WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

VINCENT HERNANDEZ, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

Adjudication Numbers: ADJ9074552; ADJ9074553
Salinas District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Subsequent Injuries Benefits Trust Fund (SIBTF) seeks reconsideration[1] of the June 16, 2025 Amended Findings of Fact, Orders. wherein the workers' compensation administrative law judge (WCJ) deferred the issue of whether the combined effect of the subsequent injury and the previous disability or impairment results in a permanent disability equal to 70% or more of total disability under Labor Code[2], section 4751, pending further development of the record.

SIBTF contends that the WCJ abused her authority by ordering discovery reopened on the issue of applicant Vincent Hernandez's alleged preexisting disability of sleep apnea when prior to trial, applicant's attorney objected to SIBTF's multiple requests to continue the trial in order to depose Suresh Mahawar, M.D., applicant's SIBTF medical evaluator, on the very issue in which the WCJ is ordering further development of the record. SIBTF contends that applicant failed to meet his burden of proof of establishing a preexisting disability of sleep apnea and therefore is not entitled to SIBTF benefits.

We received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

---

[1] Chairwoman Caplane and Deputy Commissioner Gondak, who were on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Two other panelists have been assigned in their place.

[2] All statutory references are to the Labor Code unless otherwise indicated.

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 deny reconsideration.

I.

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. (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.
(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 July 17, 2025, and 60 days from the date of transmission is September 15, 2025. This decision is issued by or on September 15, 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 July 17, 2025, and the case was transmitted to the Appeals Board on July 17, 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 July 17, 2025.

II.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd*. (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes findings regarding threshold issues. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains findings that are final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we apply the removal standard to our review. (See *Gaona, supra*.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(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, § 10955(a).) Here, based upon the WCJ's analysis of the merits of SIBTF's arguments, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy. While we understand SIBTF's position in this discovery matter, it is not sufficient to overcome the removal standard discussed above.

Furthermore, we note that while the WCJ found that applicant sustained a minimum of 35% permanent disability for the subsequent industrial injury, there is no finding as to the percentage of permanent disability for the subsequent injury. The underlying matter settled via Stipulations and Request for Award, which settled two claims—ADJ9074552 and ADJ9074553, for 74% permanent disability. (Stipulations with Request for Award dated February 28, 2023; Joint Award dated April 11, 2023.) ADJ9074552 is designated as the subsequent injury in the SIBTF claim. (SIBTF Application dated April 12, 2023.) The Stipulations with Request for Award does not allocate the percentage of permanent disability between the two claims. Therefore, the percentage of permanent disability for the subsequent injury, ADJ9074552, is unknown.

For the foregoing reasons,

IT IS ORDERED that Subsequent Injuries Benefits Trust Fund's Petition for Reconsideration of the June 16, 2025 Amended Findings of Fact, Orders is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 5, 2025

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

VINCENT HERNANDEZ
DILLES LAW GROUP
OFFICE OF THE DIRECTOR – LEGAL UNIT (OAKLAND)

LSM/*pm*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

The SUBSEQUENT INJURY BENEFIT TRUST FUND (SIBTF), filed a timely, verified, (Amended) Petition for Reconsideration on July 11, 2025, along with a supplemental declaration of the same date, alleging the Findings of Fact do not support the Order and Decision; and, by the Order and Decision, the WCJ acted without or in excess of its powers. More specifically, that the WCJ's order for further development of the record was not warranted and was inequitable since both the MSC judge and the trial judge had not allowed further development of the record as requested by petitioner at the time of the MSC nor at trial.

APPLICANT filed a timely answer on July 15, 2025, correctly noting that the dispute involves an interlocutory issue rather than a threshold issue and, as such, the proper standard is one of removal verses reconsideration.

It is recommended that the petition for reconsideration/removal be denied.

II
BACKGROUND/FACTS

Applicant, Vincent Hernandez, while employed on 7/30/12 as a Sheriff Commander by the County of Monterey sustained injury AOE/COE to the lumbar spine, bilateral ankles, bilateral thighs, bilateral Achilles' tendons, neuropathy, bilateral lower extremities, right middle finger, psyche, cognitive, and head.

Following the filing of his workers' compensation claim, Applicant began treating with Melinda Brown, M.D., as his primary treating physician. Dr. Brown ultimately found Applicant permanent and stationary in her report dated 11/02/2016 (A-3).

Following settlement of the underlying workers' compensation case, Applicant filed an Application for SIBTF benefits on 04/12/2023.

Fishman, M.D. for the internal conditions (A-12, A-13). The workers' compensation claim resolved by Stipulations with Request for Award with the Award being approved on 04/11/2023.

For purposes of establishing entitlement to SIBTF benefits, Applicant was evaluated by Suresh Mahawar, M.D. Dr. Mahawar issued one report dated 09/18/2023 (A-2). It is upon Dr. Mahawar's reporting that Applicant primarily relies to assert entitlement to benefits from the SIBTF. The parties stipulated at trial that the 35% threshold was met, leaving the second prong of Labor Code section 4751for entitlement to SIBTF benefits in question.

In his 09/18/2023 report (A-2), Dr. Mahawar evaluated Applicant, reviewed extensive medical records, and provided opinions and concluding that Applicant had preexisting, labor disabling permanent disability associated with sleep apnea at 25% WPI which was permanent and stationary no later than 4/18/11 and resulted in increased daytime sleepiness, interfering with attention and concentration and preventing him from performing jobs such as air traffic controller. Applicant was further evaluated by vocational expert James Westman, M.R.C. on 07/16/2024, with a corresponding report issued by Mr. Westman dated 09/09/2024 (APPL'S. EXH. 1). In that report, Mr. Westman concluded that between the subsequent industrial injury and the preexisting obstructive sleep apnea, Applicant was 100% permanently totally disabled and not amenable to rehabilitation.

