

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

ARMANDO L. CALDERON, *Applicant*

vs.

**PROGENY ADVANCED GENETICS; STATE COMPENSATION INSURANCE FUND,
SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ213915 (SJO 0258391)
San Jose 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 seeks reconsideration of the Findings and Order (F&O) issued on January 18, 2022, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that (1) while employed as a produce sorter by Progeny Advanced Genetics during the period of September 30, 2003 through September 30, 2004, applicant claimed injury to his spine, bilateral knees, bilateral shoulders, peripheral vascular disease, and psyche; (2) the underlying case was settled by Compromise and Release, which covered a specific injury of October 27, 2001 (ADJ1371764) as well as this case for the sum of \$150,000.00, and was approved by the WCJ on January 8, 2015; (3) applicant filed an amended application for Subsequent Injury Benefits Trust Fund (SIBTF) benefits on November 16, 2020; and (4) applicant did not establish the threshold requirements for entitlement to SIBTF benefits under Labor Code section 4751.²

The WCJ ordered that applicant take nothing on his application for SIBTF benefits.

Applicant contends that the WCJ erroneously failed to find that his subsequent injury disability meets the 35 percent permanent disability threshold under section 4751(b).³

¹ Commissioner Lowe no longer serves on the Workers' Compensation Appeals Board. Commissioner Capurro has been substituted in her place.

² Unless otherwise stated, all further statutory references are to the Labor Code.

³ Applicant contends in the alternative that the WCJ erroneously failed to find that his subsequent injury disability meets the 5 percent permanent disability threshold under section 4751(a). Because we conclude that the evidence establishes that applicant's subsequent injury disability meets the 35 percent threshold, we do not address this argument.

We did not receive an Answer.

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 and the Report. Based upon our review of the record, and for the reasons set forth below, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b); and that defer the issues of whether applicant meets the remaining eligibility requirements for SIBTF benefits; and, as appropriate, the start date of SIBTF benefits, credits allowed, and attorney's fees; and we will return the matter to the trial court for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On August 23, 2021, the matter proceeded to trial as to the following issues:

1. Applicant's petition for SIBTF benefits dated 11/16/2020 and entitlement to such benefits as per Labor Code section 4751, et seq.
2. The start date of SIBTF benefits, if awarded (with applicant claiming 5/9/2006 as the start date, and defendant claiming a date on or about October of 2006, whenever permanent disability commenced).
3. Credits as allowed by law, with calculation thereof ordered deferred by this WCJ over applicant's objection, for adjustment or subsequent litigation as needed, if SIBTF benefits are awarded.
4. Attorney fees (requested by applicant's counsel at a rate of 15 percent).

(Minutes of Hearing, August 23, 2021, p. 3:22-40.)

The parties stipulated that (1) while employed during the period September 30, 2003 through September 30, 2004 as a produce sorter by Progeny Advanced Genetics, applicant claimed to have sustained injury to his spine, bilateral knees, bilateral shoulders, peripheral vascular disease, and psyche; and (2) the underlying case was settled by Compromise and Release for \$150,000 and approved by the WCJ on January 8, 2015. (*Id.*, p. 2:15-25.)

The WCJ admitted the Report of Dr. John Carr, MD, dated February 6, 2007, into evidence. (Ex. B, Report of Dr. John Carr, MD, February 6, 2007.) The report includes the following:

DIAGNOSIS:

1. Status post L3-S bilateral laminectomy and medial facetectomy surgery.

2. Clinical left piriformis syndrome.

DISCUSSION:

The patient is a 56-year-old male who initially sustained injury of the lumbar spine on 10-27-01. The pain initially started in his buttock and left thigh.

The symptoms progressed as he continued working associated with the physical stresses of his job activities. Ultimately he was terminated from employment on 10-31-04. At that time by his history he was involved with modified job activities.

The symptoms had progressed to the point that on 8-26-04 he entered treatment at Salinas Urgent Care, Dr. Timothy Wilken, and then came under the care of Dr. Willard Wong on 11-1-04. Dr. Wong performed L3-L5 bilateral laminectomy and medial facetectomy surgery.

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OBJECTIVE FACTORS OF DISABILITY:

1. Status post aforementioned surgery.
2. Loss of range of motion of the lumbosacral spine as noted in physical examination.
3. Abnormal nerve conduction study findings as aforementioned.
4. Sensory deficit left lateral foot and dorsum of the left foot, predominantly lateral foot.
5. Bilateral absence of the Achilles reflex.
6. Absence of the left patella reflex.
7. Left extensor hallucis longus motor strength at 0/5 level.
8. Left ankle dorsiflexion at 4/5 level.

WHOLE PERSON IMPAIRMENT:

The AMA Guides to the Evaluation of Permanent Impairment Fifth Edition and Whole Person Premiere Five software were consulted. Range of motion of the lumbar spine was rated as per instructions commencing on Page 398 15.8 and Page 405 15.9, performed by inclinometer method. Page 404 Table 15-7 was consulted as well as Tables 15-15, 15-16, and 15-18.

In as much as he has multi-level lumbar pathology and underwent multi-level surgery, the use of the range of motion method of analysis is mandated by the AMA Guides Fifth Edition. Range of Motion loss was calculated at 19% Whole Person Impairment; 7 for flexion, 7 for extension, 3 for left lateral flexion, and 2 for right lateral flexion.

As per Table 15-7 II he has had surgically treated disc lesion with residual medially documented pain and rigidity.

For the lumbar spine this is 10% Whole Person Impairment.

You add 1% for each additional level making this 12% Whole Person Impairment. Thus far we have 29% whole Person Impairment.

Left extensor hallucis longus motor strength was at L4-5 with the LS nerve root. This is 100% motor impairment with no evidence of contractility. Ankle plantar flexion are at L5-S1, S1 nerve root. This is 20% motor impairment on the left. This constitutes 37% lower extremity for L5 and 4% lower extremity for S1. The total lower extremity is 40% for motor and 16% motor Whole Person Impairment. Thus far we have 41% whole Person Impairment.

He has left L5 and S1 sensory impairment, L5 mid dorsal foot, S1 lateral foot. Left L5 sensory loss is 65% and S1 sensory loss 30%. This constitutes 5% sensory lower extremity and 2% Whole Person Impairment; 3% lower extremity for LS and 2% for S1.

The combined total for the above is 41% Whole Person Impairment. I am adding 3% Whole Person Impairment under the pain chapter as slight additional ratable pain not included in the aforementioned 41% Whole Person Impairment for a final total of 44% Whole Person Impairment.

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APPORTIONMENT AND CAUSATION:

I am considering legislative changes contained in SB899 and Sections 4663 and 4664 of the Labor Code relative to apportionment and causation. In addition, I am aware of the recent Escobedo judicial decision permitting apportionment to pathology.

Based on the history of the patient, it is my opinion that 25% of his permanent disability as outlined above was secondary to the 10-27-01 injury, and 75% due to continuing trauma in the course of his employment until his last day at work on approximately 10-31-04. The disabilities resulting from each of these factors became permanent and stationary together when Dr. Wong found him permanent and stationary.

(Ex. B, Report of Dr. John Carr, MD, dated February 6, 2007, pp. 7-10.)

In the Report, the WCJ states:

Applicant had a prior specific injury of 10/27/2001, which was the subject of an application in ADJ1371764, at the same employer, to the head, upper extremities., back, shoulders, and multiple. That prior injury of 10/27/2001, which was an accepted injury, was the subject of a Compromise and Release executed and approved in January of 2015, listing 2 injuries, the specific injury of 10/27/2001 and the current cumulative injury in ADJ213915, for c.t. 9/30/2003-9/30/2004, to the exact same listed body parts. The Compromise and Release (exhibit E) was for the sum of \$150,000.00, less sums paid, and in paragraph 9 the applicant and SCIF

wrote that the settlement "is based on reports of Drs. Carr and Chalmers, split of which is 52% (apportioned to both injuries) . . . the . . . cumulative through 2004 . . . was denied but the parties wish to buy their peace and resolve all issues."

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On or about 12/27/2011, applicant's counsel filed an Application for Subsequent Injuries Fund Benefits, listing both cases as the basis for the Application. That defect was ultimately addressed when he filed the Amended Application on or about 11/16/2020, asserting only the cumulative injury as the basis for the SIBTF application.

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[A]pplicant must satisfy one of two alternative criteria. The first is that the permanent disability resulting from the subsequent injury (the subsequent injury being the cumulative injury 9/30/2003-9/30/2004) must, when considered by itself, be equal to 35 percent or greater. As discussed below, I found that criteria to not be satisfied.

...

I concluded that applicant did not meet his burden of establishing that the cumulative injury, after apportionment, resulted in 35 percent permanent disability or more.

(Report, pp. 3-7.)

DISCUSSION

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 in order to be entitled to SIBTF benefits under section 4751, an employee must prove the following elements:

- (1) a preexisting permanent partial disability;
- (2) a subsequent compensable injury resulting in additional permanent partial disability:
 - (a) if the previous permanent partial disability affected a hand, an arm, a foot, a leg, or an eye, the subsequent permanent disability must affect the opposite and corresponding member, and this subsequent permanent disability must equal to 5% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee; or
 - (b) the subsequent permanent disability must equal to 35% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or the age of the employee;

(3) the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and

(4) the combined preexisting and subsequent permanent partial disability is equal to 70% or more. ([Lab. Code] § 4751.)

(*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 (Appeals Board en banc).)

Applicant argues that the WCJ erroneously failed to find that his subsequent injury disability meets the 35 percent permanent disability threshold by failing to adjust the whole person impairment found by Dr. Carr based upon applicant's diminished future earning capacity (DFEC).

Although Appeals Board panel decisions hold that the DFEC adjustment factor is applicable to the percentage of whole person impairment resulting from the subsequent injury, we need not address that issue here because the WCJ calculated applicant's subsequent permanent disability based upon Dr. Carr's calculation of permanent disability *after* apportionment (See *Ryder v. City of Los Angeles; Subsequent Injuries Benefits Trust Fund* (Ryder) 2016 Cal.Wrk.Comp. P.D. Lexis 212⁴; *Khandikian v. City of Los Angeles; Subsequent Injuries Benefits Trust Fund* (Khandikian)

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,

2015 Cal.Wrk.Comp. P.D. Lexis 354; *Lopez v. City and County of San Francisco; Subsequent Injuries Benefits Trust Fund (Lopez)* 2015 Cal.Wrk.Comp. P.D. Lexis 46; Report, p. 7.)

Specifically, Dr. Carr reported that applicant's permanent disability of the lumbar spine was 44 percent, with 25 percent of that permanent disability apportioned to the October 27, 2001 specific injury, which rendered a permanent disability rating of 33 percent. (Ex. B, Report of Dr. John Carr, MD, dated February 6, 2007, p. 10.) The WCJ then concluded that applicant failed to meet the 35 percent permanent disability threshold "after apportionment." (Report, p. 7.)

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

It follows that Dr. Carr's reporting that applicant's subsequent permanent disability amounted to 44 percent is sufficient to establish the 35 percent threshold.

Accordingly, we will rescind the F&O and substitute a finding that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b).

Since we have now concluded that applicant meets that section 4751 threshold requirement, the record should be developed as to whether applicant meets the remaining eligibility requirements; and, if so, the remaining issues framed for trial; namely, the issues of the start date of SIBTF benefits, credits allowed, and attorney's fees. (Minutes of Hearing, August 23, 2021, p. 3:22-40.)

The Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56

panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues regarding construction of statutory language. (See *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].)

Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].)

Accordingly, we will substitute findings that defer the issues of whether applicant meets the remaining SIBTF eligibility requirements; and, as appropriate, the start date of SIBTF benefits, credits allowed, and attorney's fees.

Accordingly, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b); and that defer the issues of whether applicant meets the remaining eligibility requirements for SIBTF benefits; and, as appropriate, the start date of SIBTF benefits, credits allowed, and attorney's fees; and we will return the matter to the trial court for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that the Findings and Order issued on January 18, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS

1. The stipulated facts set forth in the Minutes of Hearing of the hearing held on August 23, 2021, are hereby adopted as Findings of Fact.
2. Applicant, born [], while employed during the period 9/30/2003 through 9/30/2004 as a produce sorter (Occupational Group 221) at Salinas, California, by Progeny Advanced Genetics, insured by State Compensation Insurance Fund, claimed to have sustained injury to his spine, bilateral knees, bilateral shoulders, peripheral vascular disease, and psyche.
3. The underlying case was settled by Compromise and Release (with the Compromise and Release including a specific injury of 10/27/2001, the subject of ADJ1371764, as well as this case) for the sum of \$150,000.00, approved by WCJ Tuan, by Order Approving Compromise and Release dated January 8, 2015.
4. Applicant's earnings on the date of injury were \$829.38 per week.
5. Applicant, by and through his counsel, filed an Amended Application for SIBTF benefits in this case on or about 11/16/2020.
6. Applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone as required by section 4751(b).
7. The issues of the start date of SIBTF benefits, credits allowed, and attorney's fees are deferred.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 22, 2026

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

**ARMANDO L. CALDERON
LAW OFFICES OF ROBERT T. BLEDSOE
STATE COMPENSATION INSURANCE FUND
OFFICE OF THE DIRECTOR – LEGAL UNIT**

SRO/kl

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