WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ROBERT HEIGH, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

Adjudication Number: ADJ12253162
Santa Barbara District Office

OPINION AND ORDER GRANTINGING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award (F&A) issued on April 28, 2023, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a custodian on July 26, 2015, applicant claims to have sustained injury arising out of and in the curse of employment to his lumbar spine and right elbow; (2) applicant does not meet the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by Labor Code section 4751(b);[1] (3) applicant does not meet the requirements for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits; and (4) applicant shall take nothing by his claim.

Applicant contends that the WCJ erroneously failed to find that his subsequent injury disability meets the 35 percent permanent disability threshold. In the alternative, applicant contends that the WCJ erroneously failed to consider whether his subsequent injury disability meets the 5 percent permanent disability threshold under section 4751(a).

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, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b); and that defer the issues of whether applicant meets the remaining eligibility requirements for SIBTF benefits and, as appropriate, the issues of permanent disability;

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

liens; attorneys' fees; the 25 percent retainer fee agreement; the offset pursuant to section 4753; and the statute of limitations; and we will return the matter to the trial court for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On November 16, 2022, the matter proceeded to trial as to the following issues:

1. Applicant's entitlement to SIF benefits.
2. Permanent disability.
3. Liens.
4. Attorneys' fees.
5. 25 percent retainer fee agreement by Applicant.
6. Applicant's entitlement to SIF benefits pursuant to Labor Code Section 4751.
7. Applicant's entitlement to SIF benefits, including offset per Labor Code Section 4753.
8. Statute of limitations.

(Minutes of Hearing and Orders, November 16, 2022, p. 2:15-23.)

The parties stipulated that while employed as a custodian on July 26, 2015, applicant claims to have sustained injury to his lumbar spine and right elbow. (*Id*., p. 2:11-13.)

The WCJ admitted the Report of PQME Thor Gjerdrum, MD, dated June 23, 2020, into evidence. (*Id.,* p. 2:18-20, 3:6.) The report includes the following:

> AFFECTED BODY PARTS
> Affected body parts include low back pain with right sciatica with numbness and weakness and a drop foot. He also is alleging a derivative injury to the right elbow as a consequence of a fall, he believes . . . was precipitated by weakness of his leg. . . .
> DIAGNOSES
> 1. Low back pain.
> 2. Right sciatica.
> 3. Right foot drop secondary to #2.
> 4. Status post L5-S1 right and left laminectomy and interbody fusion on May 21, 2018.
> 5. Right elbow injury secondary to fall 2 August 2019.
> (Exhibit 3, Report of PQME Thor Gjerdrum, MD, dated June 23, 2020, pp, 2-3, 13-14.)
>
> IMPAIRMENT RATING
> Impairment will be per AMA Guides 5th Edition. The applicant is at maximal medical improvement as of the date of this report which is June 23, 2020. This is because his condition has stabilized and unlikely to improve with further medical or surgical treatment. Impairment is not likely to change considerably in the

foreseeable future. There is no indication or record of any previous impairment ratings that I have access to.

The applicant's impairment is best described in AMA Guides on page 384, table 15-3. I believe the applicant best fits into DRE Lumbar Category V with 26% whole person impairment. This is because he meets the DRE Lumbosacral Categories of III and IV that he is has both radiculopathy and alteration of motion. segment integrity as indicated by atrophy, sensory changes, muscle weakness and alteration of integrity as defined in Category IV with known fusion at LS-S1.

He is given 26% whole person impairment which is the mid-range of impairment for DRE Category V because of impaction on activities of daily living as a consequence of his claim and in addition he has pain which impacts many activities of daily living, therefore reference AMA Guides Chapter 18, 2% add-on for pain if appropriate. Therefore, the total impairment of this claim not considering an elbow add-on as derivative claim would be 28% whole person impairment prior to apportionment.

PRE-EXISTING CONDITIONS
Pre-existing conditions as mentioned in the discussion there are significant pre-existing conditions which include a prior lumbar spine injury in 2009 that lead to an L2 compression fracture, an injury in 1998 that lead to lumbar surgery and other medical comorbidities including the use of steroids for unrelated medical conditions.
(*Id*., pp. 15-16.)

In the Opinion on Decision, the WCJ states:

Applicant has the burden of proving they meet all . . . eligibility requirements in Labor Code §4751. (Brown v Workers' Comp. Appeals Bd (1971) 20 Cal. App3rd 903, at 914 [36 Cal. Comp. Cases 627
. . .
Applicant sustained an industrial injury on July 26, 2015. This injury is the injury relied upon to satisfy the requirements of Labor Code §4751. Specifically, the 35% threshold requirement under that statutory scheme. This is the subsequent industrial injury that needs to be 35% permanent disability without regard to adjustment for age or occupation.

Per the Stipulation with Request for Award the parties entered into a 35% stipulation after adjustment for age, occupation and apportionment. The rating formula the parties provided was as follows: 2/3 (1s.03.01,00 - 28 - [1.4] 39 - 340c - 42 - 52) 35% P.D.
. . .
[T]he 28% permanent disability found by Dr. Gjerdrum was relied upon by the parties as to the stipulated permanent disability found. However, Dr. Gjerdrum found 1/3 of the permanent disability (28%) to be non-industrial. Therefore, only

19% was found to be related to the subsequent industrial injury. While the 19% is subject to the 1.4 modifier equals 27 %.
. . .
Applicant is not entitled to SIBTF benefits.
. . .
Based on the finding hereinabove, all other issues are moot.
(Opinion on Decision, pp. 1-2.)

In the Report, the WCJ states:

Applicant sustained a specific industrial injury on July 26, 2015, to his lumbar spine and right elbow. The claim was resolved by way of Stipulated Findings and Award.
. . .
All parties agree the 35% permanent disability from the subsequent injury has to be after the application of the 1.4 modifier but without adjustment for age and occupation.

The disagreement is when and whether apportionment should apply.

In the underlying case, the parties provided a rating string within the body of the Stipulations with Request for Award. It provided as follows:

2/3 (1.03.01,00 - 28 - [1.4] 39 - 340c - 42 - 52) 35% P.D.

Dr. Gjerdrum did find applicant to have sustained 28% permanent disability. However, he also found 1/3 of the injury apportionable to a previous non-industrial injury. Therefore, when the disability considered alone from the subsequent industrial injury, it is not 28% but rather 19% and with the 1.4 modifier, the permanent disability resulting from the subsequent injury alone is 27%.

Applicant also contends he satisfies the requirements of Labor Code §4751 because the previous permanent partial disability (PPD) affected a hand, foot, arm, leg or an eye and the subsequent industrial injury affects the opposite and corresponding member equals 5% or more.

However, the subsequent industrial injury applicant sustained are to his spine and right elbow. This is not a lower extremity and as such it is not a corresponding body part to applicant's lower extremities.
(Report, pp. 2-3.)

DISCUSSION

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 this case, applicant contends that the WCJ erroneously failed to find that his subsequent injury disability meets the 35 percent permanent disability threshold by considering apportionment in the calculation of subsequent permanent disability.

Here, the record reveals that the WCJ rejected the formula used by Dr. Gjerdrum to calculate that applicant sustained subsequent permanent disability of 35 percent. (Report, pp. 2-3.) Instead, the WCJ included the amount "apportionable to a previous non-industrial injury" in calculating that applicant sustained subsequent permanent disability of 27 percent. (*Id.*)

The question of whether apportionment may be considered in calculating subsequent permanent disability was presented in *Bookout v. Workers' Comp. Appeals Bd*. (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595]. In that case, the Appeals Court reasoned that because section 4751(b) "provides that the permanent disability resulting from the subsequent injury, *when considered alone*" must equal 35 percent or more of the total disability, it excludes apportionment from the calculation of subsequent permanent disability. (*Id*., at p. 228 [Emphasis in original].)

The Appeals Board has subsequently applied *Bookout* in en banc as well as panel decisions. For example, in *Todd* the Appeals Board relied upon *Bookout's* construction of section 4751 to find

that prior and subsequent permanent disabilities may be added to the extent that they do not overlap in order to determine combined permanent disability. (*Todd, supra.*) In doing so, it noted that the language of section 4751 has not been amended since *Bookout*. (*Todd, supra*, at p. 583, fn. 9.)

In *Harris v. Numac Co*., 2020 Cal.Wrk.Comp. P.D. LEXIS 46 (Cal. Workers' Comp. App. Bd. February 26, 2020),[2] an Appeals Board panel applied *Bookout* to find that section 4751(b)'s threshold requirement was met where the applicant's injury to the respiratory system was considered alone and without regard to apportionment and adjustments for age and occupation.

Likewise, in *Riedo v. Subsequent Injuries Benefits Trust Fund*, 2022 Cal.Wrk.Comp. P.D. LEXIS 303 (Cal. Workers' Comp. App. Bd. October 21, 2022), an Appeals Board panel applied *Bookout* to find that section 4751(b)'s threshold requirement was met where the permanent disability to the applicant's neck and right thumb was calculated either separately without apportionment or combined using the Combined Values Chart.

Nonetheless, defendant argues that *Bookout* and its progeny are not controlling because SB 899 "completely abrogated former Labor Code sections 4663 and 4750[] and devised a new apportionment scheme." (Answer, p. 9:4-6.) But the Legislature's enactments to amend section 4663 and repeal section 4750 do not render *Bookout's* section 4751 construction invalid. To the contrary, because the Legislature is presumed to have been aware of *Bookout* when it devised its new apportionment scheme, and because it left section 4751 undisturbed when it did so, *Bookout* remains controlling. (See, e.g., *Vera v. Workers' Comp. Appeals Bd*. (2007) 154 Cal.App.4th 996 [72 Cal.Comp.Cases 1115].)

Hence we conclude that the WCJ erroneously considered apportionment in his calculation of applicant's subsequent permanent disability. Accordingly, we will rescind the F&A and substitute a finding that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b).

Although the record establishes that applicant meets the 35 percent permanent disability threshold, we nevertheless address applicant's alternative contention that the WCJ erroneously failed to consider whether his subsequent permanent disability meets the 5 percent permanent disability threshold under section 4751(a). Specifically, applicant argues that his subsequent injury

---

[2] Appeals Board panel decisions are not binding precedent (as are en banc decisions) on other Board panels or workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).)

"affecting his lower extremities corresponds to his pre-existing injuries . . . affecting his lower extremities," and therefore that the WCJ should have evaluated the issue of whether the subsequent injury corresponds to a previous injury which caused him permanent disability in the foot or leg. (Petition, p. 5:6-7.)

Here, the record shows that the parties stipulated that applicant claims to have sustained injury to his lumbar spine and right elbow—and that they would rely on Dr. Gjerdrum's report to determine the issue of permanent disability. (Minutes of Hearing and Orders, November 16, 2022, p. 2:11-13; Opinion on Decision, p. 1.) Since the subsequent injury claim is limited to the lumbar spine and right elbow, the WCJ correctly concluded that there is no allegation of a subsequent injury to a body part which might correspond to a previous injury to the lower extremities, i.e., the foot or leg. (Report, pp. 2-3.)

Additionally, notwithstanding that Dr. Gjerdrum's report reveals that applicant's subsequent injury involves the diagnosis of a right foot drop secondary to sciatica, the report does not relate that injury to any previous disability to applicant's feet (or otherwise). (Report of PQME Thor Gjerdrum, MD, June 23, 2020, pp. 13-16.) It follows that the record lacks medical evidence of a subsequent injury to a body part corresponding to a previous permanent disability of the foot or leg.

Accordingly, we conclude that the WCJ did not erroneously fail to consider whether applicant's subsequent injury met section 4751(a)'s five percent disability threshold.

Lastly, we observe that the WCJ concluded that applicant failed to prove entitlement to SIBTF benefits because he failed to prove one of the eligibility requirements; namely, the 35 percent permanent disability threshold. However, since we have now concluded that applicant meets that requirement, the record should be developed as to whether applicant meets the remaining eligibility requirements; and, if so, as to the remaining issues framed for trial; namely, the issues of permanent disability; liens; attorneys' fees; the 25 percent retainer fee agreement; the offset pursuant to section 4753; and the statute of limitations. (Minutes of Hearing and Orders, November 16, 2022, p. 2:15-23.)

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. (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]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].)

Accordingly, we will substitute a finding that defers the issue of whether applicant meets the remaining SIBTF eligibility requirements and, as appropriate, the issues of permanent disability; liens; attorneys' fees; the 25 percent retainer fee agreement; the offset pursuant to section 4753; and the statute of limitations.

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b); and that defer the issue of whether applicant meets the remaining eligibility requirements for SIBTF benefits and, as appropriate, the issues of permanent disability; liens; attorneys' fees; the 25 percent retainer fee agreement; the offset pursuant to section 4753; and the statute of limitations; and we will return the matter to the trial court for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on April 28, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Findings, Order and Opinion on Decision issued on April 28, 2023 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Robert Heigh, born _____, while employed on July 26, 2015, as a custodian, occupational group number 340G at Santa Barbara, California, claims to have sustained injury arising out of and in the course of employment to his lumbar spine and right elbow.
2. Applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b).
3. All other issues are deferred.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 14, 2023

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

ROBERT HEIGH
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