

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

PATRICK GALLANT, *Applicant*

vs.

**SUBSEQUENT INJURIES BENEFITS TRUST FUND; SANTA ANITA RACETRACK,
*Defendants***

**Adjudication Number: ADJ7845779
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in this matter to further study the factual and legal issues.¹ This is our Opinion and Decision After Reconsideration.

Defendant, the Director of Industrial Relations, as Administrator of the Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the Findings and Award (F&A) issued on August 3, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed by Santa Anita Racetrack during the period of January 1, 2001 through June 4, 2010 as a steward/carpenter, applicant sustained injury arising out of and in the course of employment (AOE/COE) to the low back, bilateral upper extremities, psyche, upper digestive tract, and in the form of sleep, hypertension, and diabetes; (2) applicant's earnings at the time of injury were sufficient to produce a temporary disability rate of \$746.60 per week; (3) applicant timely filed a petition for SIBTF benefits; (4) applicant's industrial injury herein was a subsequent compensable injury to that pled and resolved in ADJ7845779 pursuant to Labor Code section 4751;² (5) applicant was permanently partially disabled prior to the subsequent injury herein pursuant to section 4751; (6) applicant's subsequent injury herein, when considered alone and without regard to or adjustment for the occupation or age, was 86%, which is equal to 35 percent or more of total disability pursuant to section 4751; (7) the combination of both the prior disability

¹ Commissioner Sweeney no longer serves on the Workers' Compensation Appeals Board. Deputy Commissioner Sussman has been substituted in her place.

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

and the subsequent industrial injury's disability herein is greater than that which would have resulted from the subsequent industrial injury alone under section 4751; (8) the combined effect of the subsequent injury herein, and the previous disability or impairment is a permanent disability equal to 70 percent or more of total pursuant to section 4751; (9) SIBTF is entitled to credit pursuant to section 4753 credit for payments made, or to be made, by Santa Anita RaceTrack, insured by Liberty Mutual, relating to the awards in the prior injury claim (ADJ6860483) and in the subsequent injury claim herein; (10) the combined disability of the injury herein and the prior disability, results in permanent disability of 100 percent payable at the temporary disability indemnity rate of \$746.60 per week, commencing on February 1, 2014, for life, subject to section 4659(c) SAWW COLA adjustments, less credit for any amounts paid heretofore by SIBTF, and (a) less credit for amounts paid heretofore, or in the future, by Santa Anita RaceTrack, insured by Liberty Mutual, pursuant to the prior Award of 63% permanent disability payable commencing on November 15, 2011 at the rate of \$230.00 and thereafter \$264.50 per week, in the total amount of \$98,957.91, and, (b) less credit for amounts paid heretofore, or in the future, by Santa Anita RaceTrack, insured by Liberty Mutual pursuant to the prior Compromise and Award, in the total sum of for a total amount of \$213,667.50 (86%), subsuming the prior award and less reasonable attorney's fees; (11) jurisdiction is reserved over any outstanding medical-legal lien claims with the parties to attempt informal resolution of the same, or to be determined in supplemental proceedings upon the filing of a Declaration of Readiness to Proceed (DOR); and (12) applicant's attorney has performed reasonable services relating to applicant's award of SIBTF benefits, payable to the Law Offices of Sparagna & Sparagna, of 15% of applicant's net biweekly indemnity payments awarded herein, with "net biweekly indemnity payments" being defined as the total biweekly indemnity benefit awarded herein (permanent disability and/or life pension), less credit for payments made, or to be made in the future, by Santa Anita RaceTrack, insured by Liberty Mutual, pursuant to the prior Award and Compromise and Release in the underlying claim herein.

The WCJ issued an award in favor of applicant and against Santa Anita RaceTrack of permanent disability indemnity, reimbursement of medical-legal costs, and attorney's fees in accordance with these findings, and ordered State Compensation Insurance Fund to pay the award out of funds appropriated for such purposes in accordance with section 4754.

Defendant contends that the record fails to establish that applicant had preexisting labor-disabling permanent disability resulting from injury to the psyche, upper digestive tract, and in the

form of hypertension and diabetes. Defendant further contends that the WCJ failed to rate applicant's preexisting permanent disability and to award a credit for permanent disability indemnity received or to be received by applicant from his employer.

We received an Answer.

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 set forth below, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that applicant's permanent disability of 100% is payable commencing November 15, 2011, and to correct a clerical error in the award to identify defendant SIBTF as the party against whom it is made; and we will order that the AME Report of John Stalberg, M.D. dated February 8, 2012 be designated as Joint Exhibit 18 and admitted in evidence.

FACTUAL BACKGROUND

Applicant, while employed by Santa Anita RaceTrack during the period of January 1, 2001 through June 4, 2010 as a steward/carpenter, sustained injury AOE/COE to the low back, bilateral upper extremities, psyche, upper digestive tract, and in the form of sleep, hypertension, and diabetes. (*Id.*, p. 2:4-6.)

On January 13, 2014, a WCJ issued an Award approving the Stipulations with Request for Award executed by applicant and defendant Santa Anita RaceTrack, which stated that applicant sustained injury AOE/COE to the lumbar spine, bilateral knees, bilateral wrists and hands, right shoulder, hypertension, hiatal hernia, esophagitis and duodenitis, as well as psyche, resulting in permanent disability of 63%. The parties further stipulated that the settlement considered: (1) the Agreed Medical Evaluator (AME) reports for Andrew Roth, M.D. dated November 15, 2011, December 24, 2011, and March 5, 2012; (2) the reports and deposition testimony of AME Stanley Majcher, M.D. dated December 5, 2011, January 23, 2012, March 27, 2012, May 31, 2012, July 6, 2012 and his deposition testimony of November 2, 2012, and (3) the AME reports of John Stahlberg, M.D. dated February 8, 2012 and June 29, 2012. (Stipulations, July 1, 2013, p. 7, para. 9.)

On April 9, 2019, the parties submitted, and a WCJ approved, a Compromise and Release, resolving all issues with applicant and defendant Santa Anita RaceTrack with respect to his

continuous trauma injury. Per Addendum “B”, this C&R resolved applicant’s Petition to Reopen for New and Further disability filed on or about December 2, 2014. (C&R, April 8, 2019, p. 13, Addendum “B”, section A.) On April 17, 2019, applicant filed an Application for Subsequent Injuries Fund Benefits.

On August 26, 2021, the parties appeared at an MSC and the case was set for trial.

Thereafter, on May 17, 2022, the matter proceeded to trial against the SIBTF as to the following issues:

1. Attorney fees.
2. Other issues:
 - (a) SIBTF benefits pursuant to Labor Code Section 4751.
 - (b) SIBTF credit pursuant to Labor Code Section 4753.
 - (c) Applicant contends that the underlying industrial case is 86%.
 - (d) Applicant contends that if there is a finding of permanent total disability, that the retroactive date should commence on the date of the filing of the Petition to Reopen for New and Further, which was filed with the court on December 1, 2014.
 - (e) Defendant raises the statute of limitations for SIBTF cases, to which Applicant objected on the basis of lateness, violation of Labor Code Section 5502, and Labor Code Section 4753. Defendant responded that there is no prejudice to the Applicant and that Applicant's counsel was advised as of the last hearing date that the SIBTF was going to ask to amend the pre-trial conference statement.

(Minutes of Hearing, May 17, 2022, p. 2:12-24.)

At trial, the parties offered and the WCJ admitted into evidence medical reporting of AMEs Dr. Roth, Dr. Majcher, and Dr. Stahlberg, M.D., including several medical reports by the AMEs that were previously identified in the Stipulations with Request for Award which was approved on January 13, 2014, but had not been uploaded previously.

While we cannot locate in EAMS an earlier filed copy of the medical report authored by John Stalberg, M.D. dated February 8, 2012, and while such report was not offered as a joint report by the parties at the May 17, 2022 trial, it was filed on December 20, 2021 along with the other joint exhibits, and was discussed, cited, and relied upon by both petitioner and applicant.

The Report of the WCJ advises as follows:

Applicant’s CT claim, dated 1/1/2001 through 6/4/2010, settled via Stipulations with Request for an Award at 63% Permanent Disability (PD) to the “lumbar spine, bilateral knees, bilateral wrists and hands, right shoulder, hypertension, hiatal hernia, esophagitis and duodenitis, and psyche.” (Award and Stipulations with Request for Award dated January 13, 2014.)

On November 12, 2014 Applicant filed a Petition to Reopen for New and Further Disability. (Petition to Reopen dated November 12, 2014.) On April 9, 2019, Applicant resolved the Petition to Reopen via Compromise and Release for \$610,973. (Compromise and Release dated April 9, 2019; Order Approving Compromise and Release dated April 9, 2019.) The Compromise and Release resolved all issues, including Applicant's prior permanent disability award.

Pursuant to the above, a Petition to Re-open for New and Further Disability was filed on November 12, 2014. Further medical discovery was undertaken. AME Andrew Roth (orthopedic) issued his report on June 19, 2017 which includes his impairment ratings. (Joint Exhibit 1). In the Cross-Examination of AME John Stalberg (psych) dated 11/7/2018, Dr. Stalberg opined "the permanent disability had substantially increased. He gave the applicant a 40% Whole Person Impairment in psych and indicated that the apportionment had changed from 2/3 nonindustrial to 47% nonindustrial (Stalberg deposition 11/07/2018, page15 line 2) (Joint Exhibit 9). Pursuant to the Cross-Examination of AME Stanley Majcher (internal) dated 11/10/2017, Dr. Majcher confirms a 50% nonindustrial apportionment in his deposition (11/10/2017 page 6 and 7). After referring to the rating of the upper digestive impairment we see that he had a 23% and 6% upper digestive impairment which is attributable to pre-existing labor disabling disability. (Joint Exhibit 17).

...

The rating for the subsequent injury post-Petition to Re-open pursuant to applicant counsel:

Lumbar Spine 100 (15.03.01.00-8-[8]10-380H-13-13) 13%
Rt. Shoulder 100 (16.02.02.00-4-[7] 5-380H-7-7) 7%
Lt. Shoulder 100 (16.02.02.00-4-[7] 5-380H-7-7) 7%
Lt. Wrist 100 (16.01.02.02-6-[4] 7-380J-12-12) 12%
Rt. Wrist 100 (16.01.02.02-6-[4] 7-380J-12-12) 12%
Sleep 100 (13.03.00.00-15-[5] 20-3801-27-27) 27%
HPT 50 (04.01.00.00-49-[5] 62-380H-68-68) 34%
Psych 50 (14.01.00.00-40-[8]56-380F-62-62) 33%
UD 50 (06.01.00.00-35-[6] 46-380F-46-46) 23%
UD 50 (06.01.00.00-9-[6] 12-380F-12-12) 6%
Diabetes 50 (10.01.00.00-5-[2] 6-380F-6-6) 3 %

The CVC rating for the underlying industrial case is 86%. (Applicant's Trial Brief, 12/30/2021, p. 3).

Defendant alleges in their trial brief pursuant to the Cross Examination of AME John Stalberg, dated November 7, 2018, pp. 9-15, Joint. Exh. 9.) Application of the CVC, 34 c 27 c 23 c 23 c 13 c 12 c 12 c 7 c 7 c 3, results in a PD of 84% attributable solely to the subsequent industrial injury following the petition to reopen for new and further disability. (Defendant's Post-Trial Brief, dated June 6, 2022, p. 13)

...

Pursuant to the Cross-Examination of John Stalberg, dated November 7, 2018, Joint Exhibit 9):

Q. Okay. So it's Table 13.8. So you're giving him a Class 2 impairment of 20 percent; correct?

A. That's right.

Q. Okay. So now we know he has -- you believe he now has a 40 percent psychiatric whole person impairment; correct?

A. Yes, sir. (Id. p. 14)

Q. So it's now your belief with reasonable medical probability that, of that 40 percent WPI, there's a nonindustrial apportionment due to the issues which arose with the applicant's two prior employments before he was working for the Turf Club and the issues that arose with his family and his divorce and that, therefore, 53 percent of that 40 percent whole person impairment is due to the applicant's Turf Club employment regardless of whether it was eventually leading up to his termination or his industrial internal and orthopedic injuries; is that correct?

A. That's correct. (Id. p. 1)

Q. Well, how, when you -- how do you know that he had a preexisting disability?

A. Well, this man, I think, was suicidal, under psychiatric care. He was which makes individuals permanently intolerant of stress going forward, and it usually leaves them with some impairment. (Id. pgs. 16-17)

Q. Okay. So you would say, based on the fact that he had been previously suicidal, that it's medically probable that he had some form of labor-disabling disability, probably stress disabling, prior to his being hired at the Turf Club; is that correct?

A. That's right. (Id. p. 17)

Psych was rated as follows: 50 (14.01.00.00-40-[8]56-380F-62-62) 33%. The 33% impairment comes after 50% apportionment to disability, which logically also would be a 33% impairment. Adding this 33% impairment, which Dr. Stalberg opined would have been labor-disabling at the time of the subsequent injury, to either Applicant's or Defendant's calculation of the disability derived from the subsequent injury, arrives at over 100% disability if using the additive method.

Furthermore, AME Stalberg's report of 7/10/2018 reviews all of the Majcher reports and succinctly examines the various levels of disability and apportionment as follows. (Joint Exhibit 5):

He was issued reports since December 5, 2011. He was informed that the Applicant was awarded 63% permanent disability stipulation on January 13, 2014. There was impairment of the gastrointestinal problems with disability to 35% with 50-50 apportionment. The amount of impairment to the hypertensive cardiovascular disease was increased to 49% with 50-50 apportionment. He identified a new condition of diabetes. That was a 5% impairment. He said was the same apportionment, 50% industrial and 50% non-industrial.

In summary, as I understand it, 49% was to the hypertensive cardiovascular disease, 35% to the gastrointestinal disease and 5% to the diabetes. That would total 89%, of which 50% was apportioned to nonindustrial factors and 50% to industrial factors. (Id. p. 2).

I noted that Dr. Majcher later added sleep disorder with a 15% whole person impairment. Adding up Dr. Majcher's impairment, 49% cardiovascular, 35% digestive, 5% diabetic and 15% sleep would be 104% impairment, with about half of that work-related and half of that not work-related. (Id. p. 3).

I stated earlier regarding the Kite case that impairments need to be added and not combined as one injury to one bodily part does not lower the impairment of another bodily part. (Id. p. 5). (Emphasis added)

...

There is no question that no matter how the "combined disability" of applicant's prior injury and his subsequent injury(s)' disability are calculated the result will be in excess of 70%. The original case was stipulated for 63% permanent disability. After the Petition to Re-open the disability was either 84% or 86%. The only issue is the proper method to compute the combined disability.

Applicant contends that the prior disability of 86% or 84% should be added to the subsequent injury(s) disability of 33%, and actually much more if calculated adding the Majcher disability, and calculating this in regards to psyche only disability, would result in a total impairment in excess of 100%. Defendant contends that the two injuries should be combined utilizing the combined values charts to combine each individual factor of impairment, treating the impairments of the prior injury and the impairments of the subsequent injury herein as if all injuries/impairments were in essence components of the same single injury.

...

The 2005 rating schedule does not explicitly address the question of whether the Combined Values Chart (CVC), a table contained in both the 2005 rating schedule and the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides), is applicable to disabilities caused by multiple injuries, as distinct from a single injury.

The CVC is analogous to the Multiple Disabilities Table (MDT) contained in rating schedules in effect prior to January 1, 2005. There are two apparently conflicting appellate cases relevant to the issue of whether, when SIBTF liability is being

determined, the MDT should be applied in combining pre-existing disability with the disability caused by the subsequent industrial injury.

...

For reasons more specifically detailed below, the undersigned interprets Labor Code §4751 to require combining the disabilities/impairment of the prior injury with the subsequent injury(s) utilizing the combined values chart, unless there is clear and substantial medical, factual, or vocational evidence for not doing so.

...

[T]here is substantial medical evidence in the record by a physician concluding that applicant's combined impairment should be calculated by adding impairments, as noted by Dr. Stalberg in his 7/10/2018 report. "I stated earlier regarding the Kite case that impairments need to be added and not combined as one injury to one bodily part does not lower the impairment of another bodily part. To reiterate, this is all based on further reflection and analysis of this very very complex case with multiple injuries, multiple employers, injuries to at least three bodily parts, etc." Dr. Stalberg also recommended a Leboeuf evaluation. (Id. p. 5).

Based on the foregoing, the undersigned concludes that correct statutory interpretation of Labor Code §4751, that provides a seriously injured worker with substantial additional benefits in those cases where the worker has prior disability/impairment, requires "adding" the disabilities/impairment.

(Report, pp. 2-8.)

DISCUSSION

Initially, we note that the Appeals Board has the authority to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. As we observed in *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, fn. 7 [2006 Cal. Wrk. Comp. LEXIS 35, 51–17] (Appeals Board en banc), section 5906 provides that "[u]pon the filing of a petition for reconsideration ... the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge. ..." (§ 5906.) Similarly, section 5908 provides that "[a]fter ... a consideration of all the facts the appeals board may affirm, rescind, alter, or amend the original order, decision, or award." (§ 5908.) Thus, it is settled law that a grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*Pasquotto, supra*, citing *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

Accordingly, upon the grant of reconsideration we may exercise our authority to "affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge," in furtherance of our obligation to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (§ 5906; Cal. Const., art. XIV, § 4.)

In *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550 [2014 Cal. Wrk. Comp. LEXIS 69] (Appeals Bd. en banc), we held that when an applicant who is receiving permanent partial disability payments pursuant to section 4650(b)(1) becomes permanent and stationary and is determined to be permanently totally disabled, the defendant must pay permanent total disability benefits retroactive to the commencement date of its obligation to pay permanent disability benefits. The reasoning of *Brower* was subsequently adopted by the Sixth District Court of Appeal in *Baker v. Workers' Comp. Appeals Bd. (Guerrero)* (2017) 13 Cal.App.5th 1040 [82 Cal.Comp.Cases 825], which held that SIBTF benefits also commence when an applicant first becomes entitled to receive permanent disability benefits.

In the present case, the WCJ found that applicant's combined disability caused permanent disability of 100%, with benefits commencing on February 1, 2014, less various credits for amounts paid, including payments made by Santa Anita RaceTrack, insured by Liberty Mutual, on the prior award of 63% permanent disability benefits payable commencing on November 15, 2011. (F&A, Findings of Fact No 10.)

However, since *Brower* and *Guerrero* hold that a permanently totally disabled applicant is entitled to total disability permanent disability benefits retroactive to the commencement date of permanent disability benefits, and since applicant's entitlement to permanent disability benefits on his 63% permanent disability award commenced on November 15, 2011, applicant is entitled to receive the permanent disability benefits awarded in the F&A retroactive to that date.

Accordingly, we will amend the F&A to find that the commencement date of applicant's permanent disability benefits herein is November 15, 2011.

Defendant first contends that the record fails to establish that applicant had preexisting labor-disabling permanent disability resulting from injury to the psyche. Specifically, defendant argues that the medical record does not show that (1) applicant's "alleged preexisting disabilities were actually labor disabling that the time of the subsequent industrial injury"; or (2) applicant even had preexisting disability of the psyche. (Petition, p. 5:12-13.)

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.)

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

In *Ferguson v. Industrial Acc. Com.* (1958) 50 Cal.2d 469 [23 Cal.Comp.Cases 108], the Supreme Court held that the “previous disability or impairment” contemplated by Labor Code section 4751 “‘must be actually ‘labor disabling,’ and that such disablement, rather than ‘employer knowledge,’ is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751.” (*Ferguson, supra*, at p. 477.) The Court further noted that “‘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 [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability. ...’” (*Ferguson, supra*, (quoting Larson's Workmen's Compensation Law (1952) § 59.33, vol. 2, p. 63).)

Further, 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.App3d 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]" (*Id.*)

These authorities provide no legal support for defendant’s position that applicant holds the burden of proving that he had a preexisting disability which was actually labor disabling at the time of subsequent injury. It is rather applicant’s burden to prove that he had a preexisting disability which either actually interfered with or would have actually interfered with any type of work activity at the time of subsequent injury, regardless of whether the disability was industrial or nonindustrial in origin, or whether it developed from a congenital, developmental, pathological, or traumatic source. (*Franklin, supra*, at p. 238; see *Escobedo v. Marshalls, CNA Ins. Co.*, (2005) 70 Cal.Comp.Cases 604, 619 (citing *Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 62 [35 Cal.Comp.Cases 80]).)

Accordingly, we conclude that defendant's contention that applicant failed to establish that he had a preexisting disability of the psyche that was actually labor disabling at the time of the subsequent industrial injury is without legal support.

We next address defendant's contention that the medical record fails to show that applicant even had a preexisting psyche disability. Specifically, defendant argues that Dr. Stalberg's medical opinion is without support because it relies on an undated medical record reflected in an exhibit entitled "Report of John Stalberg, M.D., 2/08/12 at p. 7 (of the Review of Records attached to the Report found at p. 33 of 59)" stating that applicant had experienced suicidal thoughts. (Petition, p. 6:2-3.)

Applicant's Answer counters that Dr. Stalberg's report dated February 8, 2012 (along with his other reports and deposition testimony) supports his opinion that applicant had preexisting psyche disability because it relies on applicant's documented history of depression in 1994 as well as a workers' compensation claim he filed in 1995 which alleged injury in the form of anxiety and depression. (Answer, p. 5:12-20.)

As an initial matter, we recognize that the Petition for Reconsideration and the Answer both rely on the AME Report of John Stalberg, M.D. dated February 8, 2012, even though the EAMS record does not show that it was uploaded in EAMS until December 20, 2021, and does not show it was designated as an exhibit or admitted in evidence before the trial herein.

Pursuant to WCAB Rule 10803(b), all medical reports that have been filed as of the date of approval of a Stipulations with Request for Award are deemed admitted in evidence and part of the record of proceedings. (Cal. Code Regs., tit. 8, § 10803(b).)

Since a WCJ issued an Award approving the Stipulations with Request for Award in this case on January 13, 2014, and since the approved settlement considered the AME reports, including the report of Dr. Stalberg dated February 8, 2012, it appears that report should have been entered into the EAMS record on January 13, 2014, but was not as a result of clerical error. (Award approving the Stipulations with Request for Award, January 13, 2014; Stipulations, July 1, 2013, p. 7, para. 9.)

Notably, the parties appear to understand that the AME Report of John Stalberg, M.D. dated February 8, 2012 is properly part of the record because their respective pleadings cite to it and do not object to consideration of its contents. It follows that any objection to the admission of the AME Report of John Stalberg, M.D. dated February 8, 2012 into evidence is waived. (§ 5904.)

Accordingly, we shall correct the record by ordering the AME Report of John Stalberg, M.D. dated February 8, 2012 to be designated as Joint Exhibit 18 and admitted in evidence. (See *Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145, 154–155] (stating that the Appeals Board may correct a clerical error at any time without the need for further hearings); *In re Candelario* (1970) 3 Cal.3d 702, 705 (stating that the term "clerical error" includes all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. In determining whether an error is clerical or substantive, it must be determined whether the mistake was made in rendering the judgment or in recording the judgment which was rendered).)

We now turn to the merits of the contention that Dr. Stalberg's medical opinion is without support because it relies on an undated medical record stating that applicant experienced suicidal thoughts.

Here, Dr. Stalberg's report dated February 8, 2012 states that his medical records review included records subpoenaed from All One Health Resources, one of which was a record of "an uncertain date" indicating that applicant had "a history of Prozac for two years, mild depression with homicidal/suicidal," and one of which indicated record that applicant was on "Prozac 40 mg" as of December 11, 2000.

Nothing in this record suggests that Dr. Stalberg incorrectly inferred that applicant experienced symptoms suggesting that he had a psyche disability prior to his cumulative trauma injury of January 1, 2001 through June 4, 2010, or that his medical opinion otherwise lacked adequate foundation.

Based upon our own review of the record, we agree with the WCJ that Dr. Stalberg's reporting and deposition testimony constitute substantial medical evidence establishing that applicant had a preexisting psyche disability. (Report, pp. 2-8; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) (stating that 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").)

Accordingly, we are unable to discern support for defendant's contention that the record fails to show that applicant had preexisting labor-disabling permanent disability resulting from injury to the psyche.

Turning to defendant's argument that the record fails to establish that applicant had preexisting disability resulting from injury to the upper digestive tract and in the form of hypertension and diabetes, we observe that applicant's preexisting disability of the psyche and his disability resulting from subsequent injury result in 100% disability, regardless of whether the disabilities are added or combined using the CVC.³ (Report, pp. 2-8.)

It follows that the question of whether or not applicant had preexisting disability relating to other body parts can have no bearing on the determination of whether and to what extent applicant may be entitled to SIBTF benefits.

Accordingly, we conclude that defendant's argument that the record fails show that applicant had preexisting disability of the upper digestive tract and in the form of hypertension and diabetes is moot.

We turn next to defendant's argument that the WCJ failed to rate applicant's preexisting permanent disability and to award defendant a credit for permanent disability benefits received or to be received by applicant from his employer.

Here, the parties framed the issues of whether applicant is entitled to SIBTF benefits pursuant to section 4751 and whether defendant is entitled to a credit for previously paid permanent disability benefits pursuant to section 4753 for trial. (Minutes of Hearing, May 17, 2022, p. 2:12-24.)

In deciding applicant's entitlement to SIBTF benefits, the WCJ issued findings as to each element of section 4751 without making a finding as to the impairment rating of applicant's preexisting permanent disability. (F&A, Findings of Fact Nos. 1, 4-8; § 4751; *Todd, supra*.) However, the WCJ issued findings that applicant's subsequent injury, when considered alone and without regard to or adjustment for the occupation or age, was 86%, and that applicant's disability when combined with his preexisting disability was 100%, suggesting that the WCJ concluded applicant's preexisting disability was 14%. (F&A, Findings of Fact Nos. 6, 10.)

Given that the parties framed applicant's entitlement to SIBTF benefits pursuant to section 4751 as an issue for trial and section 4751 does not require an impairment rating as to preexisting

³ In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), we held that 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.

disability, we discern no support for the argument that the WCJ erred by failing to rate applicant's preexisting disability.

In deciding defendant's entitlement to a credit pursuant to section 4753, the WCJ found:

9. SIBTF is entitled to credit pursuant to L.C. §4753 credit for payments made, or to be made, by the Santa Anita RaceTrack, insured by Liberty Mutual, relating to the Awards in the prior injury claim (ADJ6860483), and in the subsequent injury claim herein.

10. The combined disability of the injury herein and the prior disability, results in permanent disability of 100 percent payable [as a life pension at a] rate of \$746.60 per week, commencing on . . . less credit for any amounts paid heretofore by SIBTF, and (1) less credit for amounts paid heretofore, or in the future, Santa Anita RaceTrack, insured by Liberty Mutual, pursuant to the prior Award of 63% permanent disability payable commencing on 11/15/2011 at the rate of \$230.00 and thereafter \$264.50 per week, in the total amount of \$98,957.91, and, (2) less credit for amounts paid heretofore, or in the future, by Santa Anita Race Track, insured by Liberty Mutual pursuant to the prior Compromise and Award, in the total sum of for a total amount of \$213,667.50, (86%) subsuming the prior award . . .

...

12. Applicant's attorney has performed reasonable services relating to applicant's award of SIBTF benefits, payable to the Law Offices of Sparagna & Sparagna, in amount of 15% of applicant's net biweekly indemnity payments awarded herein, with "net biweekly indemnity payments" being defined as the total biweekly indemnity benefit awarded herein (permanent disability and/or life pension), less credit for payments made, or to be made in the future, by Santa Anita RaceTrack, insured by Liberty Mutual, pursuant to the prior Award and Compromise and Release in the underlying claim herein, payable pursuant to L.C. §4754.

(F&A, Findings of Fact Nos. 9-10, 12.)

These findings explicitly allow defendant a credit against all funds applicant has received from Santa Anita RaceTrack, insured by Liberty Mutual, on the prior injury claim (ADJ6860483), including all sums paid or to be paid in the form of permanent disability payments, life pension payments, and attorney's fees.

The award in turn incorporates these findings, imposing on defendant an obligation to pay applicant benefits only on applicant's claim for SIBTF benefits after application of the section 4753 credit.

We note, however, that the award identifies Santa Anita RaceTrack and State Compensation Insurance Fund as the parties obligated to make payments thereunder. Since Santa Anita RaceTrack and State Compensation Insurance Fund were parties to the previous claim, and since this claim is

solely for SIBTF benefits, we conclude that the identification of Santa Anita RaceTrack and State Compensation Insurance Fund in the award was the result of clerical mistake.

Accordingly, we will amend the F&A to identify SIBTF as the defendant against whom the award herein is made. (See *Toccalino v. Workers' Comp. Appeals Bd.*, *supra.*); *In re Candelario supra.*)

Accordingly, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that applicant's permanent disability of 100% is payable commencing November 15, 2011, and to correct the clerical errors in the award to identify defendant as the party against whom it is made; and we will order that the AME Report of John Stalberg, M.D. dated February 8, 2012 be designated as Joint Exhibit 18 and admitted in evidence.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that the Findings and Award issued on August 3, 2022 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

10. The combined disability of the injury herein and the prior disability, results in permanent disability of 100 percent payable at the temporary disability indemnity rate of \$746.60 per week, commencing on November 15, 2011, for life, subject to L.C. § 4659(c) SAWW COLA adjustments, less credit for any amounts paid heretofore by SIBTF, and (1) less credit for amounts paid heretofore, or in the future, by Santa Anita RaceTrack, insured by Liberty Mutual, pursuant to the prior Award of 63% permanent disability payable commencing on November 15, 2011, at the rate of \$230.00 and thereafter \$264.50 per week, in the total amount of \$98,957.91, and, (2) less credit for amounts paid heretofore, or in the future, by Santa Anita RaceTrack, insured by Liberty Mutual, pursuant to the prior Compromise and Award, in the total sum of for a total amount of \$213,667.50 (86%), subsuming the prior award and less reasonable attorney fees (see below).

AWARD

AWARD IS MADE in favor of **PATRICK GALLANT** and against **SUBSEQUENT INJURIES BENEFITS TRUST FUND** of:

(d) Subsequent Injuries Benefits Trust Fund is hereby ordered to pay this award out of funds appropriated for such purpose in accordance with Labor Code section 4754.

IT IS FURTHER ORDERED that the AME Report of John Stalberg, M.D. dated February 8, 2012 is designated as Joint Exhibit 18 and admitted in evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 16, 2026

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

**PATRICK GALLANT
SPARAGNA & SPARAGNA
SUBSEQUENT INJURIES BENEFITS TRUST FUND
OFFICE OF THE DIRECTOR - LEGAL UNIT (LOS ANGELES)**

SRO/kl

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