WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

TIM MCCORMICK, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFTIS TRUST FUND, *Defendants*

Adjudication Number: ADJ2649256 (ANA 0372231)
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the May 11, 2023 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant Tim McCormick's claim for SIBTF benefits is not time barred.

SIBTF contends that applicant's SIBTF claim is time barred because he failed to file it within five years of the date of the subsequent injury; the reasonable time "exception test" under *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd.* (*Talcott*) (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80] does not apply; even if the reasonable time "exception test" applies, applicant's SIBTF claim is still untimely; and delaying filing a SIBTF claim results in prejudice.

We have not received an answer from applicant. 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 contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate,[1] we deny reconsideration.

[1] We note that the Report erroneously refers to UEBTF when it should be referring to SIBTF.

For the foregoing reasons,

IT IS ORDERED that Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the May 11, 2023 Findings of Fact is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 4, 2023

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

TIM MCCORMICK
MANGOSING LAW GROUP
OD LEGAL – LOS ANGELES

LSM/*oo*

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

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ2649256

TIM MCCORMICK	**V.**	**SUBSEQUENT INJURIES BENEFITS TRUST FUND**

Workers' Compensation Judge: JOSEPHINE K. BROUSSARD

REPORT AND RECOMMENDATION ON UEBTF'S PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Date of Injury : 1/1/1984 - 5/17/1992

2. Identity of Petitioner : Defendant, UEBTF, filed the Petition.
   Timeliness: The Petition is timely filed.
   Verification: The Petition is verified.

3. Date of Findings of Fact : 5/11/2023

4. Petitioner's contentions:
   (a) The evidence does not justify the findings of fact.
   (b) The findings of fact does not support the Order, Decision or Award.
   (c) By Order, Decision and Award the Appeals Board has acted without or in excess of its power.

II
FACTS

Applicant, a former professional basketball player filed three subsequent injury claims by and through counsel at the time Law Offices of Ron Mix. The first claim filed was a cumulative trauma ("CT") for the period 1984 through May 17, 1992 filed on or about January 17, 2003.[1] The cumulative trauma was pled against all teams the Applicant played for in the National Basketball

[1] The court take Judicial Notice of Findings and Award & Opinion on Decision dtd. 2/6/2007; EAMS Doc. ID#45674961; *see also* EAMS conversion of old legacy claim #ANA0372231 to ADJ2649256.

Association ("NBA") including Seattle Supersonics, Philadelphia 76ers, New Jersey Nets, Houston Rockets, Atlanta Hawks, and New York Knicks. (Findings & Award and Opinion on Decision, 2/6/2007; EAMS Doc. ID#45674961 at p. 1) hereinafter ("F&A"). The 76ers, New Jersey Nets, Houston Rockets and Atlanta Hawks were insured by TIG Insurance Company and entered a Compromise & Release ("C&R") agreement prior to the trial date on the subsequent injury. (*Id.* at p.1). At trial in the subsequent injury case, the Workers' Compensation Judge ("WCJ") found the New York Knicks liable with a date of injury ending on May 17, 1992, and awarded 69% permanent disability ("PD") (*Id*. at pp. 2-3). As mentioned *supra*, TIG resolved its share of the CT claim in a C&R and it also settled a pled specific November 15, 1987, left shoulder injury.[2] The Seattle Supersonics were dismissed from the CT claim and from a specific right knee injury on November 15, 1985.[3]

In connection with the subsequent injury CT claim, there were medical reports from three Qualified Medical Examiners ("QME"s): Dr. McColl, (Applicant's QME), Dr. Marinow (TIG's QME) and Dr. Segil (New York Nicks QME). In the subsequent injury claim F&A, the WCJ relied on the reports of Dr. McColl and Dr. Marinow and found Dr. Segil's reports were not substantial medical evidence. (F&A *supra* at p. 3). Using the range of medical evidence between reports of Dr. McColl and Dr. Marinow, the WCJ found injury to Applicant's low back, right knee, bilateral shoulders, right hip and left ankle. (F&A). The WCJ found apportionment only to the right knee with 75% related to the CT and 25% due to a 1985 injury pursuant to report of Dr. McColl. (F&A *supra* at p. 5).

Dr. McColl's' first report has a history of right knee injuries as outlined below:

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[2] The court take Judicial Notice of Joint Order Approving Compromise & Release; EAMS Doc. ID# 45406718 filed on 11/7/2005 ANA03292740 and later converted to ADJ307139.

[3] The court take Judicial Notice of Joint Order Dismissing Party; EAMS Doc. ID# 76574504. The specific injury was filed on 11/7/2005 ANA392739 and later converted to ADJ4397827.

1. In 1981 applicant missed his entire sophomore year of college ball because of lateral release surgery on both knees.
2. In 1985 at Seattle, applicant had a torn cartilage in his right knee, had surgery, and lost approximately one month of playing time.
3. In 1989 at Houston, applicant injured his right knee requiring surgery and missed most of the year.
4. In 1992 applicant had right knee surgery and was out the entire 1991/1992 season. Joint Exhibit 3 at pp. 4-5.

Dr. McColl's report notes that the surgeries in high school led to a full recovery and were not the type that would lead to the type of degenerative condition Applicant had in his knee at the time of his evaluation. (Joint Exhibit 2 at p. 4). He further stated that after the 1985 right knee injury, Applicant continued to play for another six years, passed all his team physical examinations (with the exception of one in 1991), and there was no indication of work restrictions by any doctors. *Id.* Dr. McColl also pointed out that the two years after Applicant's 1985 knee injury and surgery were his most productive years. *Id.* The report of Dr. Marinow also documents pre-existing right knee history. (Joint Exhibit 4 at pp. 6; 17).

