

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

TINA GARZA, *Applicant*

vs.

COUNTY OF KERN, permissibly self-insured, *Defendants*

**Adjudication Number: ADJ18724961; ADJ15255319
Bakersfield District Office**

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

Defendant seeks reconsideration of the Findings of Fact and Discovery Order (F&O) issued on July 29, 2025. The workers' compensation administrative law judge (WCJ) found, in relevant part, that Scott Graham, M.D., is the Agreed Medical Evaluator (AME) for both ADJ18724961 and ADJ15255319 and that defendant waived entitlement to a medical-legal examination via a Qualified Medical Evaluator (QME) selected from Panel #7803054 for the cumulative injury by previously seeking the opinion of the AME.

Defendant argues that the WCJ improperly found that defendant had waived their right to a subsequent medical legal evaluation in ADJ18724961 because the issue of waiver was not raised by applicant and there was no evidence to support waiver. They also argue that *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418 (Appeals Board en banc) and other recent panel decisions stand for the position that defendant is entitled to a new panel and that returning to a prior panel QME does not waive either party's right to a panel on a new claim filed after the original evaluation.

Applicant filed an answer. The WCJ issued a Report and Recommendation (Report) recommending denial of the claim.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and

for the reasons discussed below, we will grant reconsideration, rescind the decision and return the matter to the trial level for further proceedings consistent with this opinion.

FACTS

On June 17, 2025, the parties proceeded to an expedited hearing. According to the minutes, they requested that the matter be submitted. The minutes state that:

APPLICANT’S DOR FOR DISCOVERY ORDER BARRING ADDITIONAL QME (PANEL ISSUED BUT EXAM NOT SET)

AT REQUEST OF THE PARTIES, THE DISPUTED ISSUE IS SUBMITTED FOR DECISION AS OF 6/25/2025. PARTIES MAY SUBMIT POST-HEARING ARGUMENT.

The WCJ’s Report states that:

The present case came on regularly for Expedited Hearing before the undersigned PWCJ on June 17, 2025. The dispute was submitted for decision as of June 25, 2025 with the parties authorized to submit post-hearing argument. Minutes of Hearing 6/17/2025; Pre-Trial Conference Statement 6/17/2025.

Following submission for decision, Findings of Fact and Discovery Order issued on July 29, 2025. Applicant’s motion to invalidate Panel 7803054 and excuse her from attending any Qualified Medical Evaluation drawn from the panel was granted. Findings of Fact and Discovery Order 7/29/2025 p. 3 (Discovery Order). The undersigned PWCJ found that Dr. Graham was serving as an Agreed Medical Evaluator in both cases and his selection in the present case waived any entitlement to a panel QME evaluation. The undersigned PWCJ relied on substantial evidence in the form of Petitioners’ examination letter. Findings of Fact and Discovery Order 7/29/2025 pp. 2-3 (Findings of Fact #6 & #7, p. 4 (Opinion on Decision).

DISCUSSION

I

Former Labor Code section 5909¹ 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:

(2) 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 All further statutory references will be to the Labor Code unless otherwise indicated.

(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 2, 2025 and 60 days from the date of transmission is Saturday, November 1, 2025. The next business day that is 60 days from the date of transmission is November 3, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, November 3, 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 September 2, 2025 and the case was transmitted to the Appeals Board on September 2, 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 September 2, 2025.

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.

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 includes a finding of injury, a threshold issue. 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 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 explained below, we are

persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

III

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ’s decision. (Lab. Code, § 5313.) “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.) An adequate and complete record is necessary to understand the basis for the WCJ’s decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.) The WCJ’s decision must “set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on,” so that “the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record.” (*Id.* at p. 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

WCAB Rule 10761 states that:

- (a) A workers' compensation judge may receive evidence and submit an issue or issues for decision at a conference hearing if the parties agree.
- (b) If documentary evidence is required to determine the issue or issues being submitted, the parties shall comply with the provisions of rule 10759 regarding the listing and filing of exhibits.
- (c) **After submission at a conference, the workers' compensation judge shall prepare minutes of hearing and a summary of evidence as set forth in rule 10787.**

(Cal. Code Regs., tit. 8, § 10761, emphasis added.)

WCAB Rule 10787 (c) outlines exactly what must be in the minutes of hearing and summary of evidence when a matter is properly submitted for trial:

(c) Minutes of hearing and summary of evidence shall be prepared at the conclusion of each trial and filed in the record of proceedings. They shall include:

(1) The names of the commissioners, deputy commissioner or workers' compensation judge, reporter, the parties present, attorneys or other agents appearing therefor and witnesses sworn;

(2) The place and date of said trial;

(3) The admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence (with the identity of the party offering the same);

(4) The disposition, and if the disposition is an order taking off calendar or a continuance, the reasons for the order which shall include the time and action, if any, required for submission;

(5) A summary of the evidence required by Labor Code section 5313 that shall include a fair and unbiased summary of the testimony given by each witness;

(6) If motion pictures are shown, a brief summary of their contents or a stipulation that parties waive a summary; and

(7) A fair statement of any offers of proof.

