

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

THOMAS FUTTERER, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ7529887, ADJ1857813
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Thomas Futterer. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the July 15, 2019 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a firefighter, did not have an actual labor disabling disability at the time of subsequent industrial injuries he sustained from April 14, 1986 to July 6, 2010 (ADJ7529887, ADJ6968183), and on September 6, 2009 (ADJ7529886), May 7, 2010 (ADJ7529778), and May 7, 2011 (ADJ7853097) to various body parts.

Applicant contends that he was permanently partially disabled stemming from a December 23, 1989 (ADJ1857813) industrial injury, which occurred prior to the subsequent compensable injuries mentioned above, thereby meeting the requirement of Labor Code¹ section 4751. Applicant further contends that his prior permanent partial disability is labor disabling.

We have reviewed defendant Subsequent Injuries Benefits Trust Fund's (SIBTF's) Answer. SIBTF contends that applicant does not have a prior permanent partial disability because his December 23, 1989 industrial injury was completely rehabilitated.

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

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 rescind the July 15, 2019 Findings and Order and return this matter to the trial level for further proceedings consistent with this Opinion.

FACTS

As the WCJ stated in his Report:

The applicant was employed as a firefighter for the City of Los Angeles beginning in 1986. Early in his career, he suffered a specific industrial injury to the right biceps tendon. He settled the 12/23/1989 industrial injury to the right major upper extremity by Stipulations with Request for Award and Award approved on 11/29/1990 wherein the applicant was awarded permanent disability of 17%. The settlement document did not set forth upon what basis the parties reached settlement at 17% PD.

The applicant later filed industrial injury claims for subsequent injuries, and settled the above-noted continuous trauma injury to multiple parts of body for the period from 4/14/1986 to 7/6/2010 (ADJ7529887; ADJ6968183), as well as for specific injuries occurring on 5/7/2011 to the left hip and left knee (ADJ7953097), and on 5/7/2010 to the left elbow (ADJ7529886) by Joint Stipulations with Request for Award and Award approved on 2/24/2015^[2] wherein the applicant was awarded permanent disability of 99%. At paragraph 9, and Addendum “A” to paragraph 9 of the settlement document, the parties to the case in chief detailed the basis for their settlement noting it was partially based upon the rating of AME reports of Dr. Chester Hasday (orthopedics), Dr. Stuart Kramer (internal medicine), Dr. Lawrence Moss (psychiatry), Dr. Palez Agatstein (internal medicine), Dr. Cindy Chen (skin), Dr. Alfred Roven (hearing loss). They further set forth therein their agreements as to the permanent disability impairments for the various injured body parts and rating formulas, including after apportionment to support the adequacy of the joint award of 99% PD.

The applicant filed an Application for Subsequent Injuries Fund Benefits received by the board on 6/15/2011 in ADJ7529887, ADJ7529886 and ADJ7529778. The applicant filed an Application for Subsequent Injuries

² The February 24, 2015 Joint Stipulation with Request for Award and Award settled the following injuries: (1) cumulative trauma injury from April 14, 1986 to July 6, 2010 (ADJ7529887, ADJ6968183); (2) specific injury dated May 7, 2011 (ADJ7953097); (3) specific injury dated May 7, 2010 (ADJ7529778); and (4) specific injury dated September 6, 2009 (ADJ7529886).

Fund Benefits received by the board on 9/12/2016 in ADJ6968183. By his application for SIF benefits, the applicant contends he sustained the above-noted industrial injuries resulting in permanent disability when considered without regard to or adjustment for his occupation or age equal to 100% of total disability. He further contends immediately prior to the industrial CT injury through 7/6/2010 he suffered from a pre-existing disability to the right upper extremity because of the specific injury of 12/23/1989 for which he received a stipulated award of 17% PD on 11/29/1990.

...

The SIF disputes the applicant's entitlement to SIBTF benefits, and filed a Trial Brief dated 6/1/2018. Among other things, SIF contends the applicant did not have a labor-disabling pre-existing permanent disability at the time of any of the subsequent injuries. It argued the applicant fully recovered from his 1989 industrial injury to his biceps tendon, and had no work restrictions following his complete recovery from said injury as of 7/23/1990. It argued the evidence shows the prior injury of 12/23/1989 was not actually labor disabling at the time of the subsequent injuries, and as such the record is insufficient to establish eligibility for SIBTF benefits. It requested the applications for SIBTF benefits be denied.

The issue of the applicant's claim for SIF benefits came on the trial calendar on 5/8/2018. Judicial Notice was taken of the above-noted Stipulations with Request for Award and Awards approved on 11/29/1990 and 2/24/2015.

...

Following issuance of a Findings and Order (SIF Claim) dated 8/29/2018, the applicant timely filed a verified petition for reconsideration on 9/24/2018. An Order Rescinding Findings and Order (SIF Claim) issued on 10/8/2018 to develop the record. The parties were unable to resolve their dispute and additional evidence was subsequently received as noted above by reports of Dr. Gabriel Rubanenko dated 6/26/1990 (Applicant's Exhibit 7), Dr. Harvard Ellman dated 10/17/1990 (Applicant's Exhibit 6), Dr. Saeed Malek Afzali dated 10/26/1990 (Applicant's Exhibit 5), Dr. Saeed Malek Afzali dated 11/8/1992 (Applicant's Exhibit 4). As further noted in the Minutes of Hearing dated 4/16/2019, the newspaper article dated 2/3/2018 previously excluded from evidence was now received in evidence (Defendant's Exhibit A). The parties elected not to obtain further testimony of the applicant. The matter stood submitted.

... The [] WCJ determined the applicant should take nothing by his application for SIBTF as the evidence shows he does not qualify for those benefits under Labor Code section 4751 because he did not establish he had a pre-existing "labor disabling" disability prior to the subsequent industrial

injuries. It is from the Findings and Order (SIF Claim) of 7/15/2019 the applicant now seeks reconsideration. (Report, pp. 3-6.)

DISCUSSION

SIBTF is codified in section 4751, which 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. (§ 4751.)

Although the issue here is whether applicant was permanently partially disabled at the time of the subsequent injuries, we note that the WCJ and the parties have erroneously attributed multiple injuries as the subsequent injury for purposes of section 4751. In *Hernandez v. Commercial Building Maintenance et al.* (1978) 43 Cal.Comp.Cases 341 [1978 Cal. Wrk. Comp. LEXIS 3111] (Appeals Board en banc), we held that the subsequent compensable injury in section 4751 refers to a single injury. Indeed, the statute refers to a “subsequent compensable injury” in the singular form. The prior permanent partial disability, however, may comprise of multiple prior injuries. The statute does not limit the prior permanent disability to a single prior injury and including multiple prior injuries is consistent with the purpose of the statute, which is to encourage the employment of the disabled. (§ 4751; *Subsequent Injuries Fund of the State of California v. Industrial Acci. Com. (Patterson)* (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Industrial Acci. Com.* (1958) 50 Cal.2d 469, 475; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 619 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc)).

Because of this error, we are unable to determine whether applicant met the eligibility requirements of the statute. Given the multiple injuries applicant sustained here, we do not, nor are we called to, parcel out here which injuries are prior or subsequent for purposes of applicant's claim.

Accordingly, we rescind the July 15, 2019 Findings and Order and return this matter to the trial level for further proceedings consistent with this Opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 15, 2019 Findings and Order is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this Opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 24, 2021

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

**THOMAS FUTTERER
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE, LLP
OFFICE OF THE DIRECTOR LEGAL
CITY ATTORNEY
THOMAS COGNATA**

LSM/abs/bea

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

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