

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

LUISA CARRILLO, *Applicant*

vs.

**FRESNO FOODS, LLC; TECHNOLOGY INSURANCE COMPANY, INC.,
administered by AMTRUST SAN DIEGO, *Defendants***

**Adjudication Number: ADJ16964158
Fresno District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant seeks removal of the Findings and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on June 19, 2024, wherein the WCJ found that while employed by defendant on September 26, 2022, applicant sustained injury and that "the parts of body injured are not at issue for this trial"; that a nurse practitioner's report constitutes a valid Primary Treatment Physician (PTP) report; that defendant filed a valid objection letter to the determination of the primary treating physician; and that after the strike process, the remaining doctor will serve as the Panel Qualified Medical Examiner (PQME).

In the Petition for Removal (Petition), applicant contends that an objection under Labor Code Section 4061 to a nurse practitioner's report is not a valid objection to trigger the panel process and that defendant's objection letter was thus invalid.

The WCJ issued a Report and Recommendation (Report) recommending that the Petition be denied. Defendant's attorney filed a Response to Petition for Removal, which we will treat as an Answer.

We have considered the allegations in the Petition and the Answer, and the contents of WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, we will deny the Petition as one seeking reconsideration.

BACKGROUND

Applicant, a food worker for Fresno Foods, LLC, filed an application alleging a specific injury to her neck, back, both shoulders and both arms, when she fell at work on September 26, 2022. (11/18/22 Application.) She received medical treatment from Kings Industrial Occupational Medical Center, Inc., which served as her PTP. (Joint Exh. AA¹.) A PTP report written by nurse practitioner Beltran was issued May 26, 2023. (*Ibid.*) The report was not signed by a supervising physician. (*Ibid.*)

On October 10, 2023, defendant issued an objection letter to the PTP report, pursuant to Labor Code sections 4061 and 4062. (Joint Exh. BB.) Defendant subsequently obtained a QME panel in Orthopedic Surgery. (Defendant's Exh. A.)

In a letter dated November 7, 2023, applicant acknowledged defendant's objection to the PTP report, defendant's request for a panel, and defendant's strike of one doctor from that panel. (Applicant's Exh. 1.) Applicant argued that defendant's objection letter could not serve as a valid basis for a QME panel request, because the letter did not meet the requirements of Labor Code section 4061, was not timely under Labor Code section 4062, and was not signed by a doctor. (*Ibid.*) Applicant also struck one doctor from the panel, leaving Dr. Watson as the remaining panel physician. (*Ibid.*)

The matter went to trial on the issue of the validity of the October 26, 2023 QME panel. (6/5/24 MOH, at p. 2.) The parties stipulated that applicant was employed by Fresno Foods, that she sustained an industrial injury on September 26, 2022, that the employer has furnished some medical treatment, that applicant's primary treating physician is Dr. Chahaun, and that no attorney fees have been paid. (*Id.*, at p. 3.) Documentary evidence was admitted, and there was no witness testimony. (*Id.*, at pp. 1, 3.) The F&O issued on June 19, 2024.

DISCUSSION

I.

Former Labor Code 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.

¹ The medical report is labeled "Exhibit C" and cited as "Exhibit C" in the Report, however it was admitted into evidence as "Joint Exhibit AA" (6/5/24 MOH, at p. 3) and will thus be referred to as Joint Exhibit AA in this opinion. All other exhibits will be similarly referenced herein using the labels under which they were admitted.

Code, § 5909.) Effective July 2, 2024, Labor Code 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 Labor Code 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 July 12, 2024, and 60 days from the date of transmission is September 10, 2024. This decision is issued by or on September 10, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 July 12, 2024, and the case was transmitted to the Appeals Board on July 12, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 12, 2024.

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 findings regarding threshold issues, including a finding that applicant was employed by defendant. Accordingly, the WCJ’s decision is a final order subject to reconsideration rather than removal.

Applicant’s Petition challenges the finding that the nurse practitioner’s report is a valid PTP report and the finding that defendant’s objection letter constitutes a valid objection to trigger the panel process. (Petition, at pp. 4-9.) Thus, although the F&O contains findings that are final, applicant is challenging only interlocutory findings/orders therein. 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, applicant made neither required showing. Thus, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Therefore, we will deny the Petition as one seeking 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/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 10, 2024

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

**LUISA CARRILLO
LAW OFFICES OF BRYAN K. LEISER
YRULEGUI & ROBERTS**

MB/ara

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