WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CONNIE LEE, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

Adjudication Number: ADJ9999707
Santa Ana District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order on Application for Subsequent Injuries Benefits Trust Fund Benefits (F&O) issued on February 14, 2023, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) applicant satisfied the requirements to qualify for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits on the following grounds: (a) applicant had a permanent partial labor-disabling impairment at the time of the subsequent injury; (b) the subsequent injury arose out of and in the course of employment and resulted in an additional permanent partial disability; (c) the degree of permanent disability caused by the combination of the pre-existing and the subsequent injury is greater than the disability that would have resulted from the subsequent injury alone; (d) the combined effect of the subsequent injury and the previous disability or impairment is seventy percent or more of total disability; (e) the permanent disability resulting from the subsequent industrial injury is thirty-five percent or more when such disability is considered alone and without regard to, or adjustment for, the age or occupation of the employee; and (2) applicant is one hundred percent permanently disabled. The WCJ ordered that applicant meets the requirements for SIBTF benefits and that applicant is permanently totally disabled.

Defendant contends that (1) applicant's claim is barred by the doctrine of collateral estoppel; (2) the admissible evidence fails to establish that applicant meets the requirements for SIBTF benefits; (3) the WCJ erroneously adjusted applicant's whole person impairment by the 1.4 adjustment factor; and (4) the WCJ erroneously added the adjusted impairments instead of using the combined values chart.

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 set forth in the Report, which we adopt and incorporate herein, we will deny the Petition.

FACTUAL BACKGROUND

On October 25, 2022, the matter proceeded to trial "solely on the SIBTF claim under Labor Code Section 4751," identifying the issues as follows:

> 1. Parts of body injured: Bilateral feet.
> 2. Permanent and stationary date:
> The employee claims 4-20-2016 based on AME Dr. Danzig.
> 3. Permanent disability.
> 4. Apportionment.
> 5. Attorney fees. The applicant requests 20% if the matter is submitted and 24% if a recon or answer is filed.
> 6. Other Issues:
> 1. Does the applicant have a pre-existing disability that could have been rated as a permanent partial disability at a time before the subsequent industrial injury?
> 2. Is the pre-existing disability one that was actually labor disabling?
> 3. What is the rating for pre-existing disability or disabilities?
> 4. What is the rating for permanent disability for the subsequent industrial injury?
> 4a. Is the subsequent industrial injury a 35% before age and occupation?
> 4b. Is the subsequent industrial injury a 5% before age and occupation and affects an opposite and corresponding part of body?
> 4c. Is the DFEC used to determine if either of the SIBTF threshold requirements have been met?
> 4d. Is apportionment, if any, applied to determine if either of the SIBTF threshold requirements have been met?
> 5. Based on the above, is the applicant eligible for SIBTF benefits.
> 6. What is the overall disability considering the pre-existing disabilities and the subsequent industrial disability?
> 7. Is the resulting combined permanent disability at least 70% or more of total disability?
> 8. Is the applicant 100% disabled based on medical evidence?
> 9. Is the applicant 100% disabled based on vocational evidence?
> 10. The issue of credits, if any, is deferred.
> 11. The issue of offsets, if any, is deferred.
> (Minutes of Hearing and Summary of Evidence, October 25, 2022, pp. 2:10-3:19.)

The WCJ admitted an exhibit entitled Report of Michael Sinel dated January 17, 2019 into evidence, which includes the following:

> Aggregation of Impairment for LC 4751:
>
> With respect to attaining a final disability rating for the purposes of LC 4751, please note that the Kite decision [*Kite v. Athens Administrat*ors (2013) 78 CCC 213 (*writ denied*)] allows for the addition of the whole person impairments of related body parts instead of combining them using the combined values chart (CVC). The rationale of adding the impairments of body parts is in the situation where 2 or more related body parts' impairments can act synergistically upon each other and thereby increase the resultant level of whole-person impairment. The example provided from the Kite decision would be the synergistic effect that bilateral hip replacement surgeries would have on an individual's ability for movement as compared to a single hip replacement, where there is no contralateral extremity from which to compensate for the injury.
>
> Further as established in *Diaz v. State of California*, an examiner evaluating the impairment of 2 related body regions such as the upper GI tract (GERD) and lower GI tract (IBS) may have their impairments added instead of combined based on the synergistic effect that the upper GI tract condition may have on the lower GI tract, resulting in an overall GI impairment that exceeds the WPI from using the CVC to combine the individual body areas.
>
> The rating schedule provides that the CVC is "generally" used to combine multiple disabilities, but that other methodology may be used depending upon the relevant circumstances. It is the role of the medical expert to make a medical determination as to how to combine the separate impairments. Therefore, it is my role to opine regarding Ms. Lee's physical impairments and the method by which aggregation is the most accurate description of his overall disability.
>
> Ms. Lee's physical impairment caused by her lower extremities was previously discussed on pages 59-61 of my report and because of the *synergistic effect* of her physical impairments to her lower extremities upon one another, those disabilities should be added before being aggregated with Mr. Lee's other impairments.
> (*Id.*, p.4:5; Exhibit 2, Report of Dr. Sinel dated January 17, 2029, pp. 63-64.)

In the Opinion on Decision, the WCJ states:

> The applicant, Connie Lee, while employed as a marketing representative at various locations in California, by Barilla America, during the period ending June 8, 2015, sustained an injury arising out of and in the course of her employment. The applicant's injury caused the need for a cervical spine discectomy with two-level fusion surgery and carpal tunnel release. The industrial injury was resolved via Compromise and Release settlement. The applicant applied to the Subsequent Injuries Benefits Trust Fund (SIBTF) for benefits.
> . . .

The applicant worked for Barilla America when the injury ended on June 8, 2015. She also sustained a previous industrial injury in 2012 to her hips. The application for SIBTF benefits and the present trial was set on the 2015 injury (ADJ928125). The 2015 injury was the subsequent industrial injury. The Labor Code describes a subsequent injury in terms such as subsequent compensable injury, subsequent injury, and last injury.

In contrast, pre-existing impairment is described as a previous disability or impairment. The parties will often treat the last industrial injury as the subsequent injury and the previous industrial injury as a pre-existing injury. The WCJ followed the above approach and treated the 2015 injury as the subsequent compensable injury and the 2012 injury as a pre-existing injury. The defendant notes, "The history of injury per Dr. Sinel's report does not reference anything about her peripheral neuropathy between 2004, when she was hired by Barilla America, until 2012, when her pre-existing specific injury occurred." (emphasis added, SIBTF Post-Trial Brief, 7: 22 – 24). The 2015 injury is thus the subsequent compensable injury, and the 2012 injury is the pre-existing injury.

. . .

The applicant's trial testimony was credible because it was consistent with the history of injury given to the various medical and vocational experts. The WCJ listened to the applicant's live testimony and found it reliable and credible.

. . .

The applicant had a pre-existing disability to her bilateral lower extremities due to longstanding peripheral neuropathy, which occurred before the 2015 subsequent industrial injury. The SIBTF QME reports of Michael Sinel M.D. and the applicant's trial testimony establish that the employer made reasonable accommodations of a work restriction that physically limited the applicant's ability to conduct the trade shows. The latter was an essential part of her job. The employer provided a "helper" who performed most of the physical labor at the trade shows.

. . .

The defendant contends that the applicant did not have a prior labor-disabling disability until the 2012 industrial injury and did not prove that the peripheral neuropathy was labor-disabling until her condition flared up due to her 2012 specific injury. However, even if the defendant's assertion is true, the peripheral neuropathy still pre-existed the 2015 disability. . . .

The applicant could not perform her job's essential functions in setting up and managing the constant and numerous trade shows. She required assistance to perform these job functions, and this was labor-disabling. Based on the pre-existing peripheral neuropathy and the pre-existing 2012 industrial injury to the hips, the applicant had a pre-existing disability before the cumulative trauma claim ended on June 8, 2015.

. . .

The applicant used QME Dr. Michael Sinel to evaluate the SIBTF claim. He opined that the applicant had a pre-existing disability that rated 8 percent WPI for each lower extremity due to peripheral neuropathy. The applicant also had a pre-existing

disability to both hips due to the 2012 industrial injury of 2 percent WPI for each hip. The pre-existing impairment, therefore, adds the impairment for the hips and peripheral neuropathy to the impairment for the subsequent compensable injury. Thus, the applicant established that the combined disability is greater than the disability from the subsequent injury alone.

. . .

According to Dr. Michael Sinel, the 2015 subsequent industrial injury produced the following impairment: cervical spine, 8 percent whole person impairment (WPI); right shoulder, 1 percent WPI; left shoulder, 1 percent WPI; right foot, 9 percent WPI, left foot, 9 percent WPI, psychological pain, 3 percent WPI, medication 3 percent WPI. Before adjustment for age and occupation, the overall impairment thus rates:

(cervical spine) 15.01.00.00 – 8 – [1.4] 11;
(shoulders) 16.02.02.00 – 2 – [1.4] 3;
(right foot) 17.08.05.00– 9 – [1.4] 13;
(left foot) 17.08.05.00– 9 - [1.4] 13
IMPAIRMENT = 13 + 13 + 11 + 3 = 40 PERCENT

The industrial injury meets the 35 percent threshold requirement for SIBTF since the subsequent industrial disability, without adjusting for age and occupation, is a 40 percent permanent disability. The combined impairment, moreover, does not include impairments recommended by Dr. Sinel of 3 percent WPI for psyche pain and 3 percent WPI for medication usage.

Given that the applicant meets the 35 percent threshold requirement, there is no need to examine whether she also meets the 5 percent impairment to an opposite or corresponding body part. Defendant contends the only disability Dr. Danzig found relative to the 2015 cumulative trauma injury was to the cervical spine. The applicant, however, is not precluded from obtaining additional evidence in the form of a SIBTF QME report to help establish the elements necessary to establish the requirements of a claim. The applicant established compensability for the peripheral neuropathy based on the reporting of Dr. Michael Sinel, which was thorough, well-reasoned, and deemed substantial medical evidence. SIBTF has full discovery rights to obtain evidence regarding the nature of the impairment.

. . .

The applicant must establish that the combined effect of the pre-existing disability and the subsequent injury equals a permanent disability of 70 percent or greater. The Forensic Medical Legal Vocational Evaluation Report by Dr. Luis Mas, dated April 28, 2020, states that the applicant is not vocationally feasible and is not expected to return to suitable gainful employment through vocational rehabilitation. She is unable to participate in any vocational training because of the work limitations and restrictions and due to chronic pain, peripheral neuropathy, neck and cervical spine, bilateral hips, feet, and ankle neuropathy from pre-existing and work injuries (Luis Mas, Ph.D., 04/28/2020, pg. 25 [Applicant's Exh. 3]). The vocational and medical-legal reports show that the combined effects of the

> subsequent injury and the pre-existing disability are more than 70 percent. The vocational expert states that the applicant is 100 percent disabled by the combined effect of the pre-existing disabilities and the 2015 industrial injury. The applicant testified that she could no longer work after the 2015 cumulative trauma injury (MOH/SOE, 5: 14 – 15, 6: 23 – 24). The report of Dr. Sinel indicates that the applicant is permanently totally disabled. "Having performed a comprehensive examination and reviewed the medical records, I do not believe that Ms. Lee could perform and sustain any full-time competitive work in view of the combination of these limitations." He further does not believe the applicant will be able to return to gainful work in the future and concludes the applicant is permanently totally disabled. (Michael Sinel, M.D., 01/17/2019 report, Conclusions on Disability, pg. 64 [Applicant's Exh. 2]). Based on the above, the WCJ agrees that the permanent impairment is a permanent total disability.
> (Opinion on Decision, pp. 4-9.)

DISCUSSION

Turning first to defendant's contention that applicant's claim is barred by the doctrine of collateral estoppel, we observe:

> Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. (*Lucido v. Superior Court (1990) 51 Cal. 3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223].)* The doctrine applies only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements." (Id. at p. 341.)
> (37 Cal. 4th at p. 943 [internal quotation marks omitted].)
> (*Pacific Lumber Co. v. State Water Resources Control Bd*. (2006) 37 Cal.4th 921, 943.)

Collateral estoppel is an affirmative defense. (See e.g*., Fireside Bank Cases* (2010) 187 Cal.App. 4th 1120, 1127, 115 Cal.Rptr. 3d 80).

Here, as the WCJ states in the Report, the September 5, 2017 Compromise and Release provides that applicant's alleged injuries other than orthopedic complaints remain in dispute, the date of injury remains in dispute, and the percentage of permanent disability remains in dispute. (Report, pp. 3, 6.) It follows that the issues presented here are not identical to those of the former proceeding, were not actually litigated in the former proceeding, and were not decided in the

former proceeding. Hence, the record before us fails to establish the threshold requirements for application of the doctrine of collateral estoppel to applicant's claim for SIBTF benefits.

In addition, the record does not reveal that defendant raised the collateral estoppel defense prior to trial herein. (Minutes of Hearing and Summary of Evidence, October 25, 2022, pp. 2:10-3:19.) Since the issue was not raised, it is waived. (See *U.S. Auto Stores v. Workers' Comp. Appeals Bd*. (*Brenner*) (1971) 4 Cal.3d 469 [36 Cal.Comp.Cases 173]; *Los Angeles Unified Sch. Dist. v Workers' Comp. Appeals Bd*. (*Henry*) (2001) 66 Cal.Comp.Cases 1220 (writ den.); *Hollingsworth v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 715 (writ den.).)

Accordingly, we are unable to discern merit to defendant's contention that applicant's claim for SIBTF benefits is barred by the doctrine of collateral estoppel.

We next address defendant's contention that the admissible evidence fails to establish that applicant meets the eligibility requirements for SIBTF benefits. Specifically, defendant contends that, pursuant to Labor Code section 4060(b), applicant was not permitted to obtain an evaluation from any physician other than the physician who opined as to her underlying injury claim and, therefore, the WCJ considered Dr. Sinel's reporting to determine applicant's eligibility to receive SIBTF benefits in error.

In *Duncan v. Workers' Comp. Appeals Bd*. (2010) 75 Cal.Comp.Cases 762 (writ den.), the Appeals Board held that an applicant with cumulative trauma injuries to her upper extremities, shoulders, knees, and back was entitled to (1) obtain medical-legal evaluations in her SIBTF case without returning to the agreed medical evaluator used in the underlying case; and (2) recover the reasonable costs of the evaluations on the grounds that Labor Code the sections 4060 through 4068 do not apply regarding development of evidence in SIBTF claims.

In addition, the California Supreme Court has stated that the WCAB is authorized to consider medical reports even when they have been obtained outside the Labor Code section 4060 et seq. process:

> [T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports … Under section 4064, subdivision (d), "no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense," and "[a]ll comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board …" except as provided in specified statutes. The Board is, in general, broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a).)

> These provisions do not suggest an overarching legislative intent to limit the Board's consideration of medical evidence.
> (*Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209].)

Based upon these authorities, we conclude that defendant's contention that applicant was not permitted to obtain an evaluation from any physician other than the physician who opined as to her underlying injury claim is without legal support.

Accordingly, we are unable to discern merit to defendant's contention that the admissible evidence fails to establish that applicant meets the eligibility requirements for SIBTF benefits.

We next address defendant's contention that the WCJ erroneously adjusted applicant's whole person impairment by the 1.4 adjustment factor. Specifically, defendant argues that Labor Code section 4751 should not be read to allow DFEC adjustment to be included in the calculation of SIBTF eligibility.

Here, as the WCJ states in the Report, Appeals Board panels have construed Labor Code section 4751 to allow inclusion of the DFEC adjustment. (Report, p. 7 (citing *Farmer v. City of Fremont*, 2017 Cal. Wrk. Comp. P.D. LEXIS 63); see also *Geletko v. Cal. Highway Patrol*, 2016 Cal. Wrk. Comp. P.D. LEXIS 202 [81 Cal.Comp.Cases 661].) Although not bound by them, we agree with the reasoning of these decisions. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal.Comp.Cases 236) (stating that panel decisions are not binding precedent on other Appeals Board panels; see also *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145] (stating that panel decisions are citable authority and may be considered to the extent that their reasoning is persuasive, particularly on issues regarding construction of statutory language).)

Accordingly, we are unable to discern merit in defendant's contention that the WCJ erroneously adjusted applicant's whole person impairment by the 1.4 adjustment factor.

Lastly, we address defendant's contention that the WCJ erroneously added the adjusted impairments instead of using the combined values chart (CVC). Specifically, defendant argues that *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680] requires that the impairments be combined, not added.

Contrary to defendant's argument, however, *Fitzpatrick* does not require that impairments be combined and not added. *Fitzpatrick* found that, although impairments "are generally combined" using the CVC the "scheduled rating [under the CVC] is not absolute" and other methodologies may be used to calculate permanent disability. (*Id*., p. 614.)

Furthermore, in *Athens Administrators v. Workers' Comp. Appeals. Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied), the court concluded that impairments may be added where substantial medical evidence supports a physician's opinion that adding impairments will result in a more accurate rating of the level of disability than the rating that results from using the CVC. (See also *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal.Comp.Cases 567 (writ den.) (stating that a physician's opinion as to the most accurate rating method should be followed if she or he provides a reasonably articulated medical basis for doing so); *Johnson v. Wayman Ranches*, 2016 Cal.Wrk.Comp. P.D. LEXIS 235.)

Here, Dr. Sinel reasoned that the most accurate rating method was to add applicant's impairments:

> Ms. Lee's physical impairment caused by her lower extremities was previously discussed on pages 59-61 of my report and because of the synergistic effect of her physical impairments to her lower extremities upon one another, those disabilities should be added . . .
> (Report of QME Michael Sinel, January 17, 2019, p. 64.)

Given the absence of evidence controverting the reasons or grounds for Dr. Sinel's reporting, the WCJ was presented with no good reason to conclude that his opinion is unpersuasive—and we also conclude that it constitutes substantial medical evidence. (*Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

Accordingly, we are unable to discern merit to defendant's contention that the WCJ erroneously added the adjusted impairments instead of using the CVC.

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order on Application for Subsequent Injuries Benefits Trust Fund Benefits issued on February 14, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 12, 2023

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

CONNIE LEE
THOMAS LAW ALLIANCE
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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1.

Applicant's Occupation:	Marketing Representative
Manner Injury Alleged:	Cumulative traumatic injury
Body Parts Alleged:	Neck, bilateral upper extremity, bilateral hips

2.

Petitioner:	Subsequent Injuries Benefits Trust Fund (SIBTF)
Petitioner Filed Timely/Verified:	Yes, filed on 03/13/2023
Answer Filed Timely/Verified:	Yes, filed on 03/16/2023

3.

Findings and Order Date:	02/14/2023
Portions Appealed:	Finding and Order that the applicant qualifies for SIBTF benefits

4.

Petitioner's Contentions: Petitioner contends that (1) the applicant failed to prove that the disability resulting from the subsequent industrial injury equaled or exceeded 35 percent as required by Labor Code § 4751. (2) The applicant is precluded by collateral estoppel from re-litigating the issue of permanent disability from the subsequent industrial injury. (3) The applicant improperly obtained the medical report from Dr. Michael Sinel. (5) The WCJ erred in adjusting the whole person impairment by the 1.4 adjustment factor, and (6) erred by adding the adjusted impairments instead of using the combined values chart.

Respondent's Contentions: Respondent contends that the petitioner (1) raises new issues not raised at trial, (2) opposes well-settled matters of law, (3) imposes burdens of proof not required by California law, and (4) thereby limits the applicant's due process rights.

II. FACTS

1. Counsel for the applicant and SIBTF stipulated that during the time the applicant worked for employer Barilla America from 2004 through June 8, 2015, as a marketing

representative, she sustained a cumulative trauma injury arising out of and in the course of employment to her neck, bilateral upper extremities, and bilateral hips (Minutes of Hearing, Summary of Evidence dated 10/25/2022 (MOH/SOE), 2: 4 – 6.5). Dr. Richard Danzig was the Agreed Medical Examiner in the underlying 2015 subsequent cumulative trauma injury claim. Dr. Danzig noted that in addition to the cumulative trauma injury, the applicant also sustained a previous injury on 01/17/2012 when she fell at work and fractured her pelvis. In 2012/2013, the applicant was diagnosed with peripheral neuropathy (Richard Danzig, M.D., pg. 8 [Joint Exh. X]).

2. According to Dr. Danzig, the impairment due to the cervical spine injury resulted in 8 percent whole person impairment (WPI) (pg. 103), the injury to the bilateral shoulders resulted in 1 percent WPI rating for each shoulder (pg. 121), and injury to the pelvis produced a zero percent WPI (pg. 114). The right hip produced a 2 percent WPI (pg. 117), and the left had a 2 percent WPI (pg. 121). The burden of pain on the hips warranted an additional 2% WPI. (pg. 121). Dr. Danzig did not address whether the applicant injured her feet due to the subsequent cumulative trauma injury or if she had any permanent impairment related to the feet. He apportioned 90 percent of the cervical spine impairment on the cumulative trauma injury (pgs. 122, 123) and 100 percent of the impairment for the shoulders, thumbs, hips, and pelvis to the subsequent cumulative trauma injury (pg. 123).
3. The applicant and employer/carrier entered a Compromise and Release settlement resolving the cumulative trauma injury and the petition to reopen the 01/17/2012 specific injury (Defense Exh. B). The Compromise and Release agreement states that: the applicant's injuries other than orthopedic complaints are in dispute, the date of injury is in dispute, and the percentage of permanent disability is in dispute (pg. 7, paragraph 9). Further, paragraph 3 on page 5 indicates that the settlement agreement is limited to the settlement of the body parts, conditions, or systems and dates of injury outlined in paragraph No. 1. The Workers' Compensation Administrative Law Judge (WCALJ) approved the Compromise and Release on 09/06/2015 (Defense Exh. C).
4. On 10/13/2017, the applicant's attorney filed an Application for Subsequent Injuries Fund Benefits. The applicant obtained a Subsequent Injury Benefits Trust Fund Evaluator's Report and Supplemental Report from Dr. Michael Sinel. (Applicant's Exhs. 1, 2). Dr.

Sinel notes that pre-existing disability based on peripheral neuropathy was diagnosed on 07/23/2004. The applicant's pre-existing conditions are peripheral sensorimotor neuropathy of both feet, Charcot deformity of the feet, post-pelvic fracture in 2012, and depression. (pg. 57, Applicant's Exh. 2). Regarding disability and impairment, Dr. Sinel opined that the pre-existing peripheral neuropathy resulted in 8 percent WPI for each lower extremity, and the pelvic fracture caused a 6 percent right hip WPI and 6 percent left hip WPI (pg. 60, 61).

5. The applicant testified that the neuropathy felt like a numbness and searing pain that burned a lot, and over time the pain traveled up her legs and interfered with her ability to work. She traveled a lot for her job, and traveling became very difficult. The company put tables and chairs at trade shows so that she could sit down. They swapped out the padding so that she could walk and feel more comfortable because, by 2011, she could not walk any distances (MOH/SOE 6: 1 – 6). By 2015, the employer hired a person to travel with her to set up the booths and perform the parts of the job that she could no longer physically perform. In 2015 when she stopped working, she had pain in her hips, shoulder, neck, and especially her feet that prevented her from working (MOH/SOE, 6: 5 – 7). Dr. Phillips indicated that she should not work. She recalls seeing Dr. Danzig, but he indicated that he was not a neurologist and declined to evaluate her feet (MOH/SOE, 7: 1 – 3).
6. The applicant sustained a subsequent industrial cumulative trauma injury when she gradually developed neck, back, shoulder, and hand numbness due to her job duties. She gradually experienced needle-like sensations, muscle weakness, and burning sensation in the lower extremities. Dr. Sinel reviewed the medical records and concluded that the subsequent industrial cumulative trauma injury caused a cervical disc protrusion, cervogenic headaches, thoracic sprain/strain, lumbar disc protrusion, lumbar spine sprain/strain, bilateral shoulder sprain strain, bilateral foot pain, and a severe episode of major depression.

III.

DISCUSSION

(1) DISABILITY RESULTING FROM THE SUBSEQUENT INDUSTRIAL INJURY EQUALS OR EXCEEDS 35 PERCENT AS REQUIRED BY LABOR CODE § 4751

To establish entitlement to SIBTF benefits, the applicant must show either that the permanent disability from the industrial injury alone produced 35 percent disability or more, or that there exists 5 percent disability or more to an opposite and corresponding member. The 35 percent and 5 percent thresholds must be met before adjustment for age and occupation, and case law establishes that the above calculations include DFEC adjustment.

Labor Code Section 4751 establishes the guidelines for eligibility to receive SIBTF benefits. It states in the pertinent part:

> "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." (Section 4751)

According to Dr. Michael Sinel, the 2015 subsequent industrial injury produced the following impairment: cervical spine, 8 percent whole person impairment (WPI); right shoulder, 1 percent WPI; left shoulder, 1 percent WPI; right foot, 9 percent WPI, left foot, 9 percent WPI, psychological pain, 3 percent WPI, medication 3 percent WPI. Before adjustment for age and occupation, the overall impairment thus rates: (cervical spine) 15.01.00.00 – 8 – [1.4] 11; (shoulders) 16.02.02.00 – 2 – [1.4] 3; (right foot) 17.08.05.00– 9 – [1.4] 13; (left foot) 17.08.05.00– 9 - [1.4] 13 = 13 + 13 + 11 + 3 = 40 percent. The WPI is the almost same as the impairment prescribed by Dr. Danzig, except that Dr. Danzig did not address the injury and impairment for the feet.

The industrial injury meets the 35 percent threshold requirement for SIBTF since the subsequent industrial disability, without adjusting for age and occupation. The combined impairment is even higher if one also considers the 3 percent WPI for psyche pain and 3 percent WPI for medication usage. Given that the applicant meets the 35 percent threshold requirement,

there is no need to examine whether she also meets the 5 percent impairment to an opposite or corresponding body part.

(2) THE APPLICANT DID NOT RE-LITIGATE THE LEVEL OF DISABILITY OR IMPAIRMENT

The 2015 subsequent industrial injury was resolved via a Compromise and Release and Order Approving Compromise and Release. The Compromise and Release settlement states that in exchange for a specific lump sum, the parties forego litigation regarding ongoing disputes, including the nature and extent of the injury and permanent disability. Petitioner contends that the applicant now wants to "re-litigate" the percentage of permanent disability for the 2015 subsequent industrial injury. However, there were no prior Findings and Awards regarding the percentage of permanent disability for the 2015 subsequent industrial injury.

The Compromise and Release agreement does not by itself constitute an "award of permanent disability under section 4664(b)." (See, Pasquotto v. Hayward Lumbar (2006) (WCAB en banc) 71 Cal. Comp. Cases 223, at 230; 2006 Cal. Work. Comp. LEXIS 35.) It is not collateral estoppel as to the percentage of permanent disability for the subsequent industrial injury, since there never was a prior adjudication as to the percentage of permanent disability. The Compromise and Release instead highlights that there was a dispute concerning the nature and extent of the injury and permanent disability. It nowhere includes a specific finding concerning the permanent disability for the subsequent industrial injury. Dr. Danzig's report does not address all body parts since the feet were disputed. For example, he indicates on pages 101 and 102 that he defers "any further comments regarding the problem of the patient's feet and ankles to an AME neurologist." The petitioner cites cases that are distinguishable because they involve matters that include judicial findings regarding the percentage of permanent disability.

(4) THE REPORT OF DR. SINEL VALIDLY OBTAINED

The applicant followed the proper procedure for obtaining a medical-legal report in the SIBTF case. Labor Code § 4062.2 normally does not apply to claims for SIBTF benefits because the issues involved in the underlying case in chief and the SIBTF claim are different. (Duncan v. Workers' Compensation Appeals Bd., 75 Cal. Comp. Cases 762 (Cal. App. 1st Dist. June 11, 2010) The SIBTF matter involves a new Application and different parties - SIBTF instead of the employer/carrier, as well as different issues such as threshold requirements for SIBTF benefits.

Since Dr. Danzig did not address whether the applicant's feet were part of the subsequent industrial injury, the applicant was entirely within her rights to obtain a medical-legal report to establish the point. In sum, the applicant established compensability for the peripheral neuropathy based on the reporting of Dr. Michael Sinel, which was thorough, well-reasoned, and deemed substantial medical evidence.

(5) THE WHOLE PERSON IMPAIRMENT IS TO BE ADJUSTED BY 1.4 FACTOR

The WCJ included the 1.4 adjustment factor. Various panel decisions state that Labor Code § 4751 allows for DFEC adjustment to be included in the SIBTF eligibility calculation. The legislature only excluded adjustment for age and occupation, and therefore did not exclude the DFEC adjustment. The rule of construction of expressio unius est exclusio alterius implies that to express one is to exclude, and the mention of one or more things may be taken to exclude others. The WCAB stated, "We find that applicant's whole person impairment should be adjusted using the DFEC table in determining whether the applicant qualifies for SIBTF benefits." (Farmer v. City of Fremont, 2017 Cal. Wrk. Comp. P.D. LEXIS 63, *7-16 (Cal. Workers' Comp. App. Bd. February 16, 2017)[1].

(6) IMPAIRMENTS ADDED RATHER THAN COMBINED

Regarding the subsequent 2015 industrial injury, because of the synergistic effect of the applicant's physical impairments to her lower extremities upon one another, Dr. Sinel indicates that the disabilities should be added before being aggregated with the other impairments because adding the impairments produces the most accurate description of the applicant's overall disability (pg. 64). The disabilities did not overlap and that their synergistic disabling effect on the applicant's earning capacity supports the addition of the disability values to obtain an accurate overall rating. (Athens Administrators v. Workers' Comp. Appeals Bd. (Kite), 78 Cal. Comp. Cases 213 (Cal. App. 1st Dist. February 28, 2013))

CONCLUSION: THRESHOLD REQUIREMENTS FOR SIBTF BENEFITS MET

The applicant meets the requirements for SIBTF benefits. She had a pre-existing disability to her bilateral lower extremities due to longstanding peripheral neuropathy, which occurred before the 2015 subsequent industrial injury. The SIBTF QME reports of Michael Sinel M.D. and the applicant's trial testimony establish that the employer made reasonable accommodations. The employer provided the applicant with a "helper" who performed most of

[1] Respondents trial brief moreover cites several other panel decisions with the same result.

the physical labor required to put on the presentations at the trade shows due to the peripheral neuropathy, which pre-dates the 2015 disability. The applicant could not perform the essential functions in setting up and managing the constant and numerous trade shows, and she required assistance to perform these job functions. The applicant also had pre-existing impairment occasioned by the 2012 industrial injury to the hips.

When added to the impairment for the subsequent compensable injury, the pre-existing impairment for the hips and peripheral neuropathy increased the applicant's overall impairment. The combined disability was greater than the disability from the subsequent injury alone.

The applicant established the combined effect of the pre-existing disability, and the subsequent injury was 70 percent or greater permanent disability. The unrebutted Forensic Medical Legal Vocational Evaluation Report by Dr. Luis Mas, dated April 28, 2020, states that the applicant is not vocationally feasible and is not expected to return to suitable gainful employment through vocational rehabilitation. She is unable to participate in any vocational training because of the work limitations and restrictions and due to chronic pain, peripheral neuropathy, neck and cervical spine, bilateral hips, feet, and ankle neuropathy from pre-existing and work injuries (Luis Mas, Ph.D., 04/28/2020, pg. 25 [Applicant's Exh. 3]). The applicant testified that she could no longer work after the 2015 cumulative trauma injury (MOH/SOE, 5: 14 – 15, 6: 23 – 24). Dr. Sinel also opined that the applicant is permanently totally disabled. Dr. Sinel concludes: "Having performed a comprehensive examination and reviewed the medical records, I do not believe that Ms. Lee could perform and sustain any full-time competitive work in view of the combination of these limitations." (Michael Sinel, M.D., 01/17/2019 report, Conclusions on Disability, pg. 64 [Applicant's Exh. 2]).

IV.

RECOMMENDATION

Because of the foregoing, it is respectfully requested that the Petition for Reconsideration filed by and on behalf of the Subsequent Injuries Benefits Trust Fund filed by and on behalf of the Subsequent Injuries Benefits Trust Fund be denied.

DATE: March 28, 2023

Richard Brennen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE