

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

MATTHEW DANIELS, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ12273693
Salinas District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Defendant Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the September 18, 2024 Amended Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant is entitled to 100% permanent disability from the SIBTF, less credits as provided in Labor Code, section 4753.

SIBTF contends that applicant failed to prove additional actual prior labor disabling disability at the time of the subsequent injury besides disability to his left and right wrists—7% and 10% permanent disability, respectively—and failed to provide substantial medical evidence to support preexisting labor disabling permanent disability to his cervical spine, lumbar spine, right shoulder, left shoulder, right little finger, right elbow, left elbow, psychiatric, cognitive, digestive, and varicose veins.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, and for the reasons discussed below, we deny reconsideration.

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 November 12, 2024 and 60 days from the date of transmission is Saturday, January 11, 2025. The next business day that is 60 days from the date of transmission is Monday, January 13, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)¹ This decision is issued by or on Monday, January 13, 2025, 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

¹ WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

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

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 November 12, 2024, and the case was transmitted to the Appeals Board on November 12, 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 November 12, 2024.

II.

Due to applicant's numerous injuries, subsequent and preexisting, we provide the following table summarizing the whole person impairment (WPI) various medical providers assigned to different body parts:

	Exh A1, Newman	Exh A2, Kirz	Exh A3, Dreyfuss	Exh D2 and D4, Damore	Exh J1, Stark
Preexisting:					
Cervical spine	6% WPI				
Lumbar spine	6% WPI		15% WPI		
L shoulder	3% WPI				
R shoulder	5% WPI				
L elbow	1% WPI				
R elbow	1% WPI				
L wrist	2% WPI		5% WPI	5% WPI	
R wrist	8% WPI		5% WPI due to TFCC and 1% WPI due to sensory ⁷ loss	6% WPI	
R hand, 5 th digit	3% WPI				
Cognitive		20% WPI			
Psychoemotional		11% WPI			
Plantar fasciitis (left foot)			5% WPI		
Varicose veins			8% WPI		
GERD			10% WPI		

L knee	30% WPI + 3% for pain (30% preexisting)				
R knee	30% WPI (30% preexisting)				
Subsequent					
L knee	30% WPI + 3% for pain (70% subsequent)				20% WPI (no apportionment)
R knee	30% WPI (70% subsequent)				20% WPI (no apportionment)

For ease, we also list the following permanent disability ratings as provided in the Report:

Preexisting

15.01.01.00 - 6 - [1.4]8 - 360G - 9 – 10% PD (cervical spine)

15.03.01.00 - 6 - [1.4]8 - 360G - 9 – 10% PD (lumbar spine)

16.02.01.00 - 3 - [1.4]4 - 360G - 5 - 5% (left shoulder)

16.02.01.00 - 5 - [1.4]7 - 360G - 8 - 9% PD (right shoulder)

16.03.01.00 - 1 - [1.4]1 - 360G - 2 - 2% PD (left elbow)

16.03.01.00 - 1 - [1.4]1 - 360G - 2 - 2% PD (right elbow)

16.04.02.00 - 5 - [4] 6 - 360G - 7 - 7% PD (left wrist)

16.04.02.00 - 6 - [1.4] 8 - 360G - 9 - 10% PD (right wrist)

16.06.05.01 - 3 - [1.4]4 - 360F - 4 - 4% PD (right little finger)

13.04.00.00 - 20 - [1.4]28 - 360E - 26 – 28% PD (cognitive)

14.01.00.00 - 11 - [1.4]15 - 360E - 14 - 15% PD (psychiatric)

04.03.02.00 - 8 - [1.4]11 - 360G - 13 – 14% PD (varicose veins)

06.01.00.00 - 10 - [1.4]14 - 360F - 14 – 15% PD (digestive)

30% - (17.05.10.08 - 33 - [1.4] 46 - 360G - 49 - 51%) 15% (left knee)

30% - (17.05.10.08 - 30 - [1.4] 42 - 360G - 45 - 47%) 14% (right knee)

