

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

3
4 **RICHARD TODD,**

5 *Applicant,*

6 **vs.**

7 **SUBSEQUENT INJURIES BENEFITS TRUST**
8 **FUND,**

9 *Defendant.*
10

Case No. ADJ7475146
(Van Nuys District Office)

OPINION AND DECISION
AFTER RECONSIDERATION
(En Banc)

11 We previously granted defendant Subsequent Injuries Benefits Trust Fund (SIBTF)'s Petition for
12 Reconsideration to provide an opportunity to further study the legal and factual issues raised by the
13 Petition. This is our opinion and decision after reconsideration (en banc).¹

14 To secure uniformity of decision in the future, the Chair of the Appeals Board, upon a unanimous
15 vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision.² (Lab.
16 Code, § 115.)³

17 SIBTF seeks reconsideration of the Findings and Award issued by the workers' compensation
18 administrative law judge (WCJ) on July 17, 2017. The WCJ issued an award in accordance with section
19 4751⁴ in favor of applicant and against SIBTF of 100% permanent disability, less statutory credits to
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22 ¹ Commissioner Juan Pedro Gaffney is unavailable and is not participating in this en banc decision. The Opinion and Order
23 Granting Petition for Reconsideration was signed by former Commissioner Frank M. Brass, who no longer serves on the
Appeals Board.

24 ² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation
25 administrative judges. (Cal. Code Regs., tit. 8, former § 10341, now § 10325 [eff. Jan. 1, 2020]; *City of Long Beach v.*
Workers' Comp. Appeals Bd. (Garcia) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers'*
Comp. Appeals Bd. (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].) This en banc decision is also adopted
as a precedent decision pursuant to Government Code section 11425.60(b).

26 ³ All further statutory references are to the Labor Code unless otherwise stated.

27 ⁴ Section 4751 governs subsequent injuries payments. Section 4751 is quoted in section II of this opinion.

1 SIBTF under section 4753⁵ and less attorney's fees. The finding of 100% permanent disability was
2 determined by adding applicant's prior stipulated awards of permanent disability to his subsequent injury
3 award.

4 SIBTF contends that the WCJ should have combined the prior and subsequent permanent
5 disabilities under the Combined Values Chart (CVC) instead of adding them, resulting in less than 100%
6 permanent disability.

7 We received an Answer from applicant. We also received a Report and Recommendation on
8 Petition for Reconsideration (Report) from the WCJ, recommending that the Petition be denied.

9 Based upon our review of the record, the Petition, Answer, Report, and the relevant statutes and
10 case law, we affirm the WCJ's decision and hold that:

11 (1) Prior and subsequent permanent disabilities shall be added to the extent
12 they do not overlap in order to determine the "combined permanent
disability" specified in section 4751; and

13 (2) SIBTF is liable, under section 4751, for the total amount of the
14 "combined permanent disability," less the amount due to applicant from the
subsequent injury and less credits allowable under section 4753.

15 16 I. STATEMENT OF FACTS

17 Applicant, a former police officer, sustained a cumulative trauma injury arising out of and in the
18 course of his employment with the City of Los Angeles to his kidneys, heart, psyche, and in the form of

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20 ⁵ Section 4753 provides:

21 Such additional compensation is not in addition to but shall be reduced to the extent of any monetary payments
22 received by the employee, from any source whatsoever, for or on account of such preexisting disability or
23 impairment, except as to payments being made to the employee or to which he is entitled as a pension or other
24 compensation for disability incurred in service in the armed forces of the United States, and except as to payments
25 being made to him or to which he is entitled as assistance under the provisions of Chapter 2 (commencing with
26 Section 11200), Chapter 3 (commencing with Section 12000), Chapter 4 (commencing with Section 12500), Chapter
27 5 (commencing with Section 13000), or Chapter 6 (commencing with Section 13500) of Part 3, or Part 5
(commencing with Section 17000), of Division 9 of the Welfare and Institutions Code, and excluding from such
monetary payments received by the employee for or on account of such preexisting disability or impairment a sum
equal to all sums reasonably and necessarily expended by the employee for or on account of attorney's fees, costs and
expenses incidental to the recovery of such monetary payments.

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. (§ 4753.)

1 hypertension during the period from January 1, 1990 through November 25, 2009. (Minutes of Hearing
2 and Summary of Evidence (MOH/SOE), May 17, 2016, p. 2:4-7.) The MOH/SOE identified the
3 disputed issues for trial as permanent disability, apportionment, and attorney's fees. Under "Other
4 Issues," SIBTF also disputed applicant's claim of 100% permanent disability. (*Id.* at p. 2:15-24.)⁶

5 At the May 17, 2016 trial, the WCJ took judicial notice of a Findings and Award issued on
6 March 6, 2012 against defendant employer of 64% permanent disability as a result of applicant's injury
7 to his kidneys, heart, and in the form of hypertension. (MOH/SOE, May 17, 2016, p. 3:6-7.) Following
8 the award of 64% permanent disability, applicant filed a petition to reopen for new and further disability
9 related to applicant's psychiatric injury. This petition was resolved by way of stipulation to 68%
10 permanent disability, which included credit for the previous award of 64%. (Stipulations with Request
11 for Award, September 6, 2013.) The WCJ took judicial notice of an award dated September 11, 2013
12 approving stipulations for 68% permanent disability stemming from the same body parts. (MOH/SOE,
13 May 17, 2016, p. 3:6-7.)

14 Five prior stipulated awards offered by applicant were admitted at the May 17, 2016 trial as
15 follows: Stipulation with Request for Award in case ADJ6807484 with Award dated November 23, 2009
16 (Applicant's Exh. 1); Stipulation with Request for Award in case VNO 0486348 (ADJ671938) with
17 Award dated December 28, 2005 (Applicant's Exh. 2); Stipulation with Request for Award in case VNO
18 376604 with Award dated July 26, 1999 (Applicant's Exh. 3); Stipulation with Request for Award in
19 cases VNO 345088, MON 170580, MON 219930, and MON 210865 with Award dated August 12, 1998
20 (Applicant's Exh. 4); and Stipulation with Request for Award in case MON 170580 with Award dated
21 February 8, 1994 (Applicant's Exh. 5). Applicant also offered a vocational assessment report from
22 Broadus & Associates dated August 12, 2015, which was admitted into evidence over SIBTF's objection.
23 (Applicant's Exh. 6; MOH/SOE, May 17, 2016, p. 4:5-23.)

24 On September 15, 2016, the WCJ issued a notice of status conference requesting further
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26 ⁶ At trial, SIBTF also raised the issue of whether applicant's SIBTF claim is barred by the statute of limitations. Applicant
27 objected since SIBTF had not raised the statute of limitations issue prior to trial. SIBTF does not raise the issue in its Petition
and we do not consider it. (§ 5904.)

1 development of the record and requesting that the parties be prepared to provide permanent disability
2 ratings in the five stipulated awards offered at trial by applicant (Applicant's Exhs. 1-5), and in the
3 current case, ADJ7475146. The WCJ vacated her previous submission and set the matter for a status
4 conference to address development of the record.

5 On February 22, 2017, applicant's attorney responded by letter to the WCJ's request and
6 indicated that, pursuant to applicant's trial brief, applicant was relying on the stipulated awards in the
7 current case, ADJ7475146, and in prior cases ADJ6807484, MON 210685, and VNO 0486348 in support
8 of applicant's argument for a 100% permanent disability award.⁷ Applicant's counsel provided the
9 following ratings:

10 ADJ7475146

11 Hypertension- 4.01 – 25 [5] – 32 – 490I – 41 – 43
12 Kidneys- 7.01 – 25 [2] – 29 – 490H – 35 – 37
13 Psyche- .30 { 14.01 – 18 [8] – 25 – 490J – 36 – 40 } 12
43 C 37 C 12 = 68

14 ADJ6807484

15 Back- .80 { 15.03 – 16 [5] – 20 – 490I – 27 – 29 } 23

16 MON 210685 (ADJ3295546) [sic]

17 Right Shoulder- 7.3 – 7 – 54I – 11 – 9:3 = 10

18 VNO 486348 (ADJ671938)

19 Gastrointestinal- 6.02 – 4 [6] – 5 – 490I – 8 – 8.

20 [Based on a split with the defense QME that rated 0%, the parties
21 compromised on a stipulated award of 4% PD.]

(Applicant's Exh. 7.)

22 SIBTF did not respond to applicant's February 22, 2017 letter (Applicant's Exh. 7) or provide its
23 own ratings. The matter was submitted on April 25, 2017, and the Findings and Award issued on
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25 ⁷ In her Report, the WCJ indicates that her decision was based on adding the permanent disability percentage awarded in the
26 present case (ADJ7475146) to the sum of the permanent disability percentages from all five of the prior stipulated awards
27 identified in the MOH/SOE dated May 17, 2016. (WCJ's Report, pp. 2-3, 8; Applicant's Exhs. 1-5.) We agree, however, that
the sum of the three prior disability awards relied on by applicant and the disability from the subsequent injury entitle
applicant to a 100% permanent disability award.

1 July 17, 2017, wherein the WCJ found, in pertinent part, that the sum of applicant's successive
2 disabilities entitled applicant to permanent and total disability.⁸

3 In its Petition, SIBTF does not dispute that applicant has met the threshold for SIBTF liability
4 under section 4751, nor does it dispute the permanent disability ratings offered by applicant. SIBTF also
5 does not raise an issue with respect to overlap between the successive disabilities. Accordingly, the sole
6 issue presented by the Petition is whether the WCJ correctly combined applicant's prior and subsequent
7 permanent disabilities under section 4751 by adding them to find that applicant is permanently and
8 totally disabled. (Petition, pp. 1-3.)

9 II. DISCUSSION

10 SIBTF is a state fund that provides benefits to employees with preexisting permanent disability
11 who sustain subsequent industrial disability. The purpose of the statute is to encourage the employment
12 of the disabled as part of a "complete system of [workers'] compensation contemplated by our
13 Constitution." (*Subsequent Injuries Fund of the State of California v. Industrial Acci. Com. (Patterson)*
14 (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Industrial Acci. Com.* (1958) 50 Cal.2d 469,
15 475; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 619 [2005 Cal. Wrk. Comp. LEXIS 71]
16 (Appeals Board en banc).)

17 SIBTF is codified in section 4751, which provides:

18 If an employee who is permanently partially disabled receives a subsequent
19 compensable injury resulting in additional permanent partial disability so
20 that the degree of disability caused by the combination of both disabilities
21 is greater than that which would have resulted from the subsequent injury
22 alone, and the combined effect of the last injury and the previous disability
23 or impairment is a permanent disability equal to 70 percent or more of
24 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

25 ⁸ In her Report, the WCJ states that she alternatively based her finding on the opinion of the vocational expert who determined
26 that applicant was totally and permanently disabled. (Report, pp. 8-9; Applicant's Exh. 6.) Since we affirm the WCJ's
27 finding of 100% permanent disability based on addition of the prior and subsequent disabilities, we do not consider the merits
of the vocational evidence and the issue of whether there was an alternative basis to find that applicant was 100% permanently
disabled.

1 disability, when considered alone and without regard to, or adjustment for,
2 the occupation or age of the employee, is equal to 5 percent or more of
3 total, or (b) the permanent disability resulting from the subsequent injury,
4 when considered alone and without regard to or adjustment for the
5 occupation or the age of the employee, is equal to 35 percent or more of
6 total. (§ 4751.)

7 The preexisting disability may be congenital, developmental, pathological, or due to either an
8 industrial or nonindustrial accident. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 619.) It must be
9 “independently capable of supporting an award” of permanent disability, “as distinguished from [a]
10 condition rendered disabling only as the result of ‘lighting up’ by the second injury.” (*Ferguson, supra*,
11 50 Cal.2d at p. 477.)

12 Furthermore, there is no specific statute of limitations with respect to the filing of an application
13 against SIBTF; an application against the fund will not be barred “where, prior to the expiration of five
14 years from the date of injury, an applicant does not know and could not reasonably be deemed to know
15 that there will be substantial likelihood he will become entitled to subsequent injuries benefits, [] if he
16 files a proceeding against the Fund within a reasonable time after he learns from the board's findings on
17 the issue of permanent disability that the Fund has probable liability.” (*Subsequent Injuries Fund v.*
18 *Workmens’ Comp. Appeals Bd. (Talcott)* (1970) 2 Cal.3d 56, 65 [35 Cal.Comp.Cases 80].)

19 In a claim for SIBTF benefits, an employee must establish that a disability preexisted the
20 industrial injury. (§ 4751.) Evidence of a preexisting disability may include prior stipulated awards of
21 permanent disability or medical evidence. In order to be entitled to benefits under section 4751, an
22 employee must prove the following elements:

- 23 (1) a preexisting permanent partial disability;
- 24 (2) a subsequent compensable injury resulting in additional permanent partial disability:
 - 25 (a) if the previous permanent partial disability affected a hand, an arm, a foot, a
26 leg, or an eye, the subsequent permanent disability must affect the opposite and
27 corresponding member, and this subsequent permanent disability must equal to 5%
or more of the total disability, when considered alone and without regard to, or
adjustment for, the occupation or age of the employee; or

1 (b) the subsequent permanent disability must equal to 35% or more of the total
2 disability, when considered alone and without regard to, or adjustment for, the
3 occupation or the age of the employee;

4 (3) the combined preexisting and subsequent permanent partial disability is greater than
5 the subsequent permanent partial disability alone; and

6 (4) the combined preexisting and subsequent permanent partial disability is equal to 70%
7 or more. (§ 4751.)

8 Once the threshold requirements are met, section 4751 specifically provides that applicant “shall
9 be paid in addition to the compensation due under this code for the permanent partial disability caused by
10 the last injury compensation for *the remainder of the combined permanent disability* existing after the
11 last injury” (§ 4751; emphasis added.) “[E]ntitlement to SIBTF benefits begins at the time the
12 applicant becomes entitled to permanent disability payments.” (*Baker v. Workers’ Comp. Appeals Bd.*
13 (*Guerrero*) (2017) 13 Cal.App.5th 1040, 1050 [82 Cal.Comp.Cases 825].)

14 **A. Prior and subsequent permanent disabilities shall be added to the extent they do not overlap
15 in order to determine the “combined permanent disability” specified in section 4751.**

16 We begin our discussion here with the Court of Appeal’s decision in *Bookout v. Workers’ Comp.*
17 *Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595], which addressed the issue of how to
18 determine the “combined permanent disability” as specified in section 4751.

19 **1. The Court of Appeal’s decision in *Bookout*.**

20 In *Bookout*, applicant was employed as an oil refinery operator and sustained a compensable
21 injury to his back, which was rated at 65% permanent disability. (*Bookout, supra*, 62 Cal.App.3d at
22 pp. 219-220.) The back disability included a limitation to semi-sedentary work. (*Id.* at p. 219.) Prior to
23 his industrial injury, applicant had a nonindustrial heart condition. (*Ibid.*) The heart condition contained
24 two work preclusions: preclusion of heavy work activity and preclusion from excessive emotional stress.
25 (*Id.* at pp. 220-221.) The preclusion of heavy work activity was rated at 34.5% permanent disability. (*Id.*
26 at p. 220.) The preclusion from excessive emotional stress was rated at 12% permanent disability. (*Id.* at
27 pp. 220-221.)

1 At the trial level, the referee concluded that the heart condition precluding heavy work activity
2 completely overlapped with the back disability limitation to semi-sedentary work. (*Bookout, supra*, 62
3 Cal.App.3d at p. 224.) The referee, thus, subtracted the preclusion of heavy work activity of 34.5%
4 permanent disability from the 65% unapportioned permanent back disability and awarded applicant
5 permanent disability of 30.5% for the industrial back injury. (*Id.* at pp. 219-221.) The referee then found
6 that applicant was not eligible for SIBTF benefits based on the finding of 30.5% after apportionment,
7 which was less than the requisite minimum of 35% for a subsequent disability under section 4751.⁹ (*Id.*
8 at p. 221.) The Appeals Board affirmed both the 30.5% permanent disability award for the industrial
9 back injury and the finding that applicant was not eligible for SIBTF benefits. (*Id.* at pp. 218-219.)

10 The Court of Appeal concluded that the Appeals Board had properly determined applicant's
11 permanent disability rating of 30.5% as a result of his compensable back injury, and that the disability
12 resulting from the subsequent injury was compensable to the extent that it caused a decrease in
13 applicant's earning capacity, citing former section 4750¹⁰ and *State Compensation Ins. Fund v. Industrial*
14 *Acci. Com. (Hutchinson)* (1963) 59 Cal.2d. 45, 48-49 (an employer is only liable for the portion of
15 disability caused by the subsequent industrial injury) and *Mercier v. Workers' Comp. Appeals Bd.* (1976)
16 16 Cal.3d 711, 715-716 [41 Cal.Comp.Cases 205] (the fact that injuries are to two different parts of the
17 body does not in itself preclude apportionment). (*Bookout, supra*, 62 Cal.App.3d at pp. 222-227.)

18 The court, however, found that applicant was erroneously denied SIBTF benefits under section
19 4751. (*Bookout, supra*, 62 Cal.App.3d at p. 228.) It explained that the referee incorrectly instructed the
20 rating specialist to apportion 34.5% for the preexisting nonindustrial heart disability (based on a standard
21 rating¹¹ of 30%) from the total subsequent injury disability of 65% (based on a standard rating of 60%),

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23 ⁹ The language of section 4751 has remained the same since the time of the *Bookout* decision. (§ 4751; *Bookout, supra*, 62
24 Cal.App.3d at pp. 227-228.)

25 ¹⁰ Former section 4750 provided: "An employee who is suffering from a previous permanent disability or physical impairment
26 and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the
27 compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous
disability or impairment. [¶] The employer shall not be liable for compensation to such employee for the combined disability,
but only for that portion due to the later injury as though no prior disability or impairment had existed." (Former § 4750,
added by Stats. 1937 and repealed by Stats. 2004, ch. 34, § 37, eff. April 19, 2004.)

¹¹ The standard rating excludes adjustments for age and occupation.

1 rather than utilizing the total disability for the subsequent injury “standing alone and without regard to or
2 adjustment for the occupation or age of the employee” as required by section 4751.¹² (*Ibid.*; § 4751,
3 subd. (b).) It interpreted the language of this requirement as excluding apportionment. Thus, the court
4 held that the permanent disability attributable to applicant’s subsequent injury for the purpose of meeting
5 the 35% threshold requirement under the statute was the standard rating of 60%. (*Bookout, supra*, 62
6 Cal.App.3d at p. 228; § 4751, subd. (b).)

7 The court also examined how applicant met the 70% threshold requirement. At the trial level, the
8 rating specialist combined the 12% permanent disability from the prior heart condition precluding
9 excessive emotional stress with the 65% permanent disability for the subsequent back disability using the
10 Multiple Disabilities Table (MDT),¹³ based on an instruction by the referee to treat both disabilities as
11 resulting from a single injury. (*Bookout, supra*, 62 Cal.App.3d at pp. 220-221.) The 34.5% permanent
12 disability associated with the heart condition precluding heavy work was not considered because it was
13 subsumed by and overlapped the permanent disability from the subsequent back injury that provided a
14 limitation to semi-sedentary work. (*Id.* at p. 220.) The 12% permanent disability associated with the
15 heart condition precluding excessive emotional stress, however, did not overlap with the subsequent back
16 disability. (*Ibid.*) As a result, using the MDT to combine the non-overlapping permanent disability of
17 12% with the permanent disability of 65% from the subsequent injury resulted in 70.5% permanent
18 disability. (*Id.* at pp. 220, 225.)

19 The court noted that “[t]he rating specialist rated the back disability at 60 percent, modified for
20 age and occupation to 65 percent, and the heart disability at 10 percent, modified for age and occupation
21 to 12 percent, *resulting in a combined permanent disability of 77 percent*. Upon the utilization of
22 ‘multiple tables’ the rating specialist arrived at a recommended rating of 70 1/2 percent.” (*Bookout,*
23 *supra*, 62 Cal.App.3d at p. 220; emphasis added.) The court then observed, “[t]he 70 1/2 percentage of
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25 ¹² The work preclusions under the “Guideline for Work Capacity” utilized by the disability evaluator are found in the
26 schedules used before 2005.

27 ¹³ The MDT which was then in use included formulas and a chart that were used to rate disabilities “involving different
members or organs of the body” (1966 schedule; see discussion *infra*.)

1 combined disability rated by the referee for all the factors of disability was arrived at upon the use of the
2 multiple tables. As testified to by the [rating specialist], this determination was made upon a
3 consideration of the several factors of disability as arising out of a *single* injury and not from the
4 combination of a preexisting injury or condition and subsequent injury. The referee, himself, recognized
5 that the 70 1/2 percent disability rating was ‘based on the injuries considered as a combined disability
6 *and as one entity.*’” (*Id.* at p. 229, fn. 2; emphasis in original.)

