**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**CONSTANCE DORROUGH, *Applicant***

**vs.**

**SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant***

**Adjudication Number: ADJ12394766**
**Oakland District Office**

# OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Order issued by the workers' compensation administrative law judge (WCJ) in this matter on October 15, 2024. In that decision, the WCJ found, in pertinent part, that based upon the permanent disability rating of applicant's cervical spine, applicant has not met her burden of proof for SIBTF benefits under Labor Code[1] section 4751.

Applicant contends that the WCJ erred in this finding, as the medical reporting upon which the WCJ relied does not constitute substantial evidence.

We have not received an Answer from defendant. 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 upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for 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 section 5950 et seq.

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[1] All further references are to the Labor Code unless otherwise noted.

**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.
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> (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 November 18, 2024 and 60 days from the date of transmission is January 17, 2025. This decision is issued by or on January 17, 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 November 18, 2024, and the case was transmitted to the Appeals Board on November 18, 2024. 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 November 18, 2024.

## II.
## RELEVANT PROCEDURAL HISTORY

Applicant filed an Application for Adjudication of Claim (Application) for benefits on July 22, 2019, claiming that while employed by defendant Manheim SF Bay, she suffered industrial injury arising out of and in the course of her employment (AOE/COE) on May 23, 2019 to her back, neck, head, leg, and foot. (Application, 7/23/19, p. 3.)

The parties agreed upon Victoria Barber, M.D., as an Agreed Medical Evaluator (AME). Dr. Barber issued a report dated June 17, 2020 after examining the applicant, finding industrial injury to applicant's lumbar spine, cervical region and head. Impairment was also found as to the lumbar and cervical spine. With respect to the applicant's closed head trauma, Dr. Barber recommended applicant be evaluated by a neurologist, with respect to both impairment and well as future medical care needs. (Ex. 7, pp. 12-14.)

On April 22, 2021, the Stipulations with Request for Award (Stipulations) executed by applicant and her employer were approved by a WCJ. (Award, 4/22/21.) The Stipulations reflect that applicant sustained industrial injury to her lumbar and cervical spine, and that the injury caused temporary disability as well as 40% permanent disability. Permanent disability was "[b]ased upon the report of AME Dr. Victoria Barber dated 6/17/20 rated at a combined 40% for the lumbar spine and cervical spine after age/occupation adjustment and apportionment." (Stipulations, 4/19/21, p. 6, para.2; p. 7, para. 9.)

On June 16, 2021, applicant filed a petition to reopen her case for new and further disability, based upon the June 3, 2021 medical reporting of primary treating physician, Vikram Talwar, M.D. (Ex. C.)

Applicant returned to the AME Victoria Barber, M.D., who issued a medical report dated March 2, 2022[2]. The AME reviewed a number of records, including over 300 pages of medical records of applicant from Tiburcio Vasquez Health Center during the period 2015-2019. The AME thereafter opined that while the applicant has permanent impairment to her lumbar spine and

[2] The MOH/SOE list the report of Dr. Barber as dated March 22, 2022, but this is in error. The correct date of the report is March 2, 2022. (Ex. B.)

cervical spine and is in need of the use of a cane, the additional records reviewed now lead her to conclude that with respect to the applicant's lumbar spine, "[I]if injured at all on May 23, 2019, lumbar spine complaints would have been only temporarily aggravated by the fall on that date, then returning to pre-existing baseline. The WCJ then finds that the permanent disability attributable to applicant's lumbar spine was unrelated to the May 2019 fall. (Ex. B, p. 10, 14.)

On June 17, 2022, applicant filed an Application for Subsequent Injuries Fund Benefits, claiming she was permanently disabled due to injuries to her back and legs, which were sustained prior to the permanent disability incurred from her May 23, 2019 industrial injury. (Application, SIBTF, 6/17/22, p. 2.).

On July 19, 2022, defendant filed a Petition to Reopen and Reduce (Petition to Reduce) applicant's permanent disability award based upon the March 2, 2022 medical reporting of Dr. Barber.

Applicant was thereafter evaluated by Qualified Medical Evaluator (QME) Moses Jacob, D.C., who authored several medical reports addressing the orthopedic aspect of applicant's SIBTF claim. (Ex. 1, Collective medical reports of 10/20/22, 9/25/23, 10/3/23.)

On December 2, 2022, applicant was examined by Scott Anderson, M.D., as a QME in the field of internal medicine for the SIBTF case. Dr. Anderson issued a medical report concluding that applicant's injuries qualified her for SIBTF benefits. (Ex. 2.) During this time, applicant continued to treat with physicians Timothy Shen, M.D., and Vikram Talwar, M.D. (Ex. 9, 10.)

On March 20, 2023, the parties filed a Compromise and Release (C&R) settling applicant's subsequent injury with his employer for $ 75,000, which was approved by a WCJ on March 24, 2023.

Addendum A, paragraph 9 of the C&R indicated the following:

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> There exist genuine, bona fide disputes as to the issues of the nature and extent of injury, compensable consequence injury claims, injury AOE/COE re Nervous System/Psych and Hip(s), claims to temporary disability, claims to permanent disability, Petition to Reopen Claim dated 06/17/21, Petition to Reopen to Reduce PD Award, apportionment, liability for medical treatment, liability for self-procured medical treatment, mileage reimbursement, claims to interest and penalty, Applicant's Petition to Enforce Award and For Penalties, etc.

(C&R, 3/20/23, p. 10, para. 9.)

On September 24, 2024, applicant and defendant SIBTF appeared for trial. The issues raised were as follows:

> 1. Parts of body injured. SIBTF contends, per AME Victoria Barber, M.D., that the lumbar spine was not injured in the subsequent industrial injury.
> 2. Permanent disability and apportionment.
> 3. Attorney fees.
> 4. Other issues: Whether applicant has established her right to additional SIBTF benefits under section 4751 and interpreting case law. SIBTF contends that applicant does not meet the thresholds of section 4751.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), 9/24/24, p.2.)

On October 15, 2024, the WCJ issued her Findings and Order in which she found that the QME report of Moses Jacob, D.C., was incomplete and not substantial medical evidence as he did not review the AME report of 3/22/22 [*sic*]. The WCJ additionally found that the reports of treating physicians Timothy Shen and Vikram Talwar were not substantial medical evidence.

Basing her decision upon the updated and revised opinion of AME Dr. Barber, the WCJ found that based upon the permanent disability rating of the cervical spine, applicant did not meet her burden of proof for SIBTF benefits under section 4751.

It is from this Findings and Order that applicant seeks reconsideration.

## III.
## DISCUSSION

The WCJ notes the following in her Report:

> The Findings and Award dated 10-15-2024 agreed with SIBTF's position that applicant has not met her burden of Labor Code section 4751 based on the ratings by AME Dr. Barber in the underlying case. Petitioner contends that the decision was faulty or incomplete because Dr. Barber was equivocal on causation of injury to the low back. Petitioner contends that therefore the opinions of primary treating physician Dr. Timothy Shen and SIF QME Dr. Moses Jacobs should be relied upon to support causation to the low back. Applicant argues that it follows that the ratings set forth by the SIBTF QME Dr. Moses Jacob and/or records by the treating physician Dr. Timothy Shen should be considered to meet the threshold for SIBTF benefits under Labor Code section 4751.
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> ***

> This is an unusual situation where the parties to the subsequent industrial injury stipulated to 40% permanent disability and then after a Petition to Reopen, the AME reversed her opinion on one body part. Petitioner contends that AME Dr. Barber is equivocal as to whether applicant injured her lumbar spine as the result of the slip and fall on 05-23-2019. But the AME states "if **injured at all** the, lumbar spine complaints would have been only **temporarily aggravated** by the fall on that date." The AME is clearly doubtful that applicant sustained injury to her low back if at all. In other words, the AME is doubtful that it was the injury that caused applicant's low back condition as the newly produced prior medical records show the same complaints and issues. To constitute substantial medical evidence, a medical opinion must be predicated on reasonable medical probability.
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> It is well established that when an industrial injury lights up or aggravates a preexisting condition, it is compensable. However, the word "temporary" in this context negates the conclusion that there was an "aggravation" because the AME states that applicant's low back condition moved back to baseline and did not result in additional permanent disability. An exacerbation of a condition, an already weakened low back, that returns to a baseline would not constitute a new injury.

(Report, pp. 5-7.)

An aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. An ***exacerbation*** is a temporary increase in the symptoms of a pre-existing condition that returns to its prior level within a reasonable period of time. The industrial aggravation of a pre-existing condition constitutes an injury for workers' compensation purposes. (*Tanenbaum v. Industrial Acc. Com. (1935)* 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590; *Zemke v. Workers' Comp. Appeals Bd. (1968)* 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd. (Buckner)* (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421].) The Appeals Board has previously held that the aggravation of a prior condition constitutes an injury when the aggravation causes a need for medical treatment and a period of temporary disability. (*City of Los Angeles v. Workers' Comp. Appeals Bd. (Clark)* (2017 W/D) 82 Cal.Comp.Cases 1404; *Johnson v. Cadlac, Inc*., 2021 Cal. Wrk. Comp. P.D. LEXIS 194.)

Here, applicant was in need of medical treatment, and, per the Stipulations of the parties, sustained a period of temporary disability.

The medical records from Tiburcio Vasquez Health Center which were reviewed by the AME after applicant filed her petition to reopen her claim, relate to treatment received by the

applicant prior to her industrial injury of May 2019, and prior to the submission and approval of the original stipulations with request for Award by the parties. Applicant thereafter filed her petition to reopen for new and further disability on June 17, 2021 based upon the medical reporting of her treating physician, Dr. Vikram Talwar.

In her opinion, the WCJ finds there was good cause to reopen applicant's claim based upon this medical reporting, but that only the AME's reporting constitutes substantial medical evidence on the issue of the SIBTF threshold. The Findings state that since QME Dr. Moses Jacob did not review the AME report of March [2], 2022, his reporting is incomplete and not substantial evidence. Additionally, the WCJ found that the reports by treating physicians Dr. Timothy Shen and Dr. Vikram Talkwar are not substantial medical evidence. (Findings, 10/15/24, p. 2.)

The WCJ notes in her Opinion that both Dr. Jacob and Dr. Shen did not review the newly discovered reports from Tiburcio Vasquez Health Center, and thus the reporting cannot constitute substantial medical evidence. (Opinion, p. 7-8.)

Thus, the only reporting upon which the decision rests is that of the AME, who has now opined that applicant sustained a "temporary aggravation" to her lumbar spine.

**IV.**

Any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [520 P.2d 978, 113 Cal. Rptr. 162] [39 Cal.Comp.Cases 310]*; Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [475 P.2d 451, 90 Cal. Rptr. 355] [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [463 P.2d 432, 83 Cal. Rptr. 208] [35 Cal.Comp.Cases 16].)

In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [445 P.2d 313, 71 Cal. Rptr. 697] [33 Cal.Comp.Cases 660]*; Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [203 P.2d 747] [14 Cal.Comp.Cases 54]*; Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [20 Cal. Rptr. 2d 778] [58 Cal.Comp.Cases 313].)

Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals*

*Bd.* (1970) 69 Cal.2d 399, 407 [445 P.2d 294, 71 Cal. Rptr. 678] (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd., supra,* 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 [443 P.2d 777, 70 Cal. Rptr. 193] (the chief value of an expert's testimony rests upon the material from which their opinion is fashioned and the reasoning by which they progress from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based) (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, award, and legal conclusions of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

**V.**

In addition, 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 *Gonzales v. Industrial Acci. Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; 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 [32 Cal.Comp.Cases 431]; *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"].)

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 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 Sections 5950 et seq.

**VI.**

Accordingly, we grant applicant's Petition for Reconsideration, 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.

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov .

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings and Order issued on October 15, 2024 is **GRANTED**.

**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/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**January 17, 2025**

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

**CONSTANCE DORROUGH**
**LAW OFFICE OF GEORGE P. SUMAITIS**
**OFFICE OF THE DIRECTOR-LEGAL UNIT (OAKLAND)**
**SUBSEQUENT INJURIES BENEFITS TRUST FUND**

**LAS/abs**

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