**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**JOSE FLORES (Deceased),** ***Applicant***

**vs.**

**ALGOS, INCORPORATED, A MEDICAL CORPORATION, dba SYNOVATION MEDICAL GROUP; NOVA CASUALTY COMPANY, administered by TRISTAR RISK MANAGEMENT; CYPRESS INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES,** ***Defendants***

**Adjudication Numbers: ADJ12548721 (MF); ADJ19393188**
**Long Beach District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's report, we will deny the Petition as one seeking reconsideration.

## I.

Former Labor Code section 5909[1] 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.

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

(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 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 27, 2025 and 60 days from the date of transmission is Monday, May 26, 2025, a holiday. The next business day that is 60 days from the date of transmission is Tuesday, May 27, 2025. (See Cal. Code Regs., tit. 8 § 10600(b).)[2] This decision was issued by or on May 27, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on March 27, 2025, and the case was transmitted to the Appeals Board on March 27, 2025. Service of the Report and transmission

[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.

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 27, 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 Board 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 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 WCJ's decision is premised on a conclusion that the WCAB has jurisdiction to adjudicate the matter and includes a finding regarding a threshold issue as to employment. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (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, 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); 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).)

Section 4062.3 provides as follows in relevant part:

> (a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:
>
> > (1) Records prepared or maintained by the employee's treating physician or physicians.
> >
> > (2) Medical and nonmedical records relevant to determination of the medical issue.
>
> (b) Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.
>
> …
>
> (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.
>
> (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.

(Lab. Code, § 4062.3(a)-(b) and (e)-(f).)

Federick Butler, M.D., served as an internal panel qualified medical evaluator (PQME). William H. Mourdian, M.D., served as an orthopedic PQME. Dr. Butler evaluated applicant in person on June 21, 2020; Dr. Mouradian evaluated applicant in person on November 3, 2020.

(Petition for Removal at pp. 3:20; 4:3-4.) Applicant's April 8, 2024 subsequent, cover letter communications to the QMEs were simultaneously served on defendants. (*Id*. at p. 4:16-17.) The WCJ found that the cover letter communications were thus not an ex parte communication as that term was defined in *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136, 142 (Appeals Board en banc) and did not violate section 4062.3(e).

However, the WCJ found that applicant's counsel violated section 4062.3(b) by serving the cover letter communications on the QMEs without serving defendants his cover letter 20 days in advance. "Section 4062.3 contains different procedural requirements depending on the nature of the documents or materials to be provided to the QME." (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1810 (Appeals Board en banc).) Due to the differing treatment of information versus communication in the statute, the Appeals Board in *Maxham* delineated between the two as subsequently explained in *Suon*:

> The preliminary question is whether the documents or materials sent to the QME are "information" or "communication" as those terms are used in the Labor Code.
>
> In *Maxham*, the Appeals Board distinguished between "information" and "communication" under section 4062.3 as follows:
>
> 'Information,' as that term is used in section 4062.3, constitutes (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.
>
> A 'communication,' as that term is used in section 4062.3, can constitute 'information' if it contains, references, or encloses (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues. (*Maxham*, *supra*, 82 Cal.Comp.Cases at p. 138.)

(*Suon*, *supra*, 83 Cal.Comp.Cases at p. 1810.)

In *Suon*, the Appeals Board opined that "[i]n contrast to the specific remedy provided by section 4062.3(g) for an ex parte communication, the Labor Code does not provide a specific remedy for a violation of section 4062.3(b)." (*Suon*, *supra*, 83 Cal.Comp.Cases at p. 1815.) The decision held that the trier of fact has wide discretion to determine the appropriate remedy for a violation of section 4062.3(b). (*Id.*) Six potential factors were outlined for the trier of fact to

consider (as relevant to the particular facts of the case) in determining the appropriate remedy for a violation of section 4062.3(b):

1. The prejudicial impact versus the probative weight of the information.

2. The reasonableness, authenticity and, as appropriate, relevance of the information to determination of the medical issues.

3. The timeline of events including: evidence of proper service of the information on the opposing party, attempts, if any, by the offending party to cure the violation, any disputes regarding receipt by the opposing party and when the opposing party objected to the violation.

4. Case specific factual reasons that justify replacing or keeping the current QME, including the length of time the QME has been on the case.

5. Whether there were good faith efforts by the parties to agree on the information to be provided to the QME.

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

(*Id.* at pp. 1815-1816.)

Here, the WCJ evaluated applicant's cover letter communications to the QMEs to determine the appropriate remedy for applicant's counsel's violation of section 4062.3(b) after finding there was no violation of 4062.3(e) as the cover letter communications were simultaneously served on both defendants. The WCJ determined that the attached documents to the cover letter communications including depositions, diagnostic reporting, QME reports, permanent and stationary report, functional capacity evaluation, and death certificate had existed for some time and were in the possession of all parties. Accordingly, the WCJ used her discretion to determine the appropriate remedy for a violation of section 4062.3(b) and found that discovery remains open, and parties have time address any issues with the cover letter itself.

Petitioner erroneously states the law regarding ex parte communications:

> While any subsequent communication with the medical evaluator must be in writing and served on the opposing party when sent to the medical evaluator, simultaneous service of a communication to a QME and opposing party, is subject to the 20-day waiting period if that communication contains information similar to the case at hand per Cal. Code Regs., tit. 8, § 35(b)(1), (c)).

(Petition for Removal at pp. 6-7:1-4.)

Petitioner clearly misstates the law when it indicates that a simultaneous, subsequent communication containing information becomes subject to section 4062.3(e)—the communication does not, it becomes subject to section 4062.3(b). Then, the WCJ has wide discretion to determine the appropriate remedy for a violation of section 4062.3(b).

Here, based upon the WCJ's analysis of the merits of petitioner's arguments, 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.

Accordingly, we deny the Petition as one for reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration/Removal is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

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

**May 23, 2025**

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

**ENGLAND PONTICELLO & ST. CLAIR**
**JHM LAW OFFICES**
**LAW OFFICES OF BRADFORD & BARTHEL**

**SL/abs**

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