

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

ANTONIO LUNA ALVAREZ, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ15370512
Salinas District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by Subsequent Injuries Benefits Trust Fund (SIBTF). This is our Opinion and Decision After Reconsideration.

SIBTF seeks reconsideration of the December 10, 2024 Amended Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that (1) applicant sustained a subsequent injury to his back causing permanent disability of 27% that affected his bilateral lower extremities by causing pain that limited his activities of daily living (ADL), (2) applicant sustained a prior permanent partial disability to his heart with a 40% whole person impairment (WPI), which also affected applicant's bilateral lower extremities by causing pain, and (3) applicant suffered preexisting disability in the form of GERD, hypertension, and left knee problems. The WCJ then awarded applicant 100% permanent disability against SIBTF less credits and attorney's fees.

SIBTF contends that in order to employ the 5% eligibility threshold, the preexisting disability must be to a single hand, arm, foot, leg, or eye and the subsequent injury must have caused 5% standard disability in the opposite and corresponding member. SIBTF contends that the 5% eligibility threshold is not met here because the preexisting disability is to his heart and the subsequent injury is to his back. SIBTF further contends that applicant failed to prove the preexisting disabilities were labor disabling at the time of the subsequent injury.

We received an answer from applicant Antonio Luna Alvarez. Applicant contends that he has met the 5% eligibility threshold because there is medical evidence that both his subsequent injury to his back and his preexisting disability to his heart affected his bilateral lower extremities. Applicant further contends that combining his preexisting disabilities with the subsequent injury by adding permanent disabilities per *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc) results in 100% permanent disability.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Amended Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we return this matter to the trial level to further develop the record.

FACTS

Per the Report:

The Applicant suffered an admitted injury to his low back on 4/15/2021. This injury resulted in permanent partial disability of 27%. According to the reports of PQME Chow (Exhibits A-5 and A-6). This back injury caused radiating pain into both lower extremities which limited Applicant's activities of daily living. As far as I can tell, neither party seriously disputes the effect of this injury. Applicant claimed a higher PD at trial and continues to make this claim, but apparently has not sought reconsideration of the 12/10/2024 F&A finding that the 27% PD found by Dr. Chow continues to exist. Defendant asks the Board to ignore Dr. Chow's findings of ADL limits imposed by the radiating low back symptoms, but continues to maintain that Dr. Chow's reports are substantial and should be followed.

Years before his 2021 injury, Applicant underwent extensive treatment for cardiovascular disease, GERD, hypertension, and left knee problems. After resolution of the industrial injury, Applicant sought an evaluation with Dr. Mahawar. Based upon, *inter alia*, the history given by the injured worker and some 2,200+ pages of contemporaneous treatment records from Salinas Valley Memorial Hospital and other providers, Dr. Mahawar wrote two reports (exhibits A-1 and A-2) which conclude that (1) the cardiovascular injury and the left knee injury affected the Applicant's lower extremities and produced over 5% PD, and (2) the

combination of the pre-existing disability and the subsequent injury produced PD of 100%. (Report, p. 2.)

DISCUSSION

Labor Code¹, 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 order to be entitled to 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;

¹ All statutory references are to the Labor Code unless otherwise indicated.

(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. (§ 4751; *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc).)

The issue here is whether applicant meets the 5% SIBTF eligibility threshold because the WCJ found that applicant sustained 27% permanent disability as the subsequent injury, which failed to meet the 35% eligibility threshold. (Amended Findings and Award, Findings no. 3.)

Before we discuss the 5% eligibility threshold, we first discuss the 35% eligibility threshold. David M. Chow, M.D., Qualified Medical Evaluator, opined that applicant sustained an industrial lumbar injury on April 15, 2021, resulting in a combined whole person impairment (WPI) of 14% with a 2% add-on for pain. (Exhibit A7, Dr. Chow's report dated July 12, 2022, p. 17.) Dr. Chow further opined that 85% of the lumbar spine injury was due to the industrial specific injury and 15% was due to preexisting degenerative changes.² (*Ibid.*)

0.85 (15.03.01.00 – 16[1.4] -22 – 380H – 27 – 32) 27

Suresh Mahawar, M.D., was hired to evaluate applicant's SIBTF eligibility. Dr. Mahawar agreed with Dr. Chow with respect to applicant's WPI rating based on range of motion, but disagreed that the standard AMA Guides rating on its own was an accurate reflection of applicant's whole person impairment. (Exhibit A2, Dr. Mahawar's report dated May 15, 2023, pp. 22-23.) In addition to the 14% WPI based on range of motion and the 2% pain add-on, Dr. Mahawar includes a 4% WPI under Table 13-15 (rises to standing position; walks but has difficulty with elevation, grades, stairs, deep chairs, and long distances) and a 10% WPI under Table 6-9 (frequent discomfort which precludes heavy lifting but does not hamper some activities of daily living). (*Id.* at p. 23.)

14c10c5 = 27 + 2 = 29

0.85 (15.03.01.00 – 29[1.4] – 41 – 380H – 47 – 53) 45

We have recently issued multiple decisions, albeit subsequent to the filing of the petition at issue, concluding that apportionment is not to be included in calculating whether an employee

² Dr. Chow referenced an October 12, 2020 specific injury when discussing apportionment. This appears to be a typographical error and the subject specific injury to the lumbar spine occurred on April 15, 2021. (Exhibit A7, Dr. Chow's report dated July 12, 2022, p. 17.)

meets the 35% eligibility threshold requirement. (*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board En Banc); *Anguiano v. Subsequent Injuries Benefits Trust Fund* (November 7, 2023, ADJ11107890) [2023 Cal. Wrk. Comp. P.D. LEXIS 310]; *Heigh v. Subsequent Injuries Benefits Trust Fund* (October 9, 2023, ADJ12253162) [2023 Cal. Wrk. Comp. P.D. LEXIS 269]; *Riedo v. Subsequent Injuries Benefits Trust Fund* (October 21, 2022, ADJ7772639) [2022 Cal. Wrk. Comp. P.D. LEXIS 303]; *Anguiano v. Subsequent Injuries Benefits Trust Fund* (August 15, 2023, ADJ11107890) [2023 Cal. Wrk. Comp. P.D. LEXIS 214]). Without apportionment, the permanent disability of applicant's subsequent injury is 32% per Dr. Chow and 53% per Dr. Mahawar. That is, applicant would meet the 35% threshold per the opinion of Dr. Mahawar but not per the opinion of Dr. Chow.

The WCJ explained:

I found the reports of Dr. Chow more convincing on this point for several reasons. First, while I do not contest Dr. Mahawar's ability to comment on this point, disability to the spine fits far more within the expertise of Dr. Chow. Second, Dr. Chow was selected as a PQME in the course of an adversarial process, a reasonable assurance of his neutrality. Dr. Mahawar was selected by the unfettered discretion of Applicant. This gives one a slightly higher confidence in Dr. Chow's objectivity than Dr. Mahawar's, at least in this case. Third, the ratings differ only in application of the *Guzman* method. In any event, the medical records reviewed by Dr. Chow and Dr. Mahawar support their conclusion that both the pre-existing coronary disease and the subsequent industrial injury produced PD of over 5% which affected both lower extremities. (Opinion on Decision, p. 1.)

While we appreciate the WCJ's reasoning to find Dr. Chow's report more convincing, we are not convinced Dr. Mahawar's approach is wrong. Dr. Mahawar included impairments based on applicant's activities of daily living (ADLs) because, according to Dr. Mahawar, impairment based on range of motion was not reflective of applicant's disabilities. Dr. Chow addressed applicant's ADLs in his report but did not address why he did not include them in his impairment ratings. (Exhibit A7, Dr. Chow's report dated July 12, 2022, pp. 8-10.)

Furthermore, we are not convinced applicant met the 5% threshold. The WCJ found that applicant need not meet the 35% threshold because he met the 5% threshold. Dr. Mahawar opined:

Specifically, [] his prior permanent partial disability for his coronary artery disease impacted his lower extremities and right lower flank The 08/21/2015 report of Dr. Thomas Mustoe documented left sided midstemal CP x30 minutes with pain radiating up into his neck and down into his right flank, and further

documented discomfort going down into the lower legs. The claimant continues to experience residual discomfort in his lower extremities associated with his prior MI. The subsequent industrial disability for his low back is impacting his bilateral lower extremities through radicular complaints and gait alteration.

As a result, the previous permanent partial disability affected the bilateral lower extremities especially the right, while the subsequent permanent disability affected bilateral lower extremities. (Exhibit A2, Dr. Mahawar's report dated May 15, 2023, pp. 25-26.)

Dr. Mahawar opined that because applicant's preexisting heart disease resulted in residual discomfort going down into his lower legs and applicant's subsequent back injury radiated pain into his lower extremities, applicant met the 5% threshold. In order to meet the 5% threshold, section 4751 requires that "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." (§ 4751; emphasis added.) It is not clear from Dr. Mahawar's report how the preexisting heart disease affected applicant's leg, what the leg discomfort means, and how that is related to his heart. It is also not clear whether the heart disease medically caused impairment in applicant's legs. Similarly, it is not clear how the subsequent lumbar spine injury affected applicant's legs; there is no explanation for the radiating leg pain and / or how the leg pain is caused by the lumbar spine as opposed to some other condition. For that reason, we return this matter to the trial level to develop the record on this issue, whether applicant met the 5% threshold, and on the issue of whether applicant met the 35% threshold. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see §§ 5701 and 5906 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).)

For the foregoing reasons,

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 10, 2024 Amended Findings and Award is **RESCINDED** and that a the following Findings of Fact is **SUBSTITUTED** instead:

FINDINGS OF FACT

1. Antonio Luna Alvarez, while employed as a maintenance worker (group 380) on April 15, 2021 at Carmel, California by Tehama Golf Club, sustained a specific injury arising out of and in the course of his employment to his low back
2. Applicant's earnings at the time of injury were sufficient to produce a permanent partial disability rate of \$510.64.
3. The issue of whether applicant met the 5% or 35% SIBTF eligibility thresholds is deferred.
4. Before the subsequent (industrial) injury, applicant has sustained permanent partial disability from heart/cardiovascular disease of 40% WPI which affected applicant's bilateral lower extremity by causing pain, per the reports of Dr. Mahawar (Exhibits A-1 and A-2). In addition, at the time the subsequent industrial injury occurred, applicant was also suffering from disability due to pre-existing GERD, hypertension, and left knee problems.

AWARD

There are no awards at this time.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 7, 2026

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

**ANTONIO LUNA ALVAREZ
DILLES LAW GROUP
OD LEGAL**

LSM/oo

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