

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

VICTORIA LEE, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ10499724
Riverside District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the December 4, 2024 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant's subsequent injury meets the 35% permanent disability eligibility threshold for SIBTF benefits.

SIBTF contends that the WCJ incorrectly failed to apportion the industrial injury to preexisting disability when finding that applicant met the 35% threshold for SIBTF benefits.

We have not received an answer from applicant Victoria Lee. 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, 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 deny reconsideration.

Former Labor Code¹ 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.

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

(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 6, 2025, and 60 days from the date of transmission is March 7, 2025. This decision is issued by or on March 7, 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 the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on January 6, 2025, and the case was transmitted to the Appeals Board on January 6, 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 Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on January 6, 2025.

Turning to merits, the issue of whether apportionment should be included in calculating whether an employee meets the SIBTF 35% threshold has been determined in multiple recent cases: *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board En Banc); *Anguiano v. Subsequent Injuries Benefits Trust Fund* (November 7, 2023, ADJ11107890) [2023 Cal. Wrk. Comp. P.D. LEXIS 310]; *Heigh*

v. Subsequent Injuries Benefits Trust Fund (October 9, 2023, ADJ12253162) [2023 Cal. Wrk. Comp. P.D. LEXIS 269]; *Riedo v. Subsequent Injuries Benefits Trust Fund* (October 21, 2022, ADJ7772639) [2022 Cal. Wrk. Comp. P.D. LEXIS 303]; *Anguiano v. Subsequent Injuries Benefits Trust Fund* (August 15, 2023, ADJ11107890) [2023 Cal. Wrk. Comp. P.D. LEXIS 214]; *Hagen v. W.C.A.B. (Anguiano, Juan)* (2024) 89 Cal. Comp. Cases 702 [2024 Cal. Wrk. Comp. LEXIS 33] (writ denied); and *Millner v. Subsequent Injuries Benefits Trust Fund* (October 7, 2024, ADJ17739286) [2024 Cal. Wrk. Comp. P.D. LEXIS 360].

In *Anguiano*, 2023 Cal. Wrk. Comp. P.D. LEXIS 310, a previous panel decision involving one of the same panel members, we explained that under the doctrine of state decisis, we are bound by the holding in *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal. App. 3d 214, 228 [132 Cal. Rptr. 864, 41 Cal. Comp. Cases 595], where the Court of Appeal held that the permanent disability attributable to applicant's subsequent injury for the purpose of meeting the 35% threshold requirement under section 4751, excludes apportionment. SIBTF makes the same arguments in all these cases and we refer the parties to our previous decisions addressing these arguments.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the December 4, 2024 Findings and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 7, 2025

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

**VICTORIA LEE
WORKERS' COMPENSATION LAWYER, INC.
OD LEGAL, LOS ANGELES**

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

I
INTRODUCTION

Identity of Petitioner:	Subsequent Injuries Benefits Trust Fund
Timeliness:	The petition was filed timely.
Verification:	Unverified as Petitioner is a public entity
Date of Issuance of Order:	12/4/2024
Date of Petition for Reconsideration:	12/23/2024
Transmitted to Appeals Board:	1/6/2025

II
CONTENTIONS

Petitioner contends that the court erred in determining that applicant met the 35% threshold resulting from the industrial injury and by excluding apportionment, and therefore the Board acted in excess of its powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision, and award.

III
FACTS

Victoria Lee, a 30 year old employee of Altura Credit Union, sustained injury arising out of and in the course of her employment to her back, psyche, shoulders and excretory system on April 18, 2016 (ADJ10499724). The case in chief had been resolved by way of a Joint Compromise and Release (ADJ10499724 and ADJ10699570) with Joint Order of Approval issuing 11/18/2019. Subsequently, and on 6/10/2020, applicant filed Application for Subsequent Injuries Fund Benefits (SIBTF). The underlying issue is whether applicant is entitled to such benefits. The matter proceeded to hearing before this Administrative Law Judge (WCJ) Jeffrey Wilson on September 11, 2024. At hearing the parties agreed to limit the issue to specifically only address whether applicant has met a threshold requirement under Labor Code Section 4751 that the permanent disability arising from the subsequent injury is equal to 35% or greater.

To resolve the issues pertaining to the case in chief applicant was examined by an Agreed Medical Examiner in the field of Orthopedic Surgery, Richard Woods M.D. The doctor apparently

examined applicant on two occasions taking a detailed history and reviewing several reports and records addressing applicant's recent and prior injuries and prior substantial medical history. Ultimately the doctor determined in his 2/14/2018 report (Defendant's Exhibit D) that applicant suffers combined lumbar spine disability under DRE Lumbar Category V of 28% whole person impairment and 2% whole person impairment of the right knee. In addressing apportionment, Dr. Woods apportions 5% of the back to injury of 4/18/2016 (ADJ10499724), 5% to injury of 12/7/2016 (ADJ10699570) and 90% to prior injuries and 3 prior surgeries. In addressing the knee Dr. Woods apportions 20% to the 4/18/2016 injury (ADJ10499724) and 80% to prior symptomatic chondromalacia patella. Although the Compromise and Release pertaining to the cases in chief was not offered into evidence, this WCJ takes judicial notice of the document (EAMS ID#71606088) and specific language referring to the AME report of Dr. Woods rating 2% and AME's in urology and psychiatry rating 0%. The Compromise and Release contains further language that "the AME finds 90% apportionment to applicant's prior claims". Ultimately, the issue now before this WCJ rested with the parties arguing whether or not apportionment is to be considered in addressing whether the 35% threshold is met as it pertains to the "subsequent injury". Excluding question raised regarding apportionment, and addressing the 35% threshold based on the AME opinion, the following potential should be considered: Dr. Woods' finding of 28% whole person impairment pertaining to the lumbar spine. After applying the 1.4 adjustment factor $28\% = 39\%$. In short, and absent considering apportionment, the 35% threshold has been met with respect to the lumbar spine alone.

IV **DISCUSSION**

In addressing the limited issue raised at trial, this WCJ takes note of Labor Code Section 4751(b) which addresses the permanent disability percentage requirement of the subsequent injury, and which states as follows:

"the permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or age of the employee, is equal to 35% percent or more of total"

In the present matter, and as noted above, the subsequent injury does equate to greater than 35% without such adjustment for age and occupation. If apportionment was to be considered in the

present case, then clearly the 35% standard is not met. Considering, and notwithstanding, argument raised by SIBTF that apportionment should apply to subsequent injury “considered alone”, more recent case law suggests otherwise. While recognizing that in the past the Board may have considered apportionment in addressing whether the 35% had been met, this WCJ does take note of the case of *Bookout v. Workers’ Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214, 41 Cal.Comp.Cases 595 where the Court interpreted Labor Code Section 4751(b) as excluding apportionment when addressing the subsequent injury. More recent cases addressing the same issue by the Board have continue to follow that opinion by excluding apportionment when considering whether or not the 35% threshold has been met (see *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 583 (En Banc); *Riedo v. Subsequent Injuries Benefits Trust Fund*, 2022 Cal. Wrk. Comp. P.D. LEXIS 303; *Harris v. NUMAC Co.*, 2020 Cal.Wrk. Comp. P.D. LEXIS 46; *Heigh v. Subsequent Injuries Benefits Trust Fund*, 2023 Cal. Wrk. Comp. P.D. LEXIS 188).

Giving due consideration to the above, this WCJ determines that the 35% threshold pertaining to the subsequent injury, and pursuant to Labor Code Section 4751, had been met, and with the Board retaining further jurisdiction to address all other issues that may apply to benefit entitlement with the Subsequent Injuries Benefit Trust Fund.

While this WCJ acknowledges argument raised by Petitioner that the *Bookout* case noted above is fact specific and should arguably not be followed in the present matter, this WCJ takes note of the Board’s opinion in *Heigh v Subsequent Injuries Benefits Trust Fund* (supra) where the Board addresses whether apportionment is to be included in determining the 35% threshold pertaining to a back injury in which disability was apportioned. In considering whether apportionment is to be considered in addressing the 35% threshold, the Board again follows *Bookout*. The Board takes note in *Heigh*, and referring to *Bookout* as follows:

“In that case, the Appeals Court reasoned that because section 4751(b) “provides that the permanent disability resulting from the subsequent injury, when considered alone” must equal 35 percent or more of the total disability, it excludes apportionment from the calculation of subsequent permanent disability.”

Ultimately, and in *Heigh*, the Board found *Bookout* again to be controlling and excluding apportionment as being considered in determining the 35% permanent disability threshold

pertaining to the subsequent injury. The factual background in the present pertaining to the subsequent injury. The factual background in the present matter is quite similar to the facts in *Heigh*. Following the Board’s reasoning in such cases noted above, this WCJ determines that apportionment should be excluded when addressing whether the “subsequent injury” meets the 35% threshold.

V
RECOMMENDATION

It is recommended that Petition for Reconsideration filed by Subsequent Injuries Benefits Trust Fund be denied.

DATE: 1/3/2025

Jeffrey Wilson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE