**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

| | |
|---|---|
| **VICTORIA ENRIQUEZ,**<br>***Applicant,***<br>**vs.**<br>**COUNTY OF SANTA BARBARA, Permissibly Self-Insured; SUBSEQUENT INJURIES BENEFITS TRUST FUND,**<br>***Defendants.*** | **Case No. ADJ334261**<br>**(Santa Barbara District Office)**<br><br>**OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION** |

Defendant Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Order of April 24, 2019, wherein it was found that "Applicant is entitled to benefits from SIBTF pursuant to [Labor Code section] 4751." The WCJ did not specify the benefits due to the applicant. In this matter, in a Findings and Award of May 15, 2014, amended by a Decision After Reconsideration of July 18, 2014, it was found that, while employed during a cumulative period ending November 30, 2004 by County of Santa Barbara as an eligibility worker, applicant sustained industrial injury to her psyche, causing permanent disability of 60 percent. In finding permanent disability of 60 percent, in an Opinion and Decision After Reconsideration of July 18, 2014, we found that applicant's injury caused overall permanent total disability based on agreed medical evaluator psychiatrist Dennis J. Plesons, M.D., who opined that applicant was unable to compete in the open labor market. (July 18, 2014 Opinion at pp. 4-5.) However, Dr. Plesons apportioned 40 percent of applicant's permanent disability to other factors pursuant to Labor Code section 4663, reducing applicant's compensable permanent disability to 60 percent. (July 18, 2014 Opinion at p. 7.) After the issuance of our Decision After Reconsideration of July 18, 2014, applicant sought SIBTF benefits.

SIBTF contends that the WCJ erred in finding that applicant is entitled to SIBTF benefits. SIBTF argues that the WCJ did not make specific findings that applicant had a labor disabling disability at the

time of the industrial injury, and that the evidentiary record does not support such a finding. Additionally, SIBTF argues that the WCJ erred in not determining the precise amount of benefits owed. We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration, rescind the Findings of Fact and Order of April 24, 2019, and return this matter to the trial level for further development of the record, reanalysis, and decision regarding applicant's entitlement to SIBTF benefits. Crucially, the WCJ must make a finding supported by substantial medical evidence that, at the time of the industrial injury, applicant had a labor disabling permanent disability.

Preliminarily, we note that the issue of applicant's entitlement to SIBTF benefits was initially set for trial on June 15, 2016. The parties were given until July 15, 2016 to submit points and authorities regarding the issue of SIBTF liability, whereupon the matter would be submitted. Points and authorities were timely submitted by applicant and by SIBTF. However, on August 10, 2016, the WCJ issued an Order Vacating Submission and Ordering Further Discovery. "Specifically," wrote the WCJ in his Order, "the parties are to elicit an opinion from the AME, Dr. Plesons, whether Applicant had a pre-existing labor disabling permanent disability, prior to the industrial injury." At an August 17, 2016 hearing, it was noted that "SIBTF will write letter to doctor." Nevertheless, despite the fact that the WCJ found that further development of the record was necessary, the fact that defendant was designated to contact Dr. Plesons, and the fact that applicant carries the burden of proof on the issue (*Brown v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 903, 915 [36 Cal.Comp.Cases 627]), no further evidence was procured or admitted into the evidentiary record.

Ultimately the WCJ rendered a decision on an evidentiary record he had previously found to be inadequate. Additionally, the WCJ did not adequately explain the basis behind his decision as required by Labor Code section 5313. In the further proceedings, the record must be further developed and the WCJ must explain the basis behind any findings in reference to the applicable law regarding entitlement to SIBTF benefits, which we summarize below.

/ / /

Labor Code section 4751, which governs eligibility for SIBTF benefits, states as follows:

> 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.

In this case, the dispute centers on whether applicant was "permanently partially disabled" within the meaning of section 4751 at the time of her November 30, 2004 industrial injury.

As explained in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc), "the chief requirement for [SIBTF] benefits is that the condition must have been 'labor disabling' prior to the occurrence of the subsequent industrial injury. [Citations.]" The requirement for the existence of a prior "labor disabling" permanent disability under section 4751 is the same requirement that existed for apportionment of permanent disability under Labor Code section 4750 prior to the enactment of Senate Bill 899 (SB 899), effective April 19, 2004.

Prior to the enactment of SB 899, Labor Code section 4750 read:

> An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.
>
> The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed.

/ / /

The approach to determining whether a worker was suffering a previous permanent disability for purposes of SIBTF liability under section 4751 is the same as the approach to determining whether a prior disability could be apportioned under former section 4750. (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 239-240 [43 Cal.Comp.Cases 310].) Under the statutory scheme in place prior to SB 899, "the liability of the [SIBTF] was correlated to the liability of the employer [under section 4750]." (*Id.*) Thus, if a disability was apportionable under former section 4750, and the other prerequisites for SIBTF liability were met, the applicant was entitled to SIBTF benefits. Conversely, "[i]f there can be no apportionment to preexisting disability under section 4750, there can be no [SIBTF] liability." (*Franklin*, 79 Cal.App.3d at p. 250.) Therefore, cases discussing whether permanent disability exists for purposes of apportionment under former section 4750 are also on point regarding whether permanent disability exists for the purposes of section 4751.

In addition to former Labor Code section 4750, under the statutory scheme in place prior to SB 899, former section 4663 also allowed apportionment to the natural progression of a pre-existing disease. (*Franklin*, 79 Cal.App.3d at p. 242.) Unlike apportionment under former section 4750, however, apportionment under former section 4663 was not correlated to the liability of the SIBTF. Thus, if disability was apportioned pursuant to former section 4663, and not pursuant to former section 4750, the injured worker could not resort to SIBTF, since apportionment under former section 4663 did not implicate a labor disabling disability existing prior to the subsequent industrial injury. (*Franklin*, 79 Cal.App.3d at pp. 245-246, 248.)

On April 19, 2004, SB 899 went into effect. SB 899 contained far-reaching amendments to the California workers' compensation system. Among these changes, former Labor Code sections 4663 and 4750 were repealed, and a new Labor Code section 4663 was enacted to now provide that "Apportionment of permanent disability shall be based on causation." Thus, in contrast to the two narrow grounds for apportionment under former section 4750 (apportionment to a pre-existing labor disabling disability) and former section 4663 (apportionment to definable disability which would have resulted as a result of the natural progression of a non-industrial condition or disease), under current Labor Code section 4663, apportionment to pathology, asymptomatic prior conditions, and retroactive

prophylactic work preclusions is now permissible. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 616 [Appeals Board en banc].)

However, although SB 899 repealed the old apportionment statutes, Labor Code section 4751 governing SIBTF liability remained unaltered. Thus, even after SB 899, in order to qualify for SIBTF benefits, the employee must show that his or her disability was labor disabling prior to the subsequent industrial injury. (*Escobedo*, 70 Cal.Comp.Cases at p. 619.) "Accordingly, if an applicant's non-industrial pathology causes apportionable permanent disability ... then [SIBTF] benefits will not be payable under section 4751 unless the applicant demonstrates that the pathology was causing permanent disability prior to the subsequent industrial injury." (*Id.*)

As explained in *Franklin, supra,* in order to qualify for benefits from the SIBTF, "The previous condition ... must be actually 'labor disabling.' [Citation.] 'While the permanent partial disability need not have existed prior to work exposure [citation] nor need it be of industrial origin, known to the claimant at the time of the subsequent injury, or the subject of a prior rating [citation], or known to the employer [citation], nevertheless it must antedate the subsequent injury [citation] and it must be permanent in character [citations]. Although the prior disability need not be reflected in the form of loss of earnings, if it is not, it must be of a kind upon which an award for partial permanent disability could be made had it been industry caused. This is necessary to distinguish [it] from a "lighting up" aggravation, or acceleration of a preexisting physical condition where the employer is to be held liable for the whole. [Citations.]' [Citations.] 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 industrial injury. [Citations.] 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. [Citation.]" (*Franklin*, 79 Cal.App.3d at pp. 237-238.) However, as explained below, attempts to impose liability on SIBTF under this congenial work setting doctrine must be strictly scrutinized.

"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. (*Id.* at p. 238.) "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. [Citation.] Applying a prophylactic work restriction retroactively creates 'a sort of factual or legal fiction of an otherwise nonexistent previous disability or physical impairment.'" (*Id.* quoting *Gross v. Workmen's Comp. Appeals Bd.* (1975) 44 Cal.App.3d 397, 404 [40 Cal.Comp.Cases 49].)

As noted above, the fact that applicant was working at the time of the subsequent injury does not preclude a finding that she was permanently disabled at the time of the subsequent injury. The previous disability need only "reasonably be expected to handicap an employee's ability in the general labor market to get and hold a new job, if once he should be displaced from the job he has had." (*Subsequent Injuries Fund v. Industrial Acc. Com.* (*Allen*) 56 Cal.2d 842, 846 [26 Cal.Comp.Cases 220].) However, as noted in *Ditler v. Workers' Comp. Appeals Bd.* (1982) 131 Cal.App.3d 803, 814-815 [47 Cal.Comp.Cases 492], "there is a great danger that the discredited prophylactic restriction doctrine may be resurrected in the guise of the 'congenial work setting' doctrine, which permits an employer to demonstrate by medical evidence that the preexisting condition, 'though it did not interfere with that work, was nevertheless disabling within the meaning of the statute.' [Citation.] Under this doctrine, apportionment would be theoretically possible ... based on a retrospective medical opinion that a condition is 'labor disabling' even though asymptomatic and nondisabling in the employee's particular work. [Citation.] Because many of the same dangers that brought about the demise of the prophylactic work restriction doctrine exist under the congenial work setting doctrine, '[this] form of apportionment should be scrutinized very carefully by the workers' compensation judges, the Appeals Board, and the courts to ensure that evidence supporting this type of apportionment is substantial.' [Citation.]"

Additionally, in determining whether applicant is entitled to SIBTF benefits, and in determining the amount of any benefits, the prior disability is measured as it existed at the time immediately prior to the subsequent industrial injury. (*Mercier v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 711, 714, 716, fn. 2 [41 Cal.Comp.Cases 205]; *Bookout v. Workmen's Comp. Appeals Bd.* (1976) 62 Cal.App.3d

214, 222 [41 Cal.Comp.Cases 595]; *Hays v. Patten-Blinn Lumber Co.* (1959) 24 Cal.Comp.Cases 46, 48 [Industrial Accident Commission panel]; *Haendiges v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 233 [writ den.]; *Toma v. Workers' Comp. Appeals Bd.* (2014) 79 Cal.Comp.Cases 617 [writ den.].)

Although the matter is unclear, since the WCJ did not fully explain the basis behind his decision, it appears that the WCJ found that applicant was entitled to SIBTF benefits because we found overall permanent total disability with 40 percent apportionment to other factors in our July 18, 2014 Opinion and Decision. However, as explained *supra*, a finding of apportionment under current (or former) Labor Code section 4663 is not correlated to SIBTF liability. So while apportionment could previously be made only to labor disabling disability (former Labor Code section 4750) or to the natural progression of a pre-existing condition (former Labor Code section 4663), under current Labor Code section 4663 apportionment can be made to any factor causing permanent disability, including labor disabling conditions and the natural progression of a pre-existing condition, but also pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 616-619 [Appeals Board en banc].) Thus our finding that applicant had 40 percent disability apportionable to other factors pursuant to current Labor Code section 4663 is in no way tantamount to a finding that applicant had 40 percent (or any) labor disabling permanent disability at the time of her industrial injury.

Accordingly, we will rescind the WCJ's decision and return this matter to the trial level so that the record can be developed on whether applicant had any labor disabling permanent disability at the time of her industrial injury and the amount of the labor disabling permanent disability measured as it existed immediately prior to the industrial injury. To the extent that there is no evidence that the condition was actually labor disabling at the time of the industrial injury, and there is a medical opinion based on the congenial work setting doctrine, the evidence underlying the opinion must be very carefully scrutinized to ensure that it constitutes substantial medical evidence. The WCJ must then analyze the evidence and the law in an opinion complying with Labor Code section 5313 and determine whether applicant is entitled to section 4751 benefits and, if so, the precise amount of benefits due to the

applicant. The foregoing is not intended to be a limitation regarding how the record may be developed or which issues need to be analyzed. Additionally, our summary of the law is not intended to be exhaustive. We express no opinion on the ultimate resolution of this matter.

For the foregoing reasons,

**IT IS ORDERED** that Defendant SIBTF's Petition for Reconsideration of the Findings of Fact and Order of April 24, 2019 is **GRANTED**.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order of April 24, 2019 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

**WORKERS' COMPENSATION APPEALS BOARD**

DEPUTY

ANNE SCHMITZ

**I CONCUR,**

CHAIR

KATHERINE ZALEWSKI

CONCURRING, BUT NOT SIGNING

**MARGUERITE SWEENEY**

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

JUL 19 2019

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

**GHITTERMAN, GHITTERMAN & FELD**
**OFFICE OF THE DIRECTOR, LEGAL UNIT**
**TOBIN LUCKS**
**VICTORIA ENRIQUEZ**

**DW:oo**