WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ABEL VAZQUEZ, *Applicant*

vs.

INOCENSIO[1] RENTERIA; ZENITH INSURANCE CO., *Defendants*

Adjudication Number: ADJ11017003
Salinas District Office

OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION AFTER
FOR RECONSIDERATION

(En Banc)

To secure uniformity of decisions in the future, the Chair of the Appeals Board, upon a unanimous vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision.[2] (Lab. Code, § 115.)[3]

Applicant, who is represented by counsel, filed a Petition for Removal of the "Findings and Order" (F&O) issued on March 11, 2025, wherein the workers' compensation administrative law judge (WCJ) replaced a qualified medical evaluator (QME) pursuant to Administrative Director Rules (AD Rules) 31.3 and 31.5 because the QME was not available to set a re-evaluation within 120 days. (Cal. Code Regs., tit. 8, §§ 31.3, 31.5.)[4]

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[1] It appears that the spelling of the employer's name contained in the application for adjudication may be incorrect. If the name is misspelt, an amended application should be filed to correct the error.

[2] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation administrative law judges. (Cal. Code Regs., tit. 8, §§ 10305(k), 10325(a); C*ity of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].) This en banc decision is also adopted as a precedent decision pursuant to Government Code section 11425.60(b).

[3] All further statutory references are to the Labor Code unless noted.

[4] All further references to "AD Rules" are to the enumerated provisions in California Code of Regulations, Title 8 unless noted.

Applicant argues that the time limits set in AD Rule 31.3 should not be enforced to compel the replacement of a QME who is not available. Instead, applicant cites to the panel decision in *Corrado v. Aquafine Corp*. (June 24, 2016, ADJ9150447, ADJ9150446) [2016 Cal.Wrk.Comp. P.D. LEXIS 318] (*Corrado*), and argues that the WCJ should have applied the balancing test described in *Corrado* in deciding whether good cause existed to warrant replacement of the QME.[5]

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

We received an Answer from defendant.

We have considered the allegations of the Petition and the Answer, and the contents of the Report, and we have reviewed the record. Based upon our review of the record, and for the reasons stated below, we will treat the Petition as one seeking reconsideration because the March 11, 2025 F&O includes both final and non-final orders; however, we will apply the removal standard to the Petition as applicant only challenges a non-final order contained within the F&O. Therefore, we will grant the Petition, and as our Decision After Reconsideration we will rescind the March 11, 2025 F&O and return the matter to the trial level for further proceedings.

We hold that:

1. Only the Appeals Board has jurisdiction to determine whether a replacement panel is valid or otherwise appropriate.
2. In a represented case, where a QME does not timely establish availability to set an appointment pursuant to AD Rule 31.3, a WCJ or the Appeals Board has discretion to order a replacement QME for good cause. The WCJ or the Appeals Board may consider the following:
    a. The length of delay caused by the QME's unavailability.
    b. The amount of prejudice caused by the delay in availability versus the amount of prejudice caused by restarting the QME process.

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[5] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee*, *supra*, 96 Cal.App.4th at p. 1425, fn. 6.) However, panel decisions are citeable authority and the Appeals Board may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to *Corrado*, *supra,* because it considered a similar issue. We recommend that practitioners proceed with caution when citing to a panel decision and verify its subsequent history.

c. What efforts, if any, have been made to remedy the QME's availability.

d. Case specific factual reasons that justify replacing or keeping the current QME, including whether a party may have waived its objection.

e. The Appeals Board's constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.)

Application of this decision is prospective only, as explained below.

FACTS

Applicant was employed as a seasonal agricultural worker on March 17, 2017, when he sustained an industrial injury to his left ankle and left calf, and claims to have sustained injury to his left lower extremity, psyche, and in the form of hypertension, diabetes, and hyperlipidemia. (Minutes of Hearing and Summary of Evidence, February 4, 2025, p. 2, lines 3–6.)

Ira Fishman, M.D., was selected as a QME to evaluate the compensability of applicant's internal complaints, and issued two reports. (Applicant's Exhibits 1 and 2.) Dr. Fishman initially evaluated applicant on May 21, 2021. (Applicant's Exhibit 1, Report of QME Ira Fishman, M.D., June 9, 2021.) On May 31, 2022, he issued a supplemental report following his review of additional records. (Applicant's Exhibit 2, Report of QME Ira Fishman, M.D., May 31, 2022.)

On July 29, 2024, applicant requested a re-evaluation with Dr. Fishman. (Defendant's Exhibit A, Notice of QME Appointment with Ira Fishman, M.D., July 29, 2024.) The next available evaluation date was for December 2, 2024, which was 127 days later. (*Ibid*.)

On August 5, 2024, defendant requested a replacement panel pursuant to AD Rules 31.3(e) and 31.5(a)(2), because the re-evaluation appointment with Dr. Fishman was scheduled more than 120 days from the date of applicant's request. (Defendant's Exhibit B, Defendant's Replacement Panel Request, August 5, 2025.)

On August 15, 2024, applicant objected to the request for a replacement panel, arguing that the time limits only applied to initial evaluations and not to subsequent evaluations. (Defendant's Exhibit C, Applicant's Objection Letter to Medical Unit, August 15, 2024.) Defendant responded to applicant's letter by citing AD Rule 31.3(f) and arguing that the timeframes for QME

appointments apply to both initial and subsequent evaluations. (Defendant's Exhibit D, Defendant's Letter to Medical Unit, August 23, 2024.)

The Division of Workers' Compensation (DWC) Medical Unit issued a replacement panel on September 12, 2024. (Defendant's Exhibit E, Internal Medicine Panel No. 3521873, September 12, 2024.) Applicant objected, and the issue of whether a replacement panel was appropriate was set for trial. The WCJ found that defendant was entitled to a replacement panel due to the QME's inability to set an appointment within 120 days.

DISCUSSION

I.

PROCEDURAL BACKGROUND

HYBRID DECISION

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 (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650]). Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment (AOE/COE); jurisdiction; the existence of an employment relationship; and statute of limitations. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd*. (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].)

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 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer*, *supra*, 211 Cal.App.3d at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer*, *supra*, at 82 Cal.App.3d p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

If a decision includes a determination of a "threshold" issue, then it is treated as a "final" decision, regardless of whether all issues are resolved or whether 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).) Where a decision contains both final and non-final determinations, it is a hybrid decision. Thus, when a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the determination on the threshold issue is final and binding on the Appeals Board and all parties to the case. When a petition is treated as one for reconsideration, then, the Appeals Board follows section 5908.5 and considers the merits of any final findings, awards, or orders. If the Appeals Board does not disturb the final finding, award, or order, or affirms it, the parties' remedy is to seek appellate relief. (§§ 5950 et seq.) If no further relief is sought, the finding, award, or order, is binding on all parties as the "law of the case." (§ 5904; *Goodrich v. Industrial Acc. Com*. (1943) 22 Cal.2d 604, 611.)

However, where a petitioner challenges a WCJ's determination regarding an interlocutory issue, the Appeals Board will apply the removal standard applicable to non-final decisions with respect to that issue. Notably, decisions on interlocutory or interim issues by a WCJ or the Appeals Board may still be challenged by a petition for reconsideration once a final decision is issued.

Here, the WCJ's decision includes findings of employment and industrial injury, which are determinations of threshold issues and constitute "final" findings. Thus, even though we do not address the merits of these final findings in this decision, we treat the Petition as one for reconsideration. In the Petition, applicant only challenges the interlocutory finding/order as to the QME, and therefore, we will apply the removal standard to our review of that issue. (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, 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, § 10955(a); see also *Cortez, supra; Kleemann, supra*.) A petitioner must also 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, the WCJ struck the current QME and ordered the parties to begin the medical-legal discovery process anew. However, the decision was based upon an incorrect interpretation of statute and regulation, and it significantly alters the course of these proceedings and likely extends the ultimate resolution of this matter. Accordingly, we conclude that applicant has demonstrated that the decision will cause irreparable harm that cannot otherwise be remedied by reconsideration.

TIMELINESS OF DECISION

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. (§ 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.

(§ 5909.)

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 March 18, 2025, and 60 days from the date of transmission is Saturday, May 17, 2025, which by operation of law means this decision is due by Monday, May 19, 2025. (Cal. Code Regs., tit. 8, § 10600.) This decision issued by or on May 19, 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 shall be notice of transmission.

According to the proof of service, the Report was served on March 18, 2025, and the case was transmitted to the Appeals Board on March 18, 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 March 18, 2025.

II.

A. Only the Appeals Board has jurisdiction to determine whether a replacement panel is valid or otherwise appropriate.

As explained in our en banc decision in *Dennis v. State of California* (2020) 85 Cal.Comp.Cases 389 (Appeals Board en banc):

> Article XIV, Section 4, of the California Constitution, provides in pertinent part that:
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> > The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party …
> >
> > * * *
> >
> > The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. …
> >
> > * * *
> >
> > Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the state

> compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed.

(Cal. Const. Art. XIV, § 4.)

Under this constitutional grant of plenary power to the Legislature, the California Workers' Compensation Act (§ 3200 et seq.) was enacted "to establish a complete and exclusive system of workers' compensation including 'full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State … .'" (Citations.) Thus, under the grant of authority in the California Constitution, the Appeals Board operates as an appellate court of limited jurisdiction that reviews and decides appeals from decisions issued by workers' compensation administrative law judges. (Citations.)

The Workers' Compensation Act is found in Divisions 4 and 4.5 of the Labor Code, as administered and enforced by the Division of Workers' Compensation under the control of the Administrative Director, "except as to those duties, powers, jurisdiction, responsibilities, and purposes as are *specifically vested in*" the Appeals Board. (§ 111, emphasis added.) The Administrative Director "exercise[s] the powers of the head of a department … [including] supervision of, and responsibility for, personnel, and the coordination of the work of the division. …" (§ 111; see §§ 123, 127, 133 [describing various powers of the Administrative Director].) The Appeals Board exercises all judicial powers vested in it by the Labor Code and may do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it by the Labor Code. (§§ 111, 133; see §§ 115, 130, 134, 5307, 5309, 5813, 5900 et. seq.) [describing various powers of the Appeals Board].) In addition to review of appeals of decisions issued by workers' compensation administrative law judges by way of petitions for reconsideration and/or removal (§ 5900 et. seq.), the major function of the Appeals Board is regulation of the adjudication process by adopting rules of practice and procedure and issuing en banc opinions (§ 5307; § 115).

Pursuant to section 5300, the WCAB has exclusive jurisdiction to adjudicate the "recovery of compensation, or concerning any right or liability arising out of or incidental thereto" of injuries that "arise out of and in the course" of employment. . . . In other words, the WCAB maintains exclusive jurisdiction pursuant to the California Constitution and section 5300 to adjudicate workers' compensation disputes.

(*Id*. at p. 396.)

Accordingly, the Appeals Board is vested with the judicial power to adjudicate workers' compensation cases, which includes the determination of whether a replacement QME panel is valid or otherwise appropriate. (§ 111.)

B. In a represented case, where a QME does not timely establish availability to set an appointment pursuant to AD Rule 31.3, a WCJ or the Appeals Board has discretion to order a replacement QME for good cause.

The Appeals Board has broad powers to adjudicate discovery disputes, which include the taking of additional medical evidence. (*McDuffie v. L.A. County Metro. Transit Auth.* (2002) 67 Cal.Comp.Cases 138, 141 (Appeals Board en banc), citing §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].) A common discovery dispute arises where parties seek to replace a QME.

Two provisions in the Labor Code expressly grant parties the *statutory* right to replace a QME.[6] In other words, when a violation described in the statute occurs, a party may promptly seek replacement of the QME.

The first is ex parte communication. (§ 4062.3(f), (g)[7]; *Alvarez v. Workers' Comp. Appeals Bd*. (2010) 187 Cal.App.4th 575; see also *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases

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[6] Other provisions of the Labor Code may present good cause to replace a QME. For example, a violation of section 4628 compels the exclusion of a QME's report under subdivision (e) and could be considered by a WCJ in determining whether good cause existed for a QME's replacement. The focus of this opinion is the two provisions that provide a statutory right of replacement.

[7] Section 4062.3 states in relevant part that:

> (f) Communications with an agreed medical evaluator shall be in writing, and shall be served on the opposing party when sent to the agreed medical evaluator. Oral or written communications with physician staff or, as applicable, with the agreed medical evaluator, relative to nonsubstantial matters such as the scheduling of appointments, missed appointments, the furnishing of records and reports, and the availability of the report, do not constitute ex parte communication in violation of this section unless the appeals board has made a specific finding of an impermissible ex parte communication.
>
> (g) Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited. If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of subdivision (e), ***the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator*** to be selected according to Section 4062.1 or 4062.2, as applicable, or proceed with the initial evaluation.

(§ 4062.3(f), (g) (emphasis added).)

1803 (Appeals Board en banc); *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136 (Appeals Board en banc).)[8]

The second is a failure to timely complete a formal medical evaluation under sections 4062.5 and 139.2(j)(1).

Here, the WCJ's finding that the QME should be replaced was based on the QME's inability to schedule a medical re-evaluation within 120 days under AD Rule 31.3(e). Thus, our discussion is focused on whether the statutory language of sections 4062.5 and 139.2(j)(1) allow replacement of the QME where the QME is unable to set a re-evaluation within 120 days. As explained below, when sections 4062.5 and 139.2(j)(1) are read together, a party's statutory right to seek replacement of a QME in represented cases arises when ***the QME fails to timely issue a report following a medical evaluation***. In represented cases, the determination of whether a QME should be replaced due to *unavailability* to set an evaluation is within the discretionary power of the Appeals Board,[9] and a QME may be replaced where a party demonstrates good cause for the replacement.

Statutory analysis begins by examining "the words themselves because the statutory language is generally the most reliable indicator of legislative intent … The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818, quoting *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715–716.) When the words of a statute are clear, we must follow their plain meaning. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.) If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls. (*In re Jennings* (2004) 34 Cal.4th 254, 263.)

Section 4062.5 states:

> **If a qualified medical evaluator selected from a panel fails to complete the formal medical evaluation within the timeframes established by the**

[8] As explained in the en banc opinion in *Maxham*:

> Black's Law Dictionary defines 'ex parte' as, 'On or from one party only, usually without notice to or argument from the adverse party.' (Black's Law Dict. (7th ed. 1999) p. 597, col. 2.) Black's further states that an 'ex parte communication' is, 'A generally prohibited communication between counsel and the court *when opposing counsel is not present*.' (*Id.* [emphasis added].)

(*Maxham*, *supra*, 82 Cal.Comp.Cases at p. 142.)

[9] We emphasize that the authority to adjudicate disputes with respect to statutory violations rests with the Appeals Board.

administrative director pursuant to paragraph (1) of subdivision (j) of Section 139.2, a new evaluation may be obtained upon the request of either party, as provided in Sections 4062.1 or 4062.2. Neither the employee nor the employer shall have any liability for payment for the formal medical evaluation which was not completed within the required timeframes unless the employee or employer, on forms prescribed by the administrative director, each waive the right to a new evaluation and elects to accept the original evaluation even though it was not completed within the required timeframes.

(§ 4062.5 (emphasis added).)

Section 139.2(j)(1) states:

> (j) After public hearing pursuant to Section 5307.3, the administrative director shall adopt regulations concerning the following issues:
>
> > (1) (A) Standards governing the timeframes within which medical evaluations shall be prepared and submitted by agreed and qualified medical evaluators. Except as provided in this subdivision, the timeframe for **initial medical evaluations to be prepared and submitted shall be no more than 30 days after the evaluator has seen the employee or otherwise commenced the medical evaluation procedure**. The administrative director shall develop regulations governing the provision of extensions of the 30-day period in both of the following cases:
> >
> > > (i) When the evaluator has not received test results or consulting physician's evaluations in time to meet the 30-day deadline.
> > >
> > > (ii) To extend the 30-day period by not more than 15 days when the failure to meet the 30-day deadline was for good cause.
> >
> > (B) For purposes of subparagraph (A), "good cause" means any of the following:
> >
> > > (i) Medical emergencies of the evaluator or evaluator's family.
> > >
> > > (ii) Death in the evaluator's family.
> > >
> > > (iii) Natural disasters or other community catastrophes that interrupt the operation of the evaluator's business.

> (C) **The administrative director shall develop timeframes governing availability** of qualified medical evaluators for **unrepresented employees** under Section 4062.1. These timeframes shall give the employee the right to the addition of a new evaluator to his or her panel, selected at random, for each evaluator not available to see the employee within a specified period of time, but shall also permit the employee to waive this right for a specified period of time thereafter.

(§ 139.2(j)(1) (emphasis added).)

Based on a plain reading of section 139.2(j)(1), we conclude that the term "medical evaluation" ***does not*** refer to the scheduling or ***availability*** of the QME to set an appointment. Subsection A explicitly discusses the timeframes for "evaluations" to be prepared and submitted *after the evaluator has seen the employee*. The section clearly refers to the report that is generated after the evaluation has occurred. Furthermore, when comparing subsection (A) with subsection (C), it becomes clear that subsection (A) does not cover the availability of the QME to set an appointment as that expressed language exists in subsection (C), but is absent from subsection (A). Subsection (C) expressly refers to rules governing the *availability* of QMEs, and expressly gives the right to strike an unavailable evaluator to an *unrepresented* employee.[10]

Harmonizing sections 4062.5 and 139.2(j)(1), we conclude that the term 'formal medical evaluation' contained in section 4062.5 actually refers to the report generated after an in-person evaluation. Thus, ***a party may seek to replace a QME under section 4062.5 where an evaluation takes place and the report prepared from that evaluation is untimely served***.

AD Rule 31.3 states, in pertinent part:

> (e) If a party with the legal right to schedule an appointment with a QME is unable to obtain an appointment with a selected QME within ninety (90) days of the date of the appointment request, that party may waive the right to a replacement in order to accept an appointment no more than one-hundred-twenty (120) days after the date of the party's initial request for an appointment. When the selected QME is unable to schedule the evaluation within one-hundred-twenty (120) days of the date of that party's initial request for an appointment, either party may report the unavailability of the QME and the Medical Director shall issue a replacement pursuant to section 31.5 of Title 8 of the California Code of Regulations upon request, unless both parties agree in writing to waive the one-hundred-twenty (120) day time limit for scheduling the initial or any subsequent evaluation.

[10] This case does not involve an unrepresented employee; accordingly, we do not address application of section 139.2(j)(1)(C).

> (f) The provisions of subdivision (e) of this regulation apply to both requests for any Comprehensive Medical-Legal Evaluation by a QME and requests for Follow Up Comprehensive Medical-Legal Evaluations by a QME.

AD Rule 31.5(a)(2) states, in pertinent part, "(a) A replacement QME to a panel, or at the discretion of the Medical Director a replacement of an entire panel of QMEs, shall be selected at random by the Medical Director and provided upon request whenever any of the following occurs[.]" AD Rule 31.5 merely compels the Medical Director to issue a replacement panel upon request of a party when any of the enumerated conditions in subdivision (a)(2) occur.

Thus, while the rules are valid, AD Rules 31.3 and 31.5 cannot be interpreted as finally determining whether a replacement panel is appropriate because such an interpretation would usurp the adjudicative power of the Appeals Board to determine whether a QME should be replaced. (§ 111.)

In a represented case, the Labor Code expressly allows replacement of a QME who drafts an untimely report following a medical evaluation; however, it does not compel replacement of a QME who is not timely available to set an appointment. Absent a statute compelling such a result, whether a QME should be replaced due to unavailability falls within the Appeals Board's broad equitable powers. (§ 111; see §§ 52, 5300, 5301, 5302; see also *McHugh v. Santa Monica Rent Control Bd*. (1989) 49 Cal.3d 348, 355–356 [the Appeals Board "been legislatively endowed with judicial powers pursuant to a specific constitutional authorization"]; *Bankers Indemnity Ins. Co. v. Industrial Acc. Com*. (*Merzoian*) (1935) 4 Cal.2d 89, 98 ["[T]he Industrial Accident Commission of this state has been invested with the power and authority to hear and determine equitable issues."].)

The above is not to say that the availability timelines themselves are invalid or should not be followed by QMEs because the AD is empowered to appoint and appropriately regulate the conduct of QMEs. Per section 139.2(g): "The administrative director shall establish agreements with qualified medical evaluators to ensure the expeditious evaluation of cases assigned to them for comprehensive medical evaluations." Accordingly, where a QME is unavailable pursuant to regulation, they may subject themselves to discipline, which could ultimately lead to the loss of the QME's appointment. (Cal. Code Regs., tit. 8, § 60.)

While the dates set by the Administrative Director are important and should be followed and may even be persuasive as to whether the length of delay is inappropriate, we cannot find on

this record that the mere passing of time is sufficient to warrant replacing the existing QME. Instead, we adapt the factors set forth in the panel decision in *Corrado*, *supra*. In a represented case, the determination of whether a QME should be replaced due to unavailability requires the balancing of multiple factors, which include:

a. The length of delay caused by the QME's unavailability.

b. The amount of prejudice caused by the delay in availability versus the amount of prejudice caused by restarting the QME process.

c. What efforts, if any, have been made to remedy the QME's availability.

d. Case specific factual reasons that justify replacing or keeping the current QME, including whether a party may have waived its objection.

e. The Appeals Board's constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.)

To allow the parties adequate due process, we will return this matter to the trial level so that these balancing factors may be considered by the court in the first instance. (See *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc); see also *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

III.

THIS DECISION IS PROSPECTIVE

The Appeals Board has long held that new interpretations of statute are applied prospectively. In *Farris v. Industrial Wire Products* (2000) 65 Cal.Comp.Cases 824, 832 (Appeals Board en banc), we explained why it is appropriate to conclude under certain circumstances that a decision should be applied prospectively:

> In workers' compensation cases, it is not uncommon to provide that newly stated judicial rules **or newly stated judicial interpretations of statutes** shall be applied prospectively only. Such a declaration of prospective application is made primarily to prevent a landslide of reopenings in previously adjudicated workers' compensation cases, which would burden the workers' compensation system and result in unfairness to those parties who had relied on a different understanding of law or had accepted a different application of the law; a declaration of prospective

> application may also be made to harmonize statutory provisions. (Citations.) Although decisions regarding procedural issues are more commonly given prospective effect than are decisions regarding substantive issues (Citation.), decisions affecting an applicant's substantive right to receive or a defendant's substantive duty to pay workers' compensation benefits will be applied prospectively under appropriate circumstances. [Emphasis added.]

(*Id*. at pp. 832–833.)

In *Messele v. Pitco Foods, Inc*. (2011) 76 Cal.Comp.Cases 1318 (Appeals Board en banc), we discussed the application of *Farris*, *supra*, and we stated that:

> In *Farris*, we concluded that our decision in that case, on the application of section 5814 penalties to unreasonably delayed section 4650(d) penalties, should be applied prospectively to avoid "an undue burden on the administration of justice in the workers' compensation system" and the "overwhelming adverse effect on the workers' compensation system and on the reasonable expectations of the parties participating in it." (Citation.)
>
> These considerations apply equally to the purely procedural issues addressed in the present case.

(*Id*. at pp. 1320–1321.)

In *Messele*, the Appeals Board found that the 10-day period to request an evaluator is extended by five days by application of law. (*Id.*) However, applying such a decision retroactively would have disrupted the discovery process in a significant number of claims. Accordingly, the Appeals Board determined that the interpretation would apply prospectively.

Our decision here clarifies the factors to consider when replacing an unavailable evaluator in represented cases. We do not seek to create a landslide of litigation as to prior replacement panel orders. As noted above, the timelines suggested in the regulations may be considered by the WCJ or the Appeals Board in determining whether a replacement panel is appropriate, and thus, prior orders that issued pursuant to the regulation are not inherently incorrect. Therefore, we conclude that it is appropriate to apply this interpretation *prospectively*.

We hold that:

1. Only the Appeals Board has jurisdiction to determine whether a replacement panel is valid or otherwise appropriate.
2. In a represented case, where a QME does not timely establish availability to set an appointment pursuant to AD Rule 31.3, a WCJ or the Appeals Board has discretion to

order a replacement QME for good cause. The WCJ or the Appeals Board may consider the following:

a. The length of delay caused by the QME's unavailability.

b. The amount of prejudice caused by the delay in availability versus the amount of prejudice caused by restarting the QME process.

c. What efforts, if any, have been made to remedy the QME's availability.

d. Case specific factual reasons that justify replacing or keeping the current QME, including whether a party may have waived its objection.

e. The Appeals Board's constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.)

Application of this decision is prospective only, as explained above.

Accordingly, we grant the Petition as one seeking reconsideration, and as our Decision After Reconsideration, we rescind the March 11, 2025 F&O and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on March 11, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on March 11, 2025 by the WCJ is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 19, 2025

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

ABEL VAZQUEZ
DILLES LAW GROUP
CHERNOW, PINE & WILLIAMS

EDL/abs

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