WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ERASMO AGUILAR, ***Applicant***

vs.

SAM'S FENCE, INC.;
WESCO INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ16327959
Sacramento District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant sought removal[1] of the Findings of Fact, Order (F&O) issued on September 25, 2025 by a workers' compensation administrative law judge (WCJ), wherein the WCJ found in pertinent part that "[t]he short, approximately three second video of Erasmo Aguilar's calf muscle shown to the AME during the AME appointment is permissible communication during a regular examination." (F&O, Finding of Fact No. 20.)[2] Based on this finding of fact, the WCJ denied defendant's Petition for Replacement Panel.

Defendant contends that applicant's action of showing the agreed medical evaluator (AME) "a personal cell phone video during a medical-legal evaluation" violated Labor Code section 4062.3 because applicant did not previously disclose the video to defendant which resulted in substantial prejudice and irreparable harm because defendant was unable "to authenticate or contextualize the evidence, and misled the AME into ordering unnecessary diagnostic testing." (Petition for Reconsideration, p. 2.) Defendant further contends that the WCJ's failure to allow another opportunity for defendant to object to stipulated facts that were put on the record during

[1] Defendant styled the petition as one for removal given that the only issue raised was as to a non-final finding related to medical discovery with the parties' agreed medical evaluator; however, as set forth below in section II., the decision at issue contained both final and non-final orders and therefore, we treat the petition as one for reconsideration.

[2] The F&O also contains 19 other facts stipulated to by the parties and entered into the record in open court without objection during the first two days of trial on March 5, 2025 and April 2, 2025. Defendant raises no factual or legal objection to any of these 19 Findings of Fact in its petition.

the first and second day of trial without objection by defendant constitutes a violation of due process and therefore substantial prejudice and irreparable harm.

Applicant filed an Answer to Petition for Removal (Answer), contending that defendant cannot substantiate its contentions given applicant's testimony and given that defendant failed to depose the AME regarding the video. The WCJ filed a Report and Recommendation on Petition for Removal (Report), recommending that the petition be denied.

We have reviewed the record in this matter, the allegations of the Petition and the Answer, and the contents of the Report. Based on the Opinion on Decision and the Report, which we adopt and incorporate herein, and for the reasons set forth below, we deny reconsideration.

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 4, 2025 and 60 days from the date of transmission is Saturday, January 3, 2026. The next business day that is 60 days from the date of transmission is Monday, January 5, 2026.

(See Cal. Code Regs., tit. 8, § 10600(b).)[3] This decision is issued by or on Monday, January 5, 2026, 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 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 4, 2025, and the case was transmitted to the Appeals Board on November 4, 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 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 4, 2025.

II.

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

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

WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

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

Here, the F&O included a finding of injury arising out of and in the course of employment (AOE/COE) as a yard worker/installer/driver for Sam's Fence, Incorporated on May 6, 2022 to his hip, lumbar spine, cervical spine, and left shoulder. (F&O, Finding of Fact no. 1.) The finding of injury AOE/COE is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's F&O is a final order subject to reconsideration rather than removal.

However, defendants' petition does not challenge the finding of AOE/COE, but instead, challenges the WCJ's finding that "[t]he short, approximately three second video of Erasmo Aguilar's calf muscle shown to the AME during the AME appointment is permissible communication during a regular examination." (F&O, Finding of Fact no. 20.) That finding is an interlocutory decision related to discovery and is subject to the removal standard rather than reconsideration pursuant to the discussion above. (See *Gaona*, *supra*.)

We therefore treat defendant's petition as one for reconsideration but apply the standard for removal as the only issue raised in the petition involves a non-final finding related to discovery.

III.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10843(a); see also *Cortez*, *supra*; *Kleemann*, *supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).)

Here, for the reasons stated in the Opinion on Decision and the Report, defendant failed to establish any substantial prejudice or irreparable harm resulting from the WCJ's decision that the video shown by applicant to the AME during his evaluation was a permissible communication during a regular examination. In fact, we agree with the WCJ that based on what the WCJ found to be the credible testimony of applicant (Opinion on Decision, p. 8), the video was clearly a permissible communication pursuant to subdivision (i) of section 4062.3. We give great deference to the credibility determinations of the WCJ because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505]; also see *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140-141.) Only evidence of considerable substantiality would warrant rejecting the WCJ's credibility determination. (*Garza, supra*, 3 Cal.3d at 318-319.) We find no such evidence in the record of this case.

Defendant contends that applicant's action of showing the 3 to 4 second video to the AME *during his evaluation* to clarify what he was describing to the AME "deprived Defendant of the opportunity to authenticate or contextualize the evidence, and misled the AME into ordering unnecessary diagnostic testing." (Petition, p. 2.) First, defendant had sufficient opportunity to view and authenticate the video prior to and during trial and in fact, did so. (See Minutes of Hearing and Summary of Evidence, March 5, 2025, April 2, 2025, and September 9, 2025.) In addition, defendant cannot support its contention with substantial evidence that the AME was misled in any way given that defendant chose not to depose the AME about the video. As stated by the WCJ:

> The AME reports establish that Erasmo Aguilar had primary complaints of low back/left groin pain which radiated down his leg with cramping in his left calf. Erasmo Aguilar testified credibly that his left leg doesn't always spasm and it wasn't spasming during the appointment with AME Hatch. Erasmo Aguilar described his symptoms and showed the video of his left leg to help explain during the regular evaluation (MOH 3/5/25, MOH/SOE 4/2/25, Joint Ex.100.)
>
> Erasmo Aguilar verbally, and with the aid of the video, communicated with AME Hatch and this was the best way Erasmo Aguilar could describe a symptom. This permissible communication occurred in the context of the examination and not through separate, unilateral communication outside the evaluation setting.
>
> **Defendants chose not to depose AME Hatch regarding the video's context, impact, or relevance to his evaluation and reporting. Defendants chose not to depose Erasmo Aguilar regarding the video to establish impact,**

relevance, nature and scope of the injuries or a basic discussion regarding the video and its contents. Defendants present no evidence of prejudice.

(Opinion on Decision, p. 8.)

Finally, all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) However, we disagree that the WCJ denied defendant due process by refusing it one final opportunity to "clarify or preserve objections" to party stipulations that were recorded on the record *without objection from defendant* during trial on March 5, 2025 *and* April 2, 2025. (See Findings of Fact, nos. 1-19; MOH, March 5, 2025 and April 2, 2025.) Defendant also had the opportunity to raise objection to any of those stipulated facts when it sought removal of the WCJ's original May 21, 2025 decision – but did not. (Petition for Removal, June 9, 2025.) Defendant then filed a trial brief prior to the September 9, 2025 trial date, but again – raised no objection to any of the stipulated facts. (Trial Brief, September 8, 2025.) It is difficult to understand why, but defendant *still* raises no objections to any of the stipulated facts in its petition before the Appeals Board, choosing instead to simply argue that it should have another opportunity to *make* any objections it may have. We are not persuaded.

Accordingly, as defendant fails to state substantial prejudice or irreparable harm resulting from the WCJ's decision, and certainly nothing that cannot be remedied by reconsideration at the time of any final decision, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact, Order issued on September 25, 2025 by a workers' compensation administrative law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 26, 2025

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

ERASMO AGUILAR
LAW OFFICES OF DOUGLAS E. JAFFE
HANNA BROPHY MacCLEAN McALEER & JENSEN LLP

AJF/mc

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

REPORT AND RECOMMENDATION 0N PETITION FOR REMOVAL

INTRODUCTION

This_ is report is being submitted by the Presiding Workers' Compensation Judge pursuant to 8 Cal. Code Reg. §10962 as Judge Coze is unavailable.

1. Applicant's Occupation: Yard worker/installer/driver.
   Applicant's Age at Injury: 57.
   Date of Injury: May 6, 2022.
   Body Parts: Lumbar spine cervical spine left shoulder, hip, rib psyche, sleep internal, cognitive chest, right hip, left leg and right bilateral groi.11.

2. Identity of Petitioner: Defendant.
   Timeliness: Defendant's petition was timely filed. Verification:
   Defendant's petition was properly verified.

