WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SANDRA BLOMBERG, *Applicant*

vs.

HOME DEPOT; SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

Adjudication Number: ADJ8050004
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to further study the factual and legal issues. This is our Opinion and Decision after Reconsideration.

The Subsequent Injuries Benefit Trust Fund (SIBTF) seeks reconsideration of the January 18, 2023 Findings and Award (F&A) wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed with defendant Home Depot as a sales representative sustained injury arising out of and in the course of employment (AOE/COE) to her back, left shoulder, bladder disorder/urinary incontinence, and psyche; that the permanent disability rating for the subsequent industrial injury is 91%; that based on both medical evidence and vocational evidence, applicant is 100 percent disabled and is entitled to benefits from SIBTF under Labor Code[1] section 4751. The Award in the F&A was issued against both SIBTF and employer defendant Home Depot.

SIBTF contends that: (1) the WCJ exceeded her authority by finding substance addiction as a preexisting condition for purposes of the SIBTF claim; (2) applicant did not produce evidence that her depression was labor disabling in 1997; (3) an impairment rating under the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA Guides) does not equate to the existence of preexisting disability for an SIBTF claim; and (4) the industrial injury alone caused

[1] All further section references are to the Labor Code unless otherwise indicated.

total permanent disability, which precludes an SIBTF claim.

Applicant filed an Answer contending that: (1) the WCJ did not find that substance addiction was a pre-existing condition because a Global Assessment of functioning (GAF) score was the basis for WCJ's finding of preexisting disability; (2) preexisting disability for purposes of SIBTF does not have to exist before the earliest alleged date of injurious exposure in 1997; it has to exist before the date of injury under section 5412, which applicant asserts is March 30, 2011; (3) in the absence of evidence to the contrary, the WCJ must assume the truth of uncontradicted and unimpeached testimony; (4) no legal basis is provided for SIBTF's apparent position that an injured worker cannot have a pre-existing disability if working at the time of a subsequent industrial injury; (5) no legal basis is provided for SIBTF's suggestion that knowledge of injury or contemporaneous medical records are required to show a preexisting disability; (6) all of the psychiatrists in this case determined that applicant had a pre-existing psychiatric disability; (7) applicant demonstrated by way of her testimony that her depression was labor disabling; (8) Ted R. Greenzang, M.D.,'s reporting was substantial evidence and provided an accurate description of applicant's pre-existing labor disabling medical conditions to meet the eligibility threshold for SIBTF benefits, and that description was corroborated by applicant's testimony; (9) Dr. Greenzang was the sole physician that discussed the issues unique to an SIBTF case regarding applicant's pre-existing disabilities and her subsequent industrial injury, and that reviewed reports from other physicians with respect to applicant's psychiatric medical condition; and (10) the industrial injury alone did not cause permanent total disability.

We have considered the allegations of the Petition, the Answer and the contents of the Report of the WCJ. Based on our review of the record and for the additional reasons given below, as our Decision After Reconsideration we will amend the F&A to remove defendant employer Home Depot from the award of SIBTF benefits and otherwise affirm the WCJ's decision.

FACTS

Applicant alleged a cumulative injury during the period of January 20, 1997 to March 30, 2011, to her back, lower extremities, nervous system (stress), psyche, and other body systems "as a result of repetitive job duties, harassment by supervisor and overall bad faith personnel actions." (Application for Adjudication of Claim (Application); Amended Application.)

On November 21, 2013, orthopedic Qualified Medical Evaluator (QME) Joseph Alban,

M.D., evaluated applicant and concluded that applicant had not reached maximal medical improvement because she required surgery due to lumbar disc syndrome with radiculopathy. Dr. Alban noted that applicant developed back pain in 2008, following which she was off work for about five months in 2010. Dr. Alban also noted that although applicant was terminated "for poor job performance" in March 2011, this was probably industrial: "It is likely that her termination was a result of poor job performance due to her industrial injury." (SIBTF Exhibit C, Report of Joseph Alban, M.D., November 21, 2013, p. 17.)

At a status conference on December 22, 2015, the parties stipulated to obtain an additional QME panel in psychiatry. On November 18, 2016, Lawrence Warick, M.D., evaluated applicant. (SIBTF Exhibit D, Report of Lawrence Warick, M.D., QME in psychiatry[2], November 18, 2016.)

Subsequently, applicant and defendant Home Depot entered into a Compromise and Release (C&R). An Order Approving Compromise & Release (OAC&R) issued on July 6, 2017.

An Application for benefits from SIBTF was filed on August 8, 2017, alleging that applicant injured her back, lower extremities, and psyche AOE/COE on March 30, 2011, and that immediately prior to the injury, applicant was disabled due to depression for 20 years, dyslexia and learning disabilities. An amended SIBTF Application of January 11, 2019 alleges in greater detail how applicant's prior conditions caused a preexisting GAF score of 53 (which equates to a 25% Whole Person Impairment (WPI) under the current Permanent Disability Rating Schedule (PDRS)), as well as impaired work functions.[3]

Applicant filed a Declaration of Readiness to Proceed (DOR) dated April 9, 2019, on a "PD issue" with "SIF Claims" [*sic*], and the parties completed a pre-trial conference statement (PTCS) at the Mandatory Settlement Conference on May 7, 2019.

Trial proceedings began on December 10, 2019. The parties stipulated that applicant claims to have sustained injury AOE/COE to her back, bladder disorder/urinary incontinence, and psyche while employed by Home Depot as a sales clerk during the period ending on March 30, 2011. Trial issues were identified as (1) employment, (2) injury AOE/COE; (3) permanent disability; and (4)

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[2] The portion of the January 21, 2020 MOH/SOE identifying this exhibit incorrectly indicates that Dr. Warick was the QME in psychology instead of psychiatry. (MOH/SOE, January 21, 2020, p. 3, line 14.)

[3] The amended Application for SIBTF benefits cites *Bookout v. Workmen's Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595], *Evanoff v. City of Los Angeles* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 201, and *Lopez v. City and County of San Francisco* (2015) 83 Cal.Comp.Cases 543. The amended SIBTF Application was filed before the Appeals Board's en banc decision in *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576.

attorney fees with applicant's attorney requesting 20 percent of SIBTF benefits.

In addition to the above four issues, 11 questions were identified as "other issues," all pertaining to the SIBTF claim, as follows: (1) What is the rating for permanent disability for the subsequent industrial injury? Is the subsequent industrial injury equal to 35 percent or more before adjustment for age and occupation and apportionment? (2) Based on the above, is the applicant eligible for SIBTF benefits? (3) Is the DFEC used to determine if the SIBTF 35 percent standard has been met? (4) Did the applicant have a pre-existing disability? (a) Was the pre-existing disability labor disabling? (b) Is the pre-existing disability required to be labor disabling, or can it be merely a permanent partial disability? (c) What does the pre-existing disability rate? (5) Whether the pre-existing disability is combined on the Combined Values Chart or added to the subsequent industrial disability to determine the overall level of disability. (6) What is the overall disability, considering the pre-existing disabilities and the subsequent industrial disability? (7) Is the applicant 100 percent disabled based on vocational evidence? (8) Is the applicant 100 percent disabled based on any other evidence? (MOH/SOE, December 10, 2019, pp. 2-3.)

On January 21, 2020, exhibits were identified and applicant testified. The stipulations and issues were modified to remove the issue of AOE/COE and add the issue of which body parts were injured, specifically whether there was injury to the back and bladder disorder/urinary incontinence.

Applicant submitted reports to address medical legal issues pertinent to the SIBTF case. In psychiatry, Dr. Greenzang issued a report dated April 16, 2018. (Applicant's Exhibit 1.) In internal medicine, James Sherman, M.D., issued a report dated December 3, 2018. (Applicant's Exhibit 2.) In orthopedics, Michael Einbund, M.D., issued a report dated April 19, 2018. (Applicant's Exhibit 3.) Applicant's vocational expert, Luis Mas, issued a report dated October 5, 2018. (Applicant's Exhibit 4.)

For its part, SIBTF did not designate any QME to address issues unique to SIBTF but instead chose to rely upon reports that were generated during the case in chief. It submitted a report dated June 13, 2017, from treating physician Manuel G. Rosario, D.O., whose specialty is identified on the report as an interventional pain management and physical medicine and rehabilitation (SIBTF Exhibit A); reports dated February 26, 2016, June 3, 2015, and November 21, 2013 from panel QME in orthopedics from the case-in-chief, Dr. Alban (SIBTF Exhibits E, B, and C, respectively); and a report dated November 18, 2016 from the panel QME in psychiatry

from the case-in-chief, Lawrence H. Warick, M.D., Ph.D. (SIBTF Exhibit D).

Applicant testified at trial in pertinent part as follows. She is not currently working. Her last employer was Home Depot. She worked there for 14 years in two different states. She started in Florida, where she worked for 10 years, following which she worked in California for 4 years. During her employment at Home Depot, she injured her back. As a result of the back injury, she saw Dr. Alban as part of her workers' compensation case. She also received treatment from Dr. Rosario. Additionally, she saw Dr. Warick, a psychiatrist. She ultimately had surgery a result of her back injury. As a result of her back pain, applicant had issues with bladder control. She believes that Dr. Rosario documented her bladder control issues.

She was examined by other doctors for her SIBTF case after she settled her workers' compensation case. Specifically, she remembered seeing Dr. Greenzang for psychiatric issues, Dr. Sherman for bladder issues, and Dr. Einbund for her orthopedic complaints. She was also examined by a vocational expert, Luis Mas.

She believes she had a preexisting psychiatric condition before working for Home Depot. She cannot remember when her psychiatric issues began, but it was probably when she was in her twenties or thirties. She thinks that her depression started when she left her husband in 1980 or 1981. During her school years, she had issues, but she was really not aware of those issues until they came out in therapy. She thinks that this time in her life affected the way she works today. She works better alone.

When she worked at Home Depot in Florida, she worked as a scheduler. She arranged the schedule for 200 people in the store. She worked in an office where she was alone. She didn't have anyone else in the office with her. She would just do her own thing, and she did it very well.

Before working for Home Depot, she worked at Mitsui-Soko, Inc. She did short-term warehouse inventory control in a large warehouse. She worked in an office with four people. She succeeded there because she did her own thing and worked alone. Prior to working for Mitsui-Soko, she worked for a trucking company as a biller. She would type bills and e-mails all day long. She worked with a total of three people. She went to school to get the job as a biller.

She lived in Las Vegas for two and a half years. When she lived in California before that, she did not work and was not in a good place mentally. She then came back to California. She went on welfare and went through a vocational training program of ten-key typing. She had no skills before this.

She moved from Florida to California and transferred to another position with Home Depot. She moved to California before Home Dept found her a job there. She was told that she had 30 days to find a position with Home Depot in California in order to maintain her status as an employee; otherwise, she would have to reapply and be rehired. They found a position for her in Cypress. She was glad to have a job, but she did not have the same position that she had in Florida. She was assigned to the special service desk, which is still part of the operations department, but she was not comfortable with this position. People would come up to her and complain. She worked for the Cypress store for four or four and a half years.

At some point while she worked at the Cypress store, she was on a leave of absence for five months due to back pain that had progressed to the point where it was crippling. She had to hold on to counters in the store. She reported the problem she was having with her back to Home Depot. She was then moved to a department where she had to lift heavy items. She worked in the millworks department, where she worked with doors and windows. She did the job, but it was not good for her back. This brought her down.

Prior to her leave of absence, she worked in the paint department. This position also entailed heavy lifting. She was told by Home Depot that the job in the paint department would be better for her and a good career move. She did not want to leave the millworks department. She had finally learned how to do it and did not want to leave her comfort zone.

When she returned from her leave of absence, she felt that she was targeted by all of the managers. She was getting write-ups for a lot of things. If she did something wrong, she would get written up. While in Florida, she had one write-up in ten years. In California, she had maybe seven write-ups. The second to the last time she was written up had to do with an end cap issue. The manager called her over to the end cap while she was doing stocking and yelled at her in front of everyone. Her last write-up occurred just before she was terminated. A manager who was going on vacation gave her an outline of expectations while the manager was away. The manager spent days with other departments walking them through this but did not spend any time with her. The manager simply gave her a list of what to do. Because she did not complete something minor on the list, she was terminated. She thinks that they were working against her.

After her termination, she was shopping at Big Lots when she ran into Omar, one of the managers at Home Depot. Omar stopped to say hi to her and said that he was sorry for the things that the people at Home Depot did to her. Omar said that he knew what happened to her was wrong,

and that it should never have happened.

She believes that the events at Home Depot aggravated her pre-existing psychiatric conditions. After her termination, she saw Dr. Larry Lyons. She also saw Dr. Warick. After her examination with Dr. Warick, she left the exam feeling misunderstood. She felt that the things she told Dr. Warick did not matter to him. She believed he was twisting what she was trying to say.

In SIBTF Exhibit D, Dr. Warick's November 18, 2016 report, Dr. Warick stated that applicant "was living a normal life." She did not convey this statement to Dr. Warick. However, she recalled that after her termination, she was feeling good about life and was in a good relationship. She had gotten a new car and was in a good place at the time.

Dr. Warick mentioned in his report that he believed that applicant had no difficulty comprehending and following instructions. She does not believe this to be an accurate statement. When her supervisor gave her a sheet of paper telling her what to do, she knew what she needed to accomplish, yet she was unable to follow the instructions. The paper scared her.

Dr. Warick stated in his report that applicant had no difficulty in maintaining a work pace given the workload. She does not believe this is true. She has to work at her own pace. When she is given a timeline, she fears that she will not be able to get it right, and she usually doesn't.

Dr. Warick indicated that applicant had no difficulty with complex or varied tasks. She does not agree with this statement. All of her employment has involved simple and repetitive tasks. In school, she just got by. She graduated with a C average. She did okay in art. She had difficulty with the teacher. Her parents made her go to summer school.

Dr. Warick indicated that applicant had no difficulty in relating to people by receiving and giving instructions and stated that she is able to give instructions to others. She does not believe these statements are true. She does not believe that she has the ability to influence people. She believes that she has difficulty in making decisions without supervision. Before she moved to Florida, she asked her eight-year-old son whether they should move, which is how she made the decision to move.

She is receiving Social Security benefits at the rate of $1,430.00 a month. She does not know exactly when she injured her back at Home Depot, because the injury happened over time.

On March 27, 2020, the WCJ issued an order vacating submission, finding that the record was lacking on the issue of which body parts were injured and disabled in the subsequent industrial injury. The order notes that injury AOE/COE was removed from the PTCS as an issue at the time

of the January 21, 2020 trial, and the parties did not stipulate as to which body parts were admitted. The WCJ concluded that development of the record was necessary in order to obtain clarification from the parties regarding which body parts were admitted, and specifically whether the psyche and left shoulder were admitted with respect to the subsequent industrial injury. (Order Vacating Case Submission and Order for Development of the Record, March 27, 2020.)

A third day of formal trial proceedings was held on January 12, 2021, with a disposition that the matter was to be submitted on January 22, 2021.

The WCJ issued an Order Vacating [Submission] and Referral to the Disability Evaluation Unit (DEU) on April 11, 2021. The DEU issued a Formal Rating on April 19, 2021 based on the WCJ's instructions to rate (1) Dr. Einbund's report of April 19, 2018, pages 28-29, using his assigned impairment percentages for the left shoulder with an add-on for pain, and the lumbar spine, without apportionment; (2) Dr. Sherman's report dated December 3, 2018, at page 9, using his impairment percentage for bladder disorder, with 10 percent non-industrial apportionment; and (3) Dr. Greenzang's report of April 16, 2018, at page 45, using his assigned GAF score of 41 to rate impairment of the psyche, without apportionment. The WCJ instructed the DEU rater to combine the resulting percentages of permanent disability from these three reports on the Combined Values Chart (CVC) in the PDRS. The above instructions resulted in the following Formal Rating:

> BLADDER DISORDER - 10 WP
> 90% OF DISABILITY ATTRIBUTED TO INJURY HEREIN
> 90% [07.03.00.00 - 10 - [2] 11 - 214F - 11 - 13] 12 PD (A)
>
> PSYCHE GAF 41 = 48 WP
> 14.01.00.00 - 48 - [8]67 - 2141 - 75 - 80 PD (A)
>
> LUMBAR SPINE ROM - 30 WP
> 15.03.02.04 - 30 - [5]38 - 214F - 38 - 44 PD (A)
>
> LEFT SHOULDER - 1 WP
> 3 WP ADD ON INCLUDED FOR PAIN
> 16.02.01.00 - 4 - [7]5 - 214F - 5 - 6 PD (A)
>
> (A)= 80 C 44 C 12 C 6 = 91 FINAL PD

The DEU provided an additional Formal Rating, also dated April 19, 2021, based on the WCJ's instruction to rate Dr. Greenzang's assessment of applicant's preexisting psychiatric disability, to which he assigned a GAF score of 53, as indicated at page 48 of his report dated April

16, 2018. This instruction produced the following Formal Rating:

PSYCHE GAF 53 - 26 WP

14.01.00.00 - 26 - [8]36 - 2141 - 45 - 45 FINAL PD

Based on this Formal Rating, as well as vocational evidence, the WCJ issued an F&A on May 28, 2021, but rescinded the decision after SIBTF filed a petition for reconsideration. Further trial was set on November 9, 2021, and continued to March 22, 2022. At trial, the disposition indicated that the WCJ would be re-serving the rating instructions and allowing counsel for SIBTF 20 days to object and to request a cross-examination of the rater.

The day after the March 22, 2022 trial, the WCJ issued formal rating instructions that were the same as the previous rating instructions. The rating instructions were filed and served together with a copy of the previous Formal Rating of April 19, 2021.

On April 4, 2022, SIBTF filed an objection to the rating instructions and a DOR, requesting cross-examination of the rater. On September 8, 2022, SIBTF withdrew its request to cross-examine the rater.

On September 29, 2022, the final day of trial, the WCJ took no further testimony and ordered that the matter was submitted as of that day.

The WCJ then issued an F&A dated January 18, 2023.

DISCUSSION

I

The Subsequent Injury Benefits Trust Fund is a state fund that provides benefits to employees with preexisting permanent disability who sustain subsequent industrial disability. The California Supreme Court described its purpose as follows:

> Workmen's compensation laws of various states and the federal government contain provisions for additional compensation to be paid from a fund (rather than by the employer or his workmen's compensation insurance carrier) to the already handicapped worker who sustains an industrial injury which causes increased permanent disability. The purpose of such subsequent injuries legislation is manifestly sound and, we think, as hereinafter developed in more detail, is encompassed within the purview of the "complete system of workmen's compensation" contemplated by our Constitution. [Citation to footnote omitted.] For example, the one-eyed worker who sustains an industrial injury which results in loss of the sight of his remaining eye is in need of more compensation to enable him to rehabilitate himself than is the worker with two good eyes who sustains an industrial injury which results in loss of the sight of one. Yet it seems unfair to place

> upon the employer who is willing to hire handicapped workmen the burden of furnishing such additional compensation; indeed, in states which have held that the employer of a one-eyed workman is liable for total disability when the workman loses his second eye as a result of an industrial injury, employers as a consequence of such decisions have refused to employ the handicapped.

(*Subsequent Injuries Fund of the State of California v. I.A.C.* (*Patterson*) (1952) 39 Cal.2d 83, 85-86 [17 Cal. Comp. Cases 142].)

Effective July 13, 2026, SB171 significantly curtailed the availability of SIBTF benefits by adding sections 4750, 4754.1, 4754.2, 4754.3, 4757, and 4758, and amending sections 4751, 4753, 4753.5, 4754, 4755, and 4756 of the Labor Code. Section 4758 applies the language of former sections 4751, 4753, 4753.5, and 4754 to specified existing cases that were set for a mandatory settlement conference or trial prior to June 1, 2026 and subsequently proceeded to trial, as follows:

> (a) This section applies to a claim for SIBTF benefits that meets any of the following criteria:
>
> (1) Prior to June 1, 2026, the Workers' Compensation Appeals Board district office set a date for the trial regarding the claim for SIBTF benefits.
>
> (2) Prior to June 1, 2026, a pretrial conference statement regarding the claim for SIBTF benefits was signed by counsel for the applicant or the applicant if unrepresented and by counsel for the director and filed with the Workers' Compensation Appeals Board district office.
>
> (3) (A) On or prior to June 1, 2026, a declaration of readiness to proceed requesting a mandatory settlement conference was filed with the Workers' Compensation Appeals Board district office indicating that the SIBTF claim was ready to proceed to trial.
>
> (B) Notwithstanding subparagraph (A), this section does not apply to a declaration of readiness to proceed requesting a mandatory settlement conference filed with the Workers' Compensation Appeals Board district office on or prior to June 1, 2026, indicating that the SIBTF claim was ready to proceed to trial that was continued or taken off calendar because the claim was not ready to proceed to trial.
>
> (C) A claim described in subparagraph (A) where the mandatory settlement conference is continued or taken off calendar because the parties have reached a settlement is subject to this section.
>
> (4) The application for SIBTF benefits was filed with the Workers' Compensation Appeals Board district office on or before July 1, 2020.
>
> (b) For claims described in subdivision (a), all of the following provisions shall apply in lieu of Sections 4751, 4753, 4753.5, and 4754, as those sections were amended by the act that added this section:

(1) 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, they 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.

(2) 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 they are 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 the employee or to which the employee 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.

(3) In any hearing, investigation, or proceeding, the state shall be represented by the Attorney General, or the attorneys of the Department of Industrial Relations, as appointed by the director. Expenses incident to representation, including costs for investigation, medical examinations, other expert reports, fees for witnesses, and other necessary and proper expenses, but excluding the salary of any of the Attorney General's deputies, shall be reimbursed from the Workers' Compensation Administration Revolving Fund. No witness fees or fees for medical services shall exceed those fees prescribed by the appeals board for the same services in those cases where the appeals board, by rule, has prescribed fees. Reimbursement pursuant to this section shall be in addition to, and in augmentation of, any other appropriations made or funds available for the use or support of the legal representation.

> (4) The appeals board shall fix and award the amounts of special additional compensation to be paid under this article, and shall direct the director, as trustee or administrator of SIBTF, to pay the additional compensation so awarded. Such additional compensation may be paid only from funds appropriated for such purpose. Out of any such appropriation the fund may reimburse itself for the cost of service rendered in payment of compensation awards pursuant to this article and maintenance of accounts and records pertaining thereto, which cost shall not exceed 5 percent of the amount of award paid.
>
> (c) Sections 4750, 4754.1, 4754.2, 4754.3, and 4757, as amended by the act that added this section, shall not apply to claims described in subdivision (a).
>
> (d) This section shall become inoperative on July 1, 2031, and, as of January 1, 2032, is repealed.

