WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GEORGE HARRIS, *Applicant,* vs. NUMAC COMPANY; STATE COMPENSATION INSURANCE FUND; SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants.*	Case No. ADJ7139856 (Sacramento District Office) OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by defendant Subsequent Injuries Benefits Trust Fund (SIBTF). This is our decision after reconsideration.[1]

Defendant SIBTF seeks reconsideration of the Findings of Fact issued by the workers' compensation administrative law judge (WCJ) on February 3, 2017. The WCJ found, in pertinent part, that the combined effect of applicant's current injury with applicant's previous disabilities equal 100% permanent disability.

Defendant contends that (1) applicant's prior 34% lung impairment is not labor disabling, (2) the WCJ improperly added the prior disabilities to the current disability, and (3) applicant's SIBTF claim is barred by the statute of limitations.

We received an Answer from applicant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have considered the allegations of the Petition, Answer, and the contents of the WCJ's Report. Based on our review of the record and, as discussed below, we (1) amend finding no. 3 from the

[1] The Opinion and Order Granting Petition for Reconsideration was signed by Deputy Commissioner Richard Newman, who is now retired. A new panel member has been substituted in his place.

Findings and Award to indicate that applicant met the threshold requirement found under Labor Code section 4751, subdivision (b),[2] because the current injury resulted in permanent disability of 81%, when considered alone and without regard to apportionment and adjustments for applicant's occupation and age, (2) amend finding no. 4 to clarify that for purposes of establishing liability, the 100% combined disability consists of adding the 65% current disability and the 38% prior disabilities to applicant's back, and (3) amend the award to include increases per Labor Code section 4659(c). We otherwise affirm the Findings and Award.

I.

On January 8, 2005, applicant fell ill with pneumonia after working on an AC unit in wet and cold weather. (WCAB Exhibit EE, the report of Samuel M. Sobol, M.D., Qualified Medical Evaluator (QME) in Internal Medicine, dated October 21, 2013, pp. 2-3.) He was later diagnosed with stage II sarcoidosis. (*Id.* at p. 3.)

On December 1, 2014, the parties went to trial on parts of body. (Minutes of Hearing and Summary of Evidence (MOH/SOE) dated December 1, 2014.)

On February 10, 2015, a Disability Evaluation Unit (DEU) rating was issued indicating that applicant is 65% permanently disabled as follows:

> Respiratory Disorder
>
> 66% (05.02.00.00 - 53 - [7]72 - 380H - 77 – 77) 51
>
> 3% WPI add-on included for pain
>
> Contact Dermatitis
>
> 66% (08.03.00.00 - 10 - [2]11 - 380G – 13 - 13) 9
>
> Arousal Disorder
>
> 66% (13.03.00.00 – 20 - [6]26 - 380I – 34 - 34) 22
>
> 51 C 22 C 9 = 65 Final PD
>
> (Report of Permanent Disability Based on Instructions)

On April 3, 2015, applicant filed an Application for Subsequent Injuries Fund Benefits, claiming

[2] All subsequent statutory references are to the Labor Code unless otherwise noted.

he has a 2003 pre-existing disability to his back. (Application for Subsequent Injuries Fund Benefits.)

On April 6, 2015, applicant cross-examined the DEU rater. (Minutes of Hearing dated April 6, 2015.)

On April 23, 2015, the WCJ issued a Findings of Fact, Awards and Order finding that applicant sustained industrial injury on January 8, 2015 to his lungs/pulmonary, skin (sarcoidosis) and psyche, which caused 65% permanent disability. (Findings of Fact, Awards and Order with Opinion on Decision dated April 23, 2015.)

On November 17, 2016, the parties went to trial on the following two issues: (1) SIBTF, and (2) the statute of limitations. (Minutes of Hearing dated November 17, 2016.) At trial, the WCJ advised that he would consider all documents already in evidence. (*Id.* at p. 2:18-19.) The following is a summary of the relevant documents in evidence:

- WCAB Exhibit EE, the report of Dr. Sobol dated October 21, 2013: Dr. Sobol assigned a 50% whole person impairment (WPI) to applicant's pulmonary limitations, 3% WPI for pain, and 20% WPI for applicant's sleep and arousal disorders. (*Id.* at pp. 5-8.)
- WCAB Exhibit EE, the report of Dr. Sobol dated January 16, 2014: Dr. Sobol stated the following with regards to apportionment,

> . . . I would affirm that apportionment should remain 66% to industrial causation as specified on page 38 of my report of 1/18/12, if apportioned to disease. However . . . if we are apportioning to disability, "One could apportion 100% to occupational factors, arguing that without the trigger of the industrially related pneumonia, the patient's sarcoidosis may have remained dormant and subclinical and asymptomatic for an indefinite period of time." This recognizes that the patient apparently had dormant sarcoidosis of non-industrial origin which was not symptomatic and causing no disability prior to the pneumonia, which had an industrial component, and that the patient had no disability prior to the reactivation of sarcoidosis precipitated by the episode of pneumonia." (*Id.* at pp. 2-3.)

- WCAB Exhibit FF, the report of Ernest E. Johnson, M.D., QME in Ear, Nose and Throat, dated May 10, 2013: Dr. Johnson opined that applicant no longer suffers disability from the sinus following dental surgery. (*Id.* at p. 2.)
- WCAB Exhibit GG, the report of Oscar E. Espinas, M.D., QME in neurology, dated September 28, 2013: Dr. Espinas opined that there is no evidence for any sarcoid involvement in applicant's

central or peripheral nervous system. (*Id.* at p. 10.)

