

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

JUSTIN HARLAN, *Applicant*

vs.

**COUNTY OF MONTEREY, permissibly self-insured; STATE OF CALIFORNIA;
SUBSEQUENT INJURIES BENEFITS TRUST FUND, Defendants**

**Adjudication Number: ADJ8625541
Salinas District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the Finding and Order issued on August 9, 2023, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant did not meet the threshold for entitlement to benefits from the Subsequent Injuries Benefits Trust Fund (SIBTF).

Applicant contends that he met the initial threshold for SIBTF benefits set forth in Labor Code section 4751 of 35% for his subsequent compensable injury resulting in permanent partial disability and that his subsequent injury meets the 5% opposite and corresponding threshold; and that he is permanently and totally disabled and that he has a total loss of earning capacity based on the medical and vocational evidence.

We received an Answer from SIBTF.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition and the contents of the Report. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration, and we will order that this matter be referred to a designated hearing referee or WCJ at the Appeals Board for a status conference. Our order granting reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

As set forth in the WCJ's Report:

Justin Harlan worked as a 911 dispatcher for the County of Monterey from August of 2008 through July 31, 2012. He sustained cumulative injury arising out of and in the course of employment during the period from August 2008 through July 31, 2012 to his cervical spine, lumbar spine, and sustained sleep disturbance, headaches, injury to psyche and injury to left eye, as stipulated by the parties, and indicated in Stipulations With Request for Award dated September 11, 2018 (Exhibit D-G, EAMS ID #). During this employment he was diagnosed with multiple sclerosis. On June 4, 2018, Applicant filed an Application for benefits from the Subsequent Injuries Benefit Trust Fund (SIBTF), claiming prior disability from injury to psyche, ADHD, GERD, multiple sclerosis, vision, headaches, left knee and left lower extremity (Exhibit D-F, EAMS ID#). The parties proceeded to trial on the issue of entitlement to SIBTF benefits on April 26, 2023. The parties submitted post-trial briefing and the matter was submitted on May 19, 2023.

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).)

In *Todd, supra*, we held that:

- (1) Prior and subsequent permanent disabilities shall be added to the extent they do not overlap in order to determine the “combined permanent disability” specified in section 4751; and
- (2) SIBTF is liable, under section 4751, for the total amount of the “combined permanent disability”, less the amount due to applicant from the subsequent injury and less credits allowable under section 4753.

The question of whether apportionment may be considered in calculating subsequent permanent disability was presented in *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [132 Cal. Rptr. 864, 41 Cal.Comp.Cases 595]. 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. (*Id.*, at p. 228 [Emphasis in original].)

In this case, applicant contends that the evidence establishes that his subsequent injury meets the 5% opposite and corresponding threshold under subdivision (2)(a) and that his subsequent permanent disability amounts to thirty-five percent of the total disability, when considered without regard to his occupation or age under subdivision (2)(b). Based on our initial review of the evidence, it appears that applicant did meet his burden that his subsequent injury meets the 5% opposite and corresponding threshold and his subsequent compensable injury resulting in permanent partial disability meets the 35% threshold.

II.

We also highlight the following legal principles that may be relevant to our review of this matter:

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) “The term ‘substantial evidence’ means evidence which, if true, has probative force on the issues. It is more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value.” (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313.)

It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence. (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.)

The WCJ's decision must “set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on,” so that “the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record.” (*Id.* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to “ensure substantial justice in all cases.” (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Labor Code section 5310 states in relevant part that: “The appeals board may appoint one or more workers’ compensation administrative law judges in any proceeding, as it may deem necessary or advisable, and may refer, remove to itself, or transfer to a workers’ compensation administrative law judge the proceedings on any claim. . . .” (See also Lab. Code, §§ 123.7, 5309.)

Here, it appears that the WCJ did not properly consider *Todd, supra*, and *Bookout, supra*, in coming to her conclusion that applicant did not meet the threshold. Moreover, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ, and/or whether further development of the record may be necessary. Thus, we will order the matter to a status conference before a designated hearing referee or WCJ at the Appeals Board.

III.

Next, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Earley v. Workers' Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1, 13-15 [88 Cal.Comp.Cases 769] [the Appeals Board has the authority to issue a final decision when it grants reconsideration but is not required to do so]; see generally Lab. Code, § 5803 [“The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given

to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.”]

“The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect.” (*Azadigian v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal. App. 4th 372, 374 [57 Cal. Comp. Cases 391; see *Dow Chemical Co. v. Workmen’s Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A “final” order has been defined as one that either “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]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a “threshold” issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].)

Labor Code section 5901 states in relevant part that:

“No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers’ compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. . . .”

Thus, this order granting applicant’s Petition for Reconsideration *is not a final order* subject to writ of review and *is not a final decision* on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

IV.

Accordingly, we grant applicant's Petition for Reconsideration, order that this matter be set for a status conference, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact issued on August 9, 2023 is **GRANTED**.

IT IS FURTHER ORDERED that this matter will be set for a Status Conference with a designated hearing referee or workers' compensation administrative law judge at the Appeals Board. Notice of the date, time, and format of the conference will be served separately, to be heard in the Lifesize electronic platform, in lieu of an in person appearance at the San Francisco office of the Appeals Board.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAL, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 6, 2023

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

**JUSTIN HARLAN
SPRENKLE, GEORGARIOU & DILLES, LLP
OFFICE OF THE DIRECTOR, LEGAL UNIT, OAKLAND**

AS/mc

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