

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

ANTONIO LUNA ALVAREZ, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ15370512
Salinas District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION**

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the December 10, 2024 Amended Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant met the 5% opposite and corresponding SIBTF eligibility threshold because (1) applicant's subsequent lumbar injury caused 27% permanent disability and affected his bilateral lower extremities by causing pain which limited his activities of daily living (ADLs), and (2) applicant has preexisting permanent partial disability from his heart/cardiovascular disease of 40% WPI, which affected applicant's bilateral lower extremities by causing pain. The WCJ also found that applicant has preexisting permanent disability in the form of GERD, hypertension, and left knee problems.

SIBTF contends that applicant's subsequent lumbar injury does not affect the opposite and corresponding member of applicant's preexisting coronary artery disability and that applicant failed to prove the preexisting disabilities are labor disabling. SIBTF further contends that the medical reports of Suresh Mahawar, M.D., do not constitute substantial medical evidence.

We received an answer and amended answer from applicant Antonio Luna Alvarez. 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 Amended Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we grant SIBTF's Petition for Reconsideration. Our order

granting SIBTF's Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to section 5950 et seq.

FACTS

As the WCJ stated:

The Applicant suffered an admitted injury to his low back on 4/15/2021. This injury resulted in permanent partial disability of 27%. According to the reports of PQME Chow (Exhibits A-5 and A-6). This back injury caused radiating pain into both lower extremities which limited Applicant's activities of daily living. As far as I can tell, neither party seriously disputes the effect of this injury. Applicant claimed a higher PD at trial and continues to make this claim, but apparently has not sought reconsideration of the 12/10/2024 F&A finding that the 27% PD found by Dr. Chow continues to exist. Defendant asks the Board to ignore Dr. Chow's findings of ADL limits imposed by the radiating low back symptoms, but continues to maintain that Dr. Chow's reports are substantial and should be followed.

Years before his 2021 injury, Applicant underwent extensive treatment for cardiovascular disease, GERD, hypertension, and left knee problems. After resolution of the industrial injury, Applicant sought an evaluation with Dr. Mahawar. Based upon, *inter alia*, the history given by the injured worker and some 2,200+ pages of contemporaneous treatment records from Salinas Valley Memorial Hospital and other providers, Dr. Mahawar wrote two reports (exhibits A-1 and A-2) which conclude that (1) the cardiovascular injury and the left knee injury affected the Applicant's lower extremities and produced over 5% PD, and (2) the combination of the pre-existing disability and the subsequent injury produced PD of 100%.

There is no real dispute about that, assuming that both Dr. Chow's reports and Dr. Mahawar's reports are substantial, the result reached below was correct. SIBTF took no steps to rebut the reports of Dr. Mahawar, and indeed undertook no discovery on its own behalf that I am aware of (discovery may have been done, but produced no evidence offered at trial).

Based upon this record, an F&A awarding 100% PD against the SIBTF, less the usual credits, issued on 12/10/2024. From this Award, SIBTF seeks Reconsideration. (Report, p. 2.)

DISCUSSION

I.

Former Labor Code section 5909¹ 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. (§ 5909.) Effective July 2, 2024, 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 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 January 9, 2025, and 60 days from the date of transmission is March 10, 2025. This decision is issued by or on March 10, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

¹ All statutory references are to the Labor Code unless otherwise indicated.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on January 9, 2025, and the case was transmitted to the Appeals Board on January 9, 2025. 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 section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on January 9, 2025.

II.

Section 4751 provides:

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. (§ 4751.)

In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35], we stated that in order to be entitled to SIBTF benefits, an employee must prove the following elements:

- (1) a preexisting permanent partial disability;
- (2) a subsequent compensable injury resulting in additional permanent partial disability:
 - (a) if the previous permanent partial disability affected a hand, an arm, a foot, a leg, or an eye, the subsequent permanent disability must affect the opposite and 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

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

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

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

The issue here is what constitutes “affected” in the 5% eligibility threshold, i.e., whether applicant’s bilateral leg pain as a result of a lumbar injury and heart disability meet the standard of a previous permanent partial disability “affecting” “a hand, an arm, a foot, a leg, or an eye” and a subsequent permanent disability “affecting” the opposite and corresponding member. SIBTF contends that applicant’s lumbar injury and heart disease, albeit causing bilateral leg pain, do not “affect” a hand, an arm, a foot, a leg, or an eye. Applicant contends that the fact that the lumbar injury and heart disease cause leg pain is sufficient. We grant reconsideration to further study this issue.

III.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal. 2d 360, 364.) “[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority

limitation none will be implied.”]; see generally § 5803 [“The appeals board has continuing jurisdiction over all its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.”].)

“The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect.” (*Azadigian v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal. App. 4th 372, 374 [57 Cal. Comp. Cases 391; see *Dow Chemical Co. v. Workmen’s Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a “threshold” issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 “[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 “[t]he term [‘final’] does not include intermediate procedural orders”].)

Section 5901 states in relevant part that:

No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers’ compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. . . .

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to sections 5950 et seq.

IV.

Accordingly, we grant SIBTF's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the December 10, 2024 Amended Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 10, 2025

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

**ANTONIO LUNA ALVAREZ
DILLES LAW GROUP, PC
OD LEGAL, OAKLAND**

LSM/oo

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