

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

CHRISTOPHER BROUWERS, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

**Adjudication Number: ADJ10592929
Sacramento 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 Applicant Christopher Brouwers.¹ This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the August 27, 2024 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that although applicant's claim is not barred by the statute of limitations, applicant has not met the elements of Labor Code,² section 4751, and, therefore, is not eligible for Subsequent Injuries Benefits Trust Fund (SIBTF) benefits.

Applicant contends: "I have a combine [*sic*] amount of WPI needed to apply for SIBTF and the additional injury to my lower back on 11/17/2024 was not excepted [*sic*] by the court due to language on a doctors report. I am willing to have another QME examine me." (Petition for Reconsideration.)

We did not receive an answer. 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 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.

¹ We note that applicant is represented by the Law Office of Joseph T. Todoroff but filed the instant Petition for Reconsideration on his own.

² All statutory references are to the Labor Code unless otherwise indicated.

FACTS

As the WCJ stated in her Report:

Applicant sustained a subsequent industrial injury to the left knee while employed as a vehicle mechanic foreman on April 23, 2014. After trial it was determined that Applicant does not meet the elements pursuant to Labor Code section 4751 and is therefore not eligible for SIBTF benefits. It was also determined that Applicant does not meet the burden of proof to use the addition method of combining disabilities. It was found that Applicant sustained preexisting labor disabling disability to the right ankle of 9% and to the bilateral upper extremities of 42.5%. It was found that Applicant's claim against SIBTF is not barred by the Statute of Limitations. No attorney fees were awarded as no SIBTF benefits were found. (Report, p. 1.)

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 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;
- (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).)

A. Subsequent Injury – 35% or 5% Eligibility Thresholds

Section 4751 refers to a “subsequent compensable injury” in the singular form. The prior permanent partial disability, however, may be comprised of multiple prior injuries. The statute does not limit the prior permanent disability to a single prior injury and including multiple prior injuries is consistent with the purpose of the statute, which is to encourage the employment of the disabled. (§ 4751; *Subsequent Injuries Fund of the State of California v. Industrial Acci. Com. (Patterson)* (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Industrial Acci. Com.* (1958) 50 Cal.2d 469, 475; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 619 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc)).

Here, applicant chose the April 23, 2014 injury to his left knee as the subsequent injury for purposes of his application for SIBTF benefits even though there exists a later injury of November 17, 2014 to his back. (Application for SIBTF benefits; Joint Exhibit BB, report of Edward M. Tapper, M.D., dated September 6, 2016, p. 5.) We therefore analyze both injuries to determine if either or both satisfy the SIBTF eligibility thresholds.

Dr. Tapper, Qualified Medical Evaluator, opined that applicant sustained a 3% whole person impairment (WPI) to his left knee on April 23, 2014 and a 6% WPI to his back on November 17, 2014. (Joint Exhibit BB, report of Edward M. Tapper, M.D., dated September 6, 2016, pp. 4-5.) He stated,

Combining his back and knee impairment ratings, he has 9% whole-person impairment, plus I will add-on 3% for chronic pain, for a total of 12% whole-person impairment. (Joint Exhibit BB, report of Edward M. Tapper, M.D., dated September 6, 2016, p. 5.)

The WCJ explained,

On September 6, 2016, Applicant saw Edward Tapper, M.D. for a QME evaluation. In his report, Dr. Tapper indicates Applicant was working as a mechanic/foreman on April 23, 2014, when he jumped down from a truck, landed on his tailbone, and injured his left knee. Dr. Tapper found 3% WPI for the left knee considering patellofemoral pain and partial medial meniscectomy due to the injury on April 23, 2014. In his report under work restrictions, Dr. Tapper states simply that Applicant is not able to work and has retired. Dr. Tapper also finds 12% WPI for the back considering DRE Category II and apportioned 50% to the injury on November 17, 2014, and 50% to preexisting problems. Dr. Tapper finds an additional 3% for chronic pain. (Joint Exhibit BB) *Dr. Tapper fails to provide any explanation regarding apportionment, fails to provide work restrictions, and fails to assign the 3% pain add-on to a specific body part. It is unclear how much if any of the 3% pain add-on is meant to be attributed to the left knee.* (Report, p. 3; Opinion on Decision, p. 4; emphasis added.)

The WCJ further determined,

The findings of Dr. Tapper rate as follows, depending on how much, if any, of the 3% pain add-on is attributable to the left knee:

Left Knee 17.05.10.04- 3 [1.4] 4- 470H- 6 - 8% or
Left Knee 17.05.10.04 - 6 [1.4] 8 - 4 70H - 11 - 13% (*with up to 3% pain add-on*)

(Report, p. 3; Opinion on Decision, p. 4.)

We have recently issued multiple decisions concluding that apportionment is not to be included in calculating whether an employee meets the 35% or 5% 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]).

This is because the 35% and 5% thresholds are qualified in the statute by the phrase, “considered alone and without regard to, or adjustment for, the occupation or age of the employee” and we have previously concluded that this language excludes apportionment.

As such, the proper permanent disability ratings, for purposes of the 35% and 5% thresholds, considered alone and without regard to occupation or age, are as follows:

Left Knee 17.05.10.04 – 3 [1.4] 4

Back 15.03.01.00 – 6 [1.4] 8

Neither the April 23, 2014 left knee injury or the November 17, 2014 back injury meet the 35% eligibility threshold. However, the WCJ concluded that applicant sustained injury to opposite and corresponding members.

Applicant has a previous disability to the right lower extremity of the ankle and a subsequent industrial injury to the left lower extremity of the knee which affect opposite and corresponding members. However, it is unclear whether the disability from the subsequent industrial injury is at least 5%. Applicant suffered permanent disability to the left knee of 3% WPI which is only 4% after the 1.4 modifier. To meet this element, Applicant would need at least 1 % of the pain add-on to apply to the left knee To determine whether the subsequent industrial injury has at least 5% permanent disability, further medical opinion is needed from Dr. Tapper to indicate whether any of the 3% pain add-on is attributable to the left knee. To determination whether this element is met further development of the record would be needed (Report, pp. 6-7; Opinion on Decision, pp. 7-8.)

We agree. If the 3% add-on for pain is attributable to the left knee, applicant would meet the 5% eligibility threshold.

Left Knee 17.05.10.04 – 6 [1.4] 8

Thus, because Dr. Tapper failed to specify whether the 3% add-on for pain is attributable to the left knee or the back, we return this matter to the trial level to develop the record on this issue.

B. 70% Eligibility Threshold

The WCJ found the following preexisting disabilities based on prior settlements:

1. 42.5% bilateral upper extremities
2. 4% low back and 2% left leg
3. 2% right thumb and 6% right upper extremity, resulting in 8% permanent disability
4. 9% right ankle. (Report, pp. 2, 4; Opinion on Decision, pp. 3, 5.)

Of these preexisting disabilities, the WCJ opined that the 4% low back, 2% left leg, and 8% right upper extremity were not labor disabling. (Report, p. 2; Opinion on Decision, p. 3.) As mentioned earlier, the subsequent injury dated April 23, 2014 to the left knee is either 8% or 13% permanent disability with the pain add-on. The WCJ then made the following analysis with respect to the 70% threshold:

The combined value of the permanent disability from the prior awards, the 9% permanent disability for the right ankle, and the permanent disability of the subsequent industrial injury of the left knee range between 59% and 62% depending on whether any part of the 3% pain add-on applies to the left knee. However, even if the entire 3% is applied to the left knee, Applicant still does not meet this element of 70% or more. Moreover, this presumes preexisting labor disabling disability for the two smaller prior awards for which there is no evidence, as indicated above.

This element is not met.

42.5(43) c 9 c 8 c 8 c 4 c 2 c = 59% (*without pain add-on*) or
42.5(43) c 13 c 9 c 8 c 4 c 2 c = 62% (*with pain add-on*)

(Report, p. 6; Opinion on Decision, p. 7.)

First, we are not convinced that the 4% low back, 2% left leg, and 8% right upper extremity were not labor disabling. There is no discussion in the Report as to why the 4% low back and 2% left leg were not labor disabling. As to the 8% upper extremity, the WCJ relied on the fact that applicant was returned to work without any restrictions. (Report, p. 2; Opinion on Decision, pp. 3-4.) The preexisting disability, however, “need not have interfered with the employee’s ability to work at his employment in the particular field in which he was working at the time of the subsequent injury. [citations]” (*Franklin v. Workers’ Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238.) “The ability of the injured to carry on some type of gainful employment under work conditions congenial to the preexisting disability does not require a finding that the preexisting disability does not exist. [citations]” (*Ibid.*)

Second, the WCJ erroneously combined the preexisting and subsequent disabilities using the Combined Values Chart (CVC). In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), we held that prior and subsequent permanent disabilities shall be added to the extent they do not overlap in order to determine the “combined permanent disability” specified in section 4751. Thus, the “combined permanent disability” for purposes of the 70% threshold is as follows:

$$42.5(43) + 9 + 8 + 8 + 4 + 2 = 74\% \text{ (without pain add-on) or}$$
$$42.5(43) + 13 + 9 + 8 + 4 + 2 = 79\% \text{ (with pain add-on)}$$

Either scenario, with the pain add-on or without the pain add-on, meets the 70% threshold. We do note that applicant would not meet the 70% threshold if it is proven, as the WCJ concluded, that the 4% low back, 2% left leg, and 8% right upper extremity were not labor disabling. ((*Ferguson, supra*, p. 477; *Escobedo v. Marshall*, 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc) [the previous disability or impairment must be labor disabling].)

Accordingly, based on our analysis of the various SIBTF eligibility thresholds as discussed above, we return this matter to the trial level to further develop the record.

For the foregoing reasons,

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 27, 2024 Findings of Fact is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. The following stipulations of the parties are adopted as findings of fact:
 - a. Christopher Brouwers, [], while employed on April 23, 2014, as a vehicle mechanic foreman at Truckee, California by Truckee Donner Public Utility District, sustained injury arising out of and in the course of employment to the left knee.
 - b. At the time of the injury the employer was uninsured.
 - c. At the time of the injury, the employee's earnings were \$1,716.40 per week, warranting indemnity rates of \$1,074.64 for temporary disability, and \$290 for permanent disability.
 - d. No attorney fees have been paid and no attorney fee arrangements have been made in the SIBTF case.
2. The issue of whether applicant met the elements pursuant to Labor Code section 4751, SIBTF benefits, is deferred.
3. The issue of attorney fees on SIBTF benefits is deferred.

4. Applicant sustained preexisting labor disabling disability to the right ankle of 9% and to the bilateral upper extremities of 42.5%.
5. Applicant's claim against SIBTF is not time barred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 30, 2026

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

**CHRISTOPHER BROUWERS
LAW OFFICE OF JOSEPH T. TODOROFF
OFFICE OF THE DIRECTOR LEGAL – SACRAMENTO**

LSM/ara

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