(Lab. Code, § 4758.)

The present case clearly falls within the class of cases specified in section 4658(a), because trial was set, proceeded, and completed prior to June 1, 2026.[4] Accordingly, the provisions of section 4658(b) apply here, including eligibility requirements that are identical to those that were set forth in former section 4751:

> 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 7 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.

(Former Lab. Code, § 4751, now § 4758(b)(1).)

Under the former standard, which is applicable here through section 4758, the preexisting disability may be congenital, developmental, pathological, or due to either an industrial or

[4] Trial hearings regarding SIBTF eligibility were conducted on multiple occasions, and the issue was last tried to submission on November 29, 2022.

nonindustrial accident. (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 619.) It must be "independently capable of supporting an award" of permanent disability, "as distinguished from [a] condition rendered disabling only as the result of 'lighting up' by the second injury." (*Ferguson v. I.A.C.* (1958) 50 Cal. 2d 469 [23 Cal.Comp.Cases 108], 50 Cal.2d at p. 477.)[5]

In a claim for SIBTF benefits, an employee must establish that a disability preexisted the industrial injury. (Former Lab. Code, § 4751, now § 4758(b)(1).) Evidence of a preexisting disability may include prior stipulated awards of permanent disability or medical evidence. In order to be entitled to benefits under former section 4751 (now 4758(b)(1)), an employee must prove the following elements: (1) a preexisting permanent partial disability; (2) a subsequent compensable injury resulting in additional permanent partial disability, and as relevant here, the subsequent permanent disability must equal to 35 percent 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 percent or more. (*Ibid*.) Once the threshold requirements are met, section 4751 (now 4758(b)(1)) specifically provides that applicant "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 … ." (*Id*. emphasis added.) "[E]ntitlement to SIBTF benefits begins at the time the applicant becomes entitled to permanent disability payments." (*Baker v. Workers' Comp. Appeals Bd.* (*Guerrero*) (2017) 13 Cal.App.5th 1040, 1050 [82 Cal. Comp. Cases 825]; *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 580-582.)

II

Here we address each contention of SIBTF's Petition in turn.

First, SIBTF contends that the WCJ exceeded her authority by finding substance addiction as a preexisting condition for purposes of applicant's SIBTF claim. However, the WCJ did not make any formal finding of fact regarding applicant's history of substance use in the January 18,

[5] While current section 4750(e)(3) expressly disavows the California Supreme Court's discussion of the term "labor disabling" in *Ferguson*, we reasonably infer that section 4758 is intended to function as a grandfather clause that preserves former SIBTF criteria for cases already proceeding to trial. In keeping with this understanding, we presume that the former statutory provisions encased in section 4758(b) carry with them the judicial interpretation of those former statutes with respect to cases identified in subsection (a).

2023 F&A. Instead, the only time the WCJ identified a substance is in the opinion on decision, which SIBTF mischaracterizes as a finding of fact.

We agree with the WCJ's Report that this was merely a comment that in addition to the applicant's history of depression, she also had an addiction. It is relevant to the discussion of applicant's eligibility for SIBTF benefits only insofar as it does tend to support Dr. Greenzang's opinion that applicant had a preexisting GAF score of 53 before her employment with Home Depot, when considered together with the rest of applicant's history as related in her testimony and the medical reports in evidence. (Applicant's Exhibit 1, p. 48.)

Under section 4660, the PDRS provides *prima facie* evidence of permanent disability. The current PDRS assigns a WPI of 25 percent to a GAF score of 53, and the DEU's Formal Rating adjusts this to permanent disability of 45 percent. Furthermore, the admitted evidence at trial affords no reasonable basis to dispute the WCJ's observation regarding applicant's history of substance use. This history is mentioned numerous times in the reporting of both Dr. Greenzang and Dr. Warick. (See Applicant's Exhibit 1, pp. 6, 10, 11, 34, 37, and 40; SIBTF Exhibit D, pp. 5, 7, 14, 16, and 19.)

Next, SIBTF contends that applicant did not produce evidence that her depression was labor disabling in 1997. Applicant's Answer correctly points out that preexisting disability for purposes of SIBTF need not exist before the earliest alleged date of injurious exposure in 1997; it must exist before the date of the subsequent industrial injury under section 5412. Section 5412 defines the date of injury for a cumulative trauma as "that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.)

