

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

**NANCY VARGAS, *Applicant***

**vs.**

**SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant***

**Adjudication Number: ADJ11362885**

**Santa Barbara District Office**

**OPINION AND ORDER DENYING PETITION FOR  
RECONSIDERATION**

Defendant Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the Findings of Fact and Order (F&O) issued on July 25, 2023, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) the parties stipulated that applicant has a preexisting labor disabling disability that meets the five percent threshold for opposite member and her overall disability from all conditions is one hundred percent permanent total disability; (2) applicant's permanent disability began on April 13, 2020, at \$1,063.20; (3) applicant resolved case number ADJ11362885 by stipulations with request for award on November 25, 2020; (4) the award in case number ADJ11362885 was issued on December 11, 2020; (5) applicant applied for subsequent injuries benefits on March 31, 2019, on the grounds that she allegedly sustained subsequent injury on March 31, 2018; and (6) SIBTF has not met its burden of proving entitlement to credit for social security disability or another disability retirement benefit.

Defendant contends that the WCJ erroneously assigned it the burden of proving entitlement to credit against applicant's social security disability and disability retirement benefits. Defendant also contends that due process requires that the record be further developed as to whether it is entitled to credit against applicant's social security disability and disability retirement benefits

We received an Answer from applicant.

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 deny the Petition.

## FACTUAL BACKGROUND

On May 17, 2023, the matter proceeded to trial as to “SIBTF rights to credits under Labor Code Section 4753 for SSDI and disability retirement monies received by Applicant.” (Minutes of Hearing and Orders, May 17, 2023, p. 3:10.) The parties submitted exhibits for admission into evidence and no witness testimony was presented. (*Id.*, pp. 1, 3:10-4:17.)

In the Opinion on Decision, the WCJ states:

The case was heard on the limited issue of whether SIBTF is entitled to credit for applicant's social security disability indemnity (SSDI) and disability retirement (DR) monies.

The issue was addressed in the case of *Manas v. Director of the Dep't of Indus. Rels.* 2016 Cal. Wrk. Comp. P.D. LEXIS 265 where the Panel stated:

" ... We indicated that section 4753 expressly applies to credit for payments on account of the pre-existing disability and not to payments by the employer for the subsequent industrial injury."

Section 4753 provides in part: "Such additional compensation is not an addition to but shall be reduced to the extent of any monetary payments received by the employee, from any source whatsoever, for or on account of such preexisting disability or impairment ... excluding from such monetary payments received by the employee for or on account of such preexisting disability or impairment a sum equal to all sums reasonably and necessarily expended by the employee for or on account of attorney's fees, costs and expenses incidental to the recovery of such monetary payments. All cases under this section and under Section 4751 shall be governed by the terms of this section and Section 4751 as in effect on the date of the particular subsequent injury." *Manas, supra*.

They went on to state:

"To be fully understood, section 4753 is read in connection with SIBTF's liability under section 4751. (See *Hanson, supra*, 217 Cal.App.2d at pp. 327-330.) The plain meaning of the language in section 4753 indicates that the statute was intended to reduce SIBTF's liability under section 4751 by the amount of monetary payments received by the employee for the preexisting disability or impairment, and not for permanent disability indemnity due or paid toward the subsequent industrial injury. (See §4753; *Ybarra v. Workers' Comp. Appeals Bd. (Ybarra) (2002) 103 Cal.App.4th 987, 989-990 [127 Cal. Rptr. 2d 208, 67 Cal.Comp.Cases 1282; Hanson, supra*, 217 Cal.App.2d at pp. 327-330.)"

In *Ybarra, supra*, SIBTF was not entitled to reduce applicants award by taking credit for benefits received from a work-related disability retirement pension because the pension was not a payment from another source due to a pre-existing disability.  
(Opinion on Decision, pp. 1-2.)

In the Report, the WCJ states:

Applicant worked as a Bus Driver for Metropolitan Transit District. She was injured March 31, 2018. The case resolved by Stipulation and Award and the Award issued December 11, 2020.

Applicant filed the application for SIBTF on March 31, 2019. The parties stipulated that the applicant met the 5% threshold for opposite member and that the applicant was 100% PTD.

The only issue before the court was SIBTF credit, attorney fees and a lien of applicant's attorney. Defendants filed the petition for reconsideration on the issue of credit.

...

SIBTF asserted they are entitled to a reduction of applicant's award simply by operation of Labor Code §4753. They contend that essentially, they have no burden beyond raising credit and that alone entitles them to credit.

...

Here the evidence presented did not establish that the payment was received for a preexisting disability or impairment.

Exhibit A is a Social Security Administration Retirement, Survivors and Disability Insurance Notice of Award (SSA) which did not describe the basis of the benefit and whether it was based on pre-existing disability or impairment. Exhibits B through F are Social Security Benefit statements with no indication of whether it was received for a preexisting disability or impairment. Exhibit G is a letter from Social Security noting the dollar amount of the monthly benefit before and after deductions.

Applicant had a prior Workers' Compensation Award Exhibit I settled on November 7, 2005, to the lumbar spine and left iliotibial band.

