

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

**KENNETH MACHEN, *Applicant***

**vs.**

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

**Adjudication Number: ADJ11169039  
Sacramento District Office**

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

Applicant seeks reconsideration of the Findings of Fact issued on August 16, 2024, wherein the workers' compensation administrative law judge (WCJ) found that applicant does not meet the Labor Code section 4751 criteria for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits.

Applicant contends that the evidence establishes his entitlement to SIBTF benefits.

We received an Answer from defendant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the Findings of Fact and substitute findings that applicant has previous permanent disability of the lumbar spine, left ankle, and right hand; the issue of whether applicant has previous permanent disability in the form of cognitive and psychiatric impairment is deferred; and the issue of whether applicant is entitled to SIBTF benefits pursuant to Labor Code section 4751 and *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc) is deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

## FACTUAL BACKGROUND

On July 8, 2024, the matter proceeded to trial on the issues of permanent disability, attorney's fees, and SIBTF eligibility. (Minutes of Hearing and Summary of Evidence, July 8, 2024, p. 2:19-24.)

The WCJ admitted exhibits entitled QME report of Dr. Boni dated October 10, 2023, QME report of Dr. Kirz dated October 25, 2023, and QME report of Dr. Ambrose dated December 15, 2023, into evidence. (*Id.*, p. 3:6:13.)

The QME report of Dr. Boni states:

### **PRIOR INJURIES:**

In 1995, he sustained a severe laceration to the right arm due to being pushed through a window, and underwent surgical repair of lacerations, around "100 stitches " He is left with significant numbness of his right hand, which impairs several ADL's.

In 2000, he had a motorcycle accident in which he had a severe comminuted left ankle fracture. This was treated surgically, including arthrodesis, and resulted in chronic pain and stiffness of the left ankle, and altered gait.

In 2012, Mr. Machen developed severe back pain and says that he was "in bed for nine days." He had frequent recurrences up to the date of the subsequent industrial injury, and currently is being treated for his lumbar spine problem at "Pain and Spine Specialists" in Idaho.

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### **PHYSICAL EXAMINATION:**

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Musculoskeletal: Cervical spine range of motion is slightly restricted, especially with extension, and right and left lateral bend and rotation. Lumbar spine inspection shows a reduced lordotic curve, no scars are evident, no deformities. Range of motion was not tested due to the patient's report of an unstable spine at risk of spinal cord compression.

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Lower Extremities: The left ankle and lower leg reveal multiple healed surgical scars. At rest, the left ankle externally rotates to about 20 degrees, compared to the right ankle. Range of motion of the left ankle is moderately restricted in all planes.

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### **REVIEW OF MEDICAL RECORDS:**

11/21/10 NP Harvey / Dr. Gramm. Progress note on chronic back pain, right-sided sciatica. Treated with Norco, and recommending MRI scan and referral to "ortho spine."

11/17/15 NP Harvey. Progress report regarding lower back pain, here to establish care [sic]. Diagnosing neck pain, midline low back pain with sciatica. Recommending x-rays.

2/2/17 Dr. Chespak. MRI scan of lumbar spine. Findings include 4-5 mm of anterolisthesis of L4 on L5, disc desiccation and degeneration at this level with broad 3-4 mm disc retraction, possible annular tear, facet and posterior ligamentous hypertrophy, moderate bilateral neuroforaminal stenosis at L5-S1 and 2-3 mm disc bulge at L5-S1 with borderline compromise of both foraminal exit zones.

...

2/17/17 Dr. Reddy. New patient consultation at Spine & Nerve Diagnostic Center. Chief complaint of neck pain. Diagnosing cervical discogenic pain, headache, low back pain, lumbar discogenic pain, anterolisthesis, **lumbar radiculitis** and chronic pain. Recommending nerve conduction tests, "but he declines."

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6/21/17 Dr. Gramm. Worsening back pain. **Radiculopathy** is getting worse. Appears to be distressed. Altered gait.

8/14/17; 10/16/17; 12/18/17 Dr. Gramm. Similar information, referred to "pain management" and to "neurosurgery."

11/17 through 11/25/15 Reports on x-rays and MRI scans of the cervical, thoracic and lumbar regions of the spine. Lumbar spine x-rays reveal bilateral L4 spondylolysis with Grade 1 anterolisthesis at L4-5 and mild spondylosis.

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1/30/17 **NP Loan. Noting "patient struggled with low back pain for many years. More severe now and has constant radiculopathy to bilateral lower extremities. Patient was noted to be distressed with altered gait." Noting "radiculopathy," recommending Norco and MRI scan of lumbar spine.**

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11/19/02 Dr. Hamilton. Emergency department notes regarding motorcycle accident causing left ankle injury. It was an open, unstable left ankle area fracture, and x-ray revealed comminuted left distal fibula and tibia fracture. Further notes by Dr. Ferraro on the same date include an operative report indicating open reduction and internal fixation of medial and lateral malleolus of left ankle. Dr. Campion reviewed the preoperative x-ray, which showed multiple fractures including trimalleolar fracture distal tibia and comminuted and oblique fractures of the fibula.

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12/11/02 Dr. Ferraro. Progress notes. "Plan for surgery."

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**Condition #3:** Right upper extremity.

Mr. Machen reports, and the records substantiate, that he suffered severe lacerations of the right forearm at age 15, when he was pushed through a window when horse playing with his brother. He tells me that he is left with "no feeling in the right hand." Medical records do not record findings regarding numbness of the right hand, but Mr. Machen tells me that he has difficulty with specialized right hand

activities including typing, assembly work, operating small tools, driving, and the like.

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### **DIAGNOSES**

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Due to pre-existing conditions:

1. Chronic back pain with radiculopathy
2. Healed left tibia and fibula fractures, with ankle arthrodesis
3. Right hand numbness

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If we add the various impairments, then 12% for the lumbar spine, plus 7% for the right hand, plus 4% for the left leg and ankle, results in 23% total whole person impairment.

If we were to combine the impairments, then 12+7 combines to 18%, and 18+4 combines to 21%, according to the Combined Values Chart, page 604.

Either method, when added or combined with the psychological impairment, and when combined or added to the SII impairment [if greater than 50 %], meets the threshold to qualify for SIBTF benefits.

(Ex. 8, QME report of Dr. Boni dated October 10, 2023, pp. 4, 8, 11-13, 17-18, 20-21.)

The QME report of Dr. Kirz states:

There is a basis for mild pre-existing cognitive and psychiatric impairments in this case, with associated labor disablement.

I will begin with the cognitive issues.

The applicant struggled throughout his youth with school. He was diagnosed with ADHD and prescribed stimulants in the form of Ritalin. He was in special education throughout grammar school, middle school, and high school. Despite these accommodations, he continued to struggle academically and ultimately dropped out of school in the 11th grade. He thus has neither a diploma nor GED. He has worked only in physical labor jobs as an adult.

On exam today, Mr. Machen performed as would be expected for an individual with ADHD, at least in terms of his performance on mental status exam tasks. While most of his cognitive domains were intact, he struggled on tasks most associated with impaired attention and focus. Specifically, his performance was moderately impaired on serial 7's and digits backward, with a mild impairment on delayed recall. This profile is exactly what one would expect from an individual suffering from ADHI, but with no other learning disabilities.

In reviewing the applicant's history, I cannot identify any cognitive injuries or insults from the 2017 injury or any post-injury factors. Mr. Machen's cognitive

limitations undoubtedly pre-dated injury and continued up through his 10-26-17 injury.

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Mr. Machen reported that he only "shaped up" when he became a father eight years ago, which was only a year or two prior to his subsequent injury. At that point, he discontinued gang involvement, criminal behaviors, and became less physically aggressive on the whole.

At the same time, Mr. Machen remained a tightly wound individual, which was readily apparent on exam today. One can easily imagine him overreacting to situations, given his chronic struggles with poor anger and impulse control. Simply put, he had stabilized somewhat in the pre-injury timeframe, but his anger and impulse control challenges continued through to injury at a lesser level.

Accordingly, I would characterize Mr. Machen's pre-existing psychiatric impairment as relatively mild in the grand scheme, at least in the immediate pre-injury timeframe.

(Ex. 9, QME report of Dr. Kirz, October 25, 2023, pp. 11-12.)

The QME report of Dr. Ambrose states:

DOE: August 25, 2023

...

#### **PRIOR TO OCTOBER 26, 2017 SUBSEQUENT INDUSTRIAL INJURY**

Mr. Machen relates the following complaints which he describes as pre-existing the above-noted subsequent industrial injury.

#### **Headache**

He reports pre-existing headaches that come and go which become extremely severe. He states that he was diagnosed with migraine headache and has been prescribed rizatriptan as an abortifacient.

#### **Neck and upper back pain and stiffness**

Mr. Machen reports pre-existing pain and stiffness of the neck and upper back which he characterizes as a constant dull ache, rating his pain on the above-noted scale is 3 on a constant basis. . . .

#### **Mid back pain and stiffness**

He reports pre-existing pain of the mid back which he characterized as a constant dull ache, rating his pain on the above-noted scale at 3-4 on a constant basis. . . .

#### **Low back pain and stiffness with bilateral leg pain, numbness and tingling**

He reports pre-existing pain and stiffness of the lower back with pain, numbness and tingling traversing to the lower extremities bilaterally . . .

**Right hand paresthesia**

Mr. Machen reports a complete loss of sensation, temperature as well as pressure of the entire right hand including all fingers.

**Bilateral knee pain stiffness**

He reports pre-existing pain and stiffness of the knees bilaterally which are relatively symmetrical. He characterizes his pain as a constant dull ache, rating his pain on the above noted scale at 2-3 on a constant basis. . . .

**Left ankle pain and stiffness**

He reports pain and stiffness of the left ankle which was relatively absent at rest however does increase upon various provocative activities. He rates his pain on the above-noted scale as increasing to 9-10 upon repetitive or quickly ascending or descending stairs or ladders as well as repetitive or prolonged running, jogging, jumping or other commensurate activities.

(Ex. 11, QME report of Dr. Ambrose, December 15, 2023, pp. 6-7.)

The QME Report of Dr. Ambrose does not reveal that he reviewed any medical records generated before October 26, 2017 showing evidence preexisting permanent disability of the cervical spine, thoracic spine, soft tissue lesion of the lumbar spine, or the right knee. (*Id.*, pp.1-37.)

In the Report, the WCJ states:

Applicant sustained injury arising out of and in the course of employment to the left elbow, hand, and fingers while working as a Tower Technician II on October 26, 2017.

...

PERMANENT DISABILITY

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A Findings and Award issued November 30, 2023 for 48% permanent disability for the injury arising on October 26 2017 involving the left wrist left elbow and left hand. The impairment rating was as follows: left upper extremity 13.09.00.99 - 26 [1.4] 36 - 48J - 48 - 48%.

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The current trial relates to the Application for Subsequent Injuries Fund Benefits ('STBTF') wherein Applicant contends immediately prior to the injury he had permanent disability involving nonindustrial conditions to the neck, back, psyche and internal.

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Drs. Boni, Kirz, and Ambrose rely on an incorrect history based on Applicant's normal exam in 2019, laborious employment history, rigorous recreational activities and denial of prior medical problems. As such the reports of Drs. Boni, Kirz, and Ambrose do not constitute substantial evidence.

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Applicant had a prior repair of a lacerated right forearm at age 13 a repair of the left inguinal hernia at age 18, a repair of a fractured left ankle at age 22.

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On November 19, 2002, Applicant went to the emergency department for left ankle pain after being involved in a motorcycle accident. He suffered an open fracture of the left ankle and a laceration. The x-ray showed a comminuted left distal fracture and an open distal tibia fracture and underwent surgery of a debridement of open fracture and internal fixation of unstable ankle fracture.

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On November 21, 2020, Applicant was seen for chronic back pain and right-sided sciatic that he treated with Norco. Previously, on November 17, 2015, Applicant was seen to establish care and complained of low back pain. He was diagnosed with neck pain and midline low back pain with sciatica. On February 2, 2017, Applicant had an MRI scan of the lumbar spine showing anterolisthesis, disc desiccation with disc retorsion, possible annular tear, hypertrophy, stenosis with disc budge.

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On October 10, 2023, Applicant saw occupational physician, Brian Boni, M.D. for a SIBTF evaluation. Based on a record review and telehealth evaluation, Dr. Boni found problems that preexisted the industrial injury including chronic back pain with lumbar radiculopathy, left lower extremity pain, and right-hand numbness. Dr. Boni noted prior injuries including a severe laceration to the right arm in 1995 after being pushed through a window for which he received around 100 stitches and was left with left hand numbness which impaired several unspecified activities of daily living. Dr. Boni indicated that Applicant was involved in a motorcycle accident in 2000 where he suffered a left ankle fracture, received surgery, and resulted in chronic pain and stiffness of the left ankle with altered gait. Dr. Boni noted severe back pain in 2012 where Applicant stayed in bed for nine days and had frequent reoccurrences up until the subsequent industrial injury. . . .Dr. Boni noted lumbar radiculopathy revealed on electrodiagnostic tests and Applicant's history of troublesome low back pain with radiation down his legs since 2012. Dr. Boni found 12% WPI for the lumbar spine based on DRE category III. Dr. Boni noted an impact on many [unspecified] ADLs due to this condition prior to the subsequent industrial injury. Dr. Boni found 4% WPI based on muscle atrophy in the left leg due to the motorcycle accident. Dr. Boni noted that Applicant had no feeling in his right hand after the laceration along

with difficulty typing, doing assembly work, operating small tools, and driving. Dr. Boni found 7% WPI for the right upper extremity based on described sensory impairment. Dr. Boni diagnosed Applicant with chronic left hand and wrist pain, and left wrist tendinitis due to the subsequent industrial injury and chronic back pain with radiculopathy, healed left tibia and fibula fractures with ankle fusion, right hand numbness, and migraine headaches due to preexisting conditions. Dr. Boni gave work restrictions for the preexisting conditions. For the lumbar spine, Dr. Boni precluded heavy lifting, repetitive bending/twisting, prolonged walking, standing, climbing, and regular breaks throughout the workday as well as alternating between sitting, standing and walking with the occasional need to lay down during the workday. For right leg weakness, he found limitations on climbing,

running, and crawling as well as standing and walking for prolonged periods. (Applicant Exhibit 8) These are retroactive prophylactic work restrictions.

On October 25, 2023, Applicant saw psychologist Joshua Kirz, PhD for a SIBTF evaluation. . . . Dr. Kirz found 15% WPI for preexisting cognitive impairment and mild preexisting psychiatric impairment for the immediate preinjury timeframe and assigned a GAF of 66, equivalent to 6% WPI. Regarding the cognitive condition, Dr. Kirz found labor disabling disability of being limited from jobs requiring a high level of attention, concentration, and sustained mental focus. From the psychiatric perspective, Dr. Kirz indicates Applicant would have been unable to perform jobs likely to trigger impulse control difficulties. (Applicant Exhibit 9) The medical records do not establish that Applicant had psychological difficulty as an adult immediately before the industrial injury. On the contrary, on October 23, 2023, Applicant testified that before the injury he was happier and more outgoing. Furthermore, Applicant reported to Dr. Kirz that he "shaped up" when his 8-year-old daughter was born, discontinuing all the violence and gang activity. (Applicant Exhibit 9) This would precede the industrial injury of October 2017.

