

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

MARK WHISNANT, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ8121665
Redding District 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 Mark Whisnant. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the January 24, 2020 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant has not submitted evidence sufficient to establish eligibility for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits. Specifically, the WCJ found that applicant has not met the 5% permanent disability threshold or the 35% permanent disability threshold for a subsequent injury.

Applicant contends that development of the record should be permitted in order to clarify the opinions of Steven D. Feinberg, M.D., with respect to applicant's cumulative trauma injury. Applicant seeks clarification on whether Dr. Feinberg's cumulative trauma opinions should be apportioned to the cumulative trauma injury ending December 4, 2007 or the cumulative trauma injury ending December 6, 2010.

We received an answer from defendant SIBTF. 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, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we rescind the Findings and Order and return this matter to the trial level for further proceedings.

FACTS

As stated in the WCJ's Report:

Mark Whisnant [] while employed by Sears as a warehouse manager at Grass Valley, California, during the continuous trauma period through 12/06/2010, did sustain injury arising out of and in the course or employment to the bilateral hands, nervous system in the form of a psychiatric injury, headaches and back.

As background and relevant to this case, Applicant previously suffered the following injuries:

1. Low back injury in high school (possibly 1964 to 1969-high school age years)
2. Non-industrial motor vehicle accident in 1977.
3. Industrial injury (ADJ4352365) on 8/15/2003 to his hernia.
4. Industrial injury (ADJ6900470) on 8/20/2007 to his back, nervous system/psychiatric and headaches.
5. Industrial injury (ADJ3250495) through the period ending 12/04/2007 to his back, nervous system/psychiatric and headaches.
6. Industrial injury (ADJ8121659) on 7/15/2010 to his fingers, nervous system/ psychiatric and headaches.
7. Industrial injury (ADJ9074655) on 12/03/2010 to his back and nervous system/ psychiatric.
8. Industrial injury (ADJ8121665) through the period ending 12/06/2010 to his bilateral hands, nervous system/psychiatric and headaches.

All the above industrial injuries were sustained during Applicant's employment with Sears as a warehouse manager. There is also medical evidence of a low back injury at Sears in 2005 with some treatment; however, apparently no claim of injury was filed nor any Application.

ADJ4352365 (DOI 8/15/2003) was settled by Compromise and Release with Order Approving dated 11/17/2009. The settlement documents indicate permanent disability of 15% due to the hernia injury and based on the 8/20/2009 medical-legal report of AME Steven Feinberg, M.D. [Fn. 1 – Note that while the settlement document refers to AME Feinberg's 8/20/2009 report (Exhibit C), the actual disability opinion is found in AME Feinberg's 7/30/2009 report (Exhibit B).]

ADJ6900470 (DOI 8/20/2007); ADJ3250495 (DOI through 12/04/2007); ADJ8121659 (DOI 7/15/2010); ADJ9074655 (DOI 12/03/2010) and ADJ8121665 (DOI through 12/06/2010) were settled by a global Compromise and Release with Order Approving dated 4/12/2016. Within the settlement document, the parties agreed to compromise ratings at 65% permanent impairment for the 8/20/2007 injury; 3% permanent impairment for the continuous trauma through 12/04/2007; 36% permanent impairment for the continuous trauma through 12/06/2010 and 6% permanent impairment for the 7/15/2010 injury. As each date of injury includes multiple body parts that were not separated in the settlement document, it is impossible to determine the percentage of disability assigned to each body part for each date of injury. Further these injuries were settled by a compromise agreement and do not necessarily represent the correct or actual disability for each body part or for each date of injury.

Subsequently on or about 12/09/2014, Applicant filed an Application for Subsequent Injuries Fund Benefits alleging the continuous trauma ending 12/06/2010 caused additional injury to his bilateral hands, back and psyche which qualified him for the additional benefits of the Subsequent Injuries Benefit Trust Fund (hereinafter "SIBTF").

The parties could not agree on whether the requirements had been met for Subsequent Injuries Benefit Trust Fund eligibility, thus trial ensued on 11/21/2019 on the following issues:

1. Permanent Disability.
2. Attorney Fees.
3. SIBTF eligibility:
 - a. Does the Applicant qualify for Subsequent Injury Benefits Trust Fund benefits?
 - b. Is the 35 percent requirement needed?
 - c. Is there an opposite and corresponding threshold in lieu of the 35 percent requirement; and if so, does the evidence meet that opposite and corresponding threshold?

Given the unusual and complex nature of the issues, the parties were given until 12/19/2019 to submit post-trial briefs. Submission was on 12/19/2019.

[]

The undersigned issued Opinion on Decision and Findings of Fact on 1/27/2020. In general, it was found that Applicant did not submit either evidence or testimony sufficient to show that Applicant's permanent disability had increased by either 5% with an opposite or corresponding body part or by an additional 35% permanent disability, as discussed below. Thus, eligibility for Subsequent Injuries Benefit Trust Fund was not established. (Report, pp. 1-3.)

In her Opinion on Decision, the WCJ stated:

Previous Industrial Injuries

For the injuries of 8/15/2003, 8/20/2007, the Continuous Trauma through 12/04/2007, 7/15/2010 and 12/03/2010, the parties obtained the Agreed Medical Opinions of four medical-legal doctors. Steven Feinberg, M.D. opined on a Physical Medicine and Rehabilitation basis, Sandra Klein, M.D. opined on a Neuropsychological basis, Alberto Lopez, M.D. opined on a psychiatric basis and Fredric Newton, M.D. opined on a neurological basis. Each opined permanent disability to specific body parts and each apportioned a percentage of the permanent disability to different dates of injury. Additionally, both AME Klein and AME Feinberg gave AMA guidelines permanent disability and disability under an Almaraz analysis.

To determine the amount of permanent disability for each date of injury and thus whether the requirements for SIBTF eligibility have been met, it was first necessary to rate each AME's report by body part, then apportion to each date of injury, then add each. The ratings for each AME are as follows and note that pursuant to the requirements for SIBTF eligibility, the rating ends after the DFEC adjustment:

Sandra Klein, M.D.

AMA ratings for cognitive impairment (pursuant to the DEU rating of 5/21/2015):

13.04.00.00 - 29 [2] 33

40% caused by the psychiatric injury = 13.2 PD

Of 13.2, 75% is industrial = 9.9 PD rounded up to 10 PD

As apportioned by Alberto Lopez, M.D.:

8/20/2007 - 75% = 7.5% PD rounded up to 8% PD

12/4/2007 - 5% = .5% rounded up to 1% PD

7/15/2010 - 5% = .5% rounded up to 1% PD

12/6/2010 - 15% = 1.46% rounded down to 1% PD

13.04.00.00 - 29 [2] 33
60% caused by sleep, medication and chronic pain =
19.8 PD
Of 19.8, all is industrial = 19.8 PD rounded up to 20 PD
As apportioned by Steven Feinberg, M.D.:
8/20/2007 - 50% = 10%
12/4/2007 - 50% = 10%

Almaraz ratings for cognitive impairment and language disorder (pursuant to the DEU rating of 5/21/2015):

13.04.00.99 - 29 [2] 33
13.05.00.99 - 24 [2] 27
33 added to 27 = 60
40% caused by the psychiatric injury = 24 PD
Of 24, 75% is industrial = 18
As apportioned by Alberto Lopez, M.D.:
8/20/2007 - 75% = 13.5% PD rounded up to 14% PD
12/4/2007 - .5% = .9% PD rounded up to 1 % PD
7/15/2010 - .5% = .9% PD rounded up to 1 % PD
12/6/2010 - 15% = 2.7% PD rounded up to 3% PD

60% caused by sleep, medication and chronic pain = 36 PD
Of 36, all is industrial = 36 PD
As apportioned by Steven Feinberg, M.D.:
8/20/2007 - 50% = 18% PD
12/4/2007 - 50% = 18% PD

Alberto Lopez, M.D.

AMA ratings for psychiatric injury (pursuant to the DEU rating of 5/21/2015):

14.01.00.00 -15 [8] 21 PD
Of 21, 75% is industrial = 15.75 rounded up to 16
As apportioned by Alberto Lopez, M.D.:
8/20/2007 - 75% = 12 PD
12/4/2007 - .5% = .8 rounded up to 1 % PD
7/15/2010 - .5% = .8 rounded up to 1 % PD
12/6/2010 - 15% = 2.4 rounded down to 2%PD

Fredric Newton, M.D.

AMA rating for headaches (pursuant to DEU rating of 5/21/2015):

13.01.00.99- 3 [6] - 4
Of 4, 75% is industrial (per Lopez) = 3% PD
As apportioned by Alberto Lopez, M.D.:
8/20/2007 - 75% = 2.25 rounded down to 2% PD
12/4/2007 - .5% = 0.15 rounded down to 0% PD

7/15/2010 - .5% = 0.15 rounded down to 0% PD

Steven Feinberg, M.D.

