LAW OFFICES OF
EUGENE C. TREASTER
LINCOLN CENTER
3838 WATT AVENUE, BLDG. F-600
SACRAMENTO, CALIFORNIA 95821
TELEPHONE (916) 444-2622
TELEPHONE (209) 948-8676
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EUGENE C. TREASTER
DANIEL S. LEE
GEENA LEE

TELEPHONE HOURS
9:00 AM - 12 NOON
1:30 PM - 4:00 PM

SECOND DISABILITY LAW

PURPOSE:

The Fund was established to encourage employers to hire handicapped workers and/or disabled veterans (1946).

STATUTES & REGULATIONS

Payment by Death Without Dependants Recovery: (Funding)

Labor Code Section 4705.5(c)
Also percentage add on to W/C polices from employers

Threshold Issues:

Labor Code Section 4751

Credits Against SIF Benefits (Reduction):

Labor Code Section 4753
No reduction for VA Benefits.
Social Security (not due to pre-existing disability - no credit).

No Commutation:

Labor Code Section 5100.5
AB 1343 (Floyd) - 1999 Veto message

30 Day Notice Required:

RPP Section 10944

Apportionment of PD:

Labor Code Section 4663 [new 2004 (AB899); 2006 declaration (AB1368)]

Case Law:

Mercier vs. WCAB, 16 Cal 3d 711; 41 CCC 205 (1976)
Grob vs. WCAB, (Tom Brown case)
Moyers vs. SIF (Judge Levin - San Jose)
Webinger vs. WCAB (SIF), 40 CCC 714-722 (1975)

Pre-Existing Disabilities

Veterans! (Disabilities)

Failure to Control Anger Zahn v. WCAB, 42 CA 106 (1947);
Post-traumatic Stress (Vietnam) - medical injury
One kidney (20% STD)
Missing Spleen
Hernia (with mesh 10-15%)
Frostbite (feet)
Arthritis on knee cap
Skin cancer (avoid working in sun)
Emphysema
Diabetes (analogous to loss of kidney)
Knee Replacement (50-60% STD)
Thrombophlebitis
Headaches
Hearing Loss
Vision
Loss of visual field (Glaucoma)

Must get application for Social Security

Before and After

Before 2005 (back pages of old schedule)

Back 60%	MDT 66	
Pre-existing 40%	+ 4	10% of 40%
	70%	

After 2005 (Asymptotic Schedule)

Back 60%	MDT
Pre-Existing 40%	66%

After 1/1/03 (Payment in January of following year)
SAWW - See attached Stipulations in a 2004 case.
See Labor Code § 4659(e)

Limitations

Grob v. SIF (OAK 02733127)

MCSA - Not part of "credit"

Other Cases:

Bookout v. WCAB (1976) 41 CCC 595 (Do not subtract hearts from backs).
Escobedo v. WCAB (2005) 70 CCC 604 (Employer gets reduction for asymptomatic condition; SIF is not liable unless disabling before date of injury.

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IMPORTANT FOR ATTORNEY

No Payment of Accrued Benefits to Dependants (Different from normal benefits)

Waltrip (Writ Denied in Supreme Court - September 2009)
Monteverde Decision 22 CCC 118; 151 Cal.App.2d 147 (1957)

No Commutation for Attorney Fees

LC § 5100.5

See Veto Message (1999) by Governor Gray Davis

Medical Legal Costs from SIF

Grob Decision (Tom Brown, Atty.)

Moyers vs. SIF (Judge Levin, San Jose)

Credits (Very Important!)

No Credit for VA Benefits!!!

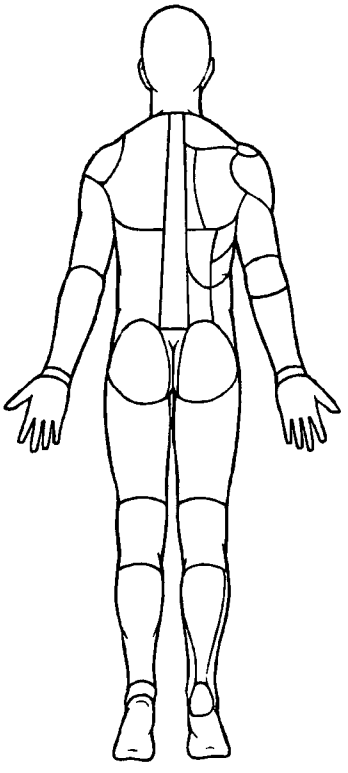
Only a percentage of Social Security - Watch out for age 62-66 because only 20-25% of benefits are for disability (in other words, early Social Security retirement is not a credit.

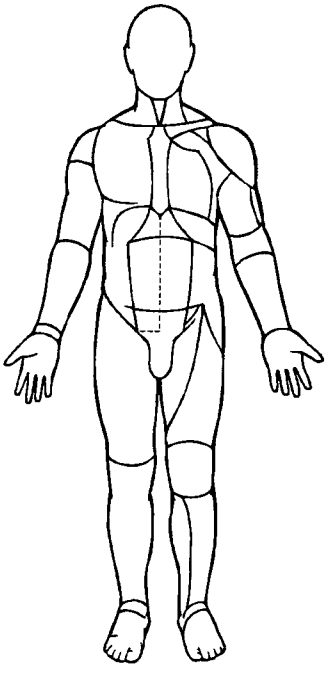
Limitations

Grob Decision

IMPORTANT

Mark "SIF" on Front of File.





EUGENE C. TREASTER

Education:

Sacramento Senior High School - 1951

Stanford University - 1951 to 1955
Bachelor of Science in Chemical Engineering

University of Southern California, School of Law - 1959 - 1960

University of California, Los Angeles, School of Law - 1960 to 1962;
LLB 1962

Organizations & Memberships:

California State Bar - January 10, 1963

Sacramento County Bar Association

California Applicants Attorneys Association
Statewide President - 1970 to 1971

Work History:

Self-employed representing injured workers in the Northern California area since 1964

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Attorney At Law

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DANIEL S. LEE

Education:

Leland High School, San Jose, California - 1985

University of California at Davis - 1985-1989

McGeorge College of Law (University of Pacific) - 1989-1992

Organizations & Memberships:

California State Bar - January 1993

Sacramento County. Bar Association

California Applicant's Attorneys Association

NOSCER - Social Security Organization of Claimant's Representatives

Work History:

Representing injured workers in Norther California since 1993

Representing Social Security claimants since1993

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Attorney At Law

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GEENA LEE

Education:

High School - St. Francis High School, Sacramento, California - 1987

University of California at Davis - 1987-1991

Southwestern University Law School - 1992-1995

Organizations & Memberships:

California State Bar - January 1996

Sacramento County Bar Association

Work History:

Representing injured workers and Social Security claimants.

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EXHIBIT LIST

Statutes

1. Labor Code § 4706.5 (Funding)
2. Labor Code § 4750 (Deleted not the law, see Labor Code §§ 4662, 4663, 4664)
3. Labor Code § 4751 (Threshold 5%:35%)
4. Labor Code § 4659(c) (2004 increases per SAWW = 70%
5. Labor Code § 4753 (CREDITS!!)
6. Labor Code § 4662 - (Presumption of 100%)
7. Labor Code § 4663 - (Apportionment to CAUSATION!)
8. Labor Code § 4664 - (Subtraction of old Award - not settlements)
9. Labor Code § 5100.5 (No commutation) + veto message by Gov. Gray Davis (2 pgs)
10. RPP 10944 (30 days - (SIF filed after normal benefit application)

California Constitution (Article XIV, Section 4-
No fault system "adequate provision for comfort, health, and safety and general welfare; treatment to cure and relieve".

STUFF

11. SIF benefits for ages 62-66 with entitlement to Soc Sec Disability get 20-25 credit
12. Social Security note regarding early Social Security
13. Stipulated Award w/SAWW with Payment Schedule by SIF

60/20 Rating Schedule

14. Old Schedule 70%
    10% add-on
15. New Schedule 68%

16. Rating - Inability to learn to read or write - 100%
17. Rating - No heavy work - 30%
    All factors - 40%
18. Tracking SIF income

CASES

Stipulations of SAWW (See #13)

19. Mercier vs. WCAB (1976) 41 CCC 205.
    See Justice Mosk's dissent!

20. Grob Case (Tom Brown case) - M/L costs

21. Moyers Decision (By Judge Levin - San Jose - re M/L costs)

22. Monteverde case (1957) 22 CCC 118 - spouse only for death benefits.

23. Waltrip (Writ denial 2009)

24. Meneo Coloma (100% - 32%)

25. Stapp (1978) 43 CCC 658
    30% gross to 40%
    No heavy work + pain slight to moderate at work
    Justice Paras - "Rate on Facts"

26. Ybarra - unpublished in CWCR
    No credit to SIF unless part of the body was listed in the application for employer disability retirement.

27. Webinger v. WCAB (SIF) (1975) 40 CCC 774 - See head note for credit.
    Credit: The Subsequent Injuries Fund was entitled to a credit for payments made to an injured employee under a Veterans Administration pension and as Social Security disability benefits only to the extent to which these payments were for a non-service connected disability which pre-existed the industrial injury. [See generally Hanna, California Law of Employee Injuries and Workmen's Compensation, Vol. 1, § 9.05[4][a].]

§4706.5. Payment of death benefits where no surviving dependent.

(c) The payments to be made to the Department of Industrial Relations, as required by subdivisions (a) and (b), shall be deposited in the General Fund and shall be credited, as a reimbursement, to any appropriation to the Department of Industrial Relations for payment of the additional compensation for subsequent injury provided in Article 5 (commencing with Section 4750), in the fiscal year in which the Controller's receipt is issued.

ARTICLE 5
Subsequent Injuries Payments

§4750. Employer's liability for combined disabilities.

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 an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed.

DELETED

Replaced by LC §§4662, 4663, 4664

2

§4751. Compensation for specified additions to permanent partial disabilities.

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.

§4659. Permanent disability; average weekly earnings; life pensions or total permanent disability.

(b) If the permanent disability is total, the indemnity based upon the average weekly earnings determined under Section 4453 shall be paid during the remainder of life.

(c) For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension or total permanent disability indemnity as set forth in subdivisions (a) and (b) shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the "state average weekly wage" as compared to the prior year. For purposes of this subdivision, "state average weekly wage" means the average weekly wage paid by employers to employees covered by unemployment insurance as reported by the United States Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred. **Leg.H.** 1993 ch. 121, effective July 16, 1993, 2002 ch. 6 (AB 749).

1993 Note: Section 4659, as amended by ch. 121, applies only to injuries occurring on or after January 1, 1994. Stats 1993 ch 121 §77

SAWW

A

§4753. Reduction of additional compensation.

Such additional compensation is not in addition to but shall be reduced to the extent of any monetary payments received by the employee, from any source whatsoever, for or on account of such preexisting disability or impairment, except as to payments being made to the employee or to which he is entitled as a pension or other compensation for disability incurred in service in the armed forces of the United States, and except as to payments being made to him or to which he is entitled as assistance under the provisions . . . of 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.

All cases under this section and under Section 4751 shall be governed by the terms of this section and Section 4751 as in effect on the date of the particular subsequent injury.

§4662. Permanent disability; presumption of total disability.

Any of the following permanent disabilities shall be conclusively presumed to be total in character.

(a) Loss of both eyes or the sight thereof.

(b) Loss of both hands or the use thereof.

(c) An injury resulting in a practically total paralysis.

(d) An injury to the brain resulting in incurable [1] **mental incapacity** or insanity

In all other cases, permanent total disability shall be determined in accordance with the fact

Leg.H. 2007 ch 31 (AB 1640) §2.

§4662. 2007 Deletes. [1] imbecility

2007 Note: It is the intent of the Legislature, in enacting this act, not to adversely affect decisional case law that has previously interpreted, or used the terms "idiot," "imbecility," or "lunatic," or any variation thereof Stats 2007 ch 31 (AB 1640) §5

§4663. Apportionment of permanent disability; causation as basis; physician's report; apportionment determination; disclosure by employee.

(a) Apportionment of permanent disability shall be based on causation.

(b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.

(c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.

(e) Subdivisions (a), (b), and (c) shall not apply to injuries or illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2. **Leg.H.** 2004 ch. 34 (SB 899) §34, effective April 19, 2004, 2006 ch. 836 (AB 1368) §1.

2006 Note: It is the intent of the Legislature that this act be construed as declaratory of existing law. Stats. 2006 ch. 836 (AB 1368) §2.

2004 Note: The addition of §4663 made by this act shall apply prospectively from the date of enactment of this act, regardless of the date of injury, unless otherwise specified, but shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board. Stats. 2004 ch. 34 (SB 899) §47.

7

§4664. Liability of employer for percentage of permanent disability directly caused by injury; conclusive presumption from prior award of permanent disability; accumulation of permanent disability awards.

(a) The 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.

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

(c)(1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following.

(A) Hearing.

(B) Vision

(C) Mental and behavioral disorders.

(D) The spine.

(E) The upper extremities, including the shoulders

(F) The lower extremities, including the hip joints.

(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent. **Leg.H.** 2004 ch. 34 (SB 899), effective April 19, 2004.

No More Rehabitation from Prior Injury

(8)

NO COMMUTATION

§5100.5. When commutation not possible.

Notwithstanding the provisions of Section 5100, the appeals board shall not commute the compensation payable under this division to a lump sum when such compensation is payable under Section 4751 of the Labor Code.

WORKERS' COMPENSATION LEGISLATION VETOED--1999

SUBSEQUENT INJURY FUND

AB 1343 (FLOYD) *CAAA'S POSITION: SUPPORT*

Would have required the WCAB to commute attorney's fees in SIF cases, and require those fees to be paid to the employee's attorney.

Passed Assembly:	76-1
Passed Senate:	22-12
Assembly Concurrence:	77-0

GOVERNOR'S VETO MESSAGE:

October 8, 1999

To Members of the California State Assembly:

I am returning AB 1343 without my signature.

This bill would require the Worker's Compensation Appeals Board to commute attorney's fees from the end of the payment process to the beginning of the process for awards in subsequent injury cases.

This bill would result, in most cases, in the attorney being paid long before the applicant ever received any funds. Thus, applicants who need the additional compensation which has been awarded to them for their work related injury or illness would have to wait until their attorney has been paid before receiving their benefits. In some cases, where the applicant dies before sufficient benefits accrue to allow for payment of an attorney's fee, the applicant would receive no benefits while the attorney would already have received his or her fee.

Placing the priority in workers' compensation cases on payment of attorneys' fees before payments to injured workers is neither a rational nor appropriate expenditure of public funds.

§10944. Notice of Hearing.

Where a claim against the Subsequent Injuries Fund is filed subsequent to the filing of an original application, thirty (30) days' notice of hearing shall be given on the Subsequent Injuries Fund application.

Note: Authority cited: Sections 133 and 5307, Labor Code. Reference: Section 5502, Labor Code.

(10)

CREDIT

CF 107606 [redacted]
INJURED'S NAME

S.S.D. "ON-GOING" CREDITS

1. 04-01-91 and continuing @ $ 880.00 x 76.50% x 3/13 = $ 155.35 thru 11-30-91.
2. 12-01-91 and continuing @ $ 915.00 x 76.50% x 3/13 = $ 161.53 thru 11-30-92.
3. 12-01-92 and continuing @ $ 945.00 x 76.50% x 3/13 = $ 166.83 thru 11-30-93.
4. 12-01-93 and continuing @ $ 970.00 x 76.50% x 3/13 = $ 171.24 thru 11-30-94.
5. 12-01-94 and continuing @ $ 998.00 x 76.50% x 3/13 = $ 176.19 thru 11-30-95.
6. 12-01-95 and continuing @ $ 998.00 x 76.50% x 3/13 = x 20% $ 35.24 thru 12-29-95.
7. 12-30-95 and continuing @ $ 1025.00 x 76.50% x 3/13 = x 20% $ 36.19 thru 12-29-96.
8. - - and continuing @ $. x % x = $ thru - - .
9. - - and continuing @ $. x % x = $ thru - - .
10. - - and continuing @ $. x % x = $ thru - - .

DOC.I.D.0281i

CREDITS TO S.I.F.

DATE OF BIRTH 1933

(11)

NOW 25% at Full @ 66 after 1943

ON-GOING CREDIT

DOB (11)

Thinking Of Retiring? Consider Your Options

www.socialsecurity.gov

What You Need To Consider

As you approach the age when you can receive Social Security retirement benefits, you have options to consider and decisions to make. Before making your retirement decision, we hope you will consider all the options.

There are important questions you need to ask yourself. At what age do you want to begin receiving benefits? Do you want to stop working and receive benefits? Do you want to work and receive benefits at the same time? Or do you want to work beyond your full retirement age and delay receiving benefits?

When you continue working beyond full retirement age, your benefit may increase because of your additional earnings. If you delay receiving benefits, your benefit will increase because of the special credits you will receive for delaying your retirement. This increased benefit could be important to you later in your life. It also could increase the future benefit amounts your family and survivors could receive.

Each person's retirement situation is different. It depends on circumstances such as health, financial needs and obligations, family responsibilities, amount of income from work and other sources. It also may depend on the amount of your Social Security benefit.

We hope the following information will help you make your retirement decision.

About The Options

Retiring At Full Retirement Age—To retire, you must have earned 40 credits. See the table below to determine your full retirement age.

*Year Of Birth**	*Full Retirement Age*
1937 or earlier	65
1938	65 and 2 months
1939	65 and 4 months
1940	65 and 6 months
1941	65 and 8 months
1942	65 and 10 months
1943-1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 or later	67

*Refer to the previous year if you were born on January 1.

Retiring Early—If you've earned 40 credits, you can start receiving Social Security benefits at 62 or at any month between 62 and full retirement age. However, your benefits will be permanently reduced based on the number of months you receive benefits before you reach full retirement age. If you retire before your full retirement age of 65, your benefits will be reduced:

20 percent at age 62;
13⅓ percent at age 63; or
6⅔ percent at age 64.

If your full retirement age is 66, they will be reduced:

25 percent at age 62;
20 percent at age 63;
13⅓ percent at age 64; or
6⅔ percent at age 65.

Receiving Retirement Benefits While You Work—You can work while receiving monthly benefits. And it could mean a higher benefit that can be important to you later in your life and increase the future benefits your family and survivors could receive.

STATE OF CALIFORNIA — Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
Subsequent Injuries Fund – Claims Unit
2424 Arden Way, Suite 355
Sacramento, CA 95825
(916) 263-2774

April 15, 2009

[redacted]
SAC 0342268

Eugene Treaster
3838 Watt Avenue, Ste. F600
Sacramento, CA 95821

The award for [redacted] states that Subsequent Injuries Fund payments commence from 08/04/2004. Due to a prior award of $61832.00, the accrued benefit through 05/21/2009 is $3628.44. A check in the amount of $3084.18 is being sent to your client and you will receive a check for $544.26.

Below is a listing of the payment schedule. Fifteen percent will be paid as attorney fee.

FROM	TO	WEEKLY RATE	PAY TO INJURED EVERY-TWO-WEEKS	ATTORNEY'S FEE PAID EVERY-TWO-WEEKS
05/22/09	12/31/09	403.16	685.37	120.95
01/01/10	12/31/10	403.16 plus COLA		
01/01/11	LIFE	New sif rate plus COLA		

As you know, these benefits are payable only [redacted]'s lifetime and no one has a right to receive any payments thereafter.

If you have any questions, you may contact the Subsequent Injuries Fund or phone me at the number above.

Sincerely,

Joanna Arizabal
Subsequent Injuries Fund

Cc: [redacted] CA 95661

Atty Fee
15% as they
accrue

13

13-1

SUBSEQUENT INJURIES BENEFIT TRUST FUND
2424 ARDEN WAY, SUITE 355
SACRAMENTO, CA 95825
(916) 263-2774

WORKERS' COMPENSATION APPEALS BOARD

OF THE STATE OF CALIFORNIA

[redacted]

Applicant,

vs.

STATE OF CALIFORNIA,
SUBSEQUENT INJURIES FUND,

Defendant

WCAB No.: SAC 0342268
EAMS No. ADJ3917998

STIPULATION OF FACTS AND AWARD

(100%)

UNDER L.C. §§ 4750 – 4755

The SUBSEQUENT INJURIES FUND and the applicant, named above, through his/her attorney Eugene Treaster do hereby stipulate to the following facts and request issuance of a Findings and Award.

1. Michelle Huynh, born 8/17/53, employed on 8/4/04, as a. Clerk, at Sacramento, California, by Sunshine Spas, sustained an injury arising out of and occurring in the course of the employment resulting in permanent disability to Left arm and left elbow (see Stipulations of 10/8/08 – attached).

2. At the time of the injury, applicant's earnings for purpose of permanent disability was $500/week.

3. The date of first payment for industrial permanent disability was 8/5/04; ~~the date of last payment for temporary disability was~~ Temporary disability was not incurred nor claimed. The applicant ~~the disability~~ became permanent and stationary on 8/4/04.

4. This injury caused permanent disability of 27%. (of 9/6/03)

5. The applicant had previous permanent disability to right arm amputation above the elbow and below shoulder, prosthetic device not possible with psychiatric sequela.

6. The percentage of permanent disability resulting from the combination of all disabilities is 100%.

7. a) The applicant incurred litigation expense of ~~$1375~~ $625 payable to Eugene C. Treaster, from SIF.
b) The applicant incurred medical expense and costs $524 payable to Eugene Treaster. from applicant.

13-2

(13)

8. 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 said pre-existing disability or impairment as provided by Labor Code Section 4753. This includes, but is not limited to the net recovery from arm amputation of 9/6/03 (net recovery $61,832

9. Applicant's attorney requests a fee of 15 %. (In accordance with L.C.§§ 5100.5.), as benefits accrue to applicant.

10. It is hereby stipulated that an Award may issue in favor of [redacted], against the SUBSEQUENT INJURIES FUND of the STATE OF CALIFORNIA, of disability indemnity of $ 133.33 weekly ($ 333.33 weekly less industrial permanent disability of $ 200 weekly) commencing on 8/5/04 and continuing for 127.50 weeks, and thereafter $ 333.33 weekly for life. (See Stipulation #11.)

11. Increases to applicant's permanent total disability indemnity consistent with Labor Code section 4659(c) beginning as of January 1, 2005.

Payment from SIF or its successor the Subsequent Injuries Benefit Trust Fund (SIBTF) is contingent upon the availability of funds to pay this claim and the authority to make payments.

Respectfully submitted,

SUBSEQUENT INJURIES FUND

Dated 4-2-09 by _____
SUBSEQUENT INJURIES FUND

Dated 3/17/09 by _____
ATTORNEY FOR APPLICANT

Dated 3/17/09 by _____
APPLICANT

13

(13)

AWARD

SAC 0342268
(ADJ3917998)

AWARD is made in favor of [redacted] against SUBSEQUENT INJURIES FUND FOR THE STATE OF CALIFORNIA OF:

(A) Permanent disability and life pension indemnity in accordance with paragraph 10, less 15 % payable to applicant's attorney as the reasonable value if services rendered.

(B) Reimbursement for medical-legal expenses in accordance with paragraph 7. ~~$1375~~ 685 from SIF; $524 from applicant.

(C) Less credits as provided in paragraph 8. ($61,832)

(D) Payment from SIF or its successor the Subsequent Injuries Benefit Trust Fund (SIBTF) is contingent upon the availability of funds to pay this claim and the authority to make payments.

Workers' Compensation Administrative Law Judge

Served on all persons listed on Official Address Record.

Dated: 4/2/09

By: SIBTF

13

B

[redacted] FOR DETERMINING MULTIPLE DISABILITY RATINGS

THE RATING FOR THE MAJOR DISABILITY WILL BE LOCATED IN THE TOP ROW, AND THE RATING FOR THE SECONDARY DISABILITY IN THE LEFT HAND COLUMN. THE RATING FOR THE COMBINED DISABILITY WILL BE FOUND IN THE SPACE WHERE THIS ROW AND COLUMN INTERSECT. FOR EXAMPLE, A MAJOR DISABILITY RATING OF 60% AND A SECONDARY DISABILITY RATING OF 30% WILL RESULT IN A RATING OF 75% FOR THE COMBINED DISABILITY. A THIRD DISABILITY RATING OF 20% CAN BE COMBINED WITH THE 75% RATING FOR THE FIRST TWO DISABILITIES IN THE SAME MANNER, AND THE COMBINED RATING FOR THE THREE DISABILITIES WILL BE FOUND TO BE 82%.

RATING FOR SECONDARY DISABILITY — PERCENT	RATING FOR MAJOR DISABILITY — PERCENT																		
	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95
5	10	15	20	25	29	34	39	44	48	53	58	63	67	72	77	82	86	91	96
6	11	16	21	25	30	35	40	44	49	54	58	63	68	72	77	82	87	91	96
7	12	17	22	26	31	36	40	45	50	54	59	64	68	73	77	82	87	91	96
8	13	18	23	27	32	36	41	46	50	55	59	64	69	73	78	82	87	92	96
9	14	19	24	28	33	37	42	46	51	55	60	65	69	74	78	83	87	92	96
10	15	20	25	29	33	38	43	47	52	56	61	65	70	74	79	83	88	92	97
11	16	21	25	30	34	39	43	48	52	57	61	66	70	74	79	83	88	92	97
12	17	22	26	31	35	40	44	48	53	57	62	66	70	75	79	84	88	92	97
13	18	23	27	32	36	40	45	49	53	58	62	67	71	75	80	84	88	93	97
14	19	24	28	33	37	41	46	50	54	58	63	67	71	76	80	84	89	93	97
15	20	25	29	34	38	42	46	51	55	59	63	68	72	76	80	85	89	93	97
16	.....			34	39	43	47	51	55	60	64	68	72	76	81	85	89	93	97
17	.....			35	39	44	48	52	56	60	64	69	73	77	81	85	89	93	98
18	.....			36	40	44	49	53	57	61	65	69	73	77	81	85	90	94	98
19	.....			37	41	45	49	53	57	61	65	69	74	78	82	86	90	94	98
20	.....			38	42	46	50	54	58	62	66	70	74	78	82	86	90	94	98
21	.....				43	47	51	55	59	63	67	71	74	78	82	86	90	94	98
22	.....				44	48	52	55	59	63	67	71	75	79	83	87	91	94	98
23	.....				45	48	52	56	60	64	68	72	75	79	83	87	91	95	98
24	.....				45	49	53	57	61	64	68	72	76	80	83	87	91	95	99
25	.....				46	50	54	58	61	65	69	73	76	80	84	88	91	95	99
26	.....					51	55	58	62	66	69	73	77	80	84	88	92	95	99
27	.....					52	55	59	63	66	70	74	77	81	84	88	92	95	99
28	.....					52	56	60	63	67	70	74	78	81	85	88	92	96	99
29	.....					53	57	60	64	67	71	75	78	82	85	89	92	96	99
30	.....					54	58	61	65	68	72	75	79	82	86	89	93	96	100
31	.....						58	62	65	69	72	76	79	82	86	89	93	96	100
32	.....						59	62	66	69	73	76	79	83	86	90	93	96	100
33	.....						60	63	66	70	73	77	80	83	87	90	93	97	100
34	.....						61	64	67	70	74	77	80	84	87	90	94	97	100
35	.....						61	65	68	71	74	78	81	84	87	91	94	97	100
36	.....							65	68	72	75	78	81	84	88	91	94	97	100
37	.....							66	69	72	75	79	82	85	88	91	94	97	100
38	.....							67	70	73	76	79	82	85	88	91	95	98	100
39	.....							67	70	73	76	80	83	86	89	92	95	98	100
40	.....							68	71	74	77	80	83	86	89	92	95	98	100
41	.....								72	75	78	81	83	86	89	92	95	98	100
42	.....								72	75	78	81	84	87	90	93	96	98	100
43	.....								73	76	79	82	84	87	90	93	96	99	100
44	.....								74	76	79	82	85	88	90	93	96	99	100
45	.....								74	77	80	83	85	88	91	94	96	99	100
46	.....									78	80	83	86	88	91	94	97	99	100
47	.....									78	81	84	86	89	91	94	97	99	100
48	.....									79	81	84	87	89	92	94	97	100	100
49	.....									79	82	85	87	90	92	95	97	100	100
50	.....									80	83	85	88	90	93	95	98	100	100
51	.....										83	86	88	90	93	95	98	100	100
52	.....										84	86	88	91	93	96	98	100	100
53	.....										84	87	89	91	94	96	98	100	100
54	.....										85	87	89	92	94	96	99	100	100
55	.....										85	88	90	92	94	97	99	100	100
56	.....											88	90	92	95	97	99	100	100
57	.....											89	91	93	95	97	99	100	100
58	.....											89	91	93	95	97	100	100	100
59	.....											90	92	94	96	98	100	100	100
60	.....											90	92	94	96	98	100	100	100
61	.....												92	94	96	98	100	100	100
62	.....												93	95	97	99	100	100	100
63	.....												93	95	97	99	100	100	100
64	.....												94	96	97	99	100	100	100
65	.....												94	96	98	100	100	100	100
66	.....													96	98	100	100	100	100
67	.....													97	98	100	100	100	100
68	.....													97	99	100	100	100	100
69	.....													98	99	100	100	100	100
70	.....													98	100	100	100	100	100

O.D Schedule

14

14

Combined Values Chart (Continued)

Directions to combine any two values, locate the larger value on the left side of the chart, and the smaller value at the bottom of the chart The intersection of that row and column contains the combined value.

51	51	52	52	53	53	54	54	55	55	56	56	57	57	58	58	59	59	60	60	61	61	62	62	63	63	64	64	65	65	66	66	67	67	68	68	69	69	70	70	71	71	72	72	73	73	74	74	75	75	76
52	52	53	53	54	54	55	55	56	56	57	57	58	58	59	59	60	60	61	61	62	62	63	63	64	64	64	65	65	66	66	67	67	68	68	69	69	70	70	71	71	72	72	73	73	74	74	75	75	76	76
53	53	54	54	55	55	56	56	57	57	58	58	59	59	60	60	61	61	61	62	62	63	63	64	64	65	65	66	66	67	67	68	68	69	69	69	70	70	71	71	72	72	73	73	74	74	75	75	76	76	77
54	54	55	55	56	56	57	57	58	58	59	59	60	60	60	61	61	62	62	63	63	64	64	65	65	66	66	66	67	67	68	68	69	69	70	70	71	71	71	72	72	73	73	74	74	75	75	76	76	77	77
55	55	56	56	57	57	58	58	59	59	60	60	60	61	61	62	62	63	63	64	64	64	65	65	66	66	67	67	68	68	69	69	69	70	70	71	71	72	72	73	73	73	74	74	75	75	76	76	77	77	78
56	56	57	57	58	58	59	59	60	60	60	61	61	62	62	63	63	63	64	64	65	66	66	66	67	67	67	68	68	69	69	70	70	71	71	71	72	72	73	73	74	74	74	75	75	76	76	77	77	78	78
57	57	58	58	59	59	60	60	60	61	61	62	62	63	63	63	64	64	65	65	66	66	66	67	67	68	68	69	69	69	70	70	71	71	72	72	72	73	73	74	74	75	75	75	76	76	77	77	78	78	79
58	58	59	59	60	60	61	61	61	62	62	63	63	63	64	64	65	65	66	66	66	67	67	68	68	69	69	69	70	70	71	71	71	72	72	73	73	74	74	74	75	75	76	76	76	77	77	78	78	79	79
59	59	60	60	61	61	61	62	62	63	63	64	64	64	65	65	66	66	66	67	67	68	68	68	69	69	70	70	70	71	71	72	72	73	73	73	74	74	75	75	75	76	76	77	77	77	78	78	79	79	80
60	60	61	61	62	62	62	63	63	64	64	64	65	65	66	66	66	67	67	68	68	68	69	69	70	70	70	71	71	72	72	72	73	73	74	74	74	75	75	76	76	76	77	77	78	78	78	79	79	80	80
61	61	62	62	63	63	63	64	64	65	65	65	66	66	66	67	67	68	68	68	69	69	70	70	70	71	71	72	72	72	73	73	73	74	74	75	75	75	76	76	77	77	77	78	78	79	79	79	80	80	81
62	62	63	63	64	64	64	65	65	65	66	66	67	67	67	68	68	68	69	69	70	70	70	71	71	72	72	72	73	73	73	74	74	75	75	75	76	76	76	77	77	78	78	78	79	79	79	80	80	81	81
63	63	64	64	64	65	65	66	66	66	67	67	67	68	68	69	69	69	70	70	70	71	71	72	72	72	73	73	73	74	74	74	75	75	76	76	76	77	77	77	78	78	79	79	79	80	80	80	81	81	82
64	64	65	65	65	66	66	67	67	67	68	68	68	69	69	69	70	70	70	71	71	72	72	72	73	73	73	74	74	74	75	75	76	76	76	77	77	77	78	78	78	79	79	79	80	80	81	81	81	82	82
65	65	66	66	66	67	67	67	68	68	69	69	69	70	70	70	71	71	71	72	72	72	73	73	73	74	74	74	75	75	76	76	76	77	77	77	78	78	78	79	79	79	80	80	80	81	81	81	82	82	83
66	66	67	67	67	68	68	68	69	69	69	70	70	70	71	71	71	72	72	72	73	73	73	74	74	75	75	75	76	76	76	77	77	77	78	78	78	79	79	79	80	80	80	81	81	81	82	82	82	83	83
67	67	68	68	68	69	69	69	70	70	70	71	71	71	72	72	72	73	73	73	74	74	74	75	75	75	76	76	76	77	77	77	78	78	78	79	79	79	80	80	80	81	81	81	82	82	82	83	83	83	84
68	68	69	69	69	70	70	70	71	71	71	72	72	72	72	73	73	73	74	74	74	75	75	75	76	76	76	77	77	77	78	78	78	79	79	79	80	80	80	80	81	81	81	82	82	82	83	83	83	84	84
69	69	70	70	70	71	71	71	71	72	72	72	73	73	73	74	74	74	75	75	75	76	76	76	76	77	77	77	78	78	78	79	79	79	80	80	80	80	81	81	81	82	82	82	83	83	83	84	84	84	85
70	70	71	71	71	72	72	72	72	73	73	73	74	74	74	75	75	75	75	76	76	76	77	77	77	78	78	78	78	79	79	79	80	80	80	81	81	81	81	82	82	82	83	83	83	84	84	84	84	85	85
71	71	72	72	72	72	73	73	73	74	74	74	74	75	75	75	76	76	76	77	77	77	77	78	78	78	79	79	79	79	80	80	80	81	81	81	81	82	82	82	83	83	83	83	84	84	84	85	85	85	86
72	72	73	73	73	73	74	74	74	75	75	75	75	76	76	76	76	77	77	77	78	78	78	78	79	79	79	80	80	80	80	81	81	81	82	82	82	82	83	83	83	83	84	84	84	85	85	85	85	86	86
73	73	74	74	74	74	75	75	75	75	76	76	76	77	77	77	77	78	78	78	78	79	79	79	79	80	80	80	81	81	81	81	82	82	82	82	83	83	83	84	84	84	84	85	85	85	85	86	86	86	87
74	74	75	75	75	75	76	76	76	76	77	77	77	77	78	78	78	78	79	79	79	79	80	80	80	81	81	81	81	82	82	82	82	83	83	83	83	84	84	84	84	85	85	85	85	86	86	86	86	87	87
75	75	76	76	76	76	77	77	77	77	78	78	78	78	79	79	79	79	80	80	80	80	81	81	81	81	82	82	82	82	83	83	83	83	84	84	84	84	85	85	85	85	86	86	86	86	87	87	87	87	88
76	76	76	77	77	77	77	78	78	78	78	79	79	79	79	80	80	80	80	81	81	81	81	82	82	82	82	82	83	83	83	83	84	84	84	84	85	85	85	85	86	86	86	86	87	87	87	87	88	88	88
77	77	77	78	78	78	78	79	79	79	79	80	80	80	80	80	81	81	81	81	82	82	82	82	83	83	83	83	83	84	84	84	84	85	85	85	85	86	86	86	86	86	87	87	87	87	88	88	88	88	89
78	78	78	79	79	79	79	80	880	80	80	80	81	81	81	81	82	82	82	82	82	83	83	83	83	84	84	84	84	84	85	85	85	85	85	86	86	86	86	87	87	87	87	87	88	88	88	88	89	89	89
79	79	79	80	80	80	80	80	81	81	81	81	82	82	82	82	82	83	83	83	83	83	84	84	84	84	84	85	85	85	85	86	86	86	86	86	87	87	87	87	87	88	88	88	88	88	89	89	89	89	90
80	80	80	81	81	81	81	81	82	82	82	82	82	83	83	83	83	83	84	84	84	84	84	85	85	85	85	85	86	86	86	86	86	87	87	87	87	87	88	88	88	88	88	89	89	89	89	89	90	90	90
81	81	81	82	82	82	82	82	83	83	83	83	83	83	84	84	84	84	84	85	85	85	85	85	86	86	86	86	86	87	87	87	87	87	87	88	88	88	88	88	89	89	89	89	89	90	90	90	90	90	91
82	82	82	83	83	83	83	83	83	84	84	84	84	84	85	85	85	85	85	85	86	86	86	86	86	87	87	87	87	87	87	88	88	88	88	88	88	89	89	89	89	89	90	90	90	90	90	90	91	91	91
83	83	83	84	84	84	84	84	84	85	85	85	85	85	85	86	86	86	86	86	86	87	87	87	87	87	87	88	88	88	88	88	88	89	89	89	89	89	89	90	90	90	90	90	90	91	91	91	91	91	92
84	84	84	84	85	85	85	85	85	85	86	86	86	86	86	86	87	87	87	87	87	87	88	88	88	88	88	88	88	89	89	89	89	89	89	90	90	90	90	90	90	91	91	91	91	91	91	92	92	92	92
85	85	85	85	86	86	86	86	86	86	87	87	87	87	87	87	87	88	88	88	88	88	88	88	89	89	89	89	89	89	90	90	90	90	90	90	90	91	91	91	91	91	91	91	92	92	92	92	92	92	93
86	86	86	86	87	87	87	87	87	87	87	88	88	88	88	88	88	88	89	89	89	89	89	89	89	90	90	90	90	90	90	90	90	91	91	91	91	91	91	91	92	92	92	92	92	92	92	93	93	93	93
87	87	87	87	88	88	88	88	88	88	88	88	89	89	89	89	89	89	89	89	90	90	90	90	90	90	90	90	91	91	91	91	91	91	91	92	92	92	92	92	92	92	92	93	93	93	93	93	93	93	94
88	88	88	88	88	89	89	89	89	89	89	89	89	90	90	90	90	90	90	90	90	91	91	91	91	91	91	91	91	91	92	92	92	92	92	92	92	92	93	93	93	93	93	93	93	93	94	94	94	94	94
89	89	89	89	89	90	90	90	90	90	90	90	90	90	91	91	91	91	91	91	91	91	91	92	92	92	92	92	92	92	92	92	93	93	93	93	93	93	93	93	93	94	94	94	94	94	94	94	94	94	95
90	90	90	90	90	91	91	91	91	91	91	91	91	91	91	92	92	92	92	92	92	92	92	92	92	93	93	93	93	93	93	93	93	93	93	94	94	94	94	94	94	94	94	94	94	95	95	95	95	95	95
91	91	91	91	91	91	92	92	92	92	92	92	92	92	92	92	92	93	93	93	93	93	93	93	93	93	93	93	93	94	94	94	94	94	94	94	94	94	94	95	95	95	95	95	95	95	95	95	95	95	96
92	92	92	92	92	92	92	93	93	93	93	93	93	93	93	93	93	93	93	94	94	94	94	94	94	94	94	94	94	94	94	94	95	95	95	95	95	95	95	95	95	95	95	95	96	96	96	96	96	96	96
93	93	93	93	93	93	93	93	94	94	94	94	94	94	94	94	94	94	94	94	94	94	95	95	95	95	95	95	95	95	95	95	95	95	95	95	96	96	96	96	96	96	96	96	96	96	96	96	96	96	97
94	94	94	94	94	94	94	94	94	95	95	95	95	95	95	95	95	95	95	95	95	95	95	95	95	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	97	97	97	97	97	97	97	97	97
95	95	95	95	95	95	95	95	95	95	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	98
96	96	96	96	96	96	96	96	96	96	96	96	96	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	98	98	98	98	98	98	98	98	98	98	98	98	98
97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	97	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	99
98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	98	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99
99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	99	100
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50

DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Industrial Accidents
Workers' Compensation Appeals Board

CASE NO. 74 STK 1878

STATE OF CALIFORNIA, SUBSEQUENT INJURIES FUND

Employee | Vs Employer | Insurance Company

20120 N. Ray Road, Lodi 95240
Employee's Address

A RECOMMENDED PERMANENT DISABILITY RATING IS REQUESTED BASED on the following:

Date of injury: 10/23/73 Age at injury: 27 Compensation rate: $70.00
Occupation: Hoist Operator

Orthopedic back disability of 45% before adjustment for age and occupation and psychiatric disability of 15% before adjustment for age and occupation, computing after adjustment for age and occupation and application of multiple disability tables to 54% permanent disability.

Visual dyslexia caused by a neurological lesion, resulting in an inability to learn to read or write.

2/22/78 - lg

C. V. McCLUSKEY
Workers' Compensation Appeals Board Judge

REPORT OF PERMANENT DISABILITY BASED ON ABOVE INSTRUCTIONS

AS ABOVE

The recommended rating is at the rate of $ 70.00 100 % amounting to a week in the total sum of $ 621.25 weeks of disability payments 43,487.50, and thereafter a life pensi at the rate of $64.61 per week

F)
O)
R)
M)
U)
L)
A)

DATE: 2/23/78

C. A. Norman
Permanent Disability Rating Specialist

NOTICE IS HEREBY GIVEN that the above instructions and reports have been received in evidence and that the case will be submitted for decision 7 days from the date of service as shown hereon unless good cause be shown to the contrary in writing.

PARTIES SERVED ON: FEBRUARY 24, 1978 by mail by L. Golden:
Eugene C. Treastor, Esq. 1010 Fourth St., Sacramento
Darryl L. Doke, Deputy Attorney General, 555 Capitol Mall, Sacramento 95814

DIA WCAB FORM 73 (REV. 11-74)
T 03P

C. V. McCLUSKEY
Workers' Compensation Appeals Board

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DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Industrial Accidents
Workmen's Compensation Appeals Board

MAY 1 1975

VI

CASE NO. 73 SAC 41579

Eugene C. Treaster

EARLY CALIFORNIA FOODS, INC. INDUSTRIAL INDEMNITY CO.

Employee vs Employer VI. Insurance Company

14. Cedar Street, Roseville, CA 95678

Employee's Address

A RECOMMENDED PERMANENT DISABILITY RATING IS REQUESTED BASED on the following:

Date of injury: 11/11/71 Age at injury: 40 Compensation rate: Max.

Occupation: Maintenance Mechanic (Maintaining Olive Tank)

Injury to back.

Back disability greater than a preclusion from heavy work but less than a limitation to light work, causing a loss of 65 percent of the applicant's pre-injury capacity for lifting, pushing and pulling, and a loss of one-half of his pre-injury ability for climbing and bending and a necessity to avoid prolonged sitting. Calf atrophy consisting of one-half inch.

J. C. STONE

~~Referee~~ Workers' Compensation Judge

REPORT OF PERMANENT DISABILITY BASED ON ABOVE INSTRUCTIONS

Disability as described above by Workers' Compensation Judge.

he recommended rating is 47 % amounting to 188 weeks of disability payments
t the rate of $ 52.50 a week in the total sum of $ 9870.00

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ATE: April 29, 1975

N. J. LONG
Permanent Disability Rating Specialist

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OTICE IS HEREBY GIVEN that the above instructions and reports have been received in evidence and that the case will be submitted r decision 7 days from the date of service as shown hereon unless good cause be shown to the contrary in writing.

ART SERVED ON: APR 30 1975

Eugene C. Treaster, 1010 4th Street, Sacramento, CA 95814
Industrial Indemnity Co., PO Box 15709, Sacramento, CA 95813
Att. J O'Reilly, Jr., 555 Capitol Mall, Suite 1510, Sacramento, CA 95814

(17)

J. C. STONE, Workers' Compensation Judge
Referee of the Workmen's Compensation Appeals Board

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FORM 73 (REV. 2-72)

SEP. 1.1998 2:01PM LAW OFC E C TREASTER

STATE OF CALIFORNIA—AGRICULTURE AND SERVICES AGENCY
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Industrial Accidents
Workmen's Compensation Appeals Board

CASE NO. 73 SAC 41579

EARLY CALIFORNIA FOODS, INC. - INDUSTRIAL INDEMNITY CO.

Employee vs Employer Insurance Company

140 Cedar Street, Roseville, CA 95678

Employee's Address

A RECOMMENDED PERMANENT DISABILITY RATING IS REQUESTED BASED on the following:

Date of injury: 11/11/71 Age at injury: 40 Compensation rate: Max.

Occupation: Maintenance Mechanic.
(Maintaining Olive Tank)

APR - 9 1975

Injury to back.

Applicant precluded from heavy work.

J. C. STONE

Referee, Workmen's Compensation Appeals Board

REPORT OF PERMANENT DISABILITY BASED ON ABOVE INSTRUCTIONS

Disability as described above by Referee.

The recommended rating is 36½ % amounting to 146 weeks of disability payments at the rate of $ 52.50 a week in the total sum of $ 7665.00

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DATE: April 8, 1975

ja

N. J. LONG

Permanent Disability Rating Specialist

NOTICE IS HEREBY GIVEN that the above instructions and reports have been received in evidence and that the case will be submitted for decision 7 days from the date of service as shown hereon unless good cause be shown to the contrary in writing.

PARTIES SERVED ON:

E. C. Treaster, 1010 4th St., Sacramento, CA 95814
Industrial Indemnity Co., PO Box 15709, Sacramento, CA 95813
J. O'Reilly, Jr., 555 Capitol Mall, Suite 1510, Sacramento, CA 95814
Attorney General's Office, Rm. 500, Wells Fargo

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2009	SIF INCOME			every 2 weeks				OCTOBER	
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April 20, 1976

PATRICK F. MERCIER, Petitioner v. WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA and CITY OF LOS ANGELES, Respondents.

W.C.A.B. No. 71 VN 31321—Patrick Mercier, employee

Civil No. LA 30332—Supreme Court of the State of California In Bank

[16 Cal. 3d 711, 129 Cal. Rptr. 161, 548 P.2d 361]

DISABILITY—PERMANENT—OVERLAPPING DISABILITIES—The Appeals Board properly apportioned part of an employee's disability following an industrial heart injury to a pre-existing disability from an earlier industrial back injury where the disabilities overlapped though the injuries involved separate and distinct parts of the body. [See generally Hanna, California Law of Employee Injuries and Workmen's Compensation, Vol. 2, § 14.03[2].]

Proceeding to review an order of the Workers' Compensation Appeals Board apportioning part of an injured employee's disability to a prior industrial injury. Order *affirmed.* [*On hearing after opinion by Court of Appeal, see 40 Cal. Comp. Cases 320.*]

For petitioner—Lewis & Marenstein, by Alan B. Marenstein

For respondent employer—Burt Pines, John T. Neville, William G. Lorenzetti

Petitioner seeks annulment of a workers' compensation award apportioning part of his permanent disability to a prior industrial injury.

In 1970 petitioner, a Los Angeles police officer, suffered an industrial injury to his back. The Workers' Compensation Appeals Board determined that the back disability precluded petitioner from doing "heavy lifting and repetitive bending" and awarded a 34½ percent permanent disability rating.

In 1971 petitioner was found to have suffered an industrially related heart disability occurring over the entire period of employment with the city, 1949 to 1971.

The referee requested the rating specialist to submit a permanent disability rating based on the following: "1. Heart disability and arteriosclerosis, more than slight and less than moderate. Applicant should avoid severe emotional stress. 2. Applicant should be limited to work between light and semi-sedentary. 3. Applicant is precluded from strenuous activities. Apportion out 34½%."

The referee adopted the rating specialist's recommendation, after apportionment, of 40.5 percent disability. Upon petition for reconsideration, the Workers' Compensation Appeals Board affirmed the referee, deciding that the back and heart injuries both prevented petitioner from performing the same type of work. Because they overlapped apportionment was upheld.[1]

[1] The board stated: "According to the 'Guidelines for Work Capacity' set forth in the Schedule for Rating Permanent Disability, 'disability precluding heavy lifting, repeated bending

Petitioner first contends that the two injuries are separate and distinct and are therefore nonapportionable.

Prior to this court's decision in *State Compensation Ins. Fund* v. *Industrial Acc. Com.* (*Hutchinson*) (1963) 59 Cal. 2d 45 [20 Cal. Comp. Cases 20, 27 Cal. Rptr. 702, 377 P.2d 902], successive industrial injuries were apportioned only if they were injuries to the same part of the body. (*Pacific Gas & Elec. Co.* v. *Ind. Acc. Com.* (*Burton*) [(1954)] 126 Cal. App. 2d 554 [19 Cal. Comp. Cases 152, 272 P.2d 818].) We replace this rigid and mechanistic formula, holding in *Hutchinson* that "the disability resulting from a subsequent injury should be compensable only to the extent that it can be said that the employee's earning capacity or ability to compete has been decreased from what it was immediately prior to the second injury. The computation of this figure cannot be determined by a mechanical application of a method of apportionment based upon whether the injury occurs to the same anatomical part of the body. It must come from a consideration of the nature of the disability caused by the injury. If successive injuries produce separate and independent disabilities then each is properly rated without concern for the theoretical 100 percent assigned to 'total' disability. But if the subsequent injury, *even if to a different part of the body,* does not alter the earning capacity or ability to compete in the labor market it is not compensable. And if it does alter these factors, it should be compensable only to the extent of the alteration." (59 Cal. 2d 45, 53; italics added.) The policy behind this rule is to encourage the employment of disabled persons by imposing liability on an employer only for that portion of the disability attributable to the subsequent industrial injury. (*Id.* at p. 49.)

Hutchinson thus rejected the inflexible rule of *Burton* substituting one that apportionment is proper when the actual decrease in the employee's ability to compete and earn is less than the sum of the disability ratings for the two injuries added together. The result is that the employee will be awarded that percentage of disability commensurate with his decreased ability to compete and earn. Obviously, the mere occurrence of a second injury does not require apportionment. In each case it must be determined if the second injury impairs the employee's ability to perform work in the same manner as the first injury. If so, apportionment is proper—but only to the extent the two injuries overlap.

Truck Ins. Exch. v. *Industrial Acc. Com.* (*Tarantino*) (1965) 235 Cal. App. 2d 207 [30 Cal. Comp. Cases 194, 45 Cal. Rptr. 178], presented facts almost identical to the present case. The employee suffered injury to his neck, low back and right hand resulting in a permanent disability rating of 31½ percent. Subsequently, the employee suffered a heart attack and was awarded a permanent disability rating of

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and stooping contemplates the individual has lost approximately half of his pre-injury capacity for lifting, bending and stooping.' According to these same guidelines, 'disability resulting in limitation to light work contemplates the individual can do work in a standing or walking position, with a minimum of demands for physical effort', while 'disability resulting in limitation to semi-sedentary work contemplates the individual can do work approximately one-half of the time in a sitting position, and approximately one-half the time in a standing or walking position, with a minimum of demands for physical effort whether standing, walking or sitting.' "

49 percent. The Court of Appeal reversed an Industrial Accident Commission decision which held the two injuries should not be apportioned solely because they occurred to separate parts of the body. Pointing out there was an overlap in the disabilities, the Court of Appeal held that *Hutchinson* required apportionment.

Hegglin v. *Workmen's Comp. App. Bd.* (1971) 4 Cal. 3d 162 [36 Cal. Comp. Cases 93, 93 Cal. Rptr. 15, 480 P.2d 967], does not lead to a contrary result. In the course of receiving medical treatment for industrial injuries the employee became infected by serum hepatitis. This court held that when the injuries arise out of the same accident section 4750 is inapplicable and apportionment is therefore not required. The court distinguished *Hutchinson* noting that its rule applies to an entirely different situation. "'We find nothing in *Hutchinson* which states or intimates that the rule prescribed by section 4750 for *successive* injuries or the procedures approved in *Hutchinson* for rating such injuries, are applicable in the rating of disabilities for a *single* industrial injury.'" (Orig. italics; *Subsequent Injuries Fund* v. *Industrial Acc. Com. (Rogers)* [(1964)] 226 Cal. App. 2d 136, 154 [29 Cal. Comp. Cases 59, 37 Cal. Rptr. 844].) "Section 4750 was enacted to promote the employment of workmen partially disabled by a prior industrial accident [citation]; that policy is inapplicable to cases involving a single industrial accident. Therefore, the special rating procedures found in *Hutchinson* to be appropriate for multiple accident cases are not applicable here." (*Hegglin* v. *Workmen's Comp. App. Bd., supra,* 4 Cal. 3d 162, 173.)

As *Hegglin* pointed out, the distinction drawn between single and multiple accident cases is well-founded. When the two injuries arise out of the same industrial accident the policy underlying *Hutchinson* of not discouraging employers from hiring disabled persons is inapplicable. In such situation, the employer properly is made to bear responsibility for all injuries caused by one accident. When there have been two or more accidents, the policy of encouraging the hiring and retaining of disabled persons is best effected by application of the rule of apportionment enunciated in *Hutchinson.*

Here, the injuries arose out of separate industrial events. In such case, apportionment turns on whether the second injury decreases the employee's earning capacity or his ability to compete in the open labor market in the same manner as the first. The fact that the injuries occur to two different anatomical parts of the body while relevant, does not in itself preclude apportionment.

Petitioner next argues no logical basis exists for concluding that an employee suffering back and heart disabilities is no more disabled than if he had suffered only the heart disability. Petitioner further asserts apportionment denies him a life pension from the city he would have been entitled to had he not suffered the previous disability.

The question of overlapping disabilities is one of fact—not of logic. The basic purpose of workers' compensation is to compensate diminished ability to compete in the labor market (Lab. Code, § 4660, subd. (a)) rather than to compensate every

injury. Proper computation of overlapping disabilities—either partial or total—calls for determining the percentage of combined disability and then subtracting the percentage of disability due to the prior injury.[2] (*Dow Chemical Co.* v. *Workmen's Comp. App. Bd.* (1967) 67 Cal. 2d 483, 492 [32 Cal. Comp. Cases 431, 62 Cal. Rptr. 757, 432 P.2d 365]; *State Compensation Fund* v. *Industrial Acc. Com. (Hutchinson)*, *supra*, 59 Cal. 2d 45, 53; *Subsequent Injuries Fund* v. *Workmen's Comp. App. Bd. (Royster)* (1974) 40 Cal. App. 3d 403, 409-410 [39 Cal. Comp. Cases 507, 115 Cal. Rptr. 204].) When all factors of disability attributable to the first injury are included in the factors attributable to the second, there is total overlap. We must conclude the rating properly was based on the combined injury. It is clear in this case that the injuries overlapped, and petitioner has failed to show that any disability factor in the first injury was not included in the instructions to the rating specialist.

Petitioner is correct in asserting he is not entitled to a life pension from his employer, but his remedy is to obtain benefits from the Subsequent Injuries Fund. (*Dow Chemical Co.* v. *Workmen's Comp. App. Bd.*, *supra*, 67 Cal. 2d 483, 495; *cf. Subsequent Injuries Fund* v. *Workmen's Comp. App. Bd. (Royster)*, *supra*, 40 Cal. App. 3d 403, 407-408.)

The decision of the Workers' Compensation Appeals Board is affirmed.

Clark, J.

We concur:

Wright, C.J.
McComb, J.
Tobriner, J.
Sullivan, J.
Richardson, J.

DISSENTING OPINION

I dissent.

To merely recite the remarkable conclusion of the majority is to refute it: an employee who suffers a back disability *and* a heart disability is *less* disabled than he would have been if he suffered only the heart disability. Such tortured logic totally eludes me.

This petitioner is a police officer who has served his city since 1949. In May 1970, he sustained a back injury in the course of his employment and as a result was

[2] As *Hutchinson* recognized, the injuries from the first accident may heal or improve prior to the second. (59 Cal. 2d at p. 56.) In such case the disability percentage to be subtracted would be based on the employee's condition immediately prior to the second injury. In the instant case, no claim of rehabilitation was made.

found to be 34½ percent permanently disabled. He continued to work pursuant to a regimen which restricted heavy lifting and repetitive bending.

In August 1971, petitioner sustained a heart injury and arteriosclerosis which rendered him 75 percent disabled. He was directed to avoid emotional stress and to perform only light or semi-sedentary work, and was precluded from all strenuous activities. An employee who is more than 70 percent permanently disabled is entitled to permanent benefits paid pursuant to a formula prescribed by Labor Code section 4659.

It would seem that a police officer who became a heart victim 75 percent permanently disabled would receive those statutorily bestowed benefits without further question. However, the Workers' Compensation Appeals Board ordered the percentage of the first disability to be subtracted from the second. Thus the 75 percent disability suddenly melted down to 40½ percent, and the lifetime benefits provided by section 4659 dissolved completely. The law of diminishing returns became the law of vanishing returns.

In *Hegglin* v. *Workmen's Comp. App. Bd.* (1971) 4 Cal. 3d 162, 171 [36 Cal. Comp. Cases 93, 93 Cal. Rptr. 15, 480 P.2d 967], we found the "injury to petitioner's back which prevented him from lifting more than 25 pounds was a factor of disability entirely separate and distinct from the factor of impaired liver function caused by the hepatitis. . . . The injury to the spine and the destruction of liver cells and liver functions obviously involve impairment or abnormalities of separate portions of the anatomy. Furthermore, it is clear that the two factors impose separate limitations on petitioner's capacity to work."

Except for the fact that *Hegglin* involved one, not two, industrial injuries, its analysis of the overlap problem on remarkably similar facts is most persuasive. Indeed, we can by simple substitution relate the circumstances of this case in precisely the terms employed in *Hegglin*: "the injury to petitioner's back which prevented him from heavy lifting and repetitive bending was a factor of disability entirely separate and distinct from the factor of impaired heart function and arteriosclerosis. . . . The injury to the spine and the damage to the heart and the heart functions obviously involve impairment or abnormalities of separate portions of the anatomy. Furthermore, it is clear that the two factors impose separate limitations on petitioner's capacity to work."

The general rule is properly extracted by the majority from *State Compensation Ins. Fund* v. *Industrial Acc. Com.* (*Hutchinson*) (1963) 59 Cal. 2d 45 [28 Cal Comp. Cases 20, 27 Cal. Rptr. 702, 377 P.2d 902], in this manner (*ante*, p. —*) "apportionment turns on whether the second injury decreases the employee's earning capacity or his ability to compete in the open labor market *in the same manner a*

* Multilith opinion, page 7.

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the first." (Italics added.) But *Hutchison* does not compel the result reached by the majority.

It should be obvious to any layman that a back injury causing only 34½ percent disability does not affect an employee's earning capacity and ability to compete in the open labor market *in the same manner* as a 75 percent disabling heart attack and arteriosclerosis. The back injury was to the musculoskeletal system, while the heart injury was to the vascular system. For the former the restriction was to avoid heavy lifting, for the latter the avoidance of emotional stress and strenuous activities. After the former injury the petitioner was able to continue his employment as a police officer, after the latter he could no longer do so. Under all these circumstances it is impossible to find "overlapping" disabilities in this case.

I would annul the award.

Mosk, J.

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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JIM GROB, *Applicant,* vs. **MICHAEL AND COMPANY; CIGA by its servicing facility INTERCARE INSURANCE for IIII INSURANCE, in liquidation, and the SUBSEQUENT INJURIES BENEFITS TRUST FUND,** *Defendant(s).*	Case No. OAK 0273127 **OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact of September 9, 2005, wherein the workers' compensation administrative law judge ("WCJ") found that applicant, while employed as an auto mechanic on February 10, 1999, sustained industrial injury to his low back and claims to have sustained industrial injury to his psyche, and that applicant knew or could have been reasonably deemed to have known that there was a substantial likelihood that he would become entitled to subsequent injuries benefits within five years of his injury and, therefore, his claim against the Subsequent Injuries Benefits Trust Fund ("SIBFT") is barred.

Applicant contends that the WCJ's finding of knowledge sufficient to bar applicant's claim against the SIBFT, pursuant to *Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56 [35 Cal.Comp.Cases 80] (hereafter *Talcott*), is erroneous.

We have considered the Petition for Reconsideration and defendant's Answer, and we have reviewed the record in this matter. As the WCJ is no longer with the Workers' Compensation Appeals Board, we have not received a Report and Recommendation on Petition for Reconsideration. For the reasons discussed below, we will grant reconsideration, amend the

Findings of Fact to find that applicant's application for SIBTF benefits was timely, and return the matter for assignment to a new WCJ to determine benefits.

BACKGROUND

The parties stipulated that applicant sustained an industrial injury to his low back on February 10, 1999, and claims to have sustained industrial injury to his psyche. Prior to his injury, applicant suffered from industrial and non-industrial conditions involving his feet, neck, and hands.

Applicant's former treating physician Dr. Fatteh opined, on July 14, 2003, that applicant is limited to sedentary work, that he will only be able to work 2-4 hours per day, and that it is doubtful he will be able to regain gainful employment. Applicant expressed agreement with Dr. Fatteh's opinion, in his trial testimony. Dr. Atkin's evaluation of the back found a low back disability that limits applicant to light work. As to the psychiatric injury, Dr. Wolfe found no disability, but Dr. Weber found minimal to slight impairment in some of the higher work functions.

On December 16, 2004, applicant was examined by Agreed Medical Evaluator ("AME") Dr. Lipton, who issued a report on December 28, 2004. Dr. Lipton concluded that applicant was limited to very light work from the industrial injury and that, combined with his carpal tunnel syndrome, plantar fasciitis and prior neck surgery, was limited to a "sheltered workshop" work environment.

Applicant and the insurance carrier settled the matter by Stipulations with Request for Award, stipulating that the injury caused 62 percent permanent disability. The Award issued on April 11, 2005.

Applicant filed an Application for Subsequent Injuries and Benefits on January 18, 2005. Trial on the SIBTF issues was on June 21, 2005. The WCJ found that applicant's SIBTF claim was time-barred because the August 13, 2001 finding of disability by the Social Security Administration "is evidence that supports the finding that he had knowledge or could be reasonably deemed to have known of a substantial likelihood of entitlement to SIBTF benefits," and because applicant had read Dr. Fatteh's report and did not feel his conclusions were in error.

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DISCUSSION

Labor Code section 4751 provides that, if an employee who is permanently partially disabled, either industrially or non-industrially, receives a subsequent compensable injury resulting in additional permanent partial disability, and the combined disability is greater than that resulting from the subsequent injury alone, the employee shall be paid compensation for the remainder of the combined disability after compensation for the last injury. Conditions applicable in this case are that the combined disability equal 70 percent or more and that the subsequent injury alone, without adjustment for age or occupation, equal 35 percent or more.

There is no statute of limitations directly applicable to proceedings for SIBTF benefits. The California appellate courts have, by decision, applied the limitations periods of Labor Code sections 5405 and 5410. (*Subsequent Injuries Fund v. Ind. Acc. Com. (Ferguson)* (1960) 178 Cal.App.2d 55, 58 [25 Cal.Comp.Cases 26].) The five year limit on proceedings for new and further disability found in §5410 applies in those cases where the employee has filed an application for normal workers' compensation benefits against the employer. (*Ibid.*)

In *Talcott*, the court considered a situation like the present one, in which the applicant failed to proceed against SIBTF (then known as the Subsequent Injuries Fund) within five years of the date of injury, and described the problem as follows:

> "The pattern which evolved in the present case is not uncommon. An Employee files for compensation benefits against his employer and its insurance carrier within the time limitations specified in section 5405 and a temporary award follows or the carrier voluntarily pays compensation. The question of permanent disability resulting from an injury cannot be determined until the applicant's physical condition has become stable and this frequently occurs many months and occasionally years after occurrence of the original injury. Indeed, the determination of whether permanent disability has resulted and, if so, its extent, may not be made until more than five years from the date of injury, as was the situation here. Absent such a determination an applicant cannot be certain that he will be entitled to any benefits from the Fund." (35 Cal.Comp.Cases at pp. 83-84.)

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After reviewing prior cases dealing with application of limitations periods, the court held:

> "We should, in the absence of statutory direction and to avoid an injustice, prevent the barring of an applicant's claim against the Fund before it arises. Therefore, we hold that where, prior to the expiration of five years from the date of injury, an applicant does not know and could not reasonably be deemed to know that there will be substantial likelihood he will become entitled to subsequent injuries benefits, his application against the Fund will not be barred—even if he has applied for normal benefits against his employer—if he files a proceeding against the Fund within a reasonable time after he learns from the Board's finding on the issue of permanent disability that the Fund has probable liability." (*Id.*, at p. 87.)

In *Talcott*, the applicant filed her claim against the Fund within five weeks of learning her permanent disability rating, and there was no contention that the five-week delay was unreasonable. The case was remanded to resolve the question of whether the fact that applicant "was aware of the existence of her prior disabilities" compels "the conclusion that [applicant] must reasonably have been deemed to know prior to August 21, 1965 (five years from the date of her injury) that there was a substantial likelihood she would become entitled to subsequent injuries benefits." (*Id.*, at p. 88.) A claim *is* time-barred if filed after five years from the date of injury when the injured worker, prior to expiration of the five-year period, does know or can be reasonably deemed to know that there is a substantial likelihood that he or she will become entitled to subsequent injuries benefits. (*Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd. (Baca)* (1970) 2 Cal.3d 74 [35 Cal.Comp.Cases 94, 95].)

When a petition for reconsideration is filed, the Appeals Board has the power to reweigh the evidence, make an independent examination of the record, and reach a different conclusion than was reached by the WCJ. (Lab. Code §§5907, 5315; *Bueschcr v. Workers' Comp. Appeals Bd.* (1968) 265 Cal.App.2d 520, 529 [33 Cal.Comp.Cases 537]; *Allied Comp. Ins. v. Ind. Acc. Comm. (Lintz)* (1961) 57 Cal.2d 115 [26 Cal.Comp.Cases 241, 243]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *Mendoza v. Workers' Comp. Appeals Bd.* (1976) 54 Cal.App.3d 820 [41 Cal.Comp.Cases 71, 73]; *Minnie West v. Ind. Acc. Comm.* (1947) 79 Cal.App.2d 711, 719 [12 Cal.Comp.Cases 86].) The Appeals Board can annul

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the findings of the trial-level WCJ and substitute its own findings and decision in light of all the evidence in the record. (*Buescher v. Workers' Comp. Appeals Bd., supra,* 33 Cal.Comp.Cases 537, 543; Lab. Code §5907.) It is also well established that the Appeals Board has the power to resolve conflicts in the record, to make its own determinations of credibility, and to reject the findings of the WCJ. (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908 [55 Cal.Comp.Cases 196].) "Nevertheless, any award, order or decision of the board must be supported by substantial evidence *in the light of the entire record...*" (*Lamb v. Workmen's Comp. Appeals Bd.,* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310, 314].)

We have conducted an independent examination of the record to determine what applicant knew, five years after his injury, about his likelihood of being entitled to SIBTF benefits. On February 10, 2004, five years after his injury, applicant knew of Dr. Fatteh's evaluation of his back injury, in which he opined that applicant was limited to sedentary work, could work only 2-4 hours per day, and would likely not be able to regain gainful employment. His psychiatric evaluation indicated no psychiatric disability. He was aware of his cervical spine disability, carpal tunnel syndrome, and plantar fasciitis. The defense qualified medical evaluation of his back resulted in a light work restriction and the defense psychiatric evaluation indicated slight disability.

No doctor, prior to Dr. Lipton's December 16, 2004 examination, had expressed an opinion on applicant's overall disability. Dr. Lipton limited applicant to very light work based on the industrial injury. Combined with his carpal tunnel syndrome, plantar fasciitis, and prior neck surgery, he believed applicant was limited to a "sheltered workshop" work environment. Furthermore, only after Dr. Lipton's report did the parties reach agreement and an award issue regarding the disability caused by the industrial injury.

Before receipt of Dr. Lipton's AME report, applicant did not know he had a substantial likelihood of being entitled to SIBTF benefits. He could not know which medical opinions would be considered more persuasive and whether his total disability would be found to exceed the 70 percent threshold. Indeed, Dr. Lipton agreed more with Dr. Atkin than with Dr. Fatteh regarding the industrial permanent disability. While applicant must have known within five years of his

injury that he *might* be eligible for SIBTF benefits, the applicable standard is that he knows or can be reasonably deemed to know that there is a substantial likelihood that he will be eligible. (*Talcott, supra,* 35 Cal.Comp.Cases at p. 87.) Dr. Lipton signed his report on December 28, 2004. This report provided the first clear indication of the substantial likelihood that applicant's overall permanent disability would be found to be in excess of 70 percent. Applicant filed an Application for Subsequent Injuries and Benefits three weeks later, on January 18, 2005. Defendant has not contended, nor could it reasonably contend, that this three-week period is not "within a reasonable time." *(Ibid.)*

As to the finding of the Social Security Administration that applicant was disabled, decisions of the Social Security Administration are governed by different standards than workers' compensation cases and cannot be used to impute knowledge of what is likely to be awarded in a workers' compensation proceeding. Moreover, applicant was still temporarily totally disabled at the time of the Social Security Disability award, so the decision had even less bearing on any potential permanent disability determination.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact of September 9, 2005, be, and the same hereby is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact of September 9, 2005, is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

Finding of Fact No. 2 is amended as set forth below:

"2. The applicant did not know and could not have been reasonably deemed to have known that there was a substantial likelihood that he would become entitled to subsequent injuries benefits within five years of his injury and, therefore, his claim against the Subsequent Injuries Benefits Trust Fund is timely."

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IT IS FURTHER ORDERED that the matter be returned to the trial level for further proceedings and decision by a new WCJ to determine the benefits to which applicant is entitled, pursuant to the decision herein.

WORKERS' COMPENSATION APPEALS BOARD

MERLE C. RABINE

I CONCUR,

JAMES C. CUNEO

RONNIE G. CAPLANE

WORKERS' COMPENSATION APPEALS BOARD EUREKA SEAL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DEC 02 2005

SERVICE BY MAIL ON SAID DATE TO THE PARTIES SHOWN BELOW:

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OD-Legal Unit, 2424 Arden Way #130, Sacramento, CA 95825

CB/bea

GROB, Jim

(20)

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Attorneys for Respondent John M. Rae, Acting Director,
Department of Industrial Relations

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISON OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

Jim Grob, Applicant, vs. Michael & Company, Intercare Insurance Services; Subsequent Injuries Benefits Trust Fund, Defendant.	WCAB Case No. OAK 0273127 **ANSWER TO PETITION FOR RECONSIDERATION**

The Acting Director of the Department of Industrial Relations, John M. Rea, as administrator of the Subsequent Injuries Benefits Trust Fund (hereafter "SIBTF") hereby answers the petition for reconsideration[1] of the findings of fact and decision of the Honorable Richard S. Nishite, Workers' Compensation Administrative Law Judge, in this matter, issued September 9, 2005. The SIBTF denies:

[1] The SIBTF objects that the petition was not served on SIBTF counsel's correct address causing counsel's receipt of the petition to be delayed for eight days.

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1. That the Workers' Compensation Administrative Law Judge's finding of knowledge sufficient to trigger application of *SIF v. WCAB and Helen L. Talcott* (1970) 35 CCC 80, 87 is erroneous.

2. That the Appeals Board acted without or in excess of its powers.

3. That the evidence does not justify the findings of fact.

4. That the findings of fact do not support the order, decision or award.

I.

ISSUE PRESENTED

Whether the evidence supports Workers' Compensation Administrative Law Judge Richard S. Nishite's finding that the applicant's claim for SIBTF benefits was time barred because "The applicant knew or could have been reasonably deemed to have known that there was a substantial likelihood that he would become entitled to subsequent injuries benefits within five years of his injury."

II.

STATEMENT OF FACTS

The Workers' Compensation Claims:

On February 10, 1999 the applicant sustained an industrial injury to his back.

On April 25, 2001 the applicant filed a workers' compensation claim against the employer.

On January 10, 2005, six years after the injury, the applicant amended his claim to seek additional subsequent injury benefits under the SIBTF. He alleged "plantar fasciities, bilateral carpal tunnel syndrome, and cervical spine disability" as pre-existing partial permanent disabilities.

Applicant's Knowledge of His Disabilities:

The applicant aggressively pursued and received benefits from the Social Security Administration (SSA). On August 12, 2001, the applicant had received a finding by the SSA that he was 100% disabled, i.e., "unable to perform any jobs existing in significant numbers in

the national economy." (Opinion on Decision, p. 1.)

The applicant pursued and received workers' compensation benefits from the employer's insurer based on the industrial injury. The treating physician found the applicant to be 100% disabled. In the physician's report dated July 14, 2003, he stated the opinion that the applicant "will only be able to work 2-4 hours per day. But, with frequent flare-ups of pain and dysfunction from day to day, it is unlikely that Mr. Grob will be able to regain gainful employment [in] the open labor market at all." (Opinion On Decision, p. 2.)

The applicant was represented at all relevant times by counsel in the SSA and workers' compensation proceedings. (Opinion On Decision, p. 2.)

In addition to the above, the record is very clear that the applicant was aware of his alleged pre-existing injuries through a long history of medical treatment for such conditions long before the expiration of five years from the date of his industrial injury:

- Problems with his feet (i.e., plantar fasciities) began two years before his industrial back injury. He used a walking cast and then a permanent cast. He later decided to have surgery on his heel performed at the time of his back surgery. (Minutes of Hearing and Summary of Evidence, p. 4:16-23.) In August of 2001, his heel was the same or worse. (Minutes of Hearing and Summary of Evidence, p. 10:8-9.)
- He had "years of problems with his neck." He suffered a neck injury when he was 17 years old when he fell from a tree. In the 1970s or 1980s he slipped and fell, which "flared his neck," and filed for workers' compensation benefits. In 1993 he injured his neck in a motor vehicle accident which "flared his neck." (Minutes of Hearing and Summary of Evidence, p. 5:3-5-23; 7:18-23.)
- His carpal tunnel problems started after his neck injury in 1993. A year and a half after this neck injury, he began to experience pain and numbing in his wrists. He had wrist surgery. He filed a workers' compensation claim and received benefits. At the time of his industrial injury, he had returned to work

with carpal tunnel problems. (Minutes of Hearing and Summary of Evidence, p. 4:25-5:2; 8:9-22.)

III.

THE APPLICANT KNEW OR SHOULD HAVE KNOWN THAT HIS INDUSTRIAL INJURY AND PRE-EXISTING INJURIES MET SIBTF BENEFIT THRESHOLDS WELL WITHIN FIVE YEARS OF THE INDUSTRIAL INJURY

A. SIBTF Benefit Thresholds And Limitations Period

The SIBTF was created after World War II to eliminate the disincentive to hire people with partial permanent disabilities by ameliorating the risk that the employer might become responsible for the *entire* disability of such an employee which might result after a subsequent industrial injury where the total disability is greater than that which would have obtained as a result of the subsequent injury alone. In furtherance of this purpose, Labor Code § 4751 provides in part:

> 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 . . .

In addition to the 70% threshold above, for purposes of the partial disabilities relevant in this case, "the permanent disability resulting from the subsequent [industrial] injury, when considered alone and without regard to or adjustment for the occupation or the age of the employee, [must be] equal to 35 percent or more of total." If these thresholds are met at the time of the subsequent industrial injury, a claim may be made to the SIBTF for benefits. A claim for subsequent injury benefits must, however, be made timely.

Though there is no statute of limitations specifically applicable to claims to the SIBTF, the California Supreme Court has applied the five-year limitations period set forth in Labor

Code § 5410. A claim against the SIBTF is barred if filed after the expiration of five years from the date of the industrial injury when the injured employee, prior to the date of expiration of the five-year period, does know or can be reasonably deemed to know that there is a substantial likelihood that he or she will become entitled to subsequent injuries benefits. (*Subsequent Injuries Trust Fund v. Workers' Compl. Appeals Board (Baca)* (1970) 35 Cal. Comp Cases 94; *Jenkins v. Workers' Compensation Appeals Board* (1985) 50 Cal. Comp. Cases 593 (writ denied); 2-24 *CA Law of Employee Injuries & Workers' Comp.* § 24.03.)[2]

The facts clearly show that the applicant here was fully aware of the disabilities that existed at the time of the industrial injury on which his SIBTF claim was based, many years before the SIBTF was joined in his workers' compensation action.

B. The Evidence Supports Judge Nishite's Finding

The judge found that the applicant aggressively pursued and received disability benefits from the Social Security Administration (SSA). On August 12, 2001, the applicant had received a finding by the SSA that he was 100% disabled, i.e., "unable to perform any jobs existing in significant numbers in the national economy."

Further, the applicant pursued and received workers' compensation benefits from the employer's insurer based on the industrial injury. The treating physician found the applicant to be 100% disabled. In the physician's report dated July 14, 2003 he stated the opinion that the applicant "will only be able to work 2-4 hours per day. But, with frequent flare-ups of pain and dysfunction from day to day, it is unlikely that Mr. Grob will be able to regain gainful employment [in] the open labor market at all." As noted by Judge Nishite, the applicant had read the report and agreed with its conclusions. At that time, the applicant still had six months after this report in which to file a claim for subsequent injury benefits before the five-year period would expire.

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[2] It should be noted that the doctrine of laches and statutes of limitations are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. These policies also guard against harm cause by a change of position during delay. (30 Cal. Jur. 3d, Equity, § 39.) The policies' underlying limitations of actions are clearly applicable here, where many years had passed after the applicant's workers' compensation claim was filed until the SIBTF was ultimately joined in the action.

The judge noted significantly that the applicant was represented at all relevant times by counsel in the SSA and workers' compensation proceedings.

In addition to the evidence establishing that the applicant had been determined to be 100% disabled, it is clear from the record that the applicant knew of his pre-existing disabilities long before the expiration of the five-year period.

Problems with his feet (i.e., plantar fasciities) began two years before his industrial back injury. He used a walking cast and then a permanent cast. He later decided to have surgery on his heel performed at the time of his back surgery. (Minutes of Hearing and Summary of Evidence, p. 4:16-23.) In August of 2001, his heel was the same or worse. (Minutes of Hearing and Summary of Evidence, p. 10:8-9.)

He had "years of problems with his neck." He suffered a neck injury when he was 17 years old when he fell from a tree. In the 1970s or 1980s he slipped and fell, which "flared his neck," and filed for workers' compensation benefits. In 1993 he injured his neck in a motor vehicle accident which "flared his neck." (Minutes of Hearing and Summary of Evidence, p. 5:3-5-23; 7:18-23.)

His carpal tunnel problems started after his neck injury in 1993. A year and a half after this neck injury, he began to experience pain and numbing in his wrists. He had wrist surgery. He filed a workers' compensation claim and received benefits. At the time of his industrial injury, he had returned to work with carpal tunnel problems. (Minutes of Hearing and Summary of Evidence, p. 4:25-5:2; 8:9-22.)

C. Labor Code § 4663 Apportionment Is Irrelevant

The applicant makes the erroneous and misleading argument that he could not be charged with knowledge of his own injuries for purposes of SIBTF claims until after the enactment of section 4663 of the Labor Code, pursuant to SB 899. The applicant's argument is clearly wrong. The thresholds for SIBTF benefits have existed for many, many years before the passage of SB 899. The applicant has always been required to allege and prove the requirements set forth in Labor Code § 4751. The enactment of Labor Code § 4663, requiring

apportionment to causation. did not affect SIBTF claim thresholds, the manner in which such claims are made, or the limitations period applicable such claims. SB 899 did not expand or otherwise alter SIBTF liability. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604.) The applicant's complaint that doctors had made an apportionment with respect to the pre-existing injuries is also irrelevant. The industrial injury was to the lower back and pre-existing injuries affected different body parts. The applicant knew of his injuries and knew or should have known of the legal consequences thereof with respect to the SIBTF.

Further, the applicant's apparent argument that the limitations period is tolled until a physician's report "acknowledging" the pre-existing disabilities is obtained is incorrect. This argument may be analogized to the application of the "discovery rule" in civil cases.

Under the "discovery rule," the statute of limitations begins to run when a plaintiff suspects or should suspect that his injury was caused by wrongdoing, that someone has done something wrong to him. The limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. A plaintiff need not be aware of the specific "facts" necessary to establish the claim; that is a process contemplated by pretrial discovery. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103,1110-1111, [245 Cal.Rptr. 658, 751 P.2d 923].) When a plaintiff has information which would put a reasonable person on inquiry, when a plaintiff's reasonably founded suspicions have been aroused and the plaintiff has become alerted to the necessity for investigation and pursuit of her remedies, the one-year period commences. Possession of "presumptive" as well as "actual" knowledge will commence the running of the statute. (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93,101-102 [132 Cal.Rptr. 657, 553 P.2d 1129]; accord *Jolly v. Eli Lilly & Co.*, supra, 4 Cal.3d at pp. 1110-1111 [245 Cal.Rptr. 658, 751 P.2d 923]; *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896-897 [218 Cal.Rptr. 313, 705 P.2d 886].) Once the plaintiff has a suspicion of the claim, and therefore an incentive to sue, he must decide whether to file suit or sit on his rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; he cannot wait for the facts to find him. (*Jolly v. Eli Lilly & Co.*, supra, 44 Cal.3d at pp. 1110-

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1111.)

This is similar to the standard applied in SIBTF cases. Once on notice of a substantial likelihood of a claim, he may not sit on his rights indefinitely. A SIBTF claimant cannot wait for the facts to find him. The factual determination of whether the applicant had such requisite knowledge is not dependent on knowledge of specific facts, such as a particular rating meeting the SIBTF thresholds. (See, e.g., *Subsequent Injuries Fund v. Workmen's Comp. App. Bd. (Pullum)* (1970) 2 Cal.3d 78.)

The applicant here apparently claims that it was only upon receipt of the report from Dr. Lipton that "he reasonably knew of a substantial likelihood of recovery against the SIF [sic]." (Petition, p. 4:16-18 (emphasis in original).) The applicant misstates the standard. As correctly stated by Judge Nishite, the standard is whether the applicant "knew or could have been reasonably deemed to have known that there was a substantial likelihood that he would become entitled to subsequent injuries benefits within five years of his injury." The evidence is clear that the applicant had sufficient knowledge of his disabling conditions to put him on notice of the substantial likelihood that he had a SIBTF claim long before the expiration of the five-year limitations period. He knew of his pre-existing disabilities and did not need Dr. Lipton's report in order to know of the substantial likelihood of his claim.

IV.

CONCLUSION

For the reasons set forth above, the SIBTF respectfully requests that the Workers' Compensation Appeals Board deny the petition for reconsideration.

Respectfully submitted,

DATED: October 18, 2005

Michael R. Drayton, Counsel for Director of Industrial Relations as Administrator of the Subsequent Injuries Benefits Trust Fund

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PROOF OF SERVICE

(Code Civ. Proc. §§ 1013a, 2015.5)

Case Name: **Jim Grob v. Michael & Company, Intercare Insurance Services; Subsequent Injuries Benefits Trust Fund**

WCAB Case No. OAK 0273127

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 2424 Arden Way, Suite 130, Sacramento, California 95825.

On October 18, 2005, I served the **Answer to Petition for Reconsideration** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Sacramento, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

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(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)	PARTY REPRESENTED
B	Workers' Compensation Appeals Board 2424 Arden Way, Suite 230 Sacramento, CA 95825	
A	Thomas Brown, Esq. 610 Auburn Ravine Road, Suite D Auburn, CA 95603 Fax # 530.823.0851	Applicant's Attorney
A	Michael & Company 351 Lincoln Avenue San Jose, CA 95126	Employer
A	Intercare Insurance Services Workers' Compensation Claims Mgr. P.O. Box 1018 Sacramento, CA 95812-1018	Insurer
A	Grancell, Lebovitz, Stander, et al. 6840 Via Del Oro, Suite 290 San Jose, CA 95119	Attorney for Insurer
A	Raymond Wright 20980 Redwood Road, Suite 260 Castro Valley, CA 94546	Lien Claimant

Executed on October 18, 2005, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Julia Carver

Julia Carver

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Law Offices of
THOMAS B. BROWN
610 Auburn Ravine Road, Suite D
Auburn, California 95603
(530)823-9758 • Fax (530)823-0851

Attorney for Applicant

BEFORE THE WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JIM GROB, Applicant, vs. MICHAEL & COMPANY, INTERCARE INSURANCE SERVICES, and SUBSEQUENT INJURIES FUND Defendants.	CASE NO.: OAK 0273127 **PETITION FOR RECONSIDERATION**

Applicant petitions for reconsideration on these grounds:

1. The judge's finding of knowledge sufficient to trigger application of the ruling of SIF vs. WCAB and Helen L. Talcott, (1970) 35 CCC 80, 87 is erroneous.

2. The Appeals Board acted without or in excess of its powers.

3. The evidence does not justify the findings of fact.

4. The findings of fact do not support the order, decision or award.

STATEMENT OF FACTS

The applicant, Jim Grob, sustained an admitted industrial injury to his back on February 10, 1999. An Application for Adjudication of Claim was filed on April 25, 2001, on January 31, 2002 the Application for Adjudication of Claim was amended to include psychiatric injury as

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a compensable consequence.

Medical records document that prior to February 10, 1999 Mr. Grob suffered from industrial and nonindustrial conditions involving the feet, neck and hands. The defendants obtained psychiatric evaluations in March of 2002 and February of 2003 (Joint Ex. WW) from Dr. Miles L. Weber indicating the presence of a 7% psychiatric impairment. The applicant obtained a psychiatric report from QME Diane H. Wolfe, M.D. that indicated no permanent psychiatric industrial or nonindustrial disability was present. Applicant's treating physician, Parvez Fatteh issued a permanent and stationary report on July 14, 2003 indicating that Mr. Grob suffered a limitation to sedentary work two to four hours a day. Dr. Fatteh doubted that Mr. Grob would be returning to gainful employment at all and also indicated in the apportionment paragraph on page 5 of Ex. UU, that apportionment was not indicated. The defendant's evaluator, David Atkin issued two reports, one in December of 2002 and one in April of 2003 (Joint Ex. TT). In these reports he indicated that the applicant was limited to light work and based on the fact of the prior cervical disk surgery, apportionment of a preclusion from very heavy work was indicated.

Applicant was awarded Social Security benefits on August 31, 2001 retroactive to his date of injury (2/10/99) and continuing. As discussed in the various medical reports at that particular time the applicant had recently undergone a fusion of L-4 to the sacrum with a poor result and was headed for a second fusion surgery in August of 2001. He was receiving TTD at that time. He became P&S in 2003.

To summarize the state of the record on February 10, 2004, five years from the date of the industrial injury, the applicant's evidence

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was that he was limited to two to four hours of part-time work on a sedentary level and that there was no apportionment to any prior disability. His psychiatric evaluation indicated no psychiatric disability. This would be equivalent to an 85% to 100% disability. On defendant's record he would receive a light work restriction and a 7% psychiatric disability with apportionment of no very heavy work to a prior cervical problem. This would be equivalent to 58% disability.

Labor Code Section 4663 was enacted on 4/19/04. The law of apportionment and applicant's burden of proof changed dramatically. Applicant and Michael and Company therefore agreed to go to Marvin Lipton, M.D. as an AME which was accomplished on December 16, 2004 (Applicant's Ex. 1). Dr. Lipton concluded that applicant had a limitation to very light work from the industrial injury and that combined with the carpal tunnel, plantar fasciitis and prior neck surgery rendered him limited to a sheltered workshop employment environment, equivalent to total disability at 100%. That report was mailed to the applicant on December 28, 2004. On January 10, 2005 the applicant mailed an Application for Subsequent Injuries and Benefits to the Oakland office of the WCAB for filing. On April 11, 2005, after the case had been transferred to the Sacramento WCAB, Stipulations with Request for Award for 62% disability based on a combination of Dr. Lipton's and Dr. Weber's opinions was approved by WCJ Esther Volkan and trial of the Subsequent Injuries Benefits Trust Fund issues took place on 5/23/05. Pre and post-trial briefs were submitted. The decision that applicant's SIBTF claim is time barred is based on the fact that applicant received a Social Security Disability award in August 2001 and that his treating physician told

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him he'd probably not only be able to return to gainful employment two to four hours a day.

ISSUES PRESENTED

Does the holding in SIF vs. WCAB and Helen L. Talcott, (1970) 35 CCC 80, 87, as applied to the facts of this case, bar applicant's claim against the Subsequent Injuries Fund?

1. **Applicant's claim for SIF benefits was filed within the time allowed by Talcott.**

The holding in Talcott is as follows:

> Therefore, we hold that where, prior to the expiration of five years from the date of injury, an applicant does not know and could not reasonably be deemed to know that there will be substantial likelihood he will become entitled to subsequent injuries benefits, his application against the Fund will not be barred - even if he has applied for normal benefits against his employer - if he files a proceeding against the Fund within a reasonable time after he learns from the Board's findings on the issue of permanent disability that the Fund has probable liability.

The applicant contends that the only time he reasonably knew of a substantial likelihood of recovery against the SIF was after he received the AME report on December 2004. Because the applicant filed his claim within a couple of weeks of the AME's opinion in this case he feels that his petition for SIF benefits was timely.

2. **Neither the Social Security opinion nor any of the reports generated prior to the five year anniversary of Mr. Grob's injury indicate a reasonable probability/likelihood of entitlement to Subsequent Injuries Fund benefits.**

The Social Security Administration's findings are obviously not binding on workers compensation proceedings. They are generally periodically reviewed to see if the injured worker is still disabled

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and while a finding by the Social Security Administration is interesting, because at Mr. Grob's age he would have had to be limited to less than sedentary work to receive Social Security benefits, he was temporarily totally disabled at the time he received the Social Security Disability award. His P&S date was March 3, 2003. It will also be noted that Exhibit XX, the Social Security decision regarding disability, is based only on the lumbar spine disability without reference to any other disabling conditions such as the cervical spine, carpal tunnel problems and foot disabilities that were ultimately acknowledged by the AME Marvin Lipton in December of 2004. On its face the Social Security decision awarding him benefits at a time when he was temporarily totally disabled and failing to take into account of other pre-existing disability would not qualify the applicant for either a permanent disability award or Subsequent Injuries Fund benefits.

Turning to the medical reports in existence on February 10, 2004, the applicant would not qualify for SIF benefits on his own medical record because there was no indication of any pre-existing disability to the cervical spine, hands and feet. On defendant's medical evidence, he did not meet the 70% threshold and would thus also not qualify. Remember at that time, in late 2003 and early in 2004, the defendants had the burden of proof on apportionment. Until SB899 came along the applicant's evidence was reasonably good on the issue of permanent disability. It was possible at that time that he would win his case based on Dr. Fatteh's reports and that there would be no apportionment. It was also possible that the defendants would win based on Dr. Atkins opinion, and he'd get 58% permanent disability.

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Neither scenario made it substantially likely that he had an SIBTF case.

The cases that discuss the requisite knowledge of a likelihood of obtaining SIF benefits are interesting. In Shields vs. WCAB (1977) 42 CCC 77, (two years after his industrial injury) the applicant was awarded 41:2% cardiac disability, after apportionment, but then he waited until more than five years to file an Application for SIF benefits. In denying Applicant's writ the Court of Appeals pointed out that Mr. Shields should reasonably have known of the substantial probability that he would be entitled to SIF benefits. Reading between the lines and because he didn't reopen his case for normal benefits, it appears that Shields' overall rating was over 70% before apportionment for pre-existing hernia, heart, back and lung conditions. There really aren't sufficient facts to understand just exactly what he knew or should have known.

In Nowell vs. WCAB and SIF (1980) 45 CCC 350, there were two injuries, the first to the back in 1971 with an award of 50% disability. The second injury occurred in 1973 and another award issued for 50% disability in May of 1977. The SIF claim wasn't filed until 1979 and the court held that "Nowell should have known, because of that [second] award that there was a substantial likelihood he was entitled to SIF benefits," and yet he waited two more years to file. The meaning of this decision is fairly clear but the facts are distinguishable from our case.

A companion case to Talcott, SIF vs. WCAB and Archie Woodburn (1970) 35 CCC 98, involved an industrial injury in approximately 1958 and a finding in 1966 attributing 65% of respondent's disability to

his tuberculosis and 35% of his disability [apparently a total of 100%] to pre-existing emphysema. The SIF claim wasn't filed until January 1967, more than a year after the Findings and Award and nine years after the date of injury. The applicant contended that Labor Code Section 5405 applied giving him one year from the last day benefits were provided by the employer (1966) to file his claim. The Supreme Court remanded the case to the WCAB for a factual determination of both knowledge of a substantial likelihood of entitlement before the award and unreasonable delay after receiving the Findings and Award. Again we have neither the outcome, the medical evidence available before the award nor the WCAB's analysis on remand, to clearly understand the facts and compare them to our case.

In another companion case to Talcott, SIF vs. WCAB and Wayne E. Pullum (1970) 35 CCC 96, the permanent disability award against the employer was made more than five years after the date of injury and the SIF claim was filed two months after the PD award. The Court indicated that the one unresolved issue on remand was whether the respondent knew or should reasonably should have known prior to the expiration of the five year period set forth in Section 5410 whether there was a substantial likelihood he would have a claim for Subsequent Injuries benefits. It is again unknown either the underlying facts or the final outcome of Pullum was.

The only other opinion found that discusses knowledge within the five year period as the issue was Jenkins vs. WCAB and SIF (1985) 50 CCC 593, a writ denied case. The facts are a little bit sketchy but at page 594 the court indicated that:

> The Board noted that numerous medical reports, dating as far back as 1973, indicated that Jenkins had considerable

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physical disabilities from several work injury claims and that Jenkins had received considerable compensation benefits in the past.

In all these cases we know only that the issue was raised by the facts.

Certainly in this case the medical reports are not quite as clear as they appear to have been in the Jenkins case. There is no comprehensive discussion of pre-existing disabilities, other injuries, etc. until Dr. Lipton's report comes along in December 2004. None of the applicant's reports discussed the prior injuries and while the defense reports did applicant wouldn't qualify for SIF benefits on those reports.

CONCLUSION

The Talcott decision does not use the term might be entitled to SIF benefits, the court used the term "substantial likelihood." Applicant likens that requirement to one of reasonable probability, or more likely than not. At any rate the best the evidence told him was that it was possible he had an SIF case. He did not have the burden of proving causation and thereby opening the door for broader apportionment until SB899 was enacted. Until the AME was given that job in December of 2004 it was not reasonably probable that he was going to be entitled to SIF benefits triggering his responsibility to file a claim. Franklin vs. WCAB (1978) 79 Cal App 3d 224, 250, 145 Cal Rptr 22, 43 Cal Comp Cases 310.

DATED: October 3, 2005

Respectfully submitted,

THOMAS B. BROWN
Attorney at Law

VERIFICATION

I am the attorney for applicant in the above-entitled action. I have read the foregoing Petition for Reconsideration and know the contents thereof; and I certify that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

Executed on October 3, 2005, at Auburn, California.

I declare under penalty of perjury that the foregoing is true and correct.

THOMAS B. BROWN

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA

JIM GROB,

Applicant,

v.

MICHAEL AND COMPANY; CIGA by its servicing facility INTERCARE INSURANCE for HIH INSURANCE, in liquidation, and the SUBSEQUENT INJURIES BENEFITS TRUST FUND,

Defendants.

Case No. OAK 273127

FINDINGS OF FACT

The above-entitled matter having been heard and regularly submitted, the Honorable RICHARD S. NISHITE, Workers' Compensation Administrative Law Judge, now makes his decision as follows:

FINDINGS OF FACT

1. The following stipulations in the Minutes of Hearings dated June 21, 2005, are incorporated as Findings of Fact herein:

   a. Jim Grob, born June 13, 1960, while employed on February 10, 1999, as an auto mechanic, occupational group number 370(g), sustained injury arising out of and in the course of employment to his low back, and claims to have sustained injury arising out of and in the course of employment to his psyche.

   b. At the time of injury, the employer's workers' compensation carrier was HIH Insurance, now in liquidation, now CIGA, by and through its servicing facility Intercare Insurance.

   c. At the time of injury, the employee's earnings were $898.98 per week, warranting indemnity rates of $490.00 or $593.33 for

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temporary disability and maximum amounts per the Labor Code for permanent disability.

d. The employer has furnished all medical treatment.

e. The primary treating physician is Dr. Shin.

2. The applicant knew or could have been reasonably deemed to have known that there was a substantial likelihood that he would become entitled to subsequent injuries benefits within five years of his injury and therefore his claim against the Subsequent Injuries Benefits Trust Fund is barred.

DATED: SEP - 9 2005

RICHARD S. NISHITE
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on parties listed on official address record on above date by A. Ong

OPINION ON DECISION

The threshold issue in this matter is whether the applicant knew or had reason to know that he could have been entitled to benefits pursuant to the Subsequent Injuries Benefits Trust Fund (SIBTF) within five years of the date of injury.

There are no statutes of limitations applicable specifically to proceedings against the SIBTF. The California Supreme Court, however, has addressed the issue in a series of cases, the holdings of which are summarized as follows:

> "When an injured employee within five years of the date of the injury does not know or cannot reasonably be deemed to know that there is a substantial likelihood that he or she will become eligible for subsequent injuries fund benefits, a claim against the Subsequent Injuries Benefits Trust Fund is not barred if filed within a reasonable time after the employee has the requisite knowledge concerning the Fund's liability. (*Subsequent Injuries Fund v. Workers' Comp. Appeals Board (Talcott)* (1970) 35 Cal. Comp. Cases 80, and companion cases *Subsequent Injuries Trust Fund v. Workers' Comp. Appeals Board (Baca)* (1970) 35 Cal. Comp. Cases 94; *Subsequent Injuries Fund v. Workers' Comp. Appeals Board (Pullum)* (1970) 35 Cal. Comp. Cases 96; *Subsequent Injuries Fund v. Workers' Comp. Appeals Board (Woodburn)* (1970) 35 Cal. Comp. Cases 98.) A claim against the Fund is barred if filed after the expiration of five years from the date of injury when the injured employee, prior to expiration of the five-year period, does know or can be reasonably deemed to know that there is a substantial likelihood that he or she will become entitled to subsequent injuries benefits. (*Baca*, 35 Cal. Comp. Cases 94; *Jenkins v. Workers' Compensation Appeals Board* (1985) 50 Cal. Comp. Cases 593 (writ denied). . . ."
>
> (2-24 CA Law of Employee Injuries & Workers' Comp § 24.03)

The applicant's testimony and the exhibits entered into this record were carefully reviewed. In particular, his proceedings before the Social Security Administration (SSA) initiated sometime in February 2000 for disability insurance benefits is evidence that supports the finding that he had knowledge or could be reasonably deemed to have known of a substantial likelihood of entitlement to SIBTF benefits. His Social Security claim was originally denied; however, the applicant pursued his appeal rights through reconsideration and then through a request for hearing. He was represented at the hearing by legal counsel. In a decision that issued on August 13, 2001, the SSA Administrative Law Judge concluded that the applicant was "unable to perform any jobs existing in significant numbers in the national economy." (Joint Exhibit XX, p. 1.) The SSA decision includes a detailed analysis of the medical and vocational rehabilitation evidence and gave the applicant a clear picture of his disability and vocational rehabilitation prospects. The ALJ even discusses the evidence that indicated a lesser disability and he explained why he did not place great weight on these opinions. (See, e.g., Joint Exhibit XX, p. 6, paragraphs 3 and 4.) While the Workers' Compensation Appeals Board and the Social Security Administration operate under significantly different laws and regulations,

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the judge's findings in the Social Security matter provided the requisite knowledge that the applicant might be eligible for SIBTF benefits. Moreover, the applicant was represented by legal counsel at the SSA hearing and presumably, his attorney would have explained the proceedings and decision following the hearing to him.

On cross-examination, the applicant was questioned about the medical reports authored by Parvez Fatteh, M.D., the applicant's former treating physician. In his July 14, 2003 Permanent and Stationary Report, Dr. Fatteh was of the opinion that the applicant "will only be able to work 2-4 hours per day. But, with frequent flare-ups of pain and dysfunction from day to day, it is doubtful that Mr. Grob will be able to regain gainful employment [in] the open labor market at all." (Joint Exhibit UU, July 14, 2003 Medical Report, p. 5.) The applicant testified at trial that he read Dr. Fatteh's report in July 2003 and did not feel his conclusions were in error. (Summary of the Evidence, p. 11, ln. 23 – p. 12, ln. 1.)

Based on the evidence discussed above, the undersigned found that the applicant prior to the expiration of the five-year period knew or could have been reasonably deemed to have known that there was a substantial likelihood that he would become entitled to SIBTF benefits. Having made this finding, the other issues identified in the Minutes of Hearing need not be addressed.

RICHARD S. NISHITE
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

RSN:ao

STATE OF CALIFORNIA
Workers' Compensation Appeals Board

SUSAN K. MOYERS, *Applicant,* v. SUBSEQUENT INJURIES BENEFIT TRUST FUND of the State of California, *et al.*, *Defendants.*	**EAMS Case No. ADJ - 3374876** **Legacy Case No. SJO - 0268303** **Order Concerning Medical-Legal Discovery in Subsequent Injuries Benefit Trust Fund Claim**

The parties have tendered the issue whether the provisions of Labor Code §§4061 *et seq.* are mandatory for obtaining medical-legal reports in claims for Subsequent Injuries Benefit Trust Fund (SIBTF) benefits. SIBTF claims these provisions are mandatory and reports obtained outside their scope are neither admissible into evidence nor reimbursable by SIBTF. Applicant claims these provisions do not apply to her SIBTF claim, and that instead she may obtain appropriate medical-legal reports from physicians of her choosing, which would be admissible into evidence and reimbursable by SIBTF assuming they are otherwise legally appropriate QME reports.[1]

The medical-legal evaluations at issue in an SIBTF case such as this one concern the Applicant's level of permanent disability. In the case in chief a permanent disability issue is evaluated by the primary treating physician pursuant to Labor Code §4061.5, and if a party disagrees with the PTP's opinion, also by an AME or QME under Labor Code §4061. Is it logical to interpret section 4061.5 to require the PTP also to evaluate any SIBTF disability, or to read section 4061 to apply to the SIBTF issues? I do not think either such interpretation is logical, or in many cases even workable.

[1] SIBTF does not seek to avoid paying for Applicant's QME reports altogether; it simply seeks to limit its liability for reimbursement to reports obtained pursuant to Labor Code §§4061 *et seq.* It has long been California law that SIBTF is liable to pay for Applicant's medical-legal reports reasonably and necessarily obtained to prove a claim for SIBTF benefits, *Subsequent Injuries Fund v. IAC (Roberson)*, 59 Cal.2d 842, 382 P.2d 597, 31 Cal.Rptr. 477, 28 C.C.C. 139 (1963); even if the SIBTF claim ultimately fails, *Subsequent Injuries Fund v. IAC (Vigil)*, 27 C.C.C. 65 (1942). While these cases were decided under former Labor Code §4600, I find no legislative or regulatory intent to deny this reimbursement by SIBTF (long established by Supreme Court precedent) under the medical-legal statutes now in effect. Furthermore, the Court of Appeal and the Board have recently awarded reimbursement by SIBTF as a cost under Labor Code §5811 for analogous vocational reports or testimony to establish the extent of disability in SIBTF claims. *Barr v. WCAB*, 64 Cal.App.4th 173, 78 Cal.Rptr.3d 732, 73 C.C.C. 763 (2008); *Rea v. WCAB (Rasmussen)*, 72 C.C.C. 1036 (2007); *Rea v. WCAB (Dias)*, 72 C.C.C. 705 (2007).

I take judicial notice that SIBTF cases usually involve multiple body parts or systems that require evaluations by multiple medical specialists. For example, the underlying ("subsequent") injury in this case involves disability in Applicant's upper extremities and shoulders, knees and back. The parties in the case in chief used an orthopedic surgeon, Mark A. Anderson, M.D., as their Agreed Medical Examiner to evaluate these disabilities. In contrast, the SIBTF petition alleges far more extensive disability in multiple body parts in addition to orthopedic disability: asthma, ENT (dizziness and ear pain), allergy, dermatological, psychiatric, gynecological, vascular headache, gastro-intestinal, sleep apnea, hypertension, herpes simplex, and multiple rheumatological problems. The SIBTF disabilities extend far beyond the scope and expertise of an orthopedic surgeon, whether he or she be an AME or a primary treating physician. It would be both unreasonable and unrealistic to interpret §4061.5 to require a PTP whose is treating orthopedic problems to prepare a comprehensive report (with or without seeking input from perhaps eight additional specialists) that addressed overall disability of the scope pleaded in this case And it would be similarly unreasonable and unrealistic to interpret §4061 to expect an AME or panel QME in the typical work injury case also to undertake the far more complex evaluation process that is typical in SIBTF cases.

In addition, the plain words of Labor Code §4061 (and 4060 and 4062) refer to disputes between the employer and employee, not to disputes between SIBTF and the employee. Section 4061 contains triggering events and time lines for notices by the employer to the employee, with resort to the AME/QME process between them if necessary. In most cases (as in the instant case), these notices, processes and AME or QME evaluations have occurred long before the employee claimed SIBTF benefits and joined the Fund.

SIBTF's brief begins with an *ipse dixit* that all medical-legal discovery in workers' compensation cases, including petitions for SIBTF benefits, is governed by §4062.2 because (it asserts) there is no other statutory authority for obtaining such discovery in such cases. But §4062.2 does not stand alone – it is within the AME/QME statutory provisions and is directly tied to resolving disputes under §§4060, 4061 or 4062. And §4061(i) by its terms applies only to an evaluation of permanent impairment "resulting from the injury", which is not the primary purpose of an SIBTF evaluation.[2] The AME/QME statutes must be read as a whole.

Furthermore, SIBTF later cites a medical-legal discovery statute outside the AME/QME process and that applies directly and exclusively to it. Labor Code §4753.5 provides for medical-legal reporting on behalf of SIBTF. It was amended in 2003 (when the AME/QME statutes were already effective) to provide that SIBTF reports were payable at not more than the fees for corresponding services in the case in chief, but neither in that statute nor elsewhere was the AME/QME process itself adopted for SIBTF evaluations.

SIBTF argues that if the AME/QME process does not apply in an SIBTF case, Applicant has no statutory authority to conduct *any* medical-legal discovery to prove her

[2] "With the exception of an evaluation or evaluations prepared by the treating physician or physicians, no **evaluation of permanent impairment** and limitations **resulting from the injury** shall be obtained, except in accordance with Section 4062.1 or 4062.2. Evaluations obtained in violation of this prohibition shall not be admissible in any proceeding before the appeals board (emphasis added)."

SIBTF claim Applicant does not require any statutory authority to obtain competent evidence to prove her case. Since Applicant has the burden of proving his right to SIBTF benefits and can only do so with appropriate medical evidence, she is entitled to obtain and offer that evidence in her case.

SIBTF refers to AD Rule 1(j), which includes in its definition of "claims administrator" the Department as administrator of SIBTF. But SIBTF fails to note that AD Rule 1(r) omits SIBTF as a defined "employer", despite the fact that §1(r) *includes* the UEBTF in the definition of "employer."[3] And as previously explained, the AME/QME statutes (Article 2 of Chapter 7 of Division 4 of the Labor Code, §§4060-4068) contemplate resolution of disputes between the employer and the employee, not between SIBTF and the employee.

SIBTF has not claimed in this case that Applicant and SIBTF should initiate the AME/QME process from the beginning. Instead, SIBTF argues that because Applicant already used that process in the case in chief and selected an AME with the employer, the only medical-legal report compensable or admissible to resolve the SIBTF dispute must be prepared by or through that AME. Here, SIBTF invokes Labor Code §4067, paragraph 2.[4] But that paragraph only applies "When an agreed medical evaluator ... has previously made a formal medical evaluation *of the same or similar issues* ... or the prior evaluator is no longer qualified or readily available to prepare a formal medical evaluation ...." In my view, an evaluation of the multiple and complex SIBTF disability is not "the same or [a] similar issue" for the reasons I discussed earlier, nor is the ordinary AME in a limited field "qualified or readily available to prepare a formal medical evaluation" of such issues. And also as previously discussed, §4067 is part of the AME/QME statutory framework that contemplates resolving issues between the employer and employee, not between SIBTF and the employee.[5]

I must also doubt that the Legislature or the Administrative Director intended SIBTF to be irrevocably bound to the AME or panel QME in the case in chief to evaluate its liability, despite the fact that SIBTF had no part in selecting the AME or in choosing the QME from the panel. Although SIBTF apparently approves of the AME in the current case, it is making the argument that the prior medical-legal evaluator would bind it in all cases. Both due process and case law suggest, on the contrary, that SIBTF would not be so bound. In fact, *Subsequent Injuries Fund v. WCAB (Royster)*, 40 Cal.App.3d 403, 115 Cal Rptr. 204, 39 C.C.C. 507 (1974) held that for purposes of SIBTF liability, the Fund was not even bound by the prior *adjudication* of Applicant's disability from the subsequent (latest) injury, but instead could relitigate that issue in the SIBTF proceedings. SIBTF's right to relitigate that issue would have little practical meaning if it were bound by the prior medical reporting in the case in chief.

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[3] SIBTF cites no authority whatever for its claim that "The AD in promulgating these regulations foresaw the potential for certain litigants to attempt to escape the procedures mandated by the Legislature."

[4] The first paragraph of §4067 applies to proceedings under Labor Code §5803 to reopen the case in chief due to a change in the underlying disability in that case. There is no such proceeding here

[5] It is also reasonable to interpret §4067 to apply to similar issues *between the same parties in the underlying case*, because they have already conducted a shared process to select the AME and the AME has already addressed substantially similar issues. That is not the case with the SIBTF

Pre-Trial

2 of 3 (2.1)

Given these considerations, IT IS ORDERED THAT Applicant may obtain appropriate and relevant medical-legal evaluations in her SIBTF case without returning to her AME in the case in chief and otherwise without using the AME/QME process to select her medical-legal experts, and that SIBTF is responsible to pay the reasonable cost of these evaluations as otherwise provided by law.

HOWARD M. LEVIN
WORKERS' COMPENSATION JUDGE

Filed and Served by mail on 9/1/09
By: Emma Sanchez

On parties listed below at their addresses as shown on the current Official Address Record

Ms. Susan K. Moyers
James A. McDonald, Att'y
Arthur L. Johnson, Jr., Att'y (Butts & Johnson)
Subsequent Injuries Benefit Trust Fund
Carol Belcher, Counsel (Office of the Director, Legal Unit)
Employment Development Department
State Compensation Insurance Fund (Claims)
Ryan Artola, Att'y (SCIF – Legal)
Council on Aging

2-4

May 20, 1957

STATE OF CALIFORNIA, SUBSEQUENT INJURIES FUND, Petitioner v. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, MARGOT N. MONTEVERDE, by her guardian ad litem and trustee, Henrietta G. Monteverde, CALIFORNIA HIGHWAY PATROL, DIVISION OF ENFORCEMENT, and STATE COMPENSATION INSURANCE FUND, Respondents.

Comm. No. S.F. 152-572—Ernest F. Monteverde, employee

Civil No. 17418—First District Court of Appeal, Division Two

STATUTORY CONSTRUCTION—The provisions of Labor Code section 4700 providing for payment to dependents of compensation accrued and unpaid at the time of death of an injured employee permit an award to a dependent child of the amount to which the employee would have been entitled at the time of death, although the award is not made until after death; enactment of the Labor Code section in language identical with a provision of the workmen's compensation act which had been so construed indicated legislative acquiescence in the construction.

SUBSEQUENT INJURIES FUND—Where the commission found that an injured employee had suffered an industrial injury which, when combined with a preexisting disability, amounted to a total disability in excess of 70%, an award made against the Fund after the death of the employee in favor of a dependent minor child for the balance of total disability over and above the amount attributable to the industrial injury, cannot be sustained; the provisions of Labor Code section 4700 have no application to the Fund and if any right to payments from the Fund was vested in the employee at the date of death they could only be collected by the executor or administrator of the estate.

Petition for writ of *certiorari* to review an award of the Industrial Accident Commission, Referee R. O. Purvis, granting accrued benefits from the Subsequent Injuries Fund and the employer to the dependent minor child of a deceased employee. Award as to Subsequent Injuries Fund *annulled.*

For petitioner—Edmund G. Brown, Attorney General, Gerald F. Carreras, Deputy.

For respondents—Everett A. Corten, Daniel C. Murphy

The Industrial Accident Commission found that the decedent Monteverde, an employee of the State of California, had suffered an industrial injury which added to a preexisting disability, amounted to a total disability in excess of 70 percent. It made an award to decedent's minor child, as his sole dependent, against the employer, State of California, for the proportion of such disability accruing before his death, attributable to the injury incurred in the decedent's employment, and an award for the balance of the total disability against the Subsequent Injuries Fund. It is the latter award which is attacked in this proceeding.

The award was made in reliance upon Labor Code, section 4700, which reads:

"The death of an injured employee does not affect the liability of the employer under Articles 2 and 3 of this chapter so far as such liability has accrued and become payable at the date of death. Any accrued and unpaid compensation shall be paid to the dependents, or, if there are no dependents, to the personal representatives of the deceased employee or heirs or other persons entitled thereto, without administration, but such death terminates the disability."

We may summarily dispose of petitioner's argument that the "liability had not accrued and become payable" at the time of decedent's death, within the meaning of this statute, because no award had been made fixing the amount of decedent's disability prior to decedent's death. This question was decided in the construction of section 9(b)(3) of the then existing Workmen's Compensation Act (Stats. 1925, p. 643) in *Fogarty* v. *Depart. of Indus. Relations,* 206 Cal. 102 [273 Pac. 791, 15 I.A.C. 182]. That provision gave the identical right to dependents of a deceased employee and used the identical language, "so far as such liability has accrued and become payable at the date of the death." In *Fogarty* the Supreme Court affirmed an award against the employer to a deceased employee's dependents for disability payments to which the employee would have been entitled up to the time of his death although no award had been made therefor prior to such death. The subsequent enactment of section 4700 in identical language indicates a legislative acquiescence in this judicial construction. (*Holmes* v. *McColgan,* 17 Cal. 2d 426, 430, [110 P. 2d 428]; *Summers* v. *Freeman,* 128 Cal. App. 2d 828, 832 [276 P. 2d 131].)

The more serious question is raised by petitioner's argument that section 4700 has no application to awards against the Subsequent Injuries Fund, but is limited by its terms to awards against employers. Section 4700 is found in Article 4 of Division 4, Part 2 of the Labor Code. It is limited by its terms to "the liability *of the employer under Articles 2 and* 3 of this chapter." Labor Code section 4751, which imposes the liability upon the Subsequent Injuries Fund, is found in the succeeding Article 5 of that Code and is limited by its terms to an award to the "employee." The Labor Code must be liberally construed to effect its beneficent purposes, and this rule extends to the construction of the provisions relating to the Subsequent Injuries Fund. (*Subsequent Etc. Fund* v. *Ind. Acc. Com.,* 39 Cal. 2d 83, 91 [244 P. 2d 889, 17 Cal. Comp. Cases 142].) But liberal construction does not justify writing into the statute a provision which is not to be found therein even by the most liberal reading of its terms. By the express terms of section 4700 it applies only to "the liability of the employer under Articles 2 and 3." The Subsequent Injuries Fund is neither an "employer" nor is the liability fixed on it found in either Article 2 or 3. The conclusion is inescapable that the provisions of section 4700 have no application to the Subsequent Injuries Fund.

Respondents suggest that the right to these payments was vested in the deceased employee at the time of his death independently of section 4700. We need not decide this question. If the liability of the Subsequent Injuries Fund to deceased employee was a debt which survived his death it would be an asset of his estate and, under hornbook principles, could only be recovered by the executor or administrator of his estate.

The award against Subsequent Injuries Fund is annulled.

Dooling, J.

We concur:

Kaufman, P. J.

Brazil, J. pro tem.

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA

STEPHEN WALTRIP (deceased)
THINH WALTRIP (widow),

Applicant,

vs.

WALTRIP & ASSOCIATES and SUBSEQUENT INJURIES BENEFIT TRUST FUND,

Defendants.

Case No. ADJ 233464
(SAC 0254147)

FINDINGS AND ORDERS

The above-entitled matter having been heard and regularly submitted, the Honorable THOMAS W. ANTHONY, Jr., Workers' Compensation Administrative Law Judge, now makes his decision as follows:

FINDINGS OF FACT

1. The following Findings of Fact are based on Stipulations of the parties entered into on February 4, 2009 and are as follows:

a. Stephen Waltrip, born December 5, 1938, while employed on October 3, 1996, by Waltrip & Associates sustained an injury arising out of and in the course of employment to his upper extremities and lower extremity.

b. At the time of the injury, the workers' compensation carrier was State Compensation Insurance Fund.

c. At the time of the injury the applicant's earnings were at maximum.

d. The carrier paid permanent disability based on 14% at $140.00 per week for a total amount of $6,470.00.

e. The employee has been adequately compensated for all periods of temporary disability by State Compensation Insurance Fund.

f. The carrier has furnished all medical treatment.

g. Stephen Waltrip had over 70% permanent disability and over 5% permanent disability to an opposite corresponding extremities.

2. Applicant became permanent and stationary on January 3, 1997.

3. Applicant's attorney is entitled to recover medical legal costs in the amount of $817.00.

4. Stephen Waltrip died October 15, 2005.

5. There was no award of benefits against the SIBTF as of October 15, 2005

6. Neither applicant's widow or his estate or heirs are entitled to payment from the Subsequent Benefit Trust Fund.

ORDER

A. Subsequent Injury Benefit Trust Fund shall reimburse applicant's counsel $817.00 for incurred medical/legal costs.

B. The applicant shall take nothing by way of the claim against the Subsequent Injuries Benefit Trust Fund.

DATED. 4/8/09

THOMAS W. ANTHONY, Jr.
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on parties
listed on official address record
on above date by
D. Harrison
D. Harrison

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OPINION ON DECISION

Stephen Waltrip, born December 5, 1938, while employed on October 3, 1996, by Waltrip & Associates sustained an injury arising out of and in the course of employment to his upper and lower extremities. At the time of the injury, the employer's workers' compensation carrier was State Compensation Insurance Fund, who, based on the applicant's maximum earnings, paid permanent disability for 14% disability at the rate of $140.00 per week for a total amount of $6,470.00.

The parties agreed that the deceased, Mr. Waltrip had over 70% permanent disability and over 5% permanent disability to opposite corresponding extremities. Mr. Waltrip (applicant) died on October 15, 2005 due to non small cell lung cancer. At the time he passed away, there was no award on his behalf against the Subsequent Injuries Benefit Trust Fund, (hereinafter SIBTF) Neither the widow nor the estate of Mr. Waltrip is entitled to be paid funds from the SIBTF. Labor Code Section 4700 that provides for the payment for the accrued or unpaid compensation at the time of death to the applicant's dependent or estate is not applicable to claims against the SIBTF. Sectiom 4700 clearly specifies that it applies to liability under Articles 2 and 3 of the workers' compensation law. The provisions regarding benefits from the SIBTF are in Article 4. The SIBTF is not an employer and the liability fixed on it is not found in either Articles 2 or 3.

The arguments made by applicant's counsel are compelling especially when he discusses the legislative intent for the creation of this fund. However, the statute is clear

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and had the legislature intended to include benefits under Article 4, they would have so specified in the statute. It is not up to the WCAB to legislate through judicial rulings.

Applicant's orthopedic conditions became permanent and stationary January 3, 1997. Based on a January 7, 2009 supplemental report from Dr. Andrew K. Burt.

Applicant's counsel is entitled to reimbursement for reasonable and necessary medical/legal expenses. Applicant's counsel is therefore entitled to reimbursement from the SIBTF for the $817.00 paid for medical/legal costs in this case.

THOMAS W. ANTHONY, Jr.
Workers' Compensation
Administrative Law Judge

TWA: dah

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STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

OFFICIAL ADDRESS RECORD

Case Number: ADJ233464

BLUE SHIELD OF CALIFORNIA	Lien Claimant - Medical Provider, C/O BOEHM & ASSOCIATES 1321 HARBOR BAY PKWY STE 250 ALAMEDA CA 94502
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STEPHEN WALTRIP	Injured Worker, 816 SMOKEY GROVE CT ROSEVILLE CA 95661
WALTRIP & ASSOC	Employer, 910 SUNRISE AVE STE A1 ROSEVILLE CA 95661
4/8/09	FINDINGS & ORDER served on all parties shown on official address record

LAW OFFICES OF EUGENE C. TREASTER
EUGENE C. TREASTER, ESQ.
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Telephone: (916) 444-2622

Attorney for Thinh Waltrip

BEFORE THE WORKERS' COMPENSATION APPEALS BOARD

IN AND FOR THE STATE OF CALIFORNIA

STEPHEN WALTRIP, (Dec'd)
THINH WALTRIP (Widow),

Applicant,

vs.

WALTRIP AND ASSOCIATES,
SUBSEQUENT INJURIES FUND,

Defendants.
_____/

EAMS No. ADJ 233464
WCAB No. SAC 254147
(DOI: 10/03/1996)

PETITION FOR RECONSIDERATION

CAVEAT

Thinh Waltrip (widow) is the real party in interest. She was not served with the decision from which she is aggrieved.

Also, the Subsequent Injuries Fund was not served with the decision (see Proof of Service of both the Minute of Hearing of 2/4/2009 and of the Findings and Orders of 4/08/2009).

THINH WALTRIP (WIDOW) AND SUBSEQUENT INJURIES FUND (ONLY)

Thinh Waltrip (widow) seeks reconsideration of the Order of April 8, 2009, on the following grounds:

1. By the order, the WCAB Trial Judge acted without or in excess of his powers.

2. The evidence does not justify the Findings of Fact that applicant's widow, or his estate or heirs are not entitled to benefits from the Subsequent Injuries Fund (Finding of Fact #6).

3. The Findings and Award (denial of benefits) and the Order (a take nothing) are unreasonable and contrary to the intent of the Subsequent Injuries Fund legislation.

4. The Findings and Order are contrary to the California Constitution which guarantees full protection under Workers' Compensation law to industrially injured workers and their dependents.

QUESTIONS TO BE DECIDED

Is the deceased injured worker entitled to accrued benefits payable to his widow?

See Minutes of Hearing of 02/04/2009 at p.3, ll. 7-8.

STEPHEN WALTRIP

Stephen Waltrip was a highly decorated wounded Vietnam veteran. He served 23 years in the United States military retiring as an E-8. He served his country in various locations (Iran, Iraq, the Balkans, Yugoslavia and Turkey as well as Vietnam). He suffered many combat wounds causing disability. He is buried in Arlington.

The parties agree that the threshold of Subsequent Injuries Fund benefits criterion was met from this accident (Paragraph 7 of the Stipulations on p.2 of the Summary of Evidence of 02/04/2009 set forths the agreement with the correction on p.8.

Stephen Waltrip's condition was permanent and stationary on 01/03/1997.

PURPOSE OF THE SUBSEQUENT INJURIES FUND

The purpose of the Subsequent Injuries Fund is set forth in the legislative history (see Exhibit 15, a binder concerning the legislative history). The Subsequent Injuries Fund legislation occurred following World War II (1945) specifically to assist in the employment of veterans so that employers would not be liable for pre-existing disabilities. In particular, pre-existing service connected disabilities (arms and legs off) posed a problem for potential employers of wounded veterans [after the end of war in Europe (1945)].

Workers' Compensation Judge Thomas W. Anthony, Jr. stated:

> "The arguments made by applicant's counsel are compelling especially when he discusses the legislative intent for the creation of the fund. However, the statute is clear and had the legislature intended to include benefits under Article 4, they would have so specified in the statute. It is not up to the WCAB to legislate through judicial rulings."

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OTHER JURISDICTIONS

The Subsequent Injuries Fund legislation in many states, is called the "Second Injury Fund" or "Pre-Existing Injury Fund."

In Michigan, for example, benefits accrued before death without a Findings and Award are payable on a limited basis to dependents.

In may be important to look to other states in line with the WCAB's comments in the Almarez and Guzman decisions. See 74 CCC 2 (advance) at pp. 201-247 (February 2009).

Legislation to assist injured soldiers (without specificity to veterans) was enacted following World War II across the nation.

CALIFORNIA CONSTITUTION

The California Constitution sets up the purpose of the Subsequent Injuries Fund (Article XIV - Labor Relations).

The constitution guarantees full protection to injured workers and their dependents.

The defendants and the WCAB rely upon Monteverde 22 CCC 118 (1957).

THERE HAVE BEEN *MATERIAL* CHANGES IN THE FUNDING OF SUBSEQUENT INJURIES FUND BENEFITS AFTER *MONTEVERDE*

The Subsequent Injuries Fund now receives funding from the employer.

There is a surcharge for Subsequent Injuries Fund benefits on workers' compensation policies (See Exhibit 10 for a sample billing showing SIF payment by an employer).

It is now clear that the Subsequent Injuries Fund benefits do not come from "non-dependent death awards" only.

The Subsequent Injuries Fund has substantial monies because they now charge the employer a premium. This has been substantial change from the 1957 law when Monteverde was decided.

The general fund of California is no longer responsible for the entire Subsequent Injuries Fund liability.

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The Subsequent Injuries Fund benefits, at least in part, are paid by:

1. A surcharge upon the workers' compensation policy of all employers; and

2. Payment from Non-Defendant Death Unit.

The funding will probably show there are substantial monies available for payment which, when not used on a year to year basis, go to the general fund. California makes money on the excess paid into the Subsequent Injury Fund yet, the benefit trust (Subsequent Injury Fund) does not pay dependents of deceased wounded veterans!

UNINTENDED CONSEQUENCES

The unintended consequences of the failure of the legislature (in 1945) to enact an "accrued benefits" provision into the Subsequent Injury Fund legislation means that wounded veterans who pass away before an award issues lose.

"Accrued normal benefits" were paid a few weeks before February 2009 in a heart case which occurred in September 1996. A "third party credit" satisfied the permanent disability in this case of 10/03/1996.

Simply stated, the Subsequent Injuries Fund involves social justice for injured veterans.

SUMMATION

1. There have been substantial changes in the funding of the Subsequent Injuries Fund after the Monteverde case.

2. The California Constitution must override the Monteverde case.

3. The "unintended consequences" of omission for accrued benefits in the Subsequent Injuries Fund legislation should not deny benefits to veterans who were disabled during combat in Korea, Vietnam, or, now, the Middle East.

Dated: April 17, 2009

Respectfully submitted,

LAW OFFICES OF EUGENE C. TREASTER

By: _____
EUGENE C. TREASTER
Attorney for Applicant

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VERIFICATION

I declare that:

I am the attorney in the above-entitled action; I have read the foregoing **Petition for Reconsideration** and know the contents thereof; the same is true of my knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct that this verification was executed on April 17, 2009 at Sacramento, California.

EUGENE C. TREASTER
Attorney for Applicant

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WORKERS' COMPENSATION APPEALS BOARD
OF THE
STATE OF CALIFORNIA

Case No. ADJ233464 (SAC 0254147)

Applicant: STEPHEN WALTRIP (Dec'd)
THINH WALTRIP (Widow)

Defendant: WALTRIP & ASSOCIATES,
SUBSEQUENT INJURY FUND

Workers' Compensation Administrative Law Judge:
THOMAS W. ANTHONY, Jr.

Date of Injury: 10/3/1996

REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION

I
INTRODUCTION

Applicant's counsel has filed a timely verified Petition for Reconsideration of the Findings and Orders that were served by mail on April 8, 2009. Petition was filed with the WCAB District Office in Sacramento on April 20, 2009. An answer has not been received by the Subsequent Injury Benefit Trust Fund. Since the Findings and Order was favorable to that fund it is anticipated that they would support the determination of the WCJ.

Applicant's counsel contends that the legislative intent of the statute that created the Subsequent Injury Benefit Trust Fund was to provide benefits to injured workers and their dependents, and as a result the dependent or estate would be entitled to receive the benefits that may have accrued at the time the injured worker passes away, even if there has not been an award against Subsequent Injury Benefit Trust Fund. He also includes that the Fund was created after World War II to encourage the hiring of wounded veterans. He also

raises the issue of whether the statute is constitutional, something that is beyond the purview of the WCAB to decide. The WCJ properly determined that Labor Code §4700 is not applicable to the Subsequent Injury Benefit Trust Fund.

II
FACTS

Deceased, Stephen Waltrip sustained an injury in October 1966 in the course of his employment. At that time he had a disability resulting from pre-existing injuries sustained in the course of a distinguished military career. The parties stipulated that Mr. Waltrip's disability met the criteria for entitlement to Subsequent Injury Benefit Trust Fund benefits and that he had become permanent and stationary January 3, 1997.

Mr. Waltrip passed away on October 15, 2005. At the time he passed away there had not been an award of benefits against the Subsequent Injury Benefits Trust Fund. The WCJ therefore determined that the applicant's widow or estate were not entitled to receive any benefits that may have accrued up to the time the applicant passed away since there had not been an award against the Subsequent Injury Benefit Trust Fund.

III
DISCUSSION

Labor Code §4700 provides that the payment for the accrued or unpaid compensation at the time of the death of an applicant is payable to the applicant's dependent or estate when there is liability under Articles 2 or 3 of the Workers' Compensation Law. However, the benefits available through the Subsequent Injury Benefit Trust Fund are not in either one of these articles but are in fact in Article 4. This

interpretation of potential liability of Subsequent Injury Benefit Trust Fund in the circumstances such as this was discussed in *Subsequent Injury Fund vs. Industrial Acts Commission* (Monteverde) (1957) 22 Cal Comp cases 118.

Applicant's counsel makes various public policy arguments why Labor Code§4700 should be interpreted different than the plain reading of the statute. The statute is not ambiguous and applicant's arguments go more to the public policy and the purpose of the legislation. Applicant's counsel notes that this legislation came about after World War II with an intent to encourage employers to hire wounded veterans. However, even in this light, the legislature did not seek that to make a special class of recipients, veterans, whose dependants or estates could receive benefits from the SIBTF absent a pre-existing award. Applicant's discussion regarding this and the current funding of the Subsequent Injury Benefit Trust Fund are public policy arguments that would require basically judicial legislation by the WCAB. The changes that applicant seeks to the statute should be addressed by the legislature.

Applicant's counsel also raises constitutional protection indicating that California Constitution guarantees full protection to the injured workers and their dependants. The WCAB is not empowered to determine the constitutionality of the statute.

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IV
RECOMMENDATION

It is recommended that the applicant's Petition for Reconsideration be denied based on the foregoing.

THOMAS W. ANTHONY, Jr.
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

TWA DAH

Served by mail May 5, 2009 on the following:

Eugene Treaster
3838 Watt Avenue, Bld. F600
Sacramento, CA 95821

State Compensation Insurance Fund
P.O. Box 3171
Suisun City, CA 94585

OD Legal
2424 Arden Way, Suite 130
Sacramento, CA 95825

By: D. Harrison
D. Harrison

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

STEPHEN WALTRIP (Deceased) THINH WALTRIP (Widow), *Applicant,* vs. WALTRIP & ASSOCIATES and SUBSEQUENT INJURIES BENEFIT TRUST FUND, *Defendant(s).*	Case No. ADJ233464 (SAC 0254147) ORDER DENYING RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration.

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For the foregoing reasons,

IT IS ORDERED that said Petition for Reconsideration be, and it hereby is, **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE

I CONCUR,

FRANK M. BRASS

DEIDRA E. LOWE

WORKERS' COMPENSATION APPEALS BOARD EUREKA SEAL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 22 2009

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

LAW OFFICES OF EUGENE C. TREASTER
THINH WALTRIP
STATE COMPENSATION INSURANCE FUND
BOEHM & ASSOCIATES

ebc

DIGESTS OF WCAB DECISIONS DENIED JUDICIAL REVIEW

ARA Services, Inc., Alexsis Risk Management Services, Petitioners v. Workers' Compensation Appeals Board, **Meneo Coloma**, Respondents.

Civil No. B096926—Court of Appeal, Second Appellate District, Division Five

61 Cal. Comp. Cases 681

Writ of Review Denied July 11, 1996

Subsequent History: Review Denied September 4, 1996

Prior History: W.C.A.B. No. SAC 0216174—WCR Alan R. Porterfield (SAC); WCAB Panel: Commissioners Ruggles, Gannon, Wiegand

Disposition: Petition for writ of review denied

Counsel: For petitioner—Law Offices of Joseph J. D'Andre, by Joseph J. D'Andre
For respondent employee—Law Offices of Eugene C. Treaster, by Eugene C. Treaster

(Matthew Bender & Co., Inc.)

Injury AOE/COE—Opinions of two heart specialists that applicant's work activities either caused his myocardial infarction or magnified the damage caused by an infarction suffered by applicant earlier the same morning at home, coupled with applicant's description of chest pain felt at work, constituted substantial evidence to support WCJ's finding that applicant suffered a myocardial infarction AOE/COE. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.03, 27.01[1][c].]

Permanent Disability—Level of Disability—Apportionment—WCJ properly found that applicant sustained permanent disability of 68% when he determined that applicant's disability attributable to a heart condition was 100% and apportioned 32% to a prior back injury. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.07[2].]

Applicant Meneo Coloma sustained an admitted injury to his back while employed by Lucky Stores, Inc., on 5/7/86. An extended period of disability and medical care followed. F&A issued on 1/25/90, in which it was found that Applicant sustained PD of 32% and was in need of further medical care.

Applicant commenced his employment with Defendant ARA Services, Inc., on 10/15/90. He was hired as a route man/truck driver and was still in training on 11/1/90. On that day Applicant reported to work and began his usual work activities for that time of day, which included sorting and loading items of merchandise to be delivered to various retail outlets on his route. At about 7:00 or 7:30 a.m., Applicant became ill while working, and may have even had a transitory episode of unconsciousness. Applicant's employer called 911 for assistance, and Applicant was transported by ambulance to the hospital. Applicant was admitted to the hospital, and it was determined that he had sustained a myocardial infarction. As a result of his injury, Applicant filed a workers' compensation claim.

Hearings were held in this matter on 10/21/93, 1/20/94, 5/19/94, 7/13/94, 11/15/94, and 4/20/95. Applicant testified at trial that he began experiencing chest pain, tightness and shortness of breath on 10/30/96. He indicated that at 2:00 a.m. on 11/1/90, he awoke with severe chest pains and shortness of breath that lasted for about one hour. Applicant awoke at about 5:00 a.m. and felt well enough to report for work. Applicant testified that, while at work, he began experiencing crushing chest pain and may have become unconscious.

On 6/30/95 WCR Porterfield issued F&A, in which he found that Applicant had sustained a specific industrial injury on 11/1/90, resulting in TD from 11/2/90 to 2/25/94, and PD of 68%.

Defendant filed a Petition for Reconsideration, contending that the evidence did not justify a finding of industrial injury and that the finding of PD was erroneous because all of Applicant's disability was attributable to his pre-existing back condition. Defendant's primary contention revolved around the question of whether Applicant had actually sustained the myocardial infarction at home on 10/31/90 or early in the morning of 11/1/90, before beginning work. Defendant cited the

position that the finding of industrial injury was erroneous because the evidence indicated that Applicant's heart attack occurred before Applicant ever reported to work, and that his collapse at work was the consequence of that non-employment event.

In his report on reconsideration, the WCR noted that heart specialists Dr. John O'Brien and Dr. Malcolm McHenry both agreed there was no substantial medical evidence that Applicant's myocardial infarction occurred while Applicant was at home. Rather, the evidence indicated that the work activities Applicant was performing on the morning of 11/1/90 either caused the infarction or magnified the damage caused by an infarction that occurred while Applicant was at home. WCR Porterfield pointed out that both physicians had a full and complete medical history from Applicant and both recognized the factual variance between statements by Applicant, his wife, and witnesses at work. WCR Porterfield believed that the opinions of Drs. O'Brien and McHenry constituted substantial evidence.

In making his finding, WCR Porterfield found essential Applicant's description of the chest pain he felt on the morning of 11/1 while at work as compared to his description of the chest pain he felt at home about 2:00 a.m.

The WCR submitted that, even if Applicant did have a myocardial infarction while at home at 2:00 a.m., the fact that he was able to get up and report for work without apparent difficulty was substantial evidence that the work activities of 11/1 caused his collapse shortly after he reported for work.

With regard to Defendant's contention that Applicant's PD was due solely to his previous back injury, the WCR pointed out that Dr. O'Brien opined Applicant was totally disabled from gainful employment because of his heart condition. He noted that Defendant's contention overlooked the fact Applicant was hired on 10/15/90 to perform work that obviously involved the use of Applicant's back on a regular and frequent basis. Thus, WCR Porterfield only apportioned Applicant's disability to the back injury that pre-existed the heart injury, and since Applicant's disability became total because of his heart attack, he felt apportionment was appropriately calculated by subtracting the prior rating of 32% for Applicant's back injury from the 100% disability attributable to Applicant's heart. The WCR further pointed out there was no support in the medical record for Defendant's contention that Applicant's back pain was actually causing his disability.

Based on the reasoning set forth by the WCR, the WCAB denied reconsideration.

Defendant filed a Petition for Writ of Review, contending their was insufficient evidence to support a finding that Applicant's work caused his myocardial infarction or aggravated a pre-existing myocardial infarction. Defendant further asserted that the WCR's award of 68% PD after apportionment was not supported by substantial evidence. Applicant responded, contending the medical and factual evidence supported a finding of injury AOE/COE and a finding of 68% PD.

WRIT DENIED July 11, 1996.

June 2, 1978

STATE COMPENSATION INSURANCE FUND, Petitioner v. WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA and JAMES STAPP, Respondents.

W.C.A.B. No. 76 STK 22506—James Stapp, employee

Civil No. 17344—Court of Appeal, Third Appellate District

[81 Cal. App. 3d 586, 146 Cal. Rptr. 513]

PROCEDURE AND PRACTICE—A disability evaluator of the Appeals Board is an expert witness who must base his testimony solely on the rating instructions submitted by either the Workers' Compensation Judge or the Workers' Compensation Appeals Board and not on the desire of the finder of fact to have these instructions given a higher or lower rating than usual. [See generally Hanna, California Law of Employee Injuries and Workmen's Compensation, Vol. 1, § 11.06[2][e].]

Proceeding to review a decision of the Workers' Compensation Appeals Board awarding an injured employee a 51% permanent disability rating after reconsideration of a judge's award of a 40% rating. Decision *annulled.*

For petitioner—Vonk, Jakob, Hernshenson & Evans, by Frank Evans and Robert A. La Porta

For respondent Appeals Board—Charles L. Swezey, Philip M. Miyamoto, Thomas J. McBirnie, Dexter Young

For respondent employee—Eugene Treaster

James Stapp injured his back while employed as a sheet metal worker for Patton Sheet Metal Works in Fresno; he applied for workers' compensation benefits. The workers' compensation judge made findings, on the basis of which he requested a recommended permanent disability rating from the Permanent Disability Rating Bureau; his request stated: "Applicant's back condition precludes heavy work, with constant slight to moderate pain." The bureau's rating specialist recommended a 30 percent standard rating, equal to 40 percent when adjusted for occupation and age.

At this point we note the legal relationship between the rating bureau and the workers' compensation judge. It has been accurately stated that the judge ". . . is the factfinder and the disability factors he has selected after reviewing all the evidence and hearing the testimony are, in effect, tentative findings of fact. See *Fidelity & Cas. Co.* v. *WCAB* (Ratzel) (1967) 252 CA2d 327, 60 Cal. Rptr. 442, 32 CCC 271. [¶] The rating specialist is an expert witness whose rating report constitutes his direct testimony. He is required to make his recommendation solely on the information provided by the [judge] . . . ." California Workmen's Compensation Practice (Cont. Ed. Bar 1973) section 15.38, page 563.

The judge made an award based upon the 30 percent rating. However the Workers' Compensation Appeals Board ordered reconsideration stating: "The

rating specialist testified that the preclusion from heavy work took a 30% standard by itself and that constant slight to moderate pain would also rate a 30% standard. While we would agree the subjective complaints consisting of slight to moderate pain which precluded heavy work would be inclusive in the preclusion from heavy work as a result of those subjective complaints, we are not certain that such subjective complaints should be included in a work preclusion where they are present when the applicant is performing less than heavy work. We are of the opinion that reconsideration should be granted to issue new permanent disability rating instructions which provide that the applicant has constant slight to moderate pain even in the absence of the precluded work activities and that the applicant's disability precludes him from heavy work."

Pursuant to this order, the Board submitted the following instruction to the rating bureau: "Consider that the applicant has constant slight to moderate pain in the back even in the absence of the precluded work activities set forth below. [¶] Consider in addition that the applicant is precluded from heavy work." In response to this instruction, a different rating specialist again recommended a 30 percent standard rating. The applicant requested cross-examination of the rating specialist, and at the hearing the latter changed his mind. He stated that he felt the Board intended him to find a rating in excess of 30 percent by using the words "consider in addition" in the second portion of the rating instruction. He therefore concluded that Stapp's disability rated 40 percent standard, since it appeared to be something more than a limitation to no heavy work but something less than a limitation to light work. When adjusted for age and occupation, the rating amounted to 51 percent.

When asked if this was an accepted method of computation at the rating bureau, the specialist replied: "I requested from five raters this morning how they would rate this case. I am in a distinct minority." He added: "The Rating Bureau normally does not differentiate between the man who is prophylactically restricted to no heavy work and never has pain, and the man who has constant pain and is therefore restricted."

Nonetheless, the specialist defended his rating of 40 percent standard on the following basis:

"The method of determining the rating is to evaluate not only the words that are placed in front of you, but what is the intent of those words.

"Q. Okay. What caused you to rate a 30% standard in the first place, then?

"A. At the time I rated it the first time I ignored the intent, because it was my opinion that the pain factor and the work restriction were inclusive.

"Q. What in the Instructions or in the record caused you to change your mind on this?

"A. I reread the old rating and the old Instruction, and had it been the intent of the Board to get a rating that was exactly the same as the prior rating, they

would have issued the exact same Instruction. This Instruction is specifically worded as to attempt to avoid what occurred in the first rating."

Asked about whether he was referring to the first or second rating instructions, the specialist testified that he did not consider that there were two instructions, rather that there were two *factors*. He would have come to a different conclusion had he viewed the factors in opposite chronological order. He viewed the preclusion first, and:

"A. Had the Instructions read 'Consider that the applicant has constant slight to moderate pain in the back and is precluded from heavy work,' I would have only given it a 30% standard.

"JUDGE: All right.

"MR. HARRIS: Q. Is that not in fact the way the Instructions reads? A. No, it is not.

"Q. Can you clarify your answer, please?

"A. The Instructions read, 'Consider that the applicant has constant slight to moderate pain in the back even in the absence of the precluded work activities set forth below,' which is the same to me as saying, 'Consider that the applicant is precluded from heavy work, and even with such preclusion has constant slight to moderate pain.' "

The specialist further testified that there are very subtle changes in the wording of instructions submitted to the rating bureau, and ". . . it becomes necessary for the rater to actually examine his own judgmental areas and redefine those in light of his interpretation of the intent of the person giving the factors, and I will agree that it frequently happens. If I know a judge well, I will read something that he has written and give it a certain value because it is a value I knew he intended to give, even though his Instruction may not be that clear. Were that same Instruction come [*sic*] from another judge I very probably will not give it the same value. We are constantly examining the intent of the person giving the Instruction. Frequently it causes us to change our minds when we are on the witness stand." He testified finally that in his opinion the words "consider in addition" in the instruction signify that he must add to the 30 percent standard.

The Board thereafter issued its opinion and decision after reconsideration stating: "We are of the opinion that the diminished capacity of an injured employee who is precluded from heavy work yet has slight to moderate pain even in the absence of heavy work activities is certainly more severe than an employee who has constant slight to moderate pain without a preclusion from work activities or who is only precluded from heavy work on a prophylactic basis or because of the degree of pain." The Board issued its award based on an adjusted 51 percent rating, as recommended by the rating specialist.

The State Compensation Insurance Fund's petition for reconsideration (from the Board's opinion and decision after reconsideration) was denied. The Board

stated: "We are of the opinion that it was perfectly proper for the rating specialist to consider the *clear meaning* of the instructions in arriving at his rating." (Emphasis added.) We granted the carrier's petition for review.

As above stated, the relationship of the judge (or the Board) to the rating specialist is one of fact finder to expert witness. The "instructions" submitted to the rating specialist are simply findings of fact. His rating must be based upon such facts. (See Fidelity & Cas. Co. v. Workmen's Comp. App. Bd. (Ratzel) (1967) 252 Cal. App. 2d 327, 331-333 [32 Cal. Comp. Cases 271, 60 Cal. Rptr. 442].) Accordingly, the *intent* of the fact finder is only relevant in determining what the facts are; the fact finder's desire to have those facts given a higher or lower rating than usual is totally irrelevant. Since the rating expert's testimony indicates that his rating was not based solely on the facts, but instead was changed to conform to the Board's *apparent intent to obtain a higher rating,* the decision must be vacated.[1]

This does not mean that in later proceedings, the rating specialist is precluded from recommending a rating higher than 30 percent standard or that the Board must so limit itself. As an abstract principle, it appears true, as the Board states, that a worker who is precluded from heavy work and who also suffers constant slight to moderate pain has a lesser ability to compete in the labor market than a worker who is precluded from heavy work but does not have constant pain. We hold only that the specialist must base his recommended rating on the *facts,* not on the deduced or presumed intent of the Board.

The Board's decision is vacated.

Paras, J.

We concur:

Puglia, P.J.

Regan, J.

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Factually distinguishable is the result in ***Ybarra v. WCAB***, 30 CWCR 272 (Unpub CA-2002), where the Court of Appeal, after a detailed inspection not only of the record in the case but of the County Disability Retirement Determination and factors therein, held that SIF was not entitled to a credit for disability retirement benefits, where the record showed that the retirement was granted based upon applicant's current orthopedic condition (the subject matter of his WCAB case), and not his preexisting internal medicine disorders. In ***Kehrer***, the disability retirement was based upon disabilities arising from a number of body systems that were clearly inclusive of preexisting body parts.

42 CCC 714 - 722

November 21, 1975

JOSEPH B. WEBINGER, Petitioner v. WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA and STATE OF CALIFORNIA SUBSEQUENT INJURIES FUND, Respondents.

W.C.A B. No. 68 LA 321-493—Joseph B. Webinger, employee

Civil No. 46094—Court of Appeal, Second Appellate District, Division 1

[*Opinion not published in official reports and therefore not citable in judicial actions or proceedings. See Cal. Rules of Ct., Rule 977.*]

CREDIT—The Subsequent Injuries Fund was entitled to a credit for payments made to an injured employee under a Veterans Administration pension and as Social Security disability benefits only to the extent to which these payments were for a non-service connected disability which pre-existed the industrial injury. [See generally Hanna, California Law of Employee Injuries and Workmen's Compensation, Vol. 1, § 9.05[4][a].]

Proceeding to review orders of the Workers' Compensation Appeals Board allowing a credit against Subsequent Injuries Fund benefits for part of both Social Security disability payments and a Veterans Administration non-service connected pension. Orders *annulled.*

For petitioner—Mestad & Sanborn, by John B. Mestad

For respondent Subsequent Injuries Fund—Evelle J. Younger and Randall B. Christison

Labor Code section 4751 provides additional publicly funded compensation (hereinafter "SIF benefits") to an employee who already has "previous disability or impairment" and then suffers a compensable industrial injury. Labor Code section 4753 is a broadly worded provision for "credit" against SIF benefits. The single question on this review is whether the Workers' Compensation Appeals Board properly applied the credit provisions of section 4753 to the facts of this case.[1]

The compensation judge ruled that one-third of the applicant's (the employee's) Veterans' Administration non-service-connected pension should be credited against the SIF benefits to which the applicant was entitled, but that no part of the applicant's Social Security disability payments should be so credited.

On reconsideration the Appeals Board adopted that result as to the VA pension, but applied the same one-third—two-thirds formula to the Social Security disability payments as well.

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[1] As pertinent to this case section 4753 provides:

"Such additional compensation [*i.e.*, the SIF benefit] is not in addition to but shall be reduced to the extent of any monetary payments received by the employee, from any source whatsoever, for or on account of such preexisting disability or impairment, except as to payments being made to the employee or to which he is entitled as a pension or other compensation for disability incurred in service in the armed forces of the United States . . . ."

We denied the applicant's petition for a writ of review primarily in reliance upon *Subsequent Injuries Fund* v. *Industrial Acc. Com.* (*Hanson*) [(1963)] 217 Cal. App. 2d 322 [28 Cal. Comp. Cases 144, 31 Cal. Rptr. 508].

Our Supreme Court granted a hearing, transferred the case to us, and directed that a writ of review issue. The court's order did not refer to any decisional or other authority.

We have issued a writ of review and studied the rather complicated record. We remain of the view that the VA pension and Social Security disability payments are properly treated alike and that each must be considered "monetary payments . . . from any source whatsoever" within the meaning of section 4753. However, we conclude that the Appeals Board has erred in not limiting the one-third—two-thirds proration to the "preexisting disability or impairment" found in this case (*i.e.*, 30%) for purposes of determining the SIF benefits. In other words, error has crept into the computation by application of the one-third—two-thirds formula to the total of the applicant's disability and by indirection, to the totals of the VA pension and the Social Security disability payments Rather, the proration should have been limited to the "pre-existing" disability, which necessarily did not include the disability left by the "subsequent" industrial injury itself. Thus we annul the Board's order and remand the case with directions.

FACTS

The facts underlying these SIF "credit" proceedings were established by stipulation. Roughly in chronological order, the facts were as follows:

(1) The applicant, 50, a restaurant counterman, served in the armed forces in World War II. Both of his feet were frozen and he was left with a "trench foot syndrome" that, among other things, impaired the circulatory process of his feet. In this connection, the stipulation of the parties recited:

"Applicant was originally afforded a partial service connected disability from the Veterans' Administration in 1945. Applicant began receiving disability payments from the Veterans' Administration on April 1, 1946, in the amount of $13.80 per month. On October 31, 1962, Mr. Webinger began receiving checks in the amount of $20 00 per month. On December 1, 1965, that award was amended to $21 00 per month. On January 1, 1968 [and after the industrial accident had occurred on December 22, 1967], he elected to take the non-service connected pension in the amount of $104 00 per month. On January 1, 1973, he began receiving $178 84 per month, which includes compensation for regular aid and attendance."

(2) On December 22, 1967, he suffered a bruise-type industrial injury to his right foot that necessitated amputation of his leg. His application for workers' compensation was resolved by a compromise and release that fixed the extent of his industrial partial permanent disability (*i.e.*, the amputation of his right leg) at 65% and compensation was awarded accordingly.

(3) Later, in connection with his proceedings for SIF benefits, it was established that his overall disability immediately following the industrial injury was 95%. To summarize, the extent and character of the applicant's disability as determined in both the workers' compensation and SIF proceedings were as follows:

30% pre-existing disability
65% disability due to the industrial accident
5% remaining "ability"
100% total[2]

(4) A "recommended rating" was obtained in connection with determination of the amount of the SIF benefits. The instructions for that rating took into account the fact that prior to the industrial injury the applicant had developed diabetes and heart disease, in addition to his circulatory impairment. Those instructions read:

"Please rate for amputation of right leg above knee, with reasonably satisfactory use of prosthesis possible;

"Subsequent to:

"Impairment in circulation of both lower extremities of moderate degree; plus diabetic condition of slight-to-moderate degree; plus coronary artery disease of slight degree."

The overall rating of 95% on these instructions was reached by application of the "Multiple Disabilities Rating Tables."

(5) In monetary terms, the SIF rating resulted in this award:

"Award is made in favor of Joseph B. Webinger against Subsequent Injuries Fund of the State of California in the sum of $5186.40, payable at the rate of $43.22 per week to commence on the 261st week after June 20, 1968, and thereafter a life pension of $34.91 per week."

(6) In the award against the SIF the compensation judge had not undertaken to particularize any "credits" that might be available to the Fund. In this connection the order merely read:

"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 said pre-existing disability or impairment as provided by Labor Code Section 4753."

(7) When the time for payment of the SIF benefits arrived (June 20, 1973) the Fund did not make the payments, but relied upon "credits" (*i.e.*, the VA pension and Social Security payments) as totally offsetting the SIF benefits. That position led, of course, to the proceedings before the Workers' Compensation Appeals Board to enforce the SIF award.

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[2] Thus the applicant qualified for SIF benefits. See Labor Code section 4751; *Dow Chemical Co.* v. *Workmen's Comp. App. Bd.* [(1967)] 67 Cal. 2d 483, 493-495 [32 Cal. Comp. Cases 431, 62 Cal. Rptr. 757, 432 P.2d 365]

(8) In July 1968, or about six months after his industrial injury and the loss of his right leg, the applicant qualified for Social Security disability payments and has been receiving those payments to date. Neither the current nor historic amounts of those payments were established in the record.

(9) Finally, although the fact seems irrelevant in this controversy, in 1970 (and thus after the applicant had qualified for both the VA pension and Social Security payments) he lost his remaining leg due to an injury similar to the first except that the incident was non-industrial.

DISCUSSION

The credit provision of Labor Code section 4753 has been an integral part of the scheme of SIF benefits since that system of benefits was adopted in 1945. However, there is a dearth of authority as to interpretation and application of the provision. *Subsequent Injuries Fund* v. *Industrial Acc. Com.* (*Hanson*), *supra,* 217 Cal. App. 2d 322, is the only reported decision on the subject.[3]

Hanson, decided by the First District a dozen years ago, generally gives section 4753 its broadest possible application in terms of the types of "monetary payments" that entitle the SIF to "credit." According to the decision, " 'From any source whatsoever' means just that. If such coverage is found to be too broad, the Legislature may change it. We must apply the statute according to the legislative intent as expressed. We cannot rewrite the statute." (217 Cal. App. 2d at 331.) Most precisely, *Hanson* held that Social Security disability payments received by an applicant under provisions of the Federal Old Age Survivors and Disability Insurance Benefits Act (42 U.S.C. Ch. 7, subchap. II, §§ 401-429) are to be credited. As those are exactly the same payments being received in the case at bench, if we were to accede to this applicant's contention in this regard, we would necessarily have to disapprove and refuse to follow *Hanson.*

The compensation judge in this case sought to distinguish *Hanson* by saying that without this industrial injury (which rated 65%), the applicant would not have qualified for Social Security and thus that it could not be said that the payments being received were "for or on account of such preexisting disability or impairment." However, *Hanson* discusses this problem (at pp. 329-330) and concludes "Thus, if it can reasonably be said that the Social Security disability payments are in some part accountable to the preexisting disability for which the Subsequent Injuries Fund is liable, then some credit should be allowed." As we shall later recite, such disability payments are made for a total unitary conception of "100% disability" or inability to work and thus are in all cases "in some part accountable to the preexisting disability" for SIF purposes. Accordingly, under *Hanson,* the only problem left is ascertainment of the "part accountable."

On ultimate analysis, *Hanson* is an eminently debatable construction of

[3] We might add that the problem of application is also not the subject of unreported judicial decisions or of opinions of the Industrial Accident Commission or the Workers' Compensation Appeals Board.

section 4753. The Social Security entitlement is not as precisely "for or on account of" preexisting disability as, for example, are a tort recovery or workers' compensation award for that disability. Such entitlement is also partly attributable to the employee's years of service and coverage for Social Security purposes generally. (See 42 U.S.C., § 423.) Also, the credit tends to defeat the ends of the SIF legislation. "It has been repeatedly stated that the purpose of the subsequent injury legislation . . . is to encourage the employment of the handicapped by assuring the employer that in the event of industrial injury, he will not be liable for the total combined disability that results but only for that portion of it which is attributable to the subsequent injury." *Jones* v. *Workmen's Comp. App. Bd.* [(1968)] 267 Cal. App. 2d 302, 305 [33 Cal. Comp. Cases 707, 72 Cal. Rptr. 766]. See also *State Compensation Ins. Fund* v. *Industrial Acc. Com. (Hutchinson)* [(1962)] 59 Cal. 2d 45, 54 [28 Cal. Comp. Cases 20, 27 Cal. Rptr. 702, 377 P.2d 902]; *Amico* v. *Workers' Comp. Appeals Bd.* [(1974)] 43 Cal. App. 3d 592, 607-608 [39 Cal. Comp. Cases 845, 117 Cal. Rptr. 831]. The legislation accomplishes its purpose by making it a matter of indifference to the employee whether he receives (1) a workers' compensation award for his total, overall disability following the industrial injury, or (2) an award partly against his employer or insurer and partly against the SIF for the preexisting disability. (SIF benefits are always in the same amount as a compensation award as to the preexisting disability.) With the expansive provision for credit in section 4753, however, the matter is no longer one of indifference and the temptation to charge the employer with the total disability is restored. Thus, pro tanto, the credit provision and its expansive construction serve to thwart the very purpose of the legislation as a whole.

Nonetheless, these are purely legislative questions. As stated in *Hanson, supra,* "the Legislature was aware that workmen were getting double compensation for their preexisting disabilities from various sources, including tort damages. To arrive at any sort of consistency in accomplishing the purpose of the statute, the Legislature intended to prevent double recoveries of any sort, resulting in a more equitable outlay of public monies. . . ." In other words, the Legislature was willing to provide funds for the preexisting disability in cases of second injury only to the extent that such preexisting disability was not also compensated "from any source whatsoever." The precept against "double recovery" has been reiterated in other decisions. ("The legislative intent is to prevent resort to the Fund which will result in double recovery for the same [previous] injury . . . ." *Brown* v. *Workmen's Comp. Appeals Bd.* [(1971)] 20 Cal. App. 3d 903, 911 [36 Cal. Comp. Cases 627, 98 Cal. Rptr. 96].)

Especially in view of the facts that *Hanson* was decided over a decade ago, has underlain administrative practice in the field, has not been criticized by our Supreme Court or other courts, and has not been affected by legislation, we are constrained to follow it. Accordingly, we hold that the Appeals Board was correct in this instance in allowing partial credit for the Social Security disability payments being received in this case.

Much the same applies to the VA pension being received in this case, except for the fact that the pension calls more vividly to mind the exclusion from credit in section 4753 for "payments being made to the employee or to which he is entitled as a pension or other compensation for disability incurred in service in the armed forces of the United States . . . ." Certain pensions administered by the Veterans' Administration are for "service connected disability" and thus would be totally excluded from credit under the express language of section 4753. However, the pension being received by this applicant is pursuant to Chapter 15 (§§ 501-562), Title 38, United States Code, "Pension for Non-Service Connected Disability or Death or for Service." Accordingly, following the logic of *Hanson,* some part of the pension is susceptible to credit.

This record is clear that following World War II and until January 1, 1968 (and therefore very shortly after this industrial incident) this applicant received a service connected pension. The pension, however, was minor in amount and was based upon a disability rating of 10%. Following the industrial injury and loss of his right leg, this applicant elected to take his present non-service-connected pension. In this respect, section 523, Title 38, United States Code, provides that "Where a veteran . . . is found to be entitled to a [non-service connected] pension . . . and is entitled to compensation for a service-connected disability, the Administrator shall pay him the greater amount." Thus it seems plain that the pension being received is partly within and partly outside the credit provisions of Labor Code section 4753. Our holding, again following *Hanson* and the result as to Social Security disability payments, is merely that a pension under Chapter 15, Title 38, United States Code, may be susceptible to credit.

Turning to computation of the appropriate credits in this case for both the Social Security payments and the VA pension, it is necessary to emphasize the literal terms of Labor Code section 4753 The credit is only for "monetary payments . . . for or on account of such preexisting disability or impairment" and even from such payments there must be excluded any amount attributable to "disability incurred in service in the armed forces of the United States." Thus the computation must arrive at the disability (and payments therefor) that preexisted the industrial injury and was not service-connected. In the case at bench, the total preexisting disability for SIF purposes was fixed at 30%. The credit can thus rise no higher than 30%, but even then it is necessary to take into account the dual service-connected and non-service-connected character of that preexisting disability.

At this point in these hearings before the compensation judge these proceedings broke down. Neither party was able (or willing) to provide the compensation judge with the data he desired to make the aforementioned determination and computation. He said: "The record will show that the referee made considerable effort to get the parties, or either of them, to bring in evidence as to the disability *rationale* upon which the Veterans' Administration had made its determination; *i.e.* was the pension based entirely on service-connected disability (and thereafter not susceptible to credit at all) or was such pension in some significant part, in-

creased because of non-service-related disability (and therefore subject to credit or set off)?

"Likewise, and concurrently, effort was made to get evidence in to the record as to the disability *rationale* upon which the Social Security benefits had been granted.

"Why is it that this very valuable potential evidence—which, if available, could have resolved definitively the dispute between the parties—never came into our record?

"It appears quite likely that counsel for one or both contestants must have made diligent efforts to secure this evidence, but could not obtain it. Contrariwise, it is not utterly beyond the realm of conceivability that one or both counsel may have been less than devotedly diligent, or may even have suspected the possible existence of some facts which, if put into our record might not be entirely helpful to his position."

However, in the nature of things it appears unlikely that any information or evidence that could have been gained from either the Social Security Administration or Veterans' Administration would have been helpful on the problem of apportionment at hand. The underlying problem is that neither the Social Security Administration nor the Veterans' Administration has occasion to make the determinations needed in applying California's credit provision. Similarly, the evidence arrayed to either of those administrations would not disclose a "rationale" sufficient to facilitate California's administration of its SIF benefits and the credits thereto.

This point can be underscored by reference to the statutes that goven the VA pension and Social Security payments. As to this VA pension "for non-service-connected disability" (but which was partially in lieu of a service-connected pension), section 502 of Title 38, United States Code, defines "disability" as the inability "to follow a substantially gainful occupation."[4] The provision relative to the Social Security disability payments is similar. Subsection 423(d), Title 42, United States Code, defines disability as the "inability to engage in any substantial gainful activity."[5] Accordingly, those administrations are not concerned with a division of overall disability into fractions of industrial versus non-industrial disability or "pre-existing" versus "subsequent" disability.

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[4] Section 502 provides in part:

"(a) For the purposes of this chapter, a person shall be considered to be permanently and totally disabled if he is sixty-five years of age or older or suffering from—

"(1) any disability which is sufficient to render it impossible for the average person to follow a substantially gainful occupation, but only if it is reasonably certain that such disability will continue throughout the life of the disabled person; or

"(2) any disease or disorder determined by the Administrator to be of such a nature or extent as to justify a determination that persons suffering therefrom are permanently and totally disabled."

[5] Subsection (d) of section 432 provides in part:

"(1) The term 'disability' means—

"(A) inability to engage in any substantial gainful activity by reason of any medically

We conclude that in the circumstances and in view of the showings made, the compensation judge and Appeals Board acted properly in turning to these compensation proceedings themselves and the medical evidence therein in arriving at the necessary apportionment. Having done so, the compensation judge arrived at an apportionment of one-third to the "non-related [to military service] diabetic condition" and two-thirds to the "service-connected disability to the lower extremities." (Recommendation of Referee on Petition for Reconsideration, February 6, 1975.) The ratio seems especially reasonable in view of the fact that the service-connected condition had an obvious, if not readily determinable, progression and interacted with all subsequent problems.

Nonetheless, it seems plain that the compensation judge and Appeals Board erred to the disadvantage of the applicant in next applying the one-third—two-thirds ratio to the entirety of the VA pension and the whole of the Social Security disability payments. Quite obviously that result is not proper in view of the gross facts of the case. It is necessary to emphasize the word "pre-existing" in Labor Code section 4753. The entire preexisting disability in this case was determined to be 30%. That was all for which the SIF was held responsible. Thus to apply the ratio to the whole of the VA pension and the Social Security payments improperly "credits" the SIF with the disability (65%) resulting from the industrial injury itself. Otherwise there would be no difference from the SIF's point of view in a case in which the fraction of the overall disability attributable to the industrial injury is major and the preexisting disability is minor (this case), from one in which the industrial disability is minor and the preexisting disability is major (*Hanson, supra*).

We conclude that the one-third—two-thirds ratio in this case should properly be applied to the preexisting disability of 30%, with the result that a 10% net credit should be allowed to the SIF as to both the VA pension and the Social Security disability payments.

Petitioning counsel raises several points in addition to his arguments as to the proper construction of Labor Code section 4753. We deem these either unmeritorious or not likely to persist into further proceedings in this case.

As to the constitutionality of the SIF legislation and its several features, in addition to *Hanson, supra,* 217 Cal. App. 3d 322, 331-332, see *Subsequent Etc. Fund* v. *Ind. Acc. Com.* [(1952)] 39 Cal. 2d 83, 86-89 [17 Cal. Comp. Cases 142, 244 P.2d 889], and *Pacific Employers Ins. Co.* v. *Industrial Acc. Com.* [(1963)] 219 Cal. App. 2d 634, 637-644 [28 Cal. Comp. Cases 193, 33 Cal. Rptr. 442]. See also *Mathews* v. *Workers' Comp. Appeals Bd.* [(1972)] 6 Cal. 3d 719, 738 [37 Cal. Comp. Cases 124, 100 Cal. Rptr. 301, 493 P.2d 1165]; *Saal* v. *Workers' Comp. Appeals Bd.* [(1975)] 50 Cal. App. 3d 291, 299 [40 Cal. Comp Cases 456, 123 Cal. Rptr. 506].

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determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; . . ."

As to the applicant's demand for a 10% delay penalty against the SIF under Labor Code section 5814, it appears that until resolution of the various issues under Labor Code section 4753 there is a "genuine doubt from a . . . legal standpoint as to liability for benefits." *Kerley* v. *Workmen's Comp. App. Bd.* [(1971)] 4 Cal. 3d 223, 230 [36 Cal. Comp. Cases 152, 93 Cal. Rptr. 192, 481 P.2d 200]. Thus the penalty was appropriately denied.

As to the refusal of the Appeals Board to "commute" a sufficient amount of SIF benefits to pay an attorney's fee (cf. Lab. Code, § 5100 5), under this court's decision it appears that there will be sufficient funds available to pay an attorney's fee and hence the issue should not again arise.

The Board's orders of March 11, 1975, are annulled and the case is remanded to the Board for further proceedings consistent with this opinion.

Wood, P.J.

We concur:

Thompson, J.

Hanson, J.
