

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

**JOSEPH BITTING, *Applicant***

**vs.**

**SAN FRANCISCO SHERIFF'S OFFICE; SUBSEQUENT INJURIES BENEFITS TRUST  
FUND, *Defendants***

**Adjudication Number: ADJ17497715  
Oakland District Office**

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

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the October 25, 2024 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained an industrial injury to his lumbar spine, that prior to the industrial injury, applicant had permanent disability of 73%, and applicant's overall permanent disability is total.

SIBTF contends that (1) the WCJ failed to make findings regarding applicant's eligibility to SIBTF benefits and failed to make any award or order regarding SIBTF benefits; (2) the WCJ failed to make an order that applicant take nothing from SIBTF because the WCJ found that the subsequent lumbar spine injury caused 28% permanent disability; and (3) the maximum permanent disability that applicant could have suffered from prior injuries is 50% because the parties stipulated that the subsequent industrial lumbar injury caused 50% permanent disability.

We received an answer from applicant Joseph Bitting. 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. Based on the Report, which we adopt and incorporate, and for the reasons discussed below, we grant reconsideration to amend the Findings of Fact to show that applicant met the SIBTF eligibility requirements and to award permanent total

disability less Labor Code section 4753<sup>1</sup> credits and less attorney's fees to be determined by the parties with jurisdiction reserved on these issues at the trial level.

Preliminarily, 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. (§ 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 10, 2024 and 60 days from the date of transmission is Saturday, February 8, 2025. The next business day that is 60 days from the date of transmission is Monday, February 10, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)<sup>2</sup> This decision is issued by or on February 10, 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

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<sup>1</sup> All statutory references are to the Labor Code unless otherwise indicated.

<sup>2</sup> 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.

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 December 10, 2024, and the case was transmitted to the Appeals Board on December 10, 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 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 December 10, 2024.

Turning to the merits of this case, the reason the WCJ concluded that applicant's subsequent industrial lumbar injury resulted in 28% permanent disability was because the WCJ excluded applicant's lumbar motor loss of 28% whole person impairment for the L5 nerve root and 15% whole person impairment for the S1 nerve root in his SIBTF permanent disability ratings. The WCJ concluded that "the lower-extremity strength deficit rated by Dr. Schick does in fact overlap with the lower-extremity muscle weakness rated by Dr. Hebrard." (Opinion on Decision, p. 5.)<sup>3</sup> The subsequent industrial lumbar injury, without accounting for overlap with applicant's pre-existing injuries, calculate to 49% permanent disability. (See WCJ Notes.)<sup>4</sup> Taking away adjustments for the occupation or age of the employee, per section 4751, results in 39% permanent disability, which meets the 35% SIBTF eligibility threshold.

Soft tissue lesion II C:  $7 + 2$  (additional levels) = 9 wp

Lumbar motion: 6 wp

Combine:  $9 + 6 = 14$

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<sup>3</sup> We make no opinions as to whether the subsequent industrial lumbar motor loss impairment overlaps with applicant's pre-existing knee muscle strength impairment as it is not necessary for us to do so. Even with the WCJ's conclusion of overlap and exclusion of the lumbar motor loss impairment, applicant's combined pre-existing and subsequent injury results in permanent total disability. Furthermore, we note that for purposes of establishing the 35% SIBTF eligibility threshold, apportionment is not taken into consideration. (*Hagen v. Workers' Compensation Appeals Board (Anguiano)* (2024) 89 Cal.Comp.Cases 702 (writ den.)

<sup>4</sup> The parties stipulated that the subsequent industrial lumbar injury resulted in 50% permanent disability in the underlying matter. (Petition for Reconsideration, p. 6:14-15; Stipulations and Request for Award dated October 25, 2023; Award dated October 26, 2023.)

*Lumbar – Range of Motion – Soft Tissue Lesion*

15.03.02.02 – 14 – [1.4]20 – 490I – 27 – 27%

L5 25% sensory loss: 1 le

S1 25% sensory loss: 1 le

Sensory combine: 1 c 1 = 2 le = 1 wp

*Lumbar – Range of Motion – Nerve Root/Spinal Cord Sensory*

15.03.02.05 – 1 – [1.4]1 – 490I - 2 – 2%

*Lumbar soft tissue lesion and nerve root/spinal cord sensory combined: 27 c 2 = 28%*

L5 75% motor loss: 37 x 75% = 28 le

S 1 75% motor loss: 20 x 75% = 15 le

Motor loss combine: 28 c 15 = 39 le = 16 wp

*Lumbar - Range of Motion - Nerve Root/Spinal Cord Motor*

15.03.02.06 - 16 - [1.4]22 – 490I - 29 – 29%

*All lumbar combined: 29 c 27 c 2 = 49%*

*All lumbar combined without account to occupation and age: 22 c 20 c 1 = 39%*

Alternatively, the subsequent industrial lumbar injury, without accounting for overlap, calculate to 50% permanent disability, which is what the parties stipulated to in the underlying matter. This 50% permanent disability is based on Dr. Schick's opinion that applicant suffered from 29% whole person impairment. (Applicant Exhibit 2, Kirsten Schick, M.D.'s report dated June 9, 2023, p. 24.) Note that Dr. Schick did not account 1% whole person impairment each for applicant's L5 and S1 nerve root sensory loss in her 29% whole person impairment calculation.

Motor loss: 16 wp

Soft tissue lesion II C: 7 + 2 (additional levels) = 9 wp

Lumbar motion: 6 wp

16 c 9 c 6 = 29 wp

15.03.xx.xx -29 - [1.4]41 – 490I – 50%

Taking away adjustments for the occupation and age of the employee, results in 41% permanent disability, which also meets the 35% SIBTF eligibility threshold.<sup>5</sup>

Accordingly, the 35% SIBTF eligibility threshold is met under either calculation. We, therefore, grant reconsideration solely to amend the Findings of Fact to show that applicant met the SIBTF eligibility requirements and to award permanent total disability less section 4753 credits and less attorney's fees to be determined by the parties with jurisdiction reserved on these issues at the trial level.

For the foregoing reasons,

**IT IS ORDERED** that the Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the October 25, 2024 Findings of Fact is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 25, 2024 Findings of Fact is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

#### **FINDINGS OF FACT**

...

- (3) Applicant's subsequent lumbar permanent disability equals to 35% or more of his total disability.
- (4) The combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone.
- (5) The combined preexisting and subsequent permanent partial disability results in 100% permanent disability, which is more than the 70% or more permanent disability threshold requirement.
- (6) The issue of attorney's fees is deferred.

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<sup>5</sup> We note the parties stipulated at trial that the subsequent lumbar industrial injury rates to 41% after adjustment for diminished future earning capacity but before any other adjustments are made, except for apportionment.

**AWARD**

**AWARD** is made in favor of applicant **JOSEPH BITTING** and against **SUBSEQUENT INJURIES BENEFITS TRUST FUND** as follows:

Applicant is awarded 100% permanent disability against Subsequent Injuries Benefits Trust Fund, less credits per Labor Code, section 4753, and less attorney's fees to be calculated by the parties, with jurisdiction reserved.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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



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

**February 10, 2025**

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

**JOSEPH BITTING  
IVANCICH & COSTIS, LLP  
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*

## **REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

### **NOTICE OF TRANSMISSION OF CASE TO RECONSIDERATION UNIT OF THE APPEALS BOARD**

By timely, verified petition filed on November 18, 2024, defendant seeks reconsideration of the decision filed herein on October 25, 2024, in this case, which arises out of an admitted back injury, during the period of employment ending December 7, 2021, who has claimed entitlement to benefits from the Subsequent Injuries Benefit Trust Fund (SIF). Petitioner, hereinafter referred to as SIF or the Fund, contends that I failed to make a certain finding establishing SIF liability, impermissibly failed to issue an award against the Fund, and miscalculated the pre-injury disability. Applicant has filed an answer, supporting the decision. I will recommend that reconsideration be denied.

### **BACKGROUND**

Following applicant's admitted industrial injury, the parties to that case stipulated that it resulted in 50% permanent disability, calculated using the impairment rating provided by a qualified medical evaluator, adjusted for diminished earning capacity, occupation and age. Mr. Bitting then filed his claim against SIF. As stated in the opinion on decision:

Prior to the employment that gave rise to his underlying workers' compensation case, Joseph Bitting served in the United States military. He was found to have sustained rhinitis and headaches as a result of that service, and he received an award of disability benefits from the Veterans Administration. In addition, he had pathology involving both knees that has since been determined to have been labor-disabling prior to his work-related injury.

The parties to the underlying case employed a qualified medical evaluator (QME), Dr. Kirsten Schick, whose report of June 9, 2023, outlines impairments she ascribes to applicant's employment, cumulatively. Although all are said to result from trauma to the low back, the impairments are several. One is a loss of range of spinal motion (6% whole-person impairment (WPI)), another sensory loss (1% for each of two nerve roots), and a third motor loss, defined as strength deficit (again, as the QME has found that two levels of the spine are involved, there is a figure for each, 28% and 15%). Using the Combined Values Chart (CVC), all of that adds up to 29% WPI, and that adjusts to 41% when the factor for diminished future earnings is applied, but not those for occupation and age. The parties to the SIF case have stipulated to these numbers.

Discovery in the SIF case consists largely of the evaluation of Dr. Michael Hebrard, whose report is dated July 31, 2023. There, he assesses the military-related conditions of rhinitis and chronic headaches, as well as patellofemoral dysfunction involving both knees.<sup>1</sup> It appears that he derived the rhinitis and headache ratings (9 and 7%WPI, respectively) from applicant's military records. The source of his ratings for the knees (10 WPI each) is less clear (see, fn. 1). Mr. Bitting reported pain and stiffness in the knees and he had a history of obesity. These are translated to the 10% ratings using the table in the AMA Guides<sup>2</sup> used for impairment due to lower-extremity muscle weakness. Dr. Hebrard concludes that the various impairment numbers should be added together, rather than reduced by using the CVC.

Among other things, applicant's claim of permanent, total disability hinges on the method of combining multiple impairments, i.e., whether they should be simply added or combined using the CVC. Those impairments stemming from Mr. Bitting's cumulative work injury are combined, as above, pursuant to Dr. Schick's reporting. For the underlying impairments, Dr. Hebrard recommends otherwise. However, at trial, SIF contended that, in one respect, Dr. Hebrard's opinion that the pre-existing impairments should be added to each other and also to the industrial impairments does not constitute substantial medical evidence. [There follows a discussion of the methods of combining multiple impairments, as well as the statutory requirements, in Labor Code section 4751, to establish SIF liability.]

After trial, I honored the Fund's argument that the lower-extremity impairment found by Dr. Schick and that found by Dr. Hebrard overlapped, and reduced the overall rating accordingly.

## DISCUSSION

SIF contends, first, that I failed to decide whether applicant had met the requirement, in section 4751, that the disability resulting from his work-related injury comprised at least 35%. I believe the answer to this argument is simple: The parties stipulated, at trial, that that disability was 41%. A party will be held to its stipulations absent good cause to vacate them. *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1]; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784 [52 Cal.Comp.Cases 419]; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856 [44 Cal.Comp.Cases 78]. The stipulation in this regard, as found in the minutes of hearing, is as follows: "The permanent impairment resulting from that injury rates to 41% percent after

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<sup>1</sup> Oddly, Dr. Hebrard's report indicates that he examined the neck for range of motion, but other parts of the body including the lower extremities were not examined.

<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 5th Ed., incorporated into the *Schedule for Rating Permanent Disabilities* effective January 1, 2005, by Lab. Code § 4660, at subd. (b). All statutory references not otherwise identified are to the Labor Code.



adjustment for diminished future earning capacity, but before any other adjustments are made, except for apportionment.” There was no objection to that recording of the stipulation of the parties, which they clearly expressed at trial. The fact that the 41% calculation was adjusted in the underlying case to 50% as was awarded, or by the aforementioned overlap with the pre-existing disability reported by Dr. Hebrard, does not change the fact of the stipulation or, in fact, its validity.