Applicant's Answer asserts that the date of injury is March 30, 2011, based on the last date of exposure at Home Depot. That date may or may not coincide with the date upon which applicant first knew, or should have known, that she had sustained compensable disability that was caused by her past employment with Home Depot. As a general rule, an applicant will not be charged with knowledge that her disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in her employment and her disability. (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985)

163 Cal.App.3d 467, 473 [50 Cal.Comp.Cases 53].) In this case, applicant has a high school education and testified that she was not strong academically. (MOH/SOE, January 21, 2020, p. 8, lines 5-8; see Applicant's Exhibit 1, p. 8; SIBTF Exhibit D, p. 6.) There is no evidence to suggest that she has any legal or medical training.

Based on the record herein, the earliest date on which she could reasonably be charged with actual or constructive knowledge that she had or might have had disability caused by a cumulative trauma caused by her employment at Home Depot is October 31, 2011, the date on which her attorneys alleged such disability on her behalf in the Application. Accordingly, applicant's burden under section 4751 was to show that "previous disability or impairment" existed prior to October 31, 2011, and not 1997.

Notwithstanding the above, based on applicant's history, Dr. Greenzang actually provided reasonable and persuasive medical evidence that applicant had a GAF score of 53 prior to her employment with Home Depot in 1997:

> She had a GAF of approximately 53 prior to her employment for Home Depot with a whole person impairment of approximately twenty-five percent. Prior to her employment for Home Depot, her diminished self-confidence and self-esteem and avoidant personality traits impacted upon her social functioning. Prior to her employment for Home Depot her decreased ability to read in conjunction with her dysphoric symptoms impacted upon her concentration, persistence, and pace. Prior to her employment for Home Depot her diminished self-confidence and self-esteem, dysphoric symptoms, avoidant personality traits, and decreased ability to read impacted upon her adaptability at the work place and her ability to deal with increasing demands. In my opinion she manifested moderate emotional symptoms which impacted upon her social and occupational functioning to a significant and substantial degree prior to her employment for Home Depot. Her disabling emotional symptomatology was greatly exacerbated by the stressful events and circumstances to which she was exposed in the course of that employment.

(Applicant's Exhibit 1, p. 48.)

Dr. Warick does not review or rebut this substantial opinion of Dr. Greenzang, who in turn did review and rebut the less persuasive opinion of Dr. Warick that applicant has a GAF score of 70, equal to zero impairment, despite his diagnostic impressions of "Mood Disorder Due to Medical Condition, Somatic Symptom Disorder, Chronic Dysthymia, Narcotic Dependence, History of [Substance] Usage, History of Alcohol Usage," and his comment that applicant has "a history of chronic depression and anxiety treated over the years with both therapy and medication, as well as hospitalization." (SIBTF Exhibit D, pp. 16-18.)

Another contention raised by SIBTF is that an impairment rating under the AMA Guides

does not equate to the existence of preexisting disability for an SIBTF claim. It cites *Lopez v. City and County of San Francisco* (2015) 83 Cal.Comp.Cases 543, 545, where the Appeals Board, quoting *Ferguson*, *supra*, 50 Cal.2d at p. 479 noted that "to qualify for resort to the Subsequent Injuries Fund an employee must show that prior to the occurrence of the subsequent industrial injury he had attained the factual status of the 'permanently partially disabled' and that such previously incepted disability was labor disabling."[6]

In *Lopez*, *supra*, a doctor's report failed to provide substantial evidence that factors of orthopedic disability were in fact labor disabling prior to a subsequent industrial injury. (*Id.* at pp. 546-547.) We discern no such problem in the instant case. The Petition calls into question only one report, the psychiatric report of Dr. Greenzang, which assigns a retrospective GAF score of 53 to applicant before her employment with Home Depot. The GAF score is derived not from the AMA Guides, but from the 2005 PDRS, which incorporated material from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, version 4 (DSM-IV). Unlike WPI assigned by the AMA Guides,[7] the GAF score addresses both symptoms and their effect on occupational functioning, including relationships with co-workers. The 2005 PDRS describes a GAF of 51-60, which is the range assigned by Dr. Greenzang to applicant's retroactive psychiatric disability, as "[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g.. few friends, conflicts with peers or co-workers)." (2005 PDRS, p. 1-14.)

In addition to assigning a number, Dr. Greenzang explains how applicant's preexisting psychiatric impairment translates into labor disability, noting that her diminished self-confidence and self-esteem, dysphoric symptoms, avoidant personality traits, and decreased ability to read impacted her adaptability in the workplace and her ability to deal with increasing demands prior to her employment for Home Depot. (Applicant's Exhibit 1, p. 48.) Dr. Greenzang did not assign prophylactic work restrictions; he persuasively described how applicant's preexisting psychiatric condition actually made work moderately more difficult, but not impossible.

