

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

**GREG DEALBA, *Applicant***

**vs.**

**SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ111292949  
Oxnard District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION AND DECISION  
AFTER RECONSIDERATION**

Applicant Greg Dealba seeks reconsideration of the July 3, 2024 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant is entitled to 77% permanent disability from the Subsequent Injuries Benefits Trust Fund (SIBTF), less \$122,260.00 in credit and less attorney's fees of 25%.

Applicant contends that the WCJ erred in not taking into account the opinions of Jeffrey Hirsch, M.D., Qualified Medical Evaluator (QME), in determining applicant's preexisting disabilities; in particular, applicant's hypertension, hernia, sinusitis, arrhythmia and prostatism.

We received an answer from SIBTF. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration and amend the Findings and Award to reflect the opinions of Dr. Hirsch with respect to applicant's preexisting disabilities.

**FACTS**

As the WCJ stated:

Petitioner sustained a left shoulder injury on 11/18/13 for which he received an award of twelve percent permanent disability on 12/13/15

(Defense Exhibits A and B). Petitioner sustained a subsequent industrial injury in the form of a cumulative trauma for the period commencing 12/9/83 through 3/19/15 to his right shoulder, cervical spine, lumbar spine, heart (arrhythmia), asthma, and hearing loss that was settled by way of Compromise and Release on 4/27/20 (Defense Exhibit A). The settlement was based on the medical reports of Agreed Medical Examiners Dr. Newton in orthopedics (Applicant's Exhibits 2-7; Defense Exhibits C,D,E), Dr. Caren in Internal Medicine (Applicant's exhibits 8 and 9), and Dr. Roven in otolaryngology (Applicant's exhibits 10 and 11). In his report dated 4/22/19, Dr. Caren opined that he did not find substantial medical evidence that Applicant had hypertension (Defense Exhibit 9, page 47). The asthma condition was found to be entirely due to industrial causation (page 50). In regards to a trial [sic] fibrillation, Dr. Caren assigned whole person impairment 20 percent. In terms of apportionment, Dr. Caren opined that 45 percent was attributable to the industrial asthma condition, and 55 percent was due to obesity (page 50).

Following the settlement, Petitioner filed an Application for benefits from SIBTF on 9/4/20. In support of said Petition, Mr. Dealba was evaluated tele-medically by Dr. Hirsch as a Panel Qualified Medical Examiner in internal medicine. In his report dated 2/8/22, in conjunction with the exam and review of medical records, Dr. Hirsch made whole person impairment findings relative to the non- industrial conditions of hypertension, sinusitis, atrial fibrillation (partially non-industrial), hernia and prostatism (Applicant's Exhibit 12)

Regarding the condition of hypertension, Dr. Hirsch stated that Applicant "has class 3 impairment. He has hypertension requiring two medications. He has concentric left ventricular hypertrophy. He has 30% whole person impairment."

For the hernia and gastrointestinal conditions, Dr. Hirsh opined "Mr. De Alba has high class 1 impairment. He does require continuous treatment. He has objective changes based on upper GI endoscopy (hiatal hernia and reflux). He has symptoms several times per week. There are no examples following Table 6-3 that provide precise guidance in cases of this nature. He has 8% whole person impairment." The records reviewed by Dr. Hirsch do not include any GI endoscopy results.

Regarding arrhythmia/atrial fibrillation, Dr. Hirsch stated "Mr. De Alba has symptomatic arrhythmia which is potentially catastrophic in nature. He currently has atrial fibrillation. The example listed on page 57 includes an individual who is entirely asymptomatic (in contrast to Mr. De Alba). Viewing the criteria in this table, he has Class 2 impairment of 20%."

Regarding sinusitis DR. Hirsh [sic] stated “Mr. De Alba has Class 1 impairment due to sinusitis. He has 6% WPI.”

For the condition of prostatism, Dr. Hirsch stated “Mr. De Alba also requires whole person impairment owing to the level of urinary frequency, urgency, and impaired bladder emptying caused by prostatism. These are clearly described as class 2 in Table 7-3 on page 151. He has 14% whole person impairment.

In discussing apportionment, Dr. Hirsch opined “100% of the impairment for hiatal hernia/reflux, hypertension, chronic sinusitis, and prostatism is non-industrial; these impairments were present and manifest prior to March 19, 2015. Dr. Caren concluded that 55% of the impairment caused by atrial fibrillation was non-industrial. Therefore, that degree of non-industrial permanent disability/impairment was labor-disabling and pre-dated March 19, 2015. Based on the information available, it appears that Dr. Caren concluded that 100% of the asthmatic disorder was industrial. Therefore, the impairment rating above (for asthma) is not relevant (unless the final Award was predicated on some degree of apportionment).”

□

The matter was originally submitted on the documentary record with no testimony on 2/8/23. The court issued Findings and Orders on 4/11/23 wherein the parties were ordered to develop the record regarding causation of Applicant’s left shoulder disability. Defendant filed a Petition for Removal regarding the finding that all discovery be open. The Court issued a more limited Findings and Orders on 5/17/23. The parties developed the medical record and the matter was again submitted on 10/25/23. The Court issued a Findings and Award on 11/8/23 wherein it was determined that Petitioner was entitled to benefits from SIBTF with the combined disability equal to 77 percent. Pre-existing permanent partial disability was determined to be 12 percent based in part on the previous stipulated award. The Court did not include any of the proposed internal disability indicated by Dr. Hirsch. Petitioner filed a Petition for Reconsideration on 11/27/23. In response the Court rescinded the Findings and Award in order to re-examine if there was further pre-existing disability for the arrhythmia. The matter was set for a conference which was continued at the request of Defendant. The matter was again submitted on 5/22/24. The Court issued the subject Findings and Award on 7/2/24 which was essentially identical to the Findings and Award of 11/8/23. (Report, pp. 2-4.)

## DISCUSSION

### A. Timeliness of this Decision

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
  - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
  - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on July 18, 2024, and 60 days from the date of transmission is September 16, 2024. This decision is issued by or on September 16, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on July 18, 2024, and the case was transmitted to the Appeals Board on July 18, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 18, 2024.

## B. Preexisting Disability

Turning to the merits of this case, there are no requirements as to the origin of the preexisting disability; it may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].) The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of workmen's compensation contemplated by our Constitution." (*Patterson* (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 475.)

The Supreme Court in *Ferguson* held that the "previous disability or impairment" contemplated by section 4751 "must be actually 'labor disabling,' and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751." (*Ferguson, supra*, p. 477; *Escobedo v. Marshall*, 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc).) The court further noted that "the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith v. Industrial Acc. Com.* (1955) 44 Cal.2d 364, 367 [2, 3] [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability. . . ." (*Ferguson*, at p. 477, quoting Larson's Workmen's Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

Further, the preexisting disability "need not have interfered with the employee's ability to work at his employment in the particular field in which he was working at the time of the subsequent injury. [citations]" (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 238.) "The ability of the injured to carry on some type of gainful employment under work conditions congenial to the preexisting disability does not require a finding that the preexisting disability does not exist. [citations]" (*Ibid.*)

To prove a preexisting disability, there needs to be evidence prior to the subsequent injury of a medically demonstrable impairment.

A preexisting disability cannot be established by a "retroactive prophylactic work restriction" on the preexisting condition placed on the injured after the subsequent industrial injury in absence of evidence to show that the worker was actually restricted in his work activity prior to the industrial injury. (*Hulbert v. Workmen's Comp. Appeals Bd., supra*,

47 Cal.App.3d 634, 640; *Gross v. Workmen's Comp. Appeals Bd.*, *supra*, 44 Cal.App.3d 397, 404-405; *Amico v. Workmen's Comp. Appeals Bd.*, *supra*, 43 Cal.App.3d 592, 606; see also *Bookout v. Workmen's Comp. Appeals Bd.*, *supra*, 62 Cal.App.3d 214, 224-225.) Where the injured was actually under a prophylactic restriction for a preexisting condition at the time of the industrial injury, apportionment to a preexisting disability is proper. It is only the *retroactive* application of a prophylactic restriction to an otherwise nonexistent previous disability that is prohibited. (*Ibid.*)

The prohibition against "retroactive prophylactic work restrictions" to establish a preexisting disability is not inconsistent with the fact that prophylactic restrictions are ratable factors of permanent disability stemming from the industrial injury. (*Gross, supra*, 44 Cal.App.3d at p. 404.) Applying a prophylactic work restriction retroactively creates "a sort of factual or legal fiction of an otherwise nonexistent previous disability or physical impairment." (*Ibid.*) Apportionment involves a factual inquiry. (See *Mercier v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.3d 711, 716; see also, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Gaba)* (1977) 72 Cal.App.3d 13, 16-17 [139 Cal.Rptr. 802].)

(*Franklin, supra*, 79 Cal.App.3d at p. 238.)

Here, the WCJ opined that Dr. Hirsch's opinions could not be relied upon because "none of the records relied upon by Dr. Hirsch were offered into evidence, but more significantly, the reporting of Dr. Hirsch does not constitute substantial medical evidence relative to the issue of whether a prior labor disabling condition existed at the time of the subsequent injury because Dr. Hirsch did not explain or provide reasoning as to how the records he reviewed established the existence of labor disabling permanent disability just prior to the subsequent industrial injury." (Report, p. 6.)

We disagree. Dr. Hirsch reviewed applicant's medical records as far back as 1995 and up until the supplemental report of Dr. Newton dated July 27, 2021. (Applicant Exhibit 12, Dr. Hirsch's report dated February 8, 2022, Appendix, pp. 20-74.) He highlighted several preexisting conditions of applicant in his February 8, 2022 report, which showed applicant's history of high blood pressure, atrial fibrillation, gastrointestinal reflux, postnasal drip and acute sinusitis, from 1995 to May 2019. (Applicant Exhibit 12, Dr. Hirsch's report dated February 8, 2022, pp. 9-14.) Dr. Hirsch also took applicant's history, which revealed that applicant developed problems with prostatism approximately five years before he retired in 2010, developing into prostate cancer in 2021. (Applicant Exhibit 12, Dr. Hirsch's report dated February 8, 2022, p. 4). Dr. Hirsch's intake of applicant's prostatism history was backed by Dr. Hirsch's review of past

medical records as noted in the Appendix of his February 8, 2022 report. (Applicant Exhibit 12, Dr. Hirsch's report dated February 8, 2022, Appendix, ¶¶ 140, 143, p. 59, 63.) It is Dr. Hirsch's review of applicant's past medical records in addition to his intake of applicant that led Dr. Hirsch to conclude that:

Based on the history I obtained from Mr. De Alba and the information in these medical records, Mr. De Alba had the following labor-disabling medical conditions in the field of Internal Medicine before March 19, 2015:

1. Hiatal hernia/reflux.
2. Hypertension with end-organ damage (both left ventricular diastolic and dysfunction and left ventricular hypertrophy).
3. Chronic sinusitis.
4. Atrial fibrillation.
5. Prostatism with symptoms.

Based on the same analysis, Mr. De Alba had the following non-disabling conditions during the same time:

1. Hyperlipidemia (non-impairing).
2. Hyperglycemia without diabetes (non-impairing).

(Applicant Exhibit 12, Dr. Hirsch's report dated February 8, 2022, p. 14.)

Dr. Hirsch provided the following permanent disability ratings for applicant's preexisting disabilities:

Using Table 4-2 on page 66 of the **AMA Guides**, Mr. De Alba has class 3 impairment. He has hypertension requiring two medications. He has concentric left ventricular hypertrophy. He has 30% whole person impairment.

Using Table 6-3 on page 121 of the **AMA Guides**, Mr. De Alba has high class 1 impairment. He does require continuous treatment. He has objective changes based on upper GI endoscopy (hiatal hernia and reflux). He has symptoms several times per week. There are no examples following Table 6-3 that provide precise guidance in cases of this nature. He has 8% whole person impairment.

Using Table 3-11 on page 56 of the **AMA Guides**, Mr. De Alba has symptomatic arrhythmia which is potentially catastrophic in nature. He currently has atrial fibrillation. The example listed on page 57 includes an individual who is entirely asymptomatic (in contrast to Mr. De Alba). Viewing the criteria in this table, he has Class 2 impairment of 20%.

Using Table 11-6 on page 260 of the **AMA Guides**, Mr. De Alba has Class 1 impairment due to sinusitis. He has 6% WPI.

Mr. De Alba also requires whole person impairment owing to the level of urinary frequency, urgency, and impaired bladder emptying caused by prostatism. These are clearly described as class 2 in Table 7-3 on page 151. He has 14% whole person impairment.

Asthma is analyzed by calculating an “asthma score” using Table 5-9 on page 104 of the **AMA Guides**. Based on the data available at this time, Mr. De Alba has an asthma score of 2. Consistent with the findings of Dr. Caren and using Table 5-10 on the same page of the **AMA Guides**, as asthma score of 2 equates to class 2 impairment of 14%. (Applicant Exhibit 12, Dr. Hirsch’s report dated February 8, 2022, p. 16; emphasis in original.)

