

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

JODI COLE, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

**Adjudication Number: ADJ9457888
San Jose District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. Having completed our review, we now issue our Opinion and Decision After Reconsideration.

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the December 19, 2023 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that SIBTF is entitled to a credit against CalPERS industrial disability retirement (IDR) benefits paid to applicant in an amount equal to the tax exemption/savings received by applicant for each payment per Internal Revenue Code section 104(a)(1), with the exact amount to be adjusted by the parties with jurisdiction reserved.

SIBTF contends that Labor Code section 4753¹ requires that the SIBTF award must be reduced by the entire CalPERS IDR payments, and that the WCJ created additional exclusionary factors where none exist. SIBTF further argues that credit must be based upon the monetary payments received, and that such credit finding should be framed in terms of a percentage based upon the percentage of applicant's preexisting disability.

We received an Answer from applicant, asserting that SIBTF has failed to prove entitlement to any credit against applicant's IDR as being due to her prior disability.

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

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

We have reviewed the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that SIBTF has failed to prove an entitlement to a credit for applicant's IDR benefits.

FACUAL BACKGROUND

On October 5, 2023, this matter proceeded to trial. At trial, the parties stipulated that: 1) Applicant is eligible for SIBTF benefits. The subsequent industrial injury (SII) caused injury to the cervical spine, lumbar spine, right knee, bilateral carpal tunnel syndrome, and right shoulder. Applicant had prior permanent disability to the neck, low back, bilateral knees, lower extremities, upper extremities, and internal condition, and the combination of all disabilities results in 100 percent permanent disability; 2) SIBTF is entitled to credit for prior awards in ADJ1319548, ADJ432601, and ADJ2144555 in an amount of \$10,880, and SIBTF is entitled to a credit in ADJ4406586 and ADJ3393935 in an amount totaling \$39,202; 3) The parties stipulate the permanent disability in ADJ9457888 is 46 percent based on the 11/2/22 report of Nader Achackzad, M.D., and 4) The case in chief resolved by Compromise and Release on 2/22/21. (Minutes of Hearing and Summary of Evidence, October 5, 2023 (MOH/SOE), p. 2: lines 21-43.)

The issue in dispute was listed as: "SIBTF's entitlement to credit against applicant's disability retirement benefit through CalPERS, with SIBTF earning a credit of 54 percent of the monthly CalPERS payment pursuant to Labor Code section 4753." (*Id.*, at p. 3: lines 4-7.)

The evidence jointly offered and admitted consisted of two letters from CalPERS dated March 4, 2023 and August 2, 2012, 1099s covering the period 2012 through 2022, and the medical report of Dr. Achackzad, dated November 2, 2022. The WCJ also took judicial notice of the Compromise and Release (C&R) dated February 12, 2021 and the Order Approving Compromise and Release dated February 22, 2021. Applicant testified and the matter stood submitted. On December 19, 2023, the WCJ issued the F&A for which defendant sought reconsideration, asserting entitlement for a larger credit than that awarded by the WCJ.

In the Report, the WCJ explains her findings as follows:

Applicant was an employee of the County of Santa Clara from 1984 through 05/01/2012 when she retired. She held positions as a police officer and a criminal investigator. She did suffer multiple specific injuries which resolved by Stipulations and she filed an overall cumulative trauma claim which is the underlying case herein.

The parties have stipulated that the cumulative trauma claim has resulted in an overall permanent disability of 46% and have also stipulated that Applicant is 100% totally permanently disabled as a result of the combination of the preexisting and subsequent conditions.

Applicant is receiving monetary payments from CalPERS effective 05/01/2012. Given the nature and extent of the industrial disabilities, Applicant qualified for an Industrial Disability Retirement and is receiving same. Applicant qualifies to have a portion of her retirement benefit “tax free” due to the application of IRS code 104(a)(1).

Defendant asserts that the tax-free portion of her retirement is subject to credit per Labor Code section 4753 as it is in the form of an award on account of the injury. This Judge granted Defendant a credit but only in an amount equal to the “tax credit” received by Applicant from the IRS. Defendant seeks Reconsideration.

