WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

EDWARD QUINTANILLA, ***Applicant***

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, ***Defendants***

Adjudication Number: ADJ12328806
San Luis Obispo District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Edward Quintanilla seeks reconsideration of the September 12, 2024 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant is not entitled to Subsequent Injuries Benefits Trust Fund (SIBTF) benefits because applicant's subsequent injury resulted in 23% permanent disability after future earning capacity (FEC) adjustment and after apportionment, which is below the 35% threshold required under Labor Code, section 4751.[1]

Applicant contends that the trial court erred in applying apportionment in determining the 35% threshold requirement, contrary to the holding in *Bookout v. Workers' Comp. Appeals Bd*. (1976) 62 Cal. App. 3d 214, 228 [132 Cal. Rptr. 864, 41 Cal. Comp. Cases 595] and *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board En Banc).

We received an answer from SIBTF. 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 grant reconsideration, rescind the September 12, 2024 Findings and Order, and return this matter to the trial level for further proceedings.

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[1] All statutory references are to the Labor Code unless otherwise indicated.

FACTS

On May 3, 2016, applicant slipped and fell on a bottle covered by a piece of paper resulting in injury to his low back, left knee, and left hip. (Applicant Exhibit 5, Report of Alan Moelleken, M.D., dated June 13, 2018, p. 4.) Dr. Moelleken, his primary treating physician, issued the following impairment ratings for his injuries: 26% whole person impairment (WPI) for the lumbar spine, 2% WPI for his left knee, and 2% WPI for his left hip, for a combined impairment of 28% WPI. (*Ibid.*) Dr. Moelleken apportioned 50% of the lumbar spine injury to the May 3, 2016 injury and 50% to applicant's prior spinal fusion. (*Ibid.*) Applicant's left hip and left knee injuries were completely attributed to the May 3, 2016 injury.

Scott A. Graham, M.D, Panel Qualified Medical Evaluator (PQME) in Orthopedics, concurred with Dr. Moelleken that applicant suffered a 28% WPI to his lumbar spine and 2% WPI to his left knee. (Defendant Exhibit K, Dr. Graham's Report dated October 9, 2019, p. 13.) He did not opine on applicant's left hip impairment in this report as he opined applicant had not reached maximum medical improvement on the left hip. (*Ibid*.) Dr. Graham also agreed with Dr. Moelleken in apportioning 50% of applicant's lumbar spine impairment to a prior industrial injury. (*Id*. at p. 14.)

Applicant claims his May 3, 2016 injury as his subsequent injury in his SIBTF claim. (Application for SIBTF.)

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
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> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on September 24, 2024 and 60 days from the date of transmission is Saturday, November 23, 2024. The next business day that is 60 days from the date of transmission is Monday, November 25, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, November 25, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 23, 2024, and the case was transmitted to the Appeals Board on September 24, 2024. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on September 24, 2024.

No other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with accurate

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

notice of transmission as required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on September 24, 2024.

II.

The WCJ here relied heavily on WCJ Cole's reasoning in *Millner v. Subsequent Injuries Benefits Trust Fund* (ADJ17739286) in finding that the 35% SIBTF threshold requirement must be calculated after apportionment. (Report, Opinion on Decision.) A different panel, with two of the same Commissioners as assigned here, issued a decision in *Millner* on October 7, 2024, which we note is after the WCJ's Report here. In that decision, we concluded that apportionment is not taken into consideration when determining whether an injured worker meets the 35% threshold requirement. Given that the legal issue and arguments here are the same as in *Millner,* we cite to the *Millner* opinion here:

> . . . the issue of whether apportionment should be included in calculating whether an employee meets the SIBTF 35% threshold has been determined in multiple recent cases: *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board En Banc); *Anguiano v. Subsequent Injuries Benefits Trust Fund* (November 7, 2023, ADJ11107890) [2023 Cal. Wrk. Comp. P.D. LEXIS 310]; *Heigh v. Subsequent Injuries Benefits Trust Fund* (October 9, 2023, ADJ12253162) [2023 Cal. Wrk. Comp. P.D. LEXIS 269]; *Riedo v. Subsequent Injuries Benefits Trust Fund* (October 21, 2022, ADJ7772639) [2022 Cal. Wrk. Comp. P.D. LEXIS 303]; *Anguiano v. Subsequent Injuries Benefits Trust Fund* (August 15, 2023, ADJ11107890) [2023 Cal. Wrk. Comp. P.D. LEXIS 214].
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> In *Anguiano*, 2023 Cal. Wrk. Comp. P.D. LEXIS 310, a previous panel decision involving some of the same panel members, we explained that under the doctrine of state decisis, we are bound by the holding in *Bookout v. Workers' Comp. Appeals Bd*. (1976) 62 Cal. App. 3d 214, 228 [132 Cal. Rptr. 864, 41 Cal. Comp. Cases 595], where the Court of Appeal held that the permanent disability attributable to applicant's subsequent injury for the purpose of meeting the 35% threshold requirement under section 4751, excludes apportionment. We explained as such in our en banc[3] decision in *Todd*, where we stated:

[3] "En banc decisions of the Appeals Board are assigned by the chairperson on a majority vote of the commissioners and are binding on panels of the Appeals Board and workers' compensation judges as legal precedent under the principle of *stare decisis.*" (Cal. Code Regs., tit. 8, § 10325; *City of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

In *Bookout*, applicant was employed as an oil refinery operator and sustained a compensable injury to his back, which was rated at 65% permanent disability. (*Bookout, supra*, 62 Cal. App. 3d at pp. 219–220.) The back disability included a limitation to semi-sedentary work. (*Id.* at p. 219.) Prior to his industrial injury, applicant had a nonindustrial heart condition. (*Ibid.*) The heart condition contained two work preclusions: preclusion of heavy work activity and preclusion from excessive emotional stress. (*Id.* at pp. 220–221.) The preclusion of heavy work activity was rated at 34.5% permanent disability. (*Id.* at p. 220.) The preclusion from excessive emotional stress was rated at 12% permanent disability. (*Id.* at pp. 220–221.)

At the trial level, the referee concluded that the heart condition precluding heavy work activity completely overlapped with the back disability limitation to semi-sedentary work. (*Bookout, supra*, 62 Cal. App. 3d at p. 224.) The referee, thus, subtracted the preclusion of heavy work activity of 34.5% permanent disability from the 65% unapportioned permanent back disability and awarded applicant permanent disability of 30.5% for the industrial back injury. (*Id.* at pp. 219–221.) The referee then found that applicant was not eligible for SIBTF benefits based on the finding of 30.5% after apportionment, which was less than the requisite minimum of 35% for a subsequent disability under section 4751. (*Id.* at p. 221.) The Appeals Board affirmed both the 30.5% permanent disability award for the industrial back injury and the finding that applicant was not eligible for SIBTF benefits. (*Id.* at pp. 218–219.)

The Court of Appeal concluded that the Appeals Board had properly determined applicant's permanent disability rating of 30.5% as a result of his compensable back injury, and that the disability resulting from the subsequent injury was compensable to the extent that it caused a decrease in applicant's earning capacity, citing former section 4750 and *State Compensation Ins. Fund v. Industrial Acci. Com. (Hutchinson)* (1963) 59 Cal. 2d 45, 48–49 [27 Cal. Rptr. 702, 377 P.2d 902] (an employer is only liable for the portion of disability caused by the subsequent industrial injury) and *Mercier v. Workers' Comp. Appeals Bd*. (1976) 16 Cal. 3d 711, 715–716 [129 Cal. Rptr. 161, 548 P.2d 361, 41 Cal. Comp. Cases 205] (the fact that injuries are to two different parts of the body does not in itself preclude apportionment). (*Bookout, supra*, 62 Cal. App. 3d at pp. 222–227.)

The court, however, found that applicant was erroneously denied SIBTF benefits under section 4751. (*Bookout, supra*, 62 Cal. App. 3d at p. 228.) It explained that the referee incorrectly instructed the rating specialist to apportion 34.5% for the preexisting nonindustrial heart disability (based on a standard rating of 30%) from the total subsequent injury disability of 65% (based on a standard rating of 60%), rather than utilizing the total