(Cal. Code Regs., tit. 8, § 10787.)

Here the Minutes lack the required components. The parties agreed to submit the issue on “applicant’s DOR for discovery order barring additional QME.” The specific issue is not outlined. There are no stipulations, issues, or exhibits outlined in the minutes of hearing or submitted on the record. While the exhibits are outlined and admitted in the F&O, the regulations clearly require a listing of all evidence received for identification or in evidence in the minutes of hearing and summary of evidence and not for the first time in the F&O.

Further, WCAB Rule 10515 prohibits petitions for judgment on the pleadings. (Cal. Code Regs., tit. 8, §10515) The MOH only states, “applicant’s DOR for discovery order barring additional QME (panel issued but exam not set). At request of the parties, the disputed issue is submitted for decision as of 6/25/2025.” The issue is not delineated apart from reference to the DOR. While the WCJ allowed post-trial briefing, by not identifying a proper issue and simply outlining the issue as “applicant’s DOR for discovery order” the parties are requesting submission for a judgement on the pleadings. That is, if we were to decide the matter using only the pleadings and the evidence submitted, the determination would be based on the pleadings.

Accordingly, we grant the Petition for Reconsideration, rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion.

IV

We turn briefly to the substance of the party's arguments based on the pleadings. Defendant argues that pursuant to *Navarro, supra*, 79 Cal.Comp.Cases 418, they are entitled to a new panel when a new claim form is filed after the initial AME evaluation. Section 4062.2 dictates how an evaluator will be selected to resolve any dispute arising out of an injury or a claimed injury. At the outset, the parties opted to forego use of the panel system outlined in section 4062.2(b) opting to utilize the AME process outlined in section 4062.2(f). This section provides:

(f) The parties may agree to an agreed medical evaluator at any time, except as to issues subject to the independent medical review process established pursuant to Section 4610.5. A panel **shall not** be requested pursuant to subdivision (b) on **any issue** that has been agreed to be submitted to or **has been submitted** to an agreed medical evaluator unless the agreement has been canceled by mutual written consent. (*emphasis added*)

(Lab. Code, § 4062.2(f).)

By its plain language, the statute precludes a QME panel request where either: 1) the parties have agreed to submit the issue to an AME **or** 2) the issue **has been** submitted to an AME. (See e.g., *People v. Loebun* (1997) 17 Cal.4th 1, 9-10, citing *White v. County of Sacramento* (1982) 31 Cal.3d 676 [the use of the disjunctive “or” in a statute indicates a legislative intent to designate alternative or separate categories including distinct ways to satisfy statutory requirements].) There is no requirement that every issue be explicitly agreed to, but rather specifically provides that only submission of *any issue* will preclude a panel request.

Section 4062.3 provides different parameters for the service of information and communication with the AME:

(c) If an agreed medical evaluator is selected, as part of their agreement on an evaluator, the parties shall agree on what information is to be provided the agreed 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...

(Lab. Code, § 4062.3(c) &(f))

Thus, to be in compliance with section 4062.3, the content of the information sent to the AME would have been agreed upon and submitted. The original application did include the wrists, fingers, and upper extremities, thus it appears that issues relating to the wrist and hands were

already submitted to the AME in the first evaluation. Subsequently, a new claim was filed. It appears that the issues were submitted to the AME pursuant to section 4062.2(f) and became part and parcel of the AME agreement. Defendant attempted to obtain a panel upon the basis that there is a dispute regarding permanent and stationary status purportedly for the cumulative injury claim. If so, this issue has been clearly submitted to the AME and is therefore no longer a viable basis for a separate panel pursuant to section 4062.2(f).

In addition to *Navarro*, defendant cites several panel decisions to support its position. Defendant acknowledges the limitations of citing to panel decision, but we also note that the cases are not on point. Each of the cases defendant cites involve panel QMEs not AMEs. The Labor Code clearly provides separate procedures for the use of an AME and therefore the analysis is not the same. Section 4062.2(f) expands an AME's opinion to issues submitted or agreed to, not just claim/injury related disputes. The notion that the AME has more broad discretion over all issues is born out in the heightened requirement for agreement to information in section 4062.3(c) followed by the less stringent service requirement in section 4062.3(f).

If defendant sent a cover letter asking the AME to address all issues relating to the cumulative injury claim, pursuant to section 4062.3(c) there would have been an agreement to the information and thus to the issues to be addressed. Section 4062.3(f) removes the 20 day waiting period for service of information that is mandatory for panel QME evaluations because of the additional requirement in section 4062.3 (c) that the information be proactively agreed upon.

Thus, while we are unable to consider the merits of the petition due to the lack of a record, it does not appear that there is a basis for initiating the panel process under section 4062.2(a) simply based on the filing of the claim form where after the claim is filed, the parties agree to and/or submit the issues to the AME.

Accordingly, we grant the Petition for Reconsideration, rescind the F&A, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the decision of July 29, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of July 29, 2025 is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 3, 2025

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

**TINA GARZA
COUNTY OF KERN
J SMITH LAW, PC**

TF/md

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