Applicant filed his SIBTF Application on September 15, 2020. (Application 9/15/2020 EAMS Doc. ID #33756651). An amended Application was filed asserting disability because of his pre-existing college knee injuries with discovery of other conditions still ongoing. (Amended Application 3/18/2022; EAMS Doc. ID #40634880).

III

DISCUSSION:

UEBTF argues in its Petition for Reconsideration that the undersigned erred by not giving Applicant's history and the medical evidence its due weight, that Applicant knew there was probable liability because he was only one percent away from the seventy percent threshold and the medical reporting confirmed twenty-five percent right knee disability. UEBTF also argues that allowing an

out-of-state resident to pursue benefits from the State of California would frustrate the purpose of the SIF.

The argument regarding residency must be quickly dispensed with and is akin to a jurisdiction argument. Applicant filed and received an Award for his subsequent injury claim in California. Additionally, it has long been held that basing jurisdiction upon residency is a denial of the equal protection of the law to non-residents.[4] *See Hafkey v. American Airlines, Inc*., 2018 Cal. Wrk. Comp. P.D. LEXIS 283.

This undersigned reiterates that there is no *express statutory* provision regarding when proceedings to collect SIBTF benefits must be filed. This issue has been developed through case law over the decades; nonetheless, the legislature has yet to enact a statute. Prior to 1970, courts dealt inconsistently with the issue of whether the time limit under Labor Code §5405[5] or Labor Code §5410[6] was the appropriate rule to apply to SIBTF cases. Later, on February 26, 1970, the California Supreme Court issued four cases[7] addressing this issue. In *Talcott,* the Supreme Court held the following:

> We should, in the absence of statutory direction and to avoid an injustice, prevent the barring of an applicant's claim against the fund before it arises. Therefore, we hold that 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 a substantial likelihood he will become entitled to subsequent injuries benefits, his application against the fund will not be barred - -

[4] While UEBTF makes this argument for policy reasons, the undersigned finds the analysis to be similar.
[5] The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
(a)The date of injury. (b)The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
(c)The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.
[6] Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period. This section does not extend the limitation provided in Section 5407.
[7] *Subsequent Injuries Fund v. Workmen's Comp. App. Bd*., (Talcott) 2 Cal. 3d 56; *Subsequent Injuries Fund v. Workers' Comp. Appeals Bd.,* (Baca) 2 Cal. 3d 74; *Subsequent Injuries Fund v. Worker' Comp. Appeals Bd*., (Pullum) 2 Cal. 3d 78; *Subsequent Injuries Fund v. Workers' Comp. Appeals Bd*., (Woodburn) 2 Cal. 3d 81

> even if he has 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.

Talcott supra at 65.

As outlined in this court's F&A on the SIBTF case, the undersigned found Applicant 'did not or could not reasonable have known' of SIBTF liability prior to the five years from the date of injury. Applicant's date of injury was May 17, 1992. Applicant did not bring his claim until on or about January 17, 2003. There is no evidence to the contrary imputing knowledge constructive or otherwise and SIBTF in its own post-trial brief acknowledged it was impossible for the Applicant to satisfy this prong of the test.

Therefore, this court was left to decide if Applicant filed his SIBTF claim within a *reasonable time* after he learned from the *board's findings on the issue of permanent disability* that the Fund may have *probable liability*. It is undisputed that there is a finding from the board on the issue of permanent disability. This trial court was thus left to analyze whether Applicant filed within a '*reasonable time'* after Applicant learned that the Fund had '*probable liability'*. There is a dearth of case law expounding on the issue of probable liability as it comes this issue. Therefore, the undersigned looked to Labor Code section 4751 and its interpreting cases for guidance.

Labor Code section 4751 states:

> 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.

While not expressly outlined in the statute, case law also requires that the prior partial disability be 'labor disabling'. *Ferguson v. Industrial Acci. Comm*. (1958); 23 Cal. Comp. Cases 108.

Of significance in this case is the existing state of the law of apportionment when the subsequent claim was litigated. From 1968 to the enactment of SB899 in 2004, there was virtually no basis for apportionment to 'pre-existing pathology' and 'other factors' that may have been a contributing cause of the disability unless it was labor disabling. However after the enactment of SB899, Labor Code section 4663 allowed apportionment to a contributing factor even for an asymptomatic pre-existing condition so long as it contributed to the present disability. So, an inference that Applicant's right knee was labor disabling absent any express language to the contrary would be contrary to the law. Dr. McColl report went on to describe how Applicant passed almost all his physicals, noted there were no restrictions, and that Applicant went on to have his most productive years after the right knee to which he apportioned. Simply put, there was no evidence that Applicant's prior right knee injury would have resulted in permanent disability. *See Edwards v. Workers' Comp. Appeals Bd*., (SIBTF) 75 Cal. Comp. Cases 767 (finding that the question of whether Applicant had permanent disability that was labor disabling despite problems, restrictions and contemplated surgery was a cloudy area and speculative); *Hayes v. Workers' Comp. Appeals Bd.*; (SIBTF) 76 Cal. Comp. Cases 679, (finding that although applicant contended the medical history and trial testimony proved labor disabling PD, there was no medical record to support a prior

ratable disability). For all the reasons outlined herein, Applicant could not have known[8] after the F&A that the fund had probable liability.

IV.

RECOMMENDATION

For the reasons stated above, it is respectfully requested that the decision not be disturbed and UEBTF's Petition for Reconsideration be denied.

DATE: 6/19/2023

Josephine K. Broussard
WORKERS' COMPENSATION JUDGE

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TIM MCCORMICK, US Mail
BY: A. Ramirez
ON: June 19, 2023

[8] UEBTF likens this case to *Baca*. That case, however, if factually different. An existing PD of 69.5 percent alone was not determinative; rather Applicant in *Baca* had already filed a Petition for New and Further Disability.