

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

**RAMIRO SOLORIO, *Applicant***

**vs.**

**CALIFORNIA COMMUNITY NEWS and ACE AMERICAN INSURANCE COMPANY,  
administered by GALLAGHER BASSETT INSURANCE SERVICES, *Defendants***

**Adjudication Numbers: ADJ10564064 (MF); ADJ13211148  
Van Nuys District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION AND  
DENYING PETITION FOR REMOVAL**

Defendant seeks reconsideration or, in the alternative, removal of the Amended Joint Findings and Award (F&A) and Notice of Intention to appoint regular physician (NOI), issued by the workers' compensation administrative law judge (WCJ) on June 25, 2024, wherein the WCJ found in pertinent part that "the record requires further development in the form of a medical expert opinion in either psychology or psychiatry before the issues of parts of body injured, temporary disability, permanent and stationary date, permanent disability, apportionment, need for further medical treatment, liability for self-procured medical treatment, and attorney fees can be determined."

Defendant contends that the WCJ erred in issuing a Notice of Intention to appoint a Regular Physician to offer an expert opinion in either psychology or psychiatry, taking the position that "applicant raised psyche as an issue but offered no evidence, either medical evidence or direct examination evidence to prove a psyche claim, therefore [the WCJ] has no choice but to make a ruling that the applicant has failed to meet his burden to prove a psyche injury." (Petition, p. 15.)

We have not received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition for reconsideration or removal be denied.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

Based on our review of the record, and as discussed below, we will deny defendant's Petition to the extent that it seeks Reconsideration and also to the extent that it seeks Removal.

### **BACKGROUND**

We incorporate the following facts and procedural history from the WCJ's Report:

A previous Joint Findings and Notice of Intention to Appoint Regular Physician dated November 30, 2023 found, inter alia, that "[t]he record requires development in the form of a medical expert opinion in either psychology or psychiatry before the issues of parts of body injured, temporary disability, permanent and stationary date, permanent disability, apportionment, need for further medical treatment, liability for self-procured medical treatment, and attorney fees can be determined." (Joint Findings and Notice of Intention to Appoint Regular Physician dated November 30, 2023, page 2, numbered paragraph 7.)

The November 30, 2023 Joint Findings and Notice of Intention to Appoint Regular Physician was rescinded under Cal. Code Regs., tit. 8, § 10955(d) upon review of defendants' previous timely petition for removal, and a status conference was held to afford the parties an opportunity to develop the record with additional evidence and argument regarding the fact that the psyche was not included in the pleadings, because an amended application dated April 21, 2020 stated "3RD AMENDED APPLICATION OF ADJUDICATION OF CLAIM TO REMOVE PSYCH FROM ADDITIONAL BODY PARTS," yet the September 19, 2023 Minutes of Hearing and Summary of Evidence clearly identified as one of the submitted trial issues "Parts of body injured: The left hip, the right hip, buttocks, bilateral upper extremities, bilateral shoulders, *psyche* and internal" (emphasis added). (Order Rescinding Joint Findings and Notice of Intention. to Appoint Regular Physician dated December 22, 2023, page 1, paragraphs 1-3.)

At the status conference, the matter was returned to the trial calendar with the consent of the parties, who declined to either withdraw injury to psyche as an issue or develop the record to address it. At the trial hearing, it was confirmed that "[a]fter discussion of the Order Rescinding Joint Findings and NOI, the parties agreed to once again submit all previously submitted issues based on the evidentiary record previously provided at trial. WCJ Feddersen will issue an amended decision" (Minutes of Hearing dated April 15, 2024, page I, under "OTHER/COMMENTS").

Having considered the exact same evidentiary record, an Amended Joint Findings and Notice of Intention to Appoint Regular Physician unsurprisingly reached the exact same conclusions regarding the need to develop the record with an opinion in psychology or psychiatry. The notice of intention provided that "an order designating and appointing a regular physician in the medical specialty of psychology or psychiatry, pursuant to Labor Code section 5701,

shall issue twenty (20) days from the date of service hereof, unless good cause to the contrary is shown in writing within said time. Good cause shall include, without limitation, agreement by the parties to an Agreed Medical Evaluator (AME) in psychology or psychiatry within said time” (Amended Joint Findings and Notice of Intention to Appoint Regular Physician dated June 21, 2024, page 2, lines 13-18).

The amended findings accompanying the June 21, 2024 notice of intention to appoint regular physician were as follows: In Case Number ADJ10564064, it was stipulated that applicant Ramiro Solorio, [age 68 at date of injury], while employed on June 16, 2016, as a truck driver/loader/unloader at Irwindale, California, by California Community News, claims to have sustained injury arising out of and in the course of employment to his left knee and left hip. In Case Number ADJ13211148, it was stipulated that applicant Ramiro Solorio, [age 68 at end of cumulative trauma period], while employed during the period September 1, 1996 to July 2, 2016, as a truck driver/loader/unloader at Irwindale, California, by California Community News, sustained injury arising out of and in the course of employment to his lumbar spine, left shoulder and left elbow, and claims to have sustained injury arising out of and in the course of employment to gastrointestinal and hypertension.

...

The record requires development in the form of a medical expert opinion in either psychology or psychiatry before the issues of parts of body injured, temporary disability, permanent and stationary date, permanent disability, apportionment, need for further medical treatment, liability for self-procured medical treatment, and attorney fees can be determined. This medical expert opinion in psychology or psychiatry must then be reviewed by the treating physicians and PQMEs in evidence, whose supplemental opinions will also be required to reach a decision regarding all submitted issues that is based on substantial medical evidence (Amended Joint Findings and Notice of Intention to Appoint Regular Physician dated June 21, 2024, pages 1-2, numbered paragraphs 1-7).

The issues submitted for decision in Case Number ADJ10564064, the Master File, were (1) Parts of body injured: The left hip, the right hip, buttocks, bilateral upper extremities, bilateral shoulders, psyche and internal; (2) Earnings: The employee supporting his claim of earnings with testimony and a W-2 form and the employer/carrier basing it upon wage information; (3) Temporary disability with the employee claiming July 2, 2016 through July 2, 2018 per Dr. Sadler; (4) Permanent and stationary date with the employee claiming September 29, 2020, based on PTP Dr. Longacre and the employer or carrier claiming December 8, 2018, based on Dr. Simon; (5) Permanent disability; (6) Apportionment; (7) Occupation and group number, with the employee claiming 460 and the employer or carrier claiming 351; (8) Need for further medical treatment; (9) Liability for self-procured medical treatment; and (10) Attorney

fees. The issues submitted for decision in Case Number ADJ13211148 were the same as the issues in the Master File, with two additional issues: injury arising out of and in the course of employment (AOE/COE), and the question of whether Dr. Longacre is actually the Primary Treating Physician (PTP) for purposes of the denied cumulative trauma injury claim as well as for the admitted specific injury (Minutes of Hearing and Summary of Evidence (MOH/SOE) of September 19, 2023, page 3, lines 1-32, and page 4, lines 15-22).

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Report, pp. 2-4.)

## DISCUSSION

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. 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 23, 2024, and 60 days from the date of transmission is Saturday, September 21, 2024. The next business day that is 60 days from the date of transmission is Monday, September 23, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).) This decision is issued by or on Monday, September 23, 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 23, 2024, and the case was transmitted to the Appeals Board on July 23, 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 23, 2024.

A petition for reconsideration may only be taken from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.<sup>1</sup>) 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 AOE/COE, 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].)

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 1180 (“[t]he term [‘final’] does not include

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

intermediate procedural orders or discovery orders”); *Kramer, supra*, at 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 orders.

Here, the Amended Joint Findings and Award contained findings on threshold issues, including the existence of an employment relationship. Although the Amended Joint Findings and Award contains a finding that is final, defendant is challenging an interlocutory holding and/or the WCJ’s notice of intent to appoint a regular physician in the medical specialty of psychology or psychiatry. To the extent that defendant seeks relief from Finding No. 7, which states as follows, this is a finding which relates to discovery and is thus interlocutory, subject to the removal standard.

The record requires development in the form of a medical expert opinion in either psychology or psychiatry before the issues of parts of body injured, temporary disability, permanent and stationary date, permanent disability, apportionment, need for further medical treatment, liability for self-procured medical treatment, and attorney fees can be determined. This medical expert opinion in psychology or psychiatry must then be reviewed by the treating physicians and PQMEs in evidence, whose supplemental opinions will also be required to reach a decision regarding all submitted issues based on substantial medical evidence.

(Amended Joint Findings and Award, p. 2.)

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 substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); *Cortez, supra*; *Kleemann, supra*.) Additionally, 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).)

Based upon the WCJ's analysis of the merits of petitioner's arguments, we are not 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 petitioner. As the WCJ notes, development of the record in the form of a medical opinion is to prevent prejudice and harm, not cause them.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141 (Appeals Bd. en banc); see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.)

The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

Here, the WCJ's determination that the record requires development in the form of a medical expert opinion in either psychology or psychiatry solely resolves an intermediate procedural or evidentiary issue. The decision does not determine any substantive right or liability and does not determine a threshold issue. Thus, it is not a "final" decision and we will apply the removal standard to our review. (See *Gaona, supra.*)

To the extent that defendant challenges the notice of intent to appoint a regular physician in the medical specialty of psychology or psychiatry, we direct defendant to WCAB Rule 10832(c). A notice of intent is just that: notice. Until an order issues, reconsideration and removal are both premature.

Finally, we admonish counsel Jeffrey N. Sardell of Floyd Skeren Manukian Langevin, attorneys for defendant Ace American Insurance as adjusted by Gallagher Bassett Services Inc., and California Community News / Tronc Inc. dba Los Angeles LA Times,<sup>2</sup> for citing unpublished Court of Appeal decisions to support their arguments. (Petition, p. 6, 8-9.) The WCAB Rules of Practice and Procedure and the California Rules of Court do not permit such conduct and continued conduct of this nature may result in sanctions. (Cal. Rules of Court, rule 8.1115; Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421(b)(8) [sanctionable conduct includes “Asserting a position that misstates or substantially misstates the law, and where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct.”].)

Based on the foregoing, we deny defendant’s Petition to the extent that it seeks reconsideration, treat the petition as one for removal, and we deny removal.

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<sup>2</sup> The correct identification of parties is essential to assure that issues of jurisdiction and liability are properly addressed. (*Coldiron v. Compuware Corp.* (2002) 67 Cal. Comp. Cases 289, 294 (Appeals Bd. en banc) [“Fundamental to the establishment of workers' compensation liability and the prompt delivery of benefits awarded to eligible injured workers is the designation of the responsible and liable entity”]; Cal. Code Regs., tit. 8, §§ 10205.5(a), 10400.)



For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration is **DENIED**.

**IT IS FURTHER ORDERED** that defendant's Petition for Removal is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

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

**/s/ JOSÉ H. RAZO, COMMISSIONER**



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

**SEPTEMBER 23, 2024**

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

**RAMIRO SOLORIO  
GLAUBER, BERENSON & VEGO  
FLOYD SKEREN MANUKIAN LANGEVIN**

***JB/pm***

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