- WCAB Exhibit JJ, the report of Boris Zhalkovsky, M.D., QME in psychiatry, dated March 14, 2013: Dr. Zhalkovsky opined that applicant is not permanently disabled from a psychiatric standpoint. (*Id.* at p. 15.)
- WCAB Exhibit NN, the report of Justin J. Frieders, D.C., QME in chiropractic, dated May 13, 2014: Dr. Frieders opined that there is no industrial causation between applicant's current cervical and upper back and shoulder complaints and his current diagnosis of sarcoidosis. (*Id.* at p. 12.)
- WCAB Exhibit OO, the report of Philip L. Levy, M.D., QME in ophthalmology, dated June 6, 2014: Dr. Levy opined that applicant's ocular disability is not industrial. (*Id.* at p. 36.)
- WCAB Exhibit QQ, the report of Howard L. Sofen, M.D., QME in dermatology, dated June 26, 2014; Dr. Sofen opined that applicant's skin impairment due to sarcoidosis is rated at 10% WPI and apportioned 50% of applicant's skin condition to industrial factors and 50% to non-industrial factors. (*Id.* at p. 7.)

On February 2, 2017, the WCJ issued a Findings and Award finding that applicant's current injury resulted in 48% permanent disability when considered alone and without adjustment to applicant's occupation or age. (Finding no. 3, Findings and Award.) In his Opinion on Decision, the WCJ explained that although the current injury actually resulted in 65% permanent disability, as supported by the recommended rating of the DEU, the 65% rating is based on three distinct impairments (respiratory disorder, contact dermatitis, and arousal disorder). (Opinion on Decision, p. 1.) The WCJ, without explanation, and for the purposes of analyzing applicant's SIBTF's eligibility, identified and separated the respiratory disorder impairment from the other two impairments. (*Ibid.*) The WCJ then excluded the adjustments for age and occupation from the 53% WPI for the respiratory disorder and apportioned 66% as industrial, resulting in 48% permanent disability. (*Ibid.*) The WCJ concluded that 48% permanent disability satisfied the 35% threshold under section 4751, subdivision (b), and proceeded to add 38% from a prior permanent disability rating from applicant's 1999 and 2003 back injuries. (*Id.* at pp. 1-2.) This addition resulted in 86% permanent disability, from which the WCJ then added 34%, which is the non-industrial portion of applicant's current respiratory disorder that the WCJ reasoned was pre-existing.

(*Id.* at p. 3.) As a result, the WCJ found that applicant's combined pre-existing and current disabilities resulted in 100% permanent disability. (Finding no. 4, Findings and Award.)

On February 28, 2017, defendant SIBTF filed the instant Petition for Reconsideration contesting the 100% permanent disability. (Petition for Reconsideration.)

On March 16, 2017, applicant filed an Answer.

On April 15, 2017, the WCJ filed his Report.

On April 25, 2017, we granted reconsideration to further study the factual and legal issues in this case.

II.

Defendant SIBTF's Petition for Reconsideration raises three issues: (1) whether applicant's prior 34% lung impairment is labor disabling, (2) whether the WCJ improperly added the prior disabilities to the current disability, and (3) whether applicant's SIBTF claim is barred by the statute of limitations.

A. Applicant's prior 34% non-industrial lung impairment is not labor disabling and should not be considered in calculating SIBTF benefits.

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, Amended by Stats. 1959, Ch. 1034.)

The elements of this statute have been summarized as follows:

(1) The combined disability of the preexisting disability and the disability from the subsequent industrial injury must be 70 percent or more; [footnote omitted]

(2) The combined disability of the two injuries must be greater than that of the disability from the subsequent injury alone; and

(3) One of the following conditions must be met:

(a) The previous disability or impairment must have affected a hand, leg, arm, foot, or eye; the disability from the subsequent injury must affect the opposite and corresponding member; and the disability from the subsequent industrial accident, when considered alone and without regard to or adjustment for the employee's age or occupation, must be equal to 5 percent or more of the total; or

(b) The permanent disability resulting from the subsequent industrial injury, when considered alone and without regard to or adjustment for the employee's age or occupation must be equal to 35 percent or more of the total. [Footnote omitted.]

There are no requirements as to the origin of the preexisting disability; it may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].)

The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of workmen's compensation contemplated by our Constitution." (*Patterson* (1952) 39 Cal.2d 83, 17 Cal.Comp.Cases 142; *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 475.)

The Supreme Court in *Ferguson* held that the "previous disability or impairment" contemplated by 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,* p. 477; *Escobedo v. Marshall*, 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc).) 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 [2, 3] [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. . . .'" (*Id.* at 477, quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 619 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc), we held as follows:

> . . . if an applicant's non-industrial pathology causes apportionable permanent disability under section 4663 or 4664(a), the SIF benefits will not be payable under section 4751 unless the applicant demonstrates that the pathology was causing permanent disability prior to the subsequent industrial injury. Although this may mean that, in some cases, an injured employee will not get either permanent disability benefits or SIF benefits for the apportioned disability, this is not a major change from pre-SB 899 law, which held that an injured employee was not entitled to SIF benefits based on an asymptomatic disease process that was not labor disabling prior to the industrial injury. [citations]

Based on *Ferguson* and *Escobedo*, we conclude that applicant's sarcoidosis was not labor disabling prior to his industrial pneumonia. Applicant was asymptomatic and had no disability prior to the pneumonia. "This recognizes that the patient apparently had dormant sarcoidosis of non-industrial origin which was not symptomatic and causing no disability prior to the pneumonia, which had an industrial component, and that the patient had no disability prior to the reactivation of sarcoidosis precipitated by the episode of pneumonia." (WCAB Exhibit EE, the report of Dr. Sobol dated January 16, 2014, p. 3.) Since applicant was asymptomatic prior to the pneumonia, his sarcoidosis was not labor disabling, even though his otherwise dormant sarcoidosis would not have lighted up but for the pneumonia. Thus, the WCJ erred in adding the 34% non-industrial dormant sarcoidosis in calculating applicant's combined disability for purposes of SIBTF's benefits. Indeed, the WCJ admitted to this error in his Report. (WCJ's Report, p. 7 ["Based on the foregoing discussion, the WCJ is persuaded that he was mistaken in assuming applicant's granulomatous lung disease met the test of a pre-existing impairment under section 4751."].)[3]

