

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

**PEARL LOHMANN, *Applicant***

**vs.**

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

**Adjudication Number: ADJ6760522  
San Jose 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.<sup>1</sup>

SIBTF seeks reconsideration of the January 29, 2021 SIBTF Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant has met the threshold requirements of Labor Code,<sup>2</sup> section 4751; specifically, that applicant has pre-existing labor disabling disability in the form of hypertension, irritable bowel syndrome, and psychiatric conditions, totaling 40% pre-existing permanent disability (Finding no. 6), and that applicant has subsequent orthopedic and psychiatric injuries totaling 139% permanent disability (Finding no. 9).

SIBTF contends that an applicant who sustains permanent total disability in a subsequent injury is not eligible for SIBTF benefits and that a SIBTF award would amount to a double recovery for applicant's subsequent injury.

We received an answer from applicant Pearl Lohmann, which was later withdrawn by a letter dated January 31, 2022. 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 contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we affirm the

---

<sup>1</sup> Commissioner Lowe, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

<sup>2</sup> All subsequent statutory references are to the Labor Code unless otherwise indicated.

January 29, 2021 SIBTF Findings and Award, except that we amend it to find that applicant is not eligible for SIBTF benefits.

## FACTS

As the WCJ stated in her Report:

Applicant was a medical records clerk and sustained an industrial injury on 06/05/2008. Prior to the industrial injury, she had pre-existing medical conditions which were labor disabling including hypertension, irritable bowel syndrome, and a psychiatric disability.

The subsequent industrial injury was to the cervical, thoracic and lumbar spines, right upper extremity, left upper extremity, and to the psyche. The parties in the industrial injury utilized Steven Feinberg, M.D., as an Agreed Medical Examiner. The parties entered into a Compromise and Release to resolve the subsequent industrial injury.

Applicant then sought benefits from SIBTF, and rather than rely on AME Feinberg, Applicant further developed the medical evidence and utilized reporting from Michael Newman, D.C., Joshua Kirz, PhD., and Bruce Dreyfuss, M.D. Based on this additional reporting Applicant established that she had significant disability resulting from the industrial injury, in an amount greater than what had been established in the underlying industrial claim.

This Judge determined that the subsequent injury resulted in permanent disability of 115% before adjustment for age and occupation, due to the application of *Kite* and *Todd*. (Report, p. 2.)

## DISCUSSION

### II.

The issue here is whether applicant is entitled to SIBTF benefits when the subsequent injury results in 100% permanent disability.

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. (§ 4751; emphasis added.)

In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35], we stated that in order to be entitled to SIBTF benefits, 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 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; emphasis added.)

The purpose of the SIBTF is to encourage the employability of disabled persons by providing state funded benefits to workers with preexisting permanent disabilities who sustain subsequent industrial injuries resulting in additional permanent disability. (*Escobedo v. Marshalls, CNA Ins. Co.* (2005) 70 Cal.Comp.Cases 604, 619 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc); *Ferguson v. Industrial Acci. Com.* (1958) 50 Cal.2d 469, 475.) The SIBTF statute was meant to assuage employers' fears that they would be stuck with paying for an employee's entire disability when the employment only caused a part of it. (*Subsequent Injuries Fund v. Industrial Acci. Com. (Patterson)* (1952) 39 Cal.2d 83, 85-86 [17 Cal.Comp.Cases 142])

However, SIBTF benefits are not meant to displace an employer's liability. When an injured worker's subsequent injury results in 100% permanent disability, there is no need for SIBTF benefits to fill in the gap between an injured worker's entire permanent disability and the percentage of disability caused by the employment. Indeed, section 4751 explicitly provides that the subsequent additional permanent disability be partial. (§ 4751.)

"It is possible for a previously injured worker to be permanently totally disabled by successive injuries and still receive SIBTF benefits. However, it is not possible for a previously injured worker who suffers a subsequent injury that in and of itself results in total permanent disability to receive a SIBTF award. Instead, the total disability is the responsibility of the subsequent employer." (*Novin v. Ramada Inn Hotel* (ADJ2255931, February 16, 2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 141, citing the WCJ's Opinion on Decision.)<sup>3</sup>

The WCJ cites to *Subsequent Injuries Fund of California v. Workmens Compensation Appeals Bd. of California (Holmes)* (1974) 39 Cal.Comp.Cases 819 [1974 Cal. Wrk. Comp. LEXIS 2377] for the proposition that a subsequent injury resulting in 100% permanent disability does not preclude SIBTF liability. But *Holmes* made no such holding. In *Holmes*, SIBTF sought a writ of review from the Court of Appeal arguing that there was no basis for an award against it where the subsequent psychiatric disability entitled the injured worker to 100% permanent disability. The Court of Appeal issued a writ denied but made no holding and no opinion on the matter. Furthermore, the facts in *Holmes* were not clear as it appears that none of the medical providers there opined that applicant's subsequent injury resulted in 100% permanent disability.

Accordingly, we affirm the January 29, 2021 SIBTF Findings and Award, except that we amend it to find that applicant is not eligible for SIBTF benefits.

---

<sup>3</sup> Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].) A California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 (Appeals Board en banc).) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the January 29, 2021 SIBTF Findings and Award is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

### **FINDINGS OF FACT**

1. Applicant, Pearl Lohmann [] while employed on 06/05/2008, as a medical records clerk, occupational group number 211, in San Jose, California, by San Jose Medical Group, sustained an injury arising out of and arising in the course of employment to the cervical, thoracic and lumbar spines, bilateral upper extremities and psyche;

2. The case-in-chief resolved by Compromise and Release on 08/11/2016, in an amount of \$275,000.00;

3. The subsequent industrial injury of 06/05/2008 resulted in orthopedic permanent disability pursuant to the opinions of Dr. Newman, as follows:

a. cervical spine at DRE II with 8% WPI which rates:

15.01 – 08[05]10 – 211D – 08 – 10%

b. thoracic spine at DRE II with 5% WPI which rates:

15.02 – 05[05]06 – 211D – 05 – 06%

c. lumbar spine at DRE III with 13% WPI which rates:

15.03 – 13[05]17 – 211D – 14 – 17%

d. right upper extremity at 41% UE which converts to 25% WPI and rates:

16.01 – 25[05]32 – 211G – 35 – 41%

e. left upper extremity at 33% UE which converts to 20% WPI and rates:

16.01 – 20[05]25 – 211G – 28 – 33%

4. The subsequent industrial injury of 06/05/2008 resulted in psychiatric permanent disability based on the opinions of Dr. Kirz, with a GAF score of 50 which results in a 30% WPI, with 60% attributed to the industrial injury, which rates as follows:

$60\%(14.01 - 30[08]42 - 211H - 48 - 54) = 32\%$

5. Pursuant to the opinions of Dr. Newman, the subsequent industrial orthopedic

disability should be added together due to no overlap, which results in orthopedic disability of 107%, and then the psychiatric disability of 32% should be added pursuant to the opinion of Dr. Kirz, for an overall subsequent injury permanent disability of 139% after adjustment for age and occupation;

6. The subsequent industrial injury, when taken alone, including the DFEC modifier, but before age and occupation rates as follows:

- a. cervical:  $15.01 - 08[05]10\%$ ;
- b. thoracic:  $15.02 - 05[05]06\%$ ;
- c. lumbar:  $15.03 - 13[05]17\%$ ;
- d. right upper extremity:  $16.01 - 25[05]32\%$
- e. left upper extremity:  $16.01 - 20[05]25\%$
- f. psychiatric:  $14.01 - 30[08]42\% \times 60\% = 25\%$

and when taken together equal 35% or more of total – equaling 115%;

7. Applicant is therefore not entitled to benefits under Labor Code section 4751;

**AWARD**

There is no award at this time.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

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

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



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

**May 9, 2025**

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

**PEARL LOHMANN  
BORAH & SHAFFER  
OD LEGAL**

**LSM/pm**

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