

# Subsequent Injury Benefits Trust Fund (SIBTF) for Physicians

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As a physician, you may already be performing qualified medical examinations (QMEs) or agreed medical examinations (AMEs) but there is another arena for performing medical legal examinations in California workers' compensation - Subsequent Injury Benefits Trust Fund (SIBTF) evaluations.

These SIBTF evaluations are requested by applicant attorneys after the workers' compensation case has settled. These evaluations can serve to assist the injured worker patient in receiving additional compensation, but for you, is also another potential source of practice revenue.

The SIBTF was created to provide financial help to persons who have significant pre-existing disability who then suffer a significant work injury.

SIBTF cases provide additional benefits under specified circumstances when an employee with a prior (labor disabling) disability suffers a subsequent workplace injury

There is an "overall threshold" and an "industrial threshold" that must be met to qualify for SIBTF benefits under L.C. Section 4751.

To reach SIF liability, an overall threshold must be met of **pre-existing disability plus Subsequent Industrial Disability (the last injury is the "subsequent" injury) must equal 70% PD or greater** and one of the two other industrial thresholds must be met:

1. The industrial (subsequent injury) disability must be a 35% disability without regard to adjustment for occupation and age, or
2. 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 (industrial) 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% or more of total disability.

There are no requirements as to the origin of the pre-existing (labor disabling) disability. The pre-existing disabilities can arise from whatever source, including congenital, developmental, disease, prior injury, war injury, non-industrial injuries or prior industrial disabilities. So long as the combination of all disabilities exceeds 70%, and one of the two other industrial "thresholds" (as noted above) has been met, there is SIBTF liability. It should be noted that the threshold percentages are not WPI, they are disability ratings prior to adjustment for age and occupation. However, the standard 1.4 multiplier is applicable per case law.

**Ratable labor disabling disability has to exist (not just the medical condition)** prior to industrial disability from the subsequent injury.

Remember though that the injured worker may have had a condition that was not perceived as labor disabling but the physician must consider whether the preexisting condition, whether known (i.e., diabetes, hypertension, heart disease, etc.) or unknown (congenital spinal stenosis etc.) was actually disabling but not

realized as such.

BUT, there needs to be medical evidence (proof) that there was a prior actual pre-existing “affect” (i.e., labor disabling disability – not just a present condition) and you will need medical proof that the disabling effect has continued (“Cured” conditions do not count).

For example, the injured worker with preexisting diabetes, heart disease or spinal stenosis may have had a job congenial to that condition but may have had an unrecognized disability.

The existence of a non-disabling pathological condition (i.e., degenerative disease) is not sufficient to justify entitlement to SIF benefits – unless it was labor disabling. Progression of the pre-existing disability doesn’t count – it must have been labor disabling prior to the subsequent industrial injury (even if only partially so). A retroactive prophylactic work restriction will not support SIF liability. Self-imposed restrictions (which are related to labor disabling condition) are not the same thing as a retroactive prophylactic work restriction nor are they always “prophylactic” – in other words, if self-imposed restrictions are legitimate from a medical standpoint, they may signify prior labor disablement.

### **History & Physical Examination**

With an SIBTF case, the **history predating the industrial injury** is of critical importance. The medical records coupled with the patients recollected medical history are obviously of considerable importance and need to be considered carefully.

Consider a past medical history of obesity, sleep apnea, tobacco and substance usage, past medication usage, psychiatric history and comorbidity, asthma, neurocognitive disorder, diabetes, heart disease, hypertension, spine disorders, hepatitis, learning disabilities, etc. Consider diagnostic tests and prior imaging studies.

Individuals often don’t remember their medical history and thus obtaining a full set of prior medical records is critical. In interviewing a significant other may be helpful to recollect prior injuries or diseases. Sometimes it is necessary to go as far as requesting school records, military or employment records to obtain medical evidence of pre-existing disabilities.

