

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

DOUGLAS RIEDO, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

**Adjudication Number: ADJ7772639
Santa Barbara Satellite Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Douglas Riedo. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the May 13, 2022 Findings of Fact and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant has failed to present evidence substantiating a preexisting labor disabling permanent disability and therefore does not meet the requirements for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits.

Applicant contends that he met his burden in establishing preexisting labor disabling permanent disability. The subsequent injury is an industrial cumulative trauma injury ending on April 20, 2009 to applicant's neck and right thumb. Applicant contends that the preexisting labor disabling permanent disabilities are (1) an industrial specific injury to his neck and left ankle on July 13, 2004; the left ankle was found to be permanent and stationary on December 15, 2008, with a substantial impairment of 28% whole person impairment (WPI); (2) an industrial injury to his lower back on June 20, 2000 that resulted in a Findings and Award dated March 13, 2002, which Peter M. Newton, M.D., found 22% WPI along with 6% WPI for his thoracic spine; and (3) two non-industrial injuries to his right shoulder, one in 1996 and the other in 2007.

We received an answer from SIBTF. SIBTF contends that applicant has failed to prove (1) prior labor disabling disability; (2) 35% permanent disability threshold from the subsequent injury;

and (3) combined disability of 70% or more.¹

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 rescind the May 13, 2022 Findings of Fact and Order and return this matter to the trial level for further proceedings consistent with this Opinion.

FACTS

As the WCJ stated in his report:

Applicant claimed two industrial injuries. A specific injury occurring on July 13, 2004 and a continuous trauma claim ending in 2009.

Both cases proceeded to trial on February 4, 2016. Following trial, the matter was vacated and Peter Newton, M.D. was appointed pursuant to L.C. § 5701.

A Joint Findings of Fact and Opinion on Decision issued on November 20, 2017.

It was found the specific injury caused injury to applicant neck and right shoulder. It was found applicant became P&S on May 11, 2009 with a combined disability of 23% P.D. with L.C. 4663 apportionment to the neck.

The continuous trauma claim was found to have caused injury to his cervical spine and right thumb. It was found he became permanent and stationary on July 26, 2016 with a finding of 41% PD with apportionment.

Defendant filed a petition for reconsideration only contesting the WCJ failed to dismiss a lien; no other issues were raised by either side.

Applicant filed a petition for SIBTF benefits on April 12, 2018. The matter proceeded to trial on December 15, 2021 and at the request of the parties, the matter was submitted on February 17, 2022.

On May 13, 2022, an Opinion on Decision and Findings of Fact and Award issued finding applicant failed to meet their burden of proof in showing applicant had a pre-existing labor disabling permanent disability. (WCJ Report, p. 2.)

DISCUSSION

A. Preexisting disability

1. Whether the July 13, 2004 specific injury disability preexisted the cumulative trauma injury ending on April 20, 2009.

¹ SIBTF also makes an argument regarding SIBTF credits. We do not address the issue of credits in this Opinion.

The main contention between the parties is whether applicant suffered a preexisting labor disabling disability before his subsequent injury. Applicant claims that there is abundant contemporaneous evidence supporting preexisting disabilities to his neck, left ankle, lower back, and right shoulder. (Petition, pp. 2:16-21; 3:21-25.) SIBTF contends that there is no prior contemporaneous evidence of prior disabilities and further contends that the permanent disability from the July 13, 2004 industrial specific injury is not preexisting the industrial cumulative trauma injury ending on April 20, 2009. SIBTF argues that applicant became permanent and stationary from the 2004 specific injury on May 11, 2009, which is subsequent to the cumulative trauma date of injury of April 20, 2009. (Answer, pp. 7:13-9:26.)

We first address whether the permanent disability from the 2004 specific injury preexisted the cumulative trauma injury ending on April 20, 2009. Labor Code,² section 4751, requires that there be a preexisting permanent disability and a subsequent injury. (§ 4751.) The date of the preexisting permanent disability from the 2004 specific injury is either the date applicant became permanent and stationary, which is May 11, 2009, or the date applicant was awarded with 23% permanent disability, which is November 20, 2017. (Applicant Exhibit 17, Joint Findings of Fact and Award dated November 20, 2017, ¶ 3; Applicant Exhibit 18 Joint Opinion on Decision, p. 2.)

The date of the subsequent injury, in this case a cumulative trauma injury, is determined under section 5412. Section 3208.1 provides:

An injury may be either: (a) “specific,” occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) “cumulative,” occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury shall be the date determined under Section 5412. (§ 3208.1.)

Section 5412 provides:

The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment. (§ 5412; see *Ruiz v. Subsequent Injuries Benefits Trust Fund* (ADJ3447817, September 21, 2012) [2012 Cal. Wrk. Comp. P.D. LEXIS 486].)

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

SIBTF cites to *Dow Chemical Co. v. Workers' Comp. Appeals Bd. (Quick)* (1967) 67 Cal.2d 486, 493 [32 Cal.Comp.Cases 431] for the proposition that the date of injury in a cumulative trauma injury in a SIBTF case is the ending date of the cumulative trauma injury. (Answer, p. 8:11-16.) The *Quick* court stated:

Accepting the guidance of the *Beveridge* case, we adopt a similar rule here which fixes what is by necessity a constructive date on which, for the purposes of subsequent injury statutes, a cumulative injury will be deemed to have been incurred. That date is the last day of the period in which the WCAB finds that cumulative injury was received by repetitive exposure to stress or other cause; **or, if disability does not appear until yet a later date, the time when the employee becomes disabled.** (*Quick, supra*, 67 Cal.2d at p. 493; emphasis added.)

Section 5412 became effective on January 1, 1948 and section 3208.1 became effective on January 1, 1969. (§§ 3208.1, 5412.) Both sections were amended in 1973 to clarify that the date of injury in cumulative trauma injuries is determined under section 5412. (*Ibid.*) The *Quick* decision was issued in 1967, before the 1973 statutory amendments. Furthermore, the *Quick* decision relied on *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, which erroneously applied section 5411, the date of injury in specific injury cases, to a cumulative trauma injury. It has since been well established that the date of injury in a cumulative trauma injury is determined in accordance with section 5412, and we conclude so as such.

Section 5412 requires (1) the existence of a disability, and (2) actual or constructive knowledge that the disability was caused by employment. Here, however, we are unable to determine from the record when the two elements above were met in order to determine the date of injury of the cumulative trauma injury. As such, we are unable to determine whether the permanent disability from the 2004 specific injury preexisted the subsequent cumulative trauma injury. For that reason, we return this matter to the trial level to determine this issue. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see §§ 5701 and 5906 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).)

2. Whether there is prior contemporaneous documentation of prior disabilities.

We next address the issue of whether there is prior contemporaneous documentation of the claimed preexisting disability to the neck, left ankle, lower back and right shoulder.

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

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 v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238.)

However, if "the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof." (§ 4664(b).)

Applicant's injury to his neck, left ankle and lower back were the subject of previous Findings and Awards. According to the Joint Findings of Fact and Joint Opinion on Decision, both dated November 20, 2017, applicant was found to have sustained permanent disability of 23% as a result of his 2004 specific injury to his neck and left ankle. (Applicant Exhibit 17, Joint Findings of Fact and Award dated November 20, 2017, ¶ 3; Applicant Exhibit 18, Joint Opinion on Decision, p. 2.) According to the Petition for Reconsideration, applicant's injury to his lower back dated June 20, 2000 resulted in a March 13, 2002 Findings and Award. (Petition, p. 3:21-

25.)³ Once the date of injury for the cumulative trauma injury ending on April 20, 2009 is determined, we will be able to determine whether the permanent disability awarded in 2002 and 2017 are prior to the cumulative trauma date of injury.

We also note that Dr. Newton's medical record review paints a history of applicant falling frequently and sustaining several injuries. Dr. Newton's medical record review summarizes the following injuries:

- Steven Dosch, M.D.'s report dated July 13, 2004 notes injury to applicant's left ankle. (WCAB Exhibit WW, Dr. Newton's report dated June 21, 2006, p. 20.)
- Thomas H. Jones, M.D.'s report dated February 6, 2008 notes injury to applicant's right shoulder. (WCAB Exhibit WW, Dr. Newton's report dated June 21, 2006, p. 21.)
- Charles J. Curatalo, M.D.'s report dated February 28, 2008 notes injury to applicant's neck, arm, right thumb, right shoulder. It also notes prior right shoulder surgery, lumbar surgery, and three left ankle surgeries. (WCAB Exhibit WW, Dr. Newton's report dated June 21, 2006, p. 21.)
- Deposition of applicant dated February 23, 2009 notes an old left ankle fracture from childhood and describes a history of falling and injuries. (WCAB Exhibit WW, Dr. Newton's report dated June 21, 2006, pp. 21-25.)

In short, although it appears that there is sufficient evidence in the record to demonstrate prior injuries, it is premature to make such a conclusion because the date of injury of the subsequent cumulative trauma injury, as discussed above, is yet to be determined.

B. 35% Threshold Requirement

SIBTF further contends that applicant does not satisfy the 35% subsequent threshold requirement because the standard rating for the cervical spine and the right thumb each are less than 35%. (Answer, pp. 10:16-11:16.)

Section 4751 requires that "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 [the] total [combined permanent disability]." (§ 4751.)

The court in *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214, 228 [41 Cal.Comp.Cases 595], held that the permanent disability attributable to applicant's subsequent injury for the purpose of meeting the 35% threshold requirement under section 4751 excludes

³ We note that this March 13, 2002 Findings and Award is not in the record and is not entered into evidence.

apportionment. (See *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 583 (Appeals Board En Banc).)

SIBTF agrees that the standard rating for applicant's cervical spine injury without apportionment is 34% and the standard rating for applicant's right thumb without apportionment is 10%. (Answer, p. 10:24-25.) Combining these two ratings using the Combined Values Chart (CVC) results in a 42% standard rating, which meets the 35% threshold requirement.

SIBTF is incorrect that the two body parts must be looked at separately in evaluating the 35% threshold requirement. (Answer, pp. 10:26-11:9.) The subsequent injury here is a single cumulative trauma injury to two body parts, applicant's cervical spine and applicant's right thumb. (Applicant Exhibit 17, Joint Findings and Award dated November 20, 2017; Applicant Exhibit 18, Joint Opinion on Decision.) The two body parts must be combined per the CVC to determine the permanent disability resulting from the subsequent cumulative trauma injury. (See *Todd, supra*, 85 Cal.Comp.Cases at p. 587.)

C. 70% Combined Permanent Disability Requirement

SIBTF argues that the combined disability between the subsequent cumulative trauma injury and the specific injury is 41% permanent disability, which is less than the required 70% permanent disability. The 41% permanent disability is derived from the subsequent injury alone because according to SIBTF, the specific injury did not preexist the cumulative injury, the permanent disability apportioned by Dr. Newton under section 4663 to non-industrial causes is not proof of a prior labor disabling disability, and the lumbar and thoracic spine does not constitute prior labor disabling disability. (Answer, pp. 11:17-13:9.)

We defer the issue of whether applicant met the 70% combined permanent disability requirement because the issues discussed above will need to be determined first. We note that per the holding in *Todd, supra*, 85 Cal.Comp.Cases at p. 589, prior and subsequent permanent disabilities shall be added to the extent they do not overlap in order to determine the combined permanent disability. Here, the only overlap appears to be applicant's cervical spine injury in the specific injury dated July 13, 2004 and the subsequent cumulative trauma injury ending on April 20, 2009.

Accordingly, for the reasons discussed above, we rescind the May 13, 2022 Findings of Fact and Order and return this matter to the trial level for further proceedings consistent with this Opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 13, 2022 Findings of Fact and Order is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 21, 2022

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

**DOUGLAS RIEDO
GUITTERMAN, GHITTERMAN & FELD
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. *abs*