

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

GERALD DOCKERY, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ8302918
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the August 10, 2023 Findings of Fact, Order & Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant's SIBTF claim was not time barred.

SIBTF contends that applicant's claim is barred because it was not filed within five years of the date of injury. SIBTF further contends that should the test found in *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80] apply, the WCJ failed to identify the date applicant acquired knowledge, whether actual or constructive, of the substantial likelihood of his entitlement to SIBTF benefits; and the evidence does not support a finding that applicant filed his claim within a reasonable time after he learned of SIBTF's probable liability from the Workers' Compensation Appeals Board's (WCAB) finding of permanent disability. SIBTF lastly contends that applicant's failure to timely file a SIBTF claim unfairly prejudices it.

We received an answer from applicant Gerald Dockery. 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. Based on the Report, which we adopt and incorporate, and for the reasons discussed below, we deny reconsideration.

We agree with the WCJ that there is no statute of limitations for SIBTF claims. Any reference to statutory limitations to file SIBTF claims is erroneous. Instead, the two-prong test delineated in *Talcott, supra*, 2 Cal.3d 56 applies as a time limitations standard for SIBTF claims. We further agree with the WCJ that the second prong of the *Talcott* test applies here: whether applicant filed his SIBTF claim within a reasonable time after he learned from the WCAB's findings on the issue of permanent disability that SIBTF has probable liability. As the WCJ explained, an Order Approving a Compromise and Release is not a WCAB finding on the issue of permanent disability.

Lastly, we conclude that the credibility determinations of the WCJ, as the trier of fact, is entitled to great weight based upon his opportunity to observe the demeanor of witnesses as they testified and were subject to cross-examination. (*Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 312.) Furthermore, a WCJ's credibility determination may be disturbed only where there is contrary evidence of considerable substantiality. (*Id.*) There is no such evidence of considerable substantiality here. As such, we find no reason to disturb the credibility findings of the WCJ here.

For the foregoing reasons,

IT IS ORDERED that Subsequent Injuries Benefits Trust's Petition for Reconsideration of the August 10, 2023 Findings of Fact, Order & Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ NATALIE PALUGYAL, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 6, 2023

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

**GERALD DOCKERY
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

**REPORT AND RECOMMENDATION ON PETITION FOR PETITION FOR
RECONSIDERATION**

**I.
INTRODUCTION**

- | | |
|---------------------------------|---------------------|
| 1. Minutes of Hearing | June 6, 2023 |
| 2. Findings and Order | August 9, 2023 |
| 3. Identity of Petitioner | Defendant (SIBTF) |
| 4. Verification | No – Claimed Exempt |
| 5. Timeliness | Petition is timely |
| 6. Petition for Reconsideration | September 5, 2023 |
| 7. Proof of Service | Yes |

**II.
FACTS AND PROCEDURAL HISTORY**

Applicant played football as a professional athlete for numerous teams including the Houston Thunderbears for the period of 1995 through 2001. (Summary of Evidence (SOE), 6/6/23 trial, at 3:24-25, 4:1-2.) Prior to his time with the Thunderbears, the Applicant played for various professional football teams including the Texas Terror, the Grand Rapids Rampage, and the Calvary Stampede as well as several college football teams including Arizona Western College and Eastern New Mexico University. (Applicant’s Exhibit 1, Medical report of Dr. Lynn Wilson dated May 31, 2012, at pp. 2-4.)

Applicant suffered a number of injuries prior to the subsequent industrial injury including: an injury to his left hand during the time he played college football for Arizona Western College in or around 1989; an injury to his right hip during the time he played college football for Eastern New Mexico University in 1991; an injury to his neck during the time he played for the Calvary Stampede in or around 1995; an injury to his right elbow during the time he played for the Texas Terror in or around 1996; and an injury to his neck and shoulder from a motor vehicle accident on May 27, 2000. (Applicant’s Exhibit 1, Medical report of Dr. Lynn Wilson dated May 31, 2012, at pp. 2-4.)

During his employment with the Thunderbears, applicant sustained an industrial injury to his head, spine, bilateral upper extremities, bilateral lower extremities, internal organs, and psyche

for a cumulative trauma (CT) claim ending on March 9, 2001. (Findings of Fact No. 1.) Applicant commenced litigation on the normal benefits claim January 17, 2012. (Minutes of Hearing and SOE, 6/6/23 trial, 1:30 p.m. session, at 2:15-16 [Stipulation No. 4].) On October 8, 2013, Applicant and the Thunderbears executed a C&R for \$75,000.00. (Exhibit 2, Compromise and Release in the Underlying Case, 10/8/13 at p. 9.)

On September 2, 2020, Applicant filed his first application for SIF benefits. (Exhibit 1, Application for SIF Dated September 2, 2020.)

On June 6, 2023, the Parties appeared before the undersigned on the issues of (1) Whether the applicant was employed by the Houston ThunderBears and (2) Whether the statute of limitations would bar compensation by the Subsequent Injuries Benefits Trust Fund. The undersigned issued Findings and Orders and an Opinion on Decision on August 9, 2023, finding in favor of the Applicant on both issues. Thereafter, Defendants filed the instant Petition for Reconsideration on September 5, 2023.

Defendant's Petition for Reconsideration is based on the following grounds:

1. By the Order, Decision and Award made and filed by the WCJ, the Appeals Board acted
1. without or in excess of its powers;
2. The evidence does not justify the findings of fact; and
3. The findings of fact do not support decision.

Essentially, Defendant petitioner argues that (1) the undersigned misapplied the judicially created tolling test under *Subsequent Injuries Fund v. Workmen's Comp. App. Bd.* (1970) 2 Cal.3d 56 (Talcott) to the instant case, and (2) if Talcott is applicable, whether the Applicant knew or had reason to know of the substantial likelihood of his entitlement to SIF benefits prior to the close of the five year period that followed his subsequent industrial injury; and (3) whether the Applicant filed his SIF application with a reasonable time after he learned that SIF had probable liability.

Defendants argue that the undersigned is required to identify with specificity the exact nanosecond that the applicant acquired, or is deemed to have acquired, knowledge of the substantial likelihood of entitlement to SIF benefits. Defendants also argue that the undersigned is required to identify the period of time that is found to be reasonable. The undersigned declines the invitation, the law interposes, and the petition for reconsideration should therefore be denied.

III. DISCUSSION

A.

The Tolling Test under *Subsequent Injuries Fund v. Workmen's Comp. App. Bd.* (1970) 2 Cal.3d 56 (Talcott) Was Properly Applied to the Instant Case

It is well-recognized that there are no express statutory time limits that apply to filing of an application for SIBTF benefits. Prior to 1970, case law had to grapple with applying sections of the Labor Code, most notably Section 5405 (this dealt with requiring that an application be filed within one year of the last provision of workers compensation benefits) and Section 5410 (this section applied to requiring, when an underlying claim was filed within the time limits of section 5405, that a reopening had to be commenced no later than five years from date of injury). These statutes were relied upon, by analogy, in determining statute of limitation issues in SIBTF cases, but produced results marked by inconsistency.

There are four Supreme Court cases that provide guidance on the issue of timeliness of a SIBTF claim. (*Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80]; *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].) The Supreme Court in Talcott, the seminal case on this issue, provided:

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 substantial likelihood he will become entitled to subsequent injuries benefits, his application against the Fund will not be barred -- 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*, 2 Cal.3d at p. 65; emphasis added.)

The holding in Talcott means 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 SIBTF claim is a reasonable time after applicant learns from the WCAB's findings on the issue of permanent disability that SIBTF has probable liability. (*Adams v. Subsequent Injuries Benefits Trust Fund* (June 22, 2020, ADJ7479135) [2020 Cal. Wrk. Comp. P.D. LEXIS 216].)¹

In the instant case, there was no trial of Mr. Dockery's claim. Instead, the claim was resolved for a compromise and release for \$75,000.00 on October 8, 2013. The compromise and release contains no statement or agreement as to the level of Applicant's level of permanent disability. Further, paragraph 12 of the Addendum provides that there is a dispute about each element of the claim. As a result, the only conclusions which can be drawn from the claim are that Applicant had a disputed claim which was settled for \$75,000.00.

