

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

DELVIN WILLIAMS, *Applicant*

vs.

**DIRECTOR OF INDUSTRIAL RELATIONS as administrator of the SUBSEQUENT
INJURIES BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ7427357
San Francisco District Office**

**OPINION AND ORDER
DENYING PETITIONS FOR
RECONSIDERATION**

We have considered the allegations of the Petitions for Reconsideration, the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 7, 2023

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

**DELVIN WILLIAMS
OFFICE OF THE DIRECTOR – LEGAL UNIT**

PAG/ara

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

**REPORT AND RECOMMENDATION
ON PETITION FOR
RECONSIDERATION**

Elizabeth Dehn, Workers' Compensation Judge, hereby submits her Report and Recommendation on the petition for reconsideration filed herein.

Introduction

On June 6, 2023, applicant filed two Petitions for Reconsideration following the issuance of my Findings of Fact and Opinion on Decision of May 17, 2023. The two petitions for reconsideration were filed using the WCAB form and set out identical contentions. One petition was accompanied by a separate document entitled again "Petition for Reconsideration" that set forth arguments in support of the Petition for Reconsideration, while the other contained a list of doctors and some medical records, but no arguments. I am filing one Report and Recommendation in response to the two petitions.¹

Applicant asserts that the evidence does not justify the Findings of Fact and that the Findings of Fact do not support the Order, Decision or Award.

Applicant's petitions were timely filed and accompanied by the verification required under Labor Code section 5902 and Regulation 10940(c). Applicant alleges that I erred in my finding that his claim for benefits from the Subsequent Injuries Benefits Trust Fund is barred by the statute of limitations. To date, I am not aware of an answer having been filed by defendants.

Facts

Delvin Williams sustained an injury to his neck, back, shoulders, brain, hips, hands, wrists, elbows, knees, fingers, ankles, feet and psyche while employed as a professional football player by the San Francisco 49ers and the Miami Dolphins during the period of January 1, 1974 through January 1, 1981.

The applicant settled his claim for indemnity, but not medical care, against the San Francisco 49ers and the Miami Dolphins via a compromise and release in the amount of \$1,100,000.00, which was approved by the WCAB on March 16, 2018. In addition to the cumulative trauma claim, the settlement resolved 10 claimed specific injuries sustained between 1974 and 1978. Applicant filed an application for benefits from the Subsequent Injuries Benefits Trust Fund ("SIBTF") on September 2, 2021.

The parties appeared for trial on April 17, 2023 on the issue of whether applicant's claim for benefits from the SIBTF was barred by the statute of limitations. Both parties submitted documentary evidence, and the applicant testified on his own behalf. On May 17, 2023, I issued my Findings and Order that the applicant's claim against SIBTF was not filed in a reasonable time

¹ Applicant attached multiple exhibits to both petitions for reconsideration in violation of Regulation 10946(c). I have not addressed any of these exhibits in this report and recommendation.

from when the applicant knew or should have known that he had a potential claim for benefits and therefore the claim was barred as untimely.

Applicant's Contentions

Applicant contends that because application for benefits from the SIBTF were filed three years after the compromise and release, his application was timely filed. He also argued that since the statute of limitations had been found to be tolled against the employer in the workers' compensation claim for the subsequent injury, it is also tolled for his claim against the SIBTF.

For the reasons discussed below, applicant's contentions are without merit, and do not provide sufficient basis to grant reconsideration.

Discussion

1. The evidence supports the finding that the applicant did not file his claim against SIBTF within a reasonable time of learning of a possible claim for benefits.

There is no statute of limitations contained in the Labor Code for applications for benefits with the Subsequent Injuries Benefits Trust Fund ("SIBTF.") However, there are explicit time limits for an injured worker to file an application for a claim against the employer. An injured worker has one year from (a) the date of injury, (b) the last payment of disability benefits, or (c) last furnishing of medical treatment, whichever is later, to file a claim. (Labor Code §5405.) An injured worker also has five years from the date of injury to file a petition to reopen for new and further disability. (Labor Code §5410.) These statutes of limitations have also been applied to claims against the SIBTF. (*Subsequent Injuries Fund vs. Industrial Acci. Com. (Ferguson)* (1960) 178 Cal. App 2d 55.) However, if it is found that the applicant reasonably did not know within five years from the date of injury he could become entitled to SIBTF benefits, those time limits can be extended if filed within a "reasonable time" after learning from the Board's findings on the issue of permanent disability that SIBTF has probable liability. (*Subsequent Injuries Fund v. Workmen's Comp. App. Bd., (Talcott)*, (1970) 2d Cal. 3d 56, 65.) The WCAB has interpreted the holding in *Talcott* as

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 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 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*, 2020 Cal. Wrk. Comp. P.D. LEXIS 216, 6.)

Applicant did not file application for benefits from the SIBTF within 5 years from the date of injury. He filed his claim against the SIBTF on September 2, 2021. (Defendant's Exhibit A.) The

subsequent injury in that application is the cumulative trauma from January 1, 1974 through January 1, 1981, more than twenty years prior to the filing of the SIBTF claim. However, in cases of cumulative traumas, Labor Code section 5412 states that the date of injury is the date that the applicant first suffered disability, and when the employee knew or should have known that the disability was industrially caused. The applicant had both knowledge and evidence of disability by March 8, 2011 when he was evaluated by Dr. Feinberg, who found that the applicant was limited to semi-sedentary work as a result of his orthopedic injuries playing from playing professional football, and that it was medically probable that he was not competitive in the open labor market when the orthopedic disability was combined with physical, emotional and cognitive disabilities, in his March 8, 2011 report. (Defendant's Exhibit D, pages 39 – 40.) Therefore, there was evidence of both disability and knowledge that the disability was industrial, when Dr. Feinberg issued his report. The claim against SIBTF was filed more than 10 years after the issuance of that report. The application for SIBTF benefits was therefore not filed within 5 years of the date of injury.

The applicant did not file his claim against SIBTF within a reasonable time of learning that he had a probable claim against the Fund. The applicant should have known at the time he entered into the compromise and release with his employers in March, 2018 that he had a potential claim against the SIBTF. He testified that his prior attorney, Martin Weinstein, told him that if he was not found to be 100%, when the case was over he could file for benefits from SIBTF. (Testimony of Delvin Williams, April 17, 2023, morning session, page 6, line 5:7.) He confirmed on cross examination that he was told by his attorney in 2017, both orally and in writing, that if he wasn't found to be 100%, he could bring a claim against SIBTF. (Id at page 8, line 31:35.) In the addendum to the Subsequent Injury Benefits Trust Fund Application, the applicant also stated that he was advised of his of the potential for a claim from the SIBTF by his prior attorney. (Defendant's Exhibit A, Addendum page 3.)

Applicant had a commutation from 2017 that the present value of a 100% award was \$1,388,472.48. (Applicant's Exhibit 3, page 2.) At the time he entered into the compromise and release in March, 2018, he knew that the overall settlement was less than what he was told was the present value of an award of 100% disability.

The claim against SIBTF was filed in September, 2021, more than 3 years after the applicant settled his case against his employers, and more than 3 years from when he was told by his attorney of his potential eligibility for SIBTF benefits. The claim against SIBTF was not filed in a reasonable time from when he knew or should have known that he had a potential claim. Applicant's claim against SIBTF should be barred.

2. Although the statute of limitations was tolled on the claim of a cumulative trauma filed against the employer, it was not tolled against the SIBTF.

Applicant contends that since the statute of limitations was tolled in his cumulative trauma claim against his employers, it was also tolled indefinitely for his claim against the SIBTF. However, there is no case law or statute to support this contention. For workers' compensation claims, the employer has a statutory duty to notify an injured employee of his or her workers' compensation rights, and if the injured workers is unaware of those rights because of the employer's breach of that duty, then the statute of limitations is tolled until the employee has actual knowledge of the

potential entitlement to workers' compensation benefits. (*See, Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal. 3d 762.) However, the Subsequent Injuries Benefits Trust Fund does not have the same statutory duty to notify injured workers of potential claims for benefits from the Fund. Therefore, there is no basis to support applicant's contention that his claim against the SIBTF was tolled because he was not informed of his potential claim for benefits by his employers.

Recommendation

For the foregoing reasons, I recommend that the two Petitions for Reconsideration, both filed on June 6, 2023, be denied.

DATE: June 19, 2023

Elizabeth Dehn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

This matter proceeded to trial on April 17, 2023 on the issue of whether the applicant's claim for benefits from the Subsequent Injuries Benefits Trust Fund of the State of California was timely filed. Documentary evidence was submitted and the applicant testified. In addition, both parties filed pre-trial briefs.

Stipulated Facts

Delvin Williams, born [], while employed during the period of January 1, 1974 through January 1, 1981 as a professional football player, Occupational Group Number 590, at various locations in California, by the San Francisco 49ers and Miami Dolphins, sustained injury arising out of and in the course of employment to the neck, back, shoulders, brain, hips, hands, wrists, elbows, knees, fingers, ankles, feet, and psyche.

Documentary evidence

Dr. Feinberg evaluated the applicant on March 8, 2011 for numerous dates of injury including a cumulative trauma through 1981 as a running back/football player for the San Francisco 49ers, Miami Dolphins and Green Bay Packers. Dr. Feinberg listed 77 work injuries incurred between August 3, 1974 through February 20, 1983 to various body parts including the wrists, fingers, feet, neck, eyes, toes, arms, knees, low back, hips ribs and concussions. Dr. Feinberg concluded that the applicant was permanent stationary and had been within one year of his last day playing football. He also stated that the applicant had a period of temporary disability of one year after each surgery. The applicant could not return to his prior job and when considering internal medicine, physical, emotional and cognitive disabilities, he stated that it was medically probable that he was not competitive in the open labor market. He recommended input from a forensic psychiatrist, neuropsychologist and a vocational specialist to assess his ability to work. The orthopedic disability was best described as a limitation a semi-sedentary work. For the cervical spine he was precluded from heavy work with no repetitive motions, for the shoulders he was precluded from work above shoulder and heavy or forceful or repetitive work activities. For the upper extremities he was precluded from heavy or forceful or repetitive work activities. For the lumbar spine he was limited to light work as well as a preclusion from prolonged weight-bearing and prolonged sitting. He was limited to light work with no prolonged weight-bearing as a result of injury to the hips, and semi-sedentary work because of the knees. For the ankles he was precluded from prolonged weight bearing. In regards to apportionment, his disability was 100% percent industrial. He recommended the subtraction method for apportionment to prior awards. (Defendant's Exhibit D, Report of Stephen Feinberg MD dated March 21, 2011, pages one, two, 34, 35, 39, 40, 41)

Applicant resolved his claims of the cumulative trauma from January 1, 1974 through January 1, 1981, specific injury of September 19, 1976, specific injury of October 1, 1976, a specific injury of November 7, 1976, the specific injury of February 1, 1977, May 1, 1978, September 19, 1978, October 1, 1978, November 15, 1978, September 12, 1976, and August 3, 1974 with the compromise and release in the amount of \$1,100,000.00. The compromise release did not resolve

his entitlement to medical care. (Defendant's Exhibit B, compromise and release in ADJ7427357, et seq., signed on March 14, 2018.) The compromise and release was approved on March 16, 2018. (Defendant's Exhibit C, Order Approving Compromise and Release in ADJ7427357, et seq., dated March 16, 2018.)

Applicant filed an application for Subsequent Injuries Fund benefits on September 2, 2021. The application stated that Delvin Williams was injured between January 1, 1974 and January 1, 1981 as a football running back for San Francisco, Miami and Oakland. He sustained injury to the neck, wrist, ankle, knee, shoulders and back and alleged to have 80% or more total disability. He claimed to have pre-existing injuries to the neck, wrist, ankles, shoulders, toe and back as a result of playing football. There was an addendum to the application dated August 30, 2021 from Delvin Williams to the Worker's Compensation Appeals Board and SIBTF. In that addendum, he noted that he was found to be substantially disabled from any gainful employment by the National Football League Retirement Board, and in 1998 the social security administration found he was permanently disabled. He also claimed that he settled his worker's compensation cumulative trauma. On page 3 of the addendum, he stated that "the only time my attorney mentioned the subsequent injuries benefits trust fund, was in a memo discussing the percentage of disability. He states, 'We may also be able to bring in the subsequent injuries benefit trust fund which gives you more disability. I will give you an example with the neck only to show what happens. Everything else will be unadjusted, and we will wait for the consultative rating.'" On page 4 of the addendum, the applicant stated that there was a consultative rating of June 14, 2011 finding 100% permanent disability. (Defendant's Exhibit A, Application for SIBTF Benefits dated September 2, 2021.)

A compromise and release was approved on November 8, 1983 in the case of Delvin Williams vs. San Francisco 49ers for an August 1, 1974 injury to the right upper extremities. No medical records were attached. (Defendant's Exhibit I, Compromise and Release and Order Approving Compromise and Release in SJ 83690.)

Social Security wrote the applicant advising that he is entitled to medical disability benefits beginning February 1996 with a date of disability of June 30, 1995. (Defendant's Exhibit H, Notice of Award of Social Security disability benefits address to the applicant, dated April 18, 1998.)

Herbert Virgin MD sent a letter to Coach Don Shula dated May 15, 1978 regarding Delvin Williams' left knee. The doctor recommended conditionally accepting him realizing that the knee is not 100% and a flare up may occur later which could necessitate surgery. (Applicant's Exhibit 4, letter from the Miami Dolphins Dr., Herbert Virgin MD dated May 15, 1978)

Simon Markovich evaluated the applicant's left shoulder and upper arm following an injury that occurred when playing against Buffalo. There was a history of a 1978 rupture of the tendon of the long head of the left biceps and he continued to play. His impression was the recent injury made the decreased function of the left arm due to the ruptured bicipital tendon more evident. Also included in the exhibit was an undated report from Dr. Lawrence Elson PhD diagnosing the applicant with left cervical radiculopathy and a probable cervical vertebrae compression fracture during the 1978 season and radiculopathy experienced during the 1979 season. He believed x-rays dated December 15, 1980 revealed early but significant changes. He opined that it was consistent with instability of motion segment between C4 and C5 and the applicant should have been advised

to stop playing football. No date was listed on that report. (Applicant's Exhibit 6, Report of Simon Markovich MD dated November 12, 1978)

The applicant was hospitalized between November 15, and November 18, 1978 for a severe neck sprain and radiculopathy. (Applicant's Exhibit 7, hospital report of Dr. Virgin dated November 18, 1978.)

Game notes detail incidents in a December 12, 1980 game and follow-up medical care. (Applicant's Exhibit 5, Game notes from the Miami Dolphins of various dates.)

A form signed by Dr. Holmboe was dated March 25, 1983, but only the last page was included. Under "additional remarks by the physician" it states the patient has significant disability involving the left shoulder, the left thumb, the right palm, the left knee, cervical spine and the right little toe. The patient that Dr. Holmboe was referring to is not listed on the form. (Applicant's Exhibit 8, excerpts from a report of Arthur Holmboe MD dated March 25, 1983.)

Dr. Harrington wrote a March 1, 1984 letter to the NFL player retirement plan. He noted the applicant had an initial football related injury in August, 1974 when he fractured his right wrist and was eventually diagnosed with a nonunion of a navicular fracture and underwent surgical bone grafting which has been painful every ever since. In 1976, he suffered an injury to his left thumb, suffered torn ligaments which were surgically repaired at the end of the season. He injured his right thumb in the 1976 or 1977 season with no surgical repair. In 1976, he suffered a dislocation of the right fifth toe for which he underwent corrective surgery and has been left with fifth toe cockup deformity. In 1978 he suffered a twisting injury to his knee, underwent an excision of a Baker cyst and was diagnosed with a tear of the posterior cruciate ligament. He developed neck pain in the 1978 season and has persistent weakness in his left arm. He suffered a tear of the long head of the biceps tendon on the left side in 1978 which was treated with surgical repair. In the doctor's opinion, he has a 55% disability related to the chronic nerve impingement syndrome in the neck, a 60% disability in the left upper arm in a 65% disability of his left knee and thigh region. He has an 85% disability of the hands related to the nonunion of the navicular fracture in the chronic instability of both thumbs. As result of the combination of injuries he should be considered disabled from work which involves any significant requirement for lifting, stooping, stretching, bending, prolonged standing or walking. He will never return to professional football. The disabilities are permanent stationary and will not change significantly in the future. (Defendant's Exhibit E, report of Kevin Harrington MD dated March 1, 1984.)

Dr. Harrington prepared a physician's report for the NFL Player Retirement Plan. The patient was first treated on March 1, 1984 and last treated on May 11, 1995. He described the nature of the disability as severe posttraumatic arthritis of the left knee, right wrist, both shoulders, both thumbs, both hips and cervical spine. The patient was severely disabled because the combination of deformities to both shoulders, biceps tendon's bilaterally, low back, neck, knees, hips etc. and the combination disability made him substantially disabled from any reasonable work activity and was directly related to cumulative trauma during his employment as a professional football player in the NFL. (Defendant's Exhibit F, report of Kevin Harrington MD dated May 11, 1995.)

Dr. Harrington wrote a letter dated July 2, 1997 to the NFL player retirement plan regarding the applicant. He believed that the applicant was disabled as of July 1993 extending back to 1984 and

has remained disabled ever since. (Defendant's Exhibit G, report of Kevin Harrington MD dated July 2, 1997.)

Dr. Kevin Harrington prepared a physician's report for the NFL player retirement plan for a cumulative disability between 1974 and 1980. The doctor checked "yes" next to the statement that it was likely that the patient was totally disabled to the extent that he is substantially unable to engage in any occupation for any remuneration or profit. He also checked "yes" that the illness or injury was the disability is a result of a football related activity. It was signed on August 14, 2000. (Joint Exhibit 101, report of Kevin Harrington MD dated August 14, 2000.)

A commutation of present value based on a permanent disability rating of 100% with a date of commutation of August 1, 2017 valued the permanent, total disability at \$1,388,472.48. Next to that, in handwriting, was "+1 million for TD = 2.38 million + medical." (Applicant's Exhibit 3, communications between applicant and his former attorney Justin Litvack of various dates.)

Excerpts of communications between the applicant and Martin Weinstein discuss amended the claim for cumulative trauma and joinder of the Oakland Invaders. (Applicant's Exhibit 10, Communication between the applicant and his former attorney, Martin Weinstein, of various dates.)

In an email string dated April 14, 2022 between Delvin Williams and Valerie Malm of the Department of Industrial Relations, Office of Self-Insured Plans Ms. Mehlman advised that the Miami Dolphins is not a business registered with the California Secretary of State. (Applicant's Exhibit 1, email between Valerie Malm and the applicant dated April 15, 2022.)

A denial of a claim for workers' compensation benefits was issued in response to an Amended Petition and Order joining Arrowood for their coverage of the Oakland Invaders. (Applicant's Exhibit 9, Denial of Workers Compensation benefits from Arrowood to Delvin Williams dated May 17, 2018.)

There is a series of emails between the applicant and Lauren Taylor of the Department of Industrial Relations with a date range between November 24, 2021 and April 7, 2022 which discussed the SIBTF's contention that the applicant's claim was barred by the statute of limitations. (Applicant's Exhibit 2, emails between applicant and Lauren Cantor of various dates)

Judicial Notice

Based on applicant's request, I have taken judicial notice of the September 25, 2015 Opinion and Decision After Reconsideration in ADJ7427357, the Application for Adjudication of Claim, dated August 10, 2010 in ADJ7427357, the December 12, 2011 Order denying the petition for joinder in ADJ7427357 and the Order Joining the Miami Dolphins in ADJ7427357.

Testimony

The applicant testified on his own behalf. He filed a workers compensation claim in 2010 for benefits for a cumulative trauma injury. In 2014, workers compensation judge suggests that the

statute of limitations was tolled and that California had jurisdiction. The defendants appealed and after several years he settled his claim for injuries.

His attorney said that if he was not 100%, when the case was over he could file for benefits from SIBTF. He and his attorney separated ways in March or April 2017. In 2021, he came across information on websites regarding SIBTF and he remembered and that it had been brought up in the past. He couldn't find an attorney to take the case. He filed a claim against SIBTF or about September 2021. He read that an application needed to be filed five years from the date of injury, the last date he received benefit or the date of the compromise and release. He filed his claim three years after he settled it. It was his understanding that he was within the timeframe.

On cross-examination he admitted that in 2017 his attorney mentioned SIBTF. He said if he wasn't found to be hundred percent, he could file a claim for SIBTF benefits. It was an oral conversation. It was followed up with a note right before he left his as his attorney. In essence he was told if he was not 100% he could bring a claim against SIBTF. He researched SIBTF between 2019 and 2020 and filed an application in 2021. He resolved his claim against the San Francisco 49ers the Miami Dolphins in 2018 for \$1.1 million.

Discussion

There is no statute of limitations contained in the Labor Code for applications for benefits with the Subsequent Injuries Benefits Trust Fund ("SIBTF.") However, there are explicit time limits for an injured worker to file an application for a claim against the employer. An injured worker has one year from (a) the date of injury, (b) the last payment of disability benefits, or (c) the last furnishing of medical treatment, whichever is later, to file a claim. (Labor Code §5405.) An injured worker also has five years from the date of injury to file a petition to reopen for new and further disability. (Labor Code §5410.) However, if it is found that the applicant reasonably did not know within five years from the date of injury he could become entitled to SIBTF benefits, those time limits can be extended for claims against the SIBTF.

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 is 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. (*Subsequent Injuries Fund v. Workmen's Comp. App. Bd., (Talcott)*, (1970) 2d Cal. 3d 56, 65.)

The courts have not defined what is considered a "reasonable time" to file a claim against the SIBTF after the injured worker learns that the Fund has potential liability. An SIBTF claim filed six months and one day following the issuance of an award of permanent disability was deemed timely. (*Hagen v. Workers' Comp. Appeals Bd., (Adams)* (2021) 86 Cal. Comp. Cases 283 (writ denied).) A claim filed less than one year after a finding on whether or not the applicant sustained a psychiatric injury as a compensable consequence of a spinal injury was also deemed timely.

(Duncan v. Workers' Comp. Appeals Bd. (May) (2010) 75 Cal. Comp. Cases 1195 (writ denied).) However, a claim against the SIBTF filed more than three years after the last provision of benefits and more than five years from the date of injury was found to be untimely. *(Moore v. Workers' Comp. Appeals Bd., (1977) 42 Cal. Comp. Cases 98.)*

Applicant filed his claim against the SIBTF on September 2, 2021. (Defendant's Exhibit A.) The subsequent injury in that application is the cumulative trauma from January 1, 1974 through January 1, 1981. In cases of cumulative traumas, Labor Code section 5412 states that the date of injury is the date that the applicant first suffered disability, and when the employee knew or should have known that the disability was industrially caused. WCJ Succa did not make a finding of the date of injury under Labor Code section 5412 in her February 12, 2014 Findings of Fact and Order. However, Dr. Feinberg found that the applicant was limited to semi-sedentary work as a result of his orthopedic injuries, and that it was medically probable that he was not competitive in the open labor market when the orthopedic disability was combined with physical, emotional and cognitive disabilities, in his March 8, 2011 report. (Defendant's Exhibit D, pages 39 – 40.) Dr. Feinberg also stated that the orthopedic disability was 100% industrial. (Id. at 40.) Therefore the applicant knew or should have known by the time of the March 8, 2011 report of Dr. Feinberg that he had a cumulative trauma injury as a result of his career as a professional football player. Therefore, there was both knowledge and evidence of disability by March 8, 2011, and under Labor Code section 5412 the latest that the date of injury could be was March 8, 2011. The claim against SIBTF was filed more than 10 years after the March 8, 2011 report of Dr. Feinberg.

The applicant settled his claim against his employers with a compromise and release, therefore there was no finding of a level of permanent disability. Settlement was based in part on the opinions of the Dr. Feinberg, who outlined a level of permanent disability as well as apportionment to prior industrial injuries in his 2011 report. The applicant should have known at the time he settled his claim that he had a potential claim against the SIBTF as all discovery regarding the level of permanent disability for the industrial injury was completed at the time of settlement. He testified that his prior attorney told him that if he was not found to be 100%, when the case was over he could file for benefits from SIBTF. (Testimony of Delvin Williams, April 17, 2023, morning session, page 6, line 5:7.) He confirmed on cross examination that he was told by his attorney in 2017, both orally and in writing, that if he wasn't found to be 100%, he could bring a claim against SIBTF. (Id at page 8, 31:35.) In the addendum to the Subsequent Injury Benefits Trust Fund Application, the applicant also stated that he was advised of his of the potential for a claim from the SIBTF by his prior attorney. (Defendant's Exhibit A, Addendum page 3.) Therefore the applicant had knowledge at the time that he settled his case with a compromise and release in March, 2018 of his potential eligibility for SITBF benefits.

Applicant also knew or should have known at the time he entered into the compromise and release he was settling for less than the full value of what he believed was the value of permanent, total disability. Applicant had a commutation from 2017 that the present value of a 100% award was \$1,388,472.48. (Applicant's Exhibit 3, page 2.)

The claim against SIBTF was filed in September, 2021, more than 3 years after the applicant settled his case against his employers, and more than 3 years from when he was told by his attorney of his potential eligibility for SIBTF benefits. I therefore find that the applicant did not file his claim against SIBTF in a reasonable time from when he knew or should have known that he had a potential claim. Applicant's claim against SIBTF is therefore barred as untimely.

DATE: May 17, 2023

Elizabeth Dehn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE