

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

KIMI DEINHARD, *Applicant*

vs.

**PACIFIC CAPITAL BANKCORP; SUBSEQUENT INJURIES BENEFITS
TRUST FUND, *Defendants***

**Adjudication Number: ADJ3666389 (GOL 0101570)
Goleta District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to study the factual and legal issues of this case. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued on June 13, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a customer service representative during the period of July 1, 2004 through March 10, 2006, applicant sustained injury arising out of and in the course of employment to her neck, back, shoulders, upper extremities and lower extremities; (2) applicant settled her industrial injury claim by way of Stipulated Findings & Award dated March 22, 2011; (3) applicant filed an application for SIBTF benefits on December 19, 2012; (4) applicant filed a separate application for SIBTF benefits on or about December 7, 2017, and settled her industrial injury claim based on the report of Alan Moelleken, M.D. dated March 1, 2013, which found injury to applicant's right rib, left hip, left shoulder and lumbar spine, a portion of which was attributed to the continuous trauma claim herein; (5) the parties stipulated to the rates of temporary disability and permanent disability benefits reflected in the Stipulated Findings & Award; (6) applicant does not have 35% or more permanent partial disability from the subsequent industrial injury alone; (7) applicant has failed to present evidence substantiating any preexisting labor disabling permanent disability; (8)

¹ Commissioner Capurro has been substituted in place of Deputy Commissioner Garcia.

applicant does not meet the requirements for benefits under Labor Code section 4751² and is not entitled to SIBTF benefits; and (9) applicant shall take nothing by her claim.

The WCJ issued an order in accordance with these findings.

Applicant contends that the WCJ erroneously failed to determine whether she had a preexisting permanent partial disability of her left wrist/hand and corresponding permanent disability resulting from her subsequent injury of her right wrist/hand equaling 5% of her total disability, Petitioner further asserts that the WCJ relied upon an incorrect theory, as there is evidence of ratable disability to applicant prior to her subsequent industrial injury (SII). Finally, defendant asserts that applicant's claim is barred as untimely filed.

We received an Answer from defendant.

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, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that the issue of whether applicant had preexisting permanent partial disability of her left wrist/hand and corresponding permanent disability resulting from her subsequent injury of her right wrist/hand equaling 5% of her total disability, as well as whether applicant's claim is barred as untimely filed are deferred, and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On March 22, 2011, a WCJ approved the Stipulations with Request for Award entered into on March 16, 2011 with defendant Pacific Capital Bankcorp, insured by Travelers Insurance, for industrial injury during the period of July 1, 2004 through March 10, 2006 to the neck, back, foot, shoulder, lumbar spine, wrists, right ankle, upper extremities, and shoulders. (Stipulations with Request for Award, March 16, 2011, p. 6.) Applicant further stipulated that her final permanent disability was rated at 20%, with a proviso that the stipulation "ONLY REFLECTS THE LEVEL OF DISABILITY/IMPAIRMENT THAT IS THE DIRECT RESULT OF THE PENDING . . . MATTER AND IS NOT INTENDED TO BE A REPRESENTATION OF THE TOTAL LEVEL

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

OF DISABILITY/IMPAIRMENT OF THE APPLICANT DUE TO ALL CAUSE[S] BOT[H] INDUSTRIAL AND NON-INDUSTRIAL.” (*Id.*, pp. 8, 11.)

Thereafter, applicant filed an application to obtain benefits from the Subsequent Industrial Benefits Trust Fund (SIBTF). On September 15, 2021, the matter proceeded to trial, with the following issues in dispute:

1. Parts of body, specifically right ankle and wrist.
2. Permanent disability.
3. Apportionment.
4. Whether there was prior labor disabling permanent disability.
5. Attorneys fees on the SIF case; Applicant is requesting 25 percent pursuant to their updated disclosure statement.
6. SIBTF eligibility pursuant to Labor Code Section 4751.
7. Entitlement to credit and/or offset for Labor Code Sections 4751 and 4753.
8. Statute of limitations based on the 2012 application and timeliness of filing in 2017 for not having filed within one year after the stipulations and issues that were entered into March 21, 2011.

(Minutes of Hearing and Summary of Evidence, September 15, 2021, pp. 2:17-3:2.)

The WCJ admitted into evidence several exhibits, including the Agreed Medical Evaluator (AME) reports of Rocco Calderone, M.D. dated January 9, 2009 and November 2, 2009.

In the report dated January 9, 2009, Dr. Calderone states:

SURGERIES:

...

She has had multiple surgeries in 1987 due to a multiple stabbing injury. This included surgery for treatment of a stab wound to the left hand involving a left wrist laceration requiring treatment for median nerve and radial artery injury.

...

PAST INJURIES/DISABILITIES:

She has had a prior non-work-related injury in March 1987 involving a violent crime where she was stabbed eight times. This resulted in laceration at the left wrist to the median nerve and radial artery. She also had a stab to the left side of C2 posterior neck resulting spinal cord injury with Brown-Sequard syndrome which manifested in weakness and paresis of the right upper and lower extremities and decreased pain temperature sensation in the left upper and lower extremities.

...

UPPER EXTREMITIES:

Inspection: Healed transverse laceration noted on the left wrist along the radial side to the midline. There is scar tissue and prominence noted over the midline volar

aspect of the wrist. . . .The right upper extremity is noted to have significant right scapular winging and deformity consistent with intrinsic minus position of the right hand. No other swelling or deformities are noted.

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Special Tests:

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Wrists: Finkelstein's test is negative bilaterally. Tinel's sign negative in the right wrist, positive in the left wrist in the region of previous injury. Phalen's sign of the right wrist was negative and Phalen's sign of the left wrist not applicable due to median nerve injury with deficit.

...

DIAGNOSES:

1. FROZEN RIGHT SHOULDER.

2. OVERUSE SYNDROME BILATERAL UPPER EXTREMITIES INCLUDING BILATERAL TRAPEZIUS AND SHOULDER GIRDLE AND RIGHT PECTORALIS.

3. LEFT ELBOW LATERAL EPICONDYLITIS, RESOLVED.

4. HISTORY OF SPINAL CORD INJURY, C2 WITH BROWN-SEQUARD SYNDROME, RIGHT UPPER AND LOWER EXTREMITY HEMIPARESIS, LEFT UPPER AND LOWER EXTREMITY SENSORY DISTURBANCE.

5. LEFT WRIST LACERATION WITH RADIAL ARTERY AND MEDIAN NERVE INJURY, FROM PAST HISTORY OF STAB INJURY TO THE LEFT WRIST IN 1987.

6. HISTORY OF RIGHT KNEE LIGAMENT TEAR FROM 1993 INDUSTRIAL INJURY.

...

DISCUSSION:

Based on the review of the records along with interview and examination of Ms. Kim Deinhard, it is evident that she has sustained work-related injuries to the bilateral upper extremities. This is consistent with a cumulative trauma injury from July 2004 through March 10, 2006. She has symptoms consistent with an overuse syndrome resulting from prolonged and repetitive activities at a computer work station occurring from work as a customer service manager for Pacific Capital Bank Corporation. This initially began in the left upper extremity. It is evident by the record review, specifically on her DWC-1 Claim Form dated November 15, 2004 that this also involved the right upper extremity.

...

It is my opinion, based on her examination that repetitive use injury to the left upper extremity did have symptoms in the right upper extremity as she explains in 2004 and as evident in the records. The right upper extremity symptoms were made

worse by compensating use of the right upper extremity when her left upper extremity symptoms were worse. She does have an underlying condition of Brown-Sequard syndrome which will warrant significant apportionment of her current disability level at the time of achieving maximum medical benefit. However, her work activities did contribute to her symptoms and condition of both upper extremities.

(Ex. 7, report of Dr. Rocco Calderone dated January 9, 2009, pp. 7, 9, 10-11, 17-18.)

The report of Dr. Rocco Calderone dated November 2, 2009 states:

FACTORS OF DISABILITY:

...

OBJECTIVE FACTORS:

On physical examination, there is slight decrease in side bending to the right and left of the cervical spine.

There is decreased range of motion of the right shoulder.

Neurologic findings are consistent with Brown-Sequard syndrome indicating right hemiparesis and decreased pain and temperature sensation on the left side of the body from a C2 spinal cord stab injury.

There is evidence of decrease in the median nerve distribution of the left wrist from a stab injury with laceration of the median nerve from a 1987 injury.

...

QUALIFIED INJURY STATUS:

Ms. Deinhard is a Qualified Injured Worker. unable to return to previous occupation.

IMPAIRMENT RATING

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There are several ratable factors of impairment based on Ms. Deinhard's examination.

First, in regard to the cervical spine, objective findings do not qualify under DRE or Range of Motion method as there are no radicular findings or significant disc pathology based on current diagnostic tests. She does have a loss of range of motion and this would rate as a 2% whole person impairment for loss of side bending to the right and left. This 2% whole person impairment in regard to the cervical spine is considered in the context of Almaraz/Guzman decision in noting that she does have analogous impairment rating in loss of range of motion although she does not fit specifically into a Range of Motion method or DRE category.

In regard to the lumbar spine, she does have full range of motion. She has an absence of radicular symptoms although she had some referred pain into her left thigh region. Absent radicular findings and absent loss of range of motion, she does not have ratable impairment in regard to the lumbar spine.

Considering the upper extremities, she has a loss in range of motion of the right shoulder. Based on range of motion table from 16-40 through 16-43 and 16-46, she does have a 4% upper extremity impairment in regard to right shoulder loss of internal rotation and forward flexion.

The abnormal findings in bilateral wrists on EMO/Nerve Conduction Study is considered in the context of the Carpal Tunnel Syndrome Section of the AMA Guidelines Fifth Edition page 495. Reviewing the EMO/Nerve Conduction Study results with Dr. Shorr dated January 13, 2009, he notes that the EMO examination to the bilateral upper and lower extremities and related cervical and lumbar paraspinal muscles were normal. He relates abnormalities in the nerve conduction velocity indicative of moderate left and minimal right-sided prolongation and median sensory distal latencies consistent with bilateral carpal tunnel syndrome more consistent on the left. He also indicates absent peroneal F-wave responses, otherwise unremarkable.

In addition to this, the patient is noted to have had a median nerve laceration to the left wrist in 1987 from a stab injury for which she has incompletely recovered. Additionally, she has spinal cord injury with Brown-Sequard syndrome resulting in mild weakness in the right upper extremity.

Considering the three scenarios within the carpal tunnel syndrome section of the AMA Guidelines, the patient is rated best under scenario number two considering the Almaraz/Guzman decision. Under scenario number one, rating her according to sensory and motor deficits would be difficult with the underlying sensory and motor deficits from non-industrial injuries which include the stab injuries to the cervical spinal cord and left median nerve at the wrist. Rating under scenario number three would imply a normal sensibility on examination along with normal opposition strength. She does have abnormal sensibility and does have abnormal strength.

Considering scenario number two, absent her spinal cord injury and left wrist median nerve laceration, she would have normal sensibility and opposition strength with associated abnormalities noted on nerve conduction testing and thus although imperfect, this would be the most accurate rating found in the AMA Guidelines *Fifth Edition*. This is considered 5% upper extremity impairment. This would rate as 5% upper extremity impairment or 3% whole person impairment at the bilateral wrists.

...

CAUSATION AND APPORTIONMENT:

Kim Deinhard does have a previous work injury of 1993 involving a ligament injury to the right knee. She does have underlying non-industrial injury involving multiple stabbings in 1987 resulting in C2 level Brown-Sequard spinal cord injury as well as median nerve laceration to the left wrist. In addition to this, she has a cumulative trauma injury dated July 2004 through March 10, 2006.

...
The non-industrial injury of 1987 involving spinal cord injury as well as laceration to the median nerve of the left wrist does warrant consideration for apportionment or current level of disability. I anticipate that even absent the cumulative trauma of 2004 through 2006 Ms. Deinhard would be restricted to a semi-sedentary status. I do not anticipate the need for work restrictions in regard to repetitive flexion, extension, or rotation of the neck or work at or above shoulder level nor restriction from heavy lifting or repetitive gripping or grasping with regard to the upper extremities from her non-industrial injuries. These restrictions are apportioned 100% to cumulative trauma injury of July 2004 through March 10, 2006.

Additionally, in deciding this complex issue of apportionment, I would note that ratable factors of impairment in regard to the cervical spine and bilateral upper extremities are entirely attributed to the cumulative trauma of July 2004 through March 10, 2006. Note that the spinal cord injury and median nerve laceration to the left wrist were not included in this impairment rating. In other words, the impairment rating computed above in regard to the cervical spine and bilateral upper extremities including wrist and right shoulder were derived entirely from consideration of cumulative trauma injury of July 2004 through March 10, 2006 only.

(Ex. 10, QME report of Dr. Rocco Calderone, November 2, 2009, pp. 11-15.)

In the Report, the WCJ states:

Applicant concedes she does not meet the 35% threshold, but contends she meets the 5% threshold because the subsequent industrial injury (SII) involves the right hand/wrist and the prior injury involves an opposite and corresponding member.

Applicant refers to a 1997 non-industrial stabbing where applicant sustained injuries to her left wrist/hand. (Reconsideration petition - Page2, lines 12 -14).

Applicant identifies the 2004 – 2006 continuous trauma claim resolved in 2011 by way of a Stipulated Findings & Award as the predicate injury (SII) upon which Applicant qualifies for SIBTF benefits. (Reconsideration petition - Page2, lines 22 -26).

Applicant further identifies the body part that was injured industrially that supports SIBTF liability is the right wrist/hand.

(Report, p. 3.)

DISCUSSION

Applicant contends that the WCJ erroneously failed to determine whether she had a preexisting permanent partial disability of her left wrist/hand and corresponding permanent disability resulting from the subsequent injury of her right wrist/hand equaling 5% of her total disability.

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 an employee must prove the following elements to recover subsequent injuries fund benefits:

- (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).)

In *Ferguson v. Industrial Acc. Com.* (1958) 50 Cal.2d 469 [23 Cal.Comp.Cases 108], the Supreme Court held that the "previous disability or impairment" contemplated by Labor Code section 4751 "must be actually 'labor disabling,' and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751." (*Ferguson, supra*, at p. 477.) The Court further noted that "the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith v. Industrial Acc. Com.* (1955) 44 Cal.2d 364, 367 [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability..." (*Ferguson, supra*, (quoting Larson's Workmen's Compensation Law (1952) § 59.33, vol. 2, p. 63).)

Further, the preexisting disability "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.App3d 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]" (*Id.*)

Hence, an injured worker may establish entitlement to SIBTF benefits based upon a showing that he or she had a preexisting disability which either actually interfered with or would have actually interfered with any type of work activity at the time of subsequent injury, regardless of whether the disability was industrial or nonindustrial in origin, or whether it developed from a congenital, developmental, pathological, or traumatic source. (*Franklin, supra*, at p. 238; see *Escobedo v. Marshalls, CNA Ins. Co.*, (2005) 70 Cal.Comp.Cases 604, 619 (citing *Subsequent*

Injuries Fund v. Workmen's Comp. Appeals Bd. (Talcott) (1970) 2 Cal.3d 56, 62 [35 Cal.Comp.Cases 80].)

Turning to the issue of whether applicant had a preexisting permanent partial disability of her left wrist/hand and corresponding permanent disability resulting from the subsequent injury of her right wrist/hand equaling 5% of her total disability, we observe that the parties framed the issues of injury to the right wrist, permanent disability, preexisting labor disabling permanent disability, and eligibility for SIBTF benefits for trial. (Minutes of Hearing and Summary of Evidence, September 15, 2021, pp. 2:17-3:2.)

Although the WCJ found that applicant's subsequent permanent disability does not meet the 35% threshold under section 4751(b), he did not determine whether applicant had a previous permanent partial disability that affected her left wrist/hand and a subsequent permanent disability of the right wrist/hand equaling 5% or more of total disability under section 4751(a). (*Todd, supra.*)

We therefore evaluate whether the medical record establishes the 5% threshold under section 4751(a).

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) To constitute substantial evidence "... a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

Here, Dr. Calderone reported that applicant's symptoms evidenced a decrease in the median nerve distribution of the left wrist from her 1987 stab injury and showed signs of Brown-Sequard syndrome in the form of right hemiparesis and decreased pain and temperature sensation on the left side of the body from her C2 spinal cord stab injury. (Ex. 10, QME report of Dr. Rocco Calderone, November 2, 2009, p. 12.) Dr. Calderone further reported that these clinical findings "warrant[ed] consideration for . . . current level of disability," noting that he "anticipate[d] that even absent the cumulative trauma of 2004 through 2006 [applicant would have been] restricted to a semi-sedentary status." (*Id.*, p. 14.)