It is clear based upon the controlling Talcott decision that the Defendant cannot sustain its burden of proof on the statute of limitations. The correct standard for determining the Statute of Limitations is whether the Applicant has been put on notice from findings by the Board that there is a probable claim for SIBTF benefits. Based on the uncontroverted facts in the instant case, there is no basis for Defendant's affirmative defense of the Statute of Limitations. In this case the Defendant has presented no evidence of the Board's findings, because, in fact, none occurred. In this case there is no set of facts upon which the Defendant can carry its burden on the Statute of Limitations. As a result, the Court must find in the Applicant's favor on the issue of the affirmative Statute of Limitations defense.

B.

The Applicant Did Not Know or Have Reason to Know of the Substantial Likelihood of His Entitlement to SIF Benefits Prior to the Close of the Five Year Period that Followed His Subsequent Industrial Injury.

Defendants argue that the WCJ in these types of cases must "make a factual determination as to when the Applicant obtained knowledge, or is deemed to have known, of the substantial likelihood of entitlement to SIF benefits." (Pet. For Recon, pg. 11, lines 6-8.) They are essentially arguing the court must determine the exact nanosecond the applicant knew or should have known or is deemed to have known of the substantial likelihood of entitlement to SIF benefits. Defendants

¹ Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].) A California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 (Appeals Board en banc).) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

argue that, in this case, that date is October 8, 2013 because that is the date of the Order Approving C&R. (Pet. For Recon, pg. 11, lines 12-13.) This argument fails.

The Appeals Board just issued a decision in *Humphrey v. Subsequent Injuries Benefits Trust Fund* (September 8, 2023) (ADJ7016841). This case holds that a compromise and release does not constitute a finding by the Board on the issue of permanent disability, stating, “The Compromise and Release is not a finding on the issue of permanent disability... A Compromise and Release is a compromise; it is not a finding of disability... Moreover, the Appeals Board’s power to determine the adequacy of the Compromise and Release and issue an award based upon the release or compromise agreement is not a finding of permanent disability. (§ 5002; Cal. Code Regs., tit. 8, § 10700.) A finding of adequacy is not the same as a finding of permanent disability. (§§ 4660, 5002; Cal. Code Regs., tit. 8, § 10700.) (Humphrey at page 4.)

In this case there is no set of facts upon which the Defendant can carry its burden on the Statute of Limitations. As a result, the Board must find in the Applicant’s favor on the Statute of Limitations defense and reject Defendant’s flawed analysis. The invitation by Defendant’s to require a WCJ to determine with surgical precision the moment an applicant knew or should have known of his entitlement to SIF benefits must be declined.

C.

The Applicant Filed His SIF Application Within a Reasonable Time After He Learned That SIF Had Probable Liability.

The applicant testified that he, “...learned that Subsequent Injuries Benefits Trust Fund was available in 2020. A claim with Subsequent Injuries Benefits Trust Fund was then filed on his behalf that same year. On September 2, 2020, Applicant filed his first application for SIF benefits. (Exhibit 1, Application for SIF Dated September 2, 2020.)

Prior to contacting Attorney Phillip Allen, he had no information regarding the Subsequent Injuries Benefits Trust Fund.” (Summary of Evidence, at 4: 8-10). The testimony was uncontroverted and the undersigned made a determination that the applicant was credible. After reflecting on the record as a whole and after carefully weighing and considering the witnesses’ demeanor while testifying and the manner in which they testified; their personal interest or lack of interest in the outcome of the proceeding; their capacity to accurately perceive, recollect, and communicate the matters on which they testified; and their attitudes toward this proceeding and towards their giving of testimony (see, e.g., Cal. Evid. Code, § 780 [listing various factors to

consider in determining credibility]), the court found that the applicant's testimony on the dispositive facts were credible.

Based on the credible and un rebutted testimony of the applicant at trial, applicant's exhibits 1 through 4, and the Court's exhibits 1 and 2, it was found by the undersigned that the statute of limitations does not provide a bar to workers' compensation benefits for this applicant by the Subsequent Injury Benefits Trust Fund. The undersigned further found that the applicant acted within a reasonable time after he knew or should have known that there is a substantial likelihood that he will become entitled to benefits from the SIF. In this case, those findings are in favor of the applicant.

RECOMMENDATION

For the reasons stated above, it is respectfully requested that Defendant's Petition for Reconsideration be denied.

DATE: September 19, 2023

**HON. TROY SLATEN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE**