

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

BOBBY BRENT COTTON, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFIT TRUST FUND, *Defendant*

**Adjudication Number: ADJ6741812
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in this matter to further study the factual and legal issues.¹ This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) issued on July 15, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed on February 7, 2009, as a termite inspector by Terminex, insured by Zurich American Insurance, applicant sustained injury arising out of and in the course of employment to his back and left knee; (2) this injury caused permanent disability of 34%; and (3) applicant has not met his burden of proving that he is entitled to benefits from the Subsequent Injuries Benefit Trust Fund (SIBTF).

The WCJ ordered that applicant's petition for benefits from SIBTF be denied.

Applicant contends that he sustained subsequent injury to the back, left knee, and in the form of sexual dysfunction which resulted in permanent disability of 35 percent or more. Applicant further contends that the record establishes that his combined preexisting and subsequent permanent partial disability exceeds that of his subsequent permanent disability alone in an amount of 70% or more.

We did not receive an Answer.

¹Commissioner Sweeney no longer serves on the Workers' Compensation Appeals Board. Commissioner Capurro has been substituted in her place.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied, or, in the alternative, granted and returned to the trial level for development of the issue of permanent disability.

We have reviewed the Petition and the contents of the Report. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that applicant's subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation or age, and defer the issues of whether his combined preexisting and subsequent permanent partial disability exceeds his subsequent permanent disability alone and is in an amount of 70% or more; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On January 11, 2021, the matter proceeded to trial with the following issues in dispute:

1. Permanent disability, including apportionment.
2. Entitlement to Subsequent Injuries Benefit Trust Fund benefits.

(Minutes of Hearing and Summary of Evidence, January 11, 2021, p. 2:23-26.)

The parties stipulated that while employed on February 7, 2019,² as a termite inspector, by Terminix, insured by Zurich North America, applicant sustained injury arising out of and in the course of employment to his left knee and low back, and claims to have sustained injury to his psyche. (*Id.*, p. 2:9-12.)

The WCJ admitted into evidence multiple exhibits, including exhibits not enumerated by the WCJ on the record, but referred to by the WCJ as “in a list that will be appended to the Minutes of today’s hearing.”³ These exhibits included Exhibit 11, the AME Report of James Robbins,

² While applicant’s date of industrial injury is repeatedly referred to as occurring on February 7, 2019 in both the January 11, 2021 and July 13, 2022 MOH/SOE, this appears to be a clerical error, as the evidence supports, and the F&O properly finds, that the injury occurred on February 7, 2009.

³ We were unable to locate a copy of January 11, 2021 MOH/SOE that appended such list, but did locate a separate document entitled “Amended App. Trial Exhibit Index” in the adjudication file, which we presume to be the 18 exhibits offered by applicant. The parties and the WCJ are reminded that per WCAB Rule 10787:

...
(c) Minutes of hearing and summary of evidence shall be prepared at the conclusion of each trial and filed in the record of proceedings. They shall include:

...
(3) The admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence (with the identity of the party offering the same);
(Cal. Code Regs., tit. 8, § 10787(c)(3).)

M.D., dated October 3, 2011, and Exhibit 2, the Deposition Transcript of Dr. Robbins, dated May 3, 2013, into evidence.

The AME Report of James Robbins, M.D., states:

CAUSATION OF DISABILITY

I have considered Mr. Cotton's lengthy history, his longstanding problems with multiple sclerosis, his character makeup, the medication issues, and the very well-documented evidence in the neurologic literature of depression associated with multiple sclerosis.

I cannot find any indication that the actual events of the injury of 02/07/09, the development of chronic pain, and the herniated disc with necessity for surgery was the predominant cause of his temporary total or permanent partial psychiatric disability.

(Ex. 11, AME Report of James Robbins, M.D., October 3, 2011, p. 48.)

In his deposition, Dr. Robbins testified:

Q. And when you 're talking about predominantly, you're talking about the 51 percent threshold?

A. Yes.

Q. Okay. So then Apportionment of Disability, could you read that paragraph , page 50, Apportionment of Disability?

A. The evidence is overwhelming that the patient's permanent partial psychiatric disability is a result of his longstanding symptoms of multiple sclerosis and his concomitant long history of depression. This is no apportionment to the industrial injury of February 7th, 2009.

Q. Okay. Is that still your opinion?

A. Yes.

Q. Okay. And then you 're recommending some medications for Mr. Cotton but on a nonindustrial basis?

A. Yes, because there was no industrial contribution.

(Exhibit 2, Deposition Transcript of Dr. Robbins, May 3, 2-13, pp. 57:23-58:14.)

On January 25, 2021, the WCJ issued a Findings and Order stating that applicant's SIBTF benefits could not be determined through the use of the evidentiary record developed to date, and ordered the parties to develop the record in accordance with the Opinion on Decision issued concurrently with the F&O. (Findings and Order, January 25, 2021, p. 1.)

Thereafter, the parties returned to trial, and on July 13, 2022, the parties stipulated to injury to the left knee and low back, as well as earnings at the time of injury. The issue listed for trial was "Permanent disability as payable by the Subsequent Injuries Benefits Trust Fund." Offered as an exhibit and entered into evidence was the deposition transcript of Dr. Stephen Isono, dated September 30, 2021. (MOH, July 13, 2022, p. 2.)

On July 15, 2022, the WCJ issued his F&O in which it was found applicant's industrial injury caused 34% permanent disability and that applicant has not met his burden of showing entitlement to benefits from the SIBTF. It is from this F&O that applicant seeks reconsideration.

In the Report, the WCJ states:

In the litigation of the case in chief, the parties employed an agreed medical evaluator (AME) in orthopedics, Dr. Steven Isono, and another in psychiatry, Dr. James Robbins. The former wrote three reports, in 2010 and 2011, and the latter wrote one, in 2011; both were deposed. Briefly, Dr. Isono, in his initial report of November 3, 2010, reviews an extensive history, including many years of treatment involving the left knee, including four arthroscopic surgeries, from the mid-1970s through August, 1997 (a fifth took place in June, 2011), and a procedure to the low back on May 10, 2010, described as a posterior fusion at L4-5, and concludes that applicant's condition would not reach permanent and stationary status until the completion of investigative studies including a CT myelogram, electrodiagnostics and an MRI with contrast. (Exh. 10) In his next evaluation, dated October 18, 2011, the AME finds both the back and the left knee maximally improved, with residual impairment rated using the AMA Guides, with some apportionment to preexisting pathology in both. (Exh. 9)

Dr. Robbins's evaluation is dated October 3, 2011. There, he also provides a detailed analysis of the history and his findings, concluding that Mr. Cotton's considerable psychological impairment is nonindustrial. (Exh. 11) Included among his diagnoses, however, as applicant pointed out at trial, is opiate-induced erectile disorder, for which he assigns an impairment rating. (Applicant testified, credibly, that he did not have that problem until he began taking opioids, and that he took them for his industrial back injury.)

Although there are other factors and some nuances, the apportionment applied by these evaluators derives primarily from two causes: Mr. Cotton's multiple sclerosis,

reportedly diagnosed in 1987, and a work-related injury to his left knee, from a slip-and-fall while working at Applebee's in 1996. In Dr. Robbins's opinion, the former condition is largely responsible for applicant's depression, and in Dr. Isono's, the latter, which caused the need for five surgical procedures, also caused the bulk of the impairment in that knee. Dr. Isono apportioned 20% of Mr. Cotton's spinal impairment to stenosis and degenerative changes found on MRI and at surgery.

Both the employee and the employer engaged vocational evaluators.^{[fn]3} Here, applicant's effort was directed in large part to undermining the apportionment found by the orthopedic evaluator, defendant's to reinforcing it. Reporting for Mr. Cotton, Jeff Malmuth finds that he is effectively unemployable, given all factors, and that his permanent disability deriving solely from the effects of his 2009 injury is greatly in excess of that found by the AME. (Exhs. 5, 6) Reporting for the employer, Blair Hunt disagrees, concluding that applicant is employable and that his limitations are caused by multiple factors. (Exh. A)

In addition, Mr. Cotton's treating physician, Dr. Richard Shinaman, has reported and testified that he is essentially unable to return to gainful employment. (Exh. 3)

In the current litigation, applicant contends that his permanent disability, from all causes, is total, and that he has met the applicable thresholds for entitlement to SIF benefits. Defendant SIF argues that one of those thresholds is not met by the permanent disability ratings of the medical reports, chiefly that of Dr. Isono.

