

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

EDWARD QUINTANILLA, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ12328806
San Luis Obispo District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR RECONSIDERATION AND
DENYING PETITION FOR REMOVAL**

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of our November 25, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, wherein we rescinded the September 12, 2024 Findings and Order and returned the matter to the trial level for further proceedings on the issue of whether the 35% SIBTF threshold requirement under Labor Code¹, section 4751, must be calculated after apportionment.

SIBTF contends that apportionment to preexisting disability should be considered in calculating the 35% SIBTF threshold requirement and that we erroneously relied on *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal. App. 3d 214, 228 [132 Cal. Rptr. 864, 41 Cal. Comp. Cases 595] and *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board En Banc) to conclude otherwise.

We received an answer from applicant Edward Quintanilla.

We have considered the Petition for Reconsideration, the Answer, and we have reviewed the record in this matter. For the reasons discussed below, we dismiss reconsideration as our November 25, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is not a final order. We further deny this petition as a petition for removal as SIBTF has not shown significant prejudice or irreparable harm.

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

FACTS

On May 3, 2016, applicant slipped and fell on a bottle covered by a piece of paper resulting in injury to his low back, left knee, and left hip. (Applicant Exhibit 5, Report of Alan Moelleken, M.D., dated June 13, 2018, p. 4.) Dr. Moelleken, his primary treating physician, issued the following impairment ratings for his injuries: 26% whole person impairment (WPI) for the lumbar spine, 2% WPI for his left knee, and 2% WPI for his left hip, for a combined impairment of 28% WPI. (*Ibid.*) Dr. Moelleken apportioned 50% of the lumbar spine injury to the May 3, 2016 injury and 50% to applicant's prior spinal fusion. (*Ibid.*) Applicant's left hip and left knee injuries were completely attributed to the May 3, 2016 injury.

Scott A. Graham, M.D, Panel Qualified Medical Evaluator (PQME) in Orthopedics, concurred with Dr. Moelleken that applicant suffered a 28% WPI to his lumbar spine and 2% WPI to his left knee. (Defendant Exhibit K, Dr. Graham's Report dated October 9, 2019, p. 13.) He did not opine on applicant's left hip impairment in this report as he opined applicant had not reached maximum medical improvement on the left hip. (*Ibid.*) Dr. Graham also agreed with Dr. Moelleken in apportioning 50% of applicant's lumbar spine impairment to a prior industrial injury. (*Id.* at p. 14.)

Applicant claims his May 3, 2016 injury as his subsequent injury in his SIBTF claim. (Application for SIBTF.)

DISCUSSION

I.

Former 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, 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 December 19, 2024 and 60 days from the date of transmission is Monday, February 17, 2025. The next business day that is 60 days from the date of transmission is Tuesday, February 18, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Tuesday, February 18, 2025, so that we have timely acted on the petition as required by 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.

Here, according to our review of the record, we did not receive a Report and Recommendation by a workers’ compensation administrative law judge, and no other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with the notice of transmission required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on December 19, 2024.

II.

A petition for reconsideration may properly be taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order has been defined as one that either

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

(1) “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, 413]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]); or (2) determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656], emphasis added.) Interlocutory procedural or evidentiary decisions entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian, supra*, 81 Cal.App.4th at p. 1075; *Rymer, supra*, 211 Cal.App.3d at p. 1180; *Kramer, supra*, 82 Cal.App.3d at p. 45.) Here, our November 25, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is not a final order, decision, or award. The November 25, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration rescinded the September 12, 2024 Findings and Order and returned the matter to the trial level for further proceedings. It is an interlocutory order subject to removal.

A party may petition for removal of an interim order. (Cal. Code Regs., tit. 8, § 10955.) Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955.)

Here, there is no significant prejudice or irreparable harm in rescinding the September 12, 2024 Findings and Order and returning the matter to the trial level for further proceedings. Once a new Findings and Order is issued by the WCJ, SIBTF maintains its right to file a petition for reconsideration pursuant to sections 5900 et seq. Thus, there is no significant prejudice or irreparable harm. Of note the issue of whether the 35% SIBTF threshold requirement under Labor Code³, section 4751, must be calculated after apportionment has been decided in multiple cases as

³ All statutory references are to the Labor Code unless otherwise indicated.

referenced in our November 25, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration.

For the foregoing reasons,

IT IS ORDERED that Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of our November 25, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is **DISMISSED**.

IT IS FURTHER ORDERED that Subsequent Injuries Benefits Trust Fund's Petition for Removal of our November 25, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 18, 2025

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

**EDWARD QUINTANILLA
GHITTERMAN, GHITTERMAN & FELD
DIR – OD LEGAL, LOS ANGELES**

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