

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

FREDDIE MITCHELL, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ7161613
Oakland District Office**

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

Applicant Freddie Mitchell seeks reconsideration of the July 8, 2021 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant's claim for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits is barred by the statute of limitations.

Applicant contends that his SIBTF claim should not be barred because (1) there was no Workers' Compensation Appeals Board (WCAB) findings on the issue of permanent disability, (2) neither the underlying Compromise and Release nor the Panel Qualified Medical Examination (PQME) report of Zan Ian Lewis, M.D., dated March 30, 2011, provided applicant with a basis for determining whether he had a substantial likelihood of entitlement to SIBTF benefits, (3) there is a dearth of information concerning SIBTF benefits and applicant should not be charged with constructive knowledge of his substantial likelihood of entitlement to SIBTF benefits, (4) application of the SIBTF limitations standard found in the California Supreme Court case *Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56 [35 Cal.Comp.Cases 80] supports applicant's contention that his SIBTF claim should not be barred, (5) applicant did not have constructive notice of a substantial SIBTF claim, (6) analogy to case law regarding statute of limitations for cumulative trauma injuries supports that applicant's SIBTF claim is not barred, and (7) SIBTF failed to carry its burden of proof on the affirmative defense of the statute of limitations.

We received an answer from SIBTF and have reviewed it. 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 grant reconsideration, amend the July 8, 2021 Findings and Order, and return this matter to the trial level for further proceedings.

FACTS

As stated in the WCJ's Report:

Applicant testified on his own behalf at trial he "kind of" recalls filing an application for adjudication in 2010. He had a different attorney then - Mel Owens and then Mr. Cohen. He recalls receiving a settlement amount of about \$150,000.00. He thought his right to medical care was left open.

He recalls coming to California to see a doctor. He recalls being seen by Dr. Lewis, but not with a great deal of specificity. He has not seen a copy of Dr. Lewis' report (Exh. 103). He never had a face to face meeting with Mr. Cohen (one of his prior attorneys). He later was apprised by his current attorney that he has no right for future medical care as a result of his settlement.

He first heard of potential for Subsequent Injuries Benefits Trust Fund (SIBTF) claim was after 2019 Super Bowl, when told by an attorney, James Sims. He then spoke to current attorney, which led to him filing his claim in May of 2019 for SIBTF. He then underwent several QME's for this in California.

Between his settlement and his conversation with Mr. Sims in early 2019, he was not aware of an SIBTF claim and didn't know what that was. He was not advised of how the Dr. Lewis report was rated. (Report, p. 2.)

DISCUSSION

We first address the timeliness of this Opinion. Labor Code¹ section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (§ 5909.) Applicant filed his Petition for Reconsideration on June 7, 2021. The Appeals Board had until August 6, 2021 to act on the Petition. However, the Appeals Board did not receive notice of it until October 6, 2021.

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

It “is a fundamental principle of due process that a party may not be deprived of a substantial right without notice . . .” (*Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant’s petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of section 5909. The Appeals Board did not act on applicant’s petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board’s decision holding that the time to act on applicant’s petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Like the Court in *Shipley*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Id.* at p. 1108.) Therefore, considering that applicant filed a timely petition for reconsideration on June 7, 2021 and that our failure to act was due to a procedural error, we find that our time to act on applicant’s petition for reconsideration was tolled until October 6, 2021, the date we received the Petition. Accordingly, per section 5909, the deadline to act on this Petition is extended to December 6, 2021. Therefore, this Opinion and Decision After Reconsideration is timely.

Turning to the issues raised in the Petition, we conclude that the record is lacking. There are no Minutes of Hearing and Summary of Evidence of the trial and there are no admitted exhibits.

Labor Code² section 5313 requires the WCJ to,

. . . make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made. (§ 5313.)

Section 5313 requires the WCJ to state the “reasons or grounds upon which the [court’s] determination was made.” (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIA 74].) The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision “must be based on admitted evidence in the record” (*Hamilton*, at p. 478), and must be

² All statutory references are to the Labor Code unless otherwise noted.

supported by substantial evidence. (§§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at p. 475.)

Furthermore, the WCJ is charged with preparing the minutes of hearing and a summary of evidence at the conclusion of each hearing. (Cal. Code Regs., tit. 8, § 10566; *Hamilton, supra*, at p. 476.) The minutes of hearing and summary of evidence must include all interlocutory orders, admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence, the disposition of the matter, and a fair and unbiased summary of the testimony given by each witness. (Cal. Code Regs., tit. 8, § 10566; *Hamilton, supra*, at p. 476.)

Here, we are unable to ascertain the basis for the WCJ's decision with the existing record and as such, we rescind the July 8, 2021 Findings and Order and return this matter to the trial level for further proceedings.

Nevertheless, in light of the parties' arguments, we provide the following guidance with respect to the limitations period of SIBTF claims:

In light of these four Supreme Court decisions [*Talcott, supra*, 2 Cal.3d 56; *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd. (Pullum)* (1970) 2 Cal.3d 78 [35 Cal.Comp.Cases 96]; *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd. (Woodburn)* (1970) 2 Cal.3d 81 [35 Cal.Comp.Cases 98]; *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd. (Baca)* (1970) 2 Cal.3d 74 [35 Cal.Comp.Cases 94]] we interpret the holding in *Talcott* to mean that 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 SIBT claim is a reasonable time after applicant learns from the WCAB's findings on the issue of permanent disability that SIBTF has probable liability.

The fact distinguishing *Baca* from the other three Supreme Court cases is that applicant filed a petition for new and further disability before the expiration of five years from the date of injury with the knowledge that he had already received a combined permanent disability award of 69.5%, which was only 0.5% short of the 70% combined disability threshold under Labor Code section 4751. The court determined that this fact was sufficient to hold that applicant knew he had a substantial likelihood of entitlement to subsequent injuries benefits before the expiration of five years from the date of injury. (*Adams v. Subsequent Injuries Benefits Trust Fund* (June 22, 2020, ADJ7479135) [2020 Cal. Wrk. Comp. P.D. LEXIS 216].)

For the foregoing reasons,

IT IS ORDERED that applicant Freddie Mitchell's Petition for Reconsideration of the July 8, 2021 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 8, 2021 Findings and Order is **AMENDED** as follows and the matter is **RETURNED** to the trial level for further proceedings:

Findings of Fact

1. Applicant, Freddie Mitchell, while employed during the period from July 26, 2001 through September 3, 2005 as a professional athlete by the Kansas City Chiefs at Kansas City, Missouri, sustained injury arising out of and in the course of employment as set forth in the Compromise and Release approved on May 31, 2012.
2. The initial application for benefits in the underlying case was filed on January 19, 2010.
3. The Compromise and Release agreement was approved on May 31, 2012.
4. The application for Subsequent Injuries Benefits Trust Fund (SIBTF) was filed on May 3, 2019.

5. The issue of whether applicant's claim for SIBTF is barred by the limitations period is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 24, 2021

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

**FREDDIE MITCHELL
MANGOSING LAW GROUP
OFFICE OF THE DIRECTOR-LEGAL UNIT (OAKLAND)**

LSM/bea

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