

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

RICK BOURISK, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

**Adjudication Number: ADJ10373160
San Jose District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the January 30, 2023 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant is entitled to SIBTF benefits, having sustained an industrial injury of 65% permanent disability and pre-existing permanent disabilities of 55%, resulting in overall permanent total disability.

SIBTF contends that (1) the parties must use the medical-legal process found in Labor Code, section 4062.2¹, to determine applicant's subsequent industrial disability and that medical reporting applicant obtained through section 4753.5 for purposes of his SIBTF claim cannot be used to determine his subsequent industrial disability; (2) applicant's pre-existing disabilities for GERD and psyche are not supported by substantial evidence; and (3) applicant's pre-existing disability in the form of addiction is not supported by substantial evidence and the addiction and psyche impairments are duplicative.

We have received and reviewed an answer from applicant Rick Bourisk. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

¹ All subsequent statutory references are to the Labor Code unless otherwise indicated.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report and for the reasons discussed below, we deny reconsideration.

Section 4060 et seq., including section 4062.2, provides medical-legal processes for the employee and *employer* where there is a dispute as to the compensability of workers' compensation benefits. The wording in these sections clearly pertain to an action between an employee and an employer. Section 4060(b) and (c) state:

(b) Neither the employer nor the employee shall be liable for any comprehensive medical-legal evaluation performed by other than the treating physician, except as provided in this section. However, reports of treating physicians shall be admissible.

(c) If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2. (§ 4060(b) and (c).)

Section 4061(b) provides:

If either the employee or employer objects to a medical determination made by the treating physician concerning the existence or extent of permanent impairment and limitations or the need for future medical care, and the employee is represented by an attorney, a medical evaluation to determine permanent disability shall be obtained as provided in Section 4062.2. (§ 4061(b).)

Section 4062.2 provides the process in which a represented employee and an employer must follow to select a qualified medical evaluator. (§ 4062.2.) It specifically states that if the employee fails to make an appointment with the selected qualified medical evaluator, the *employer* may arrange the appointment and notify the employee. (§ 4062.2(d).)

Once a comprehensive medical evaluation performed under section 4060 et seq. resolves any dispute between the employee and the employer, payment of compensation shall begin or proceedings before the appeals board shall promptly commence. (§ 4061(h)(1).)

While the parties in the underlying matter against the employer are required to follow the medical-legal process found in section 4060 et seq. when there is a dispute as to workers' compensation compensability, the same is not true in an action against SIBTF. (*Moyers v. Council*

on Aging (ADJ3374876, February 15, 2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 54 [“. . .the statutes that address the development of the medical record concerning a workers' compensation claim do not prescribe the process for development of the medical record regarding a claim for SIBTF benefits.”] That is because SIBTF is not an *employer*. (*Baker v. Workers' Comp. Appeals Bd.* (2017) 13 Cal.App.5th 1040, 1047 [82 Cal.Comp.Cases 825] [“the SIBTF is not considered an employer for purposes of payment of workers' compensation benefits.”]) An action against SIBTF is not the same as an action against the employer. In *Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd. (Royster)* (1974) 40 Cal.App.3d 403, 409 [39 Cal.Comp.Cases 507], the Court held:

Where the employer is liable for all or a portion of the disability, the Fund is not also liable. (*Moyer v. Workmen's Comp. Appeals Bd.*, 24 Cal.App.3d 650, 656 [100 Cal.Rptr. 540].) By logical extension, the Fund should not be obligated to begin making life pension benefit payments prior to the date the employer's liability should properly cease. Thus, while the Fund may not relitigate the issue of the employer's liability in an attempt to increase his obligation, it may litigate the question of the employer's liability so as to properly determine the extent of its obligation to the applicant. Any danger that the applicant may find himself faced with conflicting decisions with respect to benefits to which he is entitled can be obviated by his joining the Fund when he institutes his claim for permanent disability benefits if it appears likely that benefits may also be payable from the Subsequent Injuries Fund.

SIBTF is not bound by the findings and awards against the employer in the underlying case and may litigate the question of whether the employer's liability should be more than what was found against it or settled with it in order to reduce its liability. Therefore, an action against the employer is separate and distinct than an action against SIBTF. While the parties in the SIBTF case may utilize the medical reports obtained through section 4060 et seq., and/or adopt any findings or settlement in the underlying matter against the employer, it is not required to do so. The parties in the SIBTF case may develop the record separately and obtain their own medical evaluations independent from medical evaluations obtained in an action against the employer. As such, contrary to SIBTF's contention, applicant is not bound by the medical-legal process found in section 4062.2 to determine the subsequent industrial injury in an action against SIBTF. Accordingly, and for the reasons stated in the Report, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the January 30, 2023 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 25, 2023

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

**RICK BOURISK
ROBERT BLEDSOE
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. *mc*

II. FACTS

Applicant, Rick Bourisk, born [], while employed during the period 2/01/2012 through 7/02/2015, as a carpenter, by Bogard Construction, sustained an injury arising out of and in the course of employment to the neck, back, bilateral shoulders and bilateral upper extremities.

On 6/16/2016, he was examined by QME Stephen Whitelaw, D.C. in the underlying workers' compensation case. Dr. Whitelaw's report noted applicant presented with symptoms of neck, shoulder, left upper thoracic area pain, and decreased sensation in both hands at the time of the evaluation. Dr. Whitelaw determined applicant had not reached maximum medical improvement. (Exhibit B)

On 8/09/2016, applicant settled his underlying workers' compensation claim prior to obtaining a final medical-legal report from Dr. Whitelaw. The claim settled by way of Compromise & Release (C&R) for \$90,400.00. (Exhibit A) Thereafter, applicant pursued a claim for benefits from SIBTF.

On 3/28/2022, the parties presented to trial. The issues to be decided were, injury AOE/COE; whether applicant had established a compensable industrial cumulative trauma injury for 2/01/2012 through 7/02/2015; if so, whether applicant established eligibility for SIBTF benefits pursuant to Labor Code Section 4751.

On 6/06/2022, Findings and Award and Opinion on Decision issued. The undersigned found applicant had sustained injury AOE/COE during period 2/01/2012 through 7/02/2015 to the neck, back, bilateral shoulders and bilateral upper extremities and that he had met the thresholds of Section 4751.

On 7/01/2022, defendant SIBTF filed a timely Petition for Reconsideration listing several issues for reconsideration. Applicant filed an Answer thereto and requesting corrections to the Findings and Award.

On 7/14/2022, the undersigned issued an Order Vacating Findings and Award and Order to Develop the Record. The parties were ordered to provide Sutter Health records to Dr. Chen again and request that he summarize said records and issue a supplemental report indicating whether or not re-review of the records changed his opinion with regard to applicant's pre-existing GERD and addiction. In response, Dr. Chen issued a supplemental report, dated 7/16/2022.

On 10/13/2022, a Notice of Intention to Augment the Record and Notice of Intention to Resubmit the Matter for Decision issued. The 7/16/2022 report

of Christopher Chen, M.D. was admitted as Board Exhibit X and the matter was resubmitted for decision on 11/03/2022.

On 1/30/2023, a second Findings and Award and Opinion issued to address the concerns raised by the parties. It is from the second Findings and Award and Opinion that defendant seeks reconsideration.

III. **DISCUSSION**

Labor Code Section 4062.2

Defendant SIBTF argues that the medical-legal reports offered by applicant for the determination of industrial disability can only be obtained by way of Labor Code Section 4062.2. SIBTF asserts that section 4062.2 expressly prohibits the opinions of these evaluators be used to establish applicant's industrial disability and thus Dr. Chens reports are inadmissible because they were not obtained through the section 4062.2 medical-legal process. First, as previously noted, the only report that defendant objected to at trial was Applicant's Exhibit 1, the report of Dr. Stephen Whitelaw, dated 1/28/2022. This report was marked for identification and the undersigned subsequently determined Exhibit 1 was inadmissible. All other medical reports were admitted without objection. Further, as was indicated in the Opinion, it has been established that applicant is not bound to conduct discovery within the Section 4062.2 medical-legal process¹. In this instance, applicant did not obtain Dr. Chen's reports to offer them in the underlying workers' compensation case. Rather, the reports were obtained to pursue applicant's SIBTF case. There is no legal authority in support of SIBTF's argument that applicant is precluded from conducting discovery for the SIBTF claim once the underlying workers' compensation case has been resolved. Applicant is required to meet the thresholds of Labor Code Section 4751 and meet all required elements. If applicant must obtain additional evidence not obtained in the underlying case, applicant is certainly entitled to do so. Applicant has the burden of proving his right to SIBTF benefits and can only do so with appropriate medical evidence. Dr. Chen reviewed extensive medical records, including the 6/16/2016 report of Dr. Whitelaw. The reports of Drs. Chen and O'Dowd were properly obtained, offered, and admitted without objection and were found to be substantial medical evidence of applicant's industrial disability.

