WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DEMETRIUS THOMAS, *Applicant*

vs.

RALPH'S GROCERY COMPANY/THE KROGER COMPANY, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Numbers: ADJ21567804, ADJ20197460, ADJ20197482
Pomona District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued on April 20, 2026. The workers' compensation administrative law judge (WCJ) found that (1) the applicant did not need further medical treatment consisting of a second opinion consultation with Medical Provider Network (MPN) physician; (2) applicant is not entitled to a second opinion consultation per Labor Code sections 4600, 4601[1], and Administrative Director (AD) Rule 9767.7 (Cal. Code Regs., tit. 8, § 9767.7); (3) the permanent and stationary report from Concentra dated October 16, 2025 is not substantial medical evidence and that the record may be developed by returning to the Primary Treating Physician (PTP) or by proceeding with the panel Qualified Medical Evaluator (QME) process.

Applicant contends that the release from care report dated October 16, 2025 is invalid as it was issued by a family nurse practitioner without appropriate physician supervision pursuant to section 3209.10. Applicant argues that the opinion that applicant is at maximum medical improvement or released from care is void, and therefore applicant is entitled to a second opinion under sections 4616.3 and 4616.4, or to change treating physicians and continue with medical treatment.

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

Defendant filed a response. The WCJ issued a Report and Recommendation (Report) recommending that the Petition be reviewed as one for removal and that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, we will grant the Petition for Reconsideration, rescind the F&O, and substitute a new Findings of Fact that finds that a nurse practitioner may not be designated as a PTP and the report of October 16, 2025 is invalid as a basis to release applicant from care; and that applicant is not released from care and is entitled to designate a new PTP.

FACTS

Applicant, while employed as a stocker by defendant, sustained injury arising out of and in the course of employment on August 17, 2025, to the low back. Defendant has furnished medical treatment and the parties stipulated that the PTP is "Concentra." (Minutes of Hearing/Summary of Evidence (MOH/SOE), March 24, 2026, 2:9-10.)

The only medical report, dated October 16, 2025, was authored by Michelle Cuevas, FNP-C (FNP) and does not have a signature from any other physician. (Joint Exhibit X.) The report notes that applicant was doing well and was ready for discharge. The physical examination showed normal tenderness and full range of motion. The diagnosis was lumbar spine strain. The report indicated a discharge from care, release to full duty work, and no permanent disability. The FNP concluded applicant was at maximum medical improvement. A 'Work Activity Status Report' is attached to the report which confirmed the release to full duty but also noted an additional chiropractic session on October 21, 2025.

On December 8, 2025, applicant sent correspondence to defendant requesting authorization for a primary treating physician within the MPN. (Applicant's Exhibit 1.)

On January 9, 2026, applicant filed a Declaration of Readiness to Proceed (DOR) requesting a Mandatory Settlement Conference (MSC) alleging that his request for a PTP had not been addressed despite following up on December 17, 2025, December 26, 2025, and January 5, 2026. Defendant filed an Objection to DOR alleging that defendant objected to a change in treating physician as there was not a continued need for medical treatment and there was a release from care.

On January 14, 2026, applicant sent a section 4061 objection to the October 16, 2025 report as well as a letter requesting a second opinion within the MPN. (Applicant's Exhibits 2 and 3.)

An MSC took place on February 18, 2026, and the matter was set for trial. The Minutes note that all issues were deferred to the trial judge and that a QME was scheduled for May 6, 2026 "regarding new date of injury." It does not appear that a Pre-Trial Conference Statement (PTCS) was completed at the time of the MSC.

On February 27, 2026, applicant filed a PTCS that was not signed by defendant. Defendant filed a petition in response on March 23, 2026, arguing that applicant provided the PTCS after the MSC and that they did not have the opportunity to fully participate in the completion of the PTCS, and requesting the trial be taken off calendar.

On February 24, 2026, applicant filed a joint petition requesting a remote trial, noting that no witness testimony was required. The petition is also signed by defense counsel.

On March 3, 2026, without setting the matter for a hearing, the WCJ issued an order denying the request. Subsequently, on March 13, 2026, applicant filed a Petition for Removal of this order. This Petition was never addressed and never transmitted to the Appeals Board.[2]

On March 24, 2026, trial went forward in person and was submitted. The issues were:

> 1. Need for further medical treatment: second opinion consultation with MPN physician Dr. Keolanui Chun.
> 2. Whether the applicant is entitled to a second opinion consultation per Labor Codes 4600, 4601, 9767.7, and *Alvarado vs. Warner Brothers.*
> 3. Whether the P&S report from Concentra dated October 16, 2025, is substantial medical evidence.