7 Noting that the successive disabilities resulted from a “preexisting injury or condition and a
8 subsequent injury” in contrast to the referee’s consideration of the “several factors of disability as arising
9 out of a single injury,” the court determined that the 12% non-overlapping permanent disability
10 attributable to the prior disability should be added to the 65% subsequent back disability, resulting in
11 77% permanent disability. (*Bookout, supra*, 62 Cal.App.3d at p. 229, fn. 2.) The court then subtracted
12 30.5%, which was the permanent disability award for the subsequent back injury after apportionment,
13 from the combined 77% permanent disability, and concluded that SIBTF was liable for the difference of
14 46.5% permanent disability. (*Id.* at pp. 229-230, citing *Subsequent Injuries Fund v. Industrial Acci.*
15 *Com. (Harris)* (1955) 44 Cal.2d 604.)

16 **2. The 1997 and 2005 Permanent Disability Rating Schedules indicate that the MDT or**
17 **Combined Values Chart (CVC) are to be used in a single injury and not in successive**
18 **injuries.**

19 The Permanent Disability Rating Schedules (schedules) are used to determine the percentage of
20 permanent disability sustained by an injured worker. (§§ 4660, 4660.1.) There are multiple schedules
21 throughout the years as they are amended from time to time. The 2005 schedule is the most current
22 schedule.

23 To determine permanent disability caused by an injury, the schedules take into account the nature
24 of the injury, the occupation of the injured worker, and his or her age. (§§ 4660, 4660.1.) An injury can
25 result in multiple permanent disabilities. The schedules utilize a table to determine the final overall
26 permanent disability. If the injury occurred prior to January 1, 2005, the table that is used to combine
27 multiple permanent disabilities is the MDT, which was the table that was in use at the time of the
Bookout decision. If the injury occurred on or after January 1, 2005, the table that is used to combine

1 multiple permanent disabilities is the CVC.

2 The 1997 schedule, which incorporates the MDT, instructs that it is “to be used when combining
3 multiple disabilities involving different members or systems of the body . . .” or “when combining two or
4 more disability factors occurring in one or both arms or legs.” (1997 schedule, p. 7-12.) Although this
5 language does not distinguish between rating a single injury and successive injuries, a further look at
6 other language in the schedule shows otherwise.

7 Under the section “pyramiding,” the schedule provides in pertinent part that:

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

12 Under the section entitled “Duplication,” the schedule provides that:

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

17 Finally, under the section “Overlap” the schedule provides that:

18 When factors of disability resulting from the current injury duplicate
19 factors resulting from a *different* injury or condition, the disabilities are
20 said to “overlap”. Overlap occurs to the extent that the factors of
21 disability resulting from the current injury do not reduce an injured
22 worker’s ability to compete in an open labor market beyond the disability
23 resulting from pre-existing injury(ies) [*sic*] and / or condition(s).

22 The attribution of overlapping factors of disability to different causes is
23 called apportionment. Overlapping disability(ies) [*sic*] resulting from the
24 prior injury or condition must be factored out of the current disability so
25 that the rating reflects only the residual disability caused by the current
26 injury. Overlap may be total, partial or absent, as illustrated in the
27 following examples. [Examples omitted.] (1997 schedule, p. 1-10;
emphasis in original.)

26 In *Mihesuah v. Workers’ Comp. Appeals Bd.* (1976) 55 Cal.App.3d 720, 727 [41 Cal.Comp.Cases
27 81], the court explained that the purpose of the MDT is to avoid overlap between disabilities and

1 impairments, or pyramiding when rating a single injury:

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

7 The 2005 schedule incorporates the CVC and provides instructions “for combining two or more
8 disabilities or two or more impairments.” (2005 schedule, pp. 8-1 to 8-4.) The 2005 schedule also
9 includes a formula for combining impairments and disabilities (*Id.* at pp. 1-10 to 1-11) and examples of
10 how to rate multiple impairments and disabilities using the CVC (*Id.* at pp. 7-1 to 7-4).

11 Like the 1997 schedule, the 2005 schedule contains language that it is to be used for rating a
12 single injury. The introduction to the 2005 schedule provides that “[t]he extent of permanent disability
13 that results from *an* industrial injury can be assessed once an employee’s condition becomes permanent
14 and stationary.” (2005 schedule, p. 1-2; emphasis added.) Under the heading “Impairment Standard,”
15 the 2005 schedule provides that “[a] *single injury* can result in multiple impairments of several parts of
16 the body. . . . and “[i]t is not always appropriate to combine all impairment standards resulting from a
17 *single injury*, since two or more impairments may have a duplicative effect on the function of the injured
18 body part.” (*Id.* at p. 1-5; emphasis added.)

19 Pursuant to sections 4660 and 4660.1, the schedules must incorporate the descriptions and
20 measurements of physical impairments published in the American Medical Association Guides (Guides)
21 to the Evaluation of Permanent Impairment (5th Edition). (§§ 4660, 4660.1.) The philosophy for the use
22 of the CVC is expressed in the beginning of the AMA Guides:

23 The Combined Values Chart (p. 604) was designed to enable the physician
24 to account for the effects of multiple impairments with a summary value.
25 A standard formula was used to ensure that regardless of the number of
26 impairments, the summary value would not exceed 100% of the whole
27 person. According to the formula listed in the combined values chart,
multiple impairments are combined so that the whole person impairment
value is equal to or less than the sum of all the individual impairment
values.

1 A scientific formula has not been established to indicate the best way to
2 combine multiple impairments. Given the diversity of impairments and
3 great variability inherent in combining multiple impairments, it is difficult
4 to establish a formula to account for all situations. A combination of some
5 impairments could decrease overall functioning more than suggested by
6 just adding impairment ratings for the separate impairments (e.g.,
7 blindness and inability to use both hands). When other multiple
8 impairments are combined, a less than additive approach may be more
9 appropriate. (AMA Guides, 5th ed., § 1.4, at pp. 9-10.)

10 The schedules support the use of the MDT or CVC to combine multiple impairments or
11 permanent disabilities with respect to the rating of *single injuries*, but not to combine *successive*
12 permanent disabilities related to prior and subsequent injuries under section 4751. The language from
13 both the 1997 and 2005 schedules and the authority cited above, therefore, reinforce the holding in
14 *Bookout* that, under section 4751, non-overlapping successive permanent disabilities are to be added.
15 (See also *Lopez v. City and County of San Francisco* (February 11, 2015, ADJ7827606) [2015 Cal. Wrk.
16 Comp. P.D. LEXIS 46]; *Evanoff v. City of Los Angeles* (April 25, 2016, ADJ9171432) [2016 Cal. Wrk.
17 Comp. P.D. LEXIS 201].)¹⁴

18 Notably, the court in *Bookout* did not reject the disability evaluator’s method of rating the
19 successive disabilities under the MDT, but rather it rejected the referee’s instruction to treat both
20 disabilities as a single injury, which would require use of the MDT. (*Bookout, supra*, 62 Cal.App.3d at
21 pp. 225-226; see also *Singh v. State of California* (April 28, 2017, ADJ2653468, ADJ7229862,
22 ADJ9578758, ADJ10137164) [2017 Cal. Wrk. Comp. P.D. LEXIS 204].)

23 We also note that although the words “combination” and “combined” are used in the statute, the
24 term “combined” does not by itself denote any particular method of *how* to combine permanent
25 disabilities, and we do not interpret the term to mean or imply that successive disabilities must be

26 ¹⁴ Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers’
27 compensation judges. (See *Gee, supra*, 96 Cal.App.4th at p. 1425, fn. 6.) A California Compensation Cases digest of a “writ
denied” case is also not binding precedent. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366
(Appeals Board en banc).) While not binding, the WCAB may consider panel decisions to the extent that it finds their
reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en
banc).)

1 combined using a particular formula or table.¹⁵ Addition is one method of combining, utilizing the CVC
2 another. (See *Bookout*, *supra*, 62 Cal.App.3d at p. 225 [“Adverting to the instruction by the referee to
3 the rating specialist with respect to subsequent injuries fund benefits, we observe that it produces a rating
4 of 65 percent for the back injury and a rating of 12 percent for the heart disability or a *combined*
5 *disability* of 77 percent reduced to 70 1/2 percent upon an application of the ‘multiples tables.’”];
6 emphasis added.)

7 We further note that although the court in *Subsequent Injuries Fund v. Industrial Acci. Com.*
8 (*Rogers*) (1964) 226 Cal.App.2d 136 [29 Cal.Comp.Cases 59] acknowledged the Industrial Accident
9 Commission’s use of the MDT to combine successive injuries, the issue of *how* the successive
10 disabilities should be combined was not before the court. Furthermore, to the extent it is argued that
11 *Rogers* supports the proposition that use of the MDT is required when combining permanent disabilities
12 from successive injuries, we believe, for the reasons stated herein, that the later Court of Appeal decision
13 in *Bookout* provides the more reasoned analysis.

14 **B. SIBTF is liable, under section 4751, for the total amount of the “combined permanent**
15 **disability”, less the amount due to applicant from the subsequent injury and less credits**
allowable under section 4753.

16 As discussed above, the court in *Bookout* concluded that SIBTF was liable for the difference in
17 percentage between the combined permanent disability and the subsequent permanent disability. The
18 court’s approach to determining SIBTF’s liability by subtracting percentages was consistent with the
19 decisions of the Supreme Court in *Hutchinson*, *supra*, 59 Cal.2d. 45 and *Harris*, *supra*, 44 Cal.2d 604.
20 Based on the court’s interpretation of former section 4750, which was repealed in 2004, the court in
21 *Hutchinson*, citing *Harris*, concluded that the proper method of computing SIBTF’s liability is to subtract
22 from the combined permanent disability that percent attributable to the subsequent injury. (*Hutchinson*,
23 at pp. 55-56; *Harris*, at pp. 609-610; see also *Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal.3d 1
24 [41 Cal.Comp.Cases 42].) The remaining percentage was considered SIBTF’s liability. (*Hutchinson*, at
25 pp. 55-56; *Harris*, at pp. 609-610.)

26 _____
27 ¹⁵ Among the definitions of “combine” is simply “to unite into a single number or expression.” (Merriam-Webster Collegiate
Dict. (10th ed. 1993) p. 228, col. 2.)

1 However, section 4751, the statute that governs SIBTF, mandates “. . . that [where the liability
2 thresholds are met, applicant] shall be paid in addition to the compensation due under this code for the
3 permanent partial disability caused by the last injury compensation for *the remainder of the combined*
4 *permanent disability* existing after the last injury” (§ 4751; emphasis added.) We interpret this
5 language to mean that the proper method of determining liability against SIBTF is to award applicant the
6 total amount of the combined permanent disability compensation less the amount due to applicant from
7 the subsequent injury and less credits allowed under section 4753. This method of determining SIBTF’s
8 liability ensures that applicant receives the full monetary value of the combined permanent disability.
9 (§§ 4658, 4659; *Novin v. Ramada Inn Hotel* (February 16, 2010, ADJ2255931 (LAO 0512153),
10 ADJ4390378 (LAO 0732653)) [2010 Cal. Wrk. Comp. P.D. LEXIS 141].)¹⁶

11 Accordingly, for the reasons set forth above, we hold that:

12 (1) Prior and subsequent permanent disabilities shall be added to the extent
13 they do not overlap in order to determine the “combined permanent
14 disability” specified in section 4751; and

15 (2) SIBTF is liable, under section 4751, for the total amount of the
16 “combined permanent disability”, less the amount due to applicant from the
17 subsequent injury and less credits allowable under section 4753.

18 As our decision after reconsideration (en banc), we affirm the July 17, 2017 decision.

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27 ¹⁶ SIBTF concedes that this is the proper method of establishing liability. (Petition, p. 10: 19-21 [“Had the *Bookout* [c]ourt applied section 4751 correctly, the award of SIF benefits would have been the dollar value of 77 percent permanent disability less the dollar value of 31 (sic) percent due to the subsequent industrial injury.”].)

1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board (En Banc) that the Findings and Award issued on July 17, 2017 by the workers' compensation
4 administrative law judge is **AFFIRMED**.

5 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

6 /s/ KATHERINE A. ZALEWSKI, CHAIR

7
8 /s/ DEIDRA E. LOWE, COMMISSIONER

9
10 /s/ MARGUERITE SWEENEY, COMMISSIONER

11 /s/ JOSÉ H. RAZO, COMMISSIONER

12
13 /s/ KATHERINE WILLIAMS DODD, COMMISSIONER

14
15 /s/ CRAIG SNELLINGS, COMMISSIONER

16
17
18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 **JUNE 23, 2020**

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

22 **RICHARD TODD**
23 **LEWIS, MARENSTEIN, ET AL.**
24 **SIBTF**
25 **OFFICE OF THE DIRECTOR – LEGAL UNIT (LOS ANGELES)**

26 **RLN/LSM/abs**



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