and expired approximately one year thereafter. (Report, p. 3.)

However, *Talcott* requires notice in the form of “findings on the issue of permanent disability that the [SIBTF] Fund has probable liability,” and Dr. Warbritton’s July 2, 2014 report does not provide notice substantially equivalent to that requirement because it does not opine as to whether applicant sustained a subsequent injury resulting in additional permanent partial disability, and, if so, whether that additional permanent partial disability meets the criteria for SIBTF benefits. (*Talcott, supra*, at p. 65.)

In particular, Labor Code section 4751 provides:

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. (Lab. Code § 4751.)

In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), we stated that an employee must prove the following elements to recover subsequent injuries fund benefits:

- (1) a preexisting permanent partial disability;
- (2) a subsequent compensable injury resulting in additional permanent partial disability:
 - (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 more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee; or

(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;

(3) the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and

(4) the combined preexisting and subsequent permanent partial disability is equal to 70% or more. ([Lab. Code] § 4751.)
(*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 (Appeals Board en banc).)

Here, Dr. Warbritton's July 2, 2014 report attributes applicant's left knee and right knee disabilities to "the specific and cumulative trauma injuries of June 2, 2009," without identifying which, if either, injury may have resulted in additional permanent partial disability, and without opining whether any such additional permanent partial disability met the criteria for SIBTF benefits, i.e., whether the injury affected an opposite and corresponding member that was previously partially disabled and equaled 5 percent or more of the total disability, and whether the injury resulted in subsequent disabilities equaling 35 percent or more of the total disability and, when combined with preexisting disability, exceeded the subsequent disability alone and equaled 70 percent or more of the total disability. (Ex. 6, Report from AME Dr. Warbritton, July 2, 2014, p. 13-17.)

In addition, Dr. Warbritton's report attributes all of the right shoulder disability to the June 2, 2009 specific injury, effectively precluding the possibility that applicant had previous partial disability of the right shoulder. (*Id.*)

Accordingly, we conclude that the record fails to establish that applicant knew or reasonably could have known that there was a substantial likelihood of her entitlement to SIBTF benefits as of July 2, 2014.

On August 26, 2015, approximately thirteen months after Dr. Warbritton's July 2, 2014 report, applicant settled her three claims without having developed the record sufficiently to learn from findings on the issue of permanent disability that she had a substantial likelihood of entitlement to SIBTF benefits. (Order Approving, August 26, 2015, p. 1; see *Adams, supra.*) That she did so, however, does not give rise to any inference that she waived her potential right to

recover SIBTF benefits or otherwise suggest that the time for filing a claim for SIBTF benefits began to expire thereon. (See *Subsequent Injuries Fund of Cal. v. Indus. Accident Comm'n of Cal. & Max Klein* (1953) 18 Cal.Comp.Cases 37 [writ den.] (finding that the WCAB's approval of a compromise and release settlement does not deprive it of jurisdiction to award SIBTF benefits).)

On July 25, 2016, approximately eleven months after applicant settled her three claims, she filed an application for SIBTF benefits but did not serve it upon SIBTF (a copy of the application was again filed six months later); and, on October 30, 2017, through her new attorney, applicant filed another application for SIBTF benefits which was served upon SIBTF. (Application for SIBTF Benefits, July 25, 2016, pp. 1-3; Application for SIBTF Benefits, January 31, 2017, pp. 2-3; Application for SIBTF Benefits, October 30, 2017, pp. 1-3.)

Pursuant to Rule 10455(a)-(b), an applicant must file only one application for each injury, duplicative applications are subject to summary dismissal, and the filing party must concurrently serve a copy of the application on all other parties. (Cal. Code Regs., tit. 8, §10455(a)-(b).) In addition, pursuant to Rule 10455(f)(2), upon the filing of an initial application, the WCAB shall, if the filing party is represented, serve a conformed copy of the application on the filing party and the filing party must then serve a copy of the conformed application on all other parties.

Here, although the record is unclear as to whether any failure of service delayed the proceedings in this case, the dates of applicant's SIBTF applications do not evidence when applicant received notice of a finding of previous disability or impairment which may establish her knowledge of probable SIBTF liability, and, as such, do not trigger her obligation to seek subsequent injuries benefits within a reasonable time. They do, however, evidence whether applicant met her obligation to timely file her application. And since there can be no dispute that applicant filed an operative application for SIBTF benefits no later than October 30, 2017, we will use that date for purposes of our analysis of the question of whether applicant filed her application within a reasonable time.

Returning to the question of when applicant received notice of a finding of previous disability or impairment establishing her knowledge of probable SIBTF liability, the record reveals that she lacked any such notice until she received Dr. Newman's March 29, 2018, which opined that applicant's June 2, 2009 specific injury constituted a subsequent injury resulting in additional permanent partial disability to the right and left shoulders, that the resulting subsequent disabilities equaled more than 35 percent of applicant's total disability, and that she otherwise met the

threshold requirements for SIBTF benefits. (Ex. 3, Report from Dr. Newman. March 29, 2018, pp. 44-45.)

Hence, because applicant filed her application for SIBTF benefits no later than October 30, 2017, and because she was not on *Talcott* notice of her claim for SIBTF benefits until March 29, 2018, we conclude that her claim is timely.

Accordingly, as our Decision After Reconsideration, we will rescind the F&O, substitute findings that applicant's petition for SIBTF benefits was timely and that defer all other issues, and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that the Findings and Order as Amended issued on April 14, 2021 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Laureen Crisci, born _____, while employed as a corrections officer at San Jose, California on 6/2/2009 by County of Santa Clara, permissibly self-insured for workers' compensation, sustained injury arising out of and occurring in the course of her employment to her low back, knees, right shoulder, and psyche and claims to have sustained injury to her upper extremities.

2. Applicant's petition for SIBTF benefits was timely pursuant to *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80].

3. All other issues are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial court for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 2, 2024

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

**LAUREEN CRISCI
BORAH & SHAFFER
OFFICE OF THE DIRECTOR – LEGAL UNIT**

SRO/cs

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