WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DAN CONLEY, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

Adjudication Number: ADJ11303362
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued on October 2, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a laborer/pipe layer on September 12, 2017, applicant sustained injury to his lumbar spine, and claims to have sustained injury to his psyche, internal, left knee, right knee, right hand, left leg, right wrist, left hand, left foot, right shoulder, right hip and right leg; and (2) applicant failed to establish his eligibility for benefits under the Subsequent Injuries Benefits Trust Fund (SIBTF).

The WCJ ordered that the application for SIBTF benefits be denied.

Applicant contends that the evidence establishes that his eligibility for SIBTF benefits.

We received an Answer from defendant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that defer the issues of whether applicant had a pre-existing permanent disability affecting an extremity and a subsequent injury which affected the opposite and corresponding extremity, with the subsequent permanent disability equaling to 5% or more of the total disability when considered alone and without regard to occupation or age; whether applicant's subsequent permanent disability equals

35% or more of his total disability when considered alone and without regard to occupation or age; whether the medical reports in evidence constitute substantial medical evidence; and the level of permanent disability; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On May 4, 2018, applicant and defendant Valverde Construction, Inc. agreed to settle applicant's September 12, 2017 claim of injury to the back, neck, shoulder, and hips, for the sum of $90,000. (Compromise and Release, May 4, 2018, pp. 3, 6.) The parties' compromise and release agreement (C&R) purports to resolve only the issues of future medical treatment and permanent disability. (*Id*., p. 7.)

On May 7, 2018, the WCJ approved the C&R. (Order Approving Compromise and Release, May 7, 2018.)

On June 21, 2018, applicant filed an application for SIBTF benefits, alleging that he had previous partial disabilities resulting from injuries to the head, neck, left shoulder, abdomen, other body parts, and in the form of high blood pressure, prior to the September 12, 20217 injury. (Proof of Service for Application for Adjudication dated June 21, 2018, Application for Adjudication, May 22, 2023, p. 11.)

On April 30, 2024, the matter proceeded to trial on the following issues:

1. Injury arising out of and in the course of employment to the claimed body parts . . .
2. Earnings . . .
3. Permanent Disability.
4. Apportionment.
5. Bills and Liens . . .
6. Attorney fees.
7. Whether ADJ11303362 meets the Subsequent Industrial Injuries threshold requirement.
8. Whether the Subsequent Industrial Injury is 35% or more or effects an opposite and corresponding member that is 5% or more without adjustment for age or occupation.
9. Whether the Applicant had a pre-existing labor disabling disability at the time of the subsequent industrial injury.
10. Whether the additional body parts on the subsequent industrial injury are compensable injuries that have resulted in additional Permanent Disability.
11. Whether the combined effect of the subsequent industrial injury and the pre-existing disability is equal to 70% or more.

12. Whether the Applicant has waived or is precluded and estopped from claiming the additional body parts that were not raised in the underlying subsequent industrial injury normal benefits claim.
13. Whether the medical reports constitute substantial medical evidence.
14. Whether SIBTF is entitled to any offset of liability including reduction by the amount paid to the Applicant in the subsequent industrial injury case.
15. Whether SIBTF claims for credit under Labor Code Section 4753 are valid including credits for unknown prior injuries . . .
16. Whether the Applicant's post-subsequent injury medical evaluations are reasonable and necessary . . .
17. Whether there is contemporaneous evidence of prior labor disabling disabilities.
18. Request of credit for ADJ8486139 for the Date of Injury August 12, 2011.
(Minutes of Hearing, April 30, 2024, pp. 2:21-4:34.)

The parties stipulated that (1) applicant sustained injury arising out of and in the course of employment to his lumbar spine, and claims to have sustained injury arising out of and in the course of employment to his psyche, internal, left knee, right knee, right hand, left leg, right wrist, left hand, left foot, right shoulder, right hip, and right leg; and (2) defendant is entitled to credits of (1) $7,500.00 for ADJ1242946, with the date of injury June 3, 1994; and (2) $7,500.00 for ADJ154392, with the date of injury October 27, 1994. (*Id.*, p. 2:3-19.)

