

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

BERNARDINA ORELLANA, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ7665104
Santa Barbara District Office**

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

Applicant Bernardina Orellana seeks reconsideration of the February 2, 2024 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant's SIBTF claim is untimely.

Applicant contends that the WCJ improperly placed the burden of proof on her to show that her SIBTF claim was timely and, even if the burden of proof on the issue of timeliness properly shifted to her, the facts do not support a finding that applicant's knowledge was so great and the facts so overwhelming that she knew there was a substantial likelihood of recovering SIBTF benefits within five years of the date of her injury. Applicant further contends that the WCJ failed to address the issue of whether the reporting of Joseph R. Ambrose, Qualified Medical Evaluator (QME), is substantial evidence and, if it is not, applicant argues that the WCJ has a duty to develop the record.

We received an answer from Subsequent Injuries Benefits Trust Fund (SIBTF). The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We also received SIBTF's Request for Judicial Notice and Declaration in support of this Request. WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964) states that supplemental petitions, pleadings, or responses shall be considered only when specifically requested or approved by the Appeals Board. We accept and review SIBTF's supplemental brief.

We have considered the Petition for Reconsideration, the Answer, the Request for Judicial Notice and the Declaration in support of this Request, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration solely to amend Finding no. 4 to reflect that there is no statute of limitations governing SIBTF claims, but that the limitations period for SIBTF claims is governed by case law.

FACTS

As the WCJ stated in his Report:

Among other industrial claims, Applicant sustained a specific industrial injury on April 29, 2010. The parties agreed to Alan Gross, M.D. to evaluate Applicant in the capacity of an AME.

Dr. Gross found Applicant did sustain a right ankle injury but found no ratable impairment. He did provide a work restriction.

The claims were resolved by way of Compromise & Release (C&R) with an OACR being issued on February 4, 2015.

Subsequent to the filing of a SIBTF claim, Applicant was evaluated by Joseph R. Ambrose, D.C. in the capacity of a QME.

An Opinion on Decision and Findings of Fact and Award issued on April 28, 2023, finding Applicant did not qualify for SIBTF benefits because she had failed to present evidence to meet the 5% threshold of impairment as required by Labor Code §4751.

Applicant filed a Petition for Reconsideration contending she did meet her burden of proof on that issue based on the medical reporting of Joseph Ambrose, D.C.

The matter went up on reconsideration and the WCAB remanded the case back to the WCJ to address various issues including that Applicant is not bound by Dr. Gross's opinions although the WCJ could rely on Dr. Gross's opinions and as stated by the WCAB, "More importantly, it appears applicant's claim is untimely."

Following trial, a Findings of Fact and Award issued providing Applicant's claim is barred as not being timely filed. It is from that determination applicant files this instant Petition for Reconsideration. (Report, p. 2.)

DISCUSSION

As we stated in our previous July 10, 2023 Decision After Reconsideration, we interpreted the contours of the limitations period in SIBTF claims as follows:

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. (*Adams v. Subsequent Injuries Benefits Trust Fund* (June 22, 2020, ADJ7479135) [2020 Cal. Wrk. Comp. P.D. LEXIS 216].)

Applicant contends that SIBTF cannot show that applicant knew of her substantial likelihood of qualifying for SIBTF benefits before April 29, 2015, five years from the date of her subsequent injury of April 29, 2010, because applicant settled her case three months before without a final opinion on impairment or permanent disability. (Petition, pp. 6:25-7:2.) Applicant further contends that it was not until the September 29, 2020 report of Dr. Ambrose that applicant was shown the “possibility” or “likelihood” of qualifying for SIBTF benefits, let alone a “substantial likelihood” of SIBTF eligibility. (Petition, p. 7:17-26.) Applicant then reasons that she filed her SIBTF application within a reasonable time of when it could be shown that there was a substantial likelihood of SIBTF eligibility. (*Ibid.*)

We are not persuaded. Applicant was found to be permanent and stationary from her April 29, 2010 subsequent injury on April 29, 2011. (Findings and Order dated February 2, 2024, Finding no. 6; see also Applicant Exhibit 6, Report of Alan Gross, M.D., dated December 6, 2013, p. 42 [concluding maximum medical improvement date of April 29, 2011 for the April 29, 2010 injury]; and also Applicant Exhibit 3, Dr. Gross's report dated October 10, 2011, p. 23 [concluding maximum medical improvement date of July 29, 2010 for the April 20, 2010 injury].) On August 1, 2011, Dr. Gross issued a report delineating multiple pre-existing injuries. (Applicant Exhibit 1,

Dr. Gross's report dated August 1, 2011, pp. 2-3.) By the time of that report, applicant was aware of her pre-existing injuries and had a subsequent injury that was permanent and stationary, placing her in a position to evaluate her eligibility for SIBTF benefits, approximately three years and eight months before the five-year limitations period.¹

In *Baca, supra*, 2 Cal.3d 74, applicant sustained two injuries, one on December 1, 1959 and the other one on March 1, 1961, resulting in a combined permanent disability of 69.5% that was awarded on December 4, 1964. (*Id.* at p. 75.) On February 28, 1966, one day before the expiration of five years from the date of the second injury, applicant filed a petition to reopen the proceedings on the second injury on the basis that he had suffered new and further disability. (*Id.* at p. 76.) In May 1967, applicant received an additional permanent disability award, raising his combined permanent disability to 84.5%. (*Ibid.*) Applicant filed his application for SIBTF benefits two weeks after the May 1967 permanent disability award, which was more than five years after the second date of injury. (*Ibid.*)

The Supreme Court held that applicant's application for SIBTF benefits was not timely. (*Baca*, at p. 75.) It reasoned that applicant "was aware prior to March 1, 1966, that he would qualify for benefits from the Fund if his total disability rating was increased by only 1/2 percent and he had filed a claim against his employer alleging that he had suffered a new and further disability on account of the second injury." (*Ibid.*) "Under these circumstances, he must be held as a matter of law to have known that there was a substantial likelihood that the Fund would be liable for the payment of benefits to him prior to the expiration of five years from the date of his injury." (*Ibid.*)

Similarly here, by the time of Dr. Gross's August 1, 2011 report, applicant was in a position to evaluate her SIBTF eligibility. We are aware that Dr. Gross found no impairment resulting from applicant's April 29, 2010 injury (Applicant Exhibit 5, Dr. Gross's report dated January 22, 2013, p. 4.) However, that did not preclude applicant from obtaining another medical evaluation for purposes of SIBT benefits. Indeed, applicant obtained the report of Joseph R. Ambrose, D.C.

¹ Dr. Ambrose found that applicant reached permanent and stationary status as of December 6, 2013 and states this conclusion is consistent with the opinion of Dr. Gross. (Applicant Exhibit 10, Dr. Ambrose's report dated September 29, 2020, p. 17.) However, Dr. Gross found applicant maximum medically improved as of April 29, 2011 in his December 6, 2013. (Applicant Exhibit 6, Report of Dr. Gross dated December 6, 2013, p. 42.) Nevertheless, even if we consider the December 6, 2013 permanent and stationary date of Dr. Ambrose, that is still more than a year before the April 29, 2015 five-year limitations period.

dated September 29, 2020,² more than nine years later. (Applicant Exhibit 10, Dr. Ambrose's report dated September 29, 2020.) There is no explanation why it took applicant more than nine years to work up her SIBTF claim. We also note that applicant filed her SIBTF claim on April 23, 2019, before Dr. Ambrose issued his report, and before Dr. Ambrose evaluated applicant on July 26, 2019, which indicates that applicant's decision to file a SIBTF claim was not based on Dr. Ambrose's report. (Applicant Exhibit 10, Dr. Ambrose's report dated September 29, 2020, p. 2.) Applicant offers no explanation why she waited until April 23, 2019, approximately nine years from her April 29, 2010 injury and more than seven years from Dr. Gross's August 1, 2011 report, to file her SIBTF claim.

Accordingly, for these reasons, we concur with the WCJ that applicant's SIBTF claim is untimely. We grant reconsideration solely to amend Finding no. 4 to reflect that there is no statute of limitations governing SIBTF claims.

For the foregoing reasons,

IT IS ORDERED that applicant Bernardina Orellana's Petition for Reconsideration of the February 2, 2024 Findings and Order is **GRANTED**.

² In our previous Decision After Reconsideration dated July 10, 2023, we called into question whether Dr. Ambrose's medical report constitute substantial evidence.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 2, 2024 Findings and Order is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

...

4. It is found that applicant's SIBTF claim is untimely filed.

...

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 15, 2024

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

**BERNARDINA ORELLANA
GHITTERMAN, GHITTERMAN & FELD
OFFICE OF THE DIRECTOR LEGAL**

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*