GERD

Defendant next argues that the undersigned's finding of prior labor disabling disability for GERD and psyche is not supported by substantial medical evidence because the opinions are speculative as there is no contemporaneous evidence to support the impairments. Defendant in its initial

¹ *Duncan v. WCAB* (Moyers) (2010) 75 CCC 762 (writ denied)

Petition for Reconsideration argued that Dr. Chen had reviewed no prior records to support his opinion of prior impairment for GERD or addiction. To address defendant's concerns, the undersigned vacated the Findings & Award and ordered the parties to re-send the Sutter records to Dr. Chen and request that he issue a summary of said records. SIBTF again argues that Dr. Chen did not review prior records related to applicant's GERD and that the two entries that note applicant's epigastric pain as of January 13, 2015 fail to identify the date of the record containing this information. However, on page 1, under Record Review, Dr. Chen noted review of 300 pages of Sutter Health records, and specified that in part 1, p. 6 there was a notation of "epigastric pain as of 1/13/15." On page 2, he noted, "Problem list epigastric abdominal pain, entered on 1/13/15." Further, on page 3, Dr. Chen stated, "The Sutter records noted that on 1/13/15, there was an entry of epigastric pain (page 7 of 1st set of Sutter Records (record numbered 6, problem list). Ms. Megan (Physician assistant from Sutter) had entered that from 1/13/15-present, Mr. Bourisk had epigastric abdominal pain, indicative of GERD." Dr. Chen found applicant's GERD developed from his 2014 injury, likely due to ingestion of NSAIDS for pain. (Board Exhibit X)

Applicant testified that his problems with GERD started about 20 to 30 years ago and that he underwent treatment and was prescribed Prilosec. This was before the 2015 injury. He attributed his GERD problems to the pain medications. (MOH/SOE, p. 4: 17-20) As such, the medical record as well as applicant's testimony document the existence of GERD problems prior to the subsequent injury. Defendant next argues that even if the notations of epigastric pain were from records that existed at the time of or prior to the subsequent injury, there is no evidence that this impairment was permanent and stationary and actually labor disabling. However, Dr. Chen noted applicant had to take daily prescription medication, he could not lie down flat on the bed and would wake up during the night due to reflux. He was unable to get restful sleep and awakened tired and thus worked at a slower pace. Dr. Chen reviewed extensive medical records and his opinion was un rebutted by defendant.

PSYCHE

Dr. O'Dowd opined applicant's current impairment is 18% WPI and attributed 10% WPI to the subsequent injury and 8% WPI to pre-existing injury. (Exhibit 7, p. 26-27) Defendant initially argued that applicant did not raise the issue of psyche as to the industrial injury and did not raise it as to the SIBTF claim. However, Dr. O'Dowd found psyche to be a pre-existing condition, and it was considered as such by the undersigned. Defendant further argues there were no contemporaneous records relating to psychiatric symptoms. However, Dr. O'Dowd indicated that "Prior to the subsequent injury, Mr. Bourisk reported a pathological pattern of alcohol abuse that began in adolescence, increased steadily throughout his adult life and led to 2 D.U.I.s and incarceration. Mr. Bourisk also suffered an intense, 1-year depressive period following his

divorce.” Dr. O’Dowd also indicated applicant’s “psychological testing found that he suffers from long-standing characterological traits typical of personality disorders.” (Exhibit 7, pg. 21) Applicant testified he experienced significant depression after the breakup of his over 30-year relationship. (MOH/SOE, p. 7: 17-18)

Dr. O’Dowd reviewed the extensive medical record and conducted multiple psychological tests and found applicant had a pre-existing psychological condition. The undersigned found Dr. O’Dowd’s unrebutted opinion to be substantial medical evidence.

ADDICTION

Defendant argues that Dr. Chen’s opinion that applicant had prior labor disabling disability for addiction, is not substantial evidence as he relies on different facts without adequate explanation, improperly applied the AMA Guides, and the addiction and psyche impairments are duplicative.

Defendant argues that Dr. Chen relied on different facts because in his May 2020 report he found applicant stopped using meth and did not have a recurrence of his addiction since approximately 2008, whereas in his latter supplemental report he found applicant continued to use meth (in 2017 the frequency was daily). Turning to Dr. Chen’s 5/29/2020 report, Dr. Chen noted,

Mr. Bourisk had a history of alcohol and drug abuse. Twelve years ago, he was in an alcohol recovery program. Per the Sutter records, at least since 1/27/2014, Mr. Bourisk smoked and stopped methamphetamine and alcohol (Sutter record 8/1/17).

...

Apportionment: Since Mr. Bourisk was in the alcohol recovery program, 12 years ago, he did not have any change in treatment (only monitoring was done), nor did he have a recurrence of his addiction. The Sutter records did not document recurrence.

The Sutter records documented stopping meth. The **current** alcohol and drug abuse were like that pre-6/1/15.
(Exhibit 6, p. 8, emphasis added)

Dr. Chen’s 7/16/2022 report notes,

Mr. Bourisk had a history of alcohol and drug abuse. Seventeen years ago, he was in an alcohol recovery program. Per the Sutter records, noted on 1/27/2014, Mr. Bourisk smoked and stopped methamphetamine and alcohol (Sutter record 8/1/17) On page 122, on 1/27/14, Mr. Bourisk was noted as an everyday smoker of ½ ppd for 20 years. On page 15 of Sutter records, 1623 pages, on

1/27/14, the report further noted that Mr. Bourisk had a meth addiction (but not on opiates and meth anymore). On 11/19/15 of 1st set of Sutter records (p. 12, Mr. Bourisk tried to stop smoking. On p. 19, the 3/30/18 report noted prior meth addiction (but stopped using opiate and meth, signed on 8/10/17 by Dr. Cortes).

...

Apportionment: Per Sutter records, Mr. Bourisk continued to have substance abuse that was present before and after the 6/1/15 injury. ... As noted from the above Sutter/PAMF records that I cited, it was apparent that Mr. Bourisk had struggled with addiction problems all his life. Since the subsequent injury, because Mr. Bourisk still had the same addiction problem (meth/cocaine/alcohol/cigarettes), I did not find that the subsequent injury had worsened his substance abuse condition.

(Board Exhibit X, p. 4)

Applicant testified he has a history of alcohol and drug problems, that he has received treatment, and that he still struggles with it every day. (MOH/SOE, p. 5: 1-2). On cross-examination, applicant testified he was in an outpatient alcohol recovery program in 2005. He testified the last time he used alcohol was over a year ago, and the last time he used methamphetamines was two years ago, around 2020. He has continued to use alcohol and methamphetamines since his 2015 injury on and off. (MOH/SOE, p. 6: 14-21). Defendant's argument that Dr. Chen's reports are based on inadequate medical history is unfounded. Both reports document *current* abuse of drugs and alcohol and Dr. Chen opined he did not find that the subsequent injury had worsened his substance abuse condition.

Defendant next argues that Dr. Chen improperly applied the AMA Guides without providing an Almaraz/Guzman analysis. Defendant raises this issue for the first time in its second Petition for Reconsideration. Failure to raise an issue at the MSC or at the start of trial precludes a party from raising it on reconsideration. Notwithstanding this, Dr. Chen assigned 13% WPI using Tables 13-5, p. 320. He opined that applicant's substance abuse resulted in a CDR score of .5 with slight impairment of community affairs, life at home, hobbies, and intellectual interests. He indicated the effect on work/ADL's was that he had to be carefully monitored by physicians, became introverted and avoided going to socialization events.

Defendant also argues that Dr. Chen's impairment rating for substance abuse and Dr. O'Dowd's impairment rating for psyche, including alcohol abuse, are duplicative. Defendant also raises this issue for the first time in its second Petition for Reconsideration and is thus deemed waived. It is noted, however, that Dr. Chen's rating is based on Chapter 13 (The Central and Peripheral

Nervous System) of the AMA Guides, whereas Dr. O’Dowd used Chapter 14 (Mental and Behavioral Disorders). The undersigned finds they are distinct and separate ratings. However, even if determined to be duplicative, as defendant argues, there is no change in the outcome. Whether the psyche or the addiction impairment are applied, the resulting overall disability is still over 100%, as demonstrated below:

Lumbar – 17% PD
GERD – 12%
PD Psyche – 17% PD
Addiction – 26% PD

Considering psyche PD only: $17 + 17 + 12 = 39$ PD

Considering addiction PD only: $26 + 17 + 12 = 46$ PD

Applying the holding in *Todd*, if considering only the psyche impairment, the pre-existing disability of 39% PD, added to the subsequent injury of 65% PD, results in an overall disability of 104% PD. Similarly, if considering only the addiction impairment, the pre-existing disability of 46% PD, added to the subsequent injury of 65% PD, results in an overall disability of 111% PD.

The reports of Dr. Chen and Dr. O’Dowd were properly admitted without objection and have been found to be substantial medical evidence. Defendant offered no evidence to rebut their opinions. Even when considering defendant’s duplicative argument for psyche and addiction, if either one of the ratings is excluded, the overall disability is still calculated at above 100% when considering all relevant medical evidence.

IV. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

DATE: 03/10/2023
NORMA L. ACOSTA
WORKERS' COMPENSATION JUDGE