

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

KENNETH BROWN (deceased), VIRGINIA BROWN (spouse), *Applicants*

vs.

**SAN DIEGO GAS & ELECTRIC COMPANY, PERMISSIBLY SELF-INSURED;
ALLIED CONSTRUCTION CO. A CORP; NEWBERRY CORPORATION; HOKIN &
GALVAN aka TECHNO CORPORATION; TRAVELER'S INSURANCE COMPANY;
STATE COMPENSATION INSURANCE FUND; PACIFIC INDEMNITY CO.;
EMPLOYERS LIABILITY ASSURANCE; CROFTON COMPANY, *Defendants***

**Adjudication Number: ADJ19297551
San Francisco District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendants filed a Joint Petition for Removal or Reconsideration (Petition) of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, issued on August 11, 2025 (Prior Opinion). In the Prior Opinion, the Appeals Board granted applicant's petition for reconsideration; rescinded the May 9, 2025 Findings and Order issued by the workers' compensation administrative law judge (WCJ); and substituted new Findings and Order wherein the Appeals Board found, in relevant part, that the April 19, 2024 report of David Tarin, M.D., may be submitted to the Qualified Medical Evaluator (QME) Daniel Bressler, M.D., pursuant to Labor Code section 4062.3(a)(2)¹, and ordered that Dr. Tarin's report shall be sent to the QME.

Defendants contend that we erred in overturning the WCJ's decision because there is no irreparable harm to applicant; and, that Dr. Tarin's report was properly excluded from the record.

We have received an Answer from applicant.

We have considered the allegations of the Petition, the Answer, and the record. For the reasons stated below and in our August 11, 2025 Opinion and Order Granting Petition for

¹ All section references are to the Labor Code, unless otherwise indicated.

Reconsideration and Decision After Reconsideration, which we incorporate by reference, we will deny the Petition. We make no changes to our Prior Opinion.

I.

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. (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.
 - (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 September 9, 2025 and 60 days from the date of transmission is Sunday, November 9, 2025. The next business day that is 60 days from the date of transmission is Monday, November 10, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, November 10, 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

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 and Recommendation shall be notice of transmission.

Here, we did not receive a Report and Recommendation from the WCJ. However, a notice of transmission was served by the district office on September 10, 2025, which is the same day as the transmission of the case to the Appeals Board on September 10, 2025. 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 September 10, 2025.

II.

If a decision includes a 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 a 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, our prior decision includes a finding regarding a threshold issue. Accordingly, the decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, defendants are 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 significant 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).)

Here, as discussed below, we are not persuaded that significant prejudice or irreparable harm will result if defendants' request for removal is denied and/or that reconsideration will not be an adequate remedy. We will therefore deny the Petition as one seeking reconsideration.

III.

Defendants contend, first, that there is no irreparable harm to applicant, since the WCJ's decision "does not close discovery." (Petition, at p. 6.)

In our Prior Opinion, we discussed the removal standard and whether applicant had met it. (Prior Opinion, at pp. 8-9.) We stated that Dr. Tarin's report "is highly relevant to the QME's determination of causation of Mr. Brown's illness and resulting death." (*Id.* at p. 9.) We indicated, too, that there was no valid legal basis for withholding Dr. Tarin's report from the QME. (*Ibid.*) We thus concluded that applicant had met her burden to demonstrate that significant prejudice or irreparable harm will result if relief is not granted, and that reconsideration was not an adequate remedy. (*Ibid.*) Defendants' argument provides us with no basis to reverse that conclusion.

Defendants' second contention is that Dr. Tarin's report was properly excluded from the record by the WCJ, based on the holding in *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256]. (Petition, at pp. 6-7.)

The Court in *Batten* held:

Section 4605 permits the admission of a report by a consulting or attending physician, and section 4061, subdivision (i) permits the admission of an evaluation prepared by a treating physician. Neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion.

(*Batten, supra*, 241 Cal.App.4th at p. 1016.)

The *Batten* Court explained, further, that “[h]ad the Legislature intended to permit the admission of additional comprehensive medical reports, obtained at a parties’ own expense for the sole purpose of rebutting the opinion of the qualified medical expert, it would have said so.” (*Id.* at p. 1015.)

Here, the *Batten* prohibition is inapplicable. Dr. Tarin’s April 19, 2024 report was written prior to the QME’s report, and was obtained outside of the worker’s compensation process. The record demonstrates that Dr. Tarin was a consulting physician; he was not an expert who was retained solely for the purpose of rebutting the QME’s opinion. In fact, QME Dr. Bressler specifically requested in his report that he be provided with an opportunity to review Dr. Tarin’s report, indicating that the report “would be helpful in order to substantiate or review the opinions expressed above.” (Joint Exh. 102, Dr. Bressler’s 9/3/24 Report, at p. 38.) Thus, Dr. Tarin’s report was not obtained in a manner violative of *Batten*, and *Batten* provides no legal basis for keeping Dr. Tarin’s report from the QME.

Hence, we are unable to discern merit to defendants’ Petition. We make no changes to our Prior Opinion.

Accordingly, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that Defendants' Joint Petition for Removal or Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 28, 2025

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

**VIRGINIA BROWN
BRAYTON PURCELL LLP
DIETZ, GILMOR & CHAZEN APC
STATE COMPENSATION INSURANCE FUND
LAURA G. CHAPMAN & ASSOCIATES
FINNEGAN, MARKS, DESMOND & JONES
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP**

MB/ara

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