

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

RUBEN ORGANISTA, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

**Adjudication Number: ADJ1744449 (SBA 0079979)
Santa Barbara District Office**

**OPINION AND ORDERS
DENYING PETITIONS FOR RECONSIDERATION**

Applicant and defendant seek reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration Findings we issued on November 20, 2023, wherein we rescinded the workers' compensation administrative law judge's (WCJ) findings that (1) while employed as a telephone technician on January 8, 1966, applicant sustained injury arising out of and in the course of employment to his neck, back, hip, and right shoulder; (2) applicant satisfied the 35 percent threshold to qualify for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits pursuant to Labor Code section 4751;¹ (3) the application for SIBTF benefits is not barred by the statute of limitations; (4) applicant became permanent and stationary on October 5, 2021; (5) applicant sustained a preexisting permanent partial disability in the form of a hip replacement; (6) applicant failed to show any level of permanent disability associated with the preexisting permanent partial disability; and (7) applicant does not qualify for SIBTF benefits; and we substituted findings to correct clerical errors as to the date of the subsequent injury and the body part of the preexisting permanent partial disability; to defer the issues of the level of permanent disability of the preexisting permanent disability and all other issues; and we returned the matter to the trial level for further proceedings consistent with our decision.

Applicant contends that the WCJ's findings misstated the date on which applicant became permanent and stationary for the subsequent injury as October 5, 2021, and that our decision failed to correct that error.

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

Defendant contends that we erroneously failed to find that (1) applicant's claim for SIBTF benefits is barred by the statute of limitations; and (2) applicant failed to present contemporaneous medical evidence as required to establish his claim.

We received Answers from applicant and defendant.

We have reviewed the contents of the Petitions and the Answers. Based upon our review of the record, and for the reasons stated below and in our November 20, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, which we adopt and incorporate herein, we will deny the Petitions.

FACTUAL BACKGROUND

On October 2, 1998, the parties stipulated that on January 9, 1996, applicant sustained injury to the neck, back, hip and right shoulder, causing permanent disability of 69 percent, for which indemnity was payable at \$164.00 per week beginning on May 5, 1997. (Stipulations with Request for Award, October 2, 1998, p. 1.) The WCJ issued an award in applicant's favor based upon the parties' stipulation as to permanent disability indemnity. (*Id.*, p. 3.)

DISCUSSION

We turn first to applicant's argument that the WCJ's findings misstated the date on which he became permanent and stationary for the subsequent injury as October 5, 2021, and that our decision failed to correct that error. In particular, applicant argues that (1) he did not raise the issue of the permanent and stationary date in his original petition for reconsideration because he believed that the question of SIBTF eligibility was of paramount importance and that the alleged error could be corrected if he was found entitled to SIBTF benefits; and (2) the October 5, 2021 permanent and stationary date is subject to correction because it results from a clerical error. (Petition, p. 2:13-22.)

Here, applicant admits that he filed his original petition for reconsideration without alleging that the WCJ misstated the permanent and stationary date of the subsequent injury. Since the issue was not raised in the original petition, it was waived. (Lab. Code, § 5904; *Los Angeles Unified Sch. Dist. v Workers' Comp. Appeals Bd. (Henry)* (2001) 66 Cal.Comp.Cases 1220 (writ denied); *Jobity v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 978 (writ den.); *Hollingsworth v Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 715 (writ denied).) Accordingly, we conclude that applicant's Petition fails on procedural grounds.

In addition, the argument that the October 5, 2021 permanent and stationary date results from a clerical error is without support. Specifically, applicant argues that the October 2, 1998 stipulated award provides that applicant was permanent and stationary with respect to the subsequent injury on May 5, 1997. But the October 2, 1998 stipulated award specifies May 5, 1997 as the start date for applicant's permanent disability benefits, not the date on which applicant became permanent and stationary. (Stipulations with Request for Award, October 2, 1998, pp. 1-3.) Since the record lacks a stipulation as to the date on which applicant became permanent and stationary, we discern no support for the argument that the October 5, 2021 permanent and stationary date results from clerical error.

Accordingly, we will deny applicant's Petition.

We next address defendant's argument that we erroneously failed to find that applicant's claim for SIBTF benefits is barred by the statute of limitations.

Here, the record shows that defendant failed to challenge the finding that the application for SIBTF benefits is not barred by the statute of limitations. Since the issue was not timely raised, it was waived. (Lab. Code, § 5904; *Henry, supra*; *Jobity, supra*; *Hollingsworth, supra*.)

In addition, the argument that the application is barred by the statute of limitations is without support. In *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80], the Supreme Court held:

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 would 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 record fails to show that applicant knew or could reasonably be deemed to have known that there was a substantial likelihood of entitlement to subsequent injuries benefits before the expiration of five years from the date of injury, and the record lacks a finding on the issue of permanent disability which could establish that applicant had knowledge of probable SIBTF liability and give rise to the requirement that he seek subsequent injuries benefits within a reasonable time.

Accordingly, we are unable to discern support for the argument we erroneously failed to find that applicant's claim for SIBTF benefits is barred by the statute of limitations.

Next, we address defendant's argument that applicant failed to present contemporaneous medical evidence as required to establish his claim.

Here, as we explained in our November 20, 2023 decision, our review of the case law reveals no requirement that the level of preexisting permanent partial disability be proven by contemporaneous medical evidence; and, since the WCJ found that applicant had a preexisting permanent partial disability to the right knee, we consider it appropriate that the record be developed as to the level of preexisting disability.

Accordingly, we will deny both Petitions.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration Findings issued on November 20, 2023 is **DENIED**.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration Findings issued on November 20, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 6, 2024

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

**RUBEN ORGANISTA
GHITTERMAN, GHITTERMAN & FELD
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