

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

**ALONZO CUNNINGHAM, *Applicant***

**vs.**

**SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant***

**Adjudication Number: ADJ8290184  
Oakland District Office**

**OPINION AND DECISION  
AFTER  
RECONSIDERATION**

We previously granted reconsideration in this matter to further study the factual and legal issues. Having completed our review, this is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) issued on November 9, 2021, wherein the workers' compensation administrative law judge (WCJ) found that the application filed against the Subsequent Injuries Benefit Trust Fund (SIBTF) on July 11, 2019 was untimely and, therefore, SIBTF has no liability in this case. The WCJ found that applicant shall take nothing from the SIBTF.

Applicant contends that the WCJ erred in finding his case to be time-barred based upon imputing presumed knowledge to applicant of his eligibility to file for an SIBTF claim from applicant's attorney, and that the record fails to support the finding that applicant could not have acquired any new knowledge or insight into the causes of his permanent disability after he filed his original claim in 2012 against the San Francisco 49ers.

We have not received an answer from SIBTF. We received applicant's request to submit a supplemental petition along with the proposed petition. 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. Finding good cause to approve the supplemental petition, we exercise our discretion to accept and consider it. The WCJ prepared a

Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the Petition for Reconsideration, the supplemental petition, and the contents of the Report, and we have reviewed the record in this matter. Based upon our review of the record, and for the reasons discussed below, we will rescind the November 9, 2021 F&O, and substitute a finding that the application filed by applicant against SIBTF on July 11, 2019 was timely filed.

### **FACTUAL BACKGROUND**

On April 17, 2012, applicant filed an Application for Adjudication of Claim (Application), claiming to have sustained injury arising out of and in the course of employment (AOE/COE) to his brain, head, neck, and multiple parts of body while employed by the San Francisco 49ers as a professional football player during the period April 26, 2002 through September 8, 2004.

On November 29, 2012, the parties submitted, and a WCJ approved, a Compromise and Release with respect to applicant's claim.

On July 11, 2019, applicant filed an Application for Subsequent Injuries Fund Benefits, alleging that prior to his subsequent industrial injury (SII) as a professional athlete, he had pre-existing disabilities to his lower legs as a result of a prior work injury. (Application for SIBTF Benefits, July 11, 2019, p. 6.)

On October 27, 2021, the matter proceeded to trial against the SIBTF on the sole issue of whether the application for SIBTF benefits was timely filed. (Minutes of Hearing and Summary of Evidence, October 27, 2021 (MOH/SOE)<sup>1</sup>, p. 2: lines 23-26.) At trial, the parties stipulated that 1) applicant, while employed during the period ending September 8, 2004, as a professional football player, Occupational Group 590, at various locations in California, including San Francisco, for the San Francisco 49ers, insured for workers' compensation by Travelers Property Casualty Company of America, claims to have sustained injuries arising out of and in the course of that employment to his brain, face, head, neck, back, hips, upper extremities, and lower extremities; 2) the case against the 49ers was resolved by a Compromise and Release, approved

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<sup>1</sup> In the case caption, the MOH/SOE dated October 27, 2021 improperly identifies San Francisco 49ers and Travelers Property Casualty Company of America as additional defendants, however, their case resolved with applicant by C&R on November 29, 2012. Additionally, the MOH/SOE which purports to admit the proffered exhibits into evidence fails to provide a descriptive listing of all exhibits received for identification or in evidence with the identity of the party offering the same in accordance with WCAB Rule 10787. (Cal. Code Regs., tit. 8, § 10787(c)(3).)

November 29, 2012, and; 3) his application for benefits from the Subsequent Injuries Benefits Trust Fund was filed July 11, 2019. (*Id.*, p. 2:8-26.)

Exhibits offered by the parties were admitted into evidence and applicant testified, with the matter thereafter submitted for decision.

At trial, applicant's un rebutted testimony was that he began his professional football career in the spring of 2002, when he was signed by the Rams through 2004. After the Rams, he was signed by the 49ers and assigned to their NFL European team in Berlin, and then after that with the home team through the summer of 2004. He filed a workers' compensation claim in California in 2011 or 2012 and he had an attorney, Jordan Cohen. (*Id.*, p. 3:12-20.) The subsequent industrial injury (SII) with the San Francisco 49ers is a cumulative injury through September 8, 2004 to multiple body parts including the brain, face, head, neck, back, hips, upper extremities, and lower extremities. (*Id.*, p. 2:8-15.) Applicant came to California for medical evaluations and saw an orthopedist and a neurologist. (*Id.*, p. 3:22-25.) Applicant settled the SII case with the San Francisco 49ers by a compromise and release (C&R), and an Order Approving Compromise and Release (OACR) issued on November 29, 2012. (*Id.*, at p. 2:17-18.) Applicant affirmed that his workers' compensation claim settled in 2012 or 2013 for \$93,000 or \$94,000 after fees. (*Id.*, p. 3:27-28.)