AMA rating for Arousal Disorder, Lumbar DRE, Corticospinal Tract/Sexual Impairment and Left Ring (pursuant to DEU rating of 5/21/2015:

$$7 + 20 + 6 + 2 = 35$$

As apportioned by Steven Feinberg, M.D.:

$$8/20/2007 - 50\% = 17.5 \text{ rounded up to } 18\% \text{ PD}$$

$$12/4/2007 - 50\% = 17.5 \text{ rounded up to } 18\% \text{ PD}$$

Almaraz rating for Arousal Disorder, Lumbar DRE, Corticospinal Tract/Sexual Impairment and Left Ring (pursuant to DEU rating of 5/21/2015:

$$7 + 20 + 11 + 6 + 2 = 46 \% \text{ PD}$$

As apportioned by Steven Feinberg, M.D.:

$$8/20/2007 - 50\% = 23 \% \text{ PD}$$

$$2/4/2007 - 50\% = 23 \% \text{ PD}$$

Converting the above ratings, to dates of injury totals:

8/20/2007:

Klein-18% AMA 32% Almaraz

Lopez-12% AMA

Newton -2% AMA

Feinberg- 18% AMA 23% Almaraz

TOTAL: 50% PD AMA 55% Almaraz

12/4/2007:

Klein-11% AMA 19% Almaraz

Lopez - 1 % AMA

Feinberg-18% AMA 23% Almaraz

TOTAL: 30% PD AMA 42% Almaraz

7/15/2010:

Klein - 1 % AMA 1% Almaraz

Lopez - 1 % AMA

TOTAL: 2% PD AMA 1% Almaraz

12/6/2010:

Klein - 1 % AMA 3% Almaraz

Lopez - 2% AMA

TOTAL: 3% PD AMA 3% Almaraz

The total of the previous injuries is 82% permanent disability and 98% permanent disability under an Almaraz analysis. The requirement for the previous injuries appears to be met. (Opinion on Decision, pp. 5-7.)

The WCJ then opined that applicant did not meet the requirements for the subsequent injury.

Subsequent Injury - 5%

As stated, the total disability for the subsequent injury, standing alone, must be at least 35% or 5% if there are opposite and corresponding body parts.

The requirement at 5% requires "opposite and corresponding" body parts. Applicant argues that Applicant's 8/15/2003 injury involved the left inguinal hernia. He also argues an AME Feinberg finding of right leg radiculopathy which, as he argues, is opposite and corresponding.

The undersigned agrees that the left inguinal hernia can be considered opposite the right leg radiculopathy. Right versus left; however and pursuant to the Merriam-Webster's Collegiate Dictionary [fn omitted], the word corresponding means "having or participating in the same relationship (as kind, degree, position, correspondence or function)". Thus, the left hernia would be corresponding to the right hernia. The left leg radiculopathy would be corresponding to the right leg radiculopathy, but a hernia is not corresponding to the leg. The requirement is both opposite and corresponding to be eligible for the 5% increase. The left inguinal hernia is not corresponding to the right leg radiculopathy, thus the 5% requirement is not met.

Alternatively, and while Dr. Gilbert H. Lang, M.D. was used as AME for the 12/06/2010 date of injury as being the subsequent injury and AME Lang does discuss right leg symptoms (the opposite and corresponding body part), AME Lang agrees with AME Feinberg in opining 15% permanent impairment to the gait [fn omitted]. AME Feinberg apportionment the gait disability to the 8/20/2007 and the 12/04/2007 injuries while AME Lang opined the gait disability to the previous 1977 motor vehicle accident and thus neither, allocates an additional 5% to the subsequent injury.

In Applicant's Application for Subsequent Injuries Fund Benefits, Applicant lists the bilateral hands, back and psyche as generating the additional 5% permanent impairment allocated to the subsequent injury for SIBTF eligibility. However, when applying the 5%

additional disability, there must be an opposite and corresponding member. Of the bilateral hands, back and psyche, there is only the bilateral hands which could generate an opposite and corresponding member; however, there is no separate rating for the hands by any of the medical-legal providers.

AME Lang includes the hands in his discussion of the upper extremities of which a large portion relates to the shoulders. AME Lang opines the shoulders to the 1977 motor vehicle accident.

He further notes the problems with the hands were evident before the acute injury of 12/6/2010 [fn omitted]. Without the opposite and corresponding member which would allow only a 5% increase, Applicant is bound by the additional 3 5% increase.

