

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

JOHN FERNANDO, *Applicant*

vs.

**STATE OF CALIFORNIA, DEPARTMENT OF CORRECTION & REHABILITATION,
legally uninsured, adjusted by STATE COMPENSATION INSURANCE FUND;
SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ10422918
Salinas District Office**

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

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration of the February 2, 2022 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) ordered that SIBTF authorize the weight-bearing bilateral knee x-rays requested by Moses Jacob, M.D., and obtain and forward to Dr. Jacob standing x-rays dated August 3, 2017 for his review and comment.

SIBTF contends that Dr. Jacob's request for x-rays are not reasonable or necessary to prove a preexisting labor disabling disability because the x-rays will not show applicant's condition at the time of the subsequent injury. SIBTF further contends that the WCJ's order improperly shifts the burden of production and proof to SIBTF.

We received an answer from applicant. 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 dismiss applicant's Petition for Reconsideration because the petition seeks reconsideration of a non-final order, and deny applicant's Petition as a Petition for Removal because applicant has not shown significant prejudice or irreparable harm.

FACTS

As the WCJ stated in his Report:

In developing the medical evidence for Applicant's claim for SIBTF benefits, an evaluation was obtained from Dr. Moses Jacob, whose report dated 02/18/2021 is in evidence as Exhibit A-2. On pages 13, 14, 15 and 17, Dr. Jacobs explained why he was requesting diagnostic imaging studies for the shoulders, knees and cervical spine. He described "limited" previous studies for the shoulders, stating that no "fresh or recent studies were available." He noted that the diagnostic studies for the knees obtained by a previous examiner, Dr. Williams, were outdated and that "fresh weight bearing films and or MRI studies are necessary to ascertain all joint pathology for rating pursuant to AMA Guides ... The patella femoral joint space IS NOT Recorded (emphasis in the original) ... The requested X-rays are considered as part of the medical-legal purposes, i.e., to address the nature/extent, impairment and apportionment ... the requested studies will in all medical probability provide a more accurate analysis of the preexisting and labor disabling condition(s)" Fresh X-rays of the cervical spine were necessary to investigate "probable underlying degenerative changes ... to confirm the level(s) of underlying degenerative joint pathology and to address apportionment below ... I have requested diagnostic studies to ascertain preexisting level of degenerative joint disorder. In all probability this was labor disabling. I will await the requested X-rays and or MRI to (sic) and will then offer a reasonable % value." (Report, pp. 1-2.)

DISCUSSION

We first address the timeliness of this Opinion. Labor Code¹ section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (§ 5909.) Applicant filed his Petition for Reconsideration on February 28, 2022. The Appeals Board had until April 29, 2022 to act on the Petition. However, the Appeals Board did not receive notice of it until May 5, 2022.

It "is a fundamental principle of due process that a party may not be deprived of a substantial right without notice" (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period

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

that the file was misplaced. (*Id.* at p. 1108.) Like the Court in *Shipley*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Id.* at p. 1108.) Therefore, considering that applicant filed a timely petition for reconsideration on February 28, 2022 and that our failure to act was due to a procedural error, we find that our time to act on applicant’s petition for reconsideration was tolled until May 5, 2022, the date we received the Petition. Accordingly, per section 5909, the deadline to act on this Petition is extended to July 5, 2022. Therefore, this Opinion is timely.

Turning to the issues in this matter, SIBTF seeks reconsideration of a discovery order, which is not a final order. A petition for reconsideration may properly be taken only from a “final” order, decision, or award. (§§ 5900(a), 5902, 5903.) A “final” order has been defined as one that either (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.) Therefore, we dismiss defendant’s Petition for Reconsideration.

We will treat SIBTF’s petition as a Petition for Removal. A party may petition for removal of an interim order. (Cal. Code Regs., tit. 8, § 10843.) 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, § 10843(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, § 10843(a).)

Here, there is no substantial prejudice or irreparable harm. Applicant is free to use a different medical evaluator for his SIBTF claim and is not bound to the same medical evaluators he used in his underlying claim against his employer. (*Duncan v. Workers' Compensation Appeals Board* (2010) 75 Cal.Comp.Cases 762 [2010 Cal. Wrk. Comp. LEXIS 101]; *Moyers v. Council on Aging* (ADJ3374876, February 25, 2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 54; *Gunderson v. Airport Home Appliance* (ADJ1916680, February 24, 2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 48; *Eidman v. Law Offices of Thomas Plumb* (ADJ1787355 and ADJ1318220, August 6, 2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 407; *Jones v. International Telecommunications Co.* (ADJ304555, June 5, 2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 297.) That medical evaluator may ask for additional records to be paid by SIBTF. (Lab. Code, § 4753.5; *ibid.*) SIBTF is free to seek reconsideration once there is a final decision on applicant's SIBTF claim.

As to the order requiring SIBTF to obtain and forward the standing x-rays dated August 3, 2017 that Don Williams, M.D., reviewed in his August 28, 2017 report, applicant may be in a better position to provide these 2017 x-rays to Dr. Jacobs as Dr. Williams was the Panel Qualified Medical Evaluation in the underlying case between applicant and his employer and SIBTF was not a party to this discovery.

For the foregoing reasons,

IT IS ORDERED that SIBTF's Petition for Reconsideration of the February 2, 2022 Findings and Order is **DISMISSED**.

IT IS FURTHER ORDERED that SIBTF's Petition for Removal of the February 2, 2022 Findings and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 29, 2022

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

**JOHN FERNANDO
SPRENKLE, GEORGARIOUS & DILLES, LLP
OFFICE OF THE DIRECTOR LEGAL**

LSM/pc

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