In searching for pre-existing opposite and corresponding medical conditions, consider the following:

- **Skin**
  - Psoriasis
  - Skin Cancer – Requiring sunscreen or wearing covering services shirt/long pants
  - Burns causing physical scars, contractures, or need for skin protection
- **Medical**
  - Diabetes
  - Heart disease
  - Hypertension
  - Pulmonary disease
  - Obstructive sleep apnea
  - Obesity
  - Gastrointestinal
- **Neurologic**
  - Diabetic neuropathy
  - Pre-existing nerve entrapment such as carpal tunnel syndrome
  - Cervical and lumbar radiculopathy causing arm or leg symptoms

- Reynaud’s syndrome causing sensitivity to heat and cold
- History of multiple sclerosis, stroke, Parkinson’s symptoms (i.e., tremors, rigidity), etc.
- **Orthopedic**
  - Prior fractures with or without deformities
  - Prior osteoarthritis or rheumatoid arthritis
  - Prior evidence of repetitive stress injury
  - Prior sports or other injuries
  - Other orthopedic problems such as plantar fasciitis, joint injuries, etc.
  - Childhood injuries
- **Prior use of adaptive equipment** such as canes, braces, etc.
- **Vascular**
  - Prior history of phlebitis, DVT, varicose veins, peripheral edema

### **The Pre-Existing Disability**

The SIBTF physician evaluator can combine the injured worker’s history as to the pre-existing disability, the medical facts from the medical records, and the findings from the current physical exam to determine the degree of pre-existing labor disablement even if the DOI was 5–10 years earlier. The physician can and should use his or her best medical judgment to make this determination. The fact the injured worker “worked around” the pre-existing disability does not mean it did not exist. For example, an individual with a diabetic neuropathy precluding wet work, extremes of heat or cold on a pre-existing basis - these are actual (not retroactive prophylactic) limitations.

### **Identifying Pre-Existing Disabling Conditions**

Many people have underlying disabling conditions that they have adapted to or “work around” and do not think about or even recognize their existence. If you don’t ask, they won’t tell. Ask about pre-existing limitations on activities of daily living. Questions about occupational issues can include pre-existing limitations as well as pre-existing exposures (chemicals, sound, overuse injuries, stress) causing avoidance of those exposures. A look at employment histories can sometimes reveal inability to keep jobs or lack of career advancement. Further inquiry into the reasons for short employment or employment gaps may help to uncover lifelong disabilities

### **Document Pre-Existing Disability**

For determining pre-existing disability, a review of the past medical history including pre-existing symptoms is critical. Consider congenital disease; hereditary/familial diseases, prior injuries including childhood accidents (fractures, burns, concussions, etc.); household auto, bicycle and prior industrial accidents; prior civil/third-party case; war injury, past psychiatric problems/disability; learning disability, cancer, history of substance abuse and criminal history.

Regarding pre-existing symptoms, consider the following:

- **General constitutional systems:** fever, chills, fatigability, night sweats, weight loss/gain
- **Eyes:** Change in vision, blurring, acuity, diplopia, photophobia, pain, redness, discharge, loss of vision.
- **Ears, nose, mouth, sinuses:** Allergy symptoms, congestion, pain, discharge, change in hearing, tinnitus, sense of smell, epistaxis, sore throat, hoarseness, teeth or gum problems, oral ulcers, change

in taste.