...

Following an earlier trial, I decided that the record as it then existed was insufficient to determine the liability of the SIBTF. Specifically, I asked that the parties inquire of the agreed medical evaluator how much permanent impairment resulted solely from applicant's 2009 work-related injury, and to clarify his calculation of spinal impairment. These questions were for the purpose of establishing the 35% threshold as required by section 4751.

...

³ The entirety of the evidentiary record before me in this case, which now involves solely the SIF as defendant, was developed in the case in chief, which was resolved in September, 2017.

...

Following the second trial, I again calculated the permanent disability ratings stemming from Mr. Cotton's 2009 injury, to determine whether they met the 35% threshold. The result I found was, again, 34%.

...

Here, we have an evaluating physician who considered multiple causes for impairment in both the left knee and the back. The apportionment for each was based on prior conditions involving those body parts, and was calculated as percentages of impairment. The result, in terms of "permanent disability resulting from the subsequent injury, when considered alone" that is itself a percentage of the overall disability for each body part. When asked if he could describe such

impairment arising from the work injury standing alone – the question I asked the parties to direct to the evaluating physician – the AME responded by reiterating the percentage-based ratings he had expressed in his reporting. In other words, there is no better way of stating the extent of disability caused by the work injury.

The result, as provided in the earlier opinion, is 25% for the back, 4% for the knee, and 7% for sexual dysfunction.[fn]6

...

6 The derivation of these numbers is explained in the first opinion:

Back: 24% standard,6 modified by the future-earning-capacity modifier[] but not by age or occupation to 31%

Knee: 13% standard, modified to 15%

Sexual dysfunction: 5%, modified to 7%

These quite clearly crest the 35% mark. However, applying the apportionment described by Dr. Isono, the numbers are 25%, 4% and 7%, which combine to 34%.

...

I remain persuaded that apportionment, in this particular instance, must be taken into account in determining whether Mr. Cotton has met the applicable threshold for SIBTF liability.

(Report, pp. 2-7.)

DISCUSSION

We turn first to applicant's contention that he sustained subsequent injury to the back, left knee, and in the form of sexual dysfunction which resulted in permanent disability of 35 percent or more.

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) To constitute substantial evidence "... a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on

facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

“Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. [Citation.] Expert testimony is necessary 'where the truth is occult and can be found only by resorting to the sciences.’” [Citation.] (*Peter Kiewit Sons v. Ind. Acc. Comm. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].)

Here, the record shows that, although Dr. Robbins opined that applicant’s sexual dysfunction was nonindustrial, the WCJ relied upon applicant’s credible testimony to conclude that his subsequent injury resulted in permanent disability which included Dr. Robbins’ impairment rating for sexual dysfunction. (Report, p. 2.) But since the record does not include medical reporting opining that the cause of applicant’s condition was industrially-related, the WCJ substituted his judgment for the medical expert’s by calculating applicant’s subsequent permanent disability based upon the impairment rating for sexual dysfunction. (Report, p. 7, fn 6.)

Accordingly, we will evaluate the question of whether applicant’s subsequent permanent disability meets the 35% threshold without consideration of the alleged permanent disability rating for sexual dysfunction.

Labor Code section 4751 provides:⁴

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,

⁴ Unless otherwise stated, all further statutory references are to the Labor Code.

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. (Lab. Code § 4751.)

In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), we stated that an employee must prove the following elements to recover subsequent injuries fund benefits:

- (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. ([Lab. Code] § 4751.)

(*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 (Appeals Board en banc).)

Applicant contends that his subsequent permanent disability meets the 35% threshold on the grounds that *Bookout v. Workmen's Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595] and its progeny exclude apportionment from the calculation of subsequent permanent disability.

In *Bookout*, the applicant was employed as an oil refinery operator and sustained a compensable injury to his back, which was rated at 65% permanent disability. (*Bookout, supra*, 62

Cal.App.3d at pp. 219–220.) The back disability included a limitation to semi-sedentary work. (*Id.*, p. 219.) Prior to his industrial injury, the applicant had a nonindustrial heart condition. (*Id.*) The heart condition contained two work preclusions: preclusion of heavy work activity and preclusion from excessive emotional stress. (*Id.*, pp. 220–221.) The preclusion of heavy work activity was rated at 34.5% permanent disability. (*Id.*, p. 220.) The preclusion from excessive emotional stress was rated at 12% permanent disability. (*Id.*, pp. 220–221.)

At the trial level, the referee concluded that the heart condition precluding heavy work activity completely overlapped with the back disability limitation to semi-sedentary work. (*Bookout, supra*, 62 Cal.App.3d at p. 224.) The referee, thus, subtracted the preclusion of heavy work activity of 34.5% permanent disability from the 65% unapportioned permanent back disability and awarded applicant permanent disability of 30.5% for the industrial back injury. (*Id.*, pp. 219–221.) The referee then found that the applicant was not eligible for SIBTF benefits based on the finding of 30.5% after apportionment, which was less than the requisite minimum of 35% for a subsequent disability under section 4751. (*Id.*, p. 221.) The Appeals Board affirmed both the 30.5% permanent disability award for the industrial back injury and the finding that applicant was not eligible for SIBTF benefits. (*Id.*, pp. 218–219.)

The Court of Appeal concluded that the Appeals Board had properly determined applicant's permanent disability rating of 30.5% as a result of his compensable back injury, and that the disability resulting from the subsequent injury was compensable to the extent that it caused a decrease in applicant's earning capacity, citing former section 4750 and *State Compensation Ins. Fund v. Industrial Acci. Com. (Hutchinson)* (1963) 59 Cal.2d 45, 48–49 (an employer is only liable for the portion of disability caused by the subsequent industrial injury) and *Mercier v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 711, 715–716 [41 Cal.Comp.Cases 205] (the fact that injuries are to two different parts of the body does not in itself preclude apportionment). (*Bookout, supra*, 62 Cal.App.3d at pp. 222–227.)

However, the Appeals Court held that applicant was erroneously denied SIBTF benefits under section 4751. (*Bookout, supra*, 62 Cal.App. 3d at p. 228.) It explained that the referee incorrectly instructed the rating specialist to apportion 34.5% for the preexisting nonindustrial heart disability (based on a standard rating of 30%) from the total subsequent injury disability of 65% (based on a standard rating of 60%), rather than utilizing the total disability for the subsequent injury “standing alone and without regard to or adjustment for the occupation or age of the

employee” as required by section 4751. (*Id.*; § 4751(b).) It interpreted the language of this requirement as excluding apportionment. Thus, the court held that the permanent disability attributable to applicant's subsequent injury for the purpose of meeting the 35% threshold requirement under the statute was the standard rating of 60%. (*Bookout, supra*, 62 Cal.App.3d at p. 228; § 4751(b).)

Hence, *Bookout* excludes apportionment from the determination of whether applicant meets the 35 percent permanent disability threshold from the subsequent industrial injury alone. (See also *Hagen v. Workers' Compensation Appeals Board (Anguiano)* (2024) 89 Cal.Comp.Cases 702 (writ den.) (denying writ of review on an Appeals Board panel’s decision that an applicant met the 35 percent threshold based upon on *Bookout's* holding that the calculation of permanent disability attributable to the applicant's subsequent injury for the purpose of meeting the threshold excludes apportionment).)

In the case before us, at the trial on January 11, 2021, the WCJ framed the issues between applicant and SIBTF as “Permanent disability, including apportionment,” and “Entitlement to Subsequent Injury Benefits Trust Fund benefits, and at the trial of July 13, 2022, the issue was listed as “Permanent disability as payable by the Subsequent Injuries Benefits Trust Fund.” (Minutes of Hearing and Summary of Evidence, January 11, 2021, p. 2:23-26; MOH/SOE, July 13, 2022, p. 2:20-22.) The WCJ found applicant failed to meet his burden of showing entitlement to SIBTF benefits, and indicated that he calculated applicant’s permanent disability for purposes of determining the 35 percent threshold using apportionment. (Report, p. 7, fn 6.)

We find that the WCJ’s framing of the issue of permanent disability as including apportionment and calculation of permanent disability based upon apportionment on the grounds that “there is no better way of stating the extent of disability caused by the [subsequent] work injury” was erroneous. (Report, p. 6.)

We are aware of no authority, and the WCJ cites none, for the proposition that the calculation of permanent disability resulting from subsequent injury for purposes of determining eligibility for SIBTF benefits may include apportionment merely because the preexisting disability resulted from a condition of the same body part later afflicted by subsequent injury.

Moreover, recent Appeals Board panels have reasoned that *Bookout* precludes the use of apportionment in the calculation of permanent disability resulting from subsequent injury even where the subsequent permanent disability affects the same body part where the injured worker

had a preexisting disability. (See *Francisco v. Subsequent Injuries Benefits Trust Fund* 2025 Cal. Wrk. Comp. P.D. LEXIS 34⁵ (noting the absence of authority for the proposition that the calculation of permanent disability resulting from subsequent injury must include apportionment if the preexisting disability resulted from industrial injury to the same body part affected by subsequent injury); see also *Whisnant v. Subsequent Injuries Benefits Trust Fund* 2025 Cal. Wrk. Comp. P.D. LEXIS 341 (rejecting the argument that apportionment under the pre-2004 version of section 4663 would be allowed to determine whether the applicant met the 35% threshold based upon *Bookout* and *Todd*.)

In other words, our view is consistent with numerous recent Appeals Board panel decisions holding that *Bookout* excludes apportionment from the calculation of permanent disability resulting from subsequent injury under all circumstances because it requires that the calculation be made with respect to the subsequent injury "standing alone." (*Bookout, supra*, at pp. 228–229; *Dhami v. Subsequent Injuries Benefits Trust Fund*, 2025 Cal. Wrk. Comp.P.D. LEXIS 14; *Millner v. Subsequent Injuries Benefits Trust Fund*, 2025 Cal. Wrk. Comp. P.D. LEXIS 10; 2025 LX 46046; *Anguiano v. Subsequent Injuries Benefits Trust Fund* 2023 Cal. Wrk. Comp. P.D. LEXIS 310; *Heigh v. Subsequent Injuries Benefits Trust Fund* 2023 Cal. Wrk. Comp. P.D. LEXIS 269]; *Riedo v. Subsequent Injuries Benefits Trust Fund* 2022 Cal. Wrk. Comp. P.D. LEXIS 303.)

Thus, the WCJ should have calculated permanent disability resulting from subsequent injury by combining the 31% impairment of the back with the 15% impairment of the knee by using the CVC and rated subsequent disability at 41%.

Accordingly, we will substitute a finding that applicant's subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation or age.

Since the WCJ found that applicant's subsequent permanent disability does not meet the 35% threshold, he did not determine whether applicant met the remaining eligibility requirements for SIBTF benefits.

⁵ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues regarding construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].)

Consequently, the record remains unclear as to whether (1) the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and (2) the combined preexisting and subsequent permanent partial disability is equal to 70% or more. (§ 4751; *Todd, supra.*)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the [Appeals] Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record ... the WCJ or the [Appeals] Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id.*)

Because the record is unclear as to whether the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone and equals to 70% or more, we conclude that the record requires further development as to these issues.

Accordingly, we will substitute findings that defer these issues.

Our non-binding recommendation is that the parties develop the record through further discovery from the AMEs in the case. (*McDuffie, supra.*)

Accordingly, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that applicant's subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation or age, and that defer the issues of whether his combined preexisting and subsequent permanent partial disability exceeds his subsequent permanent disability alone and is in an amount of 70% or more; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued on July 15, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Bobby Brent Cotton, born _____, while employed on February 7, 2009, in California, as a termite inspector, by Terminix, insured for workers' compensation by Zurich American Insurance, sustained an injury arising out of and in the course of employment to his back and left knee.

2. Applicant's subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation or age.

3. The issue of whether his combined preexisting and subsequent permanent partial disability exceeds his subsequent permanent disability alone is deferred.

4. The issue of whether his combined preexisting and subsequent permanent partial disability is in an amount of 70% or more is deferred.

5. All other issues are deferred.

IT IS FURTHER ORDERED that this matter is hereby **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 3, 2026

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

**BOBBY BRENT COTTON
FARNSWORTH LAW GROUP
OFFICE OF THE DIRECTOR LEGAL**

SRO/kl

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