The WCJ admitted exhibits entitled SIBTF Report of Dr. Edward Jennings dated December 23, 2019, SIBTF Report of Dr. Pavel Moldaskiy dated February 13, 2021, and SIBTF Report of Dr. Scott Anderson dated January 26, 2022, into evidence. (Opinion on Decision, p. 3.)

The SIBTF Report of Dr. Edward Jennings dated April 19, 2019 states:

3. Did the worker have a pre-existing labor disabling permanent disability?
Yes.

4. Did the pre-existing disability affect an upper or lower extremity or eye?
Yes. Right and left knees, right wrist, right middle finger, left thumb, left ankle, gait disturbance and cervical spine.

5. Did the industrial permanent disability affect the opposite and corresponding body part?
Yes. The subsequent injury affected the lumbar spine, right leg and right hip.

6. Did the opposite and corresponding body part rate to 5% permanent disability or more?
Yes. I provided a rating for the right knee of 7% WPI, left knee 7% WPI, right middle finger 4% WPI, right wrist 7% WPI, left ankle 7% WPI, left leg 9% WPI, left thumb 2% WPI and cervical spine 8% WPI.

7. Is the total disability equal to or greater than 70% after modification?
Using the Combined Values Chart, pages 604-605, the total disability is equal to 85% Whole Person Impairment. However, I discussed that the Kite Method should be applied, in which case the total impairment is equal to 187% Whole Person Impairment.
(Ex. 5, SIBTF Report of Dr. Edward Jennings, December 23, 2019, pp. 2-3.)

The SIBTF Report of Dr. Pavel Moldaskiy dated February 13, 2021 states:

SUMMARY OF FINDINGS:
In summary, based on my evaluation of the examinee and review of medical records from an orthopedic standpoint, I do believe the examinee sustained an industrial injury 9/12/2017 to his low back.

He had significant labor disabling injuries prior to this industrial injury. The body parts included his neck, low back, bilateral knees, left leg, left foot, right middle finger, left thumb and right wrist.

Using the combined values chart, his combined orthopedic impairment is 61%.
(Of note, the 7 percent impairment for the lumbar spine from the pre-existing lumbar spine injury is not added as the 13% from the subsequent injury encompasses the 7% already present. Thus, if you combined both the pre-existing and subsequent injury you would be counting the impairment twice.)
(Ex. 9, SIBTF Report of Dr. Pavel Moldaskiy, February 13, 2021, p. 71.)

The SIBTF Report of Dr. Scott Anderson dated January 26, 2022 states:

2. Did the industrial injury rate to 35% disability by themselves without modification for age and occupation?
Yes, his industrial injuries did rate to 35% disability by themselves with respect to combination of back and extremity injuries.

3. Did the worker have a pre-existing labor disabling permanent disability?
Yes, the conditions outlined in this report that are non-industrial and industrial all existed prior to his date of injury. The non-industrial conditions are apportioned to pre-injury non-industrial causation.

4. Did the pre-existing disability affect an upper or lower extremity or eye?
Yes, the pre-existing injuries affected the lower extremities particularly the legs bilaterally.

5. Did the industrial permanent disability affect the equal and opposite body part?
Yes, he had bilateral knee injuries reflecting equal and opposite body part involvement.

6. Did the equal and opposite body part rate to 5% permanent disability or more?

Yes, this is described in the medical records as being the case with respect to the knee injuries.
(Ex. 10, SIBTF Report of Dr. Scott Anderson, January 26, 2022, pp. 60-61.)

In the Opinion on Decision, the WCJ states:

Applicant's Exhibits 4-10 are hereby admitted into evidence.
. . .
During trial, the applicant testified that his first workers' compensation claim was filed in 1994, and he did have a prior injury to his left knee that happened in 1979, and it was settled without an attorney. He accepted $1,500 from the insurance company after undergoing arthroscopic surgery. They diagnosed him with chondromalacia and bone spurs in his left knee and told him that he could either live with it or have surgery, including a knee replacement. In 1994, he had an injury where he cut the tip of his middle finger laying pipe. He states that they sewed his finger into his palm, and the soft tissue grew back. He states that the bone was at the top end of his finger. He received a Compromise and Release and did have an attorney on that case. In 1994, he also injured his left foot as he was disconnecting a compressor from a truck. He states that the wheel on the truck was not locked in, and it rolled onto his left foot and broke bones in his foot.[fn]

The applicant also testified to a 2011 injury when he was running a Wacker compacter when his foot caught on a pipe, causing him to fall in a ditch, landing on his head. He was hospitalized with injuries to his head, neck, right shoulder, right hip, and right leg. The case was settled for $50,000.00.[fn]

He also was injured in 2017 when a barricade he was working on fell on him. He injured his neck, left shoulder, left hip, left leg and lower back.[fn] That case settled for $100,000.00. Other injuries included an injury to his face and skull when he was injured on a motorcycle at 16 years old. In 2018 he was hit on the left side of his face with a baseball bat.[fn] He also testified to a 1976 injury to his knees when he fell off a scaffolding. He received $1500 for that injury. He also received $25,000.00 for an injury to his left leg while working as a Merchant Marine.
(Opinion on Decision, pp. 3-6.)

In the Report, the WCJ states:

In the case before us, the applicant's treating doctor reported in Exhibit 2, reported no complaints to the various body systems at the time of his injury on September 12, 2017. Consequently, defendants argued that Applicant is not eligible for SIF benefits because the subsequent industrial injury did not result in 35 percent or more permanent disability without adjustment. The alleged subsequent injury is a September 12, 2017, injury to the neck, back, hips, and shoulders. The lumbar spine, however, was the only body part with a ratable impairment. The Applicant's primary treating physician Dr. Kamran Aflatoon opined that the lumbar spine had a 10 percent whole person impairment (WPI). After the 1.4 adjustment, the lumbar spine is only 14 percent. The September 12, 2017 injury simply did not result in

any ratable impairment to the neck, hips, shoulders or any other body part. Thus, the September 12, 2017 injury does not exceed the 35 percent threshold requirement.

. . .

In their answer to the Petition for Reconsideration, Defendant asserts that the Applicant claimed that the September 12, 2017, injury resulted in additional disability to other body parts. The Applicant cannot add the body parts now. Unfortunately, the Applicant never pled in the normal benefits claim that the September 12, 2017 injury resulted in disability to his psyche, internal knees, hands, legs, right wrist, left foot, right shoulder, and right hip. Thus, the employer in the normal benefits claim never admitted compensability nor has the Applicant obtained a finding of compensability for these injuries. The Applicant cannot satisfy his burden to prove that he suffered a compensable injury to these body parts. The body parts cannot be added now.

Even if the Applicant is allowed to plead the additional body parts now, the Applicant cannot add the disabilities from prior injuries to the subsequent injury claim to show that the 35 percent threshold is satisfied. Under Section 4751, the subsequent industrial injury must be one singular injury - not a combination of multiple injuries.

. . .

The Court notes that while the applicant testifies to numerous preexisting injuries and conditions, he does not testify to additional injury as a result of the September 12, 2017, injury. There is no assertion that he injured and "an opposite and corresponding" body part, as alleged in his pleadings. As Defendant's assert, there is no impairment claimed to the right hip and no rating was provided by Dr. Aflatoon. In fact, in his report of 3/22/18, Dr. Aflatoon indicates that applicant denied these symptoms

Further, the court notes that reliance on the additional medical reports to find an overall rating of 35% to the subsequent injury by adding additional claims is also not supported by the evidence existing at the time. While applicant claims that they may utilize other medicals to support these additional body parties, the court also has discretion to determine the weight and validity of this evidence. When viewing the newly obtained reports and considering them in light of the applicant's testimony, the WCJ is not persuaded that these numerous conditions were discussed at the time of the subsequent injury and as such, does believe that the form the basis of a claim for subsequent injury benefits. While applicant discusses some of these conditions at trial, they are not all discussed for example memory impairment, GERD, and urinary tract disease.

(Report, pp. 2-4.)

DISCUSSION
I.

Former Labor Code 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, Labor Code 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 Labor Code 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 19, 2024 and 60 days from the date of transmission is January 18, 2025. The next business day that is 60 days from the date of transmission is Tuesday, January 21, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Tuesday, January 21, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code 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 19, 2024, and the case was transmitted to the Appeals Board on November 19, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 19, 2024.

II.

Applicant contends that the evidence establishes his entitlement to SIBTF benefits. Specifically, applicant argues that the medical record shows that (1) he had a pre-existing permanent partial disability affecting a hand, arm, foot, or leg, and that the permanent disability resulting from subsequent injury affects the opposite and corresponding extremity, with the subsequent permanent disability equaling to 5% or more of his total disability; or (2) his subsequent permanent disability equals 35% or more of his total disability.

Labor Code section 4751 provides:

> 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, 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 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 *Ferguson v. Industrial Acc. Com*. (1958) 50 Cal.2d 469 [23 Cal.Comp.Cases 108], the Supreme Court held that the "previous disability or impairment" contemplated by Labor Code section 4751 "'must be actually 'labor disabling,' and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751." (*Ferguson*, *supra*, at p. 477.) The Court further noted that "'the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith v. Industrial Acc. Com.* (1955) 44 Cal.2d 364, 367 [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability....'" (*Ferguson*, *supra*, (quoting Larson's Workmen's Compensation Law (1952) § 59.33, vol. 2, p. 63).)

In the present case, the WCJ concluded that applicant failed to establish that he had a pre-existing permanent partial disability affecting a hand, arm, foot, or leg, and a subsequent permanent disability which affected the opposite and corresponding member on the grounds that applicant's September 12, 2017 subsequent injury claim did not allege disability to his "internal knees, hands, legs, right wrist, left foot, right shoulder, and right hip" and Dr. Aflatoon did not opine as to those body parts. (Report, p. 3.)

However, we are unaware of any authority for the proposition that a claim for SIBTF benefits is limited to the pleadings and evidence generated during litigation of the underlying claim where the underlying claim was settled without adjudicated findings. Rather, parties to SIBTF cases may utilize the medical reports obtained in the underlying case and/or adopt any findings or settlements in the underlying matter against the employer but are not required to do so. (See *Bourisk v. Subsequent Injuries Benefits Trust Fund*, 2023 Cal. Wrk. Comp. P.D. LEXIS 105;[1] see also *Duncan v. Workers' Comp. Appeals Bd*. (2010) 75 Cal.Comp.Cases 762 (writ den.).)

The question before us, then, is whether the evidence establishes that applicant had a pre-existing permanent disability affecting an extremity and the subsequent injury affected the opposite and corresponding extremity pursuant to Labor Code section 4751 as explicated by *Todd*.

Here, the record includes evidence that (1) applicant had pre-existing disability affecting the right and left knees, right wrist, right middle finger, left thumb, left ankle, and gait disturbance; (2) the subsequent injury affected the right leg, right hip, and right knee, and (3) the subsequent permanent disability equals 5% or more of the total disability, when considered alone and without regard to occupation or age. (Ex. 5, SIBTF Report of Dr. Jennings. December 23, 2019, pp. 2-3; Ex. 9, SIBTF Report of Dr. Moldaskiy, February 13, 2021, p. p. 71; Ex. 10 SIBTF Report of Dr. Anderson, January 26, 2022, pp. 60-61.)

Notwithstanding the parties' stipulation that applicant claims subsequent injury to the left knee, right knee, right hand, left leg, right wrist, left hand, left foot, right shoulder, right hip, and right leg, the WCJ did not determine whether any of these body parts correspond to a previously partially disabled opposite extremity, and, if so, the level of disability as to each such body part.

Hence, we conclude that the record requires further development on the issue of whether applicant had a pre-existing permanent disability affecting an extremity and a subsequent injury which affected the opposite and corresponding extremity. Accordingly, we will substitute a finding that defers that issue. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals*

Bd. (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924] (stating the Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process).)

Turning to applicant's contention that the evidence establishes that his subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation or age, we note the WCJ concluded that Labor Code section 4751 does not authorize a claim based upon "a combination of multiple injuries" and that even if the statute authorized such a claim, applicant still could not show subsequent permanent disability of 35% because the medical evidence was insufficient. (Report, p. 3.)

In this regard, Labor Code section 4751 requires that applicant show "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" without limitation as to whether the subsequent injury affected one or more body parts. (Lab. Code § 4751.) And since applicant's underlying claim alleged injury to the back, neck, shoulder, and hips, we are unpersuaded that he may be precluded from establishing the 35% threshold based upon multiple resulting disabilities. (Compromise and Release, May 4, 2018, p. 3.)

Hence, we conclude that the record requires further development on the issue of whether applicant's subsequent permanent disability equals 35% or more of his total disability. Accordingly, we will substitute a finding that defers that issue.

The WCJ is required to "make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award, there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code § 5313; see also *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton*, *supra*, at p. 476, (citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351]).)

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [262 Cal. Rptr. 537, 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." (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [93 Cal. Rptr. 15, 480 P.2d 967, 36 Cal.Comp.Cases 93, 97].)

Having determined that the issues of whether applicant meets the Labor Code section 4751 thresholds pursuant to subsections (a) and (b) require further development, we note that the WCJ did not make a record as to what body part(s) are included in applicant's subsequent injury claim, what body parts, if any, were previously partially disabled,[2] or the level of permanent disability for all such body parts.

To make these determinations, however, it is first necessary for the WCJ to evaluate the nature of the medical evidence, i.e., whether and to what extent the physicians' reports constitute substantial medical evidence and may be relied upon to prove those statutory elements. Hence, we conclude that the record requires further development on the issues of whether the medical

[2] We note that the parties framed the issue of whether there is contemporaneous evidence of prior labor disabling disabilities as one for trial. However, an Appeals Board panel decision recently found that an applicant is not required to present contemporaneous medical evidence to establish the level of pre-existing permanent partial disability in order to establish entitlement to SIBTF benefits. (*Organista v. Subsequent Injuries Benefits Trust Fund*, 2024 Cal. Wrk. Comp. P.D. LEXIS 57

reports constitute substantial medical evidence and the level of permanent disability, if any. Accordingly, we will substitute findings that defer those issues.

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that defer the issues of whether applicant had a pre-existing permanent disability affecting an extremity and a subsequent injury which affected the opposite and corresponding extremity, with the subsequent permanent disability equaling to 5% or more of total disability when considered alone and without regard to occupation or age; whether applicant's subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation or age; whether the medical reports in evidence constitute substantial medical evidence; and the level of permanent disability; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued on October 2, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Findings and Order issued on October 2, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Dan Conley, age 61, while employed on September 12, 2017, as a laborer/pipe layer, occupation group number 480, at Santa Fe Springs, California, by Valverde Construction, sustained injury arising out of and in the course of employment to his lumbar spine, and claims to have sustained injury to his psyche, internal, left knee, right knee, right hand, left leg, right wrist, left hand, left foot, right shoulder, right hip, and right leg.

2. The issue of whether applicant had a pre-existing permanent disability affecting an extremity and a subsequent injury which affected the opposite and corresponding extremity, with the subsequent permanent disability equaling to 5% or more of total disability when considered alone and without regard to occupation or age is deferred.

3. The issue of whether applicant's subsequent permanent disability equals 35% or more of his total disability when considered alone and without regard to occupation or age is deferred.

4. The issue of whether the medical reports in evidence constitute substantial medical evidence is deferred.

5. The issue of the level of permanent disability is deferred.

6. All other issues are deferred.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 21, 2025

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

DAN CONLEY
MANGOSING LAW GROUP
OFFICE OF THE DIRECTOR – LEGAL UNIT

SRO/*cs*

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