- **Chest/lungs:** Dyspnea, cyanosis, wheezing, cough, sputum, hemoptysis, chest pain related to breathing, exposure to TB, last chest X-ray.
- **Cardiovascular:** Chest pain, palpitations, dyspnea, orthopnea, paroxysmal nocturnal dyspnea, edema, claudication,
- **Digestive:** Appetite, digestion, food intolerance, dysphagia (trouble swallowing), nausea, vomiting, bowel habits, change in bowels, hemorrhoids, history of ulcer, polyps.
- **Genitourinary:** dysuria, frequency, urgency, nocturia, hematuria, hesitancy, incontinence, hernias, flank or suprapubic pain. History of sexually transmitted diseases. Abnormal penile or vaginal discharge. *For men:* change in libido; difficulty obtaining or maintaining erection, abnormal ejaculation, premature or delayed orgasm. Testicular pain or swelling. *For women:* Normal menstrual pattern, change in menses, pain with menstruation, fertility problems pain with intercourse, problems with libido, arousal, orgasm, age at menopause, last Pap smear.
- **Breast (for women):** Pain, tenderness, discharge, lumps, last mammogram, performance of self breast exams, previous breast biopsies.
- **Musculoskeletal:** Joint pain, stiffness, restriction of motion, redness, warmth, deformity.
- **Endocrine:** thyroid enlargement or pain, heat or cold intolerance, changes in facial or body hair, change in weight, increased hat or glove size.
- **Hematologic:** Anemia, easy bruising, easy bleeding, history of blood clots.
- **Lymph nodes:** Swelling, tenderness, drainage.
- **Neurologic:** loss of consciousness, seizures, weakness or paralysis, change in sensation or coordination or gait, falls, tremor, memory loss.
- **Psychiatric:** depression, anxiety, mood changes, sleep disturbance, fears, difficulty concentrating, social withdrawal, suicidality.
- **Skin, hair, nails:** rash, itching, pigment or texture change, change in moles, excessive sweating/dry skin, abnormal nails or hair growth or texture.

Remember that these pre-existing symptoms must be translated by the physician into an actual pre-existing disability and impairment to be ratable.

When examining the individual, consider the following:

- Scars
- Deformities
- Posture, body habitus
- Gait abnormality
- Mental acuity
- Behavioral issues
- Mood and affect
- Speech impediment
- Hearing loss
- Breathing pattern, SOB, etc.

It is important to describe the pre-existing labor disablement/disability that existed prior to the last/subsequent injury. It may be more difficult to go back in time to provide an impairment rating, but the medical records can be very helpful. While a standard AMA Guides rating should be attempted, the physician may need to turn to an Almaraz Guzman Analysis and provide the most accurate impairment rating within the 4 corners of the AMA Guides. If the disabling condition is psychiatric, GAF rating will not always account for the level of impairment in functioning the injured worker experiences. It is sometimes best to specify work restriction and limitations (actual, even if self-imposed) and allow a

vocational expert to determine a disability rating based on those. Chapter 13 ratings are common for pre-existing brain injuries and neurocognitive disorders.

### **Progression/Worsening of a Pre-Existing Condition**

Just as cured conditions are not compensable, worsening or progression of pre-existing conditions beyond the subsequent injury are also not eligible for SIBTF benefits. A physician must be able to determine the level at which a condition was immediately prior to the “subsequent” industrial injury and rate it accordingly. Any progression is not compensable.

At the same time, if a condition was ratable immediately prior to the industrial injury but was cured between that time and the present, it is also not compensable and should not be rated for SIBTF eligibility purposes.

The only labor disabling disability which is eligible for compensation from the SIBTF is that, which existed up to immediately before the industrial injury and continues to exist at the time of your evaluation.

### **Relevant Case Law**

There are several notable cases relevant to SIBTF, which have influenced the expectations attorneys have for medical evidence.

The most recent was *Enriquez v County of Santa Barbara*. The claimant sustained an injury to her psyche during the cumulative period of employment with County of Santa Barbara, ending in November of 2004. The psychiatric AME on the industrial case opined that the injured worker was totally disabled from competing in the open labor market, but apportioned 40% of her disability to other factors, leaving the industrial disability at 60%. The applicant attorney filed for SIBTF benefits to obtain compensation for the 40% non-industrial disability. The WCJ issued a decision that Enriquez was eligible for SIBTF; however, the fund appealed on the basis that the applicant had not sustained their burden of proof of pre-existing labor disabling disability as required by Labor Code 4751. The appeals board reviewed the case and opined that the WCJ decision is rescinded and the matter returned to trial level for further development of the record.

This appeals board decision touches on multiple important concepts and factors, citing relevant case law and sections of the Labor Code, which each physician who conducts med-legal evaluations for SIBTF should be familiar with. The full text of the decision with rationale is attached herein for your review.