(MOH/SOE, 2:12-16.)

Applicant testified that he was examined at Concentra by the nurse practitioner as well as another gentleman that was a physician assistant. (*Id*. 3:21-22.) He confirmed that at the last evaluation he was able to perform all the testing and did not have discomfort. (*Id*. at 3:22-25.) He testified that "the appointment took from six to seven minutes. He was not seen by an actual doctor." He never met a supervising doctor either that day or at any other point during treatment at Concentra. (*Id.* at 4:1-4.)

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[2] The WCJ should have addressed the petition for remote appearance on the record pursuant to *Perez v. Chicago Dogs* (2025) 90 Cal.Comp.Cases 830, 838 (en banc), which clearly articulates that a record must be created when denying a request for a remote appearance and that the due process right to access court proceedings is good cause to allow a remote appearance. Here, in order to deny the request, the WCJ needed to create a record and then find that there was good cause to deny the stipulated request for a remote hearing under section 5702. Instead, she ignored section 5702, disregarded our en banc decision, and failed to comply with her responsibility to transmit the Petition for Removal to the Appeals Board. The WCJ is reminded that a WCJ who violates section 5500.3(a) "may be subject to disciplinary proceedings."

Currently, he continues to work full duty and experiences flare ups on occasion. He is not taking any pain medication. (*Id*. at 4:20-25.)

On April 20, 2026, the WCJ issued an F&O finding:

> 1. Under the current medical record, the applicant does not need further medical treatment consisting of a second opinion consultation with MPN physician Dr. Keolanui Chun.
> 2. The applicant is not entitled to a second opinion consultation per Labor Code 4600, 4601, and CCR 9767.7.
> 3. The Permanent and Stationary report from Concentra dated October 16, 2025, is not substantial medical evidence. The parties are to develop the record by obtaining a supplemental report from the Primary Treating Physician, Michelle Cuevas, FNP-C, from Concentra or proceed with the Panel QME process under Labor Code §§ 4061 or 4062, to obtain a comprehensive medical legal report that constitutes substantial evidence.

The WCJ opined that applicant was neither entitled to further medical treatment with a different PTP nor a second opinion within the MPN because applicant was released from care by the current PTP. Additionally, the WCJ opined that the discharge report was not substantial medical evidence for determination of permanent disability, but that the proper remedy is for applicant to participate in the medical legal process, which had already begun.

DISCUSSION

I.

Former 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.

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 May 21, 2026 and 60 days from the date of transmission is July 20, 2026. This decision is issued by or on July 20, 2026, so that we have timely acted on the petition as required by section 5909(a).

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on May 20, 2026 and the case was transmitted to the Appeals Board on May 21, 2026. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on May 21, 2026.

No other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with accurate notice of transmission as required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on May 21, 2026.

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 included a finding that applicant is not entitled to ongoing medical treatment, which even though it is qualified by "on the current record," could be construed as a final order since it could potentially bar applicant's access to further medical treatment at defendant's expense. It also includes a determination that the PTP report is not substantial medical evidence with an order to develop the record, a discovery finding. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Here, the underlying issue that applicant is challenging is the WCJ's reliance on a report that is not legally valid and his request to proceed with a second opinion in the MPN under sections 4616.3 and 4616.4. He also requests that further development of the record proceed with a different physician. Although the decision contains a finding that could be construed as final, the petitioner is challenging interlocutory findings/orders in the decision. Therefore, the removal standard would apply to our review of those contentions. (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, we conclude that prejudice will result if the Findings, based on an error in law, were left to stand thereby potentially denying applicant access to statutorily mandated medical treatment.

III.

AD Rule 9785 (a)(1) states, in relevant part:

> The "primary treating physician" is the *physician* who is primarily responsible for managing the care of an employee, and who has examined the employee at least once for the purpose of rendering or prescribing treatment and has monitored the effect of the treatment thereafter. The primary treating physician is the *physician*

> selected by the employer, the employee pursuant to Article 2 (commencing with section 4600) of Chapter 2 of Part 2 of Division 4 of the Labor Code, or under the contract or procedures applicable to a Health Care Organization certified under section 4600.5 of the Labor Code, or in accordance with the physician selection procedures contained in the medical provider network pursuant to Labor Code section 4616.

(Cal. Code Regs., tit. 8, §9785(a)(1), emphasis added.)

Section 3209.3 (a) states:

> (a) "Physician" includes physicians and surgeons holding an M.D. or D.O. degree, psychologists, acupuncturists, optometrists, dentists, podiatrists, and chiropractic practitioners licensed by California state law and within the scope of their practice as defined by California state law.

(Lab. Code, § 3209.3 (a).)

Section 3209.10 clarifies that practitioners not specifically designated as physicians in section 3209.3 may treat injured workers, but that such practitioners, including nurse practitioners may not be designated as a PTP. It states in relevant part:

> (a) Medical treatment of a work-related injury required to cure or relieve the effects of the injury may be provided by a state licensed physician assistant or nurse practitioner, *acting under the review or supervision of a physician and surgeon* pursuant to standardized procedures or protocols within their lawfully authorized scope of practice. *The reviewing or supervising physician and surgeon of the physician assistant or nurse practitioner shall be deemed to be the treating physician*. For the purposes of this section, "medical treatment" includes the authority of the nurse practitioner or physician assistant to authorize the patient to receive time off from work for a period not to exceed three calendar days if that authority is included in a standardized procedure or protocol approved by the supervising physician. The nurse practitioner or physician assistant may cosign the Doctor's First Report of Occupational Injury or Illness. The treating physician shall make any determination of temporary disability and shall sign the report.
>
> (b) The provision of subdivision (a) that requires the co-signature of the treating physician applies to this section only and it is not the intent of the Legislature that the requirement apply to any other section of law or to any other statute or regulation. *Nothing in this section implies that a nurse practitioner or physician assistant is a physician as defined in Section 3209.3.*

(Lab. Code, § 3209.10, emphasis added.)

Here, the report is not signed by anyone other than the nurse practitioner. Applicant provided unrebutted testimony that no physician other than the nurse practitioner and a physician

assistant *ever* evaluated him. Likewise, the Doctor's First Report of Injury, or any other medical reporting, was not offered to show that there was a supervising physician. Moreover, we note that the stipulation to Concentra being the primary treating physician is likewise invalid. A "primary treating physician" refers to an actual physician and not an entity. (Cal. Code Regs., tit. 8, § 9785(a)(1).) Thus, there is neither a valid designation of a PTP, nor is there any evidence that any physician been involved in treatment who may be considered a PTP.

AD Rule 9785(a)(5) defines release from care as, "a determination by the *primary treating physician* that the employee's condition has reached a permanent and stationary status with no need for continuing or future medical treatment." (Cal. Code Regs., tit. 8, § 9785(a)(1), emphasis added.) Likewise, AD Rule 9785 (f)(3) and (5) states that a primary treating physician "*shall* report when the employee's condition permits return to regular work and/or when the employee is released from care." Cal. Code Regs., tit. 8, § 9785(f)(3) and (5), emphasis added.) Only a PTP is statutorily permitted to issue a report commemorating a release from care, and a nurse practitioner by definition cannot be the PTP. Thus, the reporting and the opinion are invalid.

Without a valid release from care, the applicant may continue medical treatment or select a new PTP pursuant to AD Rule 9767.6(e). For the sake of clarity, we emphasize that this decision is not a basis to invalidate any medical legal process that is already underway.

Accordingly, we grant the Petition for Reconsideration, rescind the F&O, and substitute a new Findings of Fact that finds that a nurse practitioner may not be designated as a PTP and the report of October 16, 2025 is invalid as a basis to release applicant from care; and that applicant is not released from care and is entitled to designate a new PTP.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the decision of April 20, 2026 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of April 6, 2026 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Under Labor Code section 3209.10, a nurse practitioner may not be designated as a primary treating physician, and the report of October 16, 2025 by Michelle Cuevas, FNP-C, from Concentra is invalid as a basis to release applicant from care.

2. Applicant is not released from care and is entitled to designate a new primary treating physician.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 20, 2026

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

DEMETRIUS THOMAS
PEREZ LAW, PC
BRADFORD & BARTHEL, LLP

TF/md

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