WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JEFF CRAIL, *Applicant*

vs.

AMTRUST NORTH AMERICA;
HARTFORD FIRE INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ15951486, ADJ15951487
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant filed a Petition for Removal and/or Reconsideration (Petition) of the Joint Findings of Fact and Orders (F&O) issued on May 20, 2025, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that Panel Qualified Medical Examiner (PQME) Dr. Wiseman failed to properly serve his report and ordered PQME Dr. Wiseman replaced.

Defendant alleges the court improperly interpreted Administrative Director (AD) Rule 31.5(a)(12) (Code Cal. Regs., tit. 8, § 31.5(a)(12)), a Declaration of Readiness (DOR) does not constitute both an objection to the lateness of a PQME report and a request for a replacement panel, and reconsideration is an inadequate remedy due to the irreparable harm to defendant.

Applicant filed an Answer recommending that the Petition be denied.

The WCJ's Report and Recommendation (Report) recommends that the Petition be denied.

We have considered the allegations of the Petition, the Answer and the contents of the Report of the WCJ with respect thereto.

Based on our review of the record, and as discussed below, we will deny the Petition for Reconsideration.

I.

The relevant procedural and evidentiary records are summarized here.

On March 11, 2024, parties appeared for a mandatory settlement conference. The Minutes of Hearing reflect a discovery order issued with a joint request for OTOC. The appearance of the parties and their respective email addresses were noted on the minutes. A separate order issued for an oncology panel which states:

> The administrative director having declined to issue an Order for an additional panel in oncology due to lack of at least 5 licensed QMEs, and by mutual agreement of the parties,
>
> IT IS ORDERED THAT The following additional panel of PQMEs in Oncology (MMO), has been issued by the undersigned, consisting of: 1. Mark M. Ngo, M.D., 2. Charles L. Wiseman, M.D., and 3. James A. Padova, M.D. The parties will treat this panel as if it were issued by the DWC Medical Unit and proceed in accordance with Labor Code 4062.2. The doctors' addresses and telephone numbers as contained within the PQME database are appended to this Order.

Attached to the Order is a "Qualified Medical Evaluator database Returned Records" showing five physicians within 50 miles of applicant's zip code. One of the physicians on the list is PQME Dr. Charles Wiseman.

On July 17, 2024, PQME Charles Wiseman, M.D., electronically examined applicant and issued a report signed electronically on August 2, 2024. (Joint Exhibit 1, PQME Dr. Wiseman, PDF page 47.) At end of the report is a proof of service by mail on The Hartford Syracuse at a Kentucky post office box, dated August 6, 2024, from Dr. Wiseman's Los Angeles office and with no other entities served. (Joint Exhibit 1, PQME Dr. Wiseman, PDF page 51.) There is a later proof of service by mail dated October 25, 2024, from Brea, California, by defense counsel, showing service on applicant's counsel at a physical address and email address and service on the adjustor by EDM E-mail only. (Joint Exhibit 1, PQME Dr. Wiseman, PDF page 4.)

On August 20, 2024, defendant sent a letter objecting to PQME Dr. Wiseman's reporting for lateness. (Applicant Exhibit 1.)

Included as a separate exhibit is the October 25, 2024 proof of service. (Joint Exhibit 2.) This proof is a duplicate of the one contained in Joint Exhibit 1. (Joint Exhibit 1, PQME Dr. Wiseman, page 4).

There is an October 28, 2025, postmarked envelope from defendant addressed to applicant's counsel. (Applicant Exhibit 2.)

On October 28, 2024, applicant filed a DOR, in which future medical is marked as an issue and typed in are the statements: "DA S OBJECTION TO TIMELINESS OF SPQME

ONCOLOGY DR. WISEMAN REPORTING. NEED NEW PANEL. FILED ON ADJ15951487 ADJ15951486."

On March 4, 2025, applicant filed a petition for a replacement QME with a request for sanctions. In the petition, applicant alleges that the only valid proof of service was the October 25, 2024 proof, but does not address when PQME Dr. Charles Wiseman's report was received by applicant.

The parties proceeded to trial on March 5, 2025. In ADJ15951487, they admitted that applicant, while employed on April 7, 2021, claims to have sustained injury arising out of and in the course of employment to seizure disorder and neurovascular. In ADJ15951486, they admitted that applicant, while employed during the period April 20, 2014, to March 15, 2022, claims to have sustained injury arising out of and in the course of employment to brain, nervous system, eye, stress, and astrocytoma. Exhibits were admitted. No testimony was taken and the issue of applicant's request to replace PQME Dr. Wiseman was submitted.

On May 20, 2025, the F&O issued which included a finding of employment and that PQME Dr. Wiseman failed to properly serve his report and thus failed to comply with "8 CCR 36." PQME Dr. Wiseman was ordered replaced. In support of his decision, the WCJ stated:

> There is no evidence in the record of exactly when applicant's attorney received the report. The e-mail address listed on the proof of service is not contained elsewhere within any pleading filed in the instant matter. Without any other evidence available to review, the Court must simply assume that if served, the report would have been received by applicant's attorney 5 days later, on or about October 30, 2024. (8 CCR 10605).

(F&O, Opinion on Decision, pages 1-2.) The WCJ then concluded:

> The record demonstrates that Dr. Wiseman failed to serve his report on applicant and his attorney. Applicant sought to replace Dr. Wiseman on this basis prior to any imputed effective service of the report. There is no reliable evidence in the record which demonstrates that applicant already possessed the report prior to filing his DOR. Accordingly, the Court finds that Dr. Wiseman should be replaced as PQME.

(F&O, Opinion on Decision, page 3.)

On June 12, 2025, defendant filed the Petition asserting "[t]he QME served the report on August 6, 2024. It appears undisputed that service by the QME was deficient, as he only served the insurance carrier at its Lexington, KY address." (Petition, page 2, lines 9–11.) "Attorneys for defendant, unaware the report was sent to The Hartford, issued an objection to timeliness dated

August 20, 2024. Upon realizing the insurance carrier had a copy of the report, defendants served the report on Applicant on October 25, 2024." (Petition, page 2, lines 11-14.) "Even defendant's objection to lateness was not timely given the report was served prior to the date of the objection." (Petition, Page 4, lines 5-6.) The Petition does not address when the insurer, administrator or defense counsel received PQME Dr. Wiseman's report.

In the Report the WCJ explains "At the outset, the Court must emphasize that although the Court referenced 8 CCR 31.5 in its decision, the Court's decision was not based upon it. Namely, this is because 8 CCR 31.5 concerns the grounds for a party to petition the Medical Unit to replace a previously issued panel." (Report page 3.) "The parties were aware that the panel in question was not issued by the Medical Unit and that the Medical Director would be unable to replace it even if asked to do so. Thus, applicant did not seek replacement pursuant to 8 CCR 31.5(a)(12) and instead took the only action that the parties could have reasonably taken under such circumstances; with defendant having already objected in writing to the timeliness of the report, applicant filed a Declaration of Readiness and raised the same issue therein." (Report page 4.) The report recommended denial of the Petition.

On June 27, 2025, applicant filed an Answer. "Defendant's [*sic*] clearly withheld service of Dr. Charles Wiseman's July 17, 2024 report beyond the required period defined under Title VIII of the Code of Regulations Section 10421 (b)(4)." (Answer, page 2, lines 24-25.) The Answer does not address when applicant received PQME Dr. Wiseman's report.

II.

Former Labor Code section 5909[1] 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. (Former 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.

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(Lab. Code, § 5909.)

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 June 25, 2025, and 60 days from the date of transmission is Sunday, August 24, 2025. The time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600(b).) Here, August 24, 2025, is a Sunday which by operation of law means this decision is due by the next business day, which is Monday, August 25, 2025. This decision issued by or on August 25, 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 shall be notice of transmission.

According to the proof of service, the Report was served on June 25, 2025, and the case was transmitted to the Appeals Board on June 25, 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 June 25, 2025.

III.

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. (Lab. Code § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision is issued.

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.

The WCJ's decision here includes, inter alia, findings of employment, a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Thus, we treat the Petition as one for reconsideration. Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision, the replacement of a PQME. 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 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*.) 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, as discussed below, we conclude that substantial prejudice or irreparable harm will not result if reconsideration is not granted and that later reconsideration will be an adequate

remedy. We therefore deny the Petition for Reconsideration, but we apply the removal standard to our analysis of the issue of whether QME Dr. Wiseman must be replaced.

IV.

The WCJ has provided a well written and analyzed decision. However, on May 19, 2025, we issued an en banc decision in *Vazquez v. Inocensio Renteria* (2025) 90 Cal.Comp.Cases 514, 522 (Appeals Board en banc). Based on our review, we believe that our reasoning in *Vazquez* supports the WCJ's ultimate conclusion that the QME must be replaced.

The dispute here is applicant's request to replace the panel containing PQME Dr. Wiseman.

The "Appeals Board is vested with the judicial power to adjudicate workers' compensation cases, which includes the determination of whether a replacement QME panel is valid or otherwise appropriate." (*Vazquez*, *supra*, at page 522.)

In *Vazquez*, we found "[t]wo provisions in the Labor Code expressly grant parties the statutory right to replace a QME. In other words, when a violation described in the statute occurs, a party may promptly seek replacement of the QME." (*Vazquez*, *supra*, at page 522, emphasis added.) The first is ex parte communication described in section 4062.3, subsections (f) and (g), and the second is a failure to timely complete a formal medical evaluation under sections 4062.5 and 139.2(j)(1). (*Vazquez*, *supra*, at pages 522-523.)

Section 4062.5 provides that "[i]f a qualified medical evaluator selected from a panel fails to complete the formal medical evaluation within the timeframes established by the administrative director pursuant to paragraph (1) of subdivision (j) of Section 139.2, a new evaluation may be obtained upon the request of either party."

Section 139.2 specifically authorizes the administrative director (AD) to adopt regulations concerning the "[s]tandards governing the timeframes within which medical evaluations shall be prepared and submitted by agreed and qualified medical evaluators. Except as provided in this subdivision, the timeframe for initial medical evaluations to be prepared and submitted shall be no more than 30 days after the evaluator has seen the employee or otherwise commenced the medical evaluation procedure." (Lab. Code, § 139.2(j)(1)(A).)

"[W]hen sections 4062.5 and 139.2(j)(1) are read together, a party's statutory right to seek replacement of a QME in represented cases arises when ***the QME fails to timely issue a report following a medical evaluation***." (*Vazquez*, *supra*, page 523, emphasis in original.)

"Harmonizing sections 4062.5 and 139.2(j)(1), we conclude that the term 'formal medical evaluation' contained in section 4062.5 actually refers to the report generated after an in-person evaluation. Thus, ***a party may seek to replace a QME under section 4062.5 where an evaluation takes place and the report prepared from that evaluation is untimely served***." (*Id.* at page 525.)

"Thus, while the rules are valid, AD Rules 31.3 and 31.5 cannot be interpreted as finally determining whether a replacement panel is appropriate because such an interpretation would usurp the adjudicative power of the Appeals Board to determine whether a QME should be replaced. (§ 111.)" (*Id.* at page 526.)

In the Petition, defendant seeks to remove any possibility of an objection for lateness by asserting that any service by the PQME within the statutory 30 days from evaluation, even defective service, eliminates such objection. (Petition, page 3 line 3 to page 4 line 8.) Such argument is specious. Defendant provides no statutory or decisional authority to support its proposition that an evaluator can meet the 30-day deadline for medical reporting so long as a single party is served with the reporting. We decline to accept this argument, and as discussed below, the clearly delineated prohibition against ex parte communication supports our conclusion that all parties must be served with the reporting, and that the effective date of the reporting is when the evaluator serves the parties.

From the evidence available, it appears PQME Dr. Wiseman did not complete the formal medical evaluation. PQME Dr. Wiseman did not prepare and serve the comprehensive medical-legal evaluation report on the injured worker, his attorney, the claims administrator or the employer, within thirty days of seeing the applicant. Instead, PQME Dr. Wiseman only served the report on the insurance carrier with a proof of service on The Hartford Syracuse for a Kentucky post office box, mailed date August 6, 2024, from Los Angeles. (Joint Exhibit 1, PQME Dr. Wiseman, PDF page 51.) Such service is on its face is defective. As stated by the WCJ in the Report:

> Here, although defendant eventually served a copy of the report on applicant's attorney, this does not cure the QME's violation of 8 CCR 36. 8 CCR 36 ensures the appearance of disinterest and neutrality on the part of the QME and affords each party the same opportunity to respond to a report as it arrives. Thus, in order to avoid the appearance of impropriety, it is imperative that the QME concurrently serves the report on all necessary parties. The failure to serve all parties and the QME's use of an unlisted address for defendant casts a shadow upon the QME's report and gives rise to questions regarding the integrity of the process.

(Report, page 5.)

A party may not be aware of a report's defect regarding completeness until it is received. Here, applicant objected to the PQME's reporting three days after it was served by defendant by filing a DOR. Any deficiency in raising the issues informally may be cured by the Appeals Board. As stated by the Appeals Board in the recent en banc decision *Perez*:

> The workers' compensation system "was intended to afford a simple and nontechnical path to relief." (*Elkins v. Derby* (1974) 12 Cal.3d 410, 419 [39 Cal.Comp.Cases 624]; Cf. Cal. Const., art. XX, § 21; § 3201.) Generally, "the informality of pleadings in workers' compensation proceedings before the Board has been recognized." (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500, 512]; *Bland v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 324, 328–334 [35 Cal.Comp.Cases 513].) "[I]t is an often-stated principle that the Act disfavors application of formalistic rules of procedure that would defeat an employee's entitlement to rehabilitation benefits." (*Martino v. Workers' Comp. Appeals Bd*. (2002) 103 Cal. App.4th 485, 490 [67 Cal.Comp.Cases 1273].) Courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. (*Rubio v. Workers'Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200–01 [50 Cal.Comp.Cases 160]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 148, 152–153 [45 Cal.Comp.Cases 866].) "Necessarily, failure to comply with the rules as to details is not jurisdictional." (*Rubio*, *supra*, at pp. 200–201; see Cal. Code Regs., tit. 8, § 10517.)
>
> Therefore, in workers' compensation proceedings, it is settled law that (1) *pleadings may be informal*. (*Zurich Ins. Co.*, *supra*, 9 Cal.3d at p. 852; *Beaida v. Workmen's Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 207– 210 [33 Cal.Comp.Cases 345]); (2) *claims should be adjudicated based on substance rather than form* (*Bland*, *supra*, 3 Cal.3d at pp. 328–334; *Martino*, *supra*, 103 Cal.App.4th at p. 491; (3) *pleadings should liberally construed so as not to defeat or undermine an injured employee's right to make a claim* (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th at pp. 925–926 [72 Cal.Comp.Cases 778]); *Martino*, *supra*, 103 Cal.App.4th at p. 490; and (4) *technically deficient pleadings, if they give notice and are timely, normally do not deprive the Board of jurisdiction* (*Bland*, *supra*, 3 Cal.3d at pp. 331–332).

(*Perez v. Chicago Dogs*, (August 12, 2025) ADJ16597333, [2025 Cal. Wrk. Comp. LEXIS 29] (Appeals Board en banc, emphasis in the original).)

Having raised the issue of replacing PQME Dr. Wiseman by filing the DOR, applicant invoked the jurisdiction of the Appeals Board to resolve the completeness issue.

Based on our review, it is also appropriate to consider the prohibition against ex parte communication contained in section 4062.3(f) and (g):

> (f) Communications with an agreed medical evaluator shall be in writing, and shall be served on the opposing party when sent to the agreed medical evaluator. Oral or written communications with physician staff or, as applicable, with the agreed medical evaluator, relative to nonsubstantial matters such as the scheduling of appointments, missed appointments, the furnishing of records and reports, and the availability of the report, do not constitute ex parte communication in violation of this section unless the appeals board has made a specific finding of an impermissible ex parte communication.
>
> (g) Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited. If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of subdivision (e), the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator to be selected according to Section 4062.1 or 4062.2, as applicable, or proceed with the initial evaluation.

(Lab. Code, § 4062.3(f), (g).)

It little matters who initiates the ex parte communication as any "[e]x parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited." (Lab. Code, § 4062.3(g).) The issue here, as noted by the WCJ in the Report, is the "integrity of the process." A transparent and fair system requires a thorough inquiry into the issue of ex parte communication, which is inextricably tied to the question of whether PQME Dr. Wiseman properly completed his reporting. Thus, when Dr. Wiseman failed to timely serve applicant with his reporting, he not only failed to timely complete the evaluation, but he also engaged in an ex parte communication by only serving defendant.

Accordingly, we deny the Petition as one for reconsideration. Before engaging in further proceedings, the parties are encouraged to confirm the current state of the PQME database, and to consider the use of another PQME specialty or an agreed medical examiner (AME). The WCJ may also appoint a regular doctor under his authority in section 5701.

For the foregoing reasons,

IT IS ORDERED that defendant's petition for removal/reconsideration of the decision of May 20, 2025 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 25, 2025

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

JEFF CRAIL
LAW OFFICES OF JIM T. RADEMACHER
LAW OFFICES OF LYDIA B. NEWCOMB

PS/oo

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