The Fund further contends that the pre-injury disability was miscalculated. The ratings of that prior disability and the overall disability are explained in the opinion:

The rating in this matter is not simple. However, a workers’ compensation judge is seen as an expert in rating permanent disability, “capable of (making his or her) own appraisal of the extent of applicant’s disability.” *U.S. Auto Stores v. Workers’ Comp. Appeals Bd. (Brenner)* (1971) 4 Cal.3d 469 [36 Cal.Comp.Cases 173], 177, citing *Liberty Mutual Ins. Co. v. Indust. Accid. Comm. (Serafin)* (1948) 33 Cal.2d 89 [13 Cal.Comp.Cases 267]. I have not found it necessary in this case to refer the permanent disability to the Disability Evaluation Unit for a formal rating.

I have rated the pre-injury impairment, from Dr. Hebrard’s July 31, 2023, report (Exh. 1, pgs. 5-7) as follows:

*Nose/Throat/Related Structures – Respiration*  
11.03.01.00 - 9 - [1.4]13 - 490J - 20 – 20%

*Cranial Nerve – Trigeminal*  
13.07.04.00 - 7 - [1.4]10 - 490H - 13 – 13%

*Left-Knee – Muscle Strength*  
17.05.05.00 - 10 - [1.4]14 - 490I - 20 – 20%

*Right-Knee – Muscle Strength*  
17.05.05.00 - 10 - [1.4]14 - 490I - 20 – 20%

ADD: 20 + 20 + 20 + 13 = 73% permanent disability

The effects of the work injury, excluding the impairment figures for loss of strength in the lower extremities, are found in Dr. Schick’s June 9, 2023, report (Exh. 2, pg. 24) and are rated as follows:

*Soft tissue lesion II C*  
7 + 2 (additional levels) = 9 WPI  
Lumbar motion: 6 WPI  
Combine: 9 c 6 = 14 WPI

*Sensory loss*

L5 25% sensory loss: 1 LE

S1 25% sensory loss: 1 LE

Sensory combine:  $1 \times 1 = 2 \text{ LE} = 1 \text{ WPI}$

Thus:

*Lumbar – Range of Motion – Soft Tissue Lesion*

15.03.02.02 – 14 – [1.4]20 – 490I – 27 – 27%

*Lumbar – Range of Motion – Nerve Root/Spinal Cord Sensory*

15.03.02.05 – 1 – [1.4]1 – 490I – 2 – 2%

*Lumbar combined:  $27 \times 2 = 28\%$*

Accepting Dr. Hebrard’s unrebutted opinion that the impairments he describes should be combined using simple addition, along with the holding in Todd that the CVC applies only to single injuries, the overall total computes as follows:

$73\% \text{ (underlying disability)} + 28\% \text{ (industrial injury after apportionment)} = 101\%$

Since permanent disability is limited to 100%, that is the final result.

I have reviewed the evidence again, and remain persuaded that the above is correct.

Finally, SIF takes issue with the fact that an award of disability benefits did not accompany the findings of fact. The Labor Code affords the Fund credits or offsets for other benefits, including permanent disability indemnity paid in the case in chief, social security benefits and certain other income. Thus, the parties to the SIF case agreed and recorded in the pretrial conference statement, when the trial of this matter was scheduled, that they “stipulate to bifurcate SIBTF credit issues from the trial of this matter and discovery will remain open on SIBTF credit.” A monetary award was therefore not possible. This fact also addresses SIF’s contention that the 73% finding was in error, at least insofar as the monetary value of any award stands to be reduced by other benefits paid or payable to this employee.

### **RECOMMENDATION**

I recommend that reconsideration be denied.

This matter is hereby transmitted to the reconsideration unit of the appeals board.

Respectfully submitted,

### **NOTICE OF TRANSMISSION TO THE APPEALS BOARD**

On December 10, 2024, this matter is transmitted to the Reconsideration unit of the Appeals Board

Date: December 6, 2024

**Christopher Miller**  
Workers' Compensation Judge