

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

**ADRIAN MELERO, *Applicant***

**vs.**

**MTS/SAN DIEGO TRANSIT CORPORATION, permissibly self-insured, administered by  
CORVEL CORPORATION, *Defendants***

**Adjudication Numbers: ADJ16047168, ADJ17006634  
San Diego District Office**

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

Defendant seeks reconsideration, or in the alternative removal, of the July 31, 2024 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found that applicant was entitled to proceed with the separate chiropractic Qualified Medical Evaluation (QME) panel for applicant's December 20, 1996 through December 23, 2021 cumulative injury claim to the hands, wrists, arms, knee, and back rather than return to Dr. Jeffrey Schiffman who is currently serving as the orthopedic panel QME for applicant's December 23, 2021 specific injury claim to the head, shoulder, ear, and neck.

Defendant contends that pursuant to *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418 (Appeals Board en banc), when claim forms for multiple injuries are filed before a QME exam takes place, those claims should be addressed by the same QME. Defendant argues that both the specific and the cumulative injury claims were filed before the QME exam. As such, applicant has no right to a separate QME panel for the cumulative injury.

We have considered the Petition for Reconsideration (Petition), the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will dismiss the Petition for Reconsideration, grant it as a Petition for Removal, rescind the F&O, and return this matter to the trial level for further proceedings consistent with this decision.

## FACTS

Applicant claimed two injuries arising out of and in the course of employment (AOE/COE) while employed by defendant as a train operator. The first is a December 23, 2021 specific injury to the head, shoulder, ear, and neck. The second is a cumulative injury during the period from December 20, 1996 through December 23, 2021 to the hands, wrists, arms, knee, and back.

The record does not contain the DWC claim forms for the two injuries.

The parties proceeded with discovery and on June 16, 2022, an orthopedic QME panel was obtained for the December 23, 2021 specific injury. Dr. Jeffrey Schiffman was ultimately selected, and applicant was evaluated by Dr. Schiffman on December 9, 2022. (Exhibit A.)

On March 17, 2023, applicant requested a separate chiropractic QME panel for the cumulative injury claim. (Exhibit 1.) The medical unit issued panel 7642430 in response. (Exhibit 2.)

The matter therefore proceeded to trial on July 29, 2024. Defendant contended that Dr. Schiffman should be the QME to evaluate applicant for the cumulative injury and that a second panel was not proper.

## DISCUSSION

### I.

Preliminarily, former Labor Code section<sup>1</sup> 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.

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise noted.

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 under the Events tab 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 6, 2024, and 60 days from the date of transmission is October 25, 2024. This decision is issued by or on November 5, 2024, 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, it was served on September 6, 2024, and the case was transmitted to the Appeals Board on September 6, 2024. 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 6, 2024.

## II.

We also find it relevant here to discuss the distinction between a petition for reconsideration and a petition for removal. A petition for reconsideration is taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order is defined as one that determines “any substantive right or liability of those involved in the case” or a “threshold” issue fundamental to a claim for benefits. (*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 [43Cal.Comp.Cases 661]; *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, injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian, supra*, at 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, and other similar issues.

Here, the WCJ's decision solely resolves an intermediate procedural or evidentiary issue or issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision, and the Petition will be dismissed as one for reconsideration.

However, we will consider the Petition as one for removal. 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 can show that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a). The petitioner must also demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Id.*)

In the instant case, we are 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 applicant. Therefore, we will grant the Petition as one for removal.

### III.

Turning now to the merits of the Petition, pursuant to *Navarro*, the "Labor Code does not require an employee to return to the same panel QME for an evaluation of a subsequent claim of injury." (*Navarro, supra*, 79 Cal. Comp. Cases at p. 420.) However, sections 4062.3(j) and 4064(a) taken together state that a medical evaluation shall address "all medical issues arising from all injuries reported on one or more claim forms." Section 5401 outlines the requirements pertaining to workers' compensation claim forms, and pursuant to this section, an employer must provide a claim form, and the injured worker must file the claim form with the employer. (*Id.*) Further, "a claim form is deemed filed when it is personally delivered to the employer or received by the employer by first-class or certified mail. A dated copy of the completed form shall [then] be provided by the employer to the employer's insurer and to the employee, dependent, or agent who filed the claim form." (*Id.*)

In keeping with the requirements set forth in sections 4062.3(j) and 4064(a), *Navarro* clarifies that at the time of an evaluation, the evaluator shall consider all issues arising out of *any claims reported before the evaluation*, and if several subsequent claims of injury are filed before the evaluation takes place, the evaluator shall also consider those claims. (*Navarro, supra*, 79 Cal. Comp. Cases at p. 425, emphasis added.)

Under *Navarro*, the date the claim form is filed is the operative act in determining the right to request a new QME panel. If a claim form for an additional injury is filed before the evaluation with the panel QME, then that QME shall remain as the QME for all injuries with submitted claim forms. However, if a claim form for the additional injury is filed after the QME evaluation, the parties may request an additional QME panel.

Defendant apparently attached the claim forms to its Petition and its July 11, 2024 Points and Authorities. Attachment of the documents, however, does not equate to entry of said documents into the evidentiary record.

WCAB Rule 10803(a) states that:

(a) The Workers' Compensation Appeals Board's adjudication file shall consist of:

- (1) All documents filed by any party, attorney or other agent of record, and as provided in rule 10205.4; and
- (2) The record of proceedings, which consists of: the pleadings, minutes of hearing, summaries of evidence, certified transcripts, proofs of service,

admitted evidence, exhibits identified but not admitted as evidence, notices, petitions, briefs, findings, orders, decisions and awards, opinions on decision, reports and recommendations on petitions for reconsideration and/or removal, and the arbitrator's file, if any. Each of these documents is part of the record of proceedings, whether maintained in paper or electronic form. Documents that are in the adjudication file but have not been received or offered as evidence are not part of the record of proceedings.

(Cal. Code Regs., tit. 8, § 10803(a).)

In the instant case, the claim forms were not submitted as part of applicant's filing of his initial pleadings, i.e., his Applications for Adjudication of Claims. They were also not admitted into evidence at hearing.

WCAB Rule 10945(c) states that:

(c)(1) Copies of documents that have already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration, removal, or disqualification or answers. Documents attached in violation of this rule may be detached from the petition or answer and discarded.

(2) A document that is not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer unless a ground for the petition for reconsideration is newly discovered evidence.

(3) A document shall not be attached to or filed with a petition for removal or disqualification or answer unless the document is not part of the adjudication file and is relevant to a petition for removal or disqualification.

(Cal. Code Regs., tit. 8, § 10945(c).)

Here, there were numerous documents attached to the Petition in violation of WCAB Rule 10945(c). As noted above, subdivision (1) prohibits attachment of documents that are already contained in the record of proceedings, and subdivisions (2) and (3) prohibit attachment of documents that are not in the evidentiary record. Failure to comply with WCAB Rules may subject the offending party to sanctions. The Petition may also be dismissed. Defendant is therefore admonished from attaching documents in violation of WCAB Rule 10945(c).

In our en banc decision in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [33 Cal.Comp.Cases 350-351] (Appeals Board en banc), we concluded that a decision "must be based on admitted evidence in the record" (*Id.* at p. 478) and must be supported by substantial evidence. (§§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11

Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) This "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) Further, the WCAB has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where additional discovery may be necessary. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The above cases and statutes underscore the importance of development of the evidentiary record in furtherance of the substantial justice required in workers' compensation proceedings.

As noted above, the date of the claim form is the operative act. As such, without the claim forms and without evidence as to the operative dates for the filing of the claim forms, we are unable to determine whether *Navarro, supra*, applies. Moreover, further information is needed from defendant to determine when the claim form was received and whether receipt predated the December 9, 2022 evaluation by orthopedic panel QME, Dr. Schiffman.

Accordingly, we dismiss the Petition for Reconsideration, grant it as a Petition for Removal, rescind the F&O, and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the July 31, 2024 Findings and Order is **DISMISSED**.

**IT IS FURTHER ORDERED** that defendant's Petition for Removal of the July 31, 2024 Findings and Order is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation Appeals Board, that the July 31, 2024 Findings and Order is **RESCINDED** and the matter **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



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

**November 5, 2024**

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

**ADRIAN MELERO  
LEIGH LAW FIRM  
TROVILLION, INVEISS, DEMAKIS & HANSEN  
EMPLOYMENT DEVELOPMENT DEPARTMENT**

***RL/pm***

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