Although these clinical findings suggest that applicant had a preexisting partial permanent disability of the left wrist, Dr. Calderone did not attempt to rate this apparent preexisting disability. (*Id.*) Instead, he rated applicant with 5% upper extremity impairment (or 3% whole person impairment) of the bilateral wrists, a rating he attributed solely to her subsequent cumulative trauma injury. (*Id.*)

Consequently, the record remains unclear as to whether (1) applicant's left wrist stab injury or Brown-Sequard syndrome may have caused preexisting partial permanent disability; and (2) applicant's subsequent injury caused permanent disability of her corresponding upper extremity equaling 5% or more of her total disability.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the [Appeals] Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the [Appeals] Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id.*)

Because the record is unclear as to whether applicant had a preexisting permanent disability of the left wrist/hand and whether she had subsequent permanent disability of the right wrist/hand

equaling 5% or more of her total disability, we conclude that that the record requires further development as to that issue.

Having deferred the issue of whether applicant meets the 5% threshold under section 4751(a), we recommend that that the parties develop the record through further discovery from Dr. Calderone. (*McDuffie, supra.*) In doing so, we note that applicant need not present contemporaneous medical evidence of her preexisting permanent disability to obtain substantial medical evidence thereon. (*Organista v. Subsequent Injuries Benefits Trust Fund*, 2024 Cal. Wrk. Comp. P.D. LEXIS 57; *Angell v. Subsequent Injuries Benefits Trust Fund*, 2024 Cal. Wrk. Comp. P.D. LEXIS 83.)³

Defendant asserts in the Answer that even if it was determined that applicant has prevailed in proving eligibility for SIBTF benefits, her claim was untimely filed and is thus barred. (Answer, p. 10.) We note that while the WCJ made findings that applicant failed to meet the requirements for benefits under section 4751, and is not entitled to SIBTF benefits, the WCJ never addressed the issue of whether the applicant's claim is barred due to an untimely filing.

While there is no specific statute of limitations with respect to the filing of an application against SIBTF, the Supreme Court in *Subsequent Injuries Fund v. Workmens' Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80] provided:

We should, in the absence of statutory direction and to avoid an injustice, prevent the barring of an applicant's claim against the Fund before it arises. Therefore, we hold that where, prior to the expiration of five years from the date of injury, an applicant does not know and could not reasonably be deemed to know that there will be substantial likelihood he will become entitled to subsequent injuries benefits, his application against the Fund will not be barred—even if he has applied for normal benefits against his employer—if he files a proceeding against the Fund within a reasonable time after he learns from the board's findings on the issue of permanent disability that the Fund has probable liability.

(*Talcott, supra*, 2 Cal.3d at p. 65 [emphasis added].)

³ 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, 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].)

Here, the WCJ failed to address one of the issues raised at trial; namely, whether applicant's claim against SIBTF is time barred. Upon the return of this matter for decision, the issue should also be analyzed and addressed.

Accordingly, we will rescind the F&O and substitute findings that the issue of whether applicant had preexisting permanent partial disability of her left wrist/hand and a permanent disability resulting from her subsequent injury of her right wrist/hand equaling 5% of her total disability is deferred, as is the issue of whether applicant's claim is barred as untimely filed.

Accordingly, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that the issue of whether applicant had preexisting permanent partial disability of her left wrist/hand and corresponding permanent disability resulting from the subsequent injury of her right wrist/hand equaling 5% of her total disability, as well as whether applicant's claim is barred for untimely filing, and all other issues are deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order issued on June 13, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Kimi Deinhard, born _____, while employed during the period of July 1, 2004 through March 10, 2006, as a customer service representative, at Goleta, California by Pacific Capital Bankcorp, sustained injury arising out of and in the course of employment to her neck, back, shoulders, upper extremities and lower extremities.

2. Applicant settled her industrial injury case by way of Stipulated Findings & Award dated March 22, 2011.

3. Applicant filed an application for SIBTF benefits dated December 18, 2012 on December 19, 2012.

4. Applicant filed a SIBTF application on or about December 7, 2017.

5. Parties stipulated to the TD and PD rates as reflected in the Stipulated Findings & Award.

6. Applicant does not have 35% or more permanent partial disability from the subsequent industrial injury alone.

7. The issue of whether applicant had preexisting permanent partial disability of her left wrist/hand and permanent disability resulting from the subsequent injury of her right wrist/hand equaling 5% of her total disability is deferred.

8. The issue of whether the application against SIBTF for benefits is time barred is deferred.

9. All other issues are deferred.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 17, 2026

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

**KIMI DEINHARD
GHITTERMAN, GHITTERMAN & FELD
OFFICE OF THE DIRECTOR-LEGAL UNIT (LOS ANGELES)**

SRO/kl

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