

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

ROBERTO EUGENIO, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Numbers: ADJ10305363; ADJ10276497
San Jose District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of defendant SIBTF's Petition for Reconsideration, applicant's Answer, and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We note a case cited by applicant, *Humphrey v. SIBTF (Humphrey)* (September 8, 2023, ADJ7016841) 2023 Cal. Wrk. Comp. P.D. LEXIS 234,¹ in response to SIBTF's assertion that applicant is "limited to the psyche injury pled in his underlying industrial claim" against his employer, which was settled via Compromise and Release (C&R). (Petition, p. 7.) In so arguing, SIBTF appears to believe that the level of permanent psychiatric disability agreed to in the C&R precluded the WCJ from rendering a different finding on this issue in applicant's claim against SIBTF under Labor Code section 4751. (Findings & Award, April 12, 2024, pp. 2-3.) However, in *Humphrey*, we explained that an applicant's stipulation to PD in a C&R does not constitute a *finding* by the WCJ such that the issue cannot be considered, and a finding made, by the WCJ in the later SIBTF claim. (*Humphrey, supra*, at *6-7 ["The Compromise and Release is not a finding on the issue of permanent disability....A Compromise and Release is a compromise; it is not a finding of disability."].)

¹ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

We also note that SIBTF is incorrect that applicant failed to plead the remaining pre-existing disabilities currently raised in his SIBTF claim in his underlying workers' compensation claim. (Petition, p. 7; Answer, p. 7; C&R, p. 3.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 24, 2024

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

**ROBERTO EUGENIO
LAW OFFICES OF ROBERT T. BLEDSOE
OFFICE OF THE DIRECTOR – LEGAL UNIT**

AH/cs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1. Applicant's Occupation : Safety Manager
- Applicant's current Age : []
- Date of Injury : CT 4/24/2005 – 08/24/2015
- Parts of Body Injured : psyche, cervical spine, thoracic spine, lumbar spine
2. Identity of Petitioner : Defendant filed the Petition.
- Timeliness : The petition was timely filed.
- Verification : The Petition was properly verified.
3. Date of Issuance of Award : 04/12/2024
4. **Petitioner's contentions:** Petitioner contends that 1) the undersigned has acted without or in excess of her power; 2) that evidence does not justify the findings of fact; and 3) that the findings of fact do not support the order, decision, or award.

Applicant filed an Answer.

II.

FACTS

Applicant, sustained alleged a specific 8/24/2015 industrial injury and a cumulative trauma industrial injury for period 4/24/2005 through 8/24/2015 to his psyche, while employed, as a safety manager, in California, by Call Henry, Inc. Dr. Aparna Dixit, M.D. was the panel QME for the subsequent industrial injury and diagnosed applicant with depressive and anxiety disorders. Dr. Dixit opined applicant's psychiatric injury was not yet permanent and stationary and recommended psychological treatment. However, without undergoing the recommended treatment, and prior to obtaining a final medical-legal report from Dr. Dixit, applicant settled his underlying workers' compensation claims by way of Compromise & Release (C&R) for \$75,000.00. The C&R settlement was approved on 9/22/2016.

Thereafter, applicant pursued a claim for benefits from SIBTF on the cumulative trauma case alleging injury to the psyche, with pre-existing disability due to thalassemia, pulmonary, hypertension, erectile dysfunction, right inguinal hernia, osteoarthritis of fingers, and psyche. Applicant alleged he has met the Labor Code section 4751 threshold and that he is 100%

permanently and totally disabled. Defendant alleged applicant did not meet the threshold and is not entitled to SIBTF benefits.

Applicant's QME's for the SIBTF case were Dr. Christopher Chen, and Dr. James O'Dowd. Defendant SIBTF did not obtain its own medical-legal reports.

III.

DISCUSSION

APPLICANT MEETS THE 35% THRESHOLD OF LC SECTION 4751

Pursuant to section 4751, the permanent disability resulting from the subsequent industrial injury, when considered alone and without regard to or adjustment for the occupation or age of the employee, must be 35% or more. As previously indicated, at the time of Dr. Dixit's 12/12/2015 evaluation, applicant was not permanent and stationary. Notwithstanding this, applicant settled his claim by way of Compromise and Release prior to obtaining a P&S report. In order to establish his eligibility for SIBTF benefits, applicant offered the un rebutted medical reports and opinions of Dr. Chen and Dr. O'Dowd, which the undersigned found to constitute substantial medical evidence of applicant's subsequent industrial injury.

Defendant argues Dr. O'Dowd's reporting does not constitute substantial medical evidence because he failed to explain why he deemed applicant to have reached maximal medical improvement despite applicant's lack of psychiatric treatment and counseling, despite a lack of medication, and despite his worsening condition to the point of experiencing suicidal ideation. In her 01/05/2016 report, Dr. Dixit opined applicant's psychiatric injury was not yet permanent and stationary and recommended psychological treatment. Nonetheless, she assessed applicant's current GAF score at 60, which translates to 15% WPI. Defendant does not appear to take issue with Dr. Dixit's rating, despite not finding applicant to be permanent and stationary and despite applicant not having had any psychological treatment. At the time of the evaluation, Dr. Dixit indicated applicant was experiencing depression, anxiety, social alienation, self-doubt, and sleep disturbance. She indicated it was likely that psychological treatment would substantially improve applicant's condition. (Exhibit A)

Dr. O'Dowd disagreed with Dr. Dixit's conclusions, as applicant was not permanent and stationary at the time of Dr. Dixit's evaluation. He opined that applicant's condition continued to deteriorate from the time of Dr. Dixit's evaluation to the time of his evaluation. He opined applicant's psychological testing indicated suicidal thoughts, significant thought disorganization,

paranoia and long-standing characterological traits that pre-dated the industrial injury. Dr. O'Dowd opined that, based on applicant's moderate symptoms of depression, thought disorganization and suicidal ideation, applicant qualified for a GAF of 50, equivalent to 30% WPI, and assigned 5% WPI due to applicant's silent and underlying psychiatric disability that was labor disabling prior to the subsequent injury. With regard to Dr. Dixit's GAF rating, he indicated that had captured applicant's psychological disability at the time of the 12/12/2015 evaluation, however, his condition continued to deteriorate between the 2015 evaluation and his, 2018 evaluation. (Exhibit 5)

Applicant testified he had thoughts of suicide or ending his life but could not provide dates or times. He testified that when Dr. O'Dowd asked him if he had suicidal thoughts, he said no because he was trying to be strong. Defendant takes issue with Dr. O'Dowd's psychological testing indicating suicidal ideation, since applicant has denied having had suicidal ideation and has not attempted suicide. Defendant further takes issue with Dr. O'Dowd having declared applicant permanent and stationary, despite learning of applicant's suicidal ideation and despite his lack of treatment. However, Dr. Dixit's reporting was not a final report, and although at the time of Dr. Dixit's testing, applicant did not reveal suicidal ideation, Dr. O'Dowd's testing did. Although Dr. Dixit predicted that psychological treatment would substantially improve applicant's condition, the reality is that applicant did not obtain treatment and his condition continued to deteriorate. Dr. Dixit and Dr. O'Dowd found applicant credible, as did the undersigned. Dr. O'Dowd reviewed applicant's medical record, conducted psychological testing, and personally interviewed and observed the applicant. The undersigned found Dr. O'Dowd's report and opinions to be substantial medical evidence. When rated before adjustment for age, occupation, and apportionment, the subsequent industrial cumulative trauma injury to the psyche, alone, meets the 35% threshold:

14.01.00.00 – 30 – [1.4] 42%.

APPLICANT HAS ESTABLISHED A COMPENSABLE INDUSTRIAL CUMULATIVE TRAUMA INJURY FOR 4/24/2005 THROUGH 8/24/2015

Defendant argues that applicant is limited to the psyche injury pled in his underlying industrial injury claim and may not plead additional industrial body parts years later for the SIBTF case. However, one of the issues listed in the pre-trial conference statement and as confirmed in the Minutes of Hearing/Summary of Evidence was whether applicant established a compensable industrial cumulative trauma injury to the cervical, thoracic, and lumbar spine and psyche. Thus,

it was requested that the undersigned make a finding of whether applicant sustained cumulative trauma injury through 8/24/2015 to the aforementioned body parts. (11/02/2023 MOH/SOE, p. 2: 8-17; 01/11/2024 MOH/SOE, p. 2: 8-18) To establish his burden of proof on the issue of AOE/COE, applicant offered the un rebutted medical reports of Dr. Chen and Dr. O’Dowd, which the undersigned found to constitute substantial medical evidence of applicant’s cumulative trauma injury. Applicant also offered credible testimony of the various lifting duties requiring him to lift up to 50 pounds during the 11 years he worked for Call Henry. In fact, at trial, defense counsel aptly cross-examined applicant, in great detail, about his job duties while at Call Henry and about each of the job duties that required lifting. (11/02/2023 MOH/SOE, pp. 6-8)

Applicant also testified he had thoughts of suicide or ending his life but could not provide specific dates or times. There was a time when he thought his life was worthless. He testified that at the time he saw Dr. Dixit on 12/12/2015, he thought things would get better. (01/11/2024 MOH/SOE, p. 2: 35 – 44) Applicant testified that when Dr. O’Dowd asked him if he had suicidal thoughts, he said no because he was trying to be strong, but did mention it after the doctor asked him the question. He testified he has never tried to end his life and has never sought treatment from a psychologist, psychiatrist, or therapist and has not been prescribed medication for any mental health condition. (01/11/2024 MOH/SOE, p. 3: 19-30) Applicant testified that prior to August 2015, he sought medical treatment for his neck, mid back and low back. He testified that the first time he was informed by a doctor that he had sustained injury to his spine was after he filed his SIBTF claim. (01/22/2024 MOH/SOE: p. 5: 12-14). Dr. Chen and Dr. O’Dowd opined applicant sustained cumulative trauma injury to his cervical spine, thoracic spine, lumbar spine, and psyche. The undersigned summarized Dr. Chen’s and Dr. O’Dowd’s findings as follows:

Cervical Spine: Dr. Chen noted applicant is unable to repetitively bend at the neck, is unable to stare at computer screens for more than 1 hour at a time, and is unable to do constant/prolonged posturing of the neck for an hour at a time. He opined applicant has asymmetric loss of motion, and rated applicant’s cervical spine impairment under DRE Category II at 7% WPI.

Thoracic Spine: Dr. Chen noted that applicant is unable to have prolonged bending at the upper spine for more than 30 minutes without having to change positions. He opined applicant’s thoracic spine impairment is best described by DRE Category II at 5% WPI.

Lumbar Spine: Dr. Chen noted applicant has muscle guarding and spasms, with asymmetric loss of range of motion. He is unable to repetitively bend at the waist due to back pain,

and has to change positions after sitting for more than one hour at a time. Dr. Chen rated applicant's impairment under DRE Category II, at 7% WPI.

Psyche: Dr. O'Dowd indicated applicant reports unrelenting anxiety, panic, depression, insomnia, low self-esteem and hopelessness. He lacks energy to get out of bed and complete household chores and has problems maintaining minimal hygiene standards. Psychological testing indicated an acute emotional disturbance as well as suicidal ideation. Dr. O'Dowd opined that applicant's current impairment is 30% WPI from a GAF of 50, with 25% WPI attributed to the subsequent injury and 5% WPI to pre-existing injury.

After adjustment for age and occupation, the subsequent industrial injury rates as follows:

Cervical spine: 15.01.01.00 - 7 - [1.4] 10 - 212E - 9 - 12%) 12%

Thoracic spine: 15.02.01.00 - 5 - [1.4] 7 - 212E - 6 - 8%) 8%

Lumbar spine: 15.03.01.00 - 7 - [1.4] 10 - 212E - 9 - 12%) 12%

Psyche: 14.01.00.00 - 25 - [1.4] 35 - 212J - 47 - 55%) 55%

55 C 12 C 12 C 8 = 68%

The subsequent industrial injury to the psyche alone rates at 55% PD.

APPLICANT'S PRE-EXISTING CONDITIONS WERE LABOR DISABLING AND ARE SUPPORTED BY SUBSTANTIAL MEDICAL EVIDENCE

Pursuant to Labor Code section 4751, applicant must establish that he had pre-existing, labor disabling conditions. Applicant has offered the medical reports and opinions of Dr. Chen and Dr. O'Dowd, who document medical evidence supporting pre-existing disability related to applicant's thalassemia, hypertension, erectile dysfunction, right inguinal hernia, osteoarthritis of fingers, and psyche. Defendant does not appear to contest applicant's pre-existing thalassemia nor hypertension impairment. However, defendant argues applicant's pre-existing labor disabling conditions of pulmonary, erectile dysfunction, right inguinal hernia, osteoarthritis of fingers, and psyche are not supported by substantial medical evidence.

Pulmonary: Defendant argues Dr. Chen failed to identify any records that show diagnosis or treatment of a prior lung condition, length of treatment, work restrictions, and does not identify when the condition became ratable for purposes of assigning impairment. Applicant testified he presented to the Sansum Clinic due to shortness of breath in 2008. He testified he had been exposed off and on to secondhand smoke and that his lung problems continued after 2015. Dr. Chen found applicant has had pulmonary problems since 2/14/2008. He noted that although applicant was not

a smoker, he was exposed to decades of second-hand smoke, as his father and friends smoked. The 11/17/2017 pulmonary examination found moderate-severe restrictive and obstructive lung disease. Dr. Chen opined that applicant had shortness of breath due to restrictive lung disease. He could not take on jobs that required running. When he worked faster, he would have shortness of breath. He worked at a slower pace than his coworkers did. The condition prevented him from fully participating in therapy and rehabilitation. He assigned 10% WPI, under Class 2, Tables 5-9, 5-10, and 5-12.

Erectile Dysfunction: Defendant argues Dr. Chen diagnosed a condition that existed post-industrial injury, and concluded that since there were no subsequent medical records that show the problem worsened, then the problem must have predated the industrial injury. Defendant further argues applicant failed to produce any evidence, including prior, contemporaneous medical reports, indicating how applicant's erectile dysfunction (ED) was labor disabling. Applicant testified he saw Dr. Ryan in October of 2005 regarding his ED and received treatment. He was told it was psychological and part of the aging process. He currently has ED. (11/02/2023 MOH/SOE, p. 5: 23-24) Dr. Chen noted applicant has had ED for at least 10 years, due to loss of libido, likely due to applicant's hypertension and the medications to treat the diseases, which are associated with loss of libido and ED. He also noted that, per Sansum records of 10/13/2005 by Dr. Ryan, applicant had fatigue. As a result, applicant felt less competitive and inferior to other men and had chronic fatigue. He assigned 5% WPI, under Table 7-5, Class 1.

Right Inguinal Hernia: Defendant argues Dr. Chen did not undertake a detailed history to determine when applicant first noticed a loss of lifting capability, whether the loss of lifting capability improved or worsened over time, or any other relevant details. Defendant also argues without medical basis, that an absence of further treatment records infers that the hernia repair successfully resolved the condition. Finally, defendant argues Dr. Chen did not review any contemporaneous medical records which addressed the hernia results or lifting capability. Per Dr. Chen, the right inguinal hernia affected applicant's lifting. On 7/11/2008, he had right inguinal hernia repaired at Regional, by Dr. Canal. Post-surgery, he could only lift 50% as compared to before the surgery. Before the surgery, he could lift 150 lbs. at the gym, but since the surgery, he can lift 75 lbs. Since 2008, his lifting capacity has been unchanged. His inguinal condition was like that on 8/24/2015. Dr. Chen assigned 15% WPI, under Table 6-9, Class 2.

Osteoarthritis of fingers: Defendant argues Dr. Chen did not identify the doctor who issued the 2006 report or medical facility. Defendant further argues Dr. Chen assigned impairment based upon measurements obtained in 2017 and that there are no medical records that establish applicant's pre-injury grip strength. Applicant testified that in 2006 he noticed he had arthritis in his fingers. He saw a doctor at Kaiser and was diagnosed with arthritis and prescribed treatment. Per Dr. Chen, applicant has had swollen joints in the finger since 2006. Upon examination, he noted Heberden's nodes, consistent with osteoarthritis. Dr. Chen opined the condition is congenital and indicated medical notes from Kaiser, dated 6/23/2003 documented finger arthritis. Due to condition, he could not grip firmly. He could not have jobs that required a firm grip or repetitive use of the fingers, such as secretarial jobs. He could not open tight jars. Grip decreased by 50%. Dr. Chen assigned 6% WPI due to grip strength loss for each hand, under Table 16-34.

Psyche: Defendant argues that due to a lack of contemporaneous medical reports, and based on applicant's own testimony that he never sought or received treatment for mental health issues, Dr. O'Dowd failed to identify any basis to support his opinion that applicant had any pre-existing, labor-disabling psychiatric condition. On page 15 of his 10/09/2018 report, Dr. O'Dowd opined that, although Dr. Dixit did not find apportionment to pre-existing psychiatric disability, applicant's testing revealed the presence of long-term characterological traits typical of personality disorders, which rendered applicant's psyche brittle and predisposed to psychiatric problems under distress. Dr. O'Dowd assigned 30% WPI from a GAF of 50, with 25% WPI attributed to the subsequent injury and 5 % WPI to pre-existing underlying psychiatric disability that was labor disabling prior to the subsequent injury.

Pursuant to medical reports and opinions of Dr. Christopher Chen and Dr. James O'Dowd, applicant had the following supported pre-existing labor disabling conditions due to thalassemia, pulmonary, hypertension, erectile dysfunction, right inguinal hernia, osteoarthritis of fingers, and psyche:

Thalassemia: 09.01.00.00 - 7 - [1.4] 10 - 212F - 10 - 13%

Lungs: 05.02.00.00 - 10 - [1.4] 14 - 212F - 14 - 18%

Hypertension: 04.01.00.00 - 10 - [1.4] 14 - 212G - 16 - 20%

Erectile dysfunction: 07.05.00.00 - 5 - [1.4] 7 - 212F - 7 - 9%

Right inguinal hernia: 06.05.00.00 - 15 - [1.4] 21 - 212E - 19 - 24%

Right hand grip loss: 16.01.04.00 - 6 - [1.4] 8 - 212E - 9 - 9%

Left hand grip loss: 16.01.04.00 - 6 - [1.4] 8 – 212E - 9 - 9%

Psyche: 14.01.00.00 - 5 - [1.4] 7 - 212J - 12 - 15%

The pre-existing medical conditions combine as follows:

24 C 20 C 18 C 15 C 13 C 9 C 9 C 9 = 72%

Applying the holding in *Todd*, applicant’s pre-existing disability of 72%, when added to the subsequent industrial disability of 68%, results in an overall disability of 140%. If considering only the pre-existing psyche disability of 55% PD, added to the subsequent industrial disability of 68% PD, results in an overall disability of 123% PD.

Applicant has met the threshold of Labor Code Section 4751 and has met his burden of proving his right to SIBTF benefits with appropriate medical evidence. Dr. Chen and Dr. O’Dowd personally examined applicant and found him credible, and reviewed his extensive medical records. Their un rebutted reports were properly admitted without objection and have been found to be substantial medical evidence of applicant’s industrial and pre-existing disability. Even when considering defendant’s arguments with regard to the undersigned’s finding of cumulative trauma injury to the cervical, thoracic, and lumbar spine, the overall resulting disability is above 100%.

IV.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

DATE: 05/16/2024

NORMA L. ACOSTA

WORKERS' COMPENSATION JUDGE