

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

JODI COLE, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ9457888
San Jose District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION**

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the December 19, 2023 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that SIBTF is entitled to a credit against CalPERS industrial disability retirement benefits paid to applicant Jodi Cole in the amount equal to the tax exemption/savings received by applicant for each payment per Internal Revenue Code, section 104(a)(1).

SIBTF contends that under Labor Code,¹ section 4753, it is entitled to a credit of the entire amount of the CalPERS industrial disability retirement payments and the WCJ abused her discretion in taking into consideration applicant's and her employer's contributions into the retirement fund. SIBTF further contends that the amount of credit should be framed in terms of the percentage of applicant's preexisting disability because that is where SIBTF's liability lies.

We received an answer from applicant. 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. Based upon our preliminary review of the record, we grant SIBTF's Petition for Reconsideration. Our order granting SIBTF's Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is

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

deferred pending further review of the merits and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

FACTS

As the WCJ states in her Report:

Applicant was an employee of the County of Santa Clara from 1984 through 05/01/2012 when she retired. She held positions as a police officer and a criminal investigator. She did suffer multiple specific injuries which resolved by Stipulations and she filed an overall cumulative trauma claim which is the underlying case herein.

The parties have stipulated that the cumulative trauma claim has resulted in an overall permanent disability of 46% and have also stipulated that Applicant is 100% totally permanently disabled as a result of the combination of the pre-existing and subsequent conditions.

Applicant is receiving monetary payments from CalPERS effective 05/01/2012. Given the nature and extent of the industrial disabilities, Applicant qualified for an Industrial Disability Retirement and is receiving same. Applicant qualifies to have a portion of her retirement benefit “tax free” due to the application of IRS code 104(a)(1).

Defendant asserts that the tax-free portion of her retirement is subject to credit per Labor Code section 4753 as it is in the form of an award on account of the injury.

This Judge granted Defendant a credit but only in an amount equal to the “tax credit” received by Applicant from the IRS.

Defendant seeks Reconsideration. (Report, p. 2.)

DISCUSSION

I.

Section 4753 provides:

Such additional compensation is not in addition to but shall be reduced to the extent of any monetary payments received by the employee, from any source whatsoever, for or on account of such preexisting disability or impairment, except as to payments being made to the employee or to which he is entitled as

a pension or other compensation for disability incurred in service in the armed forces of the United States, and except as to payments being made to him or to which he is entitled as assistance under the provisions of Chapter 2 (commencing with Section 11200), Chapter 3 (commencing with Section 12000), Chapter 4 (commencing with Section 12500), Chapter 5 (commencing with Section 13000), or Chapter 6 (commencing with Section 13500) of Part 3, or Part 5 (commencing with Section 17000), of Division 9 of the Welfare and Institutions Code, and excluding from such monetary payments received by the employee for or on account of such preexisting disability or impairment a sum equal to all sums reasonably and necessarily expended by the employee for or on account of attorney's fees, costs and expenses incidental to the recovery of such monetary payments. (§ 4753.)

“Section 4753 was enacted to avoid depletion of the funds in order to encourage the employment of physically handicapped persons and to prevent double recovery for the same disabilities.” (*Subsequent Injuries Fund v. Industrial Acci. Com. (Hanson)* (1963) 217 Cal.App.2d 322, 328 [28 Cal. Comp. Cases 144])

The Court of Appeal in *Hanson* reviewed the legislative history of section 4753 and concluded that each legislative amendment to section 4753 broadened the language to include more circumstances in which SIBTF may claim a credit. (*Hanson, supra*, 217 Cal.App.2d at pp. 328-330.)

The words "from any source whatsoever" are clear and their meaning definite. As before stated, the Legislature was aware that workmen were getting double compensation for their preexisting disabilities from various sources, including tort damages. To arrive at any sort of consistency in accomplishing the purpose of the statute, the Legislature intended to prevent double recoveries of any sort, resulting in a more equitable outlay of public monies. "[From] any source whatsoever" means just that. If such coverage is found to be too broad, the Legislature may change it. We must apply the statute according to the legislative intent as expressed. We cannot rewrite the statute. (*Hanson, supra*, 217 Cal App.2d at p. 331.)

The *Hanson* court interpreted section 4753 to include social security disability payments that the applicant in that case received as a result of the combined preexisting and subsequent permanent disabilities he suffered, but concluded that SIBTF was only entitled to credit from the portion of the payments that were attributable to the preexisting permanent disability. (*Hanson, supra*, 217 Cal.App.2d at p. 329.)

Here, we are unclear whether applicant's CalPers industrial disability retirement payments were attributable to applicant's preexisting disability. We therefore grant reconsideration to

further study the issue and encourage the parties to participate in the Appeals Board's mediation program.

III.

We observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal. 2d 360, 364.) “[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied.”; see generally § 5803 [“The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.”].)

“The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect.” (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal. App. 4th 372, 374 [57 Cal. Comp. Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a “threshold”

issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Section 5901, states in relevant part that:

No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. ...

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to sections 5950 et seq.

IV.

Accordingly, we grant SIBTF's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the December 19, 2023 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 18, 2024

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

**JODI COLE
ROBERT T. BLEDSOE
OD LEGAL, OAKLAND**

LSM/oo

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