The WCJ cites to *Hoover v. Trading Places Int’l* (December 18, 2018, ADJ3674012) 2018 Cal. Wrk. Comp. P.D. LEXIS 598,<sup>1</sup> for the proposition that retroactive AMA ratings cannot form the basis of SIBTF benefits in the absence of substantial medical evidence that the medical conditions were labor disabling. (Report, pp. 5-6.) The evidence in *Hoover* was that applicant had a history of ongoing minor back pain yet provided deposition testimony downplaying his back pain as “nothing [] abnormal,” but as a result of sudden movements or doing something strenuous. (*Hoover*, at p. \*8.) Here, however, the evidence shows a medical history of high blood pressure, atrial fibrillation, sinusitis, reflux, and prostatism throughout the years from as far back as 1995 and through 2021. This shows that applicant’s medical conditions were ongoing and labor disabling at the time of the subsequent injury of a cumulative trauma ending on March 19, 2015. Accordingly, we grant reconsideration and amend the Findings and Award to reflect the opinions of Dr. Hirsch with respect to applicant’s preexisting disabilities:

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<sup>1</sup> Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers’ compensation judges (see *Gee, supra*, 96 Cal.App.4th at p. 1425, fn. 6), but 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).)



Hypertension	04.01.00.00-30-[1.4]42-480H-48-54%
Hiatal Hernia Reflux	06.05.00.00-8-[1.4]11-480H-14-17%
Atrial fibrillation	55%(03.06.00.00-20-[1.4]28-480H-34-39) 21%
Sinusitis	05.02.00.22-6-[1.4]8-480H-11-13%
Prostatism	07.05.00.00-14-[1.4]20-480F-20-24%
Left Shoulder 12% PD (not in dispute)	

54 C 24 C 21 C 17 C 13 C 12 = 82%

Adding 82% preexisting permanent disability to applicant’s 65% subsequent permanent disability results in total permanent combined disability. (*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc).)

Moreover, we do not deem fatal the fact that none of the medical records relied by Dr. Hirsch were admitted into evidence. Workers’ compensation proceedings allow for certain informalities and relaxation of rules of evidence. (See Lab. Code, §§ 5708, 5709.) We conclude Dr. Hirsch’s February 8, 2022 report to be substantial evidence for purposes of establishing applicant’s preexisting disabilities.

Finally, we note that the WCJ awarded 25% in attorney’s fees. The WCJ explained that “this case was substantially complex enough to warrant a fee of equal to 25% of each future payout from SIBTF awarded.” (Opinion on Decision dated July 3, 2024.) We recognize the care that applicant’s attorneys exercised in representing applicant and the positive result achieved for applicant. However, there has not been any evidence taken to substantiate an award of 25%. Furthermore, attorney’s fees are governed by Labor Code, section 4903 and WCAB Rule 10844, not necessarily the “complexity” of a case. For that reason, we amend the Findings and Award to defer the issue of attorney’s fees.

For the foregoing reasons,

**IT IS ORDERED** that Applicant Greg Dealba's Petition for Reconsideration of the July 3, 2024 Findings and Award is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 3, 2024 Findings and Award is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

**FINDINGS OF FACT**

...

4. Applicant had preexisting permanent partial disability of 82%.

...

6. The combination of preexisting permanent partial disability and permanent disability from the subsequent industrial cumulative trauma for the period commencing December 9, 1983 through March 19, 2015 results in permanent total disability.

...

9. Applicant is entitled to benefits from Subsequent Injuries Benefits Trust Fund (SIBTF) representing 100% permanent disability, subject to COLA increases provided by Labor Code section 4659(c), less credit to SIBTF equal to the sum of \$122,260.00.

10. The issue to attorney's fees is deferred.

**AWARD**

**AWARD IS MADE** in favor of **GREG DE ALBA** against  
**SUBSEQUENT INJURIES BENEFITS TRUST FUND** of:

1. Permanent disability of 100%, subject to COLA increases provided by  
Labor Code section 4659(c), less credit to SIBTF equal to the sum of  
\$122,260.00.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**September 16, 2024**

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

**GREG DEALBA  
GHITTERMAN GUITTERMAN & FELD  
OFFICE OF THE DIRECTOR-LEGAL UNIT (LOS ANGELES)**

**LSM/abs**

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