WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ELSA GARCIA, JOFFRE GARCIA (deceased), ***Applicant***

vs.

U.S. BANK; OLD REPUBLIC, ***Defendants***

Adjudication Number: ADJ14627934
Anaheim District Office

OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION
AND DENYING PETITION
FOR REMOVAL

Defendant seeks reconsideration of our Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (Decision), issued on June 9, 2025, wherein we rescinded a workers' compensation administrative law judge's (WCJ) Findings and Order (F&O) of February 26, 2025, and returned this matter to the trial level for further proceedings.

Defendant contends, in essence, that the Decision "improperly extends the COVID-19 presumption beyond legislative intent, fails to apply the 'materially greater risk' standard established in *Bethlehem Steel*, disregards U.S. Bank's COVID-19 protocols, relies on speculation rather than substantial evidence, and contravenes the Legislature's clear intent in creating limited COVID-19 presumptions." Defendant further contends that Appeals Board characterized the Qualified Medical Evaluator's (QME) opinion as speculative and thus not substantial medical evidence.

We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer.

Based on our review of the record, we will dismiss the Petition for Reconsideration. In order to address the merits of defendant's contentions, we will treat it as one for removal and we will deny the Petition for Removal.

I.

Former Labor Code section[1] 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on July 8, 2025, and 60 days from the date of transmission is Saturday, September 6, 2025. The next business day that is 60 days from the date of transmission is Monday, September 8, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, September 8, 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

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[1] All statutory references are to the Labor Code unless otherwise stated.

[2] 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.

act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, the Petition seeks reconsideration of our prior decision and therefore no report and recommendation was required to be filed by a WCJ.

However, a notice of transmission was served by the district office on July 8, 2025, which is the same day as the transmission of the case to the Appeals Board. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1), and consequently they had actual notice as to the commencement of the 60-day period on July 8, 2025.

II.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) 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].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at 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 petitioner is challenging an order by the Appeals Board that does not determine any substantive right or liability of those involved in the case, then the Appeals Board can choose to evaluate the issues raised by the petition under the removal standard applicable to non-final decisions. 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 substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); *Cortez*, supra; *Kleemann*, supra.) Additionally, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

Here, the Appeals Board's Decision does not determine any substantive right or liability. On the contrary, the Appeals Board's Decision rescinded the Findings and Order issued by the WCJ. Accordingly, it is not a "final" decision subject to reconsideration and as such, defendant's petition for reconsideration will be dismissed.

In order to address the merits of the contentions raised by defendant in the Petition, we will treat the Petition as one for removal, and we will deny the Petition to the extent it seeks removal of an order that did not determine any substantive right or liability of those involved in the case. We are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

The recent en banc[3] decision issued by the Appeals Board in *Ledezma v. Kareem Cart Commissary and Mfg*. (2024) 89 Cal.Comp.Cases 549 (Appeals Bd. en banc) affirmed that filing petitions for reconsideration on interlocutory orders may be considered "frivolous and filed for the purposes of delay in violation of section 5813 and WCAB Rule 10421." (*Id*., at 555.) "The petition for removal is the method to seek review of interlocutory orders, those orders that do not rise to the level of final determinations. Examples include, but are not limited to, discovery orders, orders granting or denying continuances, requests for a trial judge to recuse himself or herself, and any other action that does not finally adjudicate the substantive rights or liabilities of the aggrieved party." (*Id*.)

We note that Petitioner misstates the Appeals Board's prior Opinion and Order Granting Reconsideration and Decision After Reconsideration (Decision) , dated April 21, 2023:

> The Workers' Compensation Appeals Board issued their Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration on April 21, 2023. The Workers' Compensation Appeals Board found that

[3] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City 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].)

> Decedent, by virtue **of his occupation as a banker, is not a public safety officer and thus, he is not entitled to the presumption in Sections 3212.87 and 3212.88**.

(Petition, p. 4, emphasis in Petition.)

Petitioner goes on to accuse the Appeals Board of judicial overreach:

> Furthermore, the Appeals Board current Order has the effect of creating a new and untethered presumption from legislative mandate, for *all* employees who interact with customers, and doing so, without any statutory basis. By effectively extending the presumption to all employees who interact with customers, the Appeals Board has usurped the Legislature's role in determining which occupations warrant a presumption of industrial causation.

(Petition, p. 9, emphasis in Petition.)

The foregoing arguments are inaccurate and incorrect.

The Appeals Board previously determined that because "banker" is not one of the public safety occupations enumerated in section 3212.87, applicant is not entitled to the presumption under section 3212.87.

Turning to section 3212.88, it applies to "**employees who are not described in section 3212.87**, but who test positive during an outbreak at the employee's specific place of employment, and whose employer has five or more employees." (Lab. Code, § 3212.88(a), emphasis added.) Thus it is the Legislature who extended the presumption to *all* employees, provided, of course, that the criteria of section 3212.88 are met.

The Decision dated April 21, 2023, states:

> In this case, while the employee met the first two conditions (i.e., he tested positive within 14 days of performing work at a place of employment and the positive test occurred after July 6, 2020), there does not appear to be evidence that the "employee's positive test occurred during a period of an outbreak at the employee's specific place of employment" as required by Section 3212.88(b)(1).
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> Section 3212.88(m)(4) defines an outbreak as follows:
>
> > An "outbreak" exists if within 14 calendar days one of the following occurs at a specific place of employment:
> >
> > (A) If the employer has 100 employees or fewer at a specific place of employment, 4 employees test positive for COVID-19.

> (B) If the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment test positive for COVID-19.
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> (C) A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a community college district chancellor, school president, or school superintendent due to a risk of infection with COVID-19.
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> Here, it is undisputed that Mr. Garcia's employer had fewer than 100 employees in November of 2020 and that two employees tested positive for COVID-19 during the relevant 14-day period.

(Decision, April 21, 2023, p. 4.)

Because we are only aware of two employees who tested positive for COVID-19 during the relevant 14-day period, and because there is no evidence that applicant's place of employment was "ordered to close" as described in subsection (C), we concluded that there is insufficient evidence to find that Mr. Garcia contracted COVID-19 during an outbreak and, therefore, the section 3212.88 presumption does not apply.

In light of petitioner's conflation of legal standards, whether intentional or unintentional, we will reiterate the following.

In the absence of a presumption, applicant bears the burden of proving injury arising out of and in the course of employment (AOE/COE) by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd*. (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.)

In cases where the injury is caused by a communicable disease such as COVID-19, medical evidence is required to establish industrial causation by demonstrating that it is more likely that the injured worker acquired the disease at work or that the employment subjected the employee to a special risk of exposure in excess of that of the general population. (*Bethlehem Steel Co. v. Industrial Acc. Com*. (1943) 21 Cal.2d 742 [8 Cal.Comp.Cases 61].)

Medical evidence that industrial causation was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Worker's Comp. Appeals Bd*. (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].) Thus, it is a medical

expert's job to assess whether is medically probable that disease transmission occurred at work or that the employment subjected the employee to a special risk of exposure in excess of that of the general population.

On March 19, 2020, Governor Newsom issued Executive Order N-33-20 directing all individuals living in California "to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." The "stay-at-home" Order was in effect throughout 2020. Mr. Garcia contracted COVID-19 in November 2020, which ultimately resulted in his death on November 26, 2020.

As a bank employee, Mr. Garcia was considered an "essential critical infrastructure worker" during the COVID-19 response. (U.S. Department of Homeland Security's "Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response" version 2.0 (March 28, 2020).)

On May 16, 2024, the parties took the deposition of QME Eli E. Hendel, M.D., which was admitted into evidence as Exhibit V. We also note that petitioner isolated portions of the QME's testimony. Since the selections seem aimed at rebutting the COVID-19 presumptions, which we reiterate are not applicable here, we include portions of Dr. Hendel's deposition which relate to whether there was a special risk of exposure in excess of that of the general population:

> Q. And as a banker, from the information we have, the applicant spent approximately 40 hours a week working inside of a bank which was open to the public. Is that your understanding?
>
> A. Yes.

(Exhibit V, Dr. Hendel's deposition, pp. 11-12.)

