

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

WARREN HARRIS, *Applicant*

vs.

CITY OF LONG BEACH, *Defendant*

**Adjudication Number: ADJ10155436
Santa Ana District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge (WCJ) Findings and Order of March 21, 2022, wherein it was found that, "Applicant is not entitled to benefits from the Subsequent Injuries Benefits Trust Fund." It was found that "Applicant has not met his burden of showing either the 5% or 35% threshold requirements per §4751." Labor Code section 4751 states:

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.

Applicant had previous injuries comprising of a December 31, 2004 industrial injury to the lumbar and cervical spine causing permanent disability of 36% (ADJ1156628) and a cumulative

injury for the period ending January 12, 2005 in the forms of hypertension and mitral valve prolapse causing permanent disability of 58% (ADJ820275). In the instant case, the applicant sustained the subsequent injury comprising of a cumulative injury during the period ending July 3, 2009 in the form of thyroid cancer, causing permanent disability of 20%.

Applicant contends that the WCJ erred in finding that he is not entitled to SIBTF benefits. Applicant argues that his permanent disability in case ADJ1156628 constituted a previous disability that affected the left upper extremity and that the injury in this case affects the right upper extremity. Thus, applicant argues that the statutory requirements are met because he has a disability of more than 5 percent in the “opposite and corresponding member.” We have received an Answer from SIBTF and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

We will deny the applicant’s Petition.

While the previous injury was to the lumbar and cervical spine, we note that the March 4, 2014 report of primary treating physician orthopedist Mark W. Brown, M.D., upon which the stipulated Award in case ADJ1156628 was based, notes “intermittent left upper extremity ... radiculitis.” (March 4, 2014 report at p. 6.) Additionally, Dr. Brown utilized the Diagnosis Related Estimate method for both the lumbar and cervical spine, placing applicant in DRE Category II for each. The criteria for placement in Category II includes “radicular complaints” or “clinically significant radiculopathy.” (AMA Guides, Tables 15-3 and 15-5, pp. 384, 392.) Accordingly, without having to decide the matter, applicant arguably does have previous permanent disability affecting the left upper extremity.

However, we agree with the WCJ that the applicant produced insufficient evidence that the subsequent injury in the form of thyroid cancer caused permanent disability affecting the right upper extremity. Independent medical evaluator internist Gerald H. Markovitz, M.D., on whose report the stipulated Award was based, makes no mention of the right upper extremity in his April 4, 2016 report. The applicant did testify at trial that “he began experiencing symptoms in his right upper extremit[y] sometime after his diagnosis of thyroid cancer.” (Minutes of December 28, 2021 Hearing at p. 5.) However, there is no evidence that these symptoms were caused by the thyroid cancer. In any case, section 4751 does not only require that the subsequent injury affect the opposite and corresponding member, but that “*the permanent disability resulting from the subsequent injury affect[] the opposite and corresponding member*” (emphasis added.) As noted

previously, Dr. Markovitz made no mention of right upper extremity symptoms, so there is no evidence that the 15% whole person impairment rating given by Dr. Markovitz had any connection to the right upper extremity. (April 4, 2016 report at pp. 17-18.) The impairment rating was based on Class 1 “Impairment Due to Thyroid Disease” which is described as “Continuous thyroid therapy required for correction of thyroid insufficiency or for maintenance of normal thyroid anatomy and no objective physical or laboratory evidence of inadequate replacement therapy.” (AMA Guides, Table 10-2, p. 218.) There is nothing on the face of this impairment rating or in Dr. Markovitz’s report that enables us to find that the permanent impairment in this case affects the right upper extremity.

Accordingly, the WCJ correctly determined that the applicant did not prove that the “permanent disability resulting from the subsequent injury affects the opposite and corresponding member...” and thus correctly found that applicant was not entitled to SIBTF benefits. We therefore deny applicant’s Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Order of March 21, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 10, 2022

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

**WARREN HARRIS
DENNIS THOMAS LAW
STATE OF CALIFORNIA, DEPT OF INDUSTRIAL RELATIONS, OFFICE OF THE
DIRECTOR
LONG BEACH CITY ATTORNEY**

DW/oo

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