California Workers' Compensation Institute

Significant Decision

No. 20-03 June 24, 2020

TODD VS. SUBSEQUENT INJURIES BENEFIT TRUST FUND

WCAB EN BANC DECISION
(ADJ7475146)

FILED: JUNE 23, 2020

In an en banc decision, the Appeals Board has outlined the proper method to determine the liability of the Subsequent Injuries Benefit Trust Fund and has required the use of addition instead of combining disabilities.

Significance: In a Subsequent Injuries Benefit Trust Fund case, to the extent they do not overlap, prior and subsequent permanent disabilities must be added instead of combined.

Facts: A former LAPD officer obtained a 2012 award of 64% permanent disability as a result of injury to his kidneys, heart, and in the form of hypertension; a subsequent petition to reopen for new and further disability related to applicant's psychiatric condition was resolved in 2013 by way of stipulation to 68% overall permanent disability. Applicant next claimed injury CT 1990-2009 against the Subsequent Injuries Benefit Trust Fund, seeking 100% permanent total disability. At trial, five prior Awards were admitted into evidence including 1998 [R/shoulder, 10%], 2005 [gastrointestinal, 8%], and 2009 [back, 23%]. After **adding** the permanent disability percentage awarded in the present case to the sum of the permanent disability percentages from each of the prior stipulated awards, the WCJ found that applicant's successive disabilities entitled him to permanent and total disability. The SIBTF filed for reconsideration, contending that the WCJ should have **combined** the prior and subsequent permanent disabilities under the Combined Values Chart (CVC) instead of adding them, resulting in less than 100% permanent disability.

Holding: In upholding the WCJ, the unanimous en banc Appeals Board held that: (1) prior and subsequent permanent disabilities shall be added to the extent they do not overlap in order to determine the "combined permanent disability" specified in §4751; and (2) SIBTF is liable, under §4751, for the total amount of the "combined permanent disability" less the amount due to applicant from the subsequent injury and less credits allowable under §4753.

Discussion: In *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595], the Court of Appeal held that the permanent disability attributable to a subsequent injury should be added to the non-overlapping prior disability in order to determine eligibility for SIBTF benefits; thereafter, the permanent disability for the subsequent injury after apportionment is to be subtracted from the combined disability, with SIBTF remaining liable for the difference. Relying on *Bookout*, the Appeals Board here reasoned that prior and subsequent permanent disabilities shall be added to the extent they do not overlap in order to determine the "combined permanent disability" specified in §4751.

The Appeals Board next considered language in the various Permanent Disability Rating Schedules indicating that the charts used in the 1997 PDRS (the MDT) and the 2005 PDRS (the CVC) are to be used in a single injury -- not in successive injuries. Again looking to *Bookout*, the Appeals Board reasoned that the court there had rejected treatment of the prior and subsequent disabilities as a single injury (which would have required use of the MDT). In any event, the Appeals Board opined that the statutory requirement to "combine" disabilities does not necessarily mean "combine instead of add," stating:

> We also note that although the words "combination" and "combined" are used in the statute, the term "combined" does not by itself denote any particular method of how to combine permanent disabilities, and we do not interpret the term to mean or imply that successive disabilities must be combined using a particular formula or table. **Addition is one method of combining, utilizing the CVC another.**

Finally, the Appeals Board addressed SIBTF's actual liability. The statutory language in §4751 provides that the injured worker 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." The Appeals Board has now construed this language to mean that the proper method of determining SIBTF's liability is to award applicant the total amount of the combined permanent disability compensation less the amount due to applicant from the subsequent injury and less credits allowed under §4753. "This method of determining SIBTF's liability ensures that applicant receives the full monetary value of the combined permanent disability."

This decision will affect a very small subset of cases for most practitioners, and largely restates settled law. However, the mandate to use addition instead of the CVC chart should be of some concern, as well as the apparent ease with which the Appeals Board has condoned alternative methods of combining disabilities.

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