The Subsequent Industrial Injury (SII) was to the right foot settled by Award issued December 11, 2020.

According to Defendants Petition for Reconsideration we should assume her Social Security Disability Benefit payment could not be solely due to the SII (PFR P. 11). At page 11 lines 11-12 and referencing Exhibit 4 they base this argument on the report of Joseph Ambrose, D.C., dated July 25, 2022, at page 72. Here the report summarizes her primary treating physician, report of Dr. Steven W. Pearse

(mistakenly misspells Pearson), which states applicant was, "declared 100% disabled by Social Security *with all her medical problems.*"

However, that summary by Dr. Ambrose of Dr. Pearsons report goes on to describe how her foot is slowly getting better and how it hurts to walk and that she is using a walker. It further describes the pain following the foot surgery. Her restrictions were sedentary only and no walking or standing. In this case the foot is the SII. Defense would contend the description of "all her medical problems" is referring to more than the right foot yet the report of Dr. Pearson only describes her foot problems. All her medical problems could very well just describe all her foot problems.

SIBTF would contend it is not their burden to prove credit.  
(Report, pp. 2-3.)

### DISCUSSION

Labor Code section 4753<sup>1</sup> provides:

Such additional compensation is not in addition to but shall be reduced to the extent of any monetary payments received by the employee, from any source whatsoever, for or on account of such preexisting disability or impairment . . .

All cases under this section and under Section 4751 shall be governed by the terms of this section and Section 4751 as in effect on the date of the particular subsequent injury.  
(§ 4753.)

As relevant here, 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 . . .  
(§ 4751.)

Defendant argues that because section 4753 provides that subsequent injuries benefits "shall be reduced" to the extent that a subsequently injured employee has received payments for preexisting disability or impairment, and because section 4753 does not assign a burden of proof,

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

the statute cannot be construed within the plain meaning rule to impose the burden of proving the right to credit upon it. (Petition, p. 7:17-28.)

To evaluate this argument, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. If the statutory language is clear and unambiguous, the plain meaning of the statute governs. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056 [6 Cal.Rptr. 3d 432].) But the 'plain meaning' rule does not prohibit a court from determining whether the construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387 [241 Cal.Rptr. 67].) An interpretation that renders related provisions nugatory must be avoided (*People v. Craft* (1986) 41 Cal.3d 554, 561 [224 Cal.Rptr. 626]); each sentence must be read not in isolation but in the light of the statutory scheme (*In re Catalano* (1981) 29 Cal.3d 1, 10-11 [171 Cal.Rptr. 667]); and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115].)

Under its plain language, section 4753 provides that “compensation . . . shall be reduced to the extent of any monetary payments received by the employee, from any source whatsoever, for or on account of such preexisting disability or impairment.” (§ 4753.)

Under its plain language, section 4751 provides that permanently partially disabled employees who sustain subsequent compensable injuries resulting in additional permanent partial disability “shall be paid . . . compensation due under this code.” (§ 4751.)

In applying section 4751, the decisional law imposes upon the subsequently injured employee the burden of proving entitlement to subsequent injuries benefits. (*Brown v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 903 [36 Cal.Comp.Cases 627]; *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581–582 (Appeals Board en banc) (citing § 4751).)

Turning to our task of harmonizing the terms of section 4753 with those of section 4751, we observe that both statutes use the same mandatory language as to the reduction or payment of “compensation” and conclude that section 4753 should be read to provide that, once the subsequently injured employee meets the burden of proving entitlement to subsequent injuries

benefits, the burden of proof then shifts to SIBTF to establish its entitlement to reduction of those benefits.

In other words, since sections 4751 and 4753 respectively set forth the criteria for establishing the subsequently injured employee's entitlement to subsequent injuries benefits and for SIBTF's entitlement to reduction of those benefits (and use the same mandatory language to do so), and since the decisional law has long-placed the initial burden of proof with the subsequently injured employee, we construe section 4753 to likewise place the burden of proof as to whether subsequent injuries benefits are to be reduced with SIBTF.

Notably, our construction of section 4753 is consistent not only with section 4751, but also with workers' compensation procedural statutes which provide that the burden of proof rests on the party holding the affirmative of the issue and that the burden must be met by a preponderance of the evidence. (§§ 5705, 3202.5.)

Our construction of section 4753 is also consistent with that set forth in *Ybarra v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 987 [127 Cal.Rptr.2d 208].) In *Ybarra*, the Court of Appeals held that SIBTF was not entitled to reduce the applicant's workers' compensation award by taking credit for benefits the applicant received from a work-related disability retirement pension because the benefits were not shown to constitute payments from another source due to preexisting disability or impairment within the meaning of section 4753.

In that case, SIBTF argued that because medical records showed that the applicant had complained about the disabling nature of his hypertension and gastrointestinal conditions and an inability to return to work resulting from that condition, the disability retirement pension must have been based not only on the orthopedic disability cited by the retirement board, but also preexisting disability or impairment attributable to hypertension and gastrointestinal conditions.

However, the Court rejected SIBTF's argument on the grounds that the retirement board based its decision granting the pension on its evaluation of a physician's opinion that the applicant was unable to work due solely to orthopedic shoulder and knee conditions and "the only disability specified in the report is the orthopedic disability." (*Ybarra, supra*, at p. 1286.)

Accordingly, we are unable to discern merit in defendant's argument that section 4753 cannot be construed within the plain meaning rule to impose upon it the burden of proof as to its right to credit.

Defendant also argues that it bears no burden of proof in cases such as this one where applicant has received social security disability benefits based upon a finding of total disability. Specifically, citing *Subsequent Injuries Fund v. Industrial Acci. Com. (Hanson)* (1963) 217 Cal.App.2d 322, 328 [28 Cal.Comp.Cases 144], defendant argues that it is entitled to credit on the grounds that applicant's subsequent right foot injury and an unidentified preexisting disability combined to render her totally disabled, giving rise to an inference that some portion of her social security disability benefits were for her preexisting disability or impairment.

In *Hanson*, the Court of Appeal held that where social security disability payments are paid to an applicant because an industrial injury and a preexisting disability combined to render the applicant totally industrially disabled, SIBTF is entitled to credit based upon the percentage of social security disability payments attributable to the preexisting disability. (*Hanson, supra.*) In doing so, the Court stated:

[I]f it can reasonably be said that the social security disability payments are in some part accountable to the preexisting liability for which [SIBTF] is liable, then some credit should be allowed. The referee's holding in this regard was proper, that the fund is entitled to a credit of 68.25 per cent (the percentage attributable to the preexisting disability) of the \$118 (social security disability monthly payments). This reduced to a weekly figure is equivalent to a credit of \$ 18.53 per week so long as the employee continues to receive the payments. The rate (68.25 per cent) of credit is constant, so no problem of computation is ever involved. (*Id.*, at p. 329.)

Hence, although SIBTF was found entitled to credit for social security disability payments that the applicant received as a result of the combined preexisting and subsequent permanent disabilities he suffered, the credit was only for the portion of the payments attributable to the preexisting permanent disability. (*Id.*)

Since *Hanson* included an explicit finding that a certain portion of the applicant's social security disability benefits constituted compensation for the preexisting disability on which the subsequent injuries benefits were predicated, the decision does not stand for the proposition that a finding of one hundred percent disability for purposes of social security disability benefits and an applicant's receipt of payments thereon automatically gives rise to an inference that the payments were for a preexisting disability or impairment.

Consequently, defendant's argument that applicant's subsequent right foot disability or impairment and receipt of social security disability benefits automatically establishes its

entitlement to reduction of subsequent injuries benefits is without support. Rather, as the WCJ explained in the Report, the evidence lacks medical reporting showing any disability or impairment as to any body part other than the right foot and, therefore, the assumption that some portion of applicant's social security disability benefits were for a preexisting disability or impairment is without foundation. (Report, pp. 2-3; see also *E.L Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc) (requiring that expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and set forth reasoning to support the expert conclusions reached in order to constitute substantial evidence.)

Accordingly, we are unable to discern merit in defendant's argument that it bears no burden of proof where, as here, applicant has received social security disability benefits based upon a finding of total disability.

Lastly, defendant argues that due process requires that the record be further developed as to whether applicant's social security disability benefits "were based on a prior injury, what body parts or conditions resulted in the award, the medical report(s) that Social Security relied upon." (Petition, pp. 12:27-13:2.)

The "essence of due process is simply notice and the opportunity to be heard." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.*, 74 Cal.App.4th 928, 936, [88 Cal.Rptr.2d 516].) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (*Gangwish v. Workers' Comp. Appeals Bd.*, 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584] (citing *Rucker v. Workers Compensation Appeals Bd.*, 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].)

Due process requires "a 'hearing appropriate to the nature of the case.'" (*In re James Q.* (2000) 81 Cal.App.4th 255, 265 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865.) Although due process is "a flexible concept which depends upon the circumstances and a balancing of various factors," it generally requires the right to present relevant evidence. (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817 [80 Cal.Rptr.2d 534].)

Here, the record shows that the parties framed the issue for trial as "SIBTF rights to credits under Labor Code Section 4753 for SSDI and disability retirement monies received by Applicant,"



that defendant submitted various exhibits for admission into evidence, and that defendant presented no witness testimony. (Minutes of Hearing and Orders, May 17, 2023, pp. 1, 3:10-4:17.)

As such, the record does not suggest that defendant was denied notice and an opportunity to be heard. The record rather suggests that defendant failed to present evidence sufficient to carry its burden of proof.

Accordingly, we decline to grant reconsideration so that the record may be further developed as to whether applicant's social security disability benefits were based upon a preexisting disability or impairment which served as the basis of her entitlement to subsequent injuries benefits.

Accordingly, we will deny the Petition.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings of Fact and Order issued on July 25, 2023 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

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

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



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

**OCTOBER 20, 2023**

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

**NANCY VARGAS  
GHITTERMAN, GHITTERMAN & FELD  
OFFICE OF THE DIRECTOR – LEGAL UNIT**

**SRO/cs**

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