

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

LOUIE ZAMORA, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ11141991
Salinas 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 Subsequent Injuries Benefits Trust Fund (SIBT). This is our Opinion and Decision After Reconsideration.

SIBTF seeks reconsideration of the November 15, 2021 Amended Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant is entitled to 100% permanent disability from SIBTF, less offsets and credits permitted by law.

SIBTF contends that (1) the Amended Findings and Award are inadequate as it does not make findings on the five requirements for SIBTF benefits; (2) the opinions of Michel R. Gagnon, D.C., and M. Joel Scheinbaum, M.D., do not constitute substantial medical evidence of a prior disabling disability; (3) an applicant who continues to work after the subsequent injury cannot be found to be permanently totally disabled; and (4) applicant's average weekly wage is that which he agreed to when he settled his subsequent industrial injury.

We received an answer from applicant Louie Zamora. 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, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we amend the November 15, 2021 Amended Findings and Award to reflect a combined permanent disability of 76%.

FACTS

As the WCJ stated in his Report:

Applicant, Louie Zamora, [] while employed on 8/26/17 as a premises technician, Occupational Group 482, at Salinas, California, by Pacific Bell Telephone Company, sustained injury arising out of and occurring in the course of his employment to his lumbar spine, thoracic spine, cervical spine, both shoulders, and right ankle (MOH/SOE 09/15/2021, p. 2). At the time, he was working as a “premises technician” and was injured while descending from a telephone pole, falling 12 to 16 feet to the street.

Mr. Zamora settled his underlying claim against the employer and its carrier, by Compromise & Release approved on 7/23/2019. (Exs. A-1 and A-2.)

[] Dr. Gagnon analyzed the physical disabilities. Dr. Scheinbaum addressed the psychiatric disabilities.

At the hearing on 09/15/2021, Applicant testified that his industrial injury occurred on 08/26/2017; that at the time of injury, he was earning \$28.15 per hour; that he reviewed the reports from Drs. Scheinbaum and Gagnon and agreed with the histories recorded by the doctors; that he was currently working for PG&E as a design drafter, which was lighter and very sedentary, compared to his previous work at Pacific Bell. In the new job, he works at a desk and is able to sit and stand at will; and he is earning \$42.00 per hour for a 40-hour week. (MOH/SOE, 9/15/21, pp. 4, 5)

Dr. Gagnon concluded (report dated 9/13/19, Ex. A-5, pp. 12, 13) that Applicant had a compensable injury on 8/26/17 and that the 2017 injury produced impairments totaling 44% WPI; and that at the time of the 2017 injury, Applicant had pre-existing but ongoing disabilities from a left knee injury sustained playing soccer as a teenager and from a psychological condition that were permanent and stationary at the time of the 2017 injury. He stated that the pre-existing impairments totaled 52% WPI. He said that the total of the pre-existing and injury-related disabilities was over 70%; that this combined disability was greater than the PD caused by the subsequent injury alone and “...caused him to be almost totally disabled.”

In his 11/8/19 report (Ex. A-4, pp. 79, 80, 81), Dr. Scheinbaum chronicled a series of traumatic events and circumstances the pre-dated the 2017 injury, leaving Applicant with psychiatric, cognitive, sexual and sleep issues, extant at the time of the 2017 injury and which were labor disabling, leading the doctor to assign a GAF score of 53, or a 26% WPI.

The DEU rated the spinal, shoulder and right ankle impairments (which Dr. Gagnon found to be entirely due to the 2017 injury) at 67% PPD. The pre-existing labor disabilities, except for the left knee, were rated 59% PPD, using the Combined Values Chart. This was *added* to the left knee disability, as discussed by Dr. Scheinbaum in his 3/15/21 report (Ex. A-3), who reasonably concluded there was no overlap between the conditions he evaluated and the orthopedic disabilities. The total for the pre-existing disabilities was 68% PPD. Combining the pre- and post-injury disabilities was calculated to produce a 100% rating.

Exhibit A-11 comprises W2's from Pacific Bell for the years 2016 and 2017. Based on Applicant's testimony, coupled with the W2's, Applicant's average weekly earnings at time of injury were \$1,499.83, supporting a temporary disability rate of \$999.89. (Report, pp. 1-3.)

DISCUSSION

There are no requirements as to the origin of the preexisting disability; it may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].) The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of workmen's compensation contemplated by our Constitution." (*Patterson* (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 475.)

The Supreme Court in *Ferguson* held that the "previous disability or impairment" contemplated by section 4751 "must be actually 'labor disabling,' and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751." (*Ferguson, supra*, p. 477; *Escobedo v. Marshall*, 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc).) The court further noted that "the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith v. Industrial Acc. Com.* (1955) 44 Cal.2d 364, 367 [2, 3] [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability. . . ." (*Ferguson*, at p. 477, quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

Further, the preexisting disability "need not have interfered with the employee's ability to work at his employment in the particular field in which he was working at the time of the subsequent injury. [citations]" (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d

224, 238.) “The ability of the injured to carry on some type of gainful employment under work conditions congenial to the preexisting disability does not require a finding that the preexisting disability does not exist. [citations].” (*Ibid.*)

To prove a preexisting disability, there needs to be evidence prior to the subsequent injury of a medically demonstrable impairment.

A preexisting disability cannot be established by a "retroactive prophylactic work restriction" on the preexisting condition placed on the injured after the subsequent industrial injury in absence of evidence to show that the worker was actually restricted in his work activity prior to the industrial injury. (*Hulbert v. Workmen's Comp. Appeals Bd.*, *supra*, 47 Cal.App.3d 634, 640; *Gross v. Workmen's Comp. Appeals Bd.*, *supra*, 44 Cal.App.3d 397, 404-405; *Amico v. Workmen's Comp. Appeals Bd.*, *supra*, 43 Cal.App.3d 592, 606; see also *Bookout v. Workmen's Comp. Appeals Bd.*, *supra*, 62 Cal.App.3d 214, 224-225.) Where the injured was actually under a prophylactic restriction for a preexisting condition at the time of the industrial injury, apportionment to a preexisting disability is proper. It is only the *retroactive* application of a prophylactic restriction to an otherwise nonexistent previous disability that is prohibited. (*Ibid.*)

The prohibition against "retroactive prophylactic work restrictions" to establish a preexisting disability is not inconsistent with the fact that prophylactic restrictions are ratable factors of permanent disability stemming from the industrial injury. (*Gross, supra*, 44 Cal.App.3d at p. 404.) Applying a prophylactic work restriction retroactively creates “a sort of factual or legal fiction of an otherwise nonexistent previous disability or physical impairment.” (*Ibid.*) Apportionment involves a factual inquiry. (See *Mercier v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.3d 711, 716; see also, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Gaba)* (1977) 72 Cal.App.3d 13, 16-17 [139 Cal.Rptr. 802].)

(*Franklin, supra*, 79 Cal.App.3d at p. 238.)

Here, the two preexisting disabilities at issue are a prior injury to applicant’s left knee and a psychological condition stemming from several traumatic events in applicant’s life prior to the 2017 subsequent injury. With respect to the left knee disability, there exists medical records dating December 2014 to April 2015, when applicant was diagnosed with left knee internal derangement and left knee recurrent patellar dislocation. (Exhibit A5, Dr. Gagnon’s report dated September 13, 2019, p. 14; Exhibit A4, Dr. Scheinbaum’s report dated November 8, 2019, p. 34.) Applicant was placed on a course of physical therapy because applicant preferred non-surgical treatment. (Exhibit A5, Dr. Gagnon’s report dated September 13, 2019, p. 14.) Medical follow up notes state that the

“patient would benefit from additional physical therapy to improve his strength and endurance.” (*Ibid.*) This prior evidence of injury and treatment to applicant’s left knee establishes applicant’s prophylactic work restrictions with respect to this left knee.

However, with respect to applicant’s psychological condition, there “is no history of any psychiatric care ever in [applicant’s] past either on an inpatient or outpatient basis.” (Exhibit A4, Dr. Scheinbaum, p. 42.) In his November 8, 2019 report, Dr. Scheinbaum describes applicant experiencing several traumatic events before the subsequent injury, namely, the death of a beloved maternal uncle to suicide, the death of a paternal uncle, the death of an elderly man in a home he was working, his wife’s sexual abuse at the hand of a family member, and the loss of his family home during the 2008 recession. (*Id.* at pp. 44-46.) Dr. Scheinbaum assigned a GAF score of 53, equating 26% whole person impairment (WPI) as a result of the above traumatic events in applicant’s life. (*Id.* at p. 81.) Dr. Scheinbaum also assigned 7% WPI related to applicant’s mental state, 8% WPI due to sleep and arousal disorders, and 7% due to neurologic sexual impairment. (*Id.* at p. 78.) Dr. Scheinbaum opined these psychological conditions “were preexisting and labor disabling, long preexisting the subsequent industrial injury of 08/26/2017.” (*Ibid.*)

The problem is that these traumatic events were relayed in November 2019, two years after the 2017 subsequent injury. (*Id.* at p. 2.) And while we are sympathetic to applicant’s traumatic experiences, without prior evidence of applicant’s psychological conditions, Dr. Scheinbaum’s impairment opinion amounts to retroactive prophylactic restrictions, which are prohibited. Therefore, we would be remiss to permit applicant’s psychological condition as a preexisting disability for purposes of SIBTF benefits. As such, applicant’s permanent disability impairment rating should be as follows:

Subsequent Injury dated August 26, 2017 = 67%

Preexisting Disability of the left knee = 9%

Adding the subsequent injury impairment to the preexisting disability per *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc) = 76% permanent disability. (See Rating Instructions dated October 20, 2021 and Exhibit X, Recommended Permanent Disability Rating dated October 20, 2021.)

With respect to SIBTF’s argument that applicant’s average weekly wage is that which he agreed to when he settled his subsequent industrial injury, we agree with the WCJ that “the Board

is [not] bound by statements in the pleadings [] regarding Applicant’s earnings capacity or average weekly wage . . . [and that those] statements were not evidence, and no findings [were] made in the Order Approving Compromise & Release based on those statements.” (Report, p. 4.)

Accordingly, we amend the November 15, 2021 Amended Findings and Award to reflect a combined permanent disability of 76%.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the November 15, 2021 Amended Findings and Award is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

...

6. The combination of the prior permanent disability and the subsequent injury exceeds 70% or more of the total permanent disability, resulting in a combined permanent disability of 76%.

7. The combined preexisting and subsequent permanent partial disability are greater than the subsequent permanent partial disability alone.

...

10. The medical reports of M. Joel Scheinbaum, M.D., are not substantial evidence.

...

AWARD

Applicant is entitled to 76% permanent disability rate commencing December 31, 2018, less legally allowable offsets and credits and less an attorney's fee of 15% of the net compensation awarded after deduction of legally allowable offsets and credits. The parties shall adjust the amounts of the allowable credits and offsets and the amount of attorney's fees informally, with jurisdiction reserved in the event they are unable to reach an agreement.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 19, 2026

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

**LOUIE ZAMORA
DILLES LAW GROUP
DIR, OFFICE OF THE DIRECTOR LEGAL**

LSM/ara

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