> A: If he worked in a place of employment that saw 200 members of the public per day twice a week and the rest less than that, but I would estimate there would be at least 600 to 800 members of the public per week, if you consider that Tuesday, Wednesday, and Friday were less than 200, that means that he was exposed to the individuals of the general public more than the average person of the general public.

(Exhibit V, Dr. Hendel's deposition, p. 20.)

> Q. Okay, Doctor, so when you just testified, was it your intention to say that, yes, you thought a bank provided a special risk of exposure that was in excess of the general population -- I'm sorry -- working in a bank?

A. Based on the numbers that you told me, yes.

Q. Okay.

(Exhibit V, Dr. Hendel's deposition, pp. 20-21.)

Q. Doctor, if somebody works in a bank during COVID-19, based on the -- your understanding of how it's spread, if -- if they interact with somebody -- right? -- and then that person interacts with somebody else in the -- in the office, can it be spread from one event to the next person?

A. Yes.

Q. So whether he personally interacted with each of these people, is that as important as how many people actually entered the bank on any particular day or week?

A. The importance is how many people in a close enclosure in a -- in a facility.

(Exhibit V, Dr. Hendel's deposition, pp. 22-23.)

Q. Okay. And -- so, Doctor -- and that was the one. As far as the -- the other question -- I actually think they're very similar -- the special risk in excess of that of the general population and if it is more likely that he would have obtained it at work. As far as the people that the applicant interacted with, from your understanding, are there more people he would have interacted with per week at work or away from work?

A. At work.

(Exhibit V, Dr. Hendel's deposition, p. 23.)

Q. And in answering counsel's questions that you felt there was a greater risk, was that purely based on the numbers proposed to you by counsel in his question and not necessarily relative to the job duties of Mr. Garcia?

A. It's based on the number of people in the general public one is exposed to.

(Exhibit V, Dr. Hendel's deposition, p. 34.)

Petitioner emphasizes defendant's COVID-19 protocols and precautions. Again, it appears that petitioner is conflating legal standards. The COVID presumptions are rebuttable and may be controverted by other evidence, including evidence of workplace precautions. The analysis of whether an injured worker's employment subjected them to a special risk of exposure, in excess

of that of the general population, is distinct and separate from the analysis of whether an injured worker is entitled to any of the COVID-19 presumptions or if defendant presented evidence to rebut a presumption. (Lab. Code, §§ 3212.86-3212.88; *Bethlehem Steel, supra*.)

Petitioner contends that the "Appeals Board erroneously rejected the PQME's Dr. Hendel's well-reasoned opinion regarding industrial causation. The PQME's opinion meets all requirements for substantial medical evidence as it is based on accurate history, thorough examination, and sound medical reasoning. The Appeals Board incorrectly characterized the PQME's opinion as speculative or conjectural when in fact the PQME properly synthesized the available evidence to reach a medical conclusion based on reasonable medical probability." (Petition, p. 10.)

Because the QME's testimony is somewhat convoluted, we returned the matter to the WCJ to consider the issue of whether further medical-legal reporting is necessary in order to constitute substantial medical evidence. (Opinion and Order, issued on June 9, 2025.) However, based on the QME's testimony taken as a whole, the QME appears to opine that it is more likely that Mr. Garcia acquired COVID-19 at work or that the employment subjected him to a special risk of exposure in excess of the general population, the standard set forth in *Bethlehem Steel*. (*Bethlehem Steel, supra*, at 744; Exhibit V, May 16, 2024, deposition transcript of QME Dr. Hendel.)

Accordingly, we dismiss defendant's Petition for Reconsideration, treat it as a Petition for Removal, and deny the Petition for Removal.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Opinion and Order Granting Reconsideration and Decision After Reconsideration, issued on June 9, 2025 by the Workers' Compensation Appeals Board is **DISMISSED**.

IT IS FURTHER ORDERED that defendant's Petition for Removal of the Opinion and Opinion and Order Granting Reconsideration and Decision After Reconsideration, issued on June 9, 2025 by the Workers' Compensation Appeals Board is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 8, 2025

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

ELSA GARCIA
SCHLOSSBERG & UMHOLTZ
SILBERMAN & LAM

JB/*pm*

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