Following the Trial on 4/21/25, the WCJ issued Findings of Fact, Orders and Opinion on Decision dated 5/23/25, which was then rescinded, modified and reissued on 6/16/25.

The issue of whether the combined effect of the last injury and the previous disability is a permanent disability equal to 70 percent or more of total disability under Labor Code section 4751 was deferred pending further development of the record.

III.
DISCUSSION

THE AMENDED FINDINGS & ORDER DOES NOT RESULT IN SIGNIFICANT PREJUDICE OR IRREPARABLE HARM AND RECONSIDERATION REMAINS AN ADEQUATE REMEDY AFTER ISSUANCE OF THE FINAL ORDER, DECISION OR AWARD.

Petitioner filed a Petition for Reconsideration as opposed to a Petition for Removal to the interlocutory order for further development of the record. Applicant has no objection to said development and agrees petitioner is not aggrieved. (See Applicant Answer to Petition to Reconsideration). Removal is an extraordinary remedy rarely exercised by the Appeals Board.

(Cortez v. Workers' Comp. Appeals Bd. (2006) 71 CCC 155, 157, fn. 5). The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (See 8 CCR 10955(a).)

In his report of 9/18/2023, at the request of the applicant, Dr. Mahawar outlined permanent impairment due to sleep apnea which he concluded pre-existed the industrial injury of 7/30/12 and were permanent and stationary prior to 7/30/12 (A-2). This conclusion is unrebutted. However, pursuant to the en banc decision of McDuffie v. Los Angeles County Metropolitan Transit Authority, the medical record requires further development after submission of the case for decision. (See McDuffie v. Los Angeles County Metropolitan Transit Authority (2002) 67 CCC 138). The report is deficient in as much as further clarification and/or explanation is necessary to complete some of the findings made by Dr. Mahawar before rendering a determination on whether there is sufficient evidence of pre-existing labor disabling disability. Some of the opinions of Dr. Mahawar are sufficiently conclusory to require further development of the record. (See Granado v. Workmen's Comp. App. Bd., 33 Cal. Comp. Cases 647.)

In this regard, the parties were ordered to further develop the record, preferably by deposing Dr. Mahawar, and specifically were ordered to have him expound on the following issues raised by the WCJ herein:

• Link between chronic bronchitis and diagnosis of sleep apnea in the absence of a sleep study (In this regard, Dr. Mahawar's report is conclusory as he does not state studies linking chronic bronchitis with a diagnosis of sleep apnea or otherwise explain the link).

• Further clarification/explanation of level of whole person impairment to include the effect, if any, of a CPAP machine (Dr. Mahawar acknowledges use of CPAP machine but fails to address effect of CPAP machine on WPI, if any).

• Further explanation/clarification as to how diagnosis of sleep apnea and/or impairment rating under impairment due to Air Passage Defects was labor disabling prior to the industrial injury.

• How and why findings on a chest x-ray prior to the date of the industrial injury would render applicant permanent and stationary when formal diagnosis of sleep apnea occurred three years post injury.

The above analysis explained and identified with specificity some of the deficiencies found in the Dr. Mahawar's reporting. Sending this back to the parties to augment the record is consistent

with the Appeals Board's discretionary authority to develop the record to fully adjudicate the issues. (Labor Code §§5701, 5906; Tyler v. Workers, Appeals Board (1997) 56 Cal. App. 4th 329 [62 Cal.Comp.Cases 924]; see McClune v. Workers, Appeals Board (1998) 62 Cal. App. 4th 1117 [63 Cal.Comp.Cases 261].) In the en banc decision in McDuffie, supra, @ p. 138, the Appeals Board stated that "Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings, [but] before directing augmentation of the medical record… the WCJ or the Board must establish as a threshold matter, that the specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (McDuffie, supra, at page 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (Id.)

PETITIONER'S FRUSTRATION

Petitioner expressed frustration with the trial judge's decision to further develop the record in the face of the history of the MSC judge reportedly not allowing further discovery as requested by defendant. With all due respect, the MSC judge is not charged with reviewing and analyzing evidence which was not even filed at that point in order to determine whether or not further development of the record would be necessary. There were no Minutes of Hearing filed in EAMS reflecting defendant's objection to proceeding to trial. More importantly, the Pre-trial Conference Statement dated 02/12/2025 did not reflect an objection by defendant to proceed to trial. When defendant's reported objection was overruled and the matter ordered set for trial by the MSC judge, defendant did not Petition to Remove the MSC judge.

Petitioner asserts that objection to proceeding to trial was once again raised on the day of trial. At trial on April 21, 2025, it was conceded that there was an untimely objection to the declaration of readiness to proceed and that the MSC judge had ordered discovery closed. The matter proceeded to trial. The disposition on the 4/21/25 Minutes of Hearing, noted a joint request for the matter to go off calendar, with dates for trial briefs to be filed, and for the matter to be submitted for decision on May 6, 2025. There was no objection to the disposition. The trial judge acted within her discretion both at trial and after taking the matter under submission.

IV
RECOMMENDATION

Petitioner SIBTF is not aggrieved by the Findings and Orders. It is recommended that the WCAB deny defendant's Petition for Reconsideration.

Transmitted to the Recon Unit on:
July 17, 2025

Kathleen A. Chassion
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE