WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SHARON ANGELL, ***Applicant***

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, ***Defendants***

Adjudication Numbers: ADJ4145263 (VEN 0120366); ADJ2903274 (OXN 0124883)
Oxnard District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Applicant and defendant seek reconsideration of the Findings and Award and Order (F&O) issued on August 31, 2021, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed during the period of July 11, 1997 through April 10, 2000, applicant sustained injury to her bilateral shoulders, elbows, wrists, hands, neck and back; (2) applicant is eligible for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits; (3) applicant is entitled to benefits of $260.00 per week for a period of 615.50 weeks from October 12, 2004 until July 28, 2016, and thereafter the payment of $370.17 per week for life, less credit of $2,520.00 paid in permanent disability benefits in ADJ2903274, less a credit in favor of defendant, and less the attorney's fee; (4) defendant is entitled to a credit of $275,729.20 for the Social Security disability benefits received by applicant; and (5) the filing of the application for SIBTF benefits within six months of applicant's learning of the subsequent injury was timely.

The WCJ issued an award in accordance with these findings and ordered that 15 percent of the SIBTF benefits awarded be commuted from benefits payable upon exhaustion of the credit and withheld by defendant pending determination of the attorney's fee issue.

Applicant contends that the WCJ erroneously (1) found that defendant is entitled to a credit of $275,729.20 for Social Security Disability (SSD) benefits on the grounds that it failed to prove

[1] Commissioner Lowe and Commissioner Sweeney no longer serve on the Appeals Board. New panel members have been substituted in their place.

any of the benefits were made based upon her preexisting disability; and (2) set the attorney's fee at 15 percent of the SIBTF benefits awarded on the grounds that the attorney/client fee agreement provides a higher fee.

Defendant contends that the WCJ erroneously found that (1) applicant is entitled to SIBTF benefits because the record is without substantial medical evidence that applicant had a prior labor disabling injury resulting from a 1996 motor vehicle accident; and (2) applicant is entitled to commutation of the attorney's fee because SIBTF benefits are not subject to commutation for payment of the attorney's fee.

We received an Answer from applicant.

We received a Report and Recommendation on Petition for Reconsideration filed by applicant (Report on Applicant's Petition) and a Report and Recommendation on Petition for Reconsideration filed by defendant (Report on Defendant's Petition) from the WCJ. The Report on Applicant's Petition recommends that the Petition be granted to allow a higher attorney's fee and otherwise denied. The Report on Defendant's Petition recommends that the Petition be granted to rescind the order commuting the attorney's fee and otherwise denied.

We received a request for leave to file a supplemental pleading from applicant and we accept her supplemental pleading labeled Supplemental Legal Brief.[2]

We have reviewed the contents of the Petitions, applicant's Answer, applicant's Supplemental Legal Brief, and the Reports. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that defer the issues of the amount of applicant's preexisting disability, whether applicant's preexisting disability served as a basis for her SSD benefits, the amount of the attorney's fee, and whether applicant is entitled to SIBTF benefits pursuant to *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc).

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[2] WCAB Rule 10964 provides as follows: "When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board. Supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, shall neither be accepted nor deemed filed for any purpose and shall not be acknowledged or returned to the filing party." (Cal. Code Regs., tit. 8, § 10964.)

FACTUAL BACKGROUND

On February 2, 2021, we granted removal of the Order to Applicant to Produce Documentation of Social Security Disability (SSD) Payments, Enforcing SIBTF's Notice to Appear and Produce Dated December 11, 20119 for the sole purpose of amending the Order to clarify the method and scope of discovery ordered by the WCJ. (Opinion and Order Granting Petition for Removal and Decision After Removal, February 2, 2021, pp. 1, 9.) In it, we state:

> Applicant has therefore failed to state good cause to continue to withhold from SIBTF all relevant and responsive information and documentary evidence related to her receipt of SSD benefits. Consequently, no irreparable harm or severe prejudice inures to applicant as a result of the WCJ's order that she disclose and produce information and documentary evidence responsive to SIBTF's lawful and relevant discovery.
> . . .
> It is found that any relevant information and documentation available through applicant's Social Security Administration on-line account (see https://www.ssa.gov/myaccount), are sources of information and documentation within applicant's possession, custody, and/or control.
> (*Id*., pp. 9, 11.)

In the Opinion on Decision, the WCJ states:

> Applicant seeks benefits from the Subsequent Injuries Benefits Trust Fund. She was injured during the period 07/11/1997 through 04/10/2000 in ADJ4145263. She had previously suffered a non-industrial injury in 1996, which she alleges caused permanent disability before her industrial cumulative trauma injury.
> . . .
> In this case, the overall disability is greater than 70%, and the PD in the subsequent injury (ADJ4145263) is greater than 35%.
>
> The claim herein is predicated on the residuals of a 1996 motor vehicle accident.
>
> The subsequent injury caused fibromyalgia. That condition was also partially caused by the 1996 MVA according to David S. Silver, M.D., agreed medical examiner in rheumatology (beginning with WCAB Exhibit FFFF, report of 06/21/2006).
>
> He revisited apportionment WCAB Exhibit DDDD, report of 01/09/2009. He amended his apportionment percentages, but remained of the opinion that a portion of the fibromyalgia was attributed to the 1996 accident. He writes:

In addition, the patient clearly did have residual symptoms dating almost a full year following the motor vehicle accident and predating her work, which included TMS symptoms, sleep disturbance, chronic headaches and cervical and mid back pain. All these are consistent with the diagnosis. Clearly I cannot state that the patient met the diagnostic criteria for fibromyalgia at that time, but the patient clearly did have significant residual symptomatology that was attributable to the motor vehicle accident and was present when she began her work at Marymount Academy.

. . .

The troubling question presented by this record is raised by the fact that the doctor could not state that applicant met the diagnostic criteria for fibromyalgia "almost a full year following the motor vehicle accident and predating her work…" Therefore it is not clearly established that applicant suffered from permanent disability attributable to that condition from the previous injury.

Nevertheless her symptoms were "consistent with the diagnosis" and she had "significant residual symptomatology that was attributable to the motor vehicle accident and was present when she began her work at Marymount Academy."

Further, there would be no way the doctor could test the diagnostic criteria from the 1996 accident since he first examined her on 06/21/2006.

On balance, it is more probable than not that applicant suffered permanent disability from the 1996 previous accident before suffering permanent disability (greater than 35% of the overall PD) from the subsequent injury. The overall PD is greater than 70%.

Applicant is eligible for SIBTF benefits.

. . .

Attorney Fee

This issue was not raised at SIBTF trial proceedings of 06/12/2019 or 06/23/2021. Nevertheless this was apparent oversight. At this time a Notice of Intention to include a claim for an attorney fee will issue, allowing applicant, her attorneys or defendant to object thereto.

In the interim, defendant is ordered to withhold 15% of the balance of the amount owed after subtraction of the amounts paid and payable under the Award in ADJ4145263 and the credit allowed above, pending response to the Notice of Intention.
(Opinion on Decision, pp. 1-3, 5.)

In the Report on Applicant's Petition, the WCJ states:

When first set for trial on this claim on 06/12/2019, SIBTF objected to proceeding to trial in the absence of documentation regarding applicant's possible receipt of Social Security Disability Indemnity benefits, which would be a basis for credit to SIBTF.

At that trial proceeding the parties stipulated that:

f) Applicant did not provide Social Security disability credit information in the application for SIBTF benefits;

g) Applicant has not served SIBTF with any Social Security disability payment details and has not provided a Social Security disability release.

Petitioner then advised the Court by letter of 06/13/2019 that applicant did in fact receive Social Security Disability Indemnity benefits, though petitioner had previously "parenthetically noted" that she had not received such benefits (EAMS Doc. ID No. 29515890).

Submission was vacated on 08/07/2019 as a result of the acknowledgement of receipt by petitioner of SSDI benefits for the purpose of developing the evidentiary record.

The process of developing the record involved a rather tortured path of discovery including two petitions for removal, the Board ultimately ordering that petitioner comply with production of information and documents.

After the records were received they were admitted in evidence (Defendant's Exhibits A through P) and the matter was again submitted for decision on 06/23/2021.

Petitioner has been found eligible for SIBTF benefits as of 08/31/2021 . . . However petitioner herein contends that the $275,729.20 paid in SSDI benefits from 2001 through 2015 may not be credited against SIBTF liability since the records do not establish what disability was the basis for the Social Security payments.

Petitioner additionally contests the allowance of only 15% of the net recovery from SIBTF as an attorney fee, citing a written agreement between the injured worker and counsel dated 07/09/2019 (EAMS Doc. ID NO. 29515890).

. . .

First addressing the attorney fee, the undersigned is willing to revisit the allowance consistent with 8 Cal. Code of Reg. Section 10844. The letter documenting the worker's agreement to a higher fee allowance was filed

more than two years before the case was submitted and in the absence of any reference to it at the time of trial was not considered.

Turning to the credit issue, a fair reading of Labor Code Section 4753 militates toward allowance of the credit herein. The purpose of the statute is to avoid double recoveries and depletion of SIBTF funds.

. . .

Applicant received those benefits, as ultimately admitted and demonstrated by the evidence. Requiring SIBTF to pay the Award herein without credit for the SSDI payments would be both a double recovery for applicant and a depletion of SIBTF public funds.

(Report on Applicant's Petition, pp. 1-4.)

In the Report on Defendant's Petition, the WCJ states:

> The discovery path leading to the Social Security records was somewhat tortured, as defendant sought documentation of receipt of any such benefits while applicant averred on 06/12/2019 in briefing that "Ms. Angell has never received SSDI, so there is no credit to be obtained." The following day applicant's counsel filed a letter acknowledging that SSD benefits were received:
>
> However, we were recently advised by our client that we were misinformed. She had, in fact, received SSDI benefits in the past for quite some time, which stopped in June 2014. I can only surmise that when we inquired about her receiving SSDI benefits, she was responding to her current receipt of SSDI benefits rather than when she had ever received them in the past.
>
> In the ensuing sixteen months applicant maintained that she had no duty to supply any request for the records on her own behalf, while defendant's request to the Administration went unanswered. The question was presented to the Board on removal at least twice, and was answered on 02/20/2021, resulting in the records finally being obtained.
>
> The records include the payments made to applicant from Social Security Disability, but do not identify what injury or condition made her eligible for the benefits.
>
> . . .
>
> Petitioner defendant contends that the opinion of David S. Silver, M.D. (WCAB Exhibit DDDD, report of -1/09/2009) is not substantial evidence that the 1996 accident produced a labor disabling disability. Apportionment of disability to that accident alone would not support a finding that it produced a labor disabling disability. But Dr. Silver went further than simply apportioning. He notes that she had residual symptoms for almost a full year after the accident that were still present when she began work at Marymount.

> Thus, the 1996 accident did not produce pathology alone, it was not asymptomatic, it was not the subject of a retroactive prophylactic work restriction, it did not produce symptoms alone and was not the result of pre-existing disease.
>
> Dr. Silver had no opportunity to evaluate applicant at the time of the 1996 accident, but this does not mean the pre-existing disability was not measured as it existed at the time immediately prior to the subsequent industrial injury. This was done by apportioning permanent disability to it (but not with a retroactive prophylactic work restriction) and by considering medical records documenting the course of applicant's condition following that accident up until the industrial trauma.
> . . .
> While applicant has a total and permanent disability combining all of her injuries, petitioner defendant contends that the subsequent industrial injury combining with the 1996 injury cannot reach 100% because applicant was also awarded 6% permanent disability in her claim against employer EDS (consolidated with the Marymount claim at trial).
>
> This can only be true if the 1996 injury caused no disability that could be ratable. The best evidence (AME Dr. Silver) demonstrates that the 1996 injury was labor disabling.
>
> For workers' compensation claims of this vintage, it is possible to have Awards that when added together exceed 100% PD.
>
> It is not required that the 6% Award be subtracted from the result of the combination of the disabilities resultant from the 1996 injury and the Marymount injury.
> . . .
> The undersigned WCALJ here confesses error. Commutation of the attorney fee is prohibited by Labor Code Section 5100.5. Whatever attorney fee is allowed (see applicant's petition for reconsideration 09/14/2021 and the Report and Recommendation of 09/24/2021 regarding the percentage requested), the fee must be paid as each benefit is paid.
> (Report on Defendant's Petition, pp. 3-5.)

DISCUSSION

Labor Code section 4753[3] provides:

> Such additional [subsequent injury benefits] 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 . . .

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

> 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.)

Applicant argues that the WCJ erroneously found that defendant is entitled to a credit of $275,729.20 for SSD benefits on the grounds that it failed to prove any of the benefits were made based upon her preexisting disability.

Pursuant to section 4753, defendant may take a credit against SSD benefits applicant received upon a showing that the benefits were paid as compensation for a preexisting disability or impairment for which applicant was awarded SIBTF benefits. (See *Ybarra v. Workers' Comp. Appeals Bd*. (2002) 103 Cal.App.4th 987 [127 Cal.Rptr.2d 208].)

In *Ybarra*, 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 against which SIBTF sought a credit must have been based not only on the orthopedic disability cited by the retirement pension board, but also preexisting disability or impairment attributable to his hypertension and gastrointestinal conditions.

However, the court rejected SIBTF's argument on the grounds that the retirement pension 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.)

In this case, the WCJ determined that defendant is entitled to a credit because (1) "[a]pplicant received those benefits, as ultimately admitted and demonstrated by the evidence . . . [and] [r]equiring SIBTF to pay the Award herein without credit for the SSDI payments would be both a double recovery for applicant and a depletion of SIBTF public funds"; and (2) applicant's fibromyalgia was "partially caused by the 1996 MVA." (Report on Applicant's Petition, p. 4; Opinion on Decision, p. 2.)

But the WCJ did not make a finding as to the amount of applicant's preexisting disability or impairment that resulted from her fibromyalgia (or any other condition) before her subsequent injury—and did not reach the issue of whether applicant received SSD benefits based upon her preexisting disability or impairment.

Section 5313 requires the WCJ to state the "reasons or grounds upon which the [court's] determination was made." (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIS 74].) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, at p. 478), and must be supported by substantial evidence. (§ 5903, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." *(Hamilton*, *supra*, at p. 475.)

Because the WCJ did not make a finding as to the amount of applicant's preexisting disability before her subsequent injury—and did not reach the issue of whether applicant received SSD benefits based upon her preexisting disability, the record should be developed as to the amount applicant's preexisting disability or impairment and whether it served as a basis for applicant's SSD benefits.

Having determined that the record should be developed as to the amount of applicant's preexisting disability, we acknowledge the WCJ's statements that applicant has asserted that defendant may not conduct discovery as to the issue of whether it is entitled to a credit, that applicant's false assertion that she did not receive SSD benefits delayed the proceedings, and that discovery conducted to date includes records of SSD's payments but not records "identify[ing] what injury or condition made her eligible for [SSD] benefits." (Report on Applicant's Petition, p. 2; Report on Defendant's Petition, pp. 3-4.)

However, since we have previously determined that applicant failed to state grounds for failing to disclose materials "related to her receipt of SSD benefits," and since records evidencing what condition made applicant eligible for SSD benefits are required for adjudication of the issue of whether applicant received SSD benefits based upon the preexisting disability underlying her

claim for SIBTF benefits, we recommend that the WCJ reopen discovery as necessary to develop the medical evidence as to applicant's preexisting disability and whether applicant received SSD benefits based thereon. (Opinion and Order Granting Petition for Removal and Decision After Removal, February 2, 2021, p. 9.)

Accordingly, we will substitute a finding that the issues of the amount of applicant's preexisting disability, and, as appropriate, whether the preexisting disability served as a basis for applicant's SSD benefits are deferred. (See § 5701, § 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924] (stating that the "principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims").)

We next address applicant's argument that the WCJ erroneously set the attorney's fee at 15 percent of the benefits awarded on the grounds that the attorney/client fee agreement provides for a higher fee.

Although the record does not include a finding as to the amount of the attorney's fee, the WCJ ordered defendant to "withhold 15% of the balance of the amount owed after subtraction of the amounts paid and payable under the Award in ADJ4145263 and the credit allowed above." (Opinion on Decision, p. 5; see also F&O.) Applicant's Petition thus effectively requests an increase in her attorney's fee without including a proof of service of written notice on applicant by her attorney of the attorney's adverse interest and applicant's right to seek independent counsel as required by WCAB Rule 10842. (Cal. Code Regs. tit. 8, § 10842.) We therefore admonish applicant's attorney to promptly comply with Rule 10842 or face dismissal of the request for an increased fee. (*Id.*)

Turning to the merits of applicant's argument, we agree with the panel in *Anguiano v. Subsequent Injuries Benefits Trust Fund*, 2023 Cal. Wrk. Comp. P.D. LEXIS 214,[4] that an attorney/client fee agreement for an attorney's fee of 25 percent may not by itself support such a fee. There the panel states:

> A 25% attorney's fee agreement entered with the applicant is not enough. (see § 5702.) Applicant's attorney must show whether the higher attorney

[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of statutory or regulatory construction. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

> fee is warranted under the facts of this case, including but not limited to, whether this SIBTF claim is particularly difficult to prove, whether significant research and/or development of the medical and vocational record was required, whether the facts of this case are more complicated, as well as the factors outlined in WCAB Rule 10844 (Cal. Code of Regs., tit. 8, § 10844).
> *(Anguiano*, *supra*.)

But since the record lacks an application of the Rule 10844 factors for determining the fee, and since the WCJ states that the 15 percent ordered to be withheld by defendant is subject to application of those factors, we conclude that record should be developed to determine the attorney's fee. (Report, p. 3.)

Accordingly, we will substitute a finding that defers the issue of the attorney's fee to which applicant's attorney is entitled. (§ 5701, § 5906; *Tyler, supra*.)

We turn next to defendant's contention that the WCJ erroneously found that applicant is entitled to SIBTF benefits because the record is without substantial medical evidence that applicant had a prior labor disabling injury resulting from a 1996 motor vehicle accident.

Section 4751 provides:

> If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article; provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, and such latter permanent disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee, is equal to 5 percent or more of total, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or the age of the employee, is equal to 35 percent or more of total.
> (§ 4751.)

In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), we stated that an employee must prove the following elements to recover subsequent injuries fund benefits:

> (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).)

Here, as explained above, the WCJ found that applicant is entitled to SIBTF benefits without making a finding as to the amount of applicant's preexisting disability or as to the other elements required by *Todd.* More specifically, although the WCJ opined that applicant's "overall disability is greater than 70%", he did not explain how he arrived at this combined disability in the absence of a record as to amount of preexisting disability. (We note that contemporaneous medical evidence as to the amount of preexisting disability is not required for development of the record as to that issue. (See *Organista v. Subsequent Injuries Benefits Trust Fund*, 2023 Cal. Wrk. Comp. P.D. LEXIS 352.))

Accordingly, we will substitute a finding that defers the issue of whether applicant is entitled to SIBTF benefits pursuant to *Todd*. (See § 5701, § 5906; *Tyler, supra*.)

Lastly, we turn to defendant's argument that the WCJ erroneously found that applicant is entitled to commutation of the attorney's fee because SIBTF benefits are not subject to commutation for that purpose.

Here, as stated by the WCJ in the Report on Defendant's Petition, "Commutation of the attorney fee is prohibited by Labor Code Section 5100.5 . . . [and] [w]hatever attorney fee is allowed . . . must be paid as each benefit is paid. (Report on Defendant's Petition, p. 5.)

Accordingly, we will substitute a finding that defers the issue of the amount of the attorney's fee.

Accordingly, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that defer the issues of the amount of applicant's preexisting disability, whether applicant's preexisting disability served as a basis for her SSD benefits, the amount of the attorney's fee, and whether applicant is entitled to SIBTF benefits pursuant to *Todd*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that the Findings and Award and Order issued on August 31, 2021is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant, Sharon Angell, born ______, while employed in ADJ4145263 during the period July 11, 1997 through April 10, 2000, at Santa Barbara, California, by Marymount Academy, Inc., sustained injury arising out of and in the course of employment to her bilateral shoulders, elbows, wrists, hand, neck, and back.

2. The issues of whether and in what amount applicant is entitled to SIBTF benefits pursuant to *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc) are deferred.

3. The issues of the amount of applicant's preexisting disability and whether her preexisting disability served as a basis for her Social Security disability benefits are deferred.

4. The issue of the amount of the attorney's fee is deferred.

5. The filing of the SIBTF application within six months of applicant's learning of the subsequent injury was timely.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 18, 2024

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

SHARON ANGELL
GHITTERMAN, GHITTERMAN & FELD
OFFICE OF THE DIRECTOR – LEGAL UNIT
STATE COMPENSATION INSURANCE FUND
FLOYD SKEREN MANUKIAN LANGEVIN
SUBSEQUENT INJURIES BENEFITS TRUST FUND

SRO/*cs*

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