

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

MEENA CHANDOK, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ10550274
San Jose District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the December 27, 2022 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, in relevant part, had a pre-existing disability to her cervical spine, thoracic spine, lumbar spine, reproductive parts, and gastrointestinal parts totaling 47% permanent disability. In addition, the WCJ found that the pre-existing disability coupled with the subsequent industrial injury of 58% permanent disability results in 100% total permanent disability.

SIBTF contends that the WCJ erred in finding that an asymptomatic elective tubal ligation equates to a ratable reproductive impairment. SIBTF further contends that the WCJ erred in finding that the alleged cervical and thoracic spine impairments were ratable and labor disabling prior to the subsequent injury.

We received an answer from applicant Meena Chandok. 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.¹ Based on the Report, which we adopt and incorporate, and for the reasons discussed below, we deny reconsideration.

There are no requirements as to the origin of the preexisting disability; it may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].) The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of workmen's compensation contemplated by our Constitution." (*Patterson* (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 475.)

The Supreme Court in *Ferguson* held that the "previous disability or impairment" contemplated by section 4751 "must be actually 'labor disabling,' and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751." (*Ferguson, supra*, p. 477; *Escobedo v. Marshall*, 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc).) The court further noted that "the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith v. Industrial Acc. Com.* (1955) 44 Cal.2d 364, 367 [2, 3] [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability. . . ." (*Ferguson*, at p. 477, quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

Further, the preexisting disability "need not have interfered with the employee's ability to work at his employment in the particular field in which he was working at the time of the subsequent injury. [citations]" (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238.) "The ability of the injured to carry on some type of gainful employment under work conditions congenial to the preexisting disability does not require a finding that the preexisting disability does not exist. [citations]" (*Ibid.*)

To prove a preexisting disability, there needs to be evidence prior to the subsequent injury of a medically demonstrable impairment.

¹ Chair Zalewski, who was previously on the panel in this matter is unavailable to participate further in this decision. Another panel member was assigned in her place.

A preexisting disability cannot be established by a "retroactive prophylactic work restriction" on the preexisting condition placed on the injured after the subsequent industrial injury in absence of evidence to show that the worker was actually restricted in his work activity prior to the industrial injury. (*Hulbert v. Workmen's Comp. Appeals Bd.*, *supra*, 47 Cal.App.3d 634, 640; *Gross v. Workmen's Comp. Appeals Bd.*, *supra*, 44 Cal.App.3d 397, 404-405; *Amico v. Workmen's Comp. Appeals Bd.*, *supra*, 43 Cal.App.3d 592, 606; see also *Bookout v. Workmen's Comp. Appeals Bd.*, *supra*, 62 Cal.App.3d 214, 224-225.) Where the injured was actually under a prophylactic restriction for a preexisting condition at the time of the industrial injury, apportionment to a preexisting disability is proper. It is only the *retroactive* application of a prophylactic restriction to an otherwise nonexistent previous disability that is prohibited. (*Ibid.*)

The prohibition against "retroactive prophylactic work restrictions" to establish a preexisting disability is not inconsistent with the fact that prophylactic restrictions are ratable factors of permanent disability stemming from the industrial injury. (*Gross, supra*, 44 Cal.App.3d at p. 404.) Applying a prophylactic work restriction retroactively creates "a sort of factual or legal fiction of an otherwise nonexistent previous disability or physical impairment." (*Ibid.*) Apportionment involves a factual inquiry. (See *Mercier v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.3d 711, 716; see also, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Gaba)* (1977) 72 Cal.App.3d 13, 16-17 [139 Cal.Rptr. 802].)

(*Franklin, supra*, 79 Cal.App.3d at p. 238.)

Here, we agree with the WCJ that applicant's tubal ligation qualifies as a pre-existing disability. Table 7-11 of the AMA Guides provides that Class 1, which constitutes 0% to 15% impairment of the whole person, includes fallopian tube impairment that does not require continuous treatment. In other words, impairment to the fallopian tube is a ratable impairment per the AMA Guides that is capable of supporting an award. Furthermore, the WCJ noted that applicant's evaluating physician, Christopher Chen, M.D., concluded that applicant suffered emotional and social ramifications as a result of her tubal ligation that affected her work. As such, applicant's tubal ligation qualifies as a pre-existing disability.

Additionally, we agree with the WCJ that the record contains evidence of prior injuries and treatment to applicant's cervical and thoracic spine, records which Dr. Chen relied upon in rating applicant's spine. (Exhibit 1, Dr. Chen's report dated February 23, 2021, p. 3.) These medical records are dated prior to the subsequent injury of April 16, 2016 and are therefore not retroactive prophylactic work restrictions.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the December 27, 2022, Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 24, 2023

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

**MEENA CHANDOK
LAW OFFICES OF ROBERT T. 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*

**STATE OF CALIFORNIA
Division of Workers'
Compensation Workers' Compensation Appeals Board**

MEENA CHANDOK,

Applicant,

SUBSEQUENT INJURIES BENEFITS TRUST FUND,

Defendants.

