

**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 DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration we issued on July 14, 2023, wherein we rescinded the workers' compensation administrative law judge's (WCJ) findings that (1) while employed as a custodian on July 26, 2015, applicant claims to have sustained injury arising out of and in the course 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; and substituted findings that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b); and the issues 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 are deferred; and we returned the matter to the trial court for further proceedings consistent with our decision.

Defendant contends that we erroneously relied on the holding in *Bookout v. Workmen's Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595] to find that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b). Defendant also contends that we erroneously failed to express any reason for ordering further development of the record in violation of the right of due process.

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

We received an Answer from applicant.

We have considered the allegations of the Petition and the Answer. Based on our review of the record, and for the reasons stated below and in our July 14, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, which we adopt and incorporate herein, we will deny the Petition.

DISCUSSION

We turn first to defendant's contention that we erroneously relied on the holding in *Bookout* to find that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b).

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 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 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 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 preexisting 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 section 4751(b). (*Id.*; § 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; § 4751(b).)

Accordingly, we remain persuaded that *Bookout's* construction of section 4751(b) controls our evaluation of whether applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone.

Nevertheless, we address defendant's argument that section 4751(b) should be interpreted in accordance with the following three cases: *Reina v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 101 (writ den.); *McMahan v. Workers' Comp. Appeals Bd.* (1984) 49 Cal.Comp.Cases 95 (writ den.); and *Earley v. Workers' Comp. Appeals Bd.* (1975) 40 Cal.Comp.Cases 741 (writ den.).

In *Reina*, the court found that an applicant with a subsequent industrial injury disability that rated on a stipulated, unadjusted basis at less than the statutory criteria does not qualify for SIBTF benefits. We therefore do not view *Reina* as in conflict with *Bookout*.

In *McMahan*, the applicant received an award that he had sustained permanent disability of 37 percent as a result of a specific injury and that his cumulative injury resulted in permanent disability of 31½ percent after apportionment of 50 percent—and neither party sought reconsideration. Nevertheless, the applicant sought SIBTF benefits based upon the same

cumulative injury; and, although the WCJ deemed the cumulative injury a subsequent injury, he concluded that it did not meet the 35 percent threshold for SIBTF benefits. Because we view the applicant's subsequent injury claim to be barred on separate grounds, we do not conclude that *McMahan* stands for the proposition that evaluation of whether a subsequent injury meets the 35 percent threshold from the subsequent industrial injury alone must include apportionment.

Lastly, because *Earley* was decided prior to *Bookout*, we do not view it as persuasive authority to the extent that it conflicts with *Bookout*.

Accordingly, we are unable to discern merit to defendant's argument that we erroneously relied on the holding in *Bookout* to find that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b).

Next we address defendant's contention that we erroneously failed to express any reason for ordering further development of the record in violation of its right of due process. Here we observe that the decision states:

[T]he 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.)
(Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, p.7.)

Accordingly, we discern no merit to defendant's argument that we failed to state grounds for ordering further development of the record in violation of the right of due process.

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued on July 14, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 9, 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