Applicant further testified that he did not discuss with Mr. Cohen the filing of a claim against the Subsequent Injuries Benefits Trust Fund. He was contacted by James Sims in 2018 or 2019 and after that he contacted his current attorney and filed a claim against SIBTF. Before he spoke with Mr. Sims, he did not have any information about the SIBTF. (*Id.*, p. 3:30-37.)

On November 9, 2021, the WCJ issued his F&O finding that the application for SIBTF benefits filed by applicant on July 11, 2019 was untimely and therefore SIBTF has no liability in this case.

It is from this F&O that applicant seeks reconsideration.

### **DISCUSSION**

We first address the tone of the applicant's Petition. We note that applicant asserts in his Petition that "the WCJ's reasoning is obtuse." (Petition, p. 11.) Petitioner also takes issue with the Director of the Industrial Relations being in "complete control of every aspect of obtaining SIBTF benefits," including issuing dictates to the administrative law judges regarding setting of its hearing, exercising administrative fiat, engaging in *ex parte* and secret communication, as well as

behind-the-scenes control resulting in prejudice, failure to disseminate information, overreach, and the appearance of impropriety. (Petition, pp. 14-16.) We remind petitioner that every petition for reconsideration shall fairly state all the material evidence relative to the point or points at issue and every contention must be supported by the evidentiary record. (Cal. Code Regs., tit. 8, 10945(a)(b).) Use of inappropriate, insulting, and offensive language in pleadings is not permitted. (Cal. Code Regs., tit. 8, 10421(b)(9).)

Turning to the merits, petitioner asserts that the WCJ erred in finding applicant's case to be time-barred. The burden of proof rests upon the party holding the affirmative of the issue, and all parties shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (Lab. Code § 5705; *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289].) "Preponderance of the evidence" is defined by section 3202.5 as the "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." (Lab. Code § 3202.5.)

The issue of the timeliness of filing an SIBTF case is an affirmative defense. As such, the burden lies with the defendant. 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.)

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 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].)

We find there is no basis upon which to conclude that the applicant could have known about the existence of an SIBTF claim by 2012. Applicant's uncontroverted testimony was he was not aware of filing a claim against the SIBTF until 2018 or 2019. After he became aware of this, he contacted his current attorney and filed a claim on July 11, 2019. Thus, applicant did not know about SIBTF until 2018 or 2019, and once he did, a claim was filed. There is no evidence of any delay in pursuing his claim against SIBTF. In his Report, the WCJ states:

Applicant further contends that I "ignored" the evidence of when he became aware of his right to file a claim against the Fund. This may be so. However, as stated above, I did impute to him the knowledge of his counsel, who filed a workers' compensation claim against his employer in 2012 and, I concluded, had as much knowledge at that time as his current counsel did in 2019 of the likelihood of SIBTF liability." (Report, p. 10.)

The record is devoid of any evidence supporting that applicant's counsel had knowledge in 2012 and furthermore, any legal support to "impute" such knowledge to applicant in the absence of evidence confirming same.

Furthermore, the record is similarly lacking any documents indicating there was a finding on the issue of permanent disability, which could establish that applicant had knowledge of probable SIBTF liability, and the lack of such a finding is acknowledged by the WCJ in his Report. The WCJ additionally opines that "[w]hile the injured worker himself may not have been apprised of the possibility of SIBTF liability in 2012, the difference between his circumstances then and those existing in 2019 amounts to the identity of his counsel, only." (Report, p. 10.)

Applicant's C&R for the SII cannot be construed as a finding on the issue of permanent disability, as an order approving a Compromise and Release, without more, is not a finding of a prior award of permanent disability. First, defendant must prove that a prior award of disability exists. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 [Appeals Board en banc].) This burden requires the production of prior Stipulations with Request for Award, or a prior Compromise and Release, where the parties agreed to applicant's level of permanent disability in the settlement. (*Pasquotto, supra*, at p. 230.)

Here, the C&R pertains to applicant's cumulative injury through September 8, 2004 to multiple body parts but contains no finding of permanent disability. Further, applicant's testimony yields no further information on the C&R settlement approved by the WCJ in November of 2012 other than his approximate net monetary recovery. 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.)

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 9, 2021 Findings and Order is **RESCINDED** and the following is **SUBSTITUTED** therefor:

**FINDINGS OF FACT**

1. Alonzo Cunningham, born [ ], while employed during the period of time ending September 8, 2004, in various locations in California, as a professional athlete, occupational group number 590, by the San Francisco 49ers, insured for workers' compensation by Travelers Property Casualty Company, claims to have sustained an injury arising out of and in the course of employment to various parts of his body.
2. The application filed by applicant against SIBTF on July 11, 2019 for benefits was timely filed.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG L. SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 20, 2026**

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

**ALONZO CUNNINGHAM  
MANGOSING LAW GROUP  
SUBSEQUENT INJURIES BENEFITS TRUST FUND  
OFFICE OF THE DIRECTOR-LEGAL UNIT (LOS ANGELES)**

**bp**

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