

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

JUSTIN HARLAN, *Applicant*

vs.

**COUNTY OF MONTEREY, permissibly self-insured; STATE OF CALIFORNIA;
SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ8625541
Salinas District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration¹ to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Justin Harlan. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the August 10, 2023 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant did not meet the 35% or 5% Subsequent Injuries Benefits Trust Fund (SIBTF) eligibility thresholds.

Applicant contends that he meets both the 35% and 5% SIBTF eligibility thresholds. Applicant also contends that the WCJ erred in failing to find that applicant is 100% permanently and totally disabled.

We received an answer from SIBTF. 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 Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we affirm the August 10, 2023 Findings and Order, except that we amend it to find that applicant met the 35% and 5% SIBTF eligibility threshold.

¹ Commissioner Palugyai, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

FACTS

As the WCJ stated in her Report:

Justin Harlan worked as a 911 dispatcher for the County of Monterey from August of 2008 through July 31, 2012. He sustained cumulative injury arising out of and in the course of employment during the period from August 2008 through July 31, 2012 to his cervical spine, lumbar spine, and sustained sleep disturbance, headaches, injury to psyche and injury to left eye, as stipulated by the parties and indicated in Stipulations With Request for Award dated September 11, 2018 (Exhibit D-G, EAMS ID #). During this employment he was diagnosed with multiple sclerosis. On June 4, 2018, Applicant filed an Application for benefits from the Subsequent Injuries Benefit Trust Fund (SIBTF), claiming prior disability from injury to psyche, ADHD, GERD, multiple sclerosis, vision, headaches, left knee and left lower extremity (Exhibit D-F, EAMS ID#). The parties proceeded to trial on the issue of entitlement to SIBTF benefits on April 26, 2023. The parties submitted post-trial briefing and the matter was submitted on May 19, 2023.

It was determined in the Findings and Order issued August 9, 2023, that the cumulative trauma injury occurring from August 2008 through July 31, 2012 resulted in permanent disability indemnity rating after apportionment of 28% unadjusted, and 33% when the DFEC adjustment is included, when considered alone and without regard to or adjusted for Applicant's age and occupation. Based on this assessment it was found that the Applicant did not meet the requisite 35% threshold based on calculation of impairment associated with the subsequent injury. It was determined that the Applicant may have had previous impairment to his right foot, as right varus hindfoot, evaluated to have developed in approximately 1986, when the Applicant was approximately 13 years old, which may have been labor disabling and which was assessed with a permanent impairment rating at 5%, as well as potential injury to psyche from a 2004 non-industrial auto accident assessed with a permanent impairment rating of 11%. It was determined that the Applicant did not have permanent impairment to the left foot as part of the subsequent cumulative trauma injury from August 2008 through July 31, 2012, but did have gait disturbance calculated at 2% whole person impairment, when considered alone and without regard to or adjustment for occupation or age. It was therefore determined that even if the cumulative trauma injury of August 2008 through July 31, 2012, affected the left foot or leg with permanent impairment, as the opposite and corresponding member, for the previously impaired right foot, when considered alone and without regard to or adjustment for occupation or age, it is not equal to 5% or more of total. Based on these findings it was determined that the Applicant does not meet the threshold for entitlement to an award of benefits from the

Subsequent Injuries Benefit Trust Fund pursuant to the provisions of Labor Code §4751. It is from these Findings and Order Denying Applicant's Application for benefits from the SIBTF that Applicant seeks reconsideration. (Report pp. 1-3.)

DISCUSSION

The issue here is whether applicant met the 35% or 5% SIBTF eligibility thresholds. In order to be entitled to benefits under Labor Code, section 4751², 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 (Todd)* (2020) 85 Cal. Comp. Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc).)

The Court of Appeal in *Bookout v. Workmen's Comp. Appeals Bd. (Bookout)* (1976) 62 Cal.App.3d 214 [41 Cal. Comp. Cases 595]) refused to consider apportionment in determining the SIBTF 35% eligibility threshold. As explained in *Todd, supra*:

In *Bookout*, applicant was employed as an oil refinery operator and sustained a compensable injury to his back, which was rated at 65% permanent disability. (*Bookout, supra*, 62 Cal. App. 3d at pp. 219–220.) The back disability included a limitation to semi-sedentary work. (*Id.* at p. 219.) Prior to his industrial injury, applicant had a nonindustrial heart condition. (*Ibid.*) The heart condition contained two work preclusions: preclusion of heavy work activity and

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

preclusion from excessive emotional stress. (*Id.* at pp. 220–221.) The preclusion of heavy work activity was rated at 34.5% permanent disability. (*Id.* at p. 220.) The preclusion from excessive emotional stress was rated at 12% permanent disability. (*Id.* at pp. 220–221.)

At the trial level, the referee concluded that the heart condition precluding heavy work activity completely overlapped with the back disability limitation to semi-sedentary work. (*Bookout, supra*, 62 Cal. App. 3d at p. 224.) The referee, thus, subtracted the preclusion of heavy work activity of 34.5% permanent disability from the 65% unapportioned permanent back disability and awarded applicant permanent disability of 30.5% for the industrial back injury. (*Id.* at pp. 219–221.) The referee then found that applicant was not eligible for SIBTF benefits based on the finding of 30.5% after apportionment, which was less than the requisite minimum of 35% for a subsequent disability under section 4751. (*Id.* at p. 221.) The Appeals Board affirmed both the 30.5% permanent disability award for the industrial back injury and the finding that applicant was not eligible for SIBTF benefits. (*Id.* at pp. 218–219.)

The Court of Appeal concluded that the Appeals Board had properly determined applicant's permanent disability rating of 30.5% as a result of his compensable back injury, and that the disability resulting from the subsequent injury was compensable to the extent that it caused a decrease in applicant's earning capacity, citing former section 4750 and *State Compensation Ins. Fund v. Industrial Acci. Com. (Hutchinson)* (1963) 59 Cal. 2d 45, 48–49 [27 Cal. Rptr. 702, 377 P.2d 902] (an employer is only liable for the portion of disability caused by the subsequent industrial injury) and *Mercier v. Workers' Comp. Appeals Bd.* (1976) 16 Cal. 3d 711, 715–716 [129 Cal. Rptr. 161, 548 P.2d 361, 41 Cal. Comp. Cases 205] (the fact that injuries are to two different parts of the body does not in itself preclude apportionment). (*Bookout, supra*, 62 Cal. App. 3d at pp. 222–227.)

The court, however, found that applicant was erroneously denied SIBTF benefits under section 4751. (*Bookout, supra*, 62 Cal. App. 3d at p. 228.) It explained that the referee incorrectly instructed the rating specialist to apportion 34.5% for the preexisting nonindustrial heart disability (based on a standard rating of 30%) from the total subsequent injury disability of 65% (based on a standard rating of 60%), rather than utilizing the total disability for the subsequent injury “standing alone and without regard to or adjustment for the occupation or age of the employee” as required by section 4751. (*Ibid.*; § 4751, subd. (b).) It interpreted the language of this requirement as excluding apportionment. Thus, the court held that the permanent disability attributable to applicant's subsequent injury for the purpose of meeting the 35% threshold requirement under the statute was the standard rating of 60%. (*Bookout, supra*, 62 Cal. App. 3d at p. 228; § 4751, subd. (b).)

(*Todd, supra*, 85 Cal. Comp. Cases at pp. 582–583, 2020.)

In *Bookout*, applicant had a 60% standard subsequent injury to his back, which disability overlapped with applicant’s pre-existing heart condition prohibiting heavy work. (*Bookout, supra*, 62 Cal.App.3d at p. 220.) The Court of Appeal did not apportion out the overlapping preclusion from heavy work, and instead found that applicant’s subsequent injury, standing alone, was 60%, which met the 35% eligibility threshold requirement. (*Bookout*, at p. 228.)

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

Moreover, contrary to applicant’s contention, our holding in *Todd* was that “[p]rior 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.” (*Todd, supra*, at p. 589; emphasis added.) *Todd* did not hold that impairments from a single injury shall be added. In fact, in *Todd*, we stated that, “[the 1997 and 2005] schedules support the use of the MDT [Multiple Disabilities Table] or CVC [Combined Values Chart] to combine multiple impairments or permanent disabilities with respect to the rating of *single injuries*.” (*Id.* at p. 587; *emphasis* in the original.)

Accordingly, the permanent disability of the subsequent injury when considered alone and without regard to, or adjustment for, the occupation or the age of the employee, is as follows:

Gait Disturbance

13.08.00.00 - 9 – [5] 11

Cervical Spine

15.01.01.00 – 10 – [5]13

Lumbar Spine

15.03.01.00 – 8 – [5] 10

Visual Acuity

12.01.00.00 – 14 – [1] 15

Sexual Impairment

13.10.04.00 – 2 – [2] 2

Sleep Disturbance

13.03.00.00 – 5 – [6] 7

Psyche GAF 65

14.01.00.00 – 15 – [8] 21³

21 c 15 c 13 c 11 c 10 c 7 c 2 = 58% > 35%

The subsequent injury, considered alone and without regard to, or adjustment for, the occupation or the age of the employee, is 58%, which meets the 35% eligibility threshold.

Furthermore, applicant also meets the 5% eligibility threshold because applicant has a preexisting disability to his right foot and his gait impairment, affecting his left foot, is rated at 11% permanent disability.

We make no conclusions regarding the 70% eligibility thresholds here and return this matter to the trial level to make such determinations. We note, however, that section 4751 does not qualify the 70% eligibility threshold, unlike the 35% eligibility threshold, by taking out adjustments for the occupation and age of the employee. Nor have we found any case law that interprets the 70% eligibility threshold to preclude apportionment. Per *Todd, supra*, 85 Cal.Comp.Cases 576, prior and subsequent permanent disabilities shall be added to the extent they do not overlap in order to determine the combined permanent disability.

Accordingly, we affirm the August 10, 2023 Findings and Order, except that we amend it to find that applicant met the 35% and 5% SIBTF eligibility threshold.

³ James S. Robbins, M.D., opined in his February 6, 2017 report that applicant sustained a Global Assessment of Function or GAF score of 65, which translates to a Whole Person Impairment (WPI) of 8%, making the permanent disability rating as follows: 14.01.00.00 – 8 – [8]11, not accounting for adjustment for occupation or age. (Joint Exhibit J1, Dr. Robbins report dated February 6, 2017, p. 16.) Nevertheless, even with this reduced psyche permanent disability, applicant still meets the 35% eligibility threshold: 15 c 13 c 11 c 11 c 10 c 7 c 2 = 52% > 35%.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 10, 2023 Findings and Order is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

...

3. The cumulative trauma injury occurring from August 2008 through July 31, 2012 resulted in permanent disability greater than 35% when considered alone and without regard to, or adjustment for, the occupation or age of the applicant.

4. Applicant had previous impairment to his right foot, as right varus hindfoot, evaluated to have developed in approximately 1986, when applicant was approximately 13 years old, which may have been labor disabling and which was assessed with a permanent impairment rating of 5%.

5. Applicant has 11% permanent disability to the left foot as part of the subsequent cumulative trauma injury from August 2008 through July 31, 2012, when considered alone and without regard to, or adjustment for, the occupation or age of the applicant.

6. Applicant's permanent impairment for the subsequent cumulative trauma injury of August 2008 through July 31, 2012, when considered alone and without regard to, or adjustment, for the occupation or the age of applicant, meets both the 35% eligibility threshold and the 5% opposite and corresponding member threshold for SIBTF benefits.

7. Applicant's Counsel is entitled to reimbursement for the sums paid to Gene Gonzales, MSW, IPEC, as a vocational consultant for evaluation and preparation of reports as vocational evidence.

ORDER

Based on Finding 7, above, the Subsequent Injuries Benefit Trust Fund shall reimburse, Applicant's Counsel, Sprenkle, Georgariou and Dilles, in an amount to be ascertained by the parties.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG L. SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 23, 2026

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

**JUSTIN HARLAN
SPRENKLE, GEORGARIOU & DILLES, LLP
DIR, OFFICE OF THE DIRECTOR – LEGAL UNIT**

LSM/ara

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