

**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 ORDER
GRANTING PETITION FOR
RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Award (F&A) issued on September 1, 2023, wherein the workers' compensation administrative law judge (WCJ) found as relevant 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.

The WCJ issued an award in defendant's favor in accordance with these findings.

Applicant contends that the WCJ misapplied section 4751 to require proof of the level of preexisting permanent partial disability by contemporaneous medical evidence.

We received an Answer from defendant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration; and,

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

as our Decision After Reconsideration, we will rescind the F&A and substitute findings that correct clerical errors as to the date of the subsequent injury and the body part of the preexisting permanent partial disability and defer the issues of the level of permanent disability of the preexisting permanent disability and all other issues; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On August 17, 2022, the matter proceeded to trial of the following issues:

1. Permanent and stationary date . . .
2. Permanent disability.
3. Attorney's fees.
4. Whether Applicant had a preexisting labor-disabling permanent disability and what the level of that permanent disability was.
5. What the overall SIF permanent disability liability is.
6. What the overall permanent disability is from the subsequent industrial injury after the filing of the Petition to Reopen.
7. Statute of limitations - untimely filing of SIF Application.
8. Credit to SIF per Labor Code 4753.

(Minutes of Hearing and Summary of Evidence, August 17, 2022, pp. 3:10-22.)

The WCJ admitted an exhibit entitled Report of Dr. Newton dated August 3, 2021 into evidence, which includes the following:

In 1976, while working at General Telephone, the applicant sustained an injury to his right knee for which he underwent an open partial meniscectomy. Since that time he has had multiple surgeries including two knee replacements with the last knee replacement performed in 2016, and a manipulation under anesthesia performed two years ago. Despite these surgeries, he continues to have moderate pain and weakness in the right knee.

On examination today, the applicant has decreased painful motion of the cervical spine, both shoulders, right elbow, both wrists, and right knee. He has an antalgic gait and cannot fully straighten his right knee. He has significant painful loss of motion of the right knee.

...

CAUSATION OF INJURY:

This applicant sustained injury to his right knee in 1976 at General Telephone for which he has had multiple subsequent surgeries.

(Ex. 7, Report of Dr. Newton, August 3, 2021. pp. 21-22.)

The WCJ admitted an exhibit entitled Report of Dr. Newton dated October 5, 2021 into evidence, which includes the following:

Under the new AMA Guidelines 5th Edition, the applicant has a Total Whole Person Impairment of 67%. with respect to his cervical spine, both shoulders, right elbow, both wrists, and right knee injuries.

Summary of Whole Person Impairment Ruling Per Body Part:

Cervical Spine: 28% whole person impairment.
Right Shoulder: 14% whole person impairment.
Left Shoulder: 6% whole person impairment.
Right Elbow: 6% whole person impairment.
Right Wrist: 5% whole person impairment.
Left Wrist: 5% whole person impairment.
Right Knee: 30% whole person impairment.

...

Right Knee:

With respect to the right knee, per the criteria of table 17-33 and 17-35, he has poor results, giving him a 30% whole person impairment.

The above impairment rating is an accurate reflection of this applicant's current loss of function as discussed in the activities of daily living section of my report, where it is noted that this applicant continues to have significant loss of function with activities of daily living. Per the requirements of the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition*, Chapters 1 and 2, accurate impairment rating is to be based on accurate reflection of an individual's loss of function.

(Exhibit 8, Report of Dr. Newton, October 5, 2021, pp. 17-19.)

In the Opinion on Decision, the WCJ states:

Based on the credible testimony of Applicant with due regard for his demeanor as a witness, Applicant did sustain a prior industrial injury to his right knee (1973–1976). There was documentary evidence (Exhibit 9) substantiating Applicant was paid temporary disability for a January 8, 1973, date of injury to his right knee. Applicant further testified that he received an additional \$4,000.00 in permanent disability. Applicant testified to undergoing a knee replacement surgery in the 1970s.

Submission of this matter was vacated for the parties to obtain any records from this previous alleged injury and the only additional documentary evidence provided was Exhibit 9. An inquiry was made to State Records which produced no additional medical reporting.

The Court is satisfied and believes Applicant has met his burden of proof to show that he had a pre-existing labor disabling permanent disability.

...

Applicant initially stipulated his 1996 injury for 69% and following a Petition to Reopen and based on Peter Newton's medical report, in his capacity as an AME, dated June 25, 2019, wherein he found Applicant's permanent disability had increased to 71%.

Dr. Newton opined in his October 5, 2021, report, applicant's knee replacement surgery had a poor result qualifying him for **30% WPI**. However, applicant's injury occurred in 1973 was not determined pursuant to the AMA Guides and whole person impairment, it was governed by subjective complaints, objective findings, and work restrictions.

While Dr. Newton did give work restrictions under work status, however, this is not a contemporaneous report and since I do not have any contemporaneous reports detailing the factors of disability, the WCJ has no way to determine what the underlying permanent disability is, so as to be able to add it with the SII PD

Further, pursuant to **Todd & Bookout**, the permanent disabilities from the prior injury and from the SII are added together and there is only permanent disability from the SII.

Lastly, Labor Code §4751 requires the prior industrial injury when added to the subsequent industrial injury has to be greater than the SII alone and again, the WCJ does not have the requested information to opine on this issue.
(Opinion on Decision, pp. 1-2.)

In the Report, the WCJ states:

Applicant sustained a specific industrial injury to his neck, back, hip, and right shoulder on January 8, 1996. This is the subsequent industrial injury (SII) as referred to in Labor Code §4751.

This claim was resolved by way of a stipulated Findings & Award in the amount of 69% on or about October 12, 1998. A timely Petition to Reopen was filed on November 30, 2000, which was resolved by way of a Compromise & Release leaving future medical care open on March 1, 2021.

At the time of trial, O.D. Legal on behalf of SIBTF and applicant's counsel stipulated applicant does meet the 35% threshold as required under Labor Code §4751.

Applicant sustained a prior work-related injury resulting in a total knee replacement sometime in 1973 - 1976.

To support the finding of a pre-existing labor disabling permanent disability, applicant offered the following evidence:

1. Applicant testified he received temporary disability as a result of the knee injury (Exhibit 9).
2. Applicant testified he received approximately an additional \$4,000.00 for permanent disability in connection with this knee injury.
3. Peter Newton, M.D. reported in the capacity of an agreed medical examiner (AME) and opined in his June 25, 2019, medical report applicant's impairment increased by 2% in the SII. (Exhibit 8).
4. Dr. Newton also opined applicant had a 30% WPI in connection with his 1973 right knee injury. (Exhibit 8).

An Opinion on Decision and Findings of Fact and Award issued on September 1, 2023, finding applicant failed to show a pre-existing labor disabling permanent disability based on contemporaneous medical reporting and specifically what the level of permanent disability was from the right knee injury alone so that the two injuries together would be greater than just from the SII alone.

...

There were no contemporaneous medical reports documenting the right knee condition submitted into evidence, notwithstanding giving applicant two times to locate medical records and a search of the State records also did not produce any contemporaneous medical reporting.

Further, while Dr. Newton opined applicant sustained 30% WPI as a result of the 1973 injury. This was neither a contemporaneous medical record nor was it the approach to permanent disability in 1973. 1973 injuries were not based on whole person impairment but permanent disability. Therefore, the WCJ had no evidence as to the amount, if any, of the 1973 knee injury.

Part of Labor Code §4751 mandates the applicant to show that when the SII and the prior injury are added together, the amount is greater than just from the subsequent injury alone. There was insufficient evidence for the WCJ to determine the level of permanent disability from the prior industrial knee injury to determine what the overall permanent disability would be.
(Report, pp. 2-3.)

DISCUSSION

The Appeals Board may correct a clerical error at any time without the need for further hearings. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App. 3d 543 [47 Cal.Comp.Cases 145, 154–155].) The term "clerical error" includes all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. In determining whether an error is clerical or substantive, it must be determined whether the mistake was made in rendering

the judgment or in recording the judgment which was rendered. (*In re Candelario* (1970) 3 Cal.3d 702, 705, 91 Cal.Rptr. 497, 477 P.2d 729.) If an error or omission is the result of inadvertence, the error is clerical and the judgment may be corrected to correspond with what it would have been but for the inadvertence. An error resulting from the inadvertent omission of matter from a decision is generally considered to be a clerical error rather than a judicial error. (*Morgan v. Board of Equalization* (1949) 89 Cal.App. 2d 674, 682, 201 P.2d 859.)

Here, the F&A includes findings that applicant sustained injury on January 8, 1966, and that applicant had a preexisting labor disabling permanent disability in the form of a hip replacement. (F&A.) The Report, however, states that applicant sustained subsequent injury on January 8, 1996 and had a preexisting labor disabling injury to the knee. (Report, pp. 2-3.)

Based on the contents of the Report, we conclude that the F&A's findings as to the date of subsequent injury and the body part of the preexisting permanent partial disability resulted from clerical error. Accordingly, we will substitute findings that applicant sustained subsequent injury on January 8, 1996 and had a preexisting permanent partial disability to the right knee.

Section 4751 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.)

In the present case, applicant contends that the WCJ misapplied section 4751 to require proof of the level of preexisting permanent partial disability by contemporaneous medical evidence.

In this regard, the record shows that the WCJ determined that applicant does not qualify for SIBTF benefits because he did “not have any contemporaneous reports detailing the factors of disability”; and, therefore, “no way to determine . . . the underlying permanent disability.” (Opinion on Decision, p. 2.)

But our review of the case law reveals no requirement that the level of preexisting permanent partial disability be proven by contemporaneous medical evidence. In *Ferguson v. Industrial Acc. Com.* (1958) 50 Cal.2d 469, 477 [23 Cal.Comp.Cases 108].), the Supreme Court 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*, at p. 477.) 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 [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, supra*, (quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

In other words, the applicant’s preexisting permanent partial disability may be industrial or nonindustrial in origin and may arise from any source—congenital, developmental, pathological, or traumatic. (*Escobedo v. Marshalls, CNA Ins. Co.*, (2005) 70 Cal.Comp.Cases 604, 619 (citing *Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 62 [35 Cal.Comp.Cases 80].)

Notably, neither the fact that a preexisting disability did not interfere with the occupation the applicant was engaged in at the time of the subsequent injury nor the fact that it was unknown to the applicant may determine eligibility to SIBTF benefits. The question is whether it can be demonstrated by competent evidence that the preexisting condition did interfere or would have actually interfered with any type of work activity. (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238 [145 Cal. Rptr. 22].)

In this case, the WCJ found that competent evidence establishes that applicant had a preexisting permanent partial disability injury to his right knee. (F&A; Report, pp. 2-3.) The level of preexisting disability is unclear, however, because Dr. Newton’s reporting regarding applicant’s

current impairment attributable to the right knee (30% WPI) does not specify the level of impairment prior to the subsequent injury. (Ex. 7, Report of Dr. Newton, August 3, 2021; Ex. 8, Report of Dr. Newton, October 5, 2021; Report, pp. 2-3.)

Since the WCJ found that applicant had a preexisting permanent partial disability to the right knee and we have concluded that there is no requirement that applicant prove the level of preexisting disability by contemporaneous medical evidence, the record should be developed as to the level of preexisting disability.

The Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261, 264-265].)

Accordingly, we will substitute findings that defer the issue of the level of preexisting permanent partial disability.

Accordingly, we will grant reconsideration; and, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that correct clerical errors as to the date of the subsequent injury and the body part of the preexisting permanent partial disability and defer the issues of the level of permanent disability of the preexisting permanent partial disability and all other issues; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on September 1, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on September 1, 2023 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Ruben Organista, born _____, while employed on January 8, 1996, as a telephone technician, Occupational Group No. 31, in California, by GTE (Verizon), sustained injury arising out of and in the course of employment to his neck, back, hip, and right shoulder.

2. At the time of the injury, the employee's earnings were \$672.00 per week, warranting indemnity rates of \$448.00 for temporary disability and statutory for permanent disability.
3. Applicant's permanent disability start date is October 25, 2013, per the WCJ's decision of August 10, 2016.
4. On November 2, 1998, applicant settled his subsequent industrial injury case by stipulated award in the amount of 69% permanent disability.
5. On November 30, 2000, applicant filed a timely petition to reopen.
6. The AMEs in orthopedics in the industrial injury were Daniel Ovadia, M.D., Herbert Percival, M.D., and Peter Newton, M.D.
7. Applicant did receive social security disability payments.
8. On March 2, 2021, applicant entered into a compromise and release of his subsequent industrial injury.
9. Applicant satisfies the 35 percent threshold as provided under Labor Code section 4751.
10. The application for SIBTF benefits is not barred by the statute of limitations.
11. Applicant became permanent and stationary on October 5, 2021.
12. Applicant sustained a preexisting permanent partial disability of the right knee.
13. The issue of the level of the preexisting permanent partial disability of the right knee is deferred.
14. All other issues are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

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

NOVEMBER 20, 2023

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/es

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

CS