...

Petitioner OD Legal for SIBTF seeks the credit and therefore has the burden of proof. Petitioner must establish that the funds she receives from CalPERS are “for or on account of such pre-existing disability or impairment.” Petitioner has not met this burden of proof. All evidence indicates that the payments being received by Applicant are due to her and her employer contributions. There is no evidence of any payment being made for or on account of the disability. What Applicant DOES receive is the benefit of a portion of these payments being tax free because of her disability. As such, as that is the only benefit being received by Applicant, that is the only credit that Petitioner may receive.

Applicant’s counsel makes a compelling argument in the Answer to Petition for Reconsideration as well, indicating that SIBTF has not established what disability was considered by the employer in granting the industrial disability retirement. It then argues for a fixed percentage of the CalPERS payment without having established what disability was ever considered. Regardless, it is clear that Applicant receives a tax credit and since that is without dispute that is the credit which I allowed.

(Report, pp. 2, 4-5.)

The SII in this case is a cumulative trauma for the period of January 1, 1984 through May 1, 2012, causing injury to the cervical spine, lumbar spine, right knee, bilateral carpal tunnel

syndrome, and right shoulder, and the case in chief was resolved by C&R on February 22, 2021. (F&A, Findings 1 and 2, at p.1.) The parties stipulated to 46% permanent disability for the SII based on the report by Nader Achackzad, M.D. dated November 2, 2022, which was admitted as exhibit A and is the only medical report in the record.

Before the SII, applicant had five prior workers' compensation awards, and the parties stipulated at trial that SIBTF is entitled to credit for the prior workers' compensation awards. SIBTF contends that the SII covers all the same body parts as applicant's other industrial injuries as shown by Dr. Achackzad's report, and therefore, based on this report, the percentage of credit due for applicant's IDR benefit on account of preexisting disability is clear.

At trial, applicant testified that despite her injuries, she worked full duty for the County of Santa Clara until her retirement in 2012. (Minutes, October 5, 2023, at p. 4: lines 13-27.) In 2012, applicant received "some work restrictions," and the employer informed her they could not accommodate the restrictions and therefore, she retired. (*Ibid.*) Applicant testified that it was the employer who commenced the filing of the disability retirement application on applicant's behalf as they could not accommodate her, she was not given any option but to retire, and she is not aware of what the County considered in the retirement determination. (*Id.*, at p. 4: lines 42-45; 5: lines 8-12.)

The record contains two exhibits describing applicant's CalPERS IDR benefits. In 2012, applicant began receiving lifetime IDR benefits from CalPERS in the amount of \$8,944.46 per month retroactive to May 1, 2012. (Exh. 2.) As the WCJ states in the Opinion on Decision,

Joint exhibit 2 [a letter from CalPERS to applicant dated August 2, 2012] shows what the state of Applicant's contributions were at the time of retirement, with \$543,535.62 in total contributions, which was made up of \$159,734.36 in interest, \$8,474.86 in taxed contributions, and \$375,326.40 in non-taxed contributions. Applicant was scheduled to begin receiving \$8,944.46 per month, with \$4,894.66 tax free. The tax-free percentage was calculated to be 54.72%.

Applicant received a "corrected" notice on 03/04/23 - Joint Exhibit 1 - which confirms that industrial disability retirement benefits are considered in the nature of a workers' compensation award and excludable from taxation under section 104(a)(1) of the Internal Revenue Code up to a fixed percentage, with the remainder a taxable income. This document verifies that 45.508% remainder is being considered non-taxable. (Opinion on Decision, pp. 2-3.)

DISCUSSION

Section 4753 provides:

Such additional 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, except as to payments being made to the employee or to which he is entitled as a pension or other compensation for disability incurred in service in the armed forces of the United States, and except as to payments being made to him or to which he is entitled as assistance under the provisions of Chapter 2 (commencing with Section 11200), Chapter 3 (commencing with Section 12000), Chapter 4 (commencing with Section 12500), Chapter 5 (commencing with Section 13000), or Chapter 6 (commencing with Section 13500) of Part 3, or Part 5 (commencing with Section 17000), of Division 9 of the Welfare and Institutions Code, and excluding from such monetary payments received by the employee for or on account of such preexisting disability or impairment a sum equal to all sums reasonably and necessarily expended by the employee for or on account of attorney's fees, costs and expenses incidental to the recovery of such monetary payments. (§ 4753.)

“Section 4753 was enacted to avoid depletion of the funds in order to encourage the employment of physically handicapped persons and to prevent double recovery for the same disabilities.” (*Subsequent Injuries Fund v. Industrial Acci. Com. (Hanson)* (1963) 217 Cal.App.2d 322, 328 [28 Cal. Comp. Cases 144].)

Further, section 4753 expressly applies to credit for payments on account of the pre-existing disability and not to payments by the employer for the SII; thus, SIBTF may seek credit for applicant's IDR 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.)

Petitioner raises the holding in *Hanson* for the proposition that section 4753 supports broad interpretation and application of credit. In *Hanson*, the Court of Appeal held that where social security disability payments are paid to an applicant because an industrial injury and a preexisting disability combined to render the applicant totally industrially disabled, SIBTF is entitled to credit based upon the percentage of social security disability payments attributable to the preexisting disability. In doing so, the Court stated:

[I]f it can reasonably be said that the social security disability payments are in some part accountable to the preexisting liability for which [SIBTF] is liable, then some credit should be allowed. The referee's holding in this regard was proper, that the fund is entitled to a credit of 68.25 per cent (the percentage attributable to the preexisting disability) of the \$118 (social security disability monthly payments). This reduced to a weekly figure is equivalent to a credit of \$18.53 per week so long as the employee continues to receive the payments. The rate (68.25 per cent) of credit is constant, so no problem of computation is ever involved. (*Id.*, at p. 329.)

Hence, although SIBTF was found entitled to credit for social security payments that the applicant received as a result of the combined preexisting and subsequent permanent disabilities he suffered, the credit was *only* for the portion of the payments attributable to the preexisting permanent disability. (*Id.*)

In *Hanson*, there was an explicit finding that a certain portion of the applicant’s social security disability benefits constituted compensation for the preexisting disability on which the subsequent injuries benefits were predicated; the decision does not stand for the proposition that a finding of one hundred percent disability for purposes of social security disability benefits and an applicant’s receipt of payments thereon automatically gives rise to an inference that the payments were for a preexisting disability or impairment. In the instant case, SIBTF attempts to analogize the findings of the *Hanson* decision in its contention that the SIBTF award should be reduced by 54% of the CalPERS benefit, which equals the amount of the SIBTF liability. However, this contention must be rejected.

In *Subsequent Injuries Benefits Trust Fund v. Workers’ Comp Appeals Bd. (Vargas)* (2024) 103 Cal. App. 5th 835 [89 Cal.Comp.Cases 144], the Court of Appeals held that as the party

holding the affirmative of the issue of credit, SIBTF has the burden of proof of the issue. In doing so, the Court states:

We agree with the Board that the Fund must prove its entitlement to a credit for SSDI and other “monetary payments” received by applicants. The burden of proof in workers' compensation proceedings “rests upon the party ... holding the affirmative of the issue.” (§ 5705.) Applicants must initially show they are entitled to subsequent injury benefits under section 4751 by proving: (1) they were “permanently partially disabled” and (2) they “receive[d] a subsequent compensable injury resulting in additional permanent partial disability.” The Fund must then show it is entitled to reduce the applicant's subsequent injury benefit under section 4753, and, if so, the “extent” it may reduce those payments. Both sides must meet their burden by a preponderance of the evidence. (See § 3202.5 [“All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law.”]) Section 4753’s mandate that compensation “shall be reduced” does not, as the Fund contends, relieve the Fund of this burden. Nor does section 4751’s similar language relieve the applicant of their burden to prove eligibility for benefits. (*Id.*, at pp. 841-842.)

While the CalPERS award letters establish an industrial component to the IDR determination, the letters say nothing about whether, or to what extent, the award was on account of pre-existing disability. Further, while the report of Dr. Achackzad addressed the multiple body parts in the SII and found pre-existing impairment for each of the same body part on account of pre-existing causes, this medical-legal report dated November 2, 2022 was prepared for the SII claim, some ten years after applicant was awarded IDR. There is nothing in the record to show that Dr. Achackzad’s report was ever considered by CalPERS.

As such, the record is devoid of medical or other supporting information pertaining to the CalPERS IDR determination. There is no evidence in the record to show whether applicant’s IDR payments were attributable to applicant’s preexisting disability and/or to what extent they are based on the SII. Moreover, applicant testified that she worked full duty until her retirement in 2012. It was the County of Santa Clara that filed the application for IDR on applicant’s behalf, and she is not aware of what was considered by the County.

The WCAB is required to determine factual questions in accordance with the preponderance of the evidence standard. (§ 3202.5.) Its factual determinations, if supported by substantial evidence, are binding on the parties upon appellate review. (*LeVesque v. Workmen's Comp. Appeal Board* (1970) 1 Cal.3d 627, 637 [463 P.2d 432, 83 Cal. Rptr. 208, 35 Cal. Comp.

Cases 16].) While the WCAB may draw reasonable inferences from the evidence, this court may only determine whether the evidence is susceptible to the inferences drawn. (*Phoenix Indemn. Co. v. Industrial Acc. Com. (Hamilton)* (1948) 31 Cal.2d 856, 859 [193 P.2d 745, 13 Cal. Comp. Cases 118]; *Coborn v. Industrial Acc. Com.* (1948) 31 Cal.2d 713, 716 [192 P.2d 959, 13 Cal. Comp. Cases 89].) Based on the foregoing, we find that SIBTF has failed to establish that applicant received IDR benefits primarily for or on account of her preexisting disabilities or impairment and SIBTF has not met its burden of proof in this case.

Furthermore, we reject the decision of the WCJ that SIBTF is entitled to credit from the net non-taxable portion of applicant's disability retirement benefits for the same reason that there is a lack of evidence to resolve the factual question of what portion of the IDR award is attributable to applicant's preexisting disability.

Finally, to the extent that the parties stipulated at trial that the applicant is eligible for SIBTF benefits, and that the combination of all disabilities results in 100 percent permanent disability, we will affirm such stipulation.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the workers' compensation administrative law judge in this matter on December 19, 2023 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant, Jodi Cole, born [], while employed during the period January 1, 1984 through May 1, 2012, as a criminal investigator, occupational group number 490, in San Jose, California, by The County of Santa Clara, sustained an injury arising out of and arising in the course of employment to the cervical spine, the lumbar spine, the right shoulder, the right knee, and injury resulting in bilateral carpal tunnel syndrome;
2. The case-in-chief resolved by Compromise and Release on February 22, 2021;
3. Applicant is eligible for SIBTF benefits. The subsequent industrial injury (cumulative trauma through 5/1/12) caused injury to the cervical spine, lumbar spine, right knee, bilateral carpal tunnel syndrome, and right shoulder. Applicant had prior permanent disability to the neck, low back, bilateral knees, lower extremities, upper extremities, and internal conditions. The combination of all disabilities results in 100 percent permanent disability.

4. SIBTF is entitled to credit for prior awards in ADJ1319548, ADJ432601, and ADJ2144555 in an amount of \$10,880, and SIBTF is entitled to a credit in ADJ4406586 and ADJ3393935 in an amount totaling \$39,202.
5. The permanent disability in ADJ9457888 is 46% based on the 11/02/2022 report of Nader Achackzad, M.D.
6. SIBTF **is not** entitled to a credit against CalPERS industrial disability retirement benefits paid to applicant.
7. Applicant's attorney has earned a reasonable attorney's fee equal to 15% of each SIBTF benefit payment awarded herein, pursuant to Labor Code 5100.5.

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

MARCH 10, 2026

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

**JODI COLE
OD LEGAL
LAW OFFICES OF ROBERT T. BLEDSOE**

TD/bp

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