

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

**KAREN WHISNANT, *Applicant***

**vs.**

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

**Adjudication Number: ADJ8083715  
Sacramento District Office**

**OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by Subsequent Injuries Benefits Trust Fund (SIBTF). This is our Opinion and Decision After Reconsideration.

SIBTF seeks reconsideration of the April 5, 2022 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant's subsequent permanent disability equals 42%, after adjustment for diminished future earnings capacity but before adjustments to occupation and age, which qualifies applicant for SIBTF benefits. The WCJ found that in calculating whether applicant has met the 5% or 35% subsequent permanent disability threshold for entitlement to SIBTF benefits per Labor Code<sup>1</sup> section 4751, apportionment of subsequent permanent disability is permitted where SIBTF shows that the subsequent disability would have resulted from the normal progression of an underlying nonindustrial disease; apportionment based upon any prior award of disability under section 4664 is not permitted.

SIBTF contends that applicant did not meet the 35% eligibility threshold for the subsequent injury. SIBTF contends that the WCJ erred in applying former sections 4663 and 4750 (repealed) and that the current section 4663 apportionment should apply reducing applicant's subsequent injury to 32% permanent disability, which does not meet the 35% eligibility threshold.

We received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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<sup>1</sup> All statutory references are to the Labor Code unless otherwise indicated.

We have considered the Petition for Reconsideration, Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we affirm the April 5, 2022 Findings of Fact, except that we amend it to indicate that apportionment is not considered when determining the 5% or 35% SIBTF eligibility threshold.

## **FACTS**

As the WCJ stated in his Report:

The facts of this case are not in dispute. Applicant has prior physical injuries. She suffered a subsequent industrial injury to her psyche when she was the victim of a bank robbery. Applicant thereafter sought benefits from SIBTF.

The parties stipulated to the rating of applicant's subsequent psychological injury as follows:  $75\% (11.00 - 30 [8] - 42 - 211H - 48 - 54) = 41\% PD$ . At trial, the parties' sole dispute as to applicant's eligibility for SIBTF benefits was whether applicant's subsequent permanent disability is adjusted for apportionment based on causation of injury. Without apportionment and prior to adjustment for age and occupation, the subsequent injury rates to 42%, which qualifies applicant for SIBTF benefits. With apportionment, the subsequent injury rates to 32%, which is insufficient.

The apportionment of 75% industrial in this case is based on causation of applicant's injury to the psyche (§ 4663) and not based upon any prior award of permanent disability to her psyche (§ 4664).

The parties indicated to the court that all other factors of SIBTF eligibility are met in this case. Accordingly, the sole issue addressed on reconsideration is whether apportionment based on causation of injury applies in calculating the subsequent permanent disability threshold of 5% or 35% per section 4751. (Report, pp. 1-2.)

## **DISCUSSION**

While we appreciate the WCJ's analysis that *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal. App. 3d 214, 228 [132 Cal. Rptr. 864, 41 Cal. Comp. Cases 595] must be read in light of the apportionment statutes existing at that time, we point out that the Court of Appeal in *Bookout* refused to consider apportionment in determining the SIBTF 35% eligibility threshold.

As explained in our en banc<sup>2</sup> decision in *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board En Banc):

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.)

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<sup>2</sup> “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].)

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).)

(*Todd, supra*, 85 Cal. Comp. Cases at pp. 582–583, 2020.)

Thus, the WCJ's differentiation that “apportionment of subsequent permanent disability is permitted where SIBTF shows that the subsequent disability would have resulted from the normal progression of an underlying nonindustrial disease” but apportionment based on causation or pathology under section 4663 and based on prior disability under section 4664 is not permitted, is not supported by the *Bookout* decision. In *Bookout*, applicant had a 60% standard subsequent injury to his back, which disability overlapped with applicant's pre-existing heart condition prohibiting heavy work. (*Bookout, supra*, 62 Cal. App. 3d at p. 220.) The Court of Appeal did not apportion out the overlapping preclusion from heavy work, and instead found that applicant's subsequent injury, standing alone, was 60%, which met the 35% eligibility threshold requirement. (*Bookout*, at p. 228.)

Furthermore, we have recently issued multiple decisions, albeit, mostly subsequent to the filing of this Petition, concluding that apportionment is not to be included in calculating whether an employee meets the 35% eligibility threshold requirement. (*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]).

Accordingly, we affirm the April 5, 2022 Findings of Fact, except that we amend it to indicate that apportionment is not considered when determining the 5% or 35% SIBTF eligibility threshold.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 5, 2022 Findings of Fact is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

**FINDINGS OF FACT**

1. In calculating whether applicant has met the 5% or 35% subsequent permanent disability threshold for entitlement to SIBTF benefits per Labor Code, section 4751, apportionment is not permitted.

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**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

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



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

**September 15, 2025**

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

**KAREN WHISNANT  
LAW OFFICES OF THOMAS B. BROWN  
OFFICE OF THE DIRECTOR – LEGAL UNIT**

**LSM/pm**

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