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[3] It appears from applicant's Answer to the Petition for Reconsideration that he is arguing that his current disability should not be apportioned because his sarcoidosis was asymptomatic prior to the industrial pneumonia and absent the industrial injury, his sarcoidosis might have stayed dormant. (Answer.) Sections 4663 and 4664, which came into effect in 2004, eliminated employer liability for dormant conditions that were lighted up as a result of an industrial injury. Section 4663 states that "[a]pportionment of permanent disability shall be based on causation." (§ 4663(a).) "The plain reading of 'causation' in this context is causation *of the permanent disability*." (*Escobedo, supra,* 70 Cal.Comp.Cases at p. 611; italics in original.) Section 4664 specifies that an employer "shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (§ 4664(a).) Here, applicant's permanent disability was not only caused by the industrial pneumonia but also by the non-industrial dormant sarcoidosis that was pre-existing. Per section 4664, the employer is only liable for the industrial portion of applicant's permanent disability.

B. While it is proper to combine successive disabilities by adding, the WCJ incorrectly did so.

Pursuant to the Court of Appeal's decision in *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214, we further conclude that an employee's prior and subsequent disabilities shall be added in order to determine his or her combined disability under section 4751.[4]

The applicant in *Bookout*, an oil refinery operator, sustained a compensable injury to his back. Prior to this injury, he had a nonindustrial heart condition. The Appeals Board affirmed the referee's award of permanent disability of 30.5 % for the compensable injury based on an unapportioned rating of 65% as a result of the industrial back injury, less 34.5% apportioned to the preexisting heart condition. The referee was also affirmed by the Appeals Board in finding that applicant was not eligible for SIBTF benefits by ascribing to the subsequent injury the same 30.5% after apportionment, which is less than the requisite minimum of 35% for a subsequent disability under section 4751. (*Id.* at pp. 218-222.)

The Court determined that the Appeals Board had properly determined the percentage of permanent disability resulting from the compensable injury with respect to the employer's liability, holding that the disability resulting from the subsequent injury was compensable to the extent it caused a decrease in petitioner's earning capacity, citing former section 4750[5] and *State Compensation Ins. Fund v. Industrial Acci. Com.* (*Hutchinson*) 59 Cal.2d. 45, 48-49 (the employer is only liable for the portion of disability caused by the subsequent industrial injury) and *Mercier* v. *Worker's Comp. Appeals Bd.* (1976)

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[4] See our Opinion and Decision After Reconsideration in *Kudelka v. City of Costa Mesa* (November 6, 2019, ADJ8942156) [2019 Cal. Wrk. Comp. P.D. LEXIS 436], *Kwasigroch v. Subsequent Injuries Benefit Trust Fund* (November 25, 2019, ADJ9443336 and ADJ9779744) [2019 Cal. Wrk. Comp. P.D. LEXIS 484] and *Mondragon v. Subsequent Injuries Benefits Trust Fund* (December 16, 2019, ADJ4673316). Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) A California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 [Appeals Bd. en banc].) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).)

[5] Former section 4750 provided: "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. The employer shall not be liable for compensation to such employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed." (Former § 4750; *Bookout*, 62 Cal.App.3d at p. 222.)

16 Cal.3d 711, 715-716 (the fact that injuries are to two different parts of the body does not in itself preclude apportionment).

The Court found, however, that petitioner was erroneously denied SIBTF benefits under section 4751, because the referee incorrectly instructed the rating specialist that the permanent disability for the subsequent injury be calculated for the purposes of SIBTF liability by apportioning the 34.5% for the preexisting nonindustrial heart disability (based on a standard rating of 30% due to a "preclusion from heavy work") from the subsequent injury disability of 65% (based on a standard rating of 60% due to a "limitation to semi-sedentary work"), as opposed to 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—i.e., without reduction for apportionment.[6] Thus, the Court held that for purposes of SIBTF liability, the permanent disability attributable to the subsequent injury was 60%, which is greater than the 35% threshold requirement under the statute. (*Id.* at p. 228; § 4751, subd. (b).)

The rating specialist had combined the prior and subsequent disabilities using the Multiple Disability Tables (MDT),[7] based on the instruction by the referee to treat both disabilities as resulting from a single injury. The preclusion from heavy work that resulted from the prior heart condition was subsumed by and overlapped the permanent disability from the subsequent back injury that was based on a limitation to semi-sedentary work. However, another aspect of applicant's prior heart condition that did not overlap—a preclusion from excess emotional stress—was found equivalent to 12% permanent disability. Based on the referee's instruction to treat the successive disabilities as arising from a single injury, the non-overlapping permanent disability of 12% was combined with the subsequent injury permanent disability of 65% using the MDT, resulting in 70.5% permanent disability. (*Id.* at p. 225.) Noting that the successive disabilities resulted from a "preexisting injury or condition and a subsequent injury" in contrast to the referee's consideration of the "several factors of disability as arising out of a single injury," the Court determined that the 12% permanent disability attributable to the prior disability

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[6] The work preclusions under the "Guideline for Work Capacity" utilized by the disability evaluator are found in the permanent disability rating schedules (PDRS) used before 2005. (*Id.* at p. 224); see discussion below.)

[7] The multiple disability tables which were then in use included formulas and a chart that were used to rate disabilities "involving different members or organs of the body . . . ." (PDRS, 1968; see discussion below.)

should be added to the 65%, resulting in 77% permanent disability. (*Id.* at pp. 225, 229, fn. 2.) From this percentage, subtracting the 30.5% permanent disability that was the liability of the employer from the total, SIBTF was held liable for the difference of 46.5% permanent disability. (*Id.* at pp. 229-230.)

At the time of the *Bookout* decision, the Multiple Disabilities Tables (MDT) were in use. These tables were used in the PDRS prior to 2005. The CVC came into use when the Legislature revised section 4660 in 2004 as part of SB 899, and adopted the 5th edition of the AMA Guides as a basis for determining permanent disability. (§ 4660.) The following philosophy behind the use of the CVC is expressed in the beginning of the Guides:

> The Combined Values Chart (p. 604) was designed to enable the physician to account for the effects of multiple impairments with a summary value. A standard formula was used to ensure that regardless of the number of impairments, the summary value would not exceed 100% of the whole person. According to the formula listed in the combined values chart, multiple impairments are combined so that the whole person impairment value is equal to or less than the sum of all the individual impairment values.
>
> A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability inherent in combining multiple impairments, it is difficult to establish a formula to account for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding impairment ratings for the separate impairments (eg, blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate. (AMA Guides, 5th ed., § 1.4, at pp. 9-10.)

The 2005 PDRS incorporates the CVC and instructions "for combining two or more disabilities or two or more impairments." (2005 PDRS, pp. 8-1 to 8-4.) The schedule also includes the formula for combining impairments and disabilities (2005 PDRS, pp. 1-10 to 1-11) and examples of how to rate multiple impairments and disabilities using the CVC. (2005 PDRS, pp. 7-1 to 7-4.) In a similar fashion to the 2005 PDRS, the prior schedule, the 1997 PDRS, instructs that the MDT is "to be used when combining multiple disabilities involving different members or systems of the body . . ." or "when combining two or more disability factors occurring in one or both arms or legs." (1997 PDRS, p. 7-12.)

Although the 2005 and 1997 PDRS do not expressly provide that the rating of multiple disabilities is restricted to the rating of a single injury, there is language in both that is indicative of that

intent. The Introduction in the 2005 PDRS provides, "[t]he extent of permanent disability that results from *an* industrial injury can be assessed once an employee's condition becomes permanent and stationary." (2005 PDRS, p. 1-2; emphasis added.) Under the heading "Impairment Standard," the 2005 PDRS provides that "[a]" *single injury* can result in multiple impairments of several parts of the body. . . . and "[i]t is not always appropriate to combine all impairment standards resulting from a *single injury*, since two or more impairments may have a duplicative effect on the function of the injured body part." (*Id.* at p. 1-5; emphasis added.)

The 1997 PDRS also contains language indicating a distinction between rating a single injury and multiple injuries. Under the section "pyramiding," the schedule provides in pertinent part:

> To avoid pyramiding, the Multiple Disabilities Table (MDT) is generally used as a guide. The MDT retains the value of the greatest disability and systematically reduces the lesser disabilities to maintain a reasonable relationship between the level of overall disability and the maximum disability possible for a *single injury* (100%). See Combining Multiple Disabilities on page 7-12. (1997 PDRS p. 1-9; emphasis added.)

Under the section entitled "Duplication," the schedule provides:

> When combining multiple factors of disability resulting from a *single* injury within an extremity, single body part, or multiple areas of the body, it is necessary to avoid duplication. Duplication occurs when the combining of different factors of disability does not further reduce an injured workers' ability to compete in an open labor market beyond that resulting from a single factor standing alone. (1997 PDRS p. 1-9; emphasis in original.)

Finally, under the section "Overlap" the schedule provides:

> When factors of disability resulting from the current injury duplicate factors resulting from a *different* injury or condition, the disabilities are said to "overlap". Overlap occurs to the extent that the factors of disability resulting from the current injury do not reduce an injured worker's ability to compete in an open labor market beyond the disability resulting from pre-existing injury(ies) [sic] and / or condition(s).
>
> The attribution of overlapping factors of disability to different causes is called apportionment. Overlapping disability(ies) [sic] resulting from the prior injury or condition must be factored out of the current disability so that the rating reflects only the residual disability caused by the current injury. Overlap may be total, partial or absent, as illustrated in the following examples. [Examples omitted.] (1997 PDRS, p. 1-10; emphasis in original.)

In *Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 720, 727 [41 Cal.Comp.Cases 81], the Court noted that the purpose of the MDT is to avoid any overlap between disabilities and impairments, or pyramiding when rating a single injury:

> '. . . [I]n cases involving multiple factors of disability caused by a single industrial accident the [Worker's Compensation] Board must, in any instructions it may direct to the rating bureau, fully describe each separate factor of disability. Any overlap of the factors of disability thus described *is adequately taken into account*, and the pyramiding of *disabilities is properly avoided, by application of the multiple disabilities rating schedule*.' (*Mihesuah, supra,* at p. 727 quoting *Hegglin v. Workmen's Comp. App. Bd.* (1971) 4 Cal.3d 162, 174).)

We believe the language from the schedules and authority cited above reinforce the holding in *Bookout* that under section 4751, non-overlapping successive disabilities are to be added. (See also *Lopez v. City and County of San Francisco* (February 11, 2015, ADJ7827606) [2015 Cal. Wrk. Comp. P.D. LEXIS 46]; *Evanoff v. City of Los Angeles* (April 25, 2016, ADJ9171432) [2016 Cal. Wrk. Comp. P.D. LEXIS 201.) Notably, the Court in *Bookout* did not reject the disability evaluator's method of rating the successive disabilities under the MDT, but rather it rejected the referee's instruction to treat both disabilities as a single injury, which would require use of the MDT. (*Bookout, supra,* 62 Cal.App.3d at p. 222; see also *Mukesh Singh v. State of Calif.* (April 28, 2017, ADJ2653468, ADJ7229862, ADJ9578758) [2017 Cal. Wrk. Comp. P.D. LEXIS 204].)

We note that although the words "combination" and "combined" are used in the statute,[8] the term "combined" does not by itself denote any particular method of *how* to combine disabilities, and we do not interpret the term to mean or imply that successive disabilities must be combined using a particular formula or table.[9] Addition is one method of combining, utilizing the CVC another. (See *Bookout, supra,* 62 Cal.App.3d at p. 225 ["Adverting to the instruction by the referee to the rating specialist with respect to subsequent injuries fund benefits, we observe that it produces a rating of 65 percent for the

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[8] "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 . . . ." (§ 4751, emphasis added.)

[9] Among the definitions of "combine" is simply "to unite into a single number or expression." (Merriam Webster Collegiate Dictionary (10th ed.)

back injury and a rating of 12 percent for the heart disability or a combined disability of 77 percent reduced to 70 1/2 percent upon an application of the 'multiples tables.'"])

Here, it was proper for the WCJ to combine applicant's non-overlapping successive disabilities by adding them together. However, the WCJ incorrectly determined the permanent disabilities that must be added. For unexplained reasons, the WCJ separated the respiratory disorder from the other two disorders to derive at the percentage of the subsequent permanent disability. The WCJ stated:

> Applicant's permanent disability for the subsequent injury (*i.e.*, the injury herein) to the lungs/pulmonary, skin (sarcoidosis), and psyche was established by Findings and Award that determine the injury caused permanent disability of 65%. 65% cannot be utilized as "the permanent disability resulting from the subsequent injury" because it is derived with adjustments for age and occupation. (See Recommended Permanent Disability Rating, February 10, 2015). Although the composite rating is the result of three distinct impairments, the only one that need be considered to determine if the permanent disability was equal to 35% or more is the one for respiratory disorders.
>
> The whole person index for that impairment is 53%. The Adjustment Factor for the Future Earning Capacity raises that impairment to 72%. (*Id.*) 66% of that amount was the result of the industrial injury. (*Id.*) Thus, the level of permanent disability as a result of the subsequent injury without adjustment for age or occupation and after apportionment is 48%, exceeding the threshold 35%. (Opinion on Decision, p. 1.)

We find no legal support to separate the respiratory disorder from the other two disorders. As discussed above, the purpose of the SIBTF statute is to encourage the employment of the disabled by providing compensation for the "remainder of the combined permanent disability existing after the last injury." (§ 4751; *Patterson, supra,* 39 Cal.2d 83; *Ferguson, supra,* 50 Cal.2d at p. 475.) The statute is meant to provide compensation for an employee's *combined* permanent disability, with the employer responsible for only the industrial portion and the SIBTF responsible for the remainder. (§§ 4664, 4751.)

Accordingly, we conclude that the combination of applicant's non-overlapping successive permanent disabilities is derived by adding the 65% subsequent permanent disability, consisting of the three current impairments of respiratory disorder, contact dermatitis and arousal, and the 38% of pre-

existing permanent disability in applicant's back, resulting in 100% permanent disability.[10] We note that the 65% subsequent permanent disability is derived by combining the three impairments using the CVC because they involve a single injury, whereas the addition of the 38% pre-existing permanent disability to the 65% subsequent permanent disability is the result of successive disabilities. (See discussion, *infra.*)

Furthermore, we note that the statute excludes adjustments for the occupation and age of the employee only for the purpose of establishing the 35% threshold, not for the purpose of establishing liability. (§ 4751, subd (b); *Bookout, supra,* 62 Cal.App.3d at p. 229.) The Court in *Bookout* interpreted this part of the statute as excluding apportionment as well. (*Bookout, supra,* at p. 228.) Here, the 35% threshold, which excludes adjustments for occupation, age, and apportionment, is met as follows:

Respiratory Disorder

05.02.00.00 - 53 - [7]72

3% WPI add-on included for pain

Contact Dermatitis

08.03.00.00 - 10 - [2]11

Arousal Disorder

13.03.00.00 – 20 - [6]26

72 C 26 = 79 C 11= 81 > 35

C. Applicant timely filed his SIBTF application.

There is no statutory time limit to apply for SIBTF benefits. Instead, the limitations period for application of SIBTF benefits is as follows.

> 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 -- <u>if he files a proceeding against the Fund within a</u>

[10] The WCJ states that the Stipulations with Request for Award issued on May 29, 2008 in SAC0345198 indicate that applicant had a 38% pre-existing permanently disability as a result of back injuries in 1999 and 2003. (Opinion on Decision, p. 2.) We observe that the Stipulations with Request for Award is not in the record. (See Opinion on Decision, p. 2, fn 1.) However, we have no reason to doubt the existence of the document.

> reasonable time after he learns from the board's findings on the issue of permanent disability that the Fund has probable liability.
>
> This rule is in keeping with the doctrine that limitations provisions in the workmen's compensation law must be liberally construed in favor of employees unless otherwise compelled by the language of the statute and that statutes of limitations should not be interpreted in a manner resulting in a right being lost before it accrues. (*Fruehauf Corp.* v. *Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 569, 577 [68 Cal.Rptr. 164, 440 P.2d 236].)
>
> (*Subsequent Injuries Fund v. Workmen's Comp. App. Bd.* (*Talcott*) (1970) 2 Cal.3d 56, 65 [35 Cal. Comp. Cases 80], underline added; see *Subsequent Injuries Fund v. Workmen's Comp. App. Bd.* (*Baca*) (1970) 2 Cal.3d 74 [35Cal.Comp.Cases 94].)

Here, we conclude that applicant's SIBTF claim was timely filed on April 3, 2015, two months after the DEU rating was issued and 20 days before the WCJ found applicant sustained 65% permanent disability from his current injury. (Report of Permanent Disability Based on Instructions; Findings of Fact, Awards and Order with Opinion on Decision dated April 23, 2015.) While applicant filed his SIBTF application ten years after his date of injury of January 8, 2005, we observe that based on the evidence admitted at trial, applicant received extensive treatment and was evaluated by seven QMEs. Thus, it was not unreasonable for applicant to wait until he received a DEU rating or an award to file a SIBTF claim.

Accordingly, we (1) amend finding no. 3 from the Findings and Award to indicate that applicant met the threshold requirement found in Labor Code section 4751, subdivision (b), because the current injury resulted in permanent disability of 81%, when considered alone and without regard to apportionment and adjustments for applicant's occupation and age, (2) amend finding no. 4 to clarify that for purposes of establishing liability, the 100% combined disability consists of adding the 65% current disability and the 38% prior disabilities to applicant's back, and (3) amend the award to include increases per Labor Code section 4659(c). We otherwise affirm the Findings and Award.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the workers' compensation administrative law judge on February 3, 2017 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS

* * *

3. Applicant met the threshold requirement found in Labor Code section 4751, subdivision (b), because the current injury resulted in permanent disability of 81% when considered alone and without regard to apportionment and adjustments for applicant's occupation and age.

4. The combined effects of this injury and applicant's previous disabilities and impairments equal 100%, calculated by adding 65% current disability, consisting of respiratory disorder, contact dermatitis, and arousal disorder, and 38% prior disability to applicant's back. Per the April 23, 2015 Findings of Fact, Awards and Order, the employer is liable for the current 65% disability and the Subsequent Injuries Benefits Trust Fund is liable for the remainder of the combined permanent disability per Labor Code section 4751, subdivision (a).

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AWARD

AWARD IS MADE in favor of GEORGE HARRIS and against the STATE OF CALIFORNIA, SUBSEQUENT INJURIES BENEFITS TRUST FUND, as follows:

Permanent disability indemnity at the rate of $33.33 per week from February 2, 2005 to May 6, 2010, and recommencing July 9, 2010, for a total of 391.25 weeks and $253.33 per week thereafter for life, less credits allowed under Labor Code section 4753 and subject to increases per Labor Code section 4659(c), with jurisdiction reserved. The $33.33 per week rate consists of the difference between the $220.00 per week that the employer is liable pursuant to the April 23, 2015 Findings of Fact, Award and Order and the $253.33 per week rate as a result of the current finding that applicant is 100% permanently disabled.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

CHAIR

KATHERINE ZALEWSKI

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 26 2020

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

GEORGE HARRIS
OFFICE OF THE DIRECTOR-LEGAL
STATE COMPENSATION INSURANCE FUND
SIBTF-SACRAMENTO

LSM/bea

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GEORGE HARRIS, *Applicant,* **vs.** **NUMAC COMPANY; STATE COMPENSATION INSURANCE FUND; SUBSEQUENT INJURIES BENEFITS TRUST FUND,** ***Defendants.***	**Case No. ADJ7139856** **(Sacramento District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by defendant with regard to the decision filed on February 3, 2017.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications *relating to the petition* shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall <u>not</u>

be submitted to the district office from which the WCJ's decision issued or to any other district office of the Workers' Compensation Appeals Board, and shall *not* be e-filed in the Electronic Adjudication Management System (EAMS). Any documents relating to the petition for reconsideration lodged in violation of this order shall neither be accepted for filing nor deemed filed.

All trial level documents not related to the petition for reconsideration shall continue to be e-filed through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper form.[1] If, however, a proposed settlement is being filed, the petitioner for reconsideration should

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[1] Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g., petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements, etc.)

promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

KATHERINE ZALEWSKI

DEPUTY

RICHARD L. NEWMAN

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
APR 25 2017

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

GEORGE HARRIS
STATE COMPENSATION INSURANCE FUND
OD LEGAL – SACRAMENTO
SIBTF - SACRAMENTO

abs

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

WCAB Case No: ADJ7139856

Applicant: **GEORGE HARRIS**	**Defendant:** **NUMAC CO; SCIF INSURED SACRAMENTO;**
Workers' Compensation Administrative Law Judge:	JOSEPH SAMUEL

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

Defendant Subsequent Injuries Benefit Trust Fund (SIBTF) has filed timely Petition for Reconsideration from decision of the Workers Compensation Administrative Law Judge (WCJ) February 3, 2017, which found that applicant was permanently partially disabled before the injury herein, that the injury resulted in permanent disability of 48% when considered alone and without regard to adjustment for applicant's occupation or age, and that the combined effects of the injury and applicant's previous disabilities and impairments equal 100%.

JURISDICTIONAL BACKGROUND

Applicant, George Harris, born while employed on January 8, 2005, as a HVAC service trainee, Occupational Group 380, by Numa Mechanical, Inc., insured by State Compensation Insurance Fund, sustained injury arising out of and in the course of employment to his lungs/pulmonary, skin (sarcoidosis) and psyche, which resulted in permanent disability of 65 percent after adjustment for age and occupation and after apportionment, as reflected in permanent disability rating and instructions served February 10, 2015.

Subsequently, in a proceeding against SIBTF, the WCJ made the above-noted findings and awarded permanent disability indemnity at the rate of $33.33 per week from February 2, 2005, to May 6, 2010, and recommencing July 9, 2010, for a total of 391.25 weeks and $253.33 per week thereafter for life, less credits allowed under Labor Code section 4753.

CONTENTIONS

1. The pulmonary apportionment was based on causation, not disability, and does not equate to pre-existing disability;
2. The WCJ incorrectly interpreted Dr. Sobol's opinion on pulmonary disability;
3. The WCJ did not describe the mechanism by which he derived the finding regarding the combined effects of the injury and the prior impairments, and, thus, this element of the award cannot be meaningfully addressed;
4. The WCJ did not address the statute of limitations issue raised at trial.

DISCUSSION

SIBTF's contentions are best considered after review of the Opinion on Decision, set forth herein as follows:

> When an employee who has a permanent partial disability sustains "a subsequent compensable injury resulting in additional permanent partial disability... he shall be paid in addition to the compensation due ... for... the last injury compensation for the remainder of the combined permanent disability existing after the last injury..." [Lab. Cd. §4751] That payment comes from the Subsequent Injuries Benefits Trust Fund (SIBTF). [*Id.*, §4755, subd. (a)]
>
> In order for the employee to be entitled to compensation from SIBTF the following conditions relevant to the instant case must be present:
>
> 1. "the combined effects of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total..."
> 2. "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." [*Id.*, §4751]

Applicant's permanent disability for the subsequent injury (*i.e.*, the injury herein) to the lungs/pulmonary, skin (sarcoidosis), and psyche was established by Findings and Award that determined the injury caused permanent disability of 65%. 65% cannot be utilized as "the permanent disability resulting from the subsequent injury" because it is derived with adjustments for age and occupation. (See Recommended Permanent Disability Rating, February 10, 2015) Although the composite rating is the result of three distinct impairments, the only one that need be considered to determine if the permanent disability was equal to 35% or more is the one for respiratory disorders.

The whole person index for that impairment is 53%. The Adjustment Factor for the Future Earning Capacity raises that impairment to 72%. (*Id.*) 66% of that amount was the result of the industrial injury. (*Id.*) Thus, the level of permanent disability as a result of the subsequent injury without adjustment for age or occupation and after apportionment is 48%, exceeding the threshold 35%.

At this point it is necessary to determine if applicant had "previous disability or impairment" which has combined with the subsequent injury to equal "70 percent or more of total..." [Lab. Cd. section 4751] Stipulations with Request for Award issued May 29, 2008, in SAC0345198[1] for injury December 24, 2003, to the lumbar and thoracic spine with permanent disability of 24%. The stipulations recite in paragraph 9:

Applicant sustained an injury before on 5/18/99 to his back in SAC289920. As a result of that injury, applicant had a permanent disability of 14%. According to the PQME, Dr. Stirton, applicant currently has 38% permanent disability. However, after apportionment applicant's level of permanent disability for the injury settled in these stipulations is 24%.

38 percent preexisting permanent disability combined with the subsequent 48 percent meets the test of section 4751. If there is no more "previous disability or impairment," [Lab. Cd. §4751] UIBTF's liability would be based on 86 percent. However, applicant had "previous...impairment" of his lungs.

The definition of impairment in the *AMA Guides* includes "derangement of any body part, organ system, or organ function." [*AMA Guides* §1.2] "An impairment can be manifested objectively, for example, by a fracture... (D)etermining whether an injury or illness results in a permanent impairment requires a medical assessment performed by a physician." [*Id.*]

[1] The WCJ's copy of this document shows EAMS number ADJ2095933. The WCJ has caused this document to be scanned into EAMS in ADJ2095933, which correlates with the date of injury, December 24, 2003.

Dr. Sobol performed very thorough evaluations and prepared extensive reports that summarized relevant medical information. His summary of the initial consultation May 29, 2000, by Dr. Gordon Wong, a pulmonologist, includes a statement by Dr. Wong that "the patient had 'evidence of old granulomatous lung disease... it appeared that the patient on his admission with his bout of pneumonia in January of 2005, had evidence of old granulomatous lung disease at that time. Considering the patient had a mildly elevated ACE level and radiographic findings consistent with sarcoidosis, he could have Stage 2 sarcoidosis at this time. Although the patient's initial bout of pneumonia was most likely secondary to poor working conditions, as well as inhaled substances, the patient could have sarcoidosis at that time. CT also identified possibility of punctate callus ossification of the liver and spleen, indicating that the patient could have had at one point an exacerbation of his sarcoidosis with pulmonary manifestations." (WCAB Exhibit EE, January 18, 2012, p.12-13)

Referring to Dr. Wong's note June 28, 2007, Dr. Sobol indicates that applicant's pneumonia is not '"causing significant prolonged lung abnormalities. His pneumonia may be related to working conditions. The patient did have granulomatous lung disease and his sarcoidosis was probably exacerbated.'" (*Id.*, p.14) Dr. Sobol summarized applicant's sarcoidosis at the time of the industrial injury herein as follows:

> He was found to have sarcoidosis, and it was evident that the underlying condition, which is often asymptomatic, preceded the episode of pneumonia by a substantial period of time, noting that the appearance of callus ossifications is a time-dependent process often taking an indeterminate number of months to years. It was subsequently determined by his evaluators, and affirmed by his subsequent pulmonary consultants, Drs. Wong and Bharucha, that the eventual pulmonary disability was triggered or precipitated by the pneumonia infection, which was deemed to be industrial. Reactivating or aggravating the apparent dormant sarcoidosis. This is consistent with the nature of sarcoid... (*Id.*, p.38)

Dr. Sobol "concur(red) with Dr. Stirton's conclusions also apparently affirmed by Dr. King and acquiesced to by the pulmonary consultants, that 66% of the patient's eventual disability from his pulmonary dysfunction and sequelae would be related to industrial causation; such apportionment seems appropriate with regard to apportionment by disease." (*Id.* p.38-39) Thus, applicant had a lung impairment of 34% that preceded the subsequent injury.

Dr. Sobol opined that "it is overwhelmingly likely that the patient remains permanently disabled for gainful employment, as, it appears, has been determined by virtually all of his evaluating physicians." (*Id.*, July 30, 2013, p.18) Thus, it is apparent that applicant's combined permanent disability exceeds 86 percent and that the facts, based both on medical evidence and

> judicial determinations in SAC345198 and SAC289920, support a determination of total permanent disability. [Lab. Cd. §4662, subd. (b)]
>
> SIBTF is entitled to credit for payments applicant received from the awards in SAC345198 and SAC289920. (*Id.*, §4753) However, no finding is made with regard to those or any other potential credits since the issue of credit was deferred. (Minutes of Hearing, November 17, 2016, 2:11-11 ½)

There is no statute that "specifically prescribes time limitations for proceedings for the recovery of subsequent injuries fund benefits." [*Subsequent Injuries Fund v WCAB and Talcott* (1969) 34 CCC 52, 54] Therefore, the courts have established limitations. [*Id.*]

The issue that applies to the instant case is stated in *Talcott*, at page 55: "(M)ay a claimant, having once instituted a timely proceeding against the employer, thereafter bring in the Fund at a date more than five years after the injury but within one year after the last payment made under an award against the employer?"

Noting that "We are enjoined to remember that the limitations provisions in the Workman's Compensation Law must be liberally construed in favor of the employee," the court answered its question: "(I)f, as here, the employee is receiving benefits, whether under an award or voluntarily, and is contending, in good faith, that his disability is attributable solely to the industrial injury occurring while in that employment, there is no reason to expect, much less to compel, him to join a party which he has, as yet, no reason to regard as liable." (*Id.*, p. 56)

Based on *Talcott*, the WCJ believes that a statute of limitations is not a bar to applicant's recovery of SIBTF benefits.

SIBTF is correct that a pulmonary apportionment based on causation does not equate to pre-existing disability. The WCJ's determination was based on his assumption that applicant's

undiagnosed, non-disabling granulomatous lung disease satisfied the requirement of section 4751 that there be a pre-existing "impairment."

In *State of California v Industrial Accident Commission and Strauss* (1955) 20 CCC 230, the District Court of Appeal addressed whether section 4751 covered "a preexisting heart condition which was unknown, which had in nowise interfered with (the injured worker's) work, and which probably would not have been discovered by medical examination." [*Id.*, p. 232] The court stated, "Unfortunately the Legislature failed to define the words it used in section 4751." [*Id.*, p. 233] It then quoted from the statute: "That section starts out, 'If an employee who is permanently *partially disabled...*' and later states if the 'previous *disability or impairment...*' (Italics added) '"... Under the well-established meaning of the term 'disability,' as used in compensation law, there is a combination of partial or total physical incapacity and of inability to work... (citation omitted)" [*Id.*]

The court then cites an Indiana case indicating "that their Workman's Compensation Law 'recognizes a clear distinction in the use of the words disability and impairment. The former means inability to work, the latter has reference to "total or partial loss of the function of a member or of the body as a whole."' Thus it appears that even 'impairment' is not an unknown condition but one that causes loss of function of the body in whole or in part." (*Id.*, p. 233-234)

The court then summarized the history of section 4751 and stated, "We can find neither in the original act, nor in its present form, any indication that the Legislature intended that either the term 'disability' or 'impairment' as used therein was not to be limited to actual manifest and symptomatic disabilities which antedated an industrial injury." [*Id.*, p. 234]

The court then cited an eminent treatise: "'It is insufficient to show preexisting pathology which, at the time of industrial injury, had not become disabling.'" [*Id.*] Thereafter, the court cited cases from New York, New Jersey, Alaska, and California. [*Id.*, p. 234-236] The court "conclude(d) that section 4751, Labor Code, was not intended to apply to a symptomatic disease processes which were unknown to both employee and employer and which in nowise interfered with the employee's ability to work." [*Id.*, p. 236]

Based on the forgoing discussion, the WCJ is persuaded that he was mistaken in assuming applicant's granulomatous lung disease met the test of a pre-existing impairment under section 4751.

The WCJ disagrees with SIBTF's contention that he incorrectly interpreted Dr. Sobol's opinion on pulmonary disability. He stands by his discussion in the Opinion on Decision quoted above.

As to SIBTF's third contention, it contends that in order for the WCJ to make a finding of the combined effects of the prior orthopedic injury and the subsequent industrial injury, "it is necessary to describe the component elements which are (sic) he has used, and the method used to combine them." (Petition for Reconsideration, 5:14-16½) The WCJ disagrees. He believes the bases for determining 100% overall disability is properly described above. The liability of SIBTF is determined arithmetically.

Notwithstanding, the error in finding preexisting pulmonary disability, the evidence, as noted above, supports a finding of 38% preexisting orthopedic disability. SIBTF contends that this orthopedic disability and the subsequent industrial injury of 65% "would combine on the Combined Values Chart to 78%." SIBTF's position is that the combined subsequent and prior disability is no more than 78%. (Petition for Reconsideration, 5:19-22)

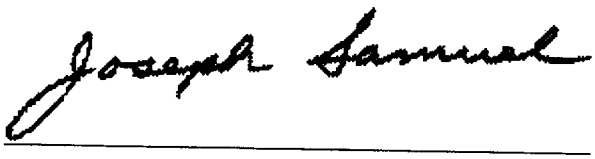
SIBTF does not cite any authority requiring the Combined Value Chart. Nor is the WCJ aware of any. On the contrary, it is his understanding, as stated in a well-regarded treatise, "The MDT is intended to be a guide as to the overall level of disability from a single injury..." [Sullivan On Comp, (2013 edit.) Chap. 10, p. 74-75, underscore added.]

Although the WCJ erred in determining applicant was permanently partially disabled before the injury with regard to his pulmonary condition, the finding of permanent partial disability is still supported by the evidence of orthopedic disability. Therefore, there is no ground for reconsideration.

RECOMMENDATION

It is recommended that SIBTF's Petition for Reconsideration be denied.

JS/AW



DATE: 04/05/2017

Joseph Samuel
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVED ON ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD.

ON: 04/05/2017
BY: A. WESTLAKE