Dr. Greenzang's reasoning appears to be consistent with applicant's history as described

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[6] With respect to *Ferguson*, see footnote 5, *supra*.

[7] "The **whole person impairment percentages** listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work*…" (AMA Guides, page 4, emphasis in original.)

in both his and Dr. Warick's reports, and it reasonably supports the inference that applicant had preexisting labor disability. Contrary to petitioner's assertions, Dr. Greenzang's report does therefore constitute substantial medical evidence, which the California Supreme Court described as "more than a mere scintilla, and means such relevant evidence as *a reasonable mind might accept as adequate to support a conclusion* . . . . It must be *reasonable in nature, credible, and of solid value*…" (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], italics in original.)

Finally, SIBTF asserts that the industrial injury alone caused total permanent disability, which precludes a SIBTF claim. This contention is unsupported by the record. While it is true that the F&A includes a finding that applicant is presently 100 percent permanently disabled, a finding that does not appear to be disputed by SIBTF, there is no finding that the total disability was caused solely by her industrial cumulative trauma. Om the contrary, the WCJ found that the permanent disability rating for the subsequent industrial injury is 91 percent. This finding is based on the Formal Rating, the objection to which petitioner has withdrawn.

III

The January 18, 2023 Award should not have been issued against defendant Home Depot. Home Depot did not participate in trial submission, nor in the trial proceedings, which commenced more than two years after approval of the settlement of the case-in-chief by C&R. Furthermore, all of the issues identified at trial were settled with respect to Home Depot or pertained solely to SIBTF. The July 6, 2017 OAC&R approved Home Depot's full and final settlement of liability to applicant for benefits, so any award of further permanent disability indemnity against Home Depot is barred. (Lab. Code, § 5005; OAC&R dated July 6, 2017; C&R, Paragraph 9.)

More fundamentally, Home Depot cannot be liable for SIBTF benefits as the very purpose of SIBTF is to relieve employers of the burden of paying for the combined effect of both an industrial injury and preexisting disability. (*Patterson*, *supra*, 39 Cal.2d at pp. 85-86.)

Accordingly, we will amend the F&A to remove Home Depot from the award of SIBTF benefits. The F&A is otherwise affirmed.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the January 18, 2023 Findings and Award is **AFFIRMED** except that it is **AMENDED** as follows:

AWARD

AWARD IS MADE in favor of SANDRA BLOMBERG against SIBTF as follows:

A. Attorney's fee is 20% for the SIBTF claim.

B. Applicant is 100% disabled.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I DISSENT (see attached dissenting opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 5, 2026

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

SANDRA BLOMBERG
THOMAS LAW ALLIANCE, INC.
OFFICE OF THE DIRECTOR – LEGAL UNIT

CWF/*cs*

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

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. I concur with my colleagues that the recent amendments to the Labor Code do not apply to this applicant. However, I would rescind the January 18, 2023 Findings and Award that applicant was entitled to SIBTF benefits and find that applicant failed to meet her burden of proving pre-existing labor disability.

Any decision of the Workers' Compensation Appeals Board must be supported by substantial medical evidence. (Lab. Code, § 5952(d); *Escobedo v. Marshalls* (2007) 70 Cal.Comp.Cases 604, 620 (Appeals Board en banc); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310], *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) A medical opinion is not substantial evidence if it is "based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 620; *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525.)

In this case, the medical expert opinions of Dr. Greenzang do not meet that definition of substantial medical evidence. Dr. Greenzang assigned a speculative GAF score, equal to 25 percent WPI under the 2005 PDRS, based solely on applicant's self-serving reporting. The January 18, 2023 F&A relies upon this insubstantial opinion of Dr. Greenzang, while ignoring the reporting of the QME in psychiatry, Dr. Warick, who evaluated the applicant in 2016 and provided a substantial opinion that could and should have been applied to the subsequent injury claim.

Dr. Warick rated the alleged pre-existing disability using the 1997 PDRS, applying the eight work functions and work restrictions from that schedule to find that there was zero pre-existing disability. This is consistent with the factual history of the case. Applicant began working at Home Depot in 1997 as a warehouse inventory control person, and the evidence presented in this case shows that she was successfully employed. There appears to be no evidence of pre-existing emotional issues requiring medications or medical treatment.

Because the evidence in this case fails to prove entitlement to SIBTF benefits, I would rescind the January 18, 2023 decision awarding SIBTF benefits.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 5, 2026

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

SANDRA BLOMBERG
THOMAS LAW ALLIANCE, INC.
OFFICE OF THE DIRECTOR – LEGAL UNIT

CWF/*cs*

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