WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GILBERTO MARTINEZ, ***Applicant***

vs.

CVS PHARMACY;
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, ***Defendants***

Adjudication Numbers: ADJ19984698; ADJ20043335
Marina del Rey District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks removal of the Joint Findings of Fact and Order (F&O) issued on January 12, 2026 by the workers' compensation administrative law judge (WCJ). The F&O found, in pertinent part, that applicant validly requested a Replacement QME Panel on March 5, 2025 (to replace panel number 3593170). The WCJ ordered that replacement QME panel number 3622506 replace panel number 3593170, leaving, after the striking process previously performed by the parties, Kofi D. Agyeman, M.D., as the orthopedic surgery QME in these matters.

Defendant contends that the WCJ erred in finding that applicant validly requested replacement QME panel number 3622506 and that Dr. Agyeman is the orthopedic surgery QME in these matters.

We did not receive an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of the Petition and the contents of the Report of the WCJ with respect thereto. Based on our review of the record and based upon the WCJ's analysis of the merits of the petitioner's arguments in the WCJ's report and the reasons stated below, we will treat the Petition as one seeking reconsideration and deny the defendant's Petition.

FACTS

We will briefly review the relevant facts.

Applicant has filed two claims for industrial injury while employed by defendant. In ADJ19984698, applicant, while employed by CVS Pharmacy on April 12, 2024 as an order selector, sustained injury arising out of and in the course of employment (AOE/COE) to the right shoulder. (Minutes of Hearing and Summary of Evidence, December 3, 2025, at pp. 2:10-13.)

In ADJ20043335, applicant, while employed by CVS Pharmacy during the period of January 31, 2023 through April 12, 2024 as an order selector, claims to have sustained injury AOE/COE to the neck, back, hand, wrist and knees. (*Id*. at pp. 2:24-25; 3:1-3.)

On December 5, 2024, at defendant's request, an initial Qualified Medical Evaluator (QME) panel number 7758937 in the field of orthopedic surgery issued. (Exhibit A.)

On January 6, 2025, applicant requested a replacement panel for panel number 7758937 because Alexander Latteri, M.D., the remaining panelist after the parties struck, was not timely scheduling pursuant to Administrative Director (AD) Rule 31.5(a)(2). (Exhibit B.)

On January 30, 2025, panel number 3593170 issued. (Joint Exhibit YY.)

On February 11, 2025, from panel number 3593170, defendant struck Jacob Rabinovich, M.D. (Exhibit C.)

On February 20, 2025, from panel number 3593170, applicant struck Jacqueline T. Lezine-Hanna, M.D. (Exhibit D.) The remaining panel QME was Darryl A. Willoughby, M.D. (*Id*.)

On February 20, 2025, applicant attempted to set an evaluation appointment with Dr. Willoughby. (Joint Exhibit ZZ.) Dr. Willoughby responded to applicant's request by e-mail as follows:

> Our office received your request to schedule a P-QME appointment. This doctor's schedule is completely booked within the 120 day timeframe allowed by the Division of Workers' Compensation for first-time and subsequent P-QME appointments.
>
> Pursuant to Title 8 of the California Code of Regulations, Article 3, §31.3 (e), both parties can agree in writing to waive the one hundred twenty (120) day time limit for scheduling the initial or subsequent evaluation.
>
> If you want to proceed, please send your jointly executed waiver to us at waivers@cmlsmd.com indicating your approval. For your convenience, we attached a waiver template for your use.

(*Id*. at p. 1.)

On March 5, 2025, applicant requested a replacement panel because Darryl A. Willoughby, M.D., the remaining panelist after the parties struck, was not timely scheduling pursuant to AD Rule 31.5(a)(2). (Joint Exhibit XX.)

On March 19, 2025, the parties were served with notice of a panel QME appointment for applicant with Dr. Willoughby scheduled for April 25, 2025. (Exhibit E.) The QME Appointment Notification Form indicates the date of the appointment call was March 13, 2025. (*Id*. at p. 2.)

On March 25, 2025, panel number 3622506 issued. (Exhibit F.)

On March 28, 2025, defendant objected to applicant's March 5, 2025, replacement panel request. (Exhibit G.)

On April 2, 2025, defendant objected to panel number 3622506, struck panelist Emile P. Wakim, M.D., and reminded applicant of the April 25, 2025, appointment with Dr. Willoughby including a mileage reimbursement check under a different cover. (Exhibit H.)

On April 7, 2025, from panel number 3622506, applicant struck Rodney A. Gabriel, M.D. (Exhibit I.) The remaining panel QME was Dr. Agyeman (*Id*.) The same day, Dr. Agyeman set and noticed a June 19, 2025, panel qualified medical evaluation for applicant. (Joint Exhibit WW.)

On April 14, 2025, defendant objected to the June 19, 2025 panel qualified medical evaluation with Dr. Agyeman set for applicant. (Exhibit J.)

On December 3, 2025, the matter proceeded to trial on the primary issue of whether applicant's replacement panel number 3622605 is valid due to Dr. Willoughby's unavailability to schedule within 120 days.

It is from the corresponding F&O by the WCJ finding that replacement QME panel number 3622506 replaces panel number 3593170, leaving Dr. Agyeman as the orthopedic surgery QME in these matters that defendant seeks removal.

DISCUSSION

I.

Preliminarily, we note that former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days

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

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 February 13, 2026 and 60 days from the date of transmission is April 14, 2026. This decision was issued by or on April 14, 2026, 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 WCJ, the Report was served on February 13, 2026, and the case was transmitted to the Appeals Board on February 13, 2026. 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 February 13, 2026.

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].)

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.)

Conversely, interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 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.

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, in ADJ19984698, the orders issued by the WCJ are a hybrid decision that included final findings on the issues of date of injury, employment, insurance coverage and injury AOE/COE to the right shoulder. In ADJ20043335, the orders issued by the WCJ are a hybrid decision that included final findings on the issues of employment and insurance coverage. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains findings that are final, petitioner is only challenging the interlocutory finding relating to the issuance of a new QME panel. 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, for the reasons set forth in the Report of the WCJ, and as discussed below, we conclude that substantial prejudice or irreparable harm will not result if removal is denied and/or that reconsideration will be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner. Thus, we will deny the Petition as one for reconsideration.

III.

In *Vazquez v. Inocensio Renteria* (2025) 90 Cal.Comp.Cases 514, 523 (Appeals Board en banc), we held that:

1. Only the Appeals Board has jurisdiction to determine whether a replacement panel is valid or otherwise appropriate.

2. In a represented case, where a QME does not timely establish availability to set an appointment pursuant to AD Rule 31.3, a WCJ or the Appeals Board has discretion to order a replacement QME for good cause. The WCJ or the Appeals Board may consider the following:

    a. The length of delay caused by the QME's unavailability.

b. The amount of prejudice caused by the delay in availability versus the amount of prejudice caused by restarting the QME process.

c. What efforts, if any, have been made to remedy the QME's availability.

d. Case specific factual reasons that justify replacing or keeping the current QME, including whether a party may have waived its objection.

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

(*Vazquez*, *supra*, at pp. 516-517.)

Defendant argues that the WCJ's decision incorrectly applied the factors set forth above in *Vasquez*, and there is no good cause to replace Darryl A. Willoughby, M.D., as panel QME.

Further, to the extent that defendant relies on the *Vasquez* analysis, we find the circumstances to be inapposite, as there has been no initial evaluation or record review by Dr. Willoughby in this case as was the case in *Vasquez*. Nevertheless, the WCJ did find that, in his discretion, and in weighing all the *Vasquez* factors, applicant was entitled to request a replacement panel.

Defendant further asserts that replacing Dr. Willoughby will result in unnecessary delay and associated expenses, and reconsideration will not be an adequate remedy after the issuance of a final order, decision or award because applicant's request for a replacement panel QME is not supported by good cause, since there were only 64 days between applicant's initial telephone call to Dr. Willoghby's office on February 20, 2025 and the timely date of the appointment set by Dr. Willoughby, April 25, 2025. This assertion ignores the February 20, 2025 e-mail from Dr. Willoughby to applicant in which he informed applicant that he had no evaluation appointments available within 120 days and if the parties wanted to proceed with him serving as panel QME, they must jointly execute and return a waiver. For the parties' convenience, Dr. Willoughby attached a waiver form to his e-mail. With this e-mail, clearly, Dr. Willoughby declined to serve as panel QME in this matter. While it appears that a subsequent telephone call on March 13, 2025 to the QME thereafter generated an earlier appointment availability within 120 days, that does not abrogate the

initial statement from the QME's office that they could not schedule the appointment within the necessary time frame set forth within AD Rule 31.5(a)(2).

As stated by the WCJ in his Report, "Once Dr. Willoughby definitively and unequivocally indicated he could not see Applicant for over 120 days, Applicant relied on that information and properly exercised his right to request a new panel." (Report, at p. 13.) We agree.

The WCJ found that applicant was entitled to procure a replacement panel due to Dr. Willoughby's unavailability, and based upon the record before us, we see no basis upon which to overturn the finding of the WCJ in this matter.

Accordingly, we deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that the defendant's Petition for Reconsideration of the Joint Findings of Fact and Order issued on January 12, 2026, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 14, 2026

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

GILBERTO MARTINEZ
DIEFER LAW FIRM
MICHAEL SULLIVAN LAW FIRM

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