Subsequent Injury dated February 12, 2018

70% - (17.05.10.08 - 33 - [1.4] 46 - 360G - 49 - 51%) 36% (left knee)

70% - (17.05.10.08 - 30 - [1.4] 42 - 360G - 45 - 47%) 33% (right knee)

SIBTF contends that, aside from the bilateral wrists, there is no substantial evidence to support the rest of the preexisting disabilities. We disagree. Michael Newman, D.C.'s, and Bruce J. Dreyfuss, M.D.'s, reports show medical records as far back as 2009 showing lumbar spine disease. (Exhibit A1, Dr. Newman's report dated September 2, 2022, pp. 13-14; Exhibit A3, Dr. Dreyfuss's report dated October 17, 2022, p. 4.) Furthermore, Dr. Newman's opinions regarding applicant's preexisting injuries to his cervical spine, bilateral shoulders, and bilateral elbows are based on x-rays that, although were taken after the subsequent injury, show degenerative disease that occurred over time; and based on applicant's work history as a grocery stocker consisting of heavy lifting, bending, and prolonged repetitive use of both upper extremities over 29+ years, it is reasonable for Dr. Newman to conclude the degenerative disease to the cervical spine and upper extremity preexisted the subsequent injury. (Exhibit A1, Dr. Newman's report dated September 2, 2022, pp. 10-11, 30.)

As to applicant's disability with respect to his plantar fasciitis, varicose veins, and GERD, the medical records show complaints of left heel pain in 2017 (Exhibit A1, Dr. Newman's report dated September 2, 2022, p. 15; Exhibit A3, Dr. Dreyfuss's report dated October 17, 2022, p. 6), left leg swelling with prescribed compression stockings in 2017 (Exhibit A3, Dr. Dreyfuss's report dated October 17, 2022, p. 14), and evidence of acid reflux in 2007 and 2017, which worsened in 2019 (Exhibit A3, Dr. Dreyfuss's report dated October 17, 2022, p. 4, 6, and 7).

Dr. Newman's opinion regarding applicant's right 5th digit fracture is based on applicant's poor range of motion at the time of Dr. Newman's examination in 2022 and applicant's history that he fractured that finger in his youth while playing softball, which required two surgeries. (Exhibit A1, Dr. Newman's report dated September 2, 2022, p. 4-5, 9.)

Joshua Kirz, Ph.D., provided opinion on applicant's cognitive and psychiatric impairments. He described applicant's learning disabilities and struggles with school and opined that given "the applicant's history of learning disabilities, the cognitive impairment was entirely preexisting and likely dated to youth." (Exhibit A2, Dr. Kirz's report dated November 30, 2021, p. 14.) With respect to applicant's psychiatric difficulties, Dr. Kirz described applicant's unstable and traumatic

childhood, poor judgment, and struggles with anxiety and depression as far back as 2004. (Exhibit A1, Dr. Newman’s report dated September 2, 2022, pp. 15-17.) Dr. Kirz opined, “However, the chronicity of the applicant’s past psychosocial stressors, poor judgment, documented emotional problems, need for psychiatric treatment, and need for stress leaves was striking. There seems little chance that these decades-long issues simply disappeared just prior to injury.” (Exhibit A1, Dr. Newman’s report dated September 2, 2022, p. 17.) As such, we conclude that there is enough contemporaneous evidence to support Dr. Newman’s, Dr. Dreyfuss’s, and Dr. Kirz’s opinions of applicant’s preexisting disabilities.

SIBTF further contends that the WCJ erred in taking Dr. Newman’s opinion regarding applicant’s bilateral knees impairment of 30% WPI, as opposed to Agreed Medical Examiner James B. Stark, M.D.’s, opinion that applicant’s bilateral knees impairment was 20% WPI. (Petition, pp. 6:16-7:2.) SIBTF contends that it “is liable only for the permanent disability of preexisting labor-disabling disabilities, and not for the progression of disease processes after the date of the subsequent industrial injury.” (Petition, p. 6:24-26.) However, Dr. Newman was simply pointing a mathematical error on the part of Dr. Stark.

Dr. Stark measured the following range of motion of applicant’s knees one year following the most recent arthroplasty:

KNEE RANGE OF MOTION:

RANGE	RIGHT	LEFT
Extension	10 degrees {lag}	15 degrees (lag)
Flexion	115 degrees	110 degrees

Dr. Stark opined:

For the right knee, pain is occasional and moderate. *For range of motion, there is 46 points.* Stability AP is 10 points. Mediolaterally 15 points, totaling total 81 points. There are deductions, the 10-degree flexion contracture is 5 points, the extensor lag is 5 points. These 10 points are subtracted from the 81 to equal 71 points.

Table 17-33 on page 547 equates 71 points with a fair result, equaling 20% whole person impairment for the right knee.

For the left knee, pain is continuous and moderate, 10 points. *Range-of-motion 44 points.* Stability AP, 5 points. Mediolaterally 15 points, totaling 74 points. There are deductions for a 15-degree flexion contracture of 5 points and 15-

degree extensor lag 10 points, equaling 15 points. Those 15 points are subtracted from the 74 to equal 59 points.

Table 17-33 on page 547 equates 59 points with a fair result, equaling 20% whole person impairment.

(Exhibit J1, Dr. Stark's report dated February 9, 2021, p. 4; emphasis added.)

Dr. Newman pointed out that for a range of motion of 115 degrees in applicant's right knee, 23 points is assigned per the AMA Guides, Fifth Edition, Table 17-35, p. 549 (stating to add 1 point per 5 degrees of range of motion), not the 46 points Dr. Stark assigned. If Dr. Stark had correctly assigned 23 points for range of motion for applicant's right knee, his calculation would result in 48 points (not 71 points). 48 points results in 30% WPI per Table 17-33, p. 547, of the AMA Guides. (Exhibit A1, Dr. Newman's report dated September 2, 2022, p. 27.)

Similarly, for a range of motion of 110 degrees in applicant's left knee, 22 points is assigned. If we replace Dr. Stark's erroneous 44 points for the left knee with 22 points, his calculation will result in 37 points, with equals to 30% WPI per Table 17-33, p. 547, of the AMA Guides. (Exhibit A1, Dr. Newman's report dated September 2, 2022, p. 26.)

Therefore, the WCJ correctly used Dr. Newman's 30% WPI for each knee in calculating applicant's permanent disability.

Accordingly, we conclude that the reports of Drs. Newman, Dreyfuss and Kirz are substantial medical evidence supporting the findings of preexisting disabilities.

For the foregoing reasons,

IT IS ORDERED that Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 13, 2025

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

**MATTHEW DANIELS
WIESNER ENGLISH, P.C.
OD LEGAL, OAKLAND**

LSM/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

On 10/11/24, Defendant, Subsequent Injuries Benefits Trust Fund (hereafter, SIBTF), filed a timely, verified Petition for Reconsideration of the undersigned's Amended Findings and Award that issued on 9/18/24. Applicant filed an Answer, entitled Opposition to Petition for Reconsideration, on 10/22/24.

This is the second Petition for Reconsideration in this matter. Previously, the undersigned found permanent disability of 83% for SIBTF purposes on 12/4/23. Applicant petitioned for reconsideration successfully. The WCAB issued its Opinion And Order Granting Petition For Reconsideration And Decision After Reconsideration on 2/26/24. After an MSC on 6/19/24, the parties requested resubmission for decision. The matter was resubmitted as of 6/20/24. (MOH, 6/19/24 MSC.)

II

FACTS

Applicant, Matthew Daniels, while employed on 12/12/18 as a Stock Clerk, Occupational Group number 360, at Freedom, California, by Safeway, Inc., then permissibly self-insured, sustained injury AOE/COE to his bilateral knees. For purposes of SIBTF benefits, the case herein is Applicant's subsequent industrial injury (hereafter, SII.) The parties to the claim settled by Compromise and Release on 4/22/21.

Applicant had two prior settlements that support his claim for SIBTF benefits. In ADJ8049145, a CT to 2/17/10 injury to his left wrist, was settled by C&R on 11/8/11; and, in ADJ10935541, a CT to 4/26/15 injury to his right wrist/hand/upper extremity was settled by C&R on 7/13/17. The applicant also had non-industrial labor disabling conditions.

The court found that the SII caused permanent partial disability of 69%, that the percentage of permanent disability resulting from the combination of all disabilities is 100%, and that the liability of the Subsequent Injuries Benefits Trust Fund is for 100% permanent disability equal to disability payments at a weekly rate to be determined per week commencing 2/14/21 for life, less statutory credits. ((Amended F&A, 9/18/24, p. 2, Findings 10 through 12.)

Defendant now petitions for reconsideration from these Findings.

III DISCUSSION

A WCJ's report "cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313." (*City of San Diego v. Workers' Comp. Appeals Bd (Rutherford)* (1989) 54 Cal. Comp. Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd* (1980) 45 Cal. Comp. Cases 1026 (writ den.)) To the extent that the undersigned failed to elaborate on her conclusions, they will be discussed below.

Applicant has the burden to show that they are entitled to benefits under Labor Code section 4751 by proving a preexisting permanent partial disability; a subsequent compensable injury resulting in additional permanent partial disability; the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and, the combined preexisting and subsequent permanent partial disability is equal to 70% or more. (*Todd v. SIBTF* (2020) 85 Cal.Comp.Cases 576, 581-582.)

The applicant had pre-existing permanently disabling conditions of industrial and non-industrial origin. The applicant sustained an SII on 12/12/18, when he injured his bilateral knees. In applicant's case, the permanent disability is greater when combined than the disability caused by the SII alone.

The permanent disability resulting from the subsequent industrial injury, when considered alone and without regard to or adjustment for the employee's age, occupation, or apportionment must be equal to 35 percent or more of the total. Applicant's bilateral knees are equal to 88% (46 + 42), when the standard is adjusted for DFEC, or 63% (33 + 30), when not adjusted for DFEC. Either way, Applicant meets this requirement.

When the pre-existing disability is combined with the subsequent disability, the resulting permanent disability must be equal to 70% or more. With just the SII and his two prior industrial injuries, the applicant meets the 70% threshold. The applicant had prior disability of 17% from his two prior industrial injuries. The applicant sustained a subsequent industrial injury (SII) that resulted in additional permanent partial disability. When combined, Applicant's permanent disability is 86% (69 + 10 + 7 = 86%.) The SII rates to 69% PD based upon the report of Michael Newman, D.C., dated 9/2/22, (APPL'S EX. A-1), which rates as follows:

70% - (17.05.10.08 - 33 - [1.4] 46 - 360G - 49 - 51%) 36% (left knee)
70% - (17.05.10.08 - 30 - [1.4] 42 - 360G - 45 - 47%) 33% (right knee)

$$36 + 33 = 69\% \text{ PD}$$

As noted in the writ denied case of *Ruiz v. Workers' Comp. Appeals Bd.*, to establish SIBTF eligibility under Labor Code § 4751, Applicant bears the burden of establishing that prior to his SII, he had a pre-existing, labor disabling condition upon which an award of PD could have been based. The Ruiz court stated,

... [A]s noted in *Escobedo*, the advent of the new rating methodology in 2005, did not alter the long-standing requirement for SIBTF eligibility. The requirement that the prior disability be one upon which an award of permanent disability could have been based was discussed in *Brown v. Workers' Comp. Appeals Bd.* (1970) 20 Cal. App. 3d. 903, 914 [36 Cal.Comp.Cases 627, 635], and cited in *Escobedo*. Applicant is not correct that she can establish through a current re-examination of her prior medical records that she had a pre-existing ratable disability, or that the prior disability need not be labor-disabling. 'The question is whether it can be demonstrated by competent evidence that the pre-existing condition did interfere or would have interfered with any type of work activity.' [Omitted.] (*Ruiz v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 1182, 1186 (writ. den.).)

Ratable permanent disability causes impairment of earning capacity, impairment of the normal use of a body part, or a competitive disadvantage in the open labor market. (*State Comp. Ins. Fund v. Industrial Acc. Com.* (Hutchinson) (1963) 28 Cal. Comp. Cases 20.)

The Supreme Court in *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 477 noted "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 [2, 3]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability. . ."

Moreover, the preexisting disability "need not have interfered with the employee's ability to work at his employment in the particular field in which he was working at the time of the subsequent injury. [Citations]" (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238.) "The ability of the injured to carry on some type of gainful employment under work conditions congenial to the preexisting disability does not require a finding that the preexisting disability does not exist. [citations]" (*Ibid.*)

Applicant's left wrist injury in ADJ8049145 (CT to 2/17/10) resulted in 7% PD, per Dr. Edward Damore's PTP report, dated 7/1/11 (DEFT'S EX. D-4), which rates as follows:

16.04.02.00 - 5 - [4] 6 - 360G - 7 - 7% PD (left wrist)

Applicant's right wrist injury in ADJ10935541 (CT to 4/26/15) resulted in 10% PD, per Dr. Edward Damore's PTP report, dated 6/17/17 (DEFT'S EX. D-2), which rates as follows:

16.04.02.00 - 6 - [1.4] 8 - 360G - 9 - 10% PD (right wrist)

Pursuant to the reporting of Drs. Newman, Kirz, and Dreyfuss (Appl's Exhibits A-1: Michael Newman, D.C., 9/2/22; A-2: Joshua Kirz, Ph.D., 11/30/21; and, A-3: Bruce Dreyfuss, M.D., 10/17/22.), the applicant had additional pre-existing labor-disabling permanent disability for numerous conditions, as follows:

15.01.01.00 - 6 - [1.4] 8 - 360G - 9 - 10% PD (cervical spine)

15.03.01.00 - 6 - [1.4] 8 - 360G - 9 - 10% PD (lumbar spine)

16.02.01.00 - 5 - [1.4] 7 - 360G - 8 - 9% PD (right shoulder)

16.02.01.00 - 3 - [1.4] 4 - 360G - 5 - 5% (left shoulder)

16.06.05.01 - 3 - [1.4] 4 - 360F - 4 - 4% PD (right little finger)

16.03.01.00 - 1 - [1.4] 1 - 360G - 2 - 2% PD (right elbow)

16.03.01.00 - 1 - [1.4] 1 - 360G - 2 - 2% PD (left elbow)

$$10 + 10 + 9 + 5 + 4 + 2 + 2 = 42\%$$

14.01.00.00 - 11 - [1.4] 15 - 360E - 14 - 15% PD (psychiatric)

13.04.00.00 - 20 - [1.4] 28 - 360E - 26 - 28% PD (cognitive)

$$15 + 28 = 43\%$$

06.01.00.00 - 10 - [1.4] 14 - 360F - 14 - 15% PD (digestive)

04.03.02.00 - 8 - [1.4] 11 - 360G - 13 - 14% PD (varicose veins)

$$15 + 14\% = 29\%$$

$$\text{All combined: } 42 + 43 + 29 = 114\%$$

Per *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576 (en banc), "prior and subsequent permanent disabilities shall be added to the extent they do not overlap in order to determine the "combined permanent disability" specified in section 4751." Combining, by adding, all PD for the SII, two prior industrial injuries, and pre-existing non-industrial conditions results in $86\% + 114\% = 200\%$. Thus, applicant is entitled to the maximum allowed – 100% PTD at his TD rate for life.

IV

RECOMMENDATION

For the foregoing reasons, it is recommended that Defendant's Petition for Reconsideration be denied.

ROISILIN RILEY

Workers' Compensation Judge

Served 11/12/2024