> disability for the subsequent injury "standing alone and without regard to or adjustment for the occupation or age of the employee" as required by section 4751. (*Ibid.*; § 4751, subd. (b).) It interpreted the language of this requirement as excluding apportionment. Thus, the court held that the permanent disability attributable to applicant's subsequent injury for the purpose of meeting the 35% threshold requirement under the statute was the standard rating of 60%. (*Bookout, supra*, 62 Cal. App. 3d at p. 228; § 4751, subd. (b).)
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> (*Todd, supra*, 85 Cal. Comp. Cases at pp. 582–583, 2020.)
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> We also explained that:
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> SIBTF's citations to *Reina v. Workers Compensation Appeals Bd.* (1997) 63 Cal. Comp. Cases 101 [1997 Cal. Wrk. Comp. LEXIS 6050], *McMahan v. Workers Compensation Appeals Bd. Of California & Subsequent Injuries Fund* (1984) 49 Cal. Comp. Cases 95 [1984 Cal. Wrk. Comp. LEXIS 3217], and *Earley v. Workers Compensation Appeals Bd. Of California & California Subsequent Injuries Fund* (1975) 40 Cal. Comp. Cases 741 [1975 Cal. Wrk. Comp. LEXIS 2304], are not binding authority. *Reina, McMahan*, and *Earley* are all panel decisions that have been writ denied. Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee, supra*, 96 Cal. App. 4th at p. 1425, fn. 6.) Further, a California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*Farmers Ins. Group of Companies v. Workers' Comp. Appeals Bd.* (2002) 104 Cal. App. 4th 684, 689, fn. 4, 128 Cal. Rptr. 2d 353 [writ denied opinions have no *stare decisis* effect]; *MacDonald v. Western Asbestos Co*. (1982) 47 Cal. Comp. Cases 365, 366 (Appeals Board en banc).)
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> (*Anguiano*, 2023 Cal. Wrk. Comp. P.D. LEXIS 310.)

We also stated in another panel decision that:

> In *Reina*, the court found that an applicant with a subsequent industrial injury disability that rated on a stipulated, unadjusted basis at less than the statutory criteria does not qualify for SIBTF benefits. We therefore do not view *Reina* as in conflict with *Bookout*.
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> In *McMahan*, the applicant received an award that he had sustained permanent disability of 37 percent as a result of a specific injury and that his cumulative injury resulted in permanent disability of 311/2 percent after apportionment of 50 percent—and neither party sought reconsideration. Nevertheless, the applicant sought SIBTF benefits based upon the same cumulative injury; and, although the WCJ deemed the

> cumulative injury a subsequent injury, he concluded that it did not meet the 35 percent threshold for SIBTF benefits. Because we view the applicant's subsequent injury claim to be barred on separate grounds, we do not conclude that *McMahan* stands for the proposition that evaluation of whether a subsequent injury meets the 35 percent threshold from the subsequent industrial injury alone must include apportionment.
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> Lastly, because *Earley* was decided prior to *Bookout*, we do not view it as persuasive authority to the extent that it conflicts with *Bookout*.
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> (*Heigh*, 2023 Cal. Wrk. Comp. P.D. LEXIS 269.)

As to SIBTF's contention that in *Whisnant v. Subsequent Ins. Bens. Trust Fund* (January 3, 2022, ADJ8121665) 2022 Cal. Wrk. Comp. P.D. LEXIS 57, the panel there contemplated applying apportionment in determining the 35% threshold, we note that such was not the holding in *Whisnant* and whether apportionment was applied to the subsequent injury or not, it appeared that applicant would not have met the 35% threshold, which is what we stated in that case.

> When removing the adjustments for occupation and age, the final permanent disability is 31%, before apportionment (20 C 7 C 6 C 2 = 31). Dr. Feinberg opined that 50% of applicant's permanent disability is due to the specific injury and 50% is due to the cumulative trauma injury. (Applicant Exhibit 2, Dr. Feinberg's report dated August 22, 2013, p. 17.) Thus, applicant's permanent disability for his cumulative trauma injury is 15.5% after apportionment (16% rounding up). Assuming this permanent disability is attributed to the December 6, 2010 cumulative trauma injury, as applicant would like us to do, it is unclear how this 15.5% permanent disability would meet the 35% permanent disability threshold even when taking into account Dr. Klein's 3% permanent disability and Dr. Lopez's 2% permanent disability, which applicant does not seem to dispute (16 C 3 C 2 = 21).
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> (*Whisnant*, 2022 Cal. Wrk. Comp. P.D. LEXIS 57.)

Accordingly, for these reasons, we grant reconsideration, rescind the September 12, 2024 Findings and Order, and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that applicant Edward Quintanilla's Petition for Reconsideration of the September 12, 2024 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 12, 2024 Findings and Order is **RESCINDEND** and the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 25, 2024

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

EDWARD QUINTANILLA
GHITTERMAN, GHITTERMAN & FELD
DIR – 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