On August 25, 2023, Applicant saw chiropractor Joseph Ambrose, D.C. for a SIBTF evaluation. Dr. Ambrose found preexisting injuries and conditions including migraine headaches, neck pain, back pain, bilateral leg pain with numbness and tingling, numbness and tingling of the right hand, bilateral knee pain, left ankle/foot pain, depression/anxiety disorder, gastritis/GERD, irritable bowel syndrome, hemorrhoids/ hernia, hearing loss with tinnitus, chronic bronchitis, and TMG. . . . Dr. Ambrose diagnosed Applicant with preexisting conditions of migraine with aura, cervical, thoracic and lumbar sprain, lumbar disc protrusion with bilateral radiculopathy, internal derangement of the bilateral knees, lesions of the median and ulnar, and enthesopathy of the ankle/foot. Dr. Ambrose found 8% WPI for the cervical spine based on range of motion and 8% WPI for the thoracic spine based on range of motion. For the lumbar spine, Dr. Ambrose found 6% WPI for a soft tissue lesion, 16% WPI for range of motion, and 25% WPI for sensory loss. Dr. Ambrose found 10% WPI for the right upper extremity considering sensory nerve impairment, 10% WPI for the right knee based on range of motion with crepitus, and 10% WPI for the left knee based on range of motion with pain and crepitus. Dr. Ambrose found 9% WPI for the left ankle considering range of motion. Then Dr. Ambrose opined Applicant had preexisting work restrictions of no repetitive or prolonged bending or repetitive heavy lifting for the thoracic spine, no repetitive or prolonged bending or repetitive lifting/carrying more than 40 pounds for the lumbar spine and left knee, no fine manual manipulation of the right hand, no repetitive stairs, no ascending or descending stairs quickly, and no repetitive or prolonged running, jogging, jumping or other commensurate activities for left ankle. (Applicant Exhibit 11) Again, these are retroactive prophylactic work restrictions. Moreover, it is unclear why Applicant was evaluated by chiropractor, Dr. Ambrose after already having an evaluation with



occupational physician, Dr. Boni. The evaluation with Dr. Ambrose appears to be a second attempt to obtain a favorable report.

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As described above, Applicant failed to establish that he had permanent disability that was actually labor disabling and permanent in character. Therefore, he does not meet the first requirement that the combined disability of the preexisting disability and the disability from the subsequent compensable injury be 70% or more. In addition, because there is no preexisting disability the combined disability of the two injuries are not greater than that of the disability from the subsequent injury alone. Applicant failed to demonstrate previous impairment to the right upper extremity as opposite and corresponding to the impairment of the left upper extremity in the subsequent industrial injury. Applicant did meet the final requirement of having 35% or more permanent disability resulting from the subsequent industrial injury as 26 multiplied by the FEC adjustment factor of 1.4 is 36. However, this is moot as Applicant does not meet the first two elements required pursuant to Labor Code section 4751 to be eligible for SIBTF benefits.

(Report, pp. 1-5.)

## DISCUSSION

### I.

Former Labor Code 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. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code 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.
- (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 Labor Code 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 6, 2024 and 60 days from the date of transmission is November 5, 2024. This decision is issued by or on November 5, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 6, 2024, and the case

was transmitted to the Appeals Board on September 6, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 6, 2024.

## II.

Applicant contends that the evidence establishes his entitlement to SIBTF benefits. Specifically, applicant argues that he had preexisting permanent partial disability of the lumbar spine of 26%, left ankle of 11%, in the form of cognitive impairment of 31% and psychiatric impairment of 12%, for a total of 80%. (Petition, p. 2:9-18.)

Labor Code section 4751 provides:

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. (Lab. Code § 4751.)

In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), we stated that an employee must prove the following elements to recover subsequent injuries fund benefits:

- (1) a preexisting permanent partial disability;

(2) a subsequent compensable injury resulting in additional permanent partial disability:

(a) if the previous permanent partial disability affected a hand, an arm, a foot, a leg, or an eye, the subsequent permanent disability must affect the opposite and corresponding member, and this subsequent permanent disability must equal to 5% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee; or

(b) the subsequent permanent disability must equal to 35% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or the age of the employee;

(3) the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and

(4) the combined preexisting and subsequent permanent partial disability is equal to 70% or more. ([Lab. Code] § 4751.)  
(*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 (Appeals Board en banc).)

In *Ferguson v. Industrial Acc. Com.* (1958) 50 Cal.2d 469 [23 Cal.Comp.Cases 108], the Supreme Court held that the "previous disability or impairment" contemplated by Labor Code 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*, at p. 477.) 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 [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, supra*, (quoting Larson's Workmen's Compensation Law (1952) § 59.33, vol. 2, p. 63).)

Preliminarily, we note that applicant's subsequent injury to the left wrist, left elbow, and left hand resulted in permanent disability of 36% and, therefore, his subsequent permanent disability meets the 35% as required by Labor Code section 4751(b). (Report, pp. 6-7.) The question before us, then, is whether the medical record establishes that the combined preexisting

and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone and equals 70% or more. (*Todd, supra.*)

In this case, the WCJ concluded that the medical record was insufficient to establish any of these criteria because the reports of QME Drs. Boni, Kirz and Ambrose relied upon incorrect medical history and did not constitute substantial medical evidence. (Report, p. 3.)

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [262 Cal. Rptr. 537, 54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) To constitute substantial evidence "... a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [93 Cal. Rptr. 15, 480 P.2d 967, 36 Cal.Comp.Cases 93, 97].)

Pursuant to these authorities, we turn first to QME Dr. Boni's reporting that applicant had preexisting permanent partial disability of (1) chronic back pain with radiculopathy resulting in impairment of 12% WPI; (2) healed left tibia and fibula fractures, with ankle arthrodesis resulting in impairment of 4% WPI; and (3) right hand numbness resulting in 7% WPI. (Report, p. 4.) Notably, Dr. Boni's reporting as to applicant's back pain with radiculopathy and left tibia and fibula fractures is based upon review of extensive medical records dating from 2002 until early 2017. (Ex. 8, QME report of Dr. Boni dated October 10, 2023, pp. 11-13.) These records reflect that applicant underwent surgical intervention for left tibia and fibula fractures and x-rays, an MRI scan, and referral for surgical consultation for lumbar pain and radiculopathy and thus provide

adequate medical history for Dr. Boni's reporting. (*Id.*) We therefore disagree with the WCJ's conclusion that Dr. Boni's reporting on applicant's preexisting permanent disability of the lumbar spine and left ankle is not substantial medical evidence.

We note too that Dr. Boni's reporting as to right hand numbness relies not only upon applicant's subjective complaints, but medical records substantiating applicant's injury to the right forearm at age 15. (*Id.*, p. 17.) Thus, we conclude that Dr. Boni's reporting as to applicant's preexisting partial permanent disability of the right hand constitutes substantial medical evidence. (See, e.g., *Organista v. Subsequent Injuries Benefits Trust Fund*, 2023 Cal. Wrk. Comp. P.D. LEXIS 352 (stating that contemporaneous medical evidence as to the amount of preexisting disability is not required for development of the record as to that issue).)

Accordingly, we will substitute a finding that applicant has previous partial permanent disability of the lumbar spine, left ankle, and right hand.

We turn next to Dr. Kirz's reporting that applicant has preexisting permanent partial disability in the form of cognitive impairment of 15% WPI and psychiatric impairment of 6% WPI. (Report, pp. 4-5.) In his report, however, Dr. Kirz fails to identify any medical records generated before applicant's October 26, 2017 injury indicating that he had any signs or symptoms of any cognitive or psychiatric impairment at any time within eight years of his subsequent injury. (Ex. 9, QME report of Dr. Kirz, October 25, 2023, pp. 11-12.) Thus, we agree with the WCJ that Dr. Kirz's reporting is not based on adequate history and does not constitute substantial medical evidence.

The Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].)

Here, because the record is unclear as to whether applicant has preexisting partial permanent disability in the form of cognitive impairment and psychiatric impairment, we conclude that the record should be further developed as to that issue.

Accordingly, we will substitute a finding that defers the issue of whether applicant has previous partial permanent disability in the form of cognitive and psychiatric impairment.

Next, we turn to Dr. Ambrose's reporting that applicant has preexisting partial permanent disability of the cervical spine of 8% WPI, the thoracic spine of 8% WPI, the lumbar spine of 6% WPI, soft tissue lesion of 16% WPI, sensory loss of 25% WPI, right upper extremity of 10% WPI, right knee of 10% WPI, left knee of 10% WPI, left ankle of 9% WPI.

Here, the record shows that Dr. Ambrose relied upon applicant's statements made during his August 25, 2023 examination and chiropractic testing performed during the exam—and not any medical record generated before October 26, 2017 evidencing any preexisting permanent disability of the cervical spine, thoracic spine, soft tissue lesion of the lumbar spine, or right knee. (Ex. 11, QME report of Dr. Ambrose, December 15, 2023, pp. 1-37; Report, pp. 5-6.) It also offers opinions contrary to those of Dr. Boni as to the permanent disability of the lumbar spine, right upper extremity, and left ankle without setting forth reasons for doing so. (Ex. 11, QME report of Dr. Ambrose, December 15, 2023, pp. 1-37; Ex. 8, QME report of Dr. Boni dated October 10, 2023, pp. 17-18, 20-21.) Thus, we agree with the WCJ that Dr. Ambrose's reporting does not constitute substantial medical evidence.

Having determined that applicant has previous permanent partial disability of the lumbar spine, left ankle, and right hand, and that the record requires further development as to the issue of whether applicant has permanent partial disability in the form of cognitive impairment and psychiatric impairment, we are unable to determine whether applicant meets the eligibility requirements for SIBTF benefits. Accordingly, we will substitute a finding that defers the issue of whether applicant is entitled to SIBTF benefits. (See Lab. Code § 5701, § 5906; *Tyler, supra*.)

In doing so, we express no opinion regarding whether or not applicant's preexisting permanent disability of the lumbar spine, left ankle, and right hand should be added or combined with his preexisting permanent disability in the form of cognitive impairment and psychiatric impairment, if any. (See, e.g., *Barrera v. Subsequent Injuries Benefits Trust Fund*, 2024 Cal. Wrk. Comp. P.D. LEXIS 266 (finding further development of the record needed where the medical record did not address the question of whether combining the applicant's impairments using Combined Values Chart in 2005 Permanent Disability Rating Schedule or adding impairments would result in more accurate determination of permanent disability as required under *Athens Administrators v. W.C.A.B. (Kite)* (2013) 78 Cal.Comp.Cases 213 [writ den.] and *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 [Appeals Board en banc].)

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the Findings of Fact and substitute findings that applicant has previous partial permanent disability of the lumbar spine, left ankle, and right hand; the issue of whether applicant has previous partial permanent disability in the form of cognitive and psychiatric impairment is deferred; and the issue of whether applicant is entitled to SIBTF benefits pursuant to Labor Code section 4751 and *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc) is deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings of Fact issued on August 16, 2024 is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration, that the Findings of Fact issued on August 16, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

#### **FINDINGS OF FACT**

1. The following stipulations of the parties are adopted as findings of fact:
  - a. Kenneth Machen, born \_\_\_\_\_, while employed on October 26, 2017, as a tower technician II, by Mastec Network Solutions, sustained injury arising out of and in the course of employment to the left elbow, hand, and fingers.
  - b. At the time of injury, the employee's earnings were \$1,494 per week, warranting indemnity rates of \$996 for temporary disability and \$290 for permanent disability.
  - c. The carrier/employer has paid compensation as follows: Temporary total disability at the weekly rate of \$996 and permanent disability advances at the weekly rate of \$290.
  - d. No attorney fees have been paid and no attorney fee arrangements have been made in the SIBTF case.
  - e. Any credits and offsets relating to any SIBTF benefits are deferred.
2. Applicant has previous partial permanent disability of the lumbar spine, left ankle, and right hand.
3. The issue of whether applicant has previous partial permanent disability in the form of cognitive and psychiatric impairment is deferred.



4. The issue of whether applicant is entitled to SIBTF benefits pursuant to Labor Code section 4751 and *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] is deferred.

**IT IS FURTHER ORDERED** that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



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

**November 5, 2024**

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

**KENNETH MACHEN  
EASON & TAMBORNINI  
OFFICE OF THE DIRECTOR - LEGAL UNIT**

**SRO/oo**

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