Subsequent Injury - 35%

Regarding the subsequent 12/06/2010 date of injury, the following ratings again are pursuant to the DEU 5/21/2015 ratings:

AME Klein of the 40% of the 33% cognitive impairment of 13.2% and of the 75% industrial, she only opined 15% or 1.5% rounded up to 2% permanent disability. Under an Almaraz analysis, the 15% apportioned to 12/6/2010 totals 2.7% rounded up to 3% permanent impairment.

AME Newton and AME Feinberg did not opine any disability to the 12/6/2010 date of injury.

AME Lopez opined 15% of the industrial 15.75%, rounded up to 16%, totaling 2.4%, rounded down to 2% permanent disability to the 12/6/2010 date of injury.

The totals pursuant to the earlier AME's for the 12/06/2010 date of injury appear to be AME Klein at 2% and AME Lopez at 2%, not close to the 35% requirement.

However, it and in addition to findings in the lumbar spine, gait derangement and finger, AME Lang opined 35% whole person impairment to the upper extremities which rated to 45% permanent impairment of the upper extremities. AME Lang includes his opinion regarding the upper extremities disability in the section entitled "AMA METHOD WITH REASONABLE MEDICAL PROBABILITY PRE-DECEMBER 2010."

It would thus appear that AME Lang is opining the upper extremities disability, based on the Functional Capacity Evaluation on 10/31/2011, was in existence prior to December 2010 and would

thus not be available to increase the 12/06/2010 disability to 35% more than the pre-existing disability. (Opinion on Decision, pp. 8-10.)

DISCUSSION

In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), we stated that an employee must prove the following SIBTF elements:

- (1) a preexisting permanent partial disability;
- (2) a subsequent compensable injury resulting in additional permanent partial disability:
 - (a) if the previous permanent partial disability affected a hand, an arm, a foot, a leg, or an eye, the subsequent permanent disability must affect the opposite and corresponding member, and this subsequent permanent disability must equal to 5% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee; or
 - (b) the subsequent permanent disability must equal to 35% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or the age of the employee;
- (3) the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and
- (4) the combined preexisting and subsequent permanent partial disability is equal to 70% or more. ([Lab. Code] § 4751.)

(*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc).)

The issue here is whether applicant met the second element regarding the subsequent compensable injury.

As indicated in the Petition, Dr. Feinberg authored 16 reports between July 2009 and December 2014 and referenced two injuries in these reports: an August 15, 2003 specific injury and a cumulative trauma injury through December 4, 2007. (Petition, p. 2:10-20.) Although Dr. Feinberg did not mention the December 6, 2010 cumulative trauma injury in any of his reports, applicant seeks to develop the record to allow Dr. Feinberg the opportunity to clarify or correct the date of applicant's cumulative trauma period. (Petition, pp. 4:14 -6:11.)

We note that the May 21, 2015 DEU Consultative Rating report based on Dr. Feinberg's medical opinions provides a final permanent disability of 38% before apportionment. (DEU Consultative Rating dated May 21, 2015.) When removing the adjustments for occupation and age, the final permanent disability is 31%, before apportionment (20 C 7 C 6 C 2 = 31). Dr. Feinberg opined that 50% of applicant's permanent disability is due to the specific injury and 50% is due to the cumulative trauma injury. (Applicant Exhibit 2, Dr. Feinberg's report dated August 22, 2013, p. 17.) Thus, applicant's permanent disability for his cumulative trauma injury is 15.5% after apportionment (16% rounding up). Assuming this permanent disability is attributed to the December 6, 2010 cumulative trauma injury, as applicant would like us to do, it is unclear how this 15.5% permanent disability would meet the 35% permanent disability threshold even when taking into account Dr. Klein's 3% permanent disability and Dr. Lopez's 2% permanent disability, which applicant does not seem to dispute (16 C 3 C 2 = 21).

Nevertheless, the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1120-1122 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete. (Citations.)" (*McDuffie, supra*, 67 Cal.Comp.Cases at 141.) Here, based on due process grounds, we return this matter to the trial level to develop the record with respect to the timeframe of Dr. Feinberg's opinions of applicant's cumulative trauma injury.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the January 24, 2020 Findings 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/ KATHERINE WILLIAMS DODD, COMMISSIONER

MARGUERITE SWEENEY, COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 3, 2022

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

**MARK WHISNANT
LAW OFFICES OF THOMAS B. BROWN
OD LEGAL, LOS ANGELES**

LSM/pc

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