WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

AMARJIT DHAMI, *Applicant*

vs.

SUBEQUENT INJURIES BENEFITS TRUST FUND, et. al., *Defendants*

Adjudication Numbers: ADJ10479461

Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the "Findings and Award" (F&A) issued on October 18, 2024, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant met the threshold for obtaining SIBTF benefits and found that applicant was permanently and totally disabled after combining applicant's injuries.

SIBTF argues that the WCJ incorrectly found that applicant's subsequent injury met the 35% threshold of Labor Code[1] section 4571 because the WCJ should have applied apportionment under section 4663 to the impairments sustained by applicant and that the holding in *Bookout v. Workers' Comp. Appeals Bd*. (1976) 62 Cal. App. 3d 214 [132 Cal. Rptr. 864, 41 Cal. Comp. Cases 595], should be disregarded.

We received an answer from applicant.

The WCJ filed a Report recommending that the Petition for Reconsideration be denied.

We have considered the allegations in the Petition for Reconsideration, the Answer, the contents of the Report, and we have reviewed the record. Based upon our review of the record, we will deny reconsideration.

[1] All future references are to the Labor Code unless noted.

FACTS

Per the WCJ's Opinion on Decision:

3. PRE-EXISTING DISABILITY

Based upon the medical reports of AME Dr. David Pang, SIBTF Evaluators Dr. Alberto Lopez and Dr. Scott Anderson, applicant sustained the following prior injuries with the following levels of disability:

Thoracic Spine
.5(15.02 – 7 – [1.4] 10 – 460H – 18 – 20%) = 10%
Lumbar Spine
.5(15.03 – 13 – [1.4] 18 – 460H – 22 – 25%) = 13%
Hypertension
04.01 – 20 – [1.4] 28 – 460H – 34 – 38%
Asthma
05.01 – 10 – [1.4] 14 – 460G – 16 – 18%

Medical evidence supported applicant suffering from an Anxiety condition prior to the subsequent injury, but SIBTF Evaluator Dr. Alberto Lopez failed to provide substantial medical evidence as to the exact level of disability that the condition was at just prior to the subsequent injury. The orthopedic conditions would utilize the CVC and combine to 22%. The remaining disabilities would be added to the orthopedic disability resulting in a total preexisting disability of 78%.

Based on the foregoing applicant was permanently and partially disabled prior to the subsequent injury. In addition, the combination of the pre-existing disability and the disability resulting from the subsequent compensable injury 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.

4. SUBSEQUENT INJURY DISABILITY

One eligibility requirement for SIBTF benefits under Labor Code § 4751 is that the permanent disability caused by a worker's industrial (or "subsequent") injury totals 35% or more before adjustment for age and occupation. Section 4751 provides as follows in that regard: "…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." (Italics added.)

> Additionally, In *Riedo v. Subsequent Injuries Benefits Trust Fund*, 2022 Cal. Wrk. Comp. P.D. LEXIS 303 (Cal. Workers' Comp. App. Bd. October 21, 2022) the Appeals Board succinctly stated the applicable rule as follows:
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> Section 4751 requires that "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 [the] total [combined permanent disability]." (§ 4751.)
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> The court in *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal. App. 3d 214, 228 [132 Cal. Rptr. 864, 41 Cal.Comp.Cases 595], 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. (See *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 583 (Appeals Board En Banc).)
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> The applicant sustained a subsequent injury on January 23, 2015. Per the unrebutted opinion of AME Dr. David Pang and Panel QME Dr. Michael Kulick, as a result of that injury the applicants unadjusted whole person impairment was 15% WPI to the Left Leg, 13% WPI to the Lumbar Spine and 7% WPI to the Thoracic Spine. Applying adjustment for diminished future earning capacity the applicant and without regard to or adjustment for the occupation or age of the applicant and excluding apportionment, the permanent disability is 21% to the Left Leg, 18% WPI to the Lumbar Spine and 10% WPI to the Thoracic Spine. Combining them via CVC provides a total disability of 42%, for which applicant has established that he has sustained a subsequent compensable injury that has resulted in additional permanent disability equal to or greater than 35 percent of the total without adjustment for age or occupation. It is found that the applicant is entitled to SIF benefits.

(Opinion on Decision, October 18, 2024, pp. 4-5.)

DISCUSSION

I.

Former Labor Code section 5909[2] 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, 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.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

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 November 26, 2024, and 60 days from the date of transmission is Saturday, January 25, 2025, which by operation of law means this decision is due by Monday, January 27, 2025. (Cal. Code Regs., tit. 8, § 10600.) This decision is issued by or on January 27, 2025, so that we have timely acted on the Petition as required by 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

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on November 26, 2024, and the case was transmitted to the Appeals Board on November 26, 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 26, 2024.

II.

As explained in our en banc decision in *Todd*:

> SIBTF is a state fund that provides benefits to employees with preexisting permanent disability who sustain subsequent industrial disability. The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of [workers'] compensation contemplated by our Constitution." (*Subsequent Injuries Fund of the State of California v. Industrial Acci. Com.* (*Patterson*) (1952) 39 Cal. 2d 83 [244 P.2d 889, 17 Cal. Comp. Cases 142]; *Ferguson v. Industrial Acci. Com*. (1958) 50 Cal. 2d 469, 475 [326 P.2d 145]; *Escobedo v, Marshalls* (2005) 70 Cal. Comp. Cases 604, 619 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc).)
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> SIBTF is codified in section 4751, which provides:
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> 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. (§ 4751.)

The preexisting disability may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (*Escobedo, supra*, 70 Cal. Comp. Cases at p. 619.) It must be "independently capable of supporting an award" of permanent disability, "as distinguished from [a] condition rendered disabling only as the result of 'lighting up' by the second injury." (Ferguson, supra, 50 Cal. 2d at p. 477.)

Furthermore, there is no specific statute of limitations with respect to the filing of an application against SIBTF; an application against the fund will not be barred "where, prior to the expiration of five years from the date of injury, an applicant does not know and could not reasonably be deemed to know that there will be substantial likelihood he will become entitled to subsequent injuries benefits, [] if he files a proceeding against the Fund within a reasonable time after he learns from the board's findings on the issue of permanent disability that the Fund has probable liability." (*Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd*. (*Talcott*) (1970) 2 Cal. 3d 56, 65 [84 Cal. Rptr. 140, 465 P.2d 28, 35 Cal. Comp. Cases 80].)

In a claim for SIBTF benefits, an employee must establish that a disability preexisted the industrial injury. (§ 4751.) Evidence of a preexisting disability may include prior stipulated awards of permanent disability or medical evidence. In order to be entitled to benefits under section 4751, an employee must prove the following elements:

(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 [*582] 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. (§ 4751.)
>
> Once the threshold requirements are met, section 4751 specifically provides that applicant "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 … ." (§ 4751; emphasis added.) "[E]ntitlement to SIBTF benefits begins at the time the applicant becomes entitled to permanent disability payments." (*Baker v. Workers' Comp. Appeals Bd*. (*Guerrero*) (2017) 13 Cal. App. 5th 1040, 1050 [220 Cal. Rptr. 3d 761, 82 Cal. Comp. Cases 825].)

(*Todd v. Subsequent Injuries Benefits Trust Fund*, (2020) 85 Cal. Comp. Cases 576, 580-582 (Appeals Board en banc).)

SIBTF's sole argument on reconsideration is that we should apply apportionment to determine applicant's subsequent disability in establishing the SIBTF threshold of section 4751. In *Todd*, the Appeals Board explained that apportionment does not apply to the calculation of SIBTF benefits pursuant to the decision of the District Court of Appeals in *Bookout*:

> We begin our discussion here with the Court of Appeal's decision in *Bookout v. Workers' Comp. Appeals Bd*. (1976) 62 Cal. App. 3d 214 [132 Cal. Rptr. 864, 41 Cal. Comp. Cases 595], which addressed the issue of how to determine the "combined permanent disability" as specified in section 4751.
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> 1. The Court of Appeal's decision in Bookout.
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> 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.)
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> 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. [*583] 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 4751.9 (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.)
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> 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.)
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> 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 4751.12 (*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).)

(*Id*. at 582-584.)

SIBTF argues in its petition for reconsideration that". . . the Appeals Board had consistently held, long after the *Bookout* decision was issued in 1976, that apportionment must be included when evaluating whether an applicant meets the 3 [*sic*] percent threshold. Furthermore, following *Bookout,* the WCAB consistently held that apportionment should be considered when determining whether a subsequent industrial injury meets the threshold eligibility requirement of Section 4751." (Petition for Reconsideration p. 10, line 26, through p. 11, line 3.) SIBTF cites two writ-

denied cases, one from 1984, and the other from 1998 in support of this assertion. SIBTF does not cite to the considerable discussion of *Bookout* contained within the En Banc decision of the Appeals Board in *Todd, supra,* and the panel decisions issued by the board following *Todd*. (See e.g., *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]; *Millner v. Subsequent Injuries Benefits Trust Fund* (October 7, 2024, ADJ17739286) [2024 Cal. Wrk. Comp. P.D. LEXIS 360].)

We admonish SIBTF and attorney Jay Lee that an attorney may not make misrepresentations through omission, and they may not omit material law when making arguments to a court. SIBTF's contention that the Appeals Board has not followed the holding in *Bookout* in two panel decisions is contrary to the Appeals Board's very recent holding in its En Banc decision in *Todd* and the panel decisions following *Todd*.

This is not the first time SIBTF has raised its disagreement with the holding in *Bookout*. The Appeals Board is a constitutional court. We are bound by the rule of law to follow the holdings of higher courts. To the extent that SIBTF disagrees with the holding in *Bookout*, it must raise this issue with either the Courts of Appeal or the Legislature. As the sole assertion of SIBTF on reconsideration is that the holding in *Bookout* should be overturned, and given that the Appeals Board has no authority to do that, SIBTF's petition for reconsideration must be denied.

Accordingly, we deny SIBTF's petition for reconsideration.

For the foregoing reasons,

IT IS ORDERED that SIBTF's petition for reconsideration of the F&A issued on October 18, 2024, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 27, 2025

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

AMARJIT DHAMI
MANGOSING LAW GROUP
OFFICE OF THE DIRECTOR, LEGAL

EDL/mc

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