3. Date of Issuance of Findings and Order: September 25, 2025.

4. Petitioners Contentions:

   A. Applicant violated Labor Code §4062.3 by showing the Agreed Medical Evaluator a three second video of his calf during the medical-legal examination, depriving defendant the opportunity to authenticate or contextualize the evidence and misleading the Agreed Medical Evaluator into ordering unnecessary diagnostic testing.

   B. Judge Coze's refusal to permit defendant from setting forth objections on the record at the September 9, 2025, trial constituted procedural error resulting in substantial prejudice and irreparable harm.

FACTS

On February 5, 2025, this case was set for trial in front of Judge Coze on defendant's Petition to Strike Panel and Report for Applicant's Violation of Labor Code 4062.3. Defendant's petition requested that Dr. Batch's report be stricken, a replacement panel in orthopedics issue, attorney fees and costs in the amount of $700.00, and that applicant be charged with contempt (Defendant's Petition to Strike Panel and Report for Applicant's Violations of Labor Code 4062.3; Request for Remedy of Replacement Panel, Costs and Sanctions, January 8, 2025, at page 4).

On March 5, 2025, the parties appeared at trial, and the stipulations and issues were read into the record (Minutes of Hearing, March 5, 2025, at pages 2-3). The minutes note that the parties agreed that the stipulations and issues read into the record were correct and superseded the Pre-Trial Conference Statement (Minutes of Hearing, March 5, 2025, at page 3, lines 11-12). Additionally, exhibits were offered by both parties and the trial was continued due to the lack of an interpreter (Minutes of Hearing, March 5, 2025, at page 2, lines 1-3). The sole issue for trial was whether defendant was entitled to a replacement panel under Labor Code §4062.3.

On April 2, 2025, the parties returned to trial, additional stipulations were read into the record and applicant offered one additional exhibit that was admitted over defendant's objection (Minutes of Hearing, Apri12, 2025, at page 2-3). Additionally, testimony was received from the applicant and the case was submitted for decision (Minutes of Hearing, April 2, 2025, at pages 3-6).

On May 21, 2025, Judge Coze issued her Findings of Fact, Order and Opinion on Decision. Judge Coze adopted the nineteen stipulations of the parties as Findings of Fact and found that the three second video of applicant's calf muscle shown to the AME during the examination was a permissible communication (Findings of Fact, May 21,

2025, at page 3).

On June 9, 2025, defendant filed a Petition for Removal. Defendant contended, among other issues, that once the certified Spanish interpreter was unavailable for the afternoon testimony, Judge Coze should have continued the trial (Petition for Removal, June 9, 2025, at page 3). Defendant contends that Judge Coze called the applicant on her cellphone and spoke to the

applicant in Spanish, which was not translated to the defense attorney who did not speak Spanish (Petition for Removal, June 9, 2025, at page 3) Judge Coze then denied defendant's request for continuance and instructed defendant to continue cross-examination without the presence of a certified interpreter (Petition for Removal, June 9, 2025, at page 3).

On June 20, 2025, Judge Coze issued an Order Rescinding Trial Findings and Order and Order Setting New Trial. The order allowed applicant to appear on Court Call for trial and defendant was ordered to have a certified Spanish interpreter available for the duration of the August 21, 2025, scheduled trial (Order Rescinding Trial Findings and Order, June 20, 2025).

On June 24, 2025, applicant attorney filed his Answer to Petition for Removal.

On August 21, 2025, the trial was continued due to illness.

On September 9, 2025, the parties appeared in front of Judge Coze (Minutes of Hearing, September 9, 2025). The minutes of hearing reflect that all stipulations, issues, and exhibits remained the same (Minutes of Hearing, September 9, 2025, at page 2, lines 1-3). It is further noted that defense counsel's objection to proceeding without the introduction of new issues and/or stipulations was overruled by Judge Coze (Minutes of Hearing, September 9, 2025, at page 2,lines 3-4). Additional testimony was received from the applicant and the case was submitted (Minutes of Hearing, September 9, 2025,at pages 2-3).

On September 25, 2025,Judge Coze issued her Findings of Fact, Order and Opinion on Decision. Judge Coze again adopted the nineteen stipulations of the parties as Findings of Fact and found that the three second video of applicant's calf muscle shown to the AME during the examination was a permissible communication (Findings of Fact, Order, and Opinion on Decision, September 25,2025, at page 2). Judge Coze ordered defendant's Petition for Replacement Panel denied (Findings of Fact, Order, and Opinion on Decision, September 25, 2025,at page 3).

On October 20, 2025, defendant filed a timely and verified Petition for Removal from Judge Coze's decision.

As of November 3, 2025, applicant has not filed an answer.

DISCUSSION

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.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues

(Cal. Code Regs., tit. 8, § 10955(a)(2).

Defendant argues that they are substantially prejudiced in that they believe the three second video of applicant's calf materially influenced Dr. Hatch's opinion, resulting in unnecessary diagnostic studies being ordered to rule out lumbosacral plexus involvement on this accepted industrial injury (Petition for Removal, October 20, 2025, at page 4, lines 19-26). Though the diagnostic testing confirmed L4 radiculopathy, there was no evidence of plexopathy, and defendant contends that this compromised Dr. Hatch's opinion and distorted the medical-legal process (Petition for Removal, October 10, 2025, at page 7, lines 27-28, and page 8, lines 1-5). However, defendant does not explain how Dr. Hatch's opinion or her ability to be objective was compromised by reviewing the video.

Additionally, defendant argues that Judge Coze's refusal to allow defense counsel to make objections on the record at the September 9, 2025, trial and then adopting the prior stipulations of the parties as findings of fact, compromised the record that a later petition for reconsideration would be an inadequate remedy for (Petition for Removal, October 20, 2025, at page 4, lines 28, at page 5, lines 1-5). Unfortunately, defendant fails to state in their removal what specific objections they planned on making at trial, in light of the fact the prior trial stipulations and issues had been agreed upon by both parties noting they superseded the Pre-Trial Conference Statement (Minutes of Hearing, March 5, 2025; at page 3, lines 11-12).

Nevertheless, Judge Coze found that the applicant showing Dr. Hatch the three second video on October 14, 2024, was a permissible communication during the medical-legal evaluation (Findings of Fact, Order and Opinion on Decision, September 25, 2025, at page 2). Applicant testified that his cramping symptoms were difficult for him to explain to Dr. Hatch, so he showed

Dr. Hatch the video (Minutes of Hearing, Summary of Evidence, September 9, 2025, at page 2, lines 20-22). Judge Coze found that Labor Code §4062.3(i) was controlling as this communication occurred during the examination.

In a similar case, a WCAB panel found that an applicant's wife's provision of notes and video showing her husband's seizures pursuant to the AME's request did not violate section 4062.3 because it occurred during the examination and the wife did not plan to show this information to the AME prior to the examination (see *Geiger v. Geiger* (December 14, 2015, ADJ7257372) 2015 Cal. Wrk. Comp. P.D. LEXIS 751).

The panel in *Geiger* also cited to *Alvarez v. Workers' Comp. Appeals Bd. (Parades)* (2010) 187 Cal.App.4th 575 [114 Cal. Rptr. 3d 429, 75 Cal.Comp.Cases 817]. The WCAB noted that:

> "the QME requested a copy of certain records in an ex parte telephone conversation with defense. The Court of Appeal held that while section 4062.3(f) expressly prohibits ex parte communications with a panel QME an exception to the prohibition is found in 4062.3(h) for written communications by an employee in connection with examination or at the request of the evaluator. (Supra, 75 Cal. Comp. Cases, at p. 825. The Court also recognized that, because a certain degree of informality of workers' compensation procedures has been recognized, not every conceivable ex parte communication pe1mits a party to obtain a new evaluation from another QME. The court stated, "an ex parte communication may be so insignificant and inconsequential that any resulting repercussion would be unreasonable. We should not interpret or apply statutory language in a manner that will lead to absurd results." (Id., 827.)
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> Geiger v. Geiger, 2015 Cal. Wrk. Comp. P.D. LEXIS 751, *8-9

Based upon this record, defendant has not established substantial prejudice or irreparable harm. Defendant has not pointed to evidence that Dr. Batch's opinion was "materially influenced" or tainted by reviewing the three second video. Nor has defendant established that seeing the video led to unnecessary testing or skewed the medical evidence upon which all future determinations would be made. It appears that defendant's request to strike the AME would seem to fall within a category of cases where the result repercussion (replacing an AME) would be unreasonable.

RECOMMENDATION

It is respectfully recommended that defendant's Petition for Removal be DENIED.

Date: November 4, 2025

NOAH W. TEMPKIN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION
PROCEDURAL HISTORY

The first day of trial was March 05, 2025. No interpreter had been scheduled so the parties completed Issues and Stipulations with Exhibits. The trial was continued to April 02, 2025, for Erasmo Aguilar's (Applicant) testimony with a Spanish interpreter. On that day, the interpreter left at noon because of a pre-existing commitment before the completion of Erasmo Aguilar's testimony.

After discussion with Erasmo Aguilar regarding his capacity to understand and answer questions in English, the trial judge was concerned with additional trial continuations and the cessation of Erasmo Aguilar's benefits. The trial judge made a determination that Erasmo Aguilar could complete cross-examination in English. Defendant asserted prejudice because Erasmo Aguilar completed testimony via telephone (speaker). Erasmo Aguilar's counsel was ill and coughing and the hearing room was not set up with screens available for everyone to view from the table. Everyone would have had to cluster around the judge to complete testimony on Court Call. Logistics and illness prevented Court Call use so the WCJ called Erasmo Aguilar on the court telephone speaker.

Trial was completed and submitted and Findings and Order issued. Defendant filed a Petition for Removal claiming violation of due process for being denied full opportunity to continue cross examination without a Spanish interpreter. The trial judge rescinded the Findings and Order and continued the trial to August 21, 2025. Defendant requested an additional continuance due to illness. Trial was completed on September 09, 2025.

FACTUAL HISTORY

Erasmo Aguilar sustained an industrial injury on May 06, 2022. He was a seat-belted passenger in the cab of a pickup truck, traveling on a desert highway, when involved in a head-on collision with a semi-truck.

The pickup rolled several times (MOH 3/05/25.) Erasmo Aguilar lost consciousness and was life-flighted to the hospital. His coworker did not survive.

As of October 14, 2024, Erasmo Aguilar has not been able to return to work due to his physical limitations. He has been able to do some small jobs at home and building smaller gates (Joint Ex. 100 AME Dr. Hatch 10/14/24 report.)

The parties agreed to utilize Dr. Hatch as an Agreed Medical Examiner (AME). The first appointment was October 14, 2024. A Spanish interpreter was present. Erasmo Aguilar's first language is Spanish (MOH 3/05/25.)

At the appointment, AME Hatch asked him about pain. Erasmo Aguilar told the AME about symptoms in his left leg and showed the AME a 3-4 second video of his left calf skin pulsating. Erasmo Aguilar testified credibly that the video was a better way to explain what he was feeling. The calf muscles twitches when he does too much physically, and he took the video to show his wife. At the appointment with the AME his leg was not cramping so he took his phone and showed the doctor the video (Joint Ex. 100 AME Dr. Hatch, MOH/SOE w/ Erasmo Aguilar testimony).

AME Hatch reported on the video in the report dated October 14, 2024, on page 25, paragraph 5 as follows:

> "[H]is primary complaint is low back/left groin pain. He describes that this pain radiates down his leg with cramping in his left calf. He showed a video on his cell phone of this cramping with clear fasciculations in his left calf. He reports a sensation of numbness in the bottom of his foot."
> (Joint Ex. 100.)

AME Hatch noted that on physical examination, Erasmo Aguilar had significant weakness in hip flexion. In addition, he has calf cramping/fasciculations. She was concerned he could have an impingement of the lumbosacral plexus (Joint Ex. 100, page 25.)

On January 02, 2025, AME Hatch served a supplemental report dated December 5, 2024, on parties. The report confirmed positive ENG findings of chronic left L4 radiculopathy which

AME Hatch indicated are objective findings assisting in substantiating Erasmo Aguilar's pain complaints in his left leg.

On January 09, 2025, Defendants filed a "Petition to Strike Panel and Report for Erasmo Aguilar's Violation of Labor Code 4062.3". (It is unclear why Defendant titled the petition in this way as Dr. Hatch is identified and stipulated by the parties as an AME. This distinction does not affect the following analysis).

Trial proceeded on March 05, 2025, April 02, 2025, and September 09, 2025, on the sole issue of whether the Defendant is entitled to a replacement panel under Labor Code Section 4062.3.

DISCUSSION

LC section 4062.3 provides in the relevant parts:

> (e) All communications with a qualified medical evaluator selected from a panel before a medical evaluation shall be in writing and shall be served on the opposing party 20 days in advance of the evaluation. Any subsequent communication with the medical evaluator shall be in writing and shall be served on the opposing party when sent to the medical evaluator.
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>
> (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.

> (i) Subdivisions (e) and (g) shall not apply to oral or written communications by the employee or, if the employee is deceased, the employee's dependent, in the course of the examination or at the request of the evaluator in connection with the examination. (LC §4062.3(e), (g) and (i); Emphasis added.)

Evidence Code §250 states:

> "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. (Cal. Evid. Code §250; Emphasis added.)

The fundamental purpose of statutory interpretation is to ascertain the Legislature's intent in order to effectuate the law's purpose. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Interpretation begins "with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent." (*People v. Watson* (2007) 42 Cal.4th 822, 828.) The plain meaning controls if there is no ambiguity in the statutory language. (*People v. King* (2006) 38 Cal.4th 617, 639.)

In this matter the statutory language is clear and without ambiguity that the prohibition against *ex parte* communication does not apply "to oral or written communications by the employee" that occur "in the course of the examination". (LC §4062.3(i)). It is equally clear that "written" means "every other means of recording upon any tangible thing" including "words, pictures, sounds", "or combinations thereof". (Cal. Evid. Code §250.)

There is no ambiguity in the language of the statute. The plain language of Lab. Code section 4062.3 allows communication by Erasmo Aguilar during an evaluation, including the showing of a video. There is no basis for a replacement of AME Hatch.

Although this matter is cleanly resolved based on a plain reading of the statute, a discussion of the facts may be of further assistance.

Preponderance of the evidence means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth (Labor Code Section 3202.5.)

Here the preponderance of the evidence indicates that the 3-4 second video shown during the examination with AME Hatch was part of the natural examination.(Joint Ex. 100, MOH/SOE).

Erasmo Aguilar testified credibly at the second trial that he had difficulties explaining the cramping to AME Dr. Hatch (MOH/SOE 4/2/25.) He testified credibly again at the third trial that he had difficulties explaining the cramping to AME Dr. Hatch.(MOH/SOE 9/9/25.) Although Defendant cross examined Erasmo Aguilar for a significant amount of time, there was no testimony that changed basic facts: a 3-4 second video of Erasmo Aguilar's leg cramping, was shown to the AME because he had a hard time describing the cramping symptoms, during the examination, and it is the only video he showed the doctor.

The AME reports establish that Erasmo Aguilar had primary complaints of low back/left groin pain which radiated down his leg with cramping in his left calf. Erasmo Aguilar testified credibly that his left leg doesn't always spasm and it wasn't spasming during the appointment with AME Hatch. Erasmo Aguilar described his symptoms and showed the video of his left leg to help explain during the regular evaluation (MOH 3/5/25, MOH/SOE 4/2/25, Joint Ex.100.)

Erasmo Aguilar verbally, and with the aid of the video, communicated with AME Hatch and this was the best way Erasmo Aguilar could describe a symptom. This permissible communication occurred in the context of the examination and not through separate, unilateral communication outside the evaluation setting.

Defendants chose not to depose AME Hatch regarding the video's context, impact, or relevance to his evaluation and reporting. Defendants chose not to depose Erasmo Aguilar regarding the video to establish impact, relevance, nature and scope of the injuries or a basic discussion regarding the video and its contents. Defendants present no evidence of prejudice.

It is difficult to understand why Defendant would abandon its duty to fully and fairly investigate a claim when new evidence becomes apparent. (see Title 8, Cal. Code of Reg. §10109.)

Defendants are not entitled to a replacement of AME Hatch.

DATE: September 25, 2025

Valerie Coze
WORKERS' COMPENSATION JUDGE