Case No. ADJ10550274

**REPORT AND RECOMMENDATION ON PETITION FOR
RECONSIDERATION**

**I.
INTRODUCTION**

Applicant, Meena Chandok, while employed on 04/16/2016, as a cashier/waitress, occupational group number 322, in Santa Clara, California, by AAK, LLC dba Shan Restaurant, sustained an injury arising out of and arising in the course of employment of a third degree burn resulting in injury to the skin, left shoulder, left wrist and thumb. The case-in-chief resolved by Compromise and Release and Applicant thereafter sought benefits from the Subsequent Injuries Benefits Trust Fund (SIBTF).

The Findings and Award in this case issued on 12/22/2022 and were served 12/27/2022. The Petitioner is SIBTF through OD Legal, who has timely filed the unverified Petition for Reconsideration on 01/23/2023. The Petition for Reconsideration is not legally defective. Applicant has filed an Answer on 01/27/2023.

This Report issues late as this Judge has been out due to a COVID infection.

Petitioner contends that it was error to rate Applicant's reproductive impairment as the procedure was elective and therefore does not amount to rateable impairment for SIBTF purposes, and also alleges that the medical reports the evaluating physician relies upon do not mention the cervical or thoracic spines and therefore these specific body parts should not be included in the overall ratings.

II. **FACTS**

Applicant suffered a third-degree burn while performing her usual and customary duties. Her industrial claim resolved by Compromise and Release in an amount of \$100,000.00 on 02/23/2017.

Applicant then sought benefits from SIBTF and alleged she had pre-existing conditions involving the cervical spine, thoracic spine, lumbar spine, reproductive system and gastrointestinal system. Applicant also alleged respiratory impairment due to a lifetime of exposure to second-hand smoke. The pre-existing disability for the reproductive system stems from an elective tubal ligation in 2002.

Applicant offered medical reporting from Christopher Chen, M.D., who found impairments and issued reports. There was NO medical evidence offered by SIBTF to rebut ANY of the opinions provided by Dr. Chen, and therefore those opinions remain unrebutted.

This Judge was not persuaded by the opinions offered by Dr. Chen as to the respiratory issues. This Judge did accept the remaining opinions and calculated a pre-existing disability of 47% before the industrial injury. SIBTF disputes the rating for the reproductive impairment, as well as for the cervical and thoracic spines.

Dr. Chen was the primary treating physician for the industrial injury and provided opinions as to the resulting impairments. The overall permanent disability resulting from the industrial injury rates to 58%. There appears to be no dispute from SIBTF as to these determinations.

This Judge determined that the overall disability, combining the pre-existing and the subsequent industrial, totaled in excess of 100% qualifying Applicant for SIBTF benefits. SIBTF admits to a 77% overall disability but disputes the 100% determination.

III. **LEGAL ARGUMENTS**

1. SIBTF ALLEGES THAT THE TUBAL LIGATION WAS ELECTIVE AND THEREFORE TABLE 7-11 OF THE AMA GUIDES DOES NOT APPLY THEREBY RESULTING IN NO RATEABLE IMPAIRMENT FOR THIS CONDITION

I admit this is a novel argument.

In 2002, Applicant's husband compelled Applicant to undergo a tubal ligation as a form of birth control. Applicant was threatened that if she refused

the procedure, she would be returned to India and separated from her children residing in the United States. Applicant did undergo the tubal ligation. Applicant's testimony as to this was credible and compelling.

Labor Code section 4751 indicates:

Pursuant to Labor Code Section 4751, 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.

For Labor Code section 4751 to apply, an Applicant must be permanently partially disabled before suffering the subsequent industrial injury. As reiterated by Applicant in her Answer to Petition for Reconsideration, we have definitions of permanent disability. Applicant cites the California Supreme Court case of *Ferguson* which tells us the prior disability should be capable of supporting an award. Applicant also correctly indicates that the Labor Code tells us that the *AMA Guides* are prima facie evidence of permanent disability.

The *AMA Guides* do have a section on reproductive impairment, and here the evaluating physician, Dr. Chen, utilized Table 7-11, and assigned a 15% WPI. It is well-established that even if a particular Table is not directly "on point" an evaluating physician may utilize a particular Table so as to adequately reflect a condition, as long as the physician remains within the "four corners" of the *Guides*. Applicant had the surgery, the *Guides* recognize this surgery results in impairment, and a medical evaluator found her condition to be rateable without rebuttal.

It does not appear that SIBTF disputes that Applicant underwent a tubal ligation. SIBTF alleges that because the surgery was “elective” rather than recommended by a physician to cure some ongoing issue such as ovarian disease, then Table 7-11 cannot apply.

While this is a compelling argument, it is beyond my authority to re-write Labor Code section 4751 and insert an exception for elective surgeries. It was within the power of the California Legislature to have section 4751 read (hypothetically): Pursuant to Labor Code Section 4751, if an employee who is permanently partially disabled, **and that disability is not due to elective surgery...** Yet the Legislature did not do so. And I find no legal authority, nor does SIBTF offer any legal authority, that a condition resulting from elective surgery cannot be utilized to calculate impairment describe in Labor Code section 4751.

SIBTF then argues “In absence of the *AMA Guides* there is no showing that Applicant’s tubal ligation is rateable as an impairment...” There may have been a time before the *AMA Guides* that a tubal ligation might not have been rateable. But that is not the case at the present. At the present, we are directed to utilize the *AMA Guides* as prima facie evidence of impairment. So what may have been the case at some prior point in time is not relevant to today’s discussion.

SIBTF also alleges that since Applicant had no complications from the surgery that this is evidence that there is no ongoing impairment. Complications from the surgery do not equate to ongoing impairment. Dr. Chen elicited evidence from Applicant that since the surgery, she was a) infertile, b) regretful, c) had low self-esteem, d) felt inferior to other women, e) was socially withdrawn, and f) was thought to be antisocial. Perhaps another rating for this condition could have been a psychiatric one. Regardless. These findings are directly as a result of the tubal ligation and these findings have not been rebutted.

SIBTF further argues that the impairment determination for the tubal ligation amounts to a retroactive prophylactic work restriction. I disagree. This is a condition that existed as of 2002, and is well-documented in the Kaiser records reviewed by Dr. Chen. This is not a condition which is being diagnosed now for the first time and findings being made retroactive to before the industrial injury. There are no “work restrictions” being placed on Applicant in terms of physical limitations. Here, Dr. Chen is acknowledging the emotional and or psychiatric sequelae which resulted from the tubal ligation in 2002, and using Table 7-11 to account for the condition.

I do not have any medical evidence to rebut the determinations of Dr. Chen, nor do I have any legal authority to support excluding this particular impairment because it resulted from elective surgery. As such, I find no basis to

change the determinations made in the Findings and Award and SIBTF's Petition for Reconsideration in this regard should be denied.

In the alternative, the Board may consider development of the record to address any psychiatric/emotional ratings which may be attributable to the tubal ligation forced upon Applicant by her husband.

2. SIBTF ALLEGES THAT THE CERVICAL AND THORACIC SPINES HAD NO RATABLE IMPAIRMENT PRIOR TO THE INDUSTRIAL INJURY

SIBTF alleges that the reporting from Dr. Chen as to the cervical and thoracic spines is not substantial evidence. Dr. Chen reviewed Applicant's Kaiser records, had his treatment records for the industrial injury, and evaluated Applicant. Dr. Chen did not solely rely upon the Kaiser records for his determinations.

Applicant credibly testified that she had two separate incidents which impacted her spine. She had a motor vehicle accident but did not recall the year. She was sure it was before the industrial injury. Applicant also had a slip and fall at work, which was not reported. Applicant sought treatment for both incidents at Kaiser.

The Kaiser records are only excerpts, so I do not have all records for my review. Dr. Chen was apparently provided with the entire Kaiser record, and he did review same. Defendant SIBTF offered a few excerpted pages from Kaiser. The Kaiser records I do have show the following:

Defendant's Exhibit A – page 956: physical therapy encounter with **cervical spine** stabilization level 2 Theraband; external rotation of **cervical spine**; [emphasis added]

Defendant's Exhibit E – page 573: back hurts **from posterior shoulders to waist**; electrode placement, 4 electrodes crossed bilateral **T4** and L5; page 574 – x-rays 2/18/14: unremarkable **thoracic spine**; [emphasis added]

So what does this tell me? This verifies that Applicant received treatment of physical therapy to the cervical spine, that she was complaining of pain from her shoulders to her waist (which would include the thoracic spine), that she had electrodes placed at T4 (thoracic spine) for electrical stimulation, and that she had x-rays of the thoracic spine done on 2/18/14 which were unremarkable. While the records are sparse, I can reasonably infer that Applicant did in fact of complaints of pain to her cervical and thoracic spine as reported to Dr. Chen, as she received treatment to these areas.

As such, SIBTF's repeated assertions that there is NO reference to the cervical or thoracic spines in the Kaiser records is simply incorrect.

There was no medical evidence offered to rebut the opinions of Dr. Chen. I continue to find that the reports of Dr. Chen are substantial evidence.

I find no basis to change my determinations as to the impairments identified by Dr. Chen for the cervical and thoracic spines, and no basis to change by determination that Applicant did have ratable impairment to include the cervical and thoracic spine.

**IV.
RECOMMENDATION**

The Petition for Reconsideration should be denied.

DATE: 02/09/2023
ADORALIDA PADILLA
WORKERS' COMPENSATION JUDGE