

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

JOSE GONZALEZ, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ11036278, ADJ15515237
Santa Barbara District Office**

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

Applicant Jose Gonzalez seeks reconsideration¹ of the June 10, 2025 Findings of Fact and Order, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant does not meet the 35% permanent disability eligibility threshold from the subsequent injury and is therefore not entitled to benefits from the Subsequent Injuries Benefits Trust Fund (SIBTF).

Applicant contends that he meets the 35% permanent disability eligibility threshold under a standard rating, which is what Labor Code, section 4751, requires ["the permanent disability 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"]. Specifically, applicant contends that according to Agreed Medical Evaluator (AME) Rocco Calderone, M.D., and Panel Qualified Medical Evaluator (PQME) Mark Lensky, M.D., applicant suffered the following impairments:

AME Calderon findings (April 9, 2019 and July 23, 2020 Reports)

Low Back: 8% WPI
Left Hip: 3% WPI
Left Knee: 3% WPI
Right Knee: 1% WPI

¹ Deputy Commissioner Schmitz, who was on the panel that issued a prior decision in this matter, is unavailable. Another panelist has been assigned in her place.

PQME Lensky findings (August 26, 2019 and April 14, 2020 Reports)

Hypertension: 40% WPI

Constipation: 3% WPI

The combination of the above impairments (40 c 8 c 3 c 3 c 3 c 1) is 51% WPI, which according to applicant results in 71% standard rating of permanent disability. (Petition, p. 6:4-15.)

Applicant further contends that there is nothing in the August 3, 2020 Compromise and Release (Exhibits B and C, Compromise and Release dated August 3, 2020 and Order Approving Compromise and Release, respectively) to prevent applicant from claiming the above standard rating.

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, affirm the June 10, 2025 Findings of Fact and Order, except that we amend it to defer the issue of SIBTF eligibility, and return this matter to the trial level for further proceedings.

FACTS

The following facts are from the Report:

Applicant sustained an orthopedic industrial injury. Within this claim of injury, Applicant alleged injury to his neurological system, hypertension, and gastro-intestinal complaints.

Applicant was evaluated by Rocco Calderon, M.D., in the capacity of an AME, and Mark Lensky, M.D., in the capacity of a PQME.

This claim was settled via Compromise and Release (C&R).

On June 10, 2025, an Opinion on Decision and Findings of Fact and Award issued, finding Applicant failed to meet their burden of proof in showing Applicant had 35% permanent disability as a result of the industrial injury.

In his Opinion on Decision, the WCJ explained:

Applicant claimed he sustained a specific injury on September 15, 2016, on an industrial basis. Applicant claimed injury to his bilateral knees,

lumbar spine, right wrist, left hip, neurological/stroke/transient ischaemic attack (TIA), constipation, and hypertension.

Rocco Calderone, M.D., served as an Agreed Medical Evaluator (AME) on the orthopedic aspects of this case. This is the SII identified by Applicant as the basis he is relying on to qualify for Subsequent Injury Benefit Trust Fund (SIBTF) benefits.

Applicant resolved the underlying industrial injury by way of Compromise and Release (C&R) in the amount of \$113,302.50, with future medical to remain open as to some body parts.

On page 7, under paragraph 9 of the C&R the parties initialed the lines next to the words, “injury AOE/COE”. Typed in by the parties next to those words are, “HYPERTENSION, NEUROLOGICAL AND CONSTIPATION ISSUES ARE DISPUTED BODY PARTS AND AOE/COE IS DENIED”.

Below again initialing a line next to, “future medical treatment” is typed, “PARTIES STIPULATE THAT ALL CLAIMS FOR FUTURE MEDICAL TREATMENT FOR HYPERTENSION, CONSTIPATION AND NEUROLOGIC ARE SETTLED AND NO FURTHER TREATMENT IS AWARDED FOR THESE DISPUTED BODY PARTS.”

Therefore, the only Permanent Disability is only from the orthopedic components of the industrial injury. On page 8 of the C&R, it provides that Permanent Disability and settlement was based on the orthopedic findings of Rocco Calderone, M.D. 11%, 4%, and 1% without adjustment for age and occupation. This totals 16%, and does not meet the 35% threshold.

Therefore, Applicant is not entitled to SIBTF benefits. (Opinion on Decision, pp. 1-2.)

DISCUSSION

I.

Former Labor Code section 5909² 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:

² All subsequent statutory references are to the Labor Code unless otherwise indicated.

(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 June 18, 2025 and 60 days from the date of transmission is Sunday, August 17, 2025. The next business day that is 60 days from the date of transmission is Monday, August 18, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)³ This decision is issued by or on Monday, August 18, 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.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on June 18, 2025, and the case was transmitted to the Appeals Board on June 18, 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 section 5909(b)(1) because service of the

³ 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.

Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on June 18, 2025.

II.

The parties here confuse a Compromise and Release with a Stipulations and Request for Award. There are no stipulations in a Compromise and Release. A Compromise and Release does not make findings on the issue of injury and/or permanent disability. Paragraph 9 of the Compromise and Release specifically states that, “The parties wish to settle these matters to avoid the costs, hazards and delays of further litigation, and agree that a serious dispute exists as to the following issues (initial only those that apply).” (Exhibit B, Compromise and Release dated August 3, 2020, ¶ 9.) Permanent disability is initialed under paragraph 9; as is “injury AOE/COE [arising out of and in the course of employment]. (*Ibid.*) Although the parties included language in paragraph 9 that hypertension, neurological, and constipation issues are disputed body parts and are denied as industrial injuries, this is not a stipulation that these body parts are not industrial injuries. Even if the parties had indeed stipulated that hypertension, neurological, and constipation issues were disputed body parts; this is not the same as a stipulation that injuries to these body parts were non-industrial. Simply put, the parties acknowledged that there was a dispute and compromised as they saw fit without admitting to anything. A Compromise and Release is a compromise; it is not a finding of injury and/or disability.

Moreover, the Appeals Board’s power to determine the adequacy of a Compromise and Release and issue an award based upon the compromise agreement is not a finding of injury and/or permanent disability. (§ 5002; Cal. Code Regs., tit. 8, § 10700.) A finding of adequacy is not the same as a finding of permanent disability. (§§ 4660, 5002; Cal. Code Regs., tit. 8, § 10700.)

Accordingly, we conclude that the finding that applicant did not meet the 35% eligibility threshold is unfounded. The underlying case did not make any findings as to injury and/or permanent disability.

For the foregoing reasons,

IT IS ORDERED that applicant Jose Gonzalez’s Petition for Reconsideration of the June 10, 2025 Findings of Fact and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 10, 2025 Findings of Fact and Order is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

. . .

4. The issue of whether applicant meets the eligibility requirement for benefits under the Subsequent Injuries Benefits Trust Fund is deferred.

ORDER

There are no Orders at this time.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 18, 2025

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

**JOSE GONZALEZ
GHITTERMAN, GHITTERMAN & FELD
OFFICE OF THE DIRECTOR – LEGAL UNIT**

LSM/pm

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