WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANDREA CASTANEDA, *Applicant*

vs.

GOOD SAMARITAN SHELTER;
PRO CENTURY INSURANCE COMPANY, administered by
ILLINOIS MIDWEST INSURANCE AGENCY, LLC, *Defendants*

Adjudication Number: ADJ20437328
Santa Barbara District Office

OPINION AND ORDERS GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks removal of the "Findings and Orders" (F&O) issued on August 29, 2025, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant was not entitled to a remote psychiatric evaluation pursuant to Administrative Director Rule 46.3 (Cal. Code Regs., tit. 8, § 46.3,) and ordered a replacement panel qualified medical evaluator.

Applicant contends that the WCJ should not have strictly applied AD Rule 46.3, but instead should have analyzed whether good cause existed to allow a remote examination.

We have received an answer from defendant. 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 for Removal and the contents of the WCJ's Report. Based on our review of the record we will treat the petition as seeking reconsideration of the F&O, as the F&O contains both final and non-final orders. We will grant applicant's petition for reconsideration and as our Decision After Reconsideration, we will rescind the August 29, 2025 F&O and return this matter to the trial level for further proceedings.

FACTS

Per the WCJ's Report:

> Applicant filed an Application for Adjudication of Claim on January 27, 2025, alleging inter alia injury to her nervous system. Defendant filed an answer averring the claim was denied on February 12, 2025.
>
> A PQME panel in psychology was requested, and after both sides struck a name, Steven P. Barnett, M.D., was the remaining name.
>
> The parties contacted Dr. Barnett, who advised he will only do remote evaluations; no in-person examination would take place.
>
> Applicant agrees to the remote evaluation; however, Defendant will not stipulate to it.
>
> The matter proceeded to trial and a Findings of Fact and Order issued holding Applicant was not entitled to a remote evaluation and the parties are entitled to a replacement PQME panel. It is from that determination that Applicant files this instant removal petition.

(WCJ's Report, p. 2.)

DISCUSSION

I.

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 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.

(§ 5909.)

[1] All future references are to the Labor Code unless 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 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 12, 2025, and 60 days from the date of transmission is Tuesday, November 11, 2025, (Veteran's Day) which by operation of law means this decision is due by Wednesday, November 12, 2025. (Cal. Code Regs., tit. 8, § 10600.). This decision is issued by or on November 12, 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.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on September 12, 2025, and the case was transmitted to the Appeals Board on September 12, 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 12, 2025.

II.

As stated in our en banc decision:

> 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, 260 Cal. Rptr. 76; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal. App. 3d 528, 534–535 [163 Cal. Rptr. 750, 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 [97 Cal. Rptr. 2d 418, 65 Cal. Comp. Cases 650].) 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.

(*Ledezma v. Kareem Cart Commissary and Mfg*, (2024) 89 Cal.Comp.Cases 462, 475 (En Banc).)

Here, the order issued by the WCJ is a hybrid decision that included final findings on issues of employment and insurance coverage. While these findings were not challenged, the inclusion of final findings renders the decision a final order for purposes of reconsideration, and thus we treat the petition as one seeking reconsideration.

Although we treat the petition as one seeking reconsideration, the petition only challenges the non-final portion of the decision. In this case, we apply the standard 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, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) 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); see also *Cortez, supra; Kleemann, supra*.) A petitioner must also 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, and for the reasons discussed below, the decision of the WCJ is not supported by an adequate record and omits discussion of whether good cause existed to permit a replacement panel. Accordingly, we find that the decision rises to the level of substantial prejudice, which warrants a grant of removal.

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).) Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(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. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) 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, § 10761.)

Here, the parties provided no exhibits. No testimony exists in the record. The matter proceeded to trial essentially upon a single stipulation of the parties, which is that the psychiatric QME will only conduct an examination remotely. (Minutes of Hearing and Summary of Evidence, June 24, 2025, p. 2, lines 17-18.) Absent that single stipulation, no record exists. If the relevant facts of this case are not in dispute, the parties should stipulate such facts. Absent a stipulation, evidence must be put into the record to support any findings that may issue.

As to the underlying legal issue, the WCJ ordered a replacement evaluator because the parties did not agree to a telehealth evaluation pursuant to AD Rule 46.3(a)(2), which states:

> 2) A QME or AME **may** complete a medical-legal evaluation through remote health when a hands on physical examination is not necessary and all of the following conditions are met:
>
> (A) There is a medical issue in dispute which involves whether or not the injury is AOE/COE (Arising Out of Employment / Course of Employment), or the physician is asked to address the termination of an injured worker's indemnity benefit payments or address a dispute regarding work restrictions; and
>
> (B) There is agreement in writing to the remote health evaluation by the injured worker, the carrier or employer, and the QME.
>
> (C) The remote health evaluation conducted by means of a virtual meeting is consistent with appropriate and ethical medical practices and the AMA Guides 5th edition, as determined by the QME and the relevant medical licensing board; and

(D) The QME attests in writing that the evaluation does not require an in person physical exam.

(Cal. Code Regs., tit. 8, § 46.3(a)(2), emphasis added.)

As defined by the Labor Code, "'Shall' is mandatory and 'may' is permissive." (Lab. Code, § 15.) The phrasing of AD Rule 46.3 explains a permissive scenario where the QME *may* complete an examination by telehealth. The rule does not use exclusionary language, such as "may only" and we do not read such language into the rule.

Other examples of use of telehealth are permitted, for example, where a QME uses telehealth pursuant to a reasonable accommodation exception granted by the Administrative Director pursuant to the Americans with Disabilities Act. At a minimum, where a party is seeking to strike a QME due to the use of telehealth, there should be evidence that the use of telehealth is not otherwise due to a reasonable accommodation of disability.

In a recent en banc opinion, the Appeals Board expressed the principle that absent an expressed provision in the Labor Code commanding the replacement of a QME, a party seeking to strike a QME must establish good cause. (See *Vazquez v. Inocensio Renteria*, (2025) 90 Cal.Comp.Cases 514 (Appeals Board, en banc).) Here, we can find no expressed provision of the Labor Code precluding a QME examination from proceeding virtually. Thus, the party objecting must show good cause as to why the QME should be replaced.

Whether good cause exists will depend upon the individual facts of each case. Some factors the parties may wish to consider include the following:

1) Whether the QME feels capable of completing the examination remotely.

2) Whether reasonable accommodations have been granted to permit a remote evaluation.

3) The nature of the disputed issue.

4) Whether the examination is the initial examination or a supplemental evaluation.

5) Whether the parties can access the necessary technology and use it.

6) Whether the QME's use of remote examination results in a violation of statute or other regulation, for example, if the QME were using remote examination as a means of obfuscating the office location requirements of AD Rule 26 and/or Labor Code section 139.2(h)(3)(C), that may warrant a replacement QME.

7) Any other case specific facts that may warrant an in-person or remote evaluation.

Here, the parties created no record outside the fact that the QME will only conduct appointments through telehealth. Accordingly, we cannot decide whether good cause exists in this case and we return the matter to the trial level for further proceedings.

Accordingly, we grant applicant's petition for reconsideration and as our Decision After Reconsideration, we rescind the August 29, 2025 F&O and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that applicant's petition for reconsideration of the Findings and Orders issued on August 29, 2025, by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Orders issued on August 29, 2025, by the WCJ is **RESCINDED**.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings.

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

NOVEMBER 10, 2025

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

ANDREA CASTANEDA
GHITTERMAN, GHITTERMAN & FELD
MULLEN & FILIPPI, LLP

EDL/mc

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