WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RAY FRANCISCO, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

Adjudication Number: ADJ11811846
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued on October 22, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a splicing technician on August 15, 2018, applicant sustained injury to his back and, on May 6, 2022, settled this and three other claims against his employer; and (2) applicant's August 15, 2018 injury does not meet the threshold requirements for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits.

The WCJ ordered that the application for SIBTF benefits be denied.

Applicant argues that the WCJ erroneously (1) considered apportionment in determining the level of permanent disability resulting from subsequent injury; and (2) failed to find that he had pre-existing disabilities affecting his bilateral lower extremities and that the subsequent injury affected the opposite and corresponding extremities, with subsequent permanent disability equaling 5% or more of the total disability.[1]

We received an Answer from defendant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration and,

[1] Applicant contends in the alternative that the permanent disability resulting from subsequent injury equals 35% or more even after consideration of apportionment. As we will explain, applicant's alternative contention is rendered moot by our evaluation of his principal contentions.

as our Decision After Reconsideration, we will rescind the F&O and substitute findings that (1) applicant's subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation or age; (2) applicant had pre-existing disabilities affecting his bilateral lower extremities, and the subsequent injury affected the opposite and corresponding extremities, with the subsequent permanent disability equaling 5% or more of the total disability when considered alone and without regard to occupation or age; and (3) the issues of whether the combined pre-existing and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone, and whether the combined pre-existing and subsequent permanent partial disability is equal to 70% or more, are deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On September 10, 2024, the matter proceeded to trial on the following issues:

1. [T]he threshold issue is whether the subsequent injury meets the threshold eligibility requirements of Labor Code section 4751. The applicant asserts that he is entitled to 100 percent permanent total disability overall, due to his level of disability for all injuries.

2. Parts of body injured: The back, psych, insomnia, GERD, loss of consciousness, bilateral knees, bilateral wrists, right ankle, head, and vision.

3. Permanent disability and apportionment.
(Minutes of Hearing and Summary of Evidence, September 10, 2024, pp. 2:33-43.)

The parties stipulated that while employed as a splicing technician on August 15, 2018, applicant sustained injury to the back and claims to have sustained injury to the psyche, bilateral knees, bilateral wrists, right ankle, head, prostate, and in the form of insomnia, GERD, vision loss and loss of consciousness. (*Id.*, p. 2:8-14.)

The WCJ admitted exhibits entitled QME Report by Edward Cremata dated October 6, 2020, and Report of Debra Welshons-Cline dated May 4, 2022, into evidence. (*Id*., pp. 3:35-4:28.)

The QME Report by Edward Cremata states:

CURRENT SYMPTOMS

. . .

LOW BACK PAIN WITH ASSOCIATED BILATERAL THIGH DYSESTHESIAS RIGHT WORSE THAN LEFT

. . .

He reports that he no longer needs a cane or a brace to walk, showing improvement since I last saw him. He can now walk approximately 30 minutes, but this still causes him symptoms of a 4/10 to 5/10 magnitude.
(Ex. 6, QME Report by Edward Cremata, October 6, 2020, p. 4.)

PAST MEDICAL HISTORY
. . .
He continues with low back and lower extremity symptoms from the effect of the August 15, 2018 industrial injury.
(*Id*., pp. 7-8.)

October 12, 2018 -- The patient saw Dr. Liu. . . . He states that he has had chronic low back pain since his original injury in 1990s and was told at that time by Dr. Rovner that he could either have surgery or live with his pain. He chose the conservative route and has been managing his symptoms, mostly with chiropractic care with some relief.

On August 13, 2018 while working as a maintenance splicer for AT&T, he reached for something and developed acute or chronic low back pain radiating down the right lower extremity posteriorly to the thigh and posterior knee mostly and sometimes into the proximal calf. These symptoms are associated with numbness, tingling and weakness in the bilateral lower extremities. Symptoms are worse at night.
(*Id*., p. 9.)

November 6, 2018 – . . . He continued with low back pain radiating down the right lower extremity posteriorly to the thigh and posterior knee mostly and sometimes into the proximal calf with numbness and tingling, mostly of the lateral right foot, and with weakness into the right lower extremity. He also had some new left lower extremity symptoms recently, but still more right than left.
(*Id*., p. 10.)

December 19, 2018 – Dr. Rovner saw the patient in consultation noting both 1990 and 2018 industrial injury. He reported that the patient had an injury to his lower back at work in 1990 from which he recovered following surgery. He was able to return to work and during the usual work activities, his lower back and leg symptoms flared up in August of this year. He has not been able to return to work since symptoms began on August 13, 2018.
(*Id.*, p. 11.)

DIAGNOSES
1. Fusion of spine, lumbar region (M43.26).
2. Radiculopathy, lumbar region (M54.16)
. . .

This injury arose out of the patient's employment and occurred during the course of his employment. He has required total temporary disability and medical treatment. Therefore, it is industrially related.
. . .
APPORTIONMENT TO CAUSATION OF PERMANENT DISABILITY BY PERCENTAGE
. . .
1. Percent causation of orthopedic disability from this industrial injury: 82%
Prior to this patient's August 15, 2018 injury, he sustained in 1990 injury to his low back while lifting a spooled cable into a truck. He required medical treatment. He reports that he required total temporary disability for approximately two months and was then sent back to modified work. He eventually continued to heal and was sent back to full duty without restrictions.

This level of impairment from the prior injury is described by the lumbar DRE II Category within the AMA Guides 5th Edition as a WPI 5% impairment. The patient required treatment to appropriately manage his condition for many years after that 1990 injury but did not have significant ADL losses during that time period until this August 15, 2018 injury. This is why the lower end of the DRE II Category was considered to describe the amount of impairment that he had prior to the August 15, 2018 injury. He was able to work without restrictions for many years following the 1990 low back injury.

Therefore, since the WPI 5% pre-existing impairment constitutes 18% of his total WPI 28% impairment from today's rating, the amount of the disability represented by a WPI 28% impairment caused from the effects of the industrial injury is 82%.
. . .
5. Percent causation from prior disability awards, asymptomatic prior conditions, or retroactive prophylactic work preclusions: 18%

The patient has had a 1990 industrial injury and had a level of impairment/disability consistent with a WPI 5% impairment. Therefore, since the WPI 5% impairment represents 18% of the patient's total WPI 28% impairment, this 18% is the amount if impairment/disability due to pre-existing factors. The remainder of the impairment/disability, represented by a WPI 23% impairment is due to the effects of the industrial injury and represents 82% of the impairment/disability present now and caused by the effects of the August 15, 2018 industrial injury.
(*Id*., pp. 18-19.)

ANALYSES OF MR. FRANCISCO IMPAIRMENT
I provided an impairment rating for this patient as follows:

1. Lumbar spine, WPI 28%.

This patient's WPI 28% derived strictly from the AMA Guides 5th Edition is an accurate impairment. No additional pain impairment is necessary and no rating by

analogy is necessary in this case. Overall, this WPI 28% impairment represents an approximate 31% of his lumbar function which is accurate based on his ADLs.
(*Id*., p. 21.)

The Report of Debra Welshons-Cline dated May 4, 2022 states:

3. Did the worker have a pre-existing labor disabling permanent disability?
Yes
4. Did the pre-existing disability affect an upper or lower extremity or eye?
Yes
5. Did the industrial permanent disability affect the opposite and corresponding body part?
Yes
6. Did the opposite and corresponding body part rate to 5% permanent disability or more?
Yes
7. Is the total disability equal to or greater than 70% after modification?
Deferred
8. 100% disabled or unemployable from a combination of the pre-existing disability and work injury?
Deferred
9. 100% disabled from industrial injury?
No
(Ex. 5, Report of Debra Welshons-Cline, May 4, 2022, pp 3-4.)

Low back pain and stiffness with bilateral leg pain, numbness and tingling, worse on the right:

Mr. Francisco reports pre-existing constant pain and stiffness of the lower back with pain, numbness and tingling traversing to the right lower extremity to the foot. He characterizes his/her pain as a constant dull ache, rating his pain on the above-noted scale at 3, on a constant basis. He states his pain would readily increase to 6 upon prolonged sitting, standing, walking, repetitive or prolonged bending, as well as any heavy lifting greater than 25 pounds. Medications taken multiple times a day when exacerbated.
(*Id*., p. 13.)

Lumbar Spine Impairment

DRE Category II: Radiculopathy
Table 15-3, Page 384.

Description and Verification: Clinical history and examination findings are compatible with a specific injury; findings may include significant muscle guarding or spasm observed at the time of the examination, asymmetric loss of range of motion, or nonverifiable radicular complaints - defined as radicular pain without

objective findings, no alteration of the structural integrity of the spine, and no significant radiculopathy.

Impairment: 5% Whole Person
The applicant's pre-existing lumbar spine condition resulted in the above noted impairment rating, and was labor disabling.
(*Id*., p. 28.)

Impairments arising from pre-existing conditions

Headache	14%WPI
Cervical	8%WPI
Thoracic Spine	8% WPI
Lumbar Spine	5%WPI
Left Wrist	8%WPI
Right Wrist	19%WPI
Left Knee	2%WPI
Right Knee	7%WPI
Right Ankle	9%WPI

. . .
Impairments arising from subsequent industrial injury of August 15, 2018

Lumbar Spine	23%WPI

The 5% equal and opposite threshold has been met.
(*Id*., p. 33.)

At trial, applicant testified that he has instability of the right ankle, numbness and tingling in both legs, with the right leg worse than the left. These conditions became worse after his 2018 injury. (Minutes of Hearing and Summary of Evidence, September 10, 2024, p. 5:6-9.) His 1990 back injury symptoms included radiating pain to the left and right legs down to his feet, which never went away. (*Id*., p. 7:32-34.)

In the Report, the WCJ states:

Applicant Ray Francisco was a career employee with Pacific Bell Telephone Company. His last position was splicing technician and on 08-15-2018, Applicant sustained an injury to his back.
. . .
Applicant, a credible historian, had a physically arduous job working for Pacific Bell. He described typical job duties as range from customer conversation to opening up a 400-pound manhole lid, climbing down the hole, pumping it out, moving heavy cables, moving heavy roadside utility boxes, going up into a boom, and cutting tree branches in order to fix everything that was broken with utility

equipment. (MOH/SOE at 6, lines 24-35.) He was employed in this capacity for 36 years. (Id.)

At trial, Applicant recalled the injury of 08-15-2018. He was working on ground on his knees on buried wires at a customer home, and when he was picking his tools up, his back went out. (MOH/SOE at p.7, lines 4-10.) He felt a pop and it was like a knife in his low back. (Id.) This was his last day of work. He had a back fusion as the result of the injury and has had internal issues as the result of the injury.

Before the subsequent injury, on 07-23-1990, Applicant suffered an injury to his back when he was lifting a heavy spool of cable into the back of a vehicle. (MOH/SOE at 5, lines 10-27.)

. . .

Dr. Cremata provides ratings for both the 1990 and 08-15-2018 injury in his second report. The QME states that "today's rating" for the lumbar spine is 28% WPI. (Ex. 6 at 19.) Out of the 28% WPI, Dr. Cremata determines that Applicant's preexisting 1990 injury rates 5% WPI under DRE II of the *AMA Guides 5th Edition*. He assigns 5% WPI as the "lower end of the DRE II Category" because Applicant was able to work without restrictions for many years following the 1990 industrial low back injury. (Ex. 6 at 18.) The QME explains that 5% WPI is subtracted from the overall rating of 28% WPI:

"The patient has had a 1990 industrial injury and had a level of impairment/disability consistent with a WPI 5% impairment. Therefore, since the WPI 5% impairment represents 18% of the patient's total WPI 28% impairment, this 18% is the amount if impairment/disability due to pre-existing factors. The remainder of the impairment/disability, represented by a WPI 23% impairment is due to the effects of the industrial injury and represents 82% of the impairment/disability present now and caused by the effects of the August 15, 2018 industrial injury."

. . .

When adjusted for the standard FEC for this date of injury, the rating for the subsequent injury is 23% WPI and when adjusted for FEC, the rating is 23(1.4) = 32% permanent disability.

The injury of 08-15-2018 was a denied injury by the employer. An Application for Adjudication was filed on 01-02-2019 alleging injury on 08-15-2018 to the back, hand, knee, nervous system, and multiple body parts. Applicant settled his 08-15-2018 injury against the employer Pacific Bell Telephone by Compromise and Release for $250,000, approved by Order Approving Compromise and Release on 05-06-2022. (EAMS Document ID Nos. 41374380 and 74585261.) That settlement included the 08-15-2018 injury (case number ADJ11811846), a cumulative injury to the upper extremities for the date ending 08-15-2018(case number 14659193), a specific injury to the back and neck dated 06-15-1990 (case number ADJ1810736) and another specific injury to the neck and back dated 07-23-1990 (case number

ADJ3317335). Because the parties settled with the employer and it's carrier, there are no findings of fact associated with the subsequent injury of 08-15-2018.
. . .
The subsequent injury in this case is the injury of 08-15-2018. To be eligible for SIBTF benefits under the Labor Code, the subsequent injury alone must meet the threshold of a 35% permanent disability rating or there must be at least five percent permanent disability to an "opposite and corresponding" body part for which there was prior disability.
. . .
The Bookout court disallowed apportionment for a prior heart condition to a back injury. Here, applicant suffered injury to the same body part twice which can only be defined as two separate industrial injuries. . . .

Based on Dr. Cremata, Applicant does not meet the 35% threshold for a subsequent industrial benefits eligibility.
(Report, pp. 2-7.)

DISCUSSION
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 December 2, 2024, and 60 days from the date of transmission is January 31, 2025. This decision is issued by or on January 31, 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 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 December 2, 2024, and the case was transmitted to the Appeals Board on December 2, 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 December 2, 2024.

II.

Applicant first contends that the WCJ erroneously considered apportionment in determining the level of permanent disability resulting from subsequent injury, arguing that *Bookout v. Workmen's Comp. Appeals Bd. (*1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595] and its progeny exclude apportionment from the permanent disability calculation.

Preliminarily, we observe that all decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [262 Cal. Rptr. 537, 54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].)

To constitute substantial evidence "… a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." *(Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [93 Cal. Rptr. 15, 480 P.2d 967, 36 Cal.Comp.Cases 93, 97].)

Here, the reporting of Drs. Cremata and Welshons-Cline is framed in terms of reasonable medical probability, pertinent facts, adequate examinations, and review of the medical record and the history provided by applicant, whom the WCJ found credible. (Report, p. 3.) We give this credibility determination great weight because the WCJ had the opportunity to observe the witness's demeanor while testifying. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]; *Sheffield Medical Group v. Workers' Comp. Appeals Bd*. (*Perez*) (1999) 70 Cal.App.4th 868 [64 Cal.Comp.Cases 358].) Accordingly, we conclude that the reporting of Drs. Cremata and Welshons-Cline constitutes substantial medical evidence.

Turning to the question of whether *Bookout* and its progeny exclude apportionment from the calculation of permanent disability for the purpose of determining the threshold requirements for SIBTF benefits, we observe that Labor Code 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.
> (Lab. Code § 4751.)

In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), we stated that an employee must prove the following elements to recover subsequent injuries fund benefits:

> (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 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. ([Lab. Code] § 4751.)
> (*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 (Appeals Board en banc).)

In *Bookout*, the applicant was employed as an oil refinery operator and sustained a compensable injury to his back, which was rated at 65 percent permanent disability. (*Bookout*, *supra*, 62 Cal.App.3d at pp. 219–220.) The back disability included a limitation to semi-sedentary work. (*Id.*, p. 219.) Prior to his industrial injury, the applicant had a nonindustrial heart condition. (*Id*.) The heart condition contained two work preclusions: preclusion of heavy work activity and preclusion from excessive emotional stress. (*Id*., pp. 220–221.) The preclusion of heavy work activity was rated at 34.5 percent permanent disability. (*Id*., p. 220.) The preclusion from excessive emotional stress was rated at 12 percent permanent disability. (*Id*., 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 percent permanent disability from the 65 percent unapportioned permanent back disability and awarded applicant permanent disability of 30.5 percent for the industrial back injury. (*Id.*, pp. 219–221.) The referee then found that the applicant was not eligible for SIBTF benefits based on the finding of 30.5 percent after apportionment, which was less than the requisite minimum of 35 percent for a subsequent disability under Labor Code section 4751(b). (*Id*., p. 221.) The Appeals Board affirmed both the 30.5 percent permanent disability award for the industrial back injury and the finding that applicant was not eligible for SIBTF benefits. (*Id*., pp. 218–219.)

The Court of Appeal concluded that the Appeals Board had properly determined applicant's permanent disability rating of 30.5 percent 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 Labor Code section 4750 and *State Compensation Ins. Fund v. Industrial Acci. Com*. (*Hutchinson*) (1963) 59 Cal.2d 45, 48–49 (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 [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.)

However, the Court of Appeal held that applicant was erroneously denied SIBTF benefits under Labor Code section 4751(b). (*Bookout*, *supra*, 62 Cal.App. 3d at p. 228.) It explained that the referee incorrectly instructed the rating specialist to apportion 34.5 percent for the pre-existing nonindustrial heart disability (based on a standard rating of 30 percent) from the total subsequent injury disability of 65 percent (based on a standard rating of 60 percent), 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 Labor Code section 4751(b). (*Id*.; Lab. Code § 4751(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 percent threshold requirement under the statute was the standard rating of 60 percent. (*Bookout*, *supra*, 62 Cal.App.3d at p. 228; Lab. Code § 4751(b).)

Hence, *Bookout* excludes apportionment from the determination of whether applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone.

More recently, in *Hagen v. Workers' Compensation Appeals Board* (*Anguiano*) (2024) 89 Cal.Comp.Cases 702 (writ den.), an Appeals Board panel affirmed its prior decision that the applicant met the 35 percent threshold requirement based upon on *Bookout's* holding that the calculation of permanent disability attributable to the applicant's subsequent injury for the purpose of meeting the threshold excludes apportionment—and the Court of Appeal denied the defendant's petition for writ of review thereon.

In the case before us, QME Dr. Cremata reported that applicant's permanent disability resulting from subsequent injury to the lumbar spine is 28%, that applicant had pre-existing permanent disability of the lumbar spine of 5% resulting from a 1990 industrial injury, and that the 5% disability should be subtracted from the 28% disability as apportionment. (Ex. 6, QME Report by Edward Cremata, October 6, 2020, pp. 18-19.)

The WCJ accepted Dr. Cremata's use of apportionment to calculate the level of permanent disability resulting from subsequent injury to the lumbar spine on the grounds that the subsequent injury was "to the same body part" that had been previously industrially injured. (Report, p. 7.) The WCJ then found that applicant's disability is 32%, or less than the 35% threshold, by multiplying the 1.4 adjustment factor for diminished earnings capacity by the 23% disability found after apportionment.

But we are unaware of any authority for the proposition that the calculation of permanent disability resulting from subsequent injury must include apportionment if the pre-existing disability resulted from industrial injury to the same body part later afflicted by subsequent injury.

To the contrary, we read *Bookout* to exclude apportionment from the calculation of permanent disability resulting from subsequent injury under all circumstances because it requires that the calculation be made with respect to the subsequent injury "standing alone." (See *Bookout*, *supra*, at pp. 228-229.)

Thus, the WCJ should have calculated permanent disability resulting from subsequent injury to the lumbar spine based upon the 28% whole person impairment (WPI) reported by Dr. Cremata multiplied by the 1.4 adjustment factor to conclude that disability is 39%. (Report, p. 7.)

Accordingly, we will substitute a finding that applicant's subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation or age.

Applicant also contends that the WCJ erroneously failed to find that he had pre-existing disabilities affecting his bilateral lower extremities and that the subsequent injury affected the opposite and corresponding extremities, with the subsequent permanent disability equaling 5% or more.

Here, the record includes unrebutted evidence that (1) applicant had pre-existing disability in the form of constant pain and stiffness of the lower back with pain, numbness and tingling of the bilateral lower extremities; (2) the subsequent injury affected the opposite and corresponding extremities; and (3) the subsequent permanent disability equals 5% or more of the total disability, when considered alone and without regard to occupation or age. (Ex. Ex. 6, QME Report by Edward Cremata, October 6, 2020, pp. 4,7-11, 21; Ex. 5, Report of Debra Welshons-Cline, May 4, 2022, pp 3-4.)

Accordingly, we will substitute a finding that applicant had pre-existing disabilities affecting his bilateral lower extremities and that the subsequent injury affected the opposite and corresponding extremities, with the subsequent permanent disability equaling 5% or more.

Having determined that applicant meets the Labor Code section 4751 thresholds for SIBTF benefits under subsections (a) and (b), we recognize that the record requires development as to the remaining requirements for such benefits, i.e., whether the combined pre-existing and subsequent disability is greater than the subsequent disability alone, and whether the combined pre-existing and subsequent disability is equal to 70% or more. (See *Todd*, *supra*.)

Accordingly, we will substitute a finding that defers those issues. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd*. (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924] (stating the Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process).)

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that (1) applicant's subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation

or age; (2) applicant had pre-existing disabilities affecting his bilateral lower extremities, and the subsequent injury affected the opposite and corresponding extremities, with the subsequent permanent disability equaling 5% or more of the total disability when considered alone and without regard to occupation or age; and (3) the issues of whether the combined pre-existing and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone, and whether the combined pre-existing and subsequent permanent partial disability is equal to 70% or more, are deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued on October 22, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Findings and Order issued on October 22, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Ray Francisco, born on _____, while employed on August 15, 2018, as a splicing technician at Hayward, California, by Pacific Bell Telephone Company, adjusted by Sedgwick, sustained injury arising out of and occurring in the course of employment to his back. This case was settled by Compromise and Release approved on May 6, 2022, and the settlement included three other cases applicant sustained while working for the employer.

2. Applicant's subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation or age.

3. Applicant had pre-existing disabilities affecting his bilateral lower extremities, and the subsequent injury affected the opposite and corresponding extremities, with the subsequent permanent disability equaling 5% or more of the total disability when considered alone and without regard to occupation or age.

4. The issues of whether the combined pre-existing and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone, and whether the combined pre-existing and subsequent permanent partial disability is equal to 70% or more, are deferred.

5. All other issues are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 30, 2025

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

RAY FRANCISCO
BRIDGES LAW FIRM
OFFICE OF THE DIRECTOR – LEGAL UNIT
SUBSEQUENT INJURIES